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# IN THE
# COURT OF APPEALS OF INDIANA

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| IN RE THE MATTER OF THE INVOLUNTARY TERMINATION OF THE PARENT-CHILD RELATIONSHIP OF E.H., J.G., AND J.J.G. | ) | |
| E.H. and J.G., | ) | |
| Appellants-Respondents, | ) | |
| vs. | ) | No. 85A04-0903-JV-126 |
| WABASH COUNTY DEPARTMENT OF CHILD SERVICES, | ) | |
| Appellee-Petitioner. | ) | |

APPEAL FROM THE WABASH CIRCUIT COURT
The Honorable Robert R. McCallen III, Judge
Cause No. 85C01-0807-JT-3

**August 28, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**CRONE, Judge**

## Case Summary

E.H. ("Mother") and J.G. ("Father") appeal the trial court's order terminating their parental rights as to their biological child, J.J.G. We affirm.

## Issues

I. Was there sufficient evidence to support the trial court's decision to terminate Mother's and/or Father's parental rights as to J.J.G.?

II. Did the trial court err by considering its contact with Mother and Father in prior CHINS proceedings?

III. Did the termination violate Mother's and/or Father's rights pursuant to the Fourteenth Amendment of the U.S. Constitution and Article 1, Section 1 of the Indiana Constitution?

## Facts and Procedural History

J.J.G. was born to Mother and Father on May 15, 2007. On June 11, 2007, the Wabash county Department of Child Services ("DCS") received a report that Mother was suffering from post-partum depression and had threatened to harm J.J.G.[1] On July 3, 2007,

[1] According to psychologist Patrick Schonbachler's written evaluation, Mother was admitted to a psychiatric hospital in June 2007 because of suicidal thoughts. She told medical personnel that she had had a fight with Father and had scratched herself with a razor:

> Medical records indicate that there is some question about whether she threatened to hurt her newborn baby, [J.J.G.], specifically to smash [his] head in. At the time of admission to inpatient, she tested positive for marijuana and opioids (urine). At the time she was one month postpartum. Medical records indicate that she told staff that she was overwhelmed with the care of her baby and had gotten depressed a week after the baby was born. She also reported to staff that she was tired of taking care of the baby all by herself and not having any support. She said that she would not hurt her baby but that she wanted her medicines adjusted.

DCS prepared a written program of informal adjustment, which Mother and Father signed. Pursuant to the program, Mother and Father agreed to follow DCS's safety plan until it was lifted, attend couples counseling, and actively and consistently participate in home-based services. Mother agreed to regularly see an individual counselor as well as her psychiatrist and to take her medication as prescribed. Also on July 3, 2007, DCS took J.J.G. into protective custody pending further investigation.

On July 9, 2007, DCS filed a request for authority to file a petition alleging J.J.G. to be a Child in Need of Services ("CHINS"), which the trial court granted the same day. In the preliminary inquiry attached to the petition, the DCS intake officer indicated that DCS had received a report that Mother had made comments such as "I'd rather take a lot of breaks than break [J.J.G.'s] neck" and "I'm fixin' to snap." Appellant's App. at 7. The report also indicates that Mother was struggling with post-partum depression, for which she was taking medication that did not appear to be effective. Mother stated that she did not bathe J.J.G. or clip his fingernails for fear that she would "snap his neck." *Id*. Father was living in the home and working odd jobs, so he was sometimes away from home.

On September 27, 2007, the trial court held a hearing on the CHINS petition. Mother and Father appeared at that hearing to enter their objection. On September 28, 2007, the trial

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Exh. 6 at 1-2. At trial, Mother testified that her depression (which had been diagnosed during her teen years) was exacerbated by a series of stressful events. Only two days after J.J.G.'s birth, Mother's mother suffered a heart attack. Eight days later, Mother drove her mother home from the hospital. Another driver ran a stop sign, causing Mother to swerve and crash into a house. Her mother's head went through the windshield during the accident. While these events may have contributed to Mother's mental state in June 2007, DCS failed to document them in its file or to the trial court; it is unclear, however, whether Mother ever informed DCS about them.

court entered an order in which it found that J.J.G. was a CHINS because "[h]is physical and/or mental condition is seriously impaired or seriously endangered as a result of the inability, refusal, or neglect of [J.J.G.'s] parents to supply the child with necessary supervision and the child needs care, treatment, or rehabilitation that he is not receiving, and that is unlikely to be provided or accepted without the coercive intervention of the Court." *Id*. at 13. The trial court further stated:

> Undeniably Mother suffers from depression and other mental health problems. Her comments to caseworkers on or about July 3, 2007, would lead any reasonable person to conclude she was crying out for help and that her child, if left in her care and custody, would likely be harmed. Father's assertion that Mother's comments were taken out of context exhibits poor judgment on his part and a lack of concern for the child. At that time, Father anticipated returning to work leaving the Mother as the child's primary caretaker, a role she clearly was not prepared for. While other family members reportedly are now available they apparently were not so available to assist Mother on or about July 3, 2007, necessitating the child's removal from the home. The parents still don't seem to recognize the seriousness of the situation instead attempting to caste [sic] Mother's comments in a more favorable light.

*Id*. The trial court also noted that Mother had made progress since J.J.G. was detained and that "it is the Court's belief that this likely should become an In Home CHINS assuming the parents will fully participate in all services offered, all evaluations required and test clean for any illegal substances prior to such return." *Id*.

On November 5, 2007, the trial court entered a dispositional decree. The trial court ordered that J.J.G. remain in foster care and ordered several services, including supervised visitation, individual, family, and couples counseling, anger management classes, random drug screens, parenting and child development training, and substance abuse evaluation. *Id*. at 16. On July 18, 2008, the trial court held a permanency hearing. In the order entered on

July 24, 2008, the trial court stated that while DCS and J.J.G. had complied with the case plan set forth in the dispositional decree, Mother and Father had only partially complied.

On or about July 22, 2008, DCS filed a verified petition for involuntary termination of Mother's and Father's parental rights. On October 24, 2008, DCS filed a progress report. DCS reported that Mother and Father had demonstrated "inconsistent" participation in the case plan and that they had not followed through with all services ordered. Exh. 10 at 5. DCS noted that while most of the supervised visits had gone well, "there are visits that have gone bad and [Mother] and [Father] have been asked to leave the facility." *Id*. DCS also reported that home-based services were terminated due to a "strained relationship" between Mother and Father and the home-based worker. *Id*. Moreover, Mother had stopped attending individual counseling and anger management sessions, Mother had never attended DCS-approved couples counseling sessions,[2] and Mother had tested positive for marijuana in a drug screen on October 15, 2008. Mother had completed parenting and child development training classes and substance abuse evaluation and counseling.

As for Father, he had failed to participate in individual counseling, couples counseling, and anger management counseling. In October 2008, Father tested positive for marijuana. Father failed to complete the parenting and child development training and the

[2] Mother testified that she and Father had attended several couples counseling sessions with their pastor before learning that they were required to see a DCS-approved counselor.

substance abuse counseling ordered by the court.[3]

During the sixteen-month period when J.J.G. was in foster care, Mother and Father were permitted supervised visitation approximately three times per week. Mother testified that she missed only "five or six" visits during that time. Tr. at 53. The foster mother's records indicate that Mother and Father had canceled twenty-three visits during that time. *Id*. at 141, Exh. 12. Witnesses also testified that Mother had slapped J.J.G.'s hand on two occasions during supervised visitation. On the second occasion, the visitation supervisor heard the slap from across the room and told Mother that she was not permitted to "physically punish" J.J.G. during their visits. *Id*. at 130. Mother responded, "I will get my child back, and at that point when I have him at home, I'll discipline him however I want." *Id*. at 131. One visit supervisor testified that Mother tended to become angry "very quickly." *Id*. at 132.

A DCS case manager described Father's attitude and demeanor as "very explosive." *Id*. at 134. The anger management counselor testified that while Father is "very much in denial" that he has an anger problem, "he did admit that he wasn't able to deal with stress very well." *Id*. at 112. One visitation supervisor testified that Father threatened her and another supervisor in front of J.J.G. After the supervisor told Mother that she had violated a

[3] While we recognize that Mother and Father would likely have benefited from each of the services ordered in this case, we remind DCS that it might not be realistic to require a parent to participate simultaneously in several types of counseling while he or she must also remain gainfully employed (in part, in order to pay for the services), care for other children, and fulfill similar important obligations. At trial, Mother testified that she did not have a phone, which made scheduling appointments with various service providers difficult, and that she often relied on others for transportation. We recognize that at least some of Mother's and Father's lack of participation in DCS services was probably related to these logistics issues rather than a lack of desire to regain custody of J.J.G.

visitation rule, Father stated, "I have a pistol at home and when I'm done, there won't be anything left of you." *Id*. at 114. One supervisor was removed from the case because she was pregnant and felt particularly vulnerable in dealing with Mother's and Father's anger.

DCS required Mother to undergo a psychological evaluation. Psychologist Patrick Schonbachler testified that he interviewed Mother on three occasions and administered various psychological tests. He concluded, among other things, that Mother suffers from borderline personality disorder and low self-esteem, that she tends to distort interpersonal relationships, and that she is likely to abuse J.J.G. because she shares several characteristics with known abusers. He recommended that J.J.G. not be returned to Mother's custody at the time of the hearing for several reasons, including the potential for child abuse, her abuse of marijuana, and her failure to comply with medication and counseling. The anger management counselor who evaluated Father testified that he did not think J.J.G. would be safe with Father. The DCS case manager stated that it would not be safe to return J.J.G. to Mother or Father.

On December 2, 2008, the trial court held a hearing on the termination petition. After hearing the evidence, the trial court ruled in part as follows:

> The Court, being duly advised, finds that the Petitioner has met its burden of proof, and further finds, by clear and convincing evidence, that
>
> (1) [J.J.G.], born May 15, 2007, is the natural child of [Father] and [Mother].
>
> (2) [J.J.G.] was adjudicated a child in need of services.
>
> (3) The child has been removed from the parent under the terms of a dispositional decree for more than six months.
>
> (4) There is a reasonable probability that the conditions that resulted in the removal of the child or the reasons for placement outside the parents' home will not be remedied, and that continuation of the parent-child

> relationship poses a threat to the well-being of the child.
>
> (5) Termination of the parent-child relationship is in the best interests of the child.
>
> (6) Petitioner has developed a satisfactory plan of care and treatment for the child as follows: adoption.
>
> The Court finds that the allegations in the Petition to Terminate the Parent-Child Relationship are true and that all the requirements of I.C. 31-35-1 et seq. have been satisfied.

Appellant's App. at 22-23. Based on these findings, the trial court terminated the parental rights of both Mother and Father. This appeal ensued.

## Discussion and Decision

### *I. Sufficiency of the Evidence*

Mother and Father claim that DCS failed to satisfy its burden of proof with regard to several allegations in its petition. To effect the involuntary termination of a parent-child relationship, DCS must present clear and convincing evidence establishing the elements of Indiana Code Section 31-35-2-4(b)(2). *A.J. v. Marion County Office of Family & Children*, 881 N.E.2d 706, 714 (Ind. Ct. App. 2008), *trans. denied*. Thus, DCS must prove:

> (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 [Indiana Code] 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).

In construing this statute, this Court has held that when determining whether certain conditions that led to the removal will be remedied, the trial court must judge the parent's fitness to care for his children at the time of the termination hearing. *In re L.V.N.*, 799 N.E.2d 63, 69 (Ind. Ct. App. 2003). The trial court need not wait until a child is irreversibly harmed such that his or her physical, mental, and social development are permanently impaired before terminating the parent-child relationship. *In re D.J.*, 755 N.E.2d 679, 684 (Ind. Ct. App. 2001), *trans. denied*.

When this Court considers the appeal of a termination of parental rights, our standard of review is well-settled.

> In reviewing termination proceedings on appeal, this court will not reweigh the evidence nor assess the credibility of witnesses. We consider only the evidence that supports the trial court's decision and the reasonable inferences drawn from that evidence. In deference to the trial court's unique position to assess the evidence, we set aside the judgment terminating a parent-child relationship only if it is clearly erroneous. If the evidence and inferences support the trial court's decision, we must affirm.

*In re L.S.*, 717 N.E.2d 204, 208 (Ind. Ct. App. 1999) (citations omitted), *trans. denied* (2000), *cert. denied* (2002).

### *A. Conditions Would Not be Remedied*

Mother and Father allege that DCS failed to present clear and convincing evidence that there is a reasonable probability that the conditions resulting in J.J.G.'s removal from their home would not be remedied. To make a determination on this issue, the trial court

must judge a parent's fitness to care for 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 trial court must also "evaluate the parent's habitual patterns of conduct to determine the probability of future neglect or deprivation of the child." *Id*. The trial court may properly consider evidence of a parent's continuing drug abuse as evidence that conditions will not be remedied. *In re A.F. & M.F.*, 762 N.E.2d 1244, 1251 (Ind. Ct. App. 2002), *trans. denied*. The trial court can also consider the parent's response to services offered through DCS. *Lang v. Starke County Office of Family & Children*, 861 N.E.2d 366, 372 (Ind. Ct. App. 2007), *trans. denied*. A pattern of unwillingness to deal with parenting problems and to cooperate with those providing social services, in conjunction with unchanged conditions, will support a finding that there exists no reasonable probability that the conditions will change. *Id*. DCS 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. *In re Kay L.*, 867 N.E.2d 236, 242 (Ind. Ct. App. 2007).

In this case, DCS removed J.J.G. because Mother suffered from mental health problems and had expressed thoughts of hurting the child, and Father had exhibited "poor judgment" and "a lack of concern for the child" by discounting the seriousness of Mother's issues. Exh. 4. DCS presented evidence that at the time the trial court ordered termination, Mother continued to suffer from mental illness and failed to properly manage her prescribed medication. Mother also admitted that she continued to smoke marijuana. Mother and Father failed to participate in and/or complete several of the services ordered by the trial

court. Father threatened to physically harm two visitation supervisors. DCS demonstrated by clear and convincing evidence that Mother and Father failed to complete many of the offered services and that their mental health and anger issues had not significantly improved since J.J.G. was removed from their home. Thus, the trial court did not clearly err in determining that there was a reasonable probability that the conditions leading to J.J.G.'s removal would not be remedied. To find otherwise, we would have to reweigh the evidence, which we will not do.

### *B. Threat to J.J.G.'s Well-Being*

Mother and Father also claim that DCS failed to prove by clear and convincing evidence that the continuation of the parent-child relationship posed a threat to J.J.G.'s well-being. We note that pursuant to the wording of Indiana Code Section 31-35-2-4(b)(2)(B), DCS needed to prove *either* that the conditions would not be remedied *or* that there was a threat to J.J.G.'s well-being, not both. Because we have determined that DCS satisfied its burden as to the first issue, we need not address the second issue.

We note, however, that Dr. Schonbachler expressed his opinion that Mother has an increased risk of physically abusing J.J.G. This opinion is based upon his determination that Mother becomes angry when under stress, and that the results of Mother's Child Abuse Potential Index indicate that she shares many characteristics with known abusers. Various witnesses, including an anger management counselor, testified as to Father's anger issues. Father denies having an anger problem and failed to participate in most of the counseling offered him by DCS. Based on this evidence, the trial court did not clearly err in determining

that the continuation of a relationship with Mother and Father would pose a threat to J.J.G.'s well-being.

### *C. Best Interests of the Child*

Mother and Father also contend that DCS failed to prove by clear and convincing evidence that termination was in J.J.G.'s best interests. First, we note that a child's need for permanency is an important consideration in determining the child's best interests. *In re D.L.*, 814 N.E.2d 1022, 1030 (Ind. Ct. App. 2004), *trans. denied*. DCS removed J.J.G. from Mother and Father's home when he was approximately eight weeks old, and at the time of the termination hearing, he was eighteen months old. He had lived with the same foster family during this entire period. DCS presented evidence that J.J.G. was thriving in foster care, that his foster parents were interested in adopting him, and that he had bonded with them and with his foster siblings.

Mother and Father failed to participate in or complete several services offered to them by DCS and ordered by the trial court. Mother continued to suffer from mental illness and was inconsistent in following her medication regimen. If the trial court had given Mother and Father more time to complete the services, then J.J.G. would have been forced to wait even longer for permanency and stability. "It is undisputed that children require secure, stable, long-term, continuous relationships with their parents or foster parents. There is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current 'home,' under the care of his parents or foster parents, especially when such uncertainty is prolonged." *Baker v. Marion County Office of Family and Children*, 810

N.E.2d 1035, 1040 (Ind. 2004) (quoting *Lehman v. Lycoming County Children's Servs. Agency*, 458 U.S. 502, 513-14 (1982). Making J.J.G. available for adoption will allow for permanency, which is in his best interests.

### *II. Trial Court Considered Improper Evidence*

Mother and Father also allege that the trial court improperly considered evidence outside the record—namely its encounters with Mother and Father while presiding over the CHINS proceedings for J.J.G.—in making its decision to terminate their parental rights. Following the presentation of evidence at the termination hearing, the trial court stated in relevant part as follows: "[H]aving dealt with the CHINS [proceeding], I can't divorce myself from the context of that as well. … I've sensed a true hostility from [Father] and [Mother] to everybody involved, which that just, when I was listening to Dr. Schonbachler … the results that he came up with from all of his testing was just unbelievably correct." Tr. at 158. Later, the court noted again that Dr. Schonbachler's findings "rang so true" based on what the trial court had observed of Mother throughout the CHINS proceedings. *Id*. at 159.

In support of their position, Mother and Father cite *In re S.F.*, 883 N.E.2d 830 (Ind. Ct. App. 2008). In that case, approximately forty-five days *after* the conclusion of a termination of parental rights trial, the trial court determined that "additional investigation is required" and ordered DCS to request an investigation of the father's home by the county health department. *Id*. at 833. At the trial court's request, the health department submitted a written report of its findings. After reviewing the report, the trial court ordered termination of the father's parental rights, without holding further proceedings or giving the father an

opportunity to cross-examine the health department inspector or to offer his own evidence contradicting the report. Another panel of this Court found that "[t]he trial court's consideration of a report that was generated through its independent investigation to which [the father] was not given an opportunity to respond violated [the father's] due process rights." *Id*. at 837.

*In re S.F.* is simply not analogous to the instant case. Here, the trial court simply noted that its prior observations of Mother's and Father's behavior during the CHINS proceeding seemed to jibe with the psychological evaluation and other witness testimony presented at the termination trial. This court did not consider independent evidence to which Mother and Father were not given an opportunity to respond.

To the extent that Mother and Father argue that the trial court was unfairly biased, we have previously held that the mere fact that a party has appeared before a certain judge in a prior action or that the judge has gained knowledge of a party by participating in other actions does not establish the existence of bias or prejudice. *Carter v. Knox County Office of Family and Children*, 761 N.E.2d 431, 435 (Ind. Ct. App. 2001). In fact, familiarity with the parties, particularly in domestic cases of an ongoing nature, will often make a judge better equipped to evaluate and fashion the best available remedy. In short, Mother and Father have failed to show any impropriety in the trial court's statements about its experience with them during prior CHINS proceedings.

### *III. Constitutional Right to Raise One's Children*

Finally, Mother and Father claim that the trial court violated their due process rights pursuant to the Fourteenth Amendment of the U.S. Constitution and Article 1, Section 1 of the Indiana Constitution by depriving them of their right to parent J.J.G.

> The Due Process Clause of the U.S. Constitution and the Due Course of Law Clause of the Indiana Constitution prohibit state action that deprives a person of life, liberty, or property without a fair proceeding. … [T]he Due Process Clause … provides heightened protection against state interference with certain fundamental rights and liberty interests. It is well settled that the right to raise one's children is an essential, basic right, more precious than property rights, within the protection of the Fourteenth Amendment of the U.S. Constitution.

*In re Paternity of M.G.S.*, 756 N.E.2d 990, 1004-05 (Ind. Ct. App. 2001) (citations omitted), *trans. denied* (2002). However, parental interests are not absolute and must be subordinated to the child's interests in determining the proper disposition of a petition to terminate parental rights. *Bester v. Lake County Office of Family & Children*, 839 N.E.2d 143, 147 (Ind. 2005). Parental rights may be terminated when the parents are unable or unwilling to meet their parental responsibilities. *Id*. The purpose of terminating parental rights is not to punish parents, but to protect children. *In re B.R.*, 875 N.E.2d 369, 372 (Ind. Ct. App. 2007), *trans. denied*. "[C]hildren should not be compelled to suffer emotional injury, psychological adjustments, and instability to preserve parental rights." *In re L.S.*, 717 N.E.2d at 210.

Mother and Father contend that their rights to parent J.J.G. were terminated because "Mother was deemed incapable of parenting because she met a certain psychological profile." Appellants' Br. at 20. They refer specifically to Dr. Schonbachler's determination that Mother has borderline personality disorder.

As noted above, the Indiana legislature has set forth, in Indiana Code Section 31-35-2-4, the elements DCS must establish by clear and convincing evidence in order to terminate a parent-child relationship. In this case, Dr. Schonbachler's opinion was but one piece of the evidence supporting termination. As laid out above, DCS presented a wealth of evidence, including the following: Mother and Father failed to participate in various court-ordered services, including regular visitation; Mother failed to properly manage the medication prescribed to treat her mental illness; Mother and Father often appeared angry and hostile to visitation supervisors; Father had threatened two supervisors with physical harm; Mother slapped infant J.J.G. on the hand on two occasions during supervised visitation; and Mother and Father tested positive for marijuana use.

All this evidence, in addition to Mother's psychological evaluation, amply supports the trial court's decision to terminate Mother's and Father's relationships with J.J.G. Their constitutional rights were not violated.

Affirmed.

MAY, J., and BROWN, J., concur.