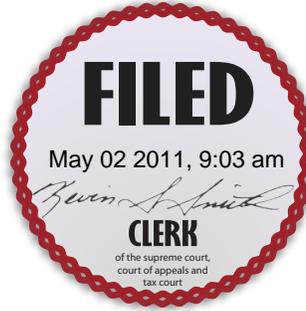


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**IN THE
COURT OF APPEALS OF INDIANA**

IN RE THE INVOLUNTARY TERMINATION)
OF THE PARENT-CHILD RELATIONSHIP OF)
S.S.:)

I.S.)

Appellant-Respondent,)

vs.)

No. 29A05-1010-JT-646

THE INDIANA DEPARTMENT OF CHILD)
SERVICES,)

Appellee-Petitioner.)

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Steven R. Nation, Judge
The Honorable Todd L. Ruetz, Commissioner
Cause No. 29D01-1004-JT-684

May 2, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

I.S. (Mother) appeals the involuntary termination of her parental rights to her child, S.S. In so doing, Mother alleges she was denied due process of law and received ineffective assistance of trial counsel.

We affirm.

Mother is the biological mother of S.S., born in May 2009.¹ The facts most favorable to the trial court's judgment reveal that several days after S.S. was born, the local Hamilton County office of the Indiana Department of Child Services ("HCDCS") was notified that S.S.'s meconium test came back positive for cocaine. During a subsequent investigation, Mother admitted to frequent cocaine use both before and during her pregnancy with S.S., as well as continued use afterwards. Because Mother was living with her own mother, B.R. (Grandmother), in a "clean, sanitary, and very appropriate" home for young children and was willing to enter into a safety plan prohibiting drug use in the home and around the children, HCDCS authorized S.S. to be released to Mother upon S.S.'s discharge from the hospital. *Appellant's Appendix* at 59. By June 8, 2009, however, HCDCS case manager Cecilee Walker took S.S. into emergency protective custody due to Mother's continuing drug use, recurrent disappearances from the family home for days at a time, and refusal to abide by the terms of the safety plan. S.S. was later placed with Grandmother with the proviso that Mother was no longer permitted to live in the family home.

¹ We note that S.S.'s older sibling, T.A. (born in December 1991), like S.S., was removed from Mother's care and custody and determined to be a child in need of services (CHINS). T.A. turned eighteen years old, however, during the underlying CHINS proceedings, and her case was dismissed. Consequently, T.A. was never subject to this termination action. In addition, S.S.'s biological father's identity and whereabouts were never made known to the trial court, nor does he participate in this appeal. Consequently, we limit our recitation of the facts to those pertinent solely to Mother's appeal.

On June 9, 2009, a detention hearing was held, after which the trial court determined there was probable cause to believe S.S. was a CHINS. The trial court also granted Mother's request for counsel. During a hearing in July 2009, Mother, who was represented by counsel, admitted to the allegations of the CHINS petition, and the trial court issued an order adjudicating S.S. as such the same day. Following a dispositional hearing in August 2009, the trial court issued an order formally removing S.S. from Mother's custody and making him a ward of HCDACS. The trial court's dispositional order also directed Mother to participate in a variety of services designed to enhance her parenting skills and to facilitate reunification of the family. These services included, among other things: (1) undergo mental health and substance abuse assessments and follow any resulting recommendations; (2) refrain from the use of illegal drugs; (3) successfully participate in and complete home-based counseling; and (4) obtain and maintain safe and stable housing and employment.

Mother's participation in court-ordered services during the ensuing months was sporadic and ultimately unsuccessful. Mother began participating in a substance-abuse program with BehaviorCorp, but later quit in October 2009, stating there were "too many people in the group" and that it was "not a really good program to get her sober again." *Transcript* at 12. Although Mother participated in another substance-abuse program with Broad Ripple Counseling between November 2009 and April 2010 and ultimately completed all the requisite class work, she continued to produce positive drug screens. Specifically, Mother tested positive for cocaine on January 4, 2010, January 22, 2010, March 11, 2010, March 25, 2010, and April 14, 2010. Mother also failed to obtain stable employment and independent housing. As for Mother's participation in home-based counseling services,

Mother missed multiple scheduled appointments, service providers frequently reported having had difficulty locating and/or communicating with Mother, and by May 2010 all home-based counseling services had been closed as unsuccessful.

On April 28, 2010, HCDCS filed a petition seeking the involuntary termination of Mother's parental rights to S.S. An evidentiary hearing on the termination petition was held on September 17, 2010. Mother was present during the hearing and represented by counsel. During the termination hearing, HCDCS presented evidence indicating Mother had failed to complete a majority of the trial court's dispositional goals and remained unable to demonstrate she was capable of providing S.S. with a safe and drug-free home environment. Specifically, HCDCS provided evidence that Mother's twenty-year struggle with addiction to illegal substances remained unresolved, and that she had again tested positive for cocaine approximately two weeks before the termination hearing. Mother was also unemployed at the time of the hearing and had failed to obtain independent housing. In addition, HCDCS family case manager Francis Austin and the Guardian ad Litem (GAL) also recommended termination of Mother's parental rights as in S.S.'s best interests.

At the conclusion of the termination hearing, the trial court took the matter under advisement. On September 24, 2010, the court issued its judgment terminating Mother's parental rights to S.S. This appeal ensued.

We begin our review by acknowledging that this court has long had a highly deferential standard of review in cases concerning the termination of parental rights. *In re K.S.*, 750 N.E.2d 832 (Ind. Ct. App. 2001). When reviewing the termination of parental rights, we will not reweigh the evidence or judge the credibility of the witnesses. *In re D.D.*,

804 N.E.2d 258 (Ind. Ct. App. 2004), *trans. denied*. Instead, we consider only the evidence and reasonable inferences that are most favorable to the judgment. *Id.* In deference to the trial court's unique position to assess the evidence, we will set aside the court's judgment terminating a parent-child relationship only if it is clearly erroneous. *In re L.S.*, 717 N.E.2d 204 (Ind. Ct. App. 1999), *trans. denied*. Thus, if the evidence and inferences support the trial court's decision, we must affirm. *Id.*

A parent's interest in the care, custody, and control of his or her children is arguably one of the oldest of our fundamental liberty interests. *Bester v. Lake Cnty. Office of Family & Children*, 839 N.E.2d 143 (Ind. 2005). Hence, "[t]he traditional right of parents to establish a home and raise their children is protected by the Fourteenth Amendment of the United States Constitution." *In re M.B.*, 666 N.E.2d 73, 76 (Ind. Ct. App. 1996), *trans. denied*. These parental interests, however, are not absolute and must be subordinated to the child's interests when determining the proper disposition of a petition to terminate parental rights. *In re M.B.*, 666 N.E.2d 73 In addition, although the right to raise one's own child should not be terminated solely because there is a better home available for the child, parental rights may be terminated when a parent is unable or unwilling to meet his or her parental responsibilities. *In re K.S.*, 750 N.E.2d at 836.

Before an involuntary termination of parental rights may occur, the State is required to allege and prove, among other things:

- (B) that one (1) of the following is true:
 - (i) There is a reasonable probability that the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied.

- (ii) There is a reasonable probability that the continuation of the parent-child relationship poses a threat to the well-being of the child.
- (iii) The child has, on two (2) separate occasions, been adjudicated a child in need of services; [and]

(C) that termination is in the best interests of the child

Ind. Code Ann. § 31-35-2-4(b)(2) (West, Westlaw through 2011 Pub. Laws approved & effective through 2-24-2011). The State’s burden of proof for establishing these allegations in termination cases “is one of ‘clear and convincing evidence.’” *In re G.Y.*, 904 N.E.2d 1257, 1260-61 (Ind. 2009) (quoting Ind. Code Ann. § 31-37-14-2 (West, Westlaw through 2011 Pub. Laws approved & effective through 2/24/2011)). If the court finds that the allegations in a petition described in section 4 of this chapter are true, the court *shall* terminate the parent-child relationship. I.C. § 31-35-2-8 (West, Westlaw through 2011 Pub. Laws approved & effective through 2/24/2011). Although Mother “concedes” that the trial court’s findings of fact are “accurate in this case,” she nevertheless asserts she is entitled to reversal because she was denied due process of law and received ineffective assistance of trial counsel. *Appellant’s Brief* at 13. We shall address each argument in turn.

Mother claims HCDCS “failed to provide appropriate services designed to address her serious addiction issues,” and, in so doing, violated her constitutional right to due process of law. *Id.* We have previously explained, however, that the “provision of family services is not a requisite element of our parental rights termination statute, and thus, even a complete failure to provide services would not serve to negate a necessary element of the termination statute and require reversal.” *In re EE*, 736 N.E. 2d 791, 796 (Ind. Ct. App. 2000). We

further clarified a parent's responsibility in seeking appropriate services as follows:

The [Indiana Department of Child Services (DCS)] and trial court have no way to know whether addictions treatment is failing because the treatment is not the most appropriate for the parent or because the parent simply does not care enough about reunification to maintain sobriety under any form of treatment. Accordingly, we will not place a burden on either the DCS or the trial court to monitor treatment and to continually modify the requirements for drug and alcohol treatment until a parent achieves sobriety. Rather, the responsibility to make positive changes will stay where it must, on the parent. If the parent feels the services ordered by the court are inadequate to facilitate the changes needed for reunification, then the onus is on the parent to request additional assistance from the court or DCS.

Prince v. Dep't of Child Servs., 861 N.E.2d 1223, 1231 (Ind. Ct. App. 2007). Here, the record reveals that many services were offered to Mother throughout the underlying CHINS proceedings in an attempt to assist her in both overcoming her substance-abuse issues and meeting her parental obligations. During the termination hearing, HCDCS family case manager Francis Austin confirmed that he had referred Mother to at least two separate substance-abuse programs, but that Mother had "quit" the program at BehaviorCorp and failed to benefit from the Broad Ripple Counseling program, as evidenced by Mother's repeated positive drug screens both during and after completion of said program. *Transcript* at 12.

Austin also informed the trial court that he initiated home-based counseling services for Mother in June 2009, but that several services providers reported they "had trouble getting a hold of [Mother]," that Mother had "conflict[s] of personality" with more than one home-based counselor, and that despite referrals to two separate providers both referrals were eventually closed as unsuccessful. *Id.* at 14. HCDCS also made referrals for Mother to participate in random drug screens, a mental health assessment, and a substance-abuse

evaluation. Nevertheless, Mother failed to successfully complete these services, and never independently sought nor requested additional or “more appropriate” services.

Although county DCS offices routinely offer services to assist parents in regaining custody of their children, as was the case here, termination of parental rights may occur independently of such services, as long as the elements of I.C. § 31-35-2-4 are proven by clear and convincing evidence. *In re B.D.J.*, 728 N.E.2d 195 (Ind. Ct. App. 2000). Based on the foregoing, we cannot conclude that Mother’s constitutional right to due process of law was violated simply because she now contends she was not offered “appropriate” services during the underlying proceedings. *See In re B.J.D.*, 728 N.E.2d 195, 201 (Ind. Ct. App. 2000) (holding that a parent may not sit idly by without asserting a need or desire for services and then successfully argue that he or she was denied services to assist with his or her parenting).

We further note that where, as here, a party challenges “only the judgment as contrary to law and does not challenge the specific findings as unsupported by the evidence,” this Court “does not look to the evidence, but only to the findings to determine whether they support the judgment.” *Smith v. Miller Builders, Inc.*, 741 N.E.2d 731, 734 (Ind. Ct. App. 2000). In terminating Mother’s parental rights to S.S., the trial court made multiple findings regarding Mother’s failure to comply with the court’s dispositional orders, her refusal to “fully participate in home-based therapy”, her failure to successfully complete and/or benefit from various substance abuse programs, and her ongoing positive drug screens. *Appellant’s Appendix* at 14. The trial court also found:

11. [Mother has] not successfully remedied the circumstances resulting in

the detention and continued removal of [S.S.] from her home. [Mother] has continued to use illegal drugs throughout the entire life of the child, including during pre-natal stages. Despite multiple opportunities to participate in drug treatment, [Mother] has tested positive for illegal drugs multiple times throughout the life of the CHINS case, including a positive screen just nineteen days prior to trial in this cause.

* * *

12. [S.S.] has been raised by the maternal grandmother since the child's release from the hospital where the child had tested positive for cocaine in his system, due to [Mother's] repeated drug use during pregnancy. [Grandmother] tended to [S.S.'s] physical and emotional needs on a daily basis, as well as the extensive medical needs of the child, which included surgery to correct an inability by the child to get proper nutrition. [Grandmother] has demonstrated a daily consistency and devotion to [S.S.] that is noticeably lacking in [Mother]. [Grandmother] has no history of chronic unemployment, criminal behavior, drug abuse, or any other items of concern that would preclude her from adopting or raising [S.S.]. The plan for adoption of this child is satisfactory and in [S.S.'s] best interests.

Id. at 15. Mother concedes that the trial court's findings are "accurate," and we conclude that the findings set forth above clearly and convincingly support the trial court's ultimate decision to terminate Mother's parental rights. *Appellant's Brief* at 13. We therefore find no error.

We now turn to Mother's additional complaint that she was denied effective assistance of trial counsel. Mother contends she was not afforded effective assistance of trial counsel in this case because her attorney "did not return her phone calls." *Id.* at 20. Mother fails, however, to direct our attention to any evidence supporting this contention. To the contrary, the evidence presented at trial indicates Mother failed to provide her attorney with a valid working telephone number, and Mother concedes in her brief that her attorney "did try to reach Mother at least once, when [HCDCS] sought permission for S.S. to have abdominal

surgery” *Id.* at 21.

When a parent asserts on appeal that his or her lawyer underperformed, the focus of the inquiry is “whether it appears that the parent[] received a fundamentally fair trial whose facts demonstrate an accurate determination.” *Baker v. Marion Cnty. Office of Family & Children*, 810 N.E.2d 1035, 1041 (Ind. 2004). Thus, the question is not whether the lawyer might have objected to this or that, but whether the lawyer’s overall performance was so ineffective that the appellate court cannot say with confidence that the conditions leading to the removal of the child from parental care are likely to be remedied and that termination is in the child’s best interests. *Baker v. Marion Cnty. Office of Family & Children*, 810 N.E.2d 1035.

Applying this standard to the present case, we find Mother’s claim to be unpersuasive. The record reveals that Mother was zealously represented by the same attorney at every hearing in both the underlying CHINS and termination cases following her appointment to Mother’s case in June 2009. As for counsel’s specific performance during the termination hearing, the evidence demonstrates that Mother’s attorney effectively cross-examined witnesses, made and won multiple objections, introduced evidence and exhibits, and proffered passionate and persuasive arguments against granting HCDCS’s petition to involuntarily terminate Mother’s parental rights. Also significant, Mother does not challenge the sufficiency of the evidence supporting the trial court’s termination order and concedes in her brief that it is “quite likely” Mother’s attorney did try to reach Mother by telephone. *Appellant’s Brief* at 22.

Based on the foregoing, we conclude that Mother has failed to show she was

prejudiced in any way by her attorney’s performance. Without more, Mother’s bald assertion that she received ineffective assistance of counsel simply because she “wishes that she had more contact with her trial attorney prior to the date of the [termination] hearing” must fail.

Id.

Judgment affirmed. ²

BAILEY, J., and BROWN, J., concur.

² We note that imbedded within Mother’s due process and ineffective assistance of counsel arguments is the suggestion that the termination of her parental rights is not in S.S.’s best interests. Mother fails, however, to support this allegation with cogent reasoning or citation to authority. Moreover, she readily concedes on appeal that the findings of fact contained in the trial court’s judgment, which include a finding that “termination of the parent-child relationship is in the best interests of the child,” are accurate. *Appellant’s Appendix* at 15. Mother has therefore waived appellate review of this issue. *See* Ind. Appellate Rule 46(A)(8)(a) (providing that the “argument must contain contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on appeal relied on” *Id.*; *see also Davis v. State*, 835 N.E.2d 1102 (Ind. Ct. App. 2005) (concluding that failure to present a cogent argument or citation to authority constitutes waiver of issue for appellate review), *trans. denied*).