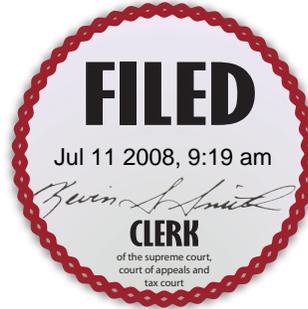


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF THE INVOLUNTARY)
TERMINATION OF PARENT-CHILD)
RELATIONSHIP OF G.E., MINOR CHILD,)
AND HER MOTHER, ANGELA EMSWILLER,)
ANGELA EMSWILLER,)
Appellant-Respondent,)

vs.)

MARION COUNTY DEPARTMENT OF)

No. 49A02-0805-JV-417)

CHILD SERVICES,)
)
 Appellee-Petitioner,)
)
 and,)
)
 CHILD ADVOCATES, INC.,)
)
 Co-Appellee.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Marilyn A. Moores, Judge
The Honorable Larry Bradley, Magistrate
Cause No. 49D09-0612-JT-51453

JULY 11, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Angela Emswiller appeals the termination of her parental rights to G.E. We reverse.

Issue

Emswiller raises one issue, which we restate as whether there is sufficient evidence to support the termination of her parental rights to G.E.

Facts

Emswiller gave birth to G.E. at Wishard Hospital in Indianapolis on December 30, 2005. She was incarcerated at that time, serving a five-year sentence for forgery. Emswiller had arranged placement for G.E. with a friend, but because of a change in

health conditions of her friend's spouse, the couple could not take the child. The Marion County Department of Child Services ("DCS") was summoned to the hospital to find placement for the baby. Emswiller reported to the DCS case manager that her other two children were in the care of her mother and step-father, but that she did not want them to be involved with G.E. She testified at the termination hearing that her brother had died, and she did not think her parents could take on the additional responsibility. Emswiller did not name a father on the birth certificate and would not provide the case manager with the father's name. Charlie Starks was eventually determined to be G.E.'s father, and he voluntarily gave up his parental rights.

DCS filed a petition alleging that G.E. was a child in need of services ("CHINS") on January 4, 2006. G.E. was declared a CHINS on June 13, 2006. Meanwhile, G.E. had been placed in foster care. G.E. has been with the same foster family since her birth, and the foster parents have indicated they would like to adopt her. Emswiller has had five visitation sessions with G.E. while incarcerated.

On December 30, 2006, DCS filed a petition for involuntary termination of the parent-child relationship between Emswiller and G.E. The trial court held a termination hearing on May 10, 2007. Emswiller moved to continue the hearing, but the continuance was denied.¹ Emswiller was still incarcerated and transportation could not be arranged,

¹ Emswiller does not appeal the denial of her continuance. In deference to the trial court and DCS, we recognize the sense of urgency in proceeding with the hearing. However, it seems that continuing the hearing at least until shortly after Emswiller's upcoming release date would have had little immediate effect on G.E., as she was placed safely in a home where she had already been for fifteen months. See Rowlett v. Vanderburgh County Office of Family and Children, 841 N.E.2d 615, 619-20 (Ind. Ct. App. 2006), trans. denied.

so she participated telephonically. Emswiller was due to be released forty-nine days from the date of the termination hearing. The trial court terminated Emswiller's parental rights to G.E. on May 11, 2007. This appeal followed.²

Analysis

In reviewing the termination of one's parental rights, we will not set aside a trial court's judgment unless it is clearly erroneous. Castro v. State Office of Family & Children, 842 N.E.2d 367, 372 (Ind. Ct. App. 2006), trans. denied. Where, as here, the trial court issues findings and conclusions, we first determine whether the evidence supports the findings, and then we determine whether the findings support the judgment. Id. "A judgment is clearly erroneous if the findings do not support the trial court's conclusions or the conclusions do not support the judgment." Id. (quoting Bester v. Lake County Office of Family and Children, 839 N.E.2d 143, 147 (Ind. 2005)). When reviewing a termination of parental rights, we neither reweigh the evidence nor judge the credibility of witnesses. Id. Instead, we consider only the evidence and reasonable inferences drawn therefrom that are most favorable to the judgment. Id.

Indiana Code Section 31-35-2-4(b)(2) provides that a CHINS petition must allege that:

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

² This appeal initially came before our court earlier this year. At that time, however, we remanded the case back to the juvenile court to obtain the signature of the trial judge in accordance with Indiana Code Sections 33-23-5-5(14) and 33-23-5-9(b). See In re G.E., No. 49A02-0706-JV-479 (Ind. Ct. App. Jan. 30, 2008). The original record and briefs have been incorporated into this appeal with the appropriately signed order.

(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.

If the trial court finds that the allegations in a petition are true, it shall terminate the parent-child relationship. See Ind. Code § 31-35-2-8(a). DCS must prove these allegations by clear and convincing evidence. Bester, 839 N.E.2d at 148. "Clear and convincing evidence need not reveal that the continued custody of the parents is wholly inadequate for the child's very survival. Rather, it is sufficient to show by clear and convincing evidence that the child's emotional and physical development are threatened by the respondent parent's custody." Id. (quotations and citations omitted).

In support of termination, DCS presented evidence that Emswiller had a history of substance abuse. Emswiller candidly admitted the same and acknowledged that the substance abuse had many negative long-term effects on her life. However, she completed a substance abuse treatment program while incarcerated. She also attends weekly narcotics anonymous meetings and plans to continue to participate in that program after her release. DCS presented no evidence at the termination hearing that Emswiller currently abuses alcohol or illegal substances.

DCS presented evidence that Emswiller has a criminal history, including various charges for check deception, conversion, and driving while suspended. Convictions included a juvenile adjudication for battery and adult convictions for possession of a controlled substance, criminal mischief, and forgery. DCS also presented evidence that Emswiller had multiple interactions with the Monroe County DCS in the past regarding her three other children. Two cases involved substantiated neglect in 1998 and two involved neglect and lack of supervision in 1999 of her oldest two children. Though the testimony and evidence on these past cases is limited, it appears the cases did not proceed to a CHINS or a termination petition. A third child was born positive for cocaine in 2000, and her parental rights to that child were terminated.³

Emswiller took advantage of the programs offered during her incarceration not only to build parenting skills, but also to develop life skills. She completed a positive

³ We note that there was no evidence presented that G.E. tested positive for any substances at birth. Testimony indicated that “the child was born normally and there was no [sic], no concerns. It was a healthy baby.” Tr. p. 75.

discipline program and a fifteen-week course in parenting education. She also participated in a grief and loss program. She entered in the vocational printing program and became certified as a printer operator. She also completed her GED and began taking college level courses.

Regarding her plans for after her release, Emswiller testified that she is enrolled in a program called Women in Motion. For the first three months of her release, this program will pay for her rent and utilities and assist her in securing employment. Wanda Wyatt, the family advocate for the program, testified the program also provides child care support and programs on parenting. Wyatt also testified that the financial assistance with rent and utilities could continue beyond the three-month period depending on the participant's situation.

The trial court found, "In looking at Mother's past habitual patterns of conduct, her vast history of substance abuse, no evidence of ever maintaining housing and employment as well as other poor life choices, it would not be in [G.E.]'s best interests to allow Mother the additional time of at least several months to try and complete services. Future changes are not likely to occur." App. p. 11. The trial court did not have sufficient evidence to terminate Emswiller's parental rights to G.E. at this stage. Although we acknowledge that Emswiller has quite an uphill battle ahead and will have many of DCS's prerequisites to complete in any reunification attempt, we find that termination at this stage was premature. "The law makes abundantly clear that termination of a parent's relationship with a child is an extreme measure to be used only as a last resort when all other reasonable efforts to protect the integrity of the natural

relationship between parent and child have failed.” Rowlett v. Vanderburgh County Office of Family and Children, 841 N.E.2d 615, 623 (Ind. Ct. App. 2006), trans. denied. We cannot find that the “last resort” has been reached in this case.

This court’s reasoning in Rowlett is instructive. Prior to initiating the CHINS proceeding in that case, the children had been found in an unclean and neglected state in father and mother’s unsafe home. Father had recently been released from jail. The children were declared CHINS, and father was subsequently charged and incarcerated for another drug offense. Termination proceedings progressed while father was incarcerated. This court found that the OFC did not prove the statutory factors necessary to terminate his rights. While incarcerated father had furthered his education, sought substance abuse treatment, and secured employment and housing. “Given the positive strides Father has made toward turning his life around, we conclude that the OFC did not present clear and convincing evidence that there is a reasonable probability that the conditions which resulted in the children’s removal would not be remedied.” Rowlett, 841 N.E.2d at 622.

Though the children in that case were older than G.E. and formed a bond with their father prior to being declared CHINS, we think the reasoning is still instructive and the situation is quite analogous. The father in Rowlett had been present while his children were living in unclean and unsafe conditions, and continued to make bad choices while the CHINS case was proceeding. Despite these facts, this court found that he deserved a chance to “prove himself as a fit parent for the children” upon his release. Id. at 623. Emswiler has not yet had that chance, but the evidence presented to the trial court demonstrated that despite her incarceration she has readied herself for it.

We do not disregard the strong bond G.E. has formed with her foster family, the only family she has known since birth. We realize that the guardian ad litem recommended that G.E. stay with the foster care family and that removal from the family would be “traumatic,” “confusing,” and “disruptive.” Tr. p. 127. However, any transition will undoubtedly be an emotional struggle for all parties involved. There is not sufficient evidence to support a finding that the continuation of the parent child relationship poses a threat to the well being of the child. We must keep in mind that “a parent’s interest in the care, custody, and control of his or her children is perhaps the oldest of the fundamental liberty interests.” Bester, 839 N.E.2d at 147 (citing Troxel v. Granville, 530 U.S. 57, 65, 120 S. Ct. 2054, 2060 (2000)).

Nor do we suggest that the trial court should have ignored Emswiller’s troubled past. We acknowledge that a parent’s habitual patterns can be determinative of future behavior. Rowlett, 841 N.E.2d at 620. Yet, “[i]n determining whether the conditions that led to the children’s removal are likely to be remedied, the trial court must assess the parent’s ability to care for the children as of the date of the termination proceeding and take into account any evidence of changed conditions.” Id. (citing In re K.S., 750 N.E.2d 832, 837 (Ind. Ct. App. 2001)).

We cannot ignore the exceptional facts here demonstrating a commitment by Emswiller to turn her life around and change her conditions as necessary to parent G.E. She has taken advantage of many opportunities during her incarceration to learn a trade, to deal with her substance abuse, and to improve her parenting skills and education. She has secured placement in a program that will ease the transition from incarceration and

put her on a path to an independent life. The trial court's conclusions that there is a reasonable probability that the conditions that resulted in the removal will not be remedied and that the continuation of the parent-child relationship poses a threat to G.E. are not supported by the evidence.

Conclusion

We find that DCS did not present sufficient evidence to terminate Emswiller's parental rights at this time. We reverse.

Reversed.

CRONE, J., and BRADFORD, J., concur.