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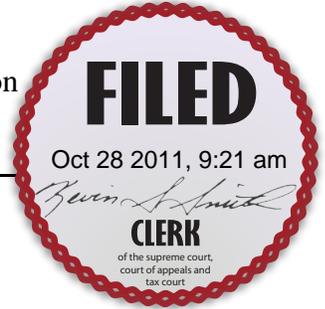
ATTORNEY FOR APPELLANT:

**LORINDA MEIER YOUNGCOURT**  
Lawrence County Public Defender  
Bedford, Indiana

ATTORNEYS FOR APPELLEE:

**ELLEN N. MARTIN**  
Indiana Department of Child Services  
Bloomfield, Indiana

**ROBERT J. HENKE**  
DCS Central Administration  
Indianapolis, Indiana



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**IN THE  
COURT OF APPEALS OF INDIANA**

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IN THE MATTER OF THE TERMINATION )  
OF THE PARENT-CHILD RELATIONSHIP )  
OF E.P. (MINOR CHILD) and A.P. and J.P. )  
(PARENTS), )

A.P. (MOTHER), )  
)  
Appellant-Respondent, )

vs. )

INDIANA DEPARTMENT OF CHILD )  
SERVICES, )  
)  
Appellee-Petitioner. )

No. 47A01-1101-JT-38

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APPEAL FROM THE LAWRENCE CIRCUIT COURT  
The Honorable Andrea K. McCord, Judge  
The Honorable James F. Gallagher, Referee  
Cause No. 47C01-0911-JT-441

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**October 28, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**CRONE, Judge**

## **Case Summary**

This case involves a mother, A.P. (“Mother”), whose relationships with her first three children had previously been terminated by courts in Montana and Indiana. When she gave birth to her fourth child, E.P., the Department of Child Services (“DCS”) removed E.P. from her and initiated proceedings that eventually resulted in the involuntary termination of Mother’s relationship with E.P.

Mother now appeals the trial court’s decision to terminate the parent-child relationship, claiming that the trial court failed to take into account her lifestyle improvements and that it erred in allowing the foster/pre-adoptive parents to participate as parties in the proceedings. Finding that the evidence is sufficient to support the trial court’s termination decision and that Mother waived the right to challenge the foster parents’ participation, we affirm.

## **Facts and Procedural History**

On August 20, 2008, Mother gave birth to E.P. She had been involved with DCS for over a year due to her instability and inability to care for her older children. Shortly after E.P.’s birth, DCS removed E.P. from the hospital and placed her with foster parents. The foster parents also had custody of Mother’s second and third children, who had previously been adjudicated children in need of services (“CHINS”).<sup>1</sup> On August 21, 2008, DCS filed a

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<sup>1</sup> At some point, with Mother’s consent, the foster parents adopted Mother’s second and third children, both half-siblings of E.P. Mother’s oldest child, J.W., was removed from her in Montana in 2002, and a Montana trial court terminated her parental relationship with J.W. in January 2004.

CHINS petition for E.P., alleging that neither Mother nor Father was able to properly care for E.P. based on their unsuitable living environment, unemployment, and drug use.

On February 3, 2009, the trial court adjudicated E.P. a CHINS, and Mother agreed to the CHINS determination with a permanency plan of reunification. She also agreed to participate in services such as monitored drug screenings, counseling, parenting classes, and visitation. Throughout the pendency of the CHINS proceedings, Mother's compliance was inconsistent, i.e., she sometimes failed to keep appointments with DCS workers and home-based counselors and often canceled visitation sessions with E.P., fell asleep during visitation, or left before the sessions were over.

On October 21, 2009, DCS placed E.P. in Mother and Father's home for a trial home visit. On November 6, 2009, local police were dispatched to a domestic dispute between Mother and Father and found drug paraphernalia at Mother and Father's home. DCS immediately removed E.P. from the home and returned her to her foster parents. Father admitted that throughout their involvement with DCS, he and Mother had had up to two altercations per week and stated that Mother had "busted" his jaw. Tr. at 239. Mother admitted that she had used methamphetamine and prescription drugs.

On November 16, 2009, DCS filed a petition to terminate Mother's and Father's parental relationship with E.P., with a permanency plan of adoption by the foster parents. The trial court held hearings on May 18, June 2, and September 15, 2010. The foster parents participated in the hearings by counsel. On December 10, 2010, the trial court issued an order terminating the parent-child relationship, which reads in pertinent part as follows:

## Findings of Fact

....

5. At the permanency hearing both parents were found to be in partial compliance in that they had met with their service providers but had failed to make significant progress. Both were found not to be in compliance due to an unsuccessful home visit in which [E.P.] had been placed in the parents' home on a trial basis on October 21, 2009. That trial placement ended on November 6, 2009 when [E.P.] was again removed from the home because of domestic violence and the parents' drug use. The court approved the permanency plan of termination of parental rights.
  
6. Joann Chase provided therapy services for both Mother and Father. Ms. Chase worked with the parents on priorities in their lives, stability, employment, maintaining a suitable home, and taking responsibility for their actions. Ms. Chase testified that although she was "amazed at what [Mother] was capable of doing" to improve her situation, Mother was unable to sustain such improvement and therefore had not made significant progress in therapy. Ms. Chase stated that she sees a continuing pattern of behavior on the part of [M]other that puts her child at risk, including choosing to make Father a priority in her life over [E.P.], using drugs, failing to take responsibility for her actions, and failing to make lasting changes in her lifestyle.

....

10. In October 2009 [E.P.] was placed with Mother and Father on the aforementioned trial home visit. Both parents agreed to a safety plan that would protect [E.P.] should they have a fight. During the trial home visit, Ms. Chase observed that Mother did not make eye contact with [E.P.] and did not respond to [E.P.'s] needs.
  
11. During the trial home visit, both parents engaged in fighting in front of [E.P.] and [E.P.] was removed from the home. ...

....

13. Evelyn Brock supervised visits between Mother and [E.P.]. Ms. Brock observed that [E.P.] did not wish to go to Mother at the beginning of visits. [E.P.] would hide behind Ms. Brock when she saw Mother come

in for the visit. Mother was inconsistent with visits, often cancelling at the last minute or not showing up. Mother was inconsistent with her interaction with [E.P.] and would often sit on the couch and watch [E.P.] play rather than interacting with her. Mother would sometimes fall asleep during visits. ...

....

15. Dr. Susan Rautio-Dietz conducted a psychological evaluation for Mother and for Father. Mother was diagnosed as suffering from mental illness (bipolar disorder) and personality disorders.
16. Mother's diagnosis is resistant to treatment. Dr. Rautio-Dietz testified that Mother's personality disorders would require years of therapy and effort to make the needed changes. Dr. Rautio-Dietz stated that because of Mother's inconsistent statements and outright lying, all information received from Mother was suspect.
17. Dr. Rautio-Dietz testified that Mother's and Father's prognoses were both "very poor."

....

19. Mother admitted to her therapist, Ms. Chase, that she had supplied drugs for Father and Paternal Grandmother, [S.R.].
20. When the termination hearing began in May, 2010, Mother had a new boyfriend, [G.M.]. In June, 2010, however, there was domestic violence between Mother and [G.M.] resulting in each seeking a protective order against the other. In spite of the violence between Mother and [G.M.], Mother testified that they may get back together if they can work on their issues.
21. Mother testified that [G.M.] is bi-polar and an alcoholic and that she knew this when she moved in with him.

....

25. Father admitted that both he and Mother were using drugs during the CHINS case, and that their home was not a safe environment for [E.P.]. Father testified that both he and Mother used drugs while [E.P.] was in the home.

....

27. Mother testified that she and Father got into a physical fight in August 2009 and November 2009. Mother also testified to using methamphetamines in November 2009. Mother also testified that she had provided drugs for Father and [S.R.] but could not remember when.
28. Mother testified that she was prescribed hydrocodone for back problems and valium for anxiety. She filled prescriptions for 70 pills in 13 days but had no explanation for why she got so many.

....

32. Both the case manager and the Guardian Ad Litem, Debra Herthel, testified that they believe it is in [E.P.'s] best interest for parental rights to be terminated and for her foster parents to adopt her.

**Clear and convincing evidence supports the following specific findings, which the court now makes:**

....

- B. The parents have demonstrated an intractable inability to provide [E.P.] with proper care. Despite the services that have been in place since 2008, the parents have not shown improvement. There is an overwhelming probability that the conditions that resulted in [E.P.'s] removal and placement outside the home will not be remedied.
- C. There is a strong probability that continuation of Mother's and Father's parent-child relationship with [E.P.] poses a threat to [E.P.'s] well-being.
- D. Prolonging the CHINS actions is unlikely to produce different results in either parent's ability to care for [E.P.] ...

Appellant's Br. at 15-18.<sup>2</sup>

Mother now appeals.<sup>3</sup> Additional facts will be provided as necessary.

## **Discussion and Decision**

### ***I. Sufficiency of Evidence***

Mother challenges the sufficiency of evidence supporting the termination of her parental rights. When reviewing a trial court's order terminating a parent-child relationship, we will not set it aside unless it is clearly erroneous. *Castro v. State Office of Family & Children*, 842 N.E.2d 367, 372 (Ind. Ct. App. 2006), *trans. denied*. We will neither reweigh evidence nor judge witness credibility. *In re A.I.*, 825 N.E.2d 798, 805 (Ind. Ct. App. 2005), *trans. denied*. Rather, we will consider only the evidence and inferences most favorable to the judgment. *Id.*

In *Bester v. Lake County Office of Family & Children*, 839 N.E.2d 143 (Ind. 2005), our supreme court stated,

The Fourteenth Amendment to the United States Constitution protects the traditional right of parents to establish a home and raise their children. A parent's interest in the care, custody, and control of his or her children is perhaps the oldest of the fundamental liberty interests. Indeed the parent-child relationship is one of the most valued relationships in our culture. We recognize of course that 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. Thus, parental rights may be terminated

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<sup>2</sup> We note that the proper procedure would have been for Mother to file an appellant's appendix containing the trial court's termination order. *See* Ind. Appellate Rule 49(A) ("The appellant shall file its Appendix with its appellant's brief."). *See also* Ind. Appellate Rule 50(A)(2)(b) (stating that the appellant's Appendix shall contain the appealed judgment, including findings of fact and conclusions thereon). However, because the termination order is included in her appellant's brief as the appealed judgment pursuant to Indiana Appellate Rule 46(A)(10), we review the findings and conclusions as contained therein.

<sup>3</sup> J.P. ("Father") has not filed a notice of appeal and has not joined in this appeal.

when the parents are unable or unwilling to meet their parental responsibilities.

*Id.* at 147 (citations, quotation marks, and alteration omitted). In recognition of the seriousness with which we address parental termination cases, Indiana has adopted a clear and convincing evidence standard. *Castro*, 842 N.E.2d at 377.

According to the statute in effect at the time the termination petition was filed, to obtain a termination of the parent-child relationship, DCS was required to establish that

- (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 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.

Ind. Code § 31-35-2-4(b)(2) (2008) (emphasis added).<sup>4</sup>

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<sup>4</sup> The Indiana General Assembly amended Indiana Code Section 31-35-2-4, effective March 10, 2010. Here, the termination petition predates the amendments. Thus, we apply the statute in effect when the petition was filed.

Here, Mother does not challenge the trial court's findings regarding the duration of removal, best interests, or permanency plan.<sup>5</sup> Rather, she challenges as clearly erroneous the trial court's findings and conclusions regarding the reasonable probability of unremedied conditions and the threat to E.P.'s well-being. Ind. Code § 31-35-2-4(b)(2)(B). Since subparagraph (b)(2)(B) is written in the disjunctive, DCS was required to prove only one of the aforementioned circumstances. Because we conclude that DCS met its burden on the former, we need not address the latter.

Mother asserts that the record does not support the trial court's conclusion that a reasonable probability exists that conditions leading to E.P.'s removal will not be remedied. When assessing whether there is a reasonable probability that conditions that led to the child's removal will not be remedied, we must consider not only the initial basis for the child's removal, but also the bases for continued placement outside the home. *In re A.I.*, 825 N.E.2d at 806. Moreover, "the trial court should judge a parent's fitness to care for his 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*. "Due to the permanent effect of termination, the trial court also must evaluate the parent's habitual patterns of conduct to determine the probability of future neglect or deprivation of the child." *Id.* For example, the court may properly consider evidence of a parent's substance abuse,

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<sup>5</sup> DCS asserts that "since Mother has not challenged whether termination was in [E.P.'s] best interests, she therefore concedes that the trial court's termination order was not clearly erroneous." Appellant's Br. at 17. Given that DCS must prove each element of Indiana Code Section 31-35-2-4(b)(2) by clear and convincing evidence, we emphatically reject the notion that a parent's concession regarding the sufficiency of evidence as to one element amounts to a concession as to all elements.

criminal history, lack of employment or adequate housing, history of neglect, and failure to provide support. *McBride v. Monroe County Office of Family & Children*, 798 N.E.2d 185, 199 (Ind. Ct. App. 2003). In making its case, “DCS need not rule out all possibilities of change; rather, [it] need establish only that there is a reasonable probability that the parent’s behavior will not change.” *In re Kay.L.*, 867 N.E.2d 236, 242 (Ind. Ct. App. 2007). “[A] trial court need not wait until a child is irreversibly influenced by a deficient lifestyle such that his or her physical, mental, and social growth is permanently impaired before terminating the parent-child relationship.” *Castro*, 842 N.E.2d at 372.

Here, the trial court made the following specific finding regarding the probability of remedied conditions:

[Mother has] demonstrated an intractable inability to provide [E.P.] with proper care. Despite the services that have been in place since 2008, [Mother has] not shown improvement. There is an overwhelming probability that the conditions that resulted in [E.P.’s] removal and placement outside the home will not be remedied.

Appellant’s Br. at 18. In conducting our review, we will look not merely at the initial basis for E.P.’s removal, i.e., Mother’s drug use, unsuitable living environment, and unemployment, but also at the reasons for her continued placement away from Mother, i.e., Mother’s continued drug use, mental illness and instability, inconsistency and partial noncompliance in completing the required services, and domestic violence.

Essentially, Mother argues that the trial court did not judge her qualifications as of the date of the termination hearings, but rather, judged her based on prior conduct that she allegedly had remedied by that time. For example, she cites her decision to divorce Father as

evidence of a remedy for the domestic violence issues. However, the record indicates that in 2010, Mother began a relationship with G.M., whom she characterized as bi-polar and an alcoholic. Like her relationship with Father, this new relationship also involved domestic violence. Despite reciprocal protective orders, Mother indicated that she might reconcile with G.M. if they could work out their issues. This is consistent with her pattern of separating from and reuniting with Father. Thus, she has demonstrated a pattern of returning to unhealthy relationships with the men in her life that does not bode well for her future parenting prospects.

Mother also cites improvements in the areas of housing and employment as well as what she characterizes as only “a one-time set-back in her addiction recovery.” Appellant’s Br. at 4. The record indicates that Mother made temporary strides during the pendency of the proceedings; however, as therapist Joann Chase concluded, Mother could not sustain her progress and make lifestyle changes that would last. Her visits with E.P. were inconsistent and characterized by low levels of interaction, and she sometimes fell asleep during the visits. In fact, it was a consistent theme among the caseworkers and therapists involved in Mother’s case that Mother lived a life of inconsistency and instability that decreased her prospects for successful parenting.

In sum, the record supports the trial court’s conclusion that there is a reasonable probability that the conditions that led to E.P.’s removal from Mother will not be remedied. As such, the trial court’s conclusion is not clearly erroneous.

## ***II. Intervention of Foster Parents***

Mother also contends that the trial court erred in allowing E.P.'s foster parents to intervene as parties without filing a motion for intervention. A foster parent is among those who have a right to be heard and make recommendations on the record to the trial court either at the termination hearing or via a written statement served on all parties to the proceedings. Ind. Code § 31-35-2-6.5(e). Subject to certain exceptions, "a foster parent may petition the court to request intervention as a party" to a CHINS or termination proceeding. Ind. Code § 31-34-21-4.5(a). "A court *may* grant [the] petition . . . if the court determines that intervention of the petitioner is in the best interests of the child." Ind. Code § 31-34-21-4.5(c) (emphasis added).

Here, E.P.'s foster parents were not only her potential adoptive parents, but they were also the adoptive parents of two of E.P.'s half siblings. Pursuant to Indiana Code Section 31-35-2-6.5(e), they had a right to be heard and to make recommendations to the trial court. However, they participated as interveners without having filed a petition to intervene as a party, and the trial court never made a determination on the record that their intervention was in E.P.'s best interests. Nevertheless, Mother never objected during the hearings and challenges their participation as interveners for the first time on appeal. Issues not raised in the trial court are waived on appeal. *In re B.R.*, 875 N.E.2d 369, 373 (Ind. Ct. App. 2007), *trans. denied*. "In order to properly preserve an issue on appeal, a party must, at a minimum, show that it gave the trial court a bona fide opportunity to pass upon the merits of the claim before seeking an opinion on appeal." *Id.* (citations and internal quotation marks omitted). Mother failed to address the alleged procedural error and thereby deprived the court of the

opportunity to pass upon the merits of her claim and to remedy any error. As such, Mother has waived the issue for review. Accordingly, we affirm.

Affirmed.

BAILEY, J., and MATHIAS, J., concur.