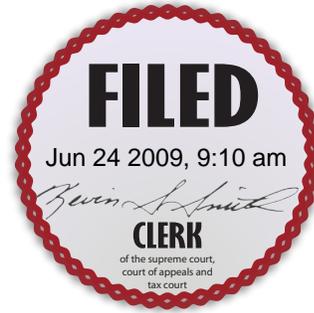


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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IN RE; THE TERMINATION OF THE PARENT- )  
CHILD RELATIONSHIP OF J.S. and D.S., )  
Minor Children, )  
)  
M.S., Father, )  
)  
L.S., Mother, )  
)  
Appellants-Respondents, )  
)  
vs. )  
)  
INDIANA DEPARTMENT OF CHILD )  
SERVICES, ALLEN COUNTY, )  
)  
Appellee-Petitioner. )

No. 02A03-0812-JV-623

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APPEAL FROM THE ALLEN SUPERIOR COURT  
The Honorable Charles F. Pratt, Judge  
Cause Nos. 02D07-0711-JT-226, 02D07-0711-JT-227

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**June 24, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**MAY, Judge**

T.S. (“Mother”) and M.S. (“Father”) appeal the termination of their parental rights to J.S. and D.S. We affirm.

**FACTS AND PROCEDURAL HISTORY**

J.S. was born June 18, 2001. Mother and Father married in 2003. D.S. was born March 11, 2004. Although Father was not the biological father of J.S., Mother and Father falsified paperwork to obtain a birth certificate for J.S. indicating Father was his father.<sup>1</sup> While the family lived in Mississippi, that state’s department of child services intervened with the family after Father spanked J.S., leaving bruises. After Mother and Father engaged in twenty weeks of counseling, all charges were dropped. Thereafter, Mother, Father, J.S., and D.S. moved from Mississippi to Louisville, Kentucky. Kentucky’s department of child services became involved with the family because Father disciplined J.S. by locking him in his room.

In August of 2006, Father hit Mother in the face in front of the children, and she decided to take the children and leave. Mother took J.S. and D.S. to live in Fort Wayne, Indiana, where her mother and sister lived. Father drove from Louisville twice a month to visit the children, and Mother allowed him unsupervised time with them. Father did not provide her with support of any kind for the children.

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<sup>1</sup> Testimony suggested Parents were able to obtain the falsified birth certificate because Hurricane Katrina destroyed the original paperwork.

On October 19, 2006, the Allen County Department of Child Services (“DCS”) received a report that Mother was being arrested because she had that day hit J.S. on the head five times with a metal broom with sufficient force to bend the broomstick. Because the children had no appropriate caregiver, they were placed in foster care. J.S. required medical attention for his injuries.

On October 23, 2006, the court held a preliminary hearing. Mother appeared, but Father did not. The court found probable cause to believe the children were CHINS, ordered DCS to file the CHINS petitions, and ordered provisional services for Mother. The court continued the children’s placement in foster care.

On November 28, 2006, Mother and Father appeared for a hearing on the CHINS petitions. Mother admitted the following pertinent allegations in the petition:

5. On or around October 19, 2006, [Mother] was arrested and charged with a D Felony Battery and was incarcerated.
6. On or around October 19, 2006, [Mother] was unable to provide care and supervision for [the children].
7. [Mother] has difficulty controlling her anger.
8. [J.S.] was diagnosed . . . as having Attention Deficit Disorder with hyperactivity, and borderline to mild mental functioning.
9. [Mother] recently moved to Indiana from Kentucky and has had some difficulty obtaining Medicaid for her children.
10. [Mother] requires the intervention of this court in order to receive support and services to help her better parent her children, support and services she cannot receive or will not receive without the involvement of this court.

(State’s Ex. 14 at 2.) Father admitted he is the father of D.S.; he is not providing material or financial support for D.S.; he is not visiting regularly or contacting D.S.; he is on probation following incarceration for theft; and he was convicted in 1996 of rape and

sodomy of a fourteen year old girl. (*Id.* at 3.) The court concluded the children were CHINS and ordered Mother and Father to engage in services. Mother was ordered to:

1. Refrain from all criminal activity;
2. Maintain clean, safe, and appropriate housing at all times;
3. Notify the Department of Child Services within forty-eight (48) hours of all changes in household composition, housing, and employment;
4. Cooperate with all caseworkers by attending all case conferences as directed[,] maintain contact, and accepting announced and unannounced home visits;
5. Immediately provide the caseworkers with accurate information regarding paternity, finances, insurance, and family history; and
6. Immediately provide the caseworkers with signed and current consents of release and exchange of information.
7. Provide your children with clean, appropriate clothing at all times.

In addition, you shall successfully complete and benefit from the following programs, services and/or other requirements in a timely manner:

8. Obtain a psychological evaluation at Park Center as directed and follow the recommendations.
9. Enroll in anger management/non-violence counseling at Park Center home based services or its recommended service provider, and successfully complete the program.
10. Enroll in individual/family counseling at Park Center to address issues of domestic violence, self-esteem and anger, attend all sessions, and successfully complete the counseling program.
11. Enroll in Park Center home based services program including services to address domestic violence, housing and parenting, participate in all sessions, and successfully complete the program.
12. Attend and appropriately participate in all visits with your children as directed.
13. Ensure the children have appropriate medical insurance and ensure your children obtain routine medical care as needed.
14. Refrain from physical discipline of your children at all times.
15. Enroll and satisfactorily complete the Center for Nonviolence Women's Support Group.

(State's Ex. 9 at 2-3.) Father was ordered to:

1. Refrain from all criminal activity;
2. Maintain clean, safe, and appropriate housing at all times;
3. Notify the Department of Child Services within forty-eight (48) hours of all changes in household composition, housing, and employment;
4. Cooperate with all caseworkers by attending all case conferences as directed; maintain contact, and accepting announced and unannounced home visits;
5. Immediately provide the caseworkers with accurate information regarding paternity, finances, insurance, and family history; and
6. Immediately provide the caseworkers with signed and current consents of release and exchange of information.
7. Provide your children with clean, appropriate clothing at all times.

In addition, you shall successfully complete and benefit from the following programs, services and/or other requirements in a timely manner:

8. Obtain suitable employment and maintain said employment.
9. Obtain a psychological evaluation at an approved/licensed agency by December 28, 2006, and follow the recommendations.
10. Enroll in anger management/non-violence counseling through group counseling at an approved/licensed agency, and successfully complete the program.
11. Enroll in parenting classes at an agency approved by Department of Child Services, attend all sessions, and successfully complete the program.
12. Pay support and fees as Ordered.
13. Refrain from physical discipline of your children at all times.

*(Id. at 3.)*

On April 11, 2007, the court held a review hearing. Mother appeared. Father did not. The court found Mother had “substantially complied with” the parent participation plan” and the conditions that led to the children’s removal were “likely to be corrected.” (State’s Ex. 8 at 1.) DCS was ordered to “increase visitation between the mother and children consistent with the children’s best interest.” *(Id.)*

The Court conducted a permanency hearing on September 5, 2007. DCS requested termination of parental rights as to both J.S. and D.S. The Court Appointed Special Advocate (“CASA”) concurred with the request by DCS. Regarding the parents’ compliance with the parent participation plan, the court found Mother was compliant but was not benefitting from services, while Father was not compliant and thus not benefitting. After finding DCS had made reasonable efforts to reunite the children with Mother and Father, the court authorized DCS to file a termination petition.

At some point during the CHINS proceedings, the court suspended Father’s visits with J.S. because J.S. exhibited increased emotional problems after visiting with Father. Following visitation, J.S. would have a bowel movement in his pants, he would tear up and break furniture at home, and he would have difficulty at school the next day. On December 13, 2007, a hearing was held regarding whether to reinstate visitation between J.S. and Father. DCS requested the court continue the suspension, and Mother and CASA agreed with DCS. Because J.S. “exhibited improved emotional behavior since the suspension of visitation,” (State’s Ex. 6 at 1), the court did not reinstate visitation.

The court heard evidence regarding the termination petitions on April 14, April 16, and August 21, 2008. The court then terminated Mother’s rights to both children and Father’s rights to both children.

### **DISCUSSION AND DECISION**

We are highly deferential when reviewing termination of parental rights. *In re K.S.*, 750 N.E.2d 832, 836 (Ind. Ct. App. 2001). We do not reweigh evidence or judge

the credibility of witnesses. *In re D.D.*, 804 N.E.2d 258, 264 (Ind. Ct. App. 2004), *trans. denied sub nom. Peterson v. Marion County OFC*, 822 N.E.2d 970 (Ind. 2004). Instead, we consider only the evidence and reasonable inferences therefrom that are most favorable to the judgment. *Id.* In deference to the juvenile 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, 208 (Ind. Ct. App. 1999), *trans. denied sub nom. Swope v. Noble County Office of Family & Children* 735 N.E.2d 226 (Ind. 2000), *cert. denied* 534 U.S. 1161 (2002).

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

- (A) [o]ne (1) of the following exists:
  - (i) the child has been removed from the parent for at least six (6) months under a dispositional decree;  
\* \* \* \* \*
- (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 State must establish each of these allegations by clear and convincing evidence. *Egley v. Blackford County Dep't of Pub. Welfare*, 592 N.E.2d 1232, 1234 (Ind. 1992).

When determining whether there is a reasonable probability the conditions justifying a child's removal and continued placement outside the home will not be

remedied, the juvenile court must judge a parent's fitness to care for his or her children at the time of the termination hearing, taking into consideration evidence of changed conditions. *In re J.T.*, 742 N.E.2d 509, 512 (Ind. Ct. App. 2001), *trans. denied sub nom. Timm v. Office of Family & Children*, 753 N.E.2d 12 (Ind. 2001). However, the court must also "evaluate the parent's habitual patterns of conduct to determine the probability of future neglect or deprivation of the child." *Id.* Pursuant to this rule, courts have properly considered evidence of a parent's prior criminal history, drug and alcohol abuse, history of neglect, failure to provide support, and lack of adequate housing and employment. *A.F. v. Marion County Office of Family & Children*, 762 N.E.2d 1244, 1251 (Ind. Ct. App. 2002), *trans. denied* 774 N.E.2d 515 (Ind. 2002). A department of child services is not obliged to rule out all possibilities of change; it need establish only a reasonable probability a parent's behavior will not change. *See In re Kay L.*, 867 N.E.2d 236, 242 (Ind. Ct. App. 2007).

1. Father's Rights

Father challenges the trial court's conclusions the conditions would not be remedied and termination is in the children's best interests.

- A. Conditions Not Remedied

The court entered the following findings and conclusions in the orders terminating Father's parental rights:

8. At the September 5, 2007 Permanency Hearing the Court found . . . that the Father was not in compliance with the Despositional [sic] Decree. A permanency plan for the termination of parental rights and adoption was

authorized by the Court.

\* \* \* \* \*

10. The Mother and Father are married. They have lived apart since August, 2006. While living together in Louisville, Kentucky, acts of domestic violence were committed between them in the presence of the children. The Respondents have stated they intend to divorce but no pleadings for the dissolution of their marriage have been filed.

11. While living in Mississippi, child protection services investigated allegations that [J.S.] had been locked in his room and had suffered physical abuse from [Father]. The parents were directed to complete counseling services.

12. [Father] continues to live in a two bedroom home in Louisville Kentucky. He is self employed.

13. Respondent [Father] has not completed anger management classes. He completed parenting classes just prior to the commencement of the factfinding. He has only recently arranged for his psychological evaluation. He has visited with [D.S.] on a monthly basis. His visitations with [J.S.] were suspended by order of the court. He has not paid for the financial support of either child.

\* \* \* \* \*

28. The Court Appointed Special Advocate reports that termination is in the child's best interests.

**TO THE ABOVE FINDINGS OF FACT THE COURT APPLIES THE RELEVANT STATUTORY LAW AND CONCLUDES THAT:**

\* \* \* \* \*

2. . . . The Father has not provided for the child's support, he has not enrolled in services as required under the dispositional decree with the exception of parenting classes that were only recently completed. Both parents have a history of abuse to a child. Both have been offered services through child protection agencies in other states. Given the historic pattern of their behaviors the court concludes that reasons for removal are not likely to be remedied.

3. . . . In this case the Court Appointed Special Advocate (CASA) has determined that adoption is in the child's best interests. The court concludes that through termination of the parent child relationship, the child can be placed in a safe and sustainable permanent home. Thus the child's best interests are served by granting the petition to terminate the parent-child relationship.

(Appellants' App. at 554-57.)<sup>2</sup>

Father asserts "nothing in the record" supports Mother's assertion that he committed acts of domestic violence against her. However, we may not reassess the credibility of the witnesses or reweigh the evidence. *See In re D.D.*, 804 N.E.2d at 264. Mother testified to those events, and the trial court chose to believe her.<sup>3</sup>

Father challenges the finding he did not comply with court-ordered services, claiming he "completed all but one of the services." (Brief of Appellant M.S. at 15.) However, what the court concluded was that Father "has not enrolled in services as required under the dispositional decree," (Appellants' App. at 557), which takes into account the testimony that Father failed to complete services within the timeframe established by the dispositional decree. For example, Father was to obtain a psychological evaluation by December 28, 2006, so that he could comply with any recommendations resulting therefrom. He did not complete that evaluation until one day before the last date of the final hearing. Therefore, DCS could not know the results of that evaluation and Father could not follow through with any recommendations resulting therefrom. Father told the Court his failure to enroll in anger management classes resulted from delays caused by the Veteran's Administration, but the Court had before it

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<sup>2</sup> The quoted language is taken from the order terminating parental rights to D.S. The order terminating Father's rights to J.S. contains nearly identical language, without substantive differences. (*See* Appellants' App. at 558-63.)

<sup>3</sup> Father also appears to challenge the finding that he was involved with child protective services in Mississippi after bruising J.S. by spanking. (*See* Brief of Appellant M.S. at 15.) However, Father does not explain why that finding was erroneous. As it is supported by testimony in the record, we find no error.

evidence Father told his DCS caseworker that he was not going to enroll in an anger management class because he did not have an anger management problem.

In light of Father's sexual offenses against a teenage girl and his history of domestic violence against Mother and J.S., we cannot disregard his failure to complete these two requirements. Father had two years to complete those requirements, and he did not. Accordingly, we find no error in the court's determination Father was not likely to remedy the problems that led to the children's removal.

We acknowledge evidence Father continued to visit with D.S. and their interactions were positive. But DCS was justifiably concerned about returning D.S to Father when he had not engaged in therapy that may have been called for by his psychological evaluation. Similarly, DCS understandably was hesitant to return a boy with J.S.'s behavior issues to Father after he spanked J.S. so hard he caused bruises and when Father had not received anger management treatment or therapy suggested by his psychological evaluation. We decline to find the court erred in finding the conditions were not likely to be remedied.

B. Best Interests

Father also challenges the finding termination was in the children's best interests. In determining the best interests of the child, the trial court must look beyond the factors identified by the Department of Child Services to the totality of the evidence. *McBride v. Monroe County Office of Family & Children*, 798 N.E.2d 185, 203 (Ind. Ct. App. 2003). In so doing, the court must subordinate the interests of the parent to those of the children.

*Id.*

The recommendations of a caseworker and guardian ad litem (“GAL”) that parental rights be terminated support a finding that termination is in the child’s best interests. *Id.* Despite Father’s claimed understanding of J.S.’s behavior problems, medical needs, and education needs, the record reflects visiting with Father causes J.S. such emotional distress that, after visits, J.S. destroys furniture, soils himself, and becomes unmanageable for his foster parents and teachers. D.S. may enjoy her visits with Father, but Father has not engaged in the services that would ensure unsupervised visits would be safe.

Accordingly, we affirm the termination of Father’s parental rights.

## 2. Mother’s Rights

Mother challenges the findings and conclusion the conditions that resulted in the children’s removal would not be remedied. The trial court entered the following findings and conclusions in the order terminating Mother’s rights to D.S.:

8. At the September 5, 2007 Permanency Hearing the Court found that the Mother had not demonstrated an ability to benefit from services . . . . A permanency plan for the termination of parental rights and adoption was authorized by the Court.

9. In 1998, the Mother placed an older sibling to [J.S.] and [D.S.] in the care of an aunt. She has not seen that child since.

10. The Mother and Father are married. They have lived apart since August, 2006. While living together in Louisville, Kentucky, acts of domestic violence were committed between them in the presence of the children. The Respondents have stated they intend to divorce but no pleadings for the dissolution of their marriage have been filed.

11. While living in Mississippi, child protection services investigated allegations that [J.S.] had been locked in his room and had suffered

physical abuse from [Father]. The parents were directed to complete counseling services.

\* \* \* \* \*

14. Since the commencement of the underlying CHINS case, the mother has not consistently maintained safe, stable housing. She has lived with her mother or with her sister on two separate occasions. She lived in [an] apartment with two roommates, a male and female. While living in the apartment her roommate used cocaine in the home. She has lived in an apartment by herself and has most recently lived with [M.M.], a man she now regards as her fiancé.

15. The Mother receives Social Security Income in the sum of \$573.00 per month. Her present rent is \$460.00 per month (including utilities). The Mother rejected an apartment with a lower rental fee offered to her through her home based case management services.

16. The Mother carries a diagnosis of adjustment disorder with depression and anger issues. From the testimony of the Mother's therapist, Sally Miller, the Court finds that the Mother has made some overall improvement. However, she has not been able to sustain her progress. She has not shown improvement in her self sufficiency and has not been able to maintain stability in her relationships. She easily embraces relationship [sic] with men in a way that poses a risk to her safety. She is vulnerable and does not have the ability to make character judgments to protect herself. She has been in abusive relationships and she is presently maintaining communication with a convicted sex offender in prison. On one occasion she met a man, known only as "Jeff", in March and announced their engagement in April. At the April, 2008 hearing of the factfinding, the Mother announced that she was intending to marry a man (now known to be [M.M.]) whose last name she either could not then recall or did not know. Since the summer of 2007 the Mother has had seven to nine relationships.

17. The Mother's therapist does not recommend that the children be returned to the Mother's care. Although by the August, 2008 portion of the factfinding, the therapist saw improvement she did not retract her position.

18. Subsequent to the April hearings and prior to the August conclusion of the factfinding, the Mother allowed [M.M.] to stay with in [sic] her apartment. On or about June 6, 2008, she sought the assistance of her mother and sister to have him removed from the home. The Mother and [M.M.] have resumed living together since. During that same time period the Mother has told the DCS casemanager that she was not going to marry him and then later advised that she was.

19. [M.M.] is prone to extreme mood swings when distressed that may bring about actions that could be disruptive to the children should they be present.

20. To her credit the Mother continues to participate in the Carriage House, a local facility designed to provide people suffering from mental illness with a supportive community. At the Carriage House, the Mother is given opportunities to gain job skills. The Mother has been actively involved with the Carriage House since October 2007.

21. As laudable as her efforts at the Carriage House have been, the Mother has not been able, during the pendency of the underlying CHINS case, to maintain safe and appropriate housing such that the children could be reunited into her care.

22. During visits with the children, the Mother favors [D.S.]. She will hold [D.S.] on her lap while [J.S.] roams the room or lies down on the floor. On [J.S.'s] birthday, the Mother gave a present to [D.S.] but did not acknowledge [J.S.]. [J.S.] refers to [Mother] as "[D.S.'s] Mother".

23. The Mother often leaves visitations early. She has been observed watching the clock during the last twenty minutes of her time with the children.

\* \* \* \* \*

**TO THE ABOVE FINDINGS OF FACT THE COURT APPLIES THE RELEVANT STATUTORY LAW AND CONCLUDES THAT:**

\* \* \* \* \*

2. . . . By the clear and convincing evidence the court determines that there is a reasonable probability that reasons that brought about the child's placement outside the home will not be remedied. Over a protracted period the mother has been offered substantial services to correct the circumstances that brought about the intervention of the court. Nevertheless, reunification could not be safely achieved. Notwithstanding the intervention of services that included home based case management, therapy, and mental health support services, the Mother has not demonstrated that she is better able to provide for the children now than she was in 2006. She does not have adequate housing for herself and two children. She is not able to maintain parenting supervision for the children through-out the very limited time span of a supervised visitation, she has not demonstrated over a period of time that she can maintain a safe relationship. While intending to marry [M.M.] she has not sought a divorce from her present husband and she has continued to communicate with a convicted sex offender in prison. Her therapist does not believe that the children should be reunited into her care at the present time. . . . Both parents have a history of abuse to a child. Both have been offered services

through child protection agencies in other states. Given the historic pattern of their behaviors the court concludes that reasons for removal are not likely to be remedied.

(Appellant's App. at 554-57.) In the order terminating Mother's rights to J.S., the court entered the following additional findings:

24. [J.S.] has been prescribed medications to control his behaviors. When first placed in foster care, [J.S.] was not toilet trained, he would spread his feces on objects, and would damage property. He requires a structured home with consistently enforced rules. From the testimony of the child's therapist the court finds that [J.S.] requires a parent or caregiver who is able to scale down his behaviors without increasing the necessity for medications.

25. Since being in foster care, [J.S.] speaks more clearly and is enrolled in school. He can accept being told "no" and is less disruptive.

26. The Mother cannot recall who is providing therapy for [J.S.] and she is not aware of his special education needs.

(*Id.* at 561.)

Mother first challenges the finding she "failed to maintain safe and appropriate housing." (Brief of Appellant T.S. (hereinafter "Mother's Br.") at 10.) The court actually found she "has not consistently maintained safe, stable housing." (App. at 555.) The finding regarding stable housing is supported by testimony about the number of places Mother had lived during the pendency of the proceedings and the caseworker's testimony that Mother never had a stable address. The finding of unsafe housing is supported by testimony Mother had a roommate who used illegal drugs and Mother currently lives with a man who threatened to commit suicide, whom Mother needed assistance to remove from her apartment, and who has "extreme mood swings." (Tr. at 317.) In addition, her therapist questions Mother's "ability to maintain stability and

safety for herself,” (*id.* at 235), which permits an inference she is unable to do so for her children.

Mother next alleges there was “no professional testimony” her fiancé’s emotional problems “would have an adverse effect upon the children if he resided with them.”

(Mother’s Br. at 11-12.) She is wrong. Mother’s therapist testified:

Well, my concern is that when he’s having depression and then that causes conflict between them, that -- that the focus might be off the children and the children’s needs, or there might be a disruption in -- in movement, that would be my biggest concern.

(Tr. at 317-18.)

Mother also claims “there had been no evidence presented demonstrating [Mother] had difficulty controlling her anger or that her anger in any way interfered with her ability to parent her children.” (Mother’s Br. at 12.) We cannot agree. DCS involvement began when Mother hit J.S. on the head five times with a metal broomstick because he wanted to cut a cake before all the guests had arrived. That is evidence Mother’s anger interferes with her ability to parent. As for more recent events, we note the visitation supervisor testified Mother was “short” with J.S. within five minutes after visitation starts. (Tr. at 123.) Her visits with the children were only one hour per week, but Mother frequently leaves the visits ten to fifteen minutes early because her patience for the children has run out. The DCS caseworker noted her concern that, if Mother becomes “easily frustrated” with J.S. in one hour visits, she might be abusive if she had to deal with him all the time. (*Id.* at 390.)

Mother admitted in the CHINS proceedings to having criminal involvement and to lacking Medicaid for the children, but she notes no further testimony indicated those problems continued. Even if that is correct, we cannot overlook the plethora of other problems that continue. Mother demonstrates instability in her housing and personal relationships, she is engaged to a man whose emotional problems may have a negative impact on the children, and she continues to lack patience to deal with the children for one hour a week. In light of these facts, and the court's numerous other findings and conclusions, we find no error in the termination of Mother's parental rights to J.S. and D.S.

Affirmed.

BAKER, C.J., and BARNES, J., concur.