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# IN THE
# COURT OF APPEALS OF INDIANA

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| IN THE MATTER OF THE INVOLUNTARY TERMINATION OF PARENT-CHILD RELATIONSHIP OF J. S. and J. M., Minor Children, and THEIR MOTHER, CHRISTINA SMITH, | ) | |
| CHRISTINA SMITH, | ) | |
| Appellant-Respondent, | ) | |
| vs. | ) | No. 49A02-0701-JV-46 |
| MARION COUNTY DEPARTMENT OF CHILD SERVICES, | ) | |
| Appellee-Petitioner, | ) | |
| and | ) | |
| CHILD ADVOCATES, INC., | ) | |
| Co-Appellee/Guardian Ad Litem. | ) | |

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Victoria Ransberger, Judge Pro Tempore
Cause No. 49F09-0410-JT-318

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**August 15, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**SHARPNACK, Judge**

Christina Smith ("Mother") appeals the trial court's termination of her parental rights to J.S. and J.M. Mother raises one issue, which we revise and restate as whether the trial court's decision that the conditions that resulted in the children's removal would not be remedied and that the continuation of the parent-child relationship would pose a threat to the children's well-being is clearly erroneous. We affirm.

The relevant facts follow. On February 26, 2004, the Marion County Department of Child Services ("MCDCS") filed a petition alleging J.S., born on October 28, 2002, was a child in need of services ("CHINS").[1] There were several cigarette burns on J.S.'s body and no one sought immediate medical care. There were questions about whether the parents or the babysitter caused the burns. On February 26, 2004, there was an initial hearing regarding the CHINS petition, and Mother and Johnnie Mickle admitted that J.S. was a CHINS.[2] The MCDCS removed J.S. from the home and placed J.S. in foster care. At the dispositional hearing, the trial court ordered Mother to participate in services. In

[1] Currently, the organization is known as the Marion County Department of Child Services. Within this proceeding, the previous name of the organization, the Marion County Office of Family and Children, was used. However, for the purpose of consistency, Department of Child Services will be used throughout this opinion.

[2] Mickle is the alleged father of J.M. and J.S. Mickle does not appeal the termination of his parental rights.

order to initiate the plan for reunification, the MCDCS made multiple referrals to Mother and Mickle, including drug and alcohol counseling, parenting assessments, parenting classes, visitations, drug screens, and remaining cooperative with the probation department.

Mother missed many of the scheduled visitations after J.S. was taken out of the home. From March 2004 to October 2004, Mother missed at least nine scheduled visits with J.S. Mother and Mickle both attended a parenting assessment in March 2004. Numerous programs were recommended, including a safety and supervision plan, individual therapy, an intensive outpatient drug program, parenting classes, continued visitation, and compliance with Mother's probation guidelines. On March 24, 2004, Mother and Mickle attended one parenting class. They restarted the classes on May 24, 2004, and were discharged from the program on August 12, 2004, due to their inconsistent attendance. They had only completed orientation and four of the eight required classes.

In May 2004, Mother was assessed in an intensive outpatient drug program ("IOP") at Family Services Association. Mother tested positive for marijuana twice during her time in IOP and then quit the program on August 27, 2004. Referrals were also made to perform drug screens on Mother. March 2004 was the first referral for drug screens, and Mother failed to participate. The second referral was in June 2004, and Mother completed only five out of the sixteen scheduled screens.

On September 2, 2004, J.M. was born. Although J.S. had already been removed from the home, J.M. was allowed to stay with Mother immediately after the birth because

of Mother's family support and efforts at reunification with J.S. However, by late September or early October 2004, the MCDCS became concerned because Mother had left maternal grandmother's house with J.M. On October 23, 2004, Mother was arrested for robbery, a class B felony. Mother had left J.M. with Mickle at this time. Mother was eventually sentenced to ten years in the Department of Correction with three years suspended.

On October 26, 2004, the MCDCS filed a petition for termination of the parental rights of Mother and Mickle as to J.S. On November 3, 2004, the MCDCS filed a petition declaring J.M. a CHINS. An initial hearing was held the same day, and Mother and Mickle admitted that J.M. was a CHINS. When J.M. was removed from the home, J.M. "was dirty, had a severe case of diaper rash and had multiple rashes around [J.M.'s] face and ears." Petitioner's Exhibit 10. J.M. was eventually placed in foster care. On July 20, 2005, the MCDCS amended its petition to involuntarily terminate the parent-child relationship to include J.M. On December 18, 2006, the termination hearing was held. On January 2, 2007, the trial court ordered the termination of Mother's parental rights as to J.S. and J.M. The trial court made the following findings of fact and conclusions thereon:

FINDINGS OF FACT

The Court now finds the following by clear and convincing evidence:

1. [Mother] is the mother of two. . ., [J.S. and J.M.]. [J.S.'s] date of birth is October 28, 2002, and [J.M.'s] date of birth is September 2, 2004.

2. Johnnie Mickle is the alleged father of J.S. and J.M.

3. [Mother] was placed on probation for a conviction of theft, as a class D felony, on or about March 26, 2003.

4. On or about February 26, 2004, a Petition Alleging Children in Need of Services (CHINS) was filed as to J.S. due to J.S. being burned while in the care of a babysitter and Johnnie Mickle and [Mother]'s failure to seek medical attention in a timely manner.

5. On or about February 26, 2004, [Mother] signed a summons and rights form acknowledging receipt and understanding of the CHINS Petition. On said date, an initial hearing was held and [Mother] admitted that J.S. was a child in need of services.

6. On or about April 8, 2004, a dispositional hearing was held and the trial court proceeded to disposition as to [Mother], legally removing J.S. from her care pursuant to a dispositional decree. J.S. has never returned to the care of [Mother] since her legal removal from the care of [Mother].

7. [Mother] was referred to a variety of services, including a parenting assessment, parenting classes, drug screens and visitation. At the dispositional hearing, she was ordered to complete said services.

8. [Mother] completed a parenting assessment in March of 2004. The parenting assessor was Barbara Brands. After completing her assessment, she had numerous concerns about [Mother's] ability to safely parent J.S. Among her concerns were [Mother's] use of marijuana, her non-compliance with the terms of probation, her general instability, and failure to take responsibility for the reasons J.S. was removed from her care. Additionally, she was concerned that [Mother] gave custody of another child to the child's father who had physically abused [Mother] and possibly the child.

9. In order for [Mother] to be reunified with J.S., Barbara Brands recommended that she successfully complete an intensive out-patient drug and alcohol program, participate in random drug screens, comply with her terms of probation, consistently visit with J.S., provide proof of stable employment, participate in home-based therapy and work on anger management.

10. On or about September 2, 2004, J.M. was born. At that time, [Mother] had begun participating in parenting classes through Lutheran Child and

Family Services as a result of a second referral for this service. The first referral had been closed out due to lack of compliance.

11. On or about September 2, 2004, [Mother] was participating in an intensive outpatient program, as the result of a second referral to Family Service Association. Although [Mother] was visiting J.S., she was doing so sporadically. [Mother] was participating minimally in her second referral for random drugs [sic] screens through Valle Vista. The first referral was closed out due to non compliance.

12. After J.M. was born, [Mother] become non-compliant with services and was eventually closed out of the parenting class program and intensive out-patient program. She stopped visiting J.S. and stopped participating in random drugs [sic] screens.

13. On or about October 26, 2004, [Mother] was arrested for robbery, a class B felony.

14. At the time of her arrest, [Mother] was non-compliant with her terms of probation for theft and an unrelated violation of said probation was pending.

15. On or about November 3, 2004, a CHINS Petition was filed as to J.M because [Mother] had failed to keep in contact with the case manager for the [MC]DCS, had stopped participating in services referred by the [MC]DCS and was arrested for robbery.

16. On or about November 3, 2004, [Mother] signed a summons and rights form and admitted that J.M. was a child in need of services.

17. On or about December 9, 2004, the trial court held a dispositional hearing and ordered J.M. legally removed from the care of [Mother] pursuant to a dispositional decree. J.M. has never been returned to the care of [Mother] since [J.M.'s] legal removal on December 9, 2004.

18. [Mother] was convicted of robbery, class B felony, and sentenced to ten years. She is currently incarcerated at Rockville Correctional Facility with three years suspended. Her pending probation for the theft conviction was revoked.

19. [Mother] arrived at Rockville Correctional Facility on or about March 24, 2005, and her case manager is Susan McElheny. Upon her arrival at

Rockville Correctional Facility, her anticipated date to be released was April 24, 2008.

20. While incarcerated, [Mother] has committed numerous conduct violations which extended her anticipated date to be released. At the time of the last hearing to conclude the evidence on December 18, 2006, her anticipated date to be released from prison was July 23, 2008.

21. [Mother] has not actively engaged in services to the full extent possible while incarcerated at Rockville Correctional Facility.

22. Witnesses testifying on behalf of the [MC]DCS provided credible and reliable testimony that [Mother] has not completed services and has numerous issues that would need to be thoroughly addressed before she could be in any position to parent her children.

23. [Mother] smoked marijuana during one or both pregnancies with her children.

24. [Mother] did not successfully complete any services offered to her prior to her arrest for [r]obbery, despite having the opportunity to do so. Additionally, [Mother] has not completed a drug and alcohol program while incarcerated.

25. [Mother's] lack of full participation in services **prior to her arrest for robbery**, and failure to comply with all her terms of probation, demonstrates a lack of commitment and desire or ability to parent her children.

26. [Mother's] lack of full participation in services during her incarceration and her continued delinquent behavior while incarcerated demonstrates a lack of commitment and desire or ability to parent her children. It also demonstrates a probability that said delinquent behavior would continue after her release.

27. [J.S. and J.M.] are placed in a pre-adoptive licensed foster care home where they are receiving appropriate nurturing. This placement is committed to adopting [J.S. and J.M.] should parental rights be terminated.

28. [J.S. and J.M.] need permanence and stability so that their mental, physical and emotional needs will be met by a consistent, permanent caretaker throughout their childhood. It is simply unfair and

unreasonable to expect the children and their foster/adoptive parents to remain in limbo yet another nearly 2 years while [Mother] finishes out her prison sentence. Further, given the history of misconduct in prison, it is certainly possible that Smith's outdate will be further extended beyond the late July 2008, earliest release date.

29. [J.S. and J.M.] are bonded with their foster care placement and it is not in their best interests to delay permanency by waiting until [Mother] is released and waiting to see if she participates in services after her release. The GAL has visited with the children and concurs in the permanency plan of adoption if termination is granted. No service provider could recommend reunification with [Mother]. [Mother] has virtually never been in [J.M.'s] life and [J.S.] has been in care nearly all of [J.S.'s] young life as well.

30. The plan for [J.S. and J.M.] is adoption by this foster care placement. The plan by MCDCS allows the children to remain together in a home where they are bonded, loved and cared for with a permanent family.

31. There is a reasonable probability that the conditions which resulted in the removal of [J.S. and J.M.], and the reasons for [their] continued placement outside [Mother's] care will not be remedied, and that continuation of the parent-child relationship poses a threat to [J.S. and J.M.'s] well-being.

32. Given [J.S. and J.M.'s] need for permanency and need for a stable, loving home free from neglect and [Mother's] lack of demonstrated ability or interest in providing for those needs, it is in their best interests to terminate the parent-child relationship.

CONCLUSIONS OF LAW

1. [J.S. and J.M.] were [each] found to be a child in need of services by order of the Marion County Superior Court, Juvenile Division.

2. [J.S. and J.M.] have been removed from [Mother] under the terms of a dispositional decree for more than six months.

3. There is a reasonable probability that the conditions that resulted in [J.S. and J.M.'s] removal from, and continued placement outside, the care and custody of [Mother] will not be remedied.

4. There is a reasonable probability that the continuation of the parent-child relationship between [J.S. and J.M.] and [Mother] poses a threat to their well-being.

5. Termination of the parent-child relationship between [J.S. and J.M.] and [Mother] is in their best interests.

6. The plan for the care and treatment of [J.S. and J.M], termination of parental rights and adoption, is acceptable and satisfactory.

7. If any of the foregoing Conclusions of Law should more properly be denominated as Findings of Fact, then they are so denominated.

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** by the Court that the parent-child relationship between [J.S. and J.M], minor children, and their mother, [Mother], is hereby permanently terminated together with all rights, powers, privileges, immunities, and duties, including rights to custody, control, and visitation and the obligation to pay child support.

* * * * *

Appellant's Appendix at 15-20.

The issue is whether the trial court's order terminating Mother's parental rights to J.S. and J.M. is clearly erroneous. Giving deference to the trial court's unique position to assess the evidence, when reviewing termination proceedings on appeal, we will neither reweigh the evidence, nor judge the credibility of witnesses. In re M.M., 733 N.E.2d 6, 11 (Ind. Ct. App. 2000). We will consider only the evidence most favorable to the trial court's judgment and the reasonable inferences to be drawn therefrom. Id. at 12. Where the trial court has entered findings of fact, we first determine whether the evidence supports the findings. Doe v. Daviess County Division of Children and Family Services, 669 N.E.2d 192, 194 (Ind. Ct. App. 1996), trans. denied. Then, we determine whether the findings support the judgment. Id. Where the trial court has entered findings of fact, we

will not set aside the trial court's findings and judgment unless they are clearly erroneous. Id. "A finding is clearly erroneous when there are no facts or inferences drawn therefrom which support it." In re B.D.J., 728 N.E.2d 195, 199 (Ind. Ct. App. 2000). If the evidence supports the trial court's decision, we must affirm. In re T.F., 743 N.E.2d 766, 773 (Ind. Ct. App. 2001), trans. denied.

Ind. Code § 31-35-2-8(a) (2004) provides that "if the court finds that the allegations in a petition described in [Ind. Code § 31-35-2-4] are true, the court shall terminate the parent-child relationship." Ind. Code § 31-35-2-4(b)(2) (2004) provides that a petition to terminate a parent-child relationship involving a CHINS must allege 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;
> >
> > (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 interest of the child; and

(D) there is a satisfactory plan for the care and treatment of the child.

The MCDCS must establish these elements by clear and convincing evidence. In re L.S., 717 N.E.2d 204, 208 (Ind. Ct. App. 1999), trans. denied. Mother challenges the trial court's determination that: (A) the conditions resulting in the children's continued placement outside the home would not be remedied; and (B) that the continuation of the parent-child relationship poses a threat to the children's well-being. [3]

A. Remedy of Conditions Resulting in Removal

Mother argues that the trial court's finding that the conditions resulting in the children's continued placement outside the home would not be remedied was clearly erroneous. Mother argues that she is attempting to improve herself and her ability to take care of her children upon her release from prison.

To determine whether the conditions that resulted in the children's removal will be remedied, the trial court must look to the parent's fitness at the time of the termination proceeding. In re L.V.N., 799 N.E.2d 63, 69 (Ind. Ct. App. 2003). The trial court need not wait until the child is irreversibly harmed such that his physical, mental, and social development is permanently impaired before terminating the parent-child relationship. In re N.B., 731 N.E.2d 492, 494 (Ind. Ct. App. 2000), trans. denied. The court must look at the patterns of conduct in which the parent has engaged to determine if future changes are

[3] Mother admits that "the trial court's findings are supported by the evidence." Appellant's Brief at 6.

likely to occur. Id. When making its determination, the trial court can reasonably consider the services offered to the parent and the parent's response to those services. Id.

Mother did not respond well to the referrals that the MCDCS made for purposes of reunification. Mother did not comply with the outpatient substance abuse program. She tested positive for drugs two out of the six times she was screened for the program. She was sporadic with her drug screens as well. Mother was referred for sixteen drug screens, and only completed five of them. Mother did not attend all of the necessary parenting classes and did not regularly visit J.S. Finally, Mother violated her probation, was arrested for robbery, and now continues to have disciplinary issues while in prison. At the time of the termination hearing, Mother's projected release date was July 23, 2008.

The trial court found that Mother would not be able to remedy the conditions that resulted in J.S. and J.M's removal and we will not reweigh the evidence nor judge the credibility of the witnesses. We cannot say the trial court's finding that there was a reasonable probability that Mother would not be able to remedy the conditions which resulted in the children's removal was clearly erroneous. See, e.g., In re J.J., 711 N.E.2d 872, 875 (Ind. Ct. App. 1999) (holding that termination of father's parental rights was not clearly erroneous where he failed to maintain contact with child and did not comply with court ordered services).

B. Threat to the Children's Well-Being

Mother also argues that there was not clear and convincing evidence that the continuation of the parent-child relationship poses a threat to the children's well-being. Ind. Code § 31-35-2-4(B) is written in the disjunctive; it requires the trial court to find

only one of the two requirements of subsection (B) by clear and convincing evidence. See In re V.A., 632 N.E.2d 752, 756 (Ind. Ct. App. 1994). The trial court found that there was a reasonable probability that Mother would not be able to remedy the conditions that warranted her children's removal from their home.

Because there is sufficient evidence to support the trial court's decision that there is a reasonable probability the conditions which warranted removal would not be remedied, we need not address whether the decision that the continuation of the parent-child relationship poses a threat to the well-being of the children is clearly erroneous. See, e.g., In re L.S., 717 N.E.2d at 209 (holding that because statute was written in the disjunctive the trial court's finding that parent-child relationship posed a threat to the well-being of the children was enough to satisfy requirement under Ind. Code § 31-35-2-4(B)), reh'g denied.

For the foregoing reasons, we affirm the trial court's decision to involuntarily terminate Mother's parental rights as to J.S. and J.M.

Affirmed.

RILEY, J. and FRIEDLANDER, J. concur