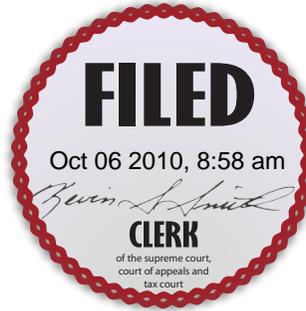


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**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF: J.W. (Minor),)
J.W., Sr. (Father),)
)
Appellant,)

vs.)

No. 45A03-1002-JT-69

INDIANA DEPARTMENT OF CHILD)
SERVICES and LAKE COUNTY COURT)
APPOINTED SPECIAL ADVOCATE,)
)
Appellees.)

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Mary Beth Bonaventura, Senior Judge
Cause No. 45D06-0902-JT-24

October 6, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

J.W., Sr. (“Father”) appeals the termination of his parental rights as to his son, J.W.

We affirm.

ISSUE

Whether there was clear and convincing evidence to support the termination of Father’s parental rights.

FACTS

J.W. was born to M.K. (“Mother”) on October 4, 2007, in Lake County. On or about October 12, 2007, the Indiana Department of Child Services (“DCS”) received a report that J.W.’s meconium¹ tested positive for cocaine, indicating that Mother had used cocaine during her pregnancy.

Mother admitted to smoking crack cocaine during her pregnancy and “off and on for the past 14 years.” (Tr. 18). Mother’s past cocaine use had resulted in the involuntary termination of her parental rights as to three other children. The last

¹ Meconium is “a dark greenish mass . . . that accumulates in the bowel during fetal life and is discharged shortly after birth.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1401 (3d ed. 1976).

termination took place in October of 2002.² Father, who lived with Mother, denied knowledge of Mother's drug use. DCS took J.W. into protective custody.

On October 18, 2007, DCS filed a petition, alleging J.W. to be a child in need of services ("CHINS") pursuant to Indiana Code section 31-34-1-10, which provides that a child is in need of services if born with fetal alcohol syndrome ("FAS") or "any amount, including a trace amount, of a controlled substance or a legend drug in the child's body[.]" Ind. Code § 31-34-1-10(B). Following a hearing, the trial court determined J.W. to be a CHINS and made him a ward of DCS. The trial court ordered that the following services be provided to both Mother and Father: "[d]rug/alcohol evaluation and any recommended treatment"; parenting classes; random drug screens "for a period of six (6) months or until further Order of the Court"; and supervised visitation with J.W. (State's Ex. 2). The trial court further ordered Father to establish paternity.

The trial court held a disposition hearing on November 28, 2007. The trial court found that Mother had had her parental rights as to other children involuntarily terminated but "allow[ed] services to be provided to [M]other at this point in time." (State's Ex. 2). The trial court, however, also found as follows:

If [M]other does not comply with the case plan, [the] Court will order []DCS to proceed with termination of parental rights in regards to [M]other, at which time [F]ather will have to decide whether he will work towards reunification with his son or remain with [M]other. If he remains with [M]other, []DCS will go forward with termination of parental rights in regards to him also.

² Mother also voluntarily terminated her parental rights as to two additional children, placing them for adoption.

(State's Ex. 2).

Both Mother and Father successfully completed their initial court-ordered parenting classes. DCS referred them to additional parenting classes after determining that they "could benefit from further parenting education[.]" (Tr. 30). Both parents completed the additional training.

The parents' supervised visits with J.W. "went well." (Tr. 31). A report, however, indicated that "one of the parents smelled like alcohol" during one visit in May of 2008. (Tr. 31). In September of 2008, the trial court ordered that visitation be increased to twice a week. In February of 2009, the trial court ordered unsupervised visitation "[w]hen appropriate[.]" (State's Ex. 2).

Mother and Father also completed drug evaluations. Father denied using drugs and tested negative for drugs. Mother admitted that she had a history of drug use and tested positive for cocaine in May of 2008.

Initially, Mother's drug screens did not include testing for alcohol. In June of 2008, however, Father expressed concern that Mother was abusing alcohol after he discovered empty vanilla extract bottles in the garbage. Accordingly, DCS began screening Mother for alcohol, for which she tested positive "throughout the time period she was tested." (Tr. 33). In total, Mother tested positive for alcohol nine times, with her last positive test on October 14, 2009.

Furthermore, the State twice charged Mother with public intoxication in 2008, during the pending CHINS case.³ The State, however, dismissed one of the charges. Despite Father's concern regarding Mother's alcohol abuse, he denied that she had a "drug problem" and objected to her having to attend substance abuse classes. (Tr. 42).

J.W. began physical therapy when he was ten months old because he "was not sitting up on his own, he wasn't doing a lot of things" (Tr. 122). Subsequently, a geneticist "fully evaluated" J.W. after he showed additional developmental delays. (Tr. 111). The geneticist identified several characteristics associated with FAS. Accordingly, J.W. began receiving developmental therapy, occupational therapy, and physical therapy.

The trial court held a fact-finding hearing on October 29, 2009, and November 12, 2009. J.W.'s case manager testified that she believed termination of parental rights to be in J.W.'s best interests because he needs to be in a home "that is free of drugs[.]" (Tr. 53). The case manager expressed concern that Father, who worked two jobs, would allow Mother to be J.W.'s primary caretaker despite Mother's several positive alcohol screens. She also testified that Father "doesn't quite . . . understand the seriousness" of FAS and had denied that J.W. is developmentally delayed. (Tr. 58).

Another case manager testified that she too believed termination of Mother's and Father's parental rights to be in J.W.'s best interests because he "is in need of a permanent stable home that is drug and alcohol free, and he has already endured the effects of both drugs and alcohol." (Tr. 113). She further testified that she believed

³ Mother also incurred four prior convictions for public intoxication in 1993, 1996, 1997, 2004; and a conviction for possession of cocaine, a class D felony, in 2000.

J.W.'s foster parents to be suitable parents and their home to be "[e]xtremely appropriate" for J.W.'s needs. (Tr. 112).

Debra Terry, J.W.'s foster mother, testified that DCS placed J.W. with her and her husband in June of 2008. She testified J.W. "will always be delayed" due to his prenatal exposure to alcohol. (Tr. 126). Terry further testified that she and her husband have adopted other children with FAS and are interested in adopting J.W.

Father testified that J.W. is "doing fine," (tr. 137), is "a normal child," (tr. 138), and is "not delayed at all." (Tr. 153). He testified that he does not believe J.W. has FAS. According to Father, Mother's positive alcohol tests were a result of Mother taking Nyquil and that she had used the vanilla extract for cooking. He also testified that he and Mother continued to reside together and that Mother has "done a complete u-turn[.]" (Tr. 151). Father denied that Mother is an alcoholic.

On December 18, 2009, the trial court issued its order, terminating Mother's and Father's parental rights.⁴ The trial court found, in relevant part, as follows:

[Father] is the child's alleged father. He denies knowledge of [M]other's prior drug usage.

....

Mother has had five prior Public Intoxication charges in Hammond, Indiana in 1993, 1996, 1997, 2003, and 2008 (this one during the pendency of this case), and a Possession of Cocaine charge in June of 2000.

....

⁴ Mother does not appeal the termination.

Mother continues to test positive for alcohol

Father reported that [M]other drinks bottles of baking vanilla in the home, which have a high alcohol content. Further, Mother tested positive for alcohol during a random screen on June 10, 2009. In October of 2009, Mother refused to submit to a drug/alcohol screen. In August of 2009, during a psychiatric evaluation, Mother smelled of alcohol Homemakers in the home sent by DCS have also smelled alcohol on Mother.

In July of 2008, [M]other discontinued drug and alcohol therapy and she and [Father] believe she was cured and no longer had a substance abuse problem.

Father is in denial that Mother continues to have an addictive personality. Neither parent feels that [M]other had a problem.

Father is in denial that Mother continues to have substance abuse issues and would therefore put the child at risk if he assumed custody. Father does not believe the child has [FAS], as diagnosed by the doctors. Father is employed and testified he would leave the child in Mother's care when at work, if he receives custody. Father is in total denial of Mother's addiction, and child's medical condition. He would not provide proper medical care for child, since he does not believe the child has [FAS].

(App. i-ii).

DECISION

Although parental rights are of a constitutional dimension, the law allows for termination of these rights when parties are unable or unwilling to meet their responsibility. *In re A.N.J.*, 690 N.E.2d 716, 720 (Ind. Ct. App. 1997). The purpose of termination of parental rights is not to punish parents but to protect children. *In re L.S.*, 717 N.E.2d 204, 208 (Ind. Ct. App. 1999), *trans. denied*.

In reviewing the termination of parental rights, we will neither reweigh the evidence nor judge the credibility of witnesses. *A.N.J.*, 690 N.E.2d at 720. We consider only the evidence most favorable to the judgment. *Id.* In deference to the trial court's unique position to assess the evidence, we will set aside a judgment terminating a parent-child relationship only if it is clearly erroneous. *L.S.*, 717 N.E.2d at 208.

When DCS seeks to terminate parental rights, it must plead and prove in relevant part that:

- (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.

I.C. § 31-35-2-4(b)(2). These allegations must be established by clear and convincing evidence. *A.N.J.*, 690 N.E.2d at 720.

1. Conditions Remedied

Father asserts that DCS failed to establish that the conditions resulting in the removal of J.W. will not be remedied and that a continuation of his parent-child relationship with J.W. poses a threat to his well-being. Because subsection (b)(2)(B) is written in the disjunctive, the trial court need only find either that the conditions resulting in the child's removal will not be remedied or that the continuation of the parent-child relationship poses a threat to the child. *Bester v. Lake County Office of Family and Children*, 839 N.E.2d 143, 153 n.5 (Ind. 2005). We shall address the former element.

To determine whether the conditions are likely to be remedied, the trial court must examine the parent's fitness to care for the child "as of the time of the termination hearing and take into account any evidence of changed conditions." *In re S.P.H.*, 806 N.E.2d 874, 881 (Ind. Ct. App. 2004). The trial court also must determine whether there is a substantial probability of future neglect or deprivation. *Id.* "A court may properly consider 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." *McBride v. Monroe County Office of Family and Children*, 798 N.E.2d 185, 199 (Ind. Ct. App. 2003). "A pattern of unwillingness to deal with parenting problems and to cooperate with those providing social services, in conjunction with unchanged conditions, support a finding that there exists no reasonable probability that the conditions will change." *In re B.J.*, 879 N.E.2d 7, 18 (Ind. Ct. App. 2008) (quoting *Lang v. Starke County Office of Family and Children*, 861 N.E.2d 366, 372 (Ind. Ct. App. 2007), *trans. denied*), *trans. denied*.

Here, DCS removed J.W. from Mother and Father's home after tests revealed that J.W. had been exposed to cocaine while Mother was pregnant with him. Further testing revealed that J.W. had been exposed to alcohol in utero. The record shows that after J.W.'s removal from the parents' custody, Mother tested positive for cocaine one time; she, however, tested positive for alcohol several times and was arrested for public intoxication two times during the pending CHINS case, resulting in one conviction.

Despite Father's own concerns regarding Mother's drinking, he excused her positive test results and denied that she abused alcohol. Father also refused to live separately from Mother, stating that J.W. "deserves his mom and dad" (Tr. 146).

Given Father's position regarding Mother, it is clear that placement of J.W. with Father would not result in any change of conditions as J.W. would continue to be exposed to drugs or alcohol. Accordingly, we find that there is ample evidence that the conditions, namely Mother's substance abuse, resulting in J.W.'s removal will not be remedied.

2. Best Interests

Father also challenges the trial court's finding and determination that termination of his parental rights is in J.W.'s best interest. For the "best interest of the child" statutory element, the trial court is required to consider the totality of the evidence and determine whether custody by the parent is wholly inadequate for the child's future physical, mental, and social growth. *In re J.K.C.*, 470 N.E.2d 88, 91 (Ind. Ct. App. 1984). In making this determination, the trial court must subordinate the interest of the parent to that of the child involved. *Id.* In addition, the recommendation of the caseworker that parental rights be terminated supports a finding that termination is in the child's best interests. *See A.J. v. Marion County Office of Family and Children*, 881 N.E.2d 706, 718 (Ind. Ct. App. 2008) (finding that the testimony of the child's caseworker regarding the child's need for permanency supports a finding that termination is in the child's best interests), *trans. denied*.

The totality of the evidence in this case demonstrates a clear showing that termination of the parent-child relationship between Father and J.W. is in J.W.'s best interests. Despite evidence to the contrary, Father denies that J.W. suffers from FAS or is developmentally delayed. He further asserts that he "know[s] a lot of people that can help [him] take care of [J.W.]," including Mother, who "has done a complete u-turn." (Tr. 140). Thus, despite evidence of Mother's abuse of alcohol, Father believes her fit enough to care for J.W.

Given Father's continued relationship with Mother, both caseworkers for the family testified that they believe termination of his parental rights to be in J.W.'s best interests. They further testified that J.W.'s foster parents provide stability for J.W. and a suitable home, particularly given their extensive experience caring for children with FAS.

Based on the totality of the evidence, we find that there is sufficient evidence that termination of Father's parental rights is in the best interests of J.W. Accordingly, DCS has established by clear and convincing evidence the elements necessary to sustain the termination of Father's parental relationship with J.W.

Affirmed.

BRADFORD, J., and BROWN, J., concur.