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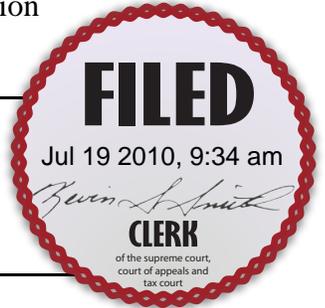
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**IN THE
COURT OF APPEALS OF INDIANA**



IN THE MATTER OF THE TERMINATION OF)
THE PARENT-CHILD RELATIONSHIP OF:)
E.L., A.R.B., AND A.B., Minor Children,)
)
M.B., Mother,)
)
Appellant-Respondent,)
)
vs.)
)
INDIANA DEPARTMENT OF CHILD)
SEVICES,)
)
Appellee-Petitioner.)

No. 48A04-0912-JV-717

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable G. George Pancol, Judge
Cause Nos. 48D02-0803-JT-124, 48D02-0803-JT-125, 48D02-0803-JT-126

July 19, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

M.B. (“Mother”) appeals the involuntary termination of her parental rights to her children, E.L., A.R.B., and A.B. Concluding that the Indiana Department of Child Services, Madison County (“MCDCS”), presented clear and convincing evidence to support the trial court’s judgment, we affirm.

Facts and Procedural History

Mother is the biological mother of E.L., born on June 24, 2008, A.R.B., born on February 20, 2007, and A.B., born on October 20, 2005. The evidence most favorable to the trial court’s judgment reveals that in August 2007 MCDCS took emergency custody of E.L., A.R.B., and A.B. because Mother, who had been observed having a difficult time walking down a public street in Anderson at 2:30 a.m., was arrested and incarcerated on charges of public intoxication. At the time of her arrest, Mother was accompanied by all three children, two of whom were not wearing any clothing except for “completely soiled” diapers, and there was no suitable caregiver available to take custody of the children. Transcript at 22.

The following day, MCDCS filed petitions under separate cause numbers alleging all three children were children in need of services (“CHINS”). Mother admitted to the allegations of the CHINS petitions during an initial hearing in the matter and the trial court adjudicated all three children CHINS. A dispositional hearing was held in September 2007, after which the trial court entered an order formally removing all three children from Mother’s care and incorporating a Parental Participation Plan directing Mother to participate in a variety of services in order to achieve reunification with her children. Among other things, Mother was ordered to: (1) refrain from any future

unlawful activity; (2) remain drug and alcohol free, complete her Relapse Prevention treatment program, attend Alcohol Anonymous/Narcotics Anonymous (“AA/NA”) meetings at least three times per week and submit to random drug screens; (3) participate in consistent counseling following the conclusion of the relapse program; (4) obtain and maintain employment; (5) cooperate with home-based services; and (6) exercise regular visitation with the children.

Mother initially engaged in court-ordered services by regularly participating in a relapse prevention program, weekly AA/NA meetings, and supervised visits with the children. Mother also submitted to random drug screens that produced negative results and cooperated with home-based service providers. Consequently, MCDCS recommended to the trial court in its January 2008 written progress report that the children be allowed to return to Mother’s care for a trial home visit. Several weeks later, however, during a six-month review hearing in early February 2008, MCDCS informed the trial court that Mother had been arrested the previous day on multiple charges including class B felony burglary, class C felony attempted battery with a deadly weapon, and class C felony possession of a legend drug. MCDCS thereafter withdrew its recommendation for a trial home visit and the children remained in foster care.

In March 2008, MCDCS filed a petition seeking the involuntary termination of Mother’s parental rights to E.L., A.R.B., and A.B. At the time of the filing of the termination petition, Mother remained incarcerated. A consolidated fact-finding hearing on the MCDCS’s involuntary termination petitions for all three children commenced approximately one year later, on March 1, 2009. At the end of the first day of evidence,

the court advised the parties that it would continue the termination hearing until July 2009, thereby providing Mother with the opportunity to be released from incarceration and to have one more chance to demonstrate her willingness and ability to successfully complete reunification services and properly parent her children. The termination hearing was thereafter continued until September 1, 2009.

Mother was released from incarceration and placed on parole in June 2009. On June 24, 2009, Mother was arrested for invasion of privacy. On August 19, 2009, Mother was again arrested for invasion of privacy. Mother also tested positive for cocaine during the first two months of her parole. Consequently, at the time of the continued termination hearing in September 2009, Mother was again incarcerated and facing approximately seven more months of possible incarceration as a result of violating the terms of her parole.

During the termination hearing, Mother did not dispute the fact that she had a lengthy criminal history, including approximately thirty arrests. Mother also acknowledged that she had not successfully completed a majority of the reunification services ordered by the trial court and had not visited with her children in approximately nineteen months. MCDCS also presented evidence that the children were thriving in foster care.

At the conclusion of the termination hearing, the trial court took the matter under advisement. On November 4, 2009, the court issued its judgment in all three causes terminating Mother's parental rights to E.L., A.R.B., and A.B. Mother now appeals.

Discussion and Decision

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 the termination of parental rights, we will not reweigh the evidence or judge the credibility of the witnesses. In re D.D., 804 N.E.2d 258, 264 (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. If the evidence and inferences support the trial court's decision, we must affirm. Id.

“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. A trial court must subordinate the interests of the parent to those of the child, however, when evaluating the circumstances surrounding a termination. K.S., 750 N.E.2d at 837. 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. Id. at 836.

When seeking an involuntary termination of parental rights, the State is required to allege and prove, among other things, 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; [and]

(C) termination is in the best interests of the child

Ind. Code § 31-35-2-4(b)(2)(B) and (C) (2008).¹ 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, 1260-1261 (Ind. 2009) (quoting Ind. Code § 31-37-14-2 (2008)). 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) (2008). Mother alleges MCDCS failed to establish, by clear and convincing evidence, that there is a reasonable probability the conditions resulting in the children’s removal and continued placement outside of her care will not be remedied and that continuation of the parent-child relationship poses a threat to the children’s well-being. Mother further asserts that MCDCS failed to prove that termination of her parental rights is in the children’s best interests. Mother therefore claims she is entitled to reversal. See I.C. § 31-35-2-4(b)(2)(B) and (C). We address each argument in turn.

Remedy of Conditions

Mother acknowledges on appeal that she did not fully participate in services prior to her most recent incarceration. Nevertheless, Mother claims that the trial court’s

¹ Indiana Code section 31-35-2-4 was amended by Pub. L. No. 21-2010, § 8 (eff. March 12, 2010). Because the changes to the statute became effective in March 2010 following the filing of the termination petition herein, they are not applicable to this case.

specific findings regarding her lack of participation and/or successful completion of services, such as a drug relapse prevention program or home-based services, as well as the court's findings that Mother failed to refrain from the use of drugs and alcohol and failed to obtain and maintain suitable housing and steady employment are not supported by the evidence.

Initially, we observe that Ind. Code § 31-35-2-4(b)(2)(B) is written in the disjunctive. The trial court was therefore required to find only one of the two requirements of subsection 2(B) had been met before issuing an order to terminate Mother's parental rights. See In re L.V.N., 799 N.E.2d 63, 69 (Ind. Ct. App. 2003). Nevertheless, the trial court found both prongs of this statute had been satisfied. See I.C. § 31-35-2-4(b)(2)(B)(i) & (ii). Because we find it to be dispositive, we address only subsection 2(B)(i).

In determining whether there exists a reasonable probability that the conditions resulting in a child's removal or continued placement outside a parent's care will not be remedied, 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 County Office of Family & Children, 762 N.E.2d 1244, 1251 (Ind. Ct.

App. 2002), trans. denied. A trial court may also properly consider the services offered to the parent by a county department of child services and the parent's response to those services as evidence of whether conditions will be remedied. Id. Finally, we point out that a county department of child services is not required to provide evidence ruling out all possibilities of change; rather, it need establish only that there is a reasonable probability a parent's behavior will not change. In re Kay L., 867 N.E.2d 236, 242 (Ind. Ct. App. 2007).

Here, in terminating Mother's parental rights, the trial court made multiple pertinent findings regarding Mother's failure to participate in court-ordered services as follows:

8. [Mother] has failed to comply with the services ordered by the Court in this matter:
 - a. She did not complete relapse prevention;
 - b. She has not abstained from drug and alcohol use;
 - c. She did not complete home-based services;
 - d. She has failed to obtain a stable home;
 - e. She has not had consistent visitation with the [children] due to her consistently being incarcerated; and
 - f. She has not paid child support.

9. In addition to her failure to comply with court-ordered services, [Mother] has consistently engaged in illegal conduct, which has repeatedly resulted in her being incarcerated:
 - a. [Mother] has been arrested nearly thirty (30) times.
 - b. On or about February 6, 2008, [Mother] was arrested on multiple charges, including Residential Entry and Possession of Legend Drug. This arrest resulted in her being incarcerated until early June of 2009;
 - c. On June 24, 2009, [Mother] was arrested for Invasion of Privacy;
 - d. On August 19, 2009, [Mother] was arrested again for Invasion of Privacy;

- e. These two (2) arrests have led to a parole violation being filed against [Mother] and her current incarceration status at this point and for the foreseeable future.

Appellant's Appendix at 56. The trial court then concluded that there is a reasonable probability that the conditions that resulted in the children's removal from Mother will not be remedied. A thorough review of the record reveals that clear and convincing evidence supports the trial court's findings set forth above. These findings, in turn, support the trial court's ultimate decision to terminate Mother's parental rights to E.L., A.R.B., and A.B.

The children were initially removed from Mother's care because of her incarceration and inability to provide the children with a safe and stable home environment. The children's continued placement outside of Mother's care was largely the direct result of Mother's ongoing criminal activities and incarceration which resulted in her inability to complete court-ordered services or visit with her children. At the time of the termination hearing, these conditions remained unchanged as Mother was again incarcerated and therefore unavailable to parent the children.

In recommending termination of Mother's parental rights, MCDCS family case manager Amanda Stokes confirmed that the main problems facing Mother and preventing reunification were "neglect issues related to the abuse of drugs and alcohol and legal issues related to that as well." Transcript at 42. Stokes further testified that during her time on the case Mother "was not able to comply with reframing (sic) from the use of alcohol and drugs," and acknowledged that no child support had been paid "by any of the

parents.” Id. at 42, 43-44. When asked whether she recommended termination of Mother’s parental rights, given Stokes’s history of involvement in the matter, Stokes answered in the affirmative and further explained:

I do not believe that the problems resulting in the removal of the children will be remedied. . . . There is a pattern of behavior . . . on [Mother’s] part . . . [Mother] has a significant [MCDCS] history and in addition she has had multiple relapses . . . and has participated in several treatment programs . . . [and] there doesn’t appear to be a change in her behavior.

Id. at 44. MCDCS family case manager Lance Hart also worked with Mother. When asked during the termination hearing if it was his opinion that Mother’s parental rights should be terminated, Hart likewise responded in the affirmative and said that he based his recommendation on her “pattern” of conduct stating, “[Y]es it’s true that [Mother] has completed certain things[;] however[,] they don’t appear to be working” and further noted that Mother “continues to have legal issues . . . involving alcohol.” Id. at 73.

In addition, State of Indiana Parole Officer Betty Weist testified that Mother had tested positive for cocaine on June 9, 2009. Weist also confirmed that she had filed a parole violation on Mother with the parole board and that Mother was facing seven additional months of incarceration should her parole be revoked.

Mother’s own testimony provides additional support for the trial court’s findings. During the termination hearing, Mother acknowledged that she had a history of involvement with MCDCS dating back to the removal of E.L. from her care in 2004, and then the first removal of A.R.B. in 2005. Mother also admitted she had a “pattern” of criminal behavior throughout her adult life and that she had been arrested “a lot” of times. Id. at 236. When specifically asked if she had been arrested as many times as thirty,

Mother answered, “Maybe.” Id. Mother thereafter admitted that she did not dispute that number. Id. at 237. Finally, Mother informed the trial court that she had been arrested approximately thirteen times for public intoxication, and that she had consumed alcohol following her release from incarceration in June 2009 on at least two separate occasions before her most recent incarceration.

Based on the foregoing, we conclude that ample evidence supports the trial court’s determination that there is a reasonable probability that the conditions resulting in the children’s removal and continued placement outside Mother’s care will not be remedied. A trial court must judge a parent’s fitness to care for his or her children *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 children. D.D., 804 N.E.2d at 266. Here, Mother repeatedly chose to engage in criminal conduct resulting in extended periods of incarceration throughout the majority of the CHINS and termination proceedings, rather than to cooperate with MCDACS caseworkers and service providers in an effort to remain sober and achieve reunification with E.L., A.R.B., and A.B. Consequently, at the time of the termination hearing, Mother was again incarcerated and unavailable to parent her children. This court has previously 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, 374 (Ind. Ct. App. 2006), trans. denied. Moreover, “[a] pattern of unwillingness to deal with parenting problems and to cooperate with those providing services, in conjunction with unchanged conditions, supports a

finding that there exists no reasonable probability that the conditions will change.” Lang v. Starke County Office of Family & Children, 861 N.E.2d 366, 372 (Ind. Ct. App. 2007), trans. denied. Mother’s arguments on appeal, emphasizing her self-serving testimony regarding the services she completed during prior CHINS cases and her own uncorroborated testimony that she had found an apartment and had some strong leads for employment opportunities should she be released from incarceration in the near future, rather than the evidence cited by the trial court in its termination order, amount to an invitation to reweigh the evidence, which we may not do. D.D., 804 N.E.2d at 265.

Best Interests

We next consider Mother’s assertion that MCDCS failed to prove that the involuntary termination of her parental rights is in the children’s best interests. We are mindful that, in determining what is in the best interests of a child, the trial court is required to look beyond the factors identified by the Department of Child Services and look to the totality of the evidence. McBride v. Monroe County 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 also indicated in its specific findings that court-appointed special advocate (“CASA”) Christy Jones and MCDCS family case manager Hart both recommended termination of Mother’s parental rights as being in the children’s best interests. This finding is also supported by the evidence.

At the conclusion of the termination hearing, CASA Christy Jones acknowledged that she had recommended termination of Mother’s parental rights to E.L., A.R.B., and A.B. and further stated that the written report she had previously filed with the court clearly represented “her feelings” on the matter. Transcript at 245. Moreover, in recommending termination of Mother’s parental rights to the children, Hart informed the court that E.L., A.R.B., and A.B. were doing “very well” in their current foster placement, and that they “definitely” had a bond with their foster mother and each other. Id. at 74. Hart went on to say that it would “definitely” be detrimental to “split up” the children or to remove them from their current foster home. Id. Similarly, Ann Cummings, Family Consultant with KidsPeace Foster Care and Community Programs, informed the trial court that she had been working with the children since December 2007 and had observed the children in their current foster home as frequently as “every other week, at least.” Id. at 137. Cummings further testified that although the children had initially struggled with “insecurity” and “abandonment” issues, they were currently “very stable.” Id. Cummings then indicated that, based on her history of involvement with the case, she agreed that termination of Mother’s parental rights was “appropriate” because the children needed “stability” and “permanency.” Id. at 141.

Based on the totality of the evidence, including Mother’s refusal to refrain from criminal activity or to abstain from the use of alcohol and other drugs throughout the duration of the underlying proceedings, her failure to complete court-ordered services, and her inability to provide the children with a safe and stable home environment at the time of the termination hearing due to her ongoing incarceration, coupled with the testimony from Jones, Hart, and Cummings, we conclude that there is sufficient evidence to support the trial court’s determination that termination of Mother’s parental rights is in all three children’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 family home will not be remedied, is sufficient to prove by clear and convincing evidence termination is in child’s best interests), trans. denied.

Conclusion

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.” In re A.N.J., 690 N.E.2d 716, 722 (Ind. Ct. App. 1997) (quoting Egly v. Blackford County Dep’t of Public Welfare, 592 N.E.2d 1232, 1235 (Ind. 1992)). We find no such error here.

Affirmed.

NAJAM, J., and VAIDIK, J., concur.