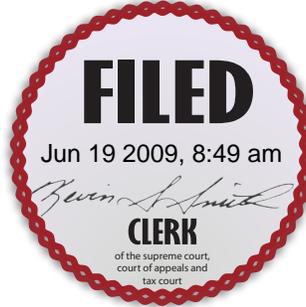


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ATTORNEY FOR APPELLANT,
R.M.

ATTORNEY FOR APPELLEE:

MATTHEW S. WILLIAMS
Williams Williams & Doxsee
Fort Wayne, Indiana

ROBERT J. HENKE
DCS Central Office
Indianapolis, Indiana

ATTORNEY FOR APPELLANT,
J.D.

TIMOTHY E. STUCKY
Blume Connelly Jordan Stucky & Lauer
Fort Wayne, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

IN RE: THE MATTER OF THE TERMINATION)
OF THE PARENT-CHILD RELATIONSHIP OF:)

A.D., and I.M.,)

Minor Children,)

and,)

J.D., (Father) & R.M., (Mother),)

Appellants-Respondents,)

vs.)

INDIANA DEPARTMENT OF)
CHILD SERVICES,)

No. 02A03-0901-JV-22

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Charles F. Pratt, Judge
Cause No. 02D07-0803-JT-75 & 02D07-0803-JT-76

June 19, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

J.D. (“Father”) and R.M. (“Mother”) appeal the termination of the parental rights to their children, A.D. and I.M. We affirm.

Issue

Father and Mother raise several issues, which we consolidate and restate as whether there was sufficient evidence to support the termination of their parental rights.

Facts

During January and February of 2007, the Allen County Division of Child Services (“DCS”) received three referrals regarding the care of A.D. and I.M. Upon investigation, DCS personnel discovered that Mother was incarcerated in Texas and had left the children in the care of others. Father had been incarcerated for some time. A preliminary hearing was held on February 26, 2007. A.D. and I.M. were declared CHINS on May 1, 2007, due to their parents’ incarceration.

On March 14, 2008, DCS filed petitions for termination of both parents' rights. On August 25, 2008, the trial court held a hearing on the termination petition. Mother participated telephonically, as she was still incarcerated in Texas, and Father appeared in person. A certified interpreter was provided.

Foster parent Anjanette Sewell testified that she cared for A.D. and I.M. from February 22, 2007 to June 27, 2008. Both children were sick, one with an ear infection and one with scabies, when they came to her home. They were both behind on their immunizations. Tonya Sullivan, Case Manager with the Allen County DCS, testified that prior to placement in foster care, relatives were caring for A.D. and I.M. When Sullivan initially contacted Mother, Mother did not know where her children were residing, though arrangements had been made at some point for them to be with a family member.

Mother testified that she was originally incarcerated in Texas for burglary and possession of cocaine.¹ She was released to parole sometime in 2003 and had to live in a halfway house. Before finishing her parole, Mother moved back to Indiana. She gave birth to A.D. on November 26, 2004, and I.M. on August 3, 2006. She was arrested for violating the Texas parole on February 7, 2007. She apparently arranged for A.D. to be placed with one of Father's relatives, Lakisha Dominguez, and I.M. to be placed with a friend, Monica Reyes. Reyes was unable to care for I.M. for financial reasons. I.M. was moved into foster care, and at that time A.D. was moved from Dominguez's home to

¹ The exact convictions are unclear because at a later point in the hearing Mother testified that her sentence was for "accomplice possession" and then "accomplice for selling cocaine." Tr. Vol. 2 p. 19.

foster care as well. Allen County DCS could not recommend A.D. staying with Dominguez because she had a prior drug related conviction.

Mother admitted to having ten prior children, and her parental rights had been terminated as to all of them.² She agreed that due to her incarceration, she was unable to provide A.D. and I.M. with food, clothing, and shelter. Her maximum release date was August 2010, but Mother insisted she could be out on parole earlier. She had already been denied parole twice, however. While incarcerated in Texas, Mother has taken computer skills classes, GED classes, and substance abuse classes. She regularly sent cards and letters to the children.

Father was incarcerated in Michigan City, Indiana at the time of the hearing, serving time for a dealing in cocaine conviction. He had never established paternity to A.D. and I.M. He has been incarcerated since before I.M.'s birth and has not met I.M. Father spent only the first two years of A.D.'s life in the family home. His earliest release date is March 2011. Father has taken classes while incarcerated and plans to become certified to work in heating and air conditioning.

Bobbie Woods, family case manager for DCS, recommended termination of rights based on the incarceration of both parents, Mother's history of previously terminated rights, and Father's criminal history. Brian Lange, guardian ad litem for the children, recommended termination with placement of the children for adoption. As to Father,

² There is a disagreement as to whether Mother voluntarily gave up her parental rights, whether she somehow unknowingly relinquished her rights because of her inability to understand English, or whether her rights were involuntarily terminated. The terminations involved a department of child services in Texas. The records for the termination of rights to eight of the children that are included in the Appendix imply that Mother relinquished her rights to them.

Lange based the decision on Father's criminal history, his failure to establish paternity of the children, and his current incarceration. As to Mother, Lange based the decision on her past history of terminations and her current incarceration. He explained that neither parent has had any role during a "huge chunk" of the children's lives. Tr. Vol. 3 p. 34. He felt permanency was the best plan for the children.

The trial court issued findings and orders terminating Mother's and Father's rights for both A.D. and I.M. on December 1, 2008. This joint appeal followed.

Analysis

"When reviewing the termination of parental rights, we do not reweigh the evidence or judge witness credibility." Bester v. Lake County Office of Family and Children, 839 N.E.2d 143, 147 (Ind. 2005). "We consider only the evidence and reasonable inferences that are most favorable to the judgment." Id. Where a trial court enters findings and conclusions granting a petition to terminate parental rights, we apply a two-tiered standard of review. Id. First, we determine whether the evidence supports the findings. Id. Then we determine whether the findings support the judgment. Id. We will set aside a judgment only when it is clearly erroneous. Id. A judgment is clearly erroneous when the findings do not support the trial court's conclusions or the conclusions do not support the judgment. Id.

A petition to terminate the parent-child relationship must allege:

(A) one (1) of the following exists:

(i) the child has been removed from the parent for at least six (6) months under a dispositional decree;

(ii) a court has entered a finding under IC 31-34-21-5.6 that reasonable efforts for family preservation or reunification are not required, including a description of the court's finding, the date of the finding, and the manner in which the finding was made; or

(iii) after July 1, 1999, the child has been removed from the parent and has been under the supervision of a county office of family and children for at least fifteen (15) months of the most recent twenty-two (22) months;

(B) there is a reasonable probability that:

(i) the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied; or

(ii) the continuation of the parent-child relationship poses a threat to the well-being of the child;

(C) termination is in the best interests of the child; and

(D) there is a satisfactory plan for the care and treatment of the child.

Ind. Code § 31-35-2-4(b)(2).

The DCS had the burden of proving these allegations by clear and convincing evidence. See Bester, 839 N.E.2d at 148. Clear and convincing evidence need not show that the continued custody of the parent is wholly inadequate for the child's survival. Id. Instead, it is sufficient to show by clear and convincing evidence that the child's emotional and physical development is threatened by the parent's custody. Id.

The trial court issued nearly identical orders for Mother and Father terminating their relationships with A.D. and I.M. The trial court found that Father had a conviction for dealing in cocaine, has not communicated with the children, and has not established

paternity. He did not have specific arrangements for housing or employment upon release. He had a criminal history and a history of abusing drugs, including a failed attempt at drug rehab in 1976. The trial court concluded that Father could not provide a safe and stable environment for the children. Given his official release date of 2011, the trial court noted that the children have quite some time to wait before reunification services with him could begin.

As to Mother, the trial court found that her “habitual pattern of conduct has resulted in multiple arrests and incarcerations.” App. p. 18. The trial court found that Mother could only speculate as to her ability to care for the children after release, as she had not secured employment or a home. It noted that her parental rights to ten previous children had been terminated and that Mother could not provide a safe and stable home for the children at the present time. The children would have to wait until 2010 before reunification services could begin with her. Even then, there would be no guarantee either parent will be able to provide for the children. The trial court ultimately concluded that termination was in the children’s best interests because the children would be placed in a safe permanent home.

On appeal, the parents contend that the State failed to meet its burden to prove by clear and convincing evidence the elements set forth in Indiana Code Section 31-35-2-4(b)(2). The parents specifically contend that there was not clear and convincing evidence that the statutory removal time minimum had been met, that the conditions resulting in the children’s removal would not be remedied, that the termination was in the children’s best interests, and that there was a satisfactory plan for the care of the children.

I. Time Requirement for Removal from the Home

The trial court found that the children had been removed from the home for more than six months under a dispositional decree and more than fifteen of the last twenty-two month period.³ The section of the statute dealing with time requirements is written in the disjunctive, so the State only needed to prove one of the elements. See I.C. § 31-35-2-4(b)(2)(A). By the time of the hearing, the children had clearly been removed from the parents for over six months since the date of the dispositional decree was May 1, 2007, and the hearing on the termination did not begin until August 25, 2008. This element is clearly supported by the evidence.

The parents also make a variety of cursory arguments in an attempt to cast doubt on the validity of the proceedings. They seem to make these arguments in an attempt to designate the CHINS dispositional hearing as flawed, which they contend would result in the “DCS’s inability to show that the children had been removed for six months, under a dispositional decree.” Appellants’ Br. p. 20. They argue that “procedural irregularities” existed during the CHINS proceedings resulting in violations of their due process rights, but we find these arguments are waived on appeal. Id.; see In re S.P.H., 806 N.E.2d 874, 878 (Ind. Ct. App. 2004) (explaining that constitutional claims raised for the first time on appeal are waived). Any objections to the nature or notice during those proceedings should have been made at the time, or at least during the termination hearing. Mother

³ Mother and Father argue that the trial court’s calculation regarding the minimum fifteen month removal is wrong. They use a different time frame, first contending that the court should calculate the months only between the court order for removal and the date of the petition to terminate. Using such dates, they contend there was only twelve and a half months between the court order for removal and the date of the filing.

also claims she did not participate in the CHINS hearing. This issue is waived, since it was raised for the first time on appeal. Waiver notwithstanding, it appears from the transcript that Mother admitted to participating telephonically in a number of hearings during the case. The order on the disposition hearing on May 1, 2007, notes that Mother's attorney was present and includes Mother's admissions. DCS case manager Woods testified Mother participated telephonically during the May 1, 2007 hearing.

Regarding any arguments that Mother could not participate because English was her second language, we note that an interpreter was provided during the termination hearing. In addition, the numerous letters and cards written in English from Mother to the children overcome arguments by Mother at this stage that her rights were hampered due to a language barrier.

II. Conditions Resulting in Removal Will Not Be Remedied

The parents contend that the trial court erred in finding the conditions that led to the children's removal from the home would not be remedied. Although admitting their incarceration fully prevents them from caring for the children, the parents argue that other factors merit a continuation of foster placement and delay of termination. They contend that In re R.H., 892 N.E.2d 144 (Ind. Ct. App. 2008), supports a reversal of the termination and that their predicament is very similar to R.H.'s father's. We disagree. There was no evidence that the father in the R.H. case was facing incarceration or had a criminal history, both major factors in this case. Instead, that father had relocated out of state for employment purposes and was working with DCS toward reunification. In re R.H., 892 N.E.2d at 150.

The parents concede that the trial court rightfully considered their past criminal histories and Mother's previous termination of parental rights. They also admit that the trial court acknowledged their efforts during their respective incarcerations to obtain skills and send cards and letters to the children. Yet the parents contend that the trial court did not put enough emphasis on the parent's positive efforts. This argument is merely an invitation for us to reweigh the evidence.

Mother has already lost custody and parental rights to ten children. This number is troubling and demonstrates a pattern of disregard for her children's welfare. She has also been incarcerated on and off during the past ten years and admits to violating her Texas parole by coming to Indiana. She has no concrete plan in place for employment and housing following her eventual release. Father was incarcerated when A.D. was only two years old and has never met I.M. Father has not established paternity to either child. We acknowledge that Father is taking advantage of opportunities during his incarceration to learn a trade and that he has sought out families willing to foster his children. Father does not have specific employment or housing plans, however, in place for his release. He has a criminal history that includes a conviction for resisting law enforcement in 2004, operating while intoxicated in 2000, criminal conversation in 1986, and a 1976 conviction for the sale of heroin. The trial court's conclusion that the conditions resulting in removal would not be remedied is not clearly erroneous.

III. Best Interests of the Children

The parents contend that it is not in the best interests of A.D. and I.M. to sever their relationship with their biological parents. They contend that postponing a

reunification until their release from prison is in the children's best interests. Our supreme court recently decided a case involving the termination of rights of an incarcerated parent and the best interests of her child. In In re G.Y., 904 N.E.2d 1257 (Ind. 2009), the supreme court reversed the trial court's termination of G.Y.'s mother's rights. It found that the trial court did not have clear and convincing evidence to support its conclusion that termination of mother's rights was in G.Y.'s best interest. In re G.Y., 904 N.E.2d at 1262. The reasons relied on by the trial court included: G.Y.'s mother's pattern of criminal activity makes it likely she will reoffend; the additional time to needed for G.Y.'s mother to be released from prison and remedy conditions would put G.Y. "on a shelf"; G.Y. has a closer relationship with his foster parents; and, G.Y. has a need for permanency and stability. Id. at 1263.

Like G.Y.'s mother, Mother in this case committed the crimes for which she was incarcerated prior to the birth of her children. Another similarity is G.Y.'s mother attempt to place G.Y. in the care of friends or family prior to her incarceration, but the failure of those attempts. Substantial differences, however, exist between the situation in G.Y. and this case including G.Y.'s consistent visitation with his Mother, her pursuit of a degree, her secured employment for post-release, and her enrollment in a program that would provide post-release housing. G.Y.'s guardian ad litem also conditioned her recommendation for termination with a suggestion for continuous future visitation and contact between G.Y. and his mother based on the bond she observed between the two. The supreme court reasoned that in light of G.Y.'s mother's efforts toward reunification and steps to provide permanency after her release, the time it would take for her to

comply with the remaining items in the participation decree was not a strong enough reason to support that termination was in G.Y.'s best interests. Id. at 1264. G.Y.'s mother's release was imminent and with the positive reports from his foster placement, our supreme court concluded that continuation of that arrangement and postponing permanency was in G.Y.'s best interest. Id. at 1265-66.

Mother here is in a very different situation than that which the supreme court was presented in G.Y. A.D. and I.M.'s guardian ad litem did not make a conditional recommendation regarding a continued relationship with either parent. Mother's history of ten terminations of parental rights demonstrated a troubling pattern. Both parents are incarcerated. Father is a stranger to I.M. and has not seen A.D. since he was two years old. Lange, the guardian ad litem, testified that the children were "settled, they're happy, they're growing" in a pre-adoptive home. Tr. Vol. 3 p. 35. Lange testified that this placement offered the children permanency that they needed. The trial court's conclusion that termination was in the best interests of the children was supported by evidence and was not clearly erroneous.

IV. Satisfactory Plan

Father and Mother also argue that the State did not have a satisfactory plan for the care of A.D. and I.M. The parents sought out a foster family willing to care for the children until they were released and able to regain custody. The potential foster father, George Stout, testified that he and his wife were certified foster parents and would be interested in caring for A.D. and I.M. There was no evidence that Stout could offer a permanent home should the parents fail at reunification efforts. The guardian ad litem,

Lange, opposed this placement because moving homes again would cause damage to the children. Lange admitted that moving the children from the first foster family's home to the adoptive family's home was also damaging, but that move was necessary to work toward permanency. To the extent that the parents argue the trial court should have disregarded the guardian ad litem's testimony regarding the potential damage to the children by another placement, this is just another request for us to reweigh evidence and judge the credibility of witnesses, which we must decline.

The trial court's order set out each element required by Indiana Code Section 31-35-2-4(b)(2) and included evidence to support each one. The judgment is not clearly erroneous and we will not reverse its decision to terminate.

Conclusion

The State presented clear and convincing evidence to support the termination of both parents' rights to A.D. and I.M. We affirm.

Affirmed.

BAKER, C.J., and MAY, J., concur.