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ATTORNEY FOR APPELLANT:

LAWRENCE D. NEWMAN
Noblesville, Indiana

ATTORNEYS FOR APPELLEE:

MICHAEL C. PRICE
Indiana Department of Child Services,
Hamilton County Office
Noblesville, Indiana

ROBERT J. HENKE
DCS Central Administration
Indianapolis, Indiana

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IN THE
COURT OF APPEALS OF INDIANA

In the Matter of the Involuntary Termination of the Parent-Child Relationship of C.K. and E.K., minor children, and D.A., biological mother	)	
D.A.,	)	
Appellant-Respondent,	)	
vs.	)	No. 29A02-1101-JT-51
INDIANA DEPARTMENT OF CHILD SERVICES,	)	
Appellee-Petitioner.	)	

APPEAL FROM THE HAMILTON CIRCUIT COURT
The Honorable Paul Felix, Judge
The Honorable Todd L. Ruetz, Master Commissioner
Cause Nos. 29C01-1004-JT-628 and -629

August 9, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

D.A. ("Mother") appeals the involuntary termination of her parental rights to her children, C.K. and E.K. In so doing, Mother challenges the sufficiency of the evidence supporting the trial court's judgment.

We affirm.

FACTS AND PROCEDURAL HISTORY

Mother is the biological mother of C.K., born in September 2007, and E.K., born in June 2009. The facts most favorable to the trial court's judgment reveal that several days following E.K.'s birth, the local Hamilton County office of the Indiana Department of Child Services ("HCDCS") received a report from hospital personnel that E.K. was born testing positive for barbiturates, benzodiazepines, and/or opiates. During the ensuing assessment, Mother admitted to HCDCS case workers that she had used heroin on a regular basis since December 2008, including while pregnant with E.K. Although E.K. remained hospitalized for several weeks due to health complications, including respiratory distress, HCDCS immediately took both children into protective custody and filed petitions, under separate cause numbers, alleging C.K. and E.K. were children in need of services ("CHINS"). At the time of the children's removal from Mother's care, the children's biological father was incarcerated on unrelated criminal matters and thus unavailable to parent the children.[1] Shortly thereafter, in July 2009, Mother was arrested for Class C felony possession of a controlled substance.

[1] The parental rights of the children's biological father, C.K. ("Father"), were also terminated by the trial court in its November 2010 judgment. Father, however, does not participate in this appeal. We therefore limit our recitation of the facts to those pertinent solely to Mother's appeal.

In September 2009, Mother admitted to the allegations of the CHINS petitions, and the trial court thereafter adjudicated both children as such. A dispositional hearing was held later the same month, after which the trial court issued an order formally removing both children from Mother's care and custody. The trial court's dispositional order further directed Mother to participate in and successfully complete a variety of tasks and services designed to address her substance abuse and parenting issues and to facilitate reunification with the children. Specifically, Mother was ordered to, among other things: (1) complete a substance abuse assessment and follow any resulting treatment recommendations; (2) participate in home-based therapy services; (3) refrain from the use of all illegal drugs and submit to random drug screens; (4) resolve all pending legal matters; and (5) exercise regular supervised visitation with the children.

Mother initially complied with the trial court's dispositional orders. Mother's successful participation in reunification services, however, was short-lived and ultimately unsuccessful. Following the dispositional hearing, Mother submitted to a substance abuse assessment and thereafter completed the recommended Intensive Out-Patient ("IOP") drug rehabilitation program. Mother also regularly visited with the children and produced clean drug screens. In addition, Mother pleaded guilty to the pending Class C felony possession of a controlled substance charge in December 2009. She was sentenced to four years of incarceration at the Indiana Department of Correction ("IDOC"), with all but fourteen days suspended, given credit for seven days actual-time and good-time credit served, and placed on probation for a period of eighteen months.

Due to Mother's progress in services, HCDCS began making arrangements for Mother to receive trial in-home visits with the children. However, in February 2010, the State of Indiana filed an Information of Violation of Probation based on allegations that Mother: (1) was dishonest with her probation officer regarding her use of illegal drugs; (2) submitted diluted urine screens as part of the terms of her probation on January 13 and January 29, 2010; and (3) tested positive for opiates on February 11, 2010. Then, in March 2010, Mother was arrested and charged with new drug-related charges including Class B felony possession of a narcotic drug and Class D felony unlawful possession of a syringe. The State thereafter filed a second Information of Violation of Probation pertaining to these new criminal charges.

Mother admitted to violating the terms of her probation during a hearing in June 2010, her probation was revoked, and she was ordered to serve two years of the previously suspended sentence in the Hamilton County Community Corrections Work Release Program. In July 2010, Mother entered into a plea agreement pertaining to the newly filed criminal charges. As part of this new plea agreement, Mother pleaded guilty to the lesser included offense of Class D felony possession of a narcotic drug, and the State dropped the unlawful possession of a syringe charge. Mother was thereafter sentenced to three years of incarceration, with one-and-one-half years suspended and the last six months of her executed sentence to be served in the Hamilton County Work Release Program.

Meanwhile, in April 2010, HCDCS filed petitions seeking the involuntary termination of Mother's parental rights to both children. A consolidated evidentiary

hearing on the termination petitions was held in September 2010. During the termination hearing, HCDCS presented evidence showing that, although Mother had experienced a brief period of sobriety and compliance with the trial court's dispositional orders during the first several months of the underlying CHINS case, by February 2010, Mother had relapsed, was subsequently arrested and later convicted of a new felony drug-related offense, never completed court-ordered reunification services, and remained unable to provide the children with a safe, stable, and drug-free home environment at the time of the termination hearing. HCDCS also introduced evidence showing Mother had remained incarcerated since her March 2010 arrest, her earliest possible release date was not until June 2011, and she had new pending battery charges stemming from an altercation that had occurred in April 2010 with another inmate while incarcerated in the Hamilton County Jail.

At the conclusion of the termination hearing, the trial court took the matter under advisement. On November 12, 2010, the trial court entered its judgment terminating Mother's parental rights to both children. Mother now appeals.

DISCUSSION AND DECISION

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, 836 (Ind. Ct. App. 2001). When reviewing a termination of parental rights case, we will not reweigh the evidence or judge the credibility of the witnesses. *In re D.D.*, 804 N.E.2d 258, 265 (Ind. Ct. App. 2004), *trans. denied*. Instead, we consider only the evidence and reasonable inferences that are most favorable to the

judgment. *Id.* Moreover, 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, 208 (Ind. Ct. App. 1999), *trans. denied*.

Here, in terminating Mother's parental rights, the trial court entered specific findings and conclusions. When a trial court's judgment contains specific findings of fact and conclusions thereon, we apply a two-tiered standard of review. *Bester v. Lake Cnty. Office of Family & Children*, 839 N.E.2d 143, 147 (Ind. 2005). First, we determine whether the evidence supports the findings, and second, we determine whether the findings support the judgment. *Id.* "Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference." *Quillen v. Quillen*, 671 N.E.2d 98, 102 (Ind. 1996). If the evidence and inferences support the trial court's decision, we must affirm. *L.S.*, 717 N.E.2d at 208.

The "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. *Id.* 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. *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 § 31-35-2-4(b)(2). 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 § 31-37-14-2). Moreover, 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. Ind. Code § 31-35-2-8(a). Mother challenges the sufficiency of the evidence supporting the trial court's findings as to subsection (b)(2)(B) and (C) of the termination statute cited above.

I. Conditions Remedied/Threat to Well-Being

At the outset, we observe that Indiana Code section 31-35-2-4(b)(2)(B) is written in the disjunctive. Thus, to properly effectuate the termination of parental rights, the trial court need only find that one of the three requirements of subsection (b)(2)(B) has been established by clear and convincing evidence. *See e.g. L.S.*, 717 N.E.2d at 209. Here, the

trial court determined that the first two elements of subsection (b)(2)(B) had been established. Because we find it to be dispositive under the facts of this case, however, we shall only discuss whether HCDCS established, by clear and convincing evidence, that there is a reasonable probability the conditions resulting in the children's removal or continued placement outside of Mother's care will not be remedied. *See* Ind. Code § 31-35-2-4(b)(2)(B)(i).

When making such a determination, a trial court must judge a parent's fitness to care for his or her child 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*. 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 Cnty. Office of Family & Children*, 762 N.E.2d 1244, 1251 (Ind. Ct. App. 2002), *trans. denied*. The trial court may also consider any services offered to the parent by the county department of child services (here, HCDCS) and the parent's response to those services, as evidence of whether conditions will be remedied. *Id.* Moreover, HCDCS is not required to provide evidence ruling out all possibilities of change; rather, it need establish only that there is a reasonable probability the parent's behavior will not change. *See In re Kay L.*, 867 N.E.2d 236, 242 (Ind. Ct. App. 2007).

On appeal, Mother asserts that there were "never any allegations or evidence presented that [she] posed a risk to C.K.[,] other than E.K. being born with controlled substances in his system," she had complied with all of the dispositional requirements "until the beginning of February 2010," and her "relapse was for a very short period of time . . . ." *Appellant's Br.* at 13-15. Mother therefore contends HCDCS failed to meet its burden of establishing, by clear and convincing evidence, that the conditions resulting in the children's removal from her care will not be remedied at some date in the future.

In the present case, the trial court's judgment contains multiple findings regarding Mother's history of substance abuse and ongoing criminal activities. Although the trial court's findings recognized Mother had initially been compliant with the case plan and reunification services offered to her, it nevertheless found Mother's continuing "drug use and criminal activity is . . . demonstrative of her inability to successfully remedy the issue and achieve reunification with the child[ren] in these proceedings." *Appellant's App*. at 31. With regard to Mother's addiction to heroin, the court specifically found that Mother "acknowledged frequent use of heroin during the pregnancy to [HCDCS] investigators, such use occurring since December 2008," and that "[d]uring the life of the CHINS case and the termination case," Mother "continued to use and abuse drugs and/or alcohol, notwithstanding reunification programs designed and intended to help [her] halt this behavior." *Id*. at 29-30. The court also found that "[s]ubstance abuse and the related deprivation of freedom and enforced absence from being the parent of the child[ren] are the core problems that had to be successfully resolved for a successful reunification by

the biological mother . . . with the child[ren]," but that Mother "failed to resolve these issues." *Id.* at 30.[2]

As for Mother's criminal history, the trial court found that "[l]ess than a month" after the CHINS action began, Mother was arrested on drug-related charges, and "[d]espite the risk of incarceration and absence from her children, and in the midst of the on-going CHINS proceedings, [Mother] proceeded to accrue two separate violations of probation." *Id.* at 31. The court also acknowledged that Mother had "accrued a battery charge while in jail," which "may result in extended incarceration on her other cases, in addition to whatever sentence she receives on this new charge." *Id.* at 32. In addition, the trial court determined that:

> 21. The drug abuse and criminal conduct of both biological parents has continued seemingly without regard to the consequences to discontinuing the relationship either parent may have with the child[ren] in these proceedings, and without regard to the continuing harm to the child[ren] in not having full-time and non-drug abusing parents to care for [them]. At the beginning of the underlying CHINS action, the biological mother was an admitted heroin addict . . . . On the date of the trial in these proceedings, . . . the biological mother had continued her drug addiction and has ended up in prison on an extended sentence.
>
> 22. The continued drug abuse and resulting criminal activity and incarceration of both biological parents clearly and convincingly demonstrates that the conditions that resulted in the child[ren]'s removal or the reasons for placement outside the home of the parents will not be remedied . . . . This finding is further enhanced by the failure of either parent to successfully utilize or implement reunification services to address these very problems, or similarly to

[2] For clarification purposes, we note that the trial court issued separate judgments in the underlying termination cases pertaining to each child. Because the language contained in both of the trial court's judgments referred to herein is substantially the same, apart from certain technical variations such as the names of the children, etc., we cite to only one judgment throughout this opinion.

> successfully obey probation programs designed to remedy this criminal and drug activity.

Id. Our review of the record leaves us convinced that there is ample evidence to support the trial court's findings cited above, which in turn support the court's ultimate decision to terminate Mother's parental rights to C.K. and E.K.

At the time of the termination hearing, Mother's circumstances remained largely unchanged in that she remained incarcerated and was facing additional criminal charges. Although Mother initially participated in a majority of the court-ordered reunification services, including an IOP and visitation with the children, she suffered a drug relapse after only a few months, repeatedly violated the terms of her probation, committed new criminal drug-related acts that resulted in convictions, and remained incarcerated for the duration of the underlying CHINS and termination cases. In addition, testimony from various caseworkers and service providers makes clear that Mother remained incapable of providing the children with a safe and stable home environment.

During the termination hearing, HCDCS case manager Jeri Gibson ("Gibson") and Guardian ad Litem ("GAL") Joan Lawrence ("Lawrence") both recommended termination of Mother's parental rights to C.K. and E.K. In so doing, Gibson confirmed that Mother was "very compliant with services" at the beginning of the CHINS case, "was attending IOP, was remaining drug[-]free, [and] was very close to a home trial visit." *Tr*. at 33-34. Gibson further reported, however, that Mother began "displaying positive [drug] screens," had "two probation violations" by February 2010, "became incarcerated March 5, 2010[,] and has remained incarcerated to the present time." *Id.* at

37. Gibson also explained that although Mother had an "expected" release date in December 2010, she would thereafter be required to participate in the Hamilton County Work Release Program until June 2011 and also had "some pending battery charges that may interfere with that." *Id.* at 39.

As noted above, a trial court must judge a parent's fitness to care for his or her child at the time of the termination hearing, taking into consideration the parent's habitual patterns of conduct to determine the probability of future neglect or deprivation of the child. *D.D.*, 804 N.E.2d at 266. Moreover, where a parent's "pattern of conduct shows no overall progress, the court might reasonably find that under the circumstances, the problematic situation will not improve." *In re A.H.*, 832 N.E.2d 563, 570 (Ind. Ct. App. 2005). Here, in addition to being incarcerated and thus unavailable to care for C.K. and E.K. at the time of the termination hearing, Mother has demonstrated a persistent unwillingness and/or inability to take the actions necessary to show she is capable of overcoming her addiction to heroin and of providing the children with the safe, stable, and drug-free home environment that they need. This court has repeatedly recognized that "[i]ndividuals who pursue criminal activity run the risk of being denied the opportunity to develop positive and meaningful relationships with their children." *Castro v. State Office of Family & Children*, 842 N.E.2d 367, 375 (Ind. Ct. App. 2006), *trans. denied*. Based on the foregoing, we find Mother's assertions on appeal amount to an impermissible invitation to reweigh the evidence. *D.D.*, 804 N.E.2d at 265.

II. Best Interests

We next consider Mother's assertion that HCDCS failed to prove that termination of her parental rights is in the children's best interests. In determining what is in the best interests of a child, the trial court is required to look beyond the factors identified by the Indiana Department of Child Services and look to the totality of the evidence. *McBride v. Monroe Cnty. Office of Family & Children*, 798 N.E.2d 185, 203 (Ind. Ct. App. 2003). In so doing, the trial court must subordinate the interests of the parent to those of the child. *Id.* The court need not wait until a child is irreversibly harmed before terminating the parent-child relationship. *Id.* Moreover, we have previously held that the recommendations of both the case manager and child advocate to terminate parental rights, in addition to evidence that the conditions resulting in removal will not be remedied, is sufficient to show by clear and convincing evidence that termination is in the child's best interests. *In re M.M.*, 733 N.E.2d 6, 13 (Ind. Ct. App. 2000).

In addition to the findings previously cited, the trial court made several pertinent findings in determining that termination of Mother's parental rights is in the children's best interests. Specifically, the court found C.K. and E.K. had been residing together in a pre-adoptive foster home since August 2009, and that their foster family "does not have any history of substance abuse, criminal activity, or inability to provide a safe and stable home" for the children. *Appellant's App*. at 32. The court thereafter found as follows:

> The [HCDCS] family case manager, the GAL, and the licensed foster father all have the opinion that terminating the parent-child relationship would be in the best interests of the child[ren.] This Court agrees and adopts this position as its own finding. This finding is clearly and convincingly supported by the extensive criminal and drug histories of both biological

> parents and their inabilities to remedy or otherwise address these serious and child-jeopardizing problems.

Id. These findings, too, are supported by the evidence.

In recommending termination of Mother's parental rights and adoption of the children by their current pre-adoptive foster parents, case manager Gibson informed the trial court that C.K. and E.K. were "doing very well in the [foster home] placement." *Tr.* at 56. Gibson went on to testify that the children are "very much bonded" with their foster parents, refer to them as "Mommy and Daddy," and refer to the other children in the home as "their brothers [and] their sisters." *Id.* at 56, 58. Gibson also explained that E.K., who was removed from Mother's care within just a few days of his birth, identifies with his foster parents as his only parents. When asked whether she had an opinion as to what would be in the children's best interests, Gibson answered, "I believe that it's in their best interest[s] . . . to continue with the stability and the consistency" of living with the foster family "on a day-to-day basis." *Id.* at 58. Similarly, GAL Lawrence confirmed that the children's foster parents were "very appropriate and patient" caretakers, that the children were "progressing appropriately and well in [the foster parents'] care," and that it would be in the children's best interests to remain in the stable environment "where they are now." *Id.* at 77.

Based on the totality of the evidence, including Mother's ongoing incarceration and current inability to provide the children with a safe and stable home environment, extensive criminal history, and unresolved substance abuse issues, coupled with the testimony from Gibson and Lawrence recommending termination of Mother's parental

rights, we conclude that there is sufficient evidence to support the trial court's determination that termination of Mother's parental rights is in C.K.'s and E.K.' s best interests. *See, e.g.*, *In re A.I.*, 825 N.E.2d 798, 811 (Ind. Ct. App. 2005) (concluding that testimony of court-appointed advocate and family case manager, coupled with evidence that conditions resulting in continued placement outside home will not be remedied, is sufficient to prove by clear and convincing evidence termination is in child's best interests), *trans. denied*.

This court will reverse a termination of parental rights '"only upon a showing of "clear error" – that which leaves us with a definite and firm conviction that a mistake has been made.'" *Matter of A.N.J.*, 690 N.E.2d 716, 722 (Ind. Ct. App. 1997) (*quoting Egly v. Blackford Cnty. Dep't of Pub. Welfare*, 592 N.E.2d 1232, 1235 (Ind. 1992)). We find no such error here.

Affirmed.

VAIDIK, J., and MATHIAS, J., concur.