ATTORNEY FOR APPELLANT:

ELIZABETH GAMBOA
Franklin, Indiana

ATTORNEY FOR APPELLEE CHILD ADVOCATES, INC.:

INGE VAN DER CRUYSSE
Indianapolis, Indiana

ATTORNEY FOR APPELLEE MARION COUNTY DEPARTMENT OF CHILD SERVICES:

BARRY A. CHAMBERS
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

IN RE: THE INVOLUNTARY TERMINATION OF THE PARENT-CHILD RELATIONSHIP OF S.M. and T.M., minor children,	)	
SHELBY STONE,	)	
Appellant-Respondent,	)	
vs.	)	No. 49A02-0704-JV-343
MARION COUNTY DEPARTMENT OF CHILD SERVICES,	)	
Appellee-Petitioner,	)	
and	)	
CHILD ADVOCATES, INC.,	)	
Co-Appellee (Guardian ad Litem).	)	

APPEAL FROM THE MARION SUPERIORT COURT
The Honorable Danielle Gaughan, Magistrate
Cause No. 49D09-0606-JT-026444

October 18, 2007

MEMORANDUM OPINION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-respondent Shelby Stone appeals from the involuntary termination of his parental rights as to his minor children, S.M. and T.M., in an action initiated by the Marion County Department of Child Services (DCS). Specifically, Stone argues that DCS failed to prove the statutory elements required to terminate his parental rights, S.M. and T.M.'s guardian ad litem did not represent the children's best interests, and DCS did not adequately consider Stone's request that the children be placed with his wife. Finding no error, we affirm the judgment of the trial court.

FACTS

On July 24, 2005, Terry Middleton gave birth to twin boys, T.M. and S.M. Stone is the twins' natural father and was incarcerated at the time T.M. and S.M. were born. On July 27, 2005, DCS filed a petition alleging that T.M. and S.M. were children in need of services (CHINS) because Middleton tested positive for cocaine at the time of the birth, the twins tested positive for barbiturates and cocaine after their birth, and Middleton had a prior history with DCS that resulted in prior parental rights being terminated because of her drug use. The petition alleged that T.M. and S.M. were CHINS with regard to Stone because he was incarcerated and unable to care for the children. T.M. and S.M. were placed in a foster home

as a result of the petition.

Stone established paternity over T.M. and S.M. in April 2006, and signed an agreed entry that T.M. and S.M. were CHINS on November 9, 2005. The trial court ordered T.M. and S.M. to be wards of DCS and ordered Stone to complete an array of parenting and drug classes. Stone completed various parenting and drug/alcohol evaluations while incarcerated.

DCS filed a petition to involuntarily terminate Stone's parental rights (the termination petition) on June 27, 2006. Stone filed a pro se petition to dismiss the termination petition on October 11, 2006, arguing that his wife, Sherry Stone (Sherry), had received the necessary certification to take custody of T.M. and S.M. Stone's petition was denied that same day. The trial court appointed a public defender for Stone on October 17, 2006, and an initial hearing was held on October 26, 2006.

Stone participated telephonically at the termination hearing on March 2, 2007. Middleton initially failed to appear, but arrived after the hearing had begun and gave consent for T.M. and S.M. to be adopted. After the presentation of evidence, the trial court took that matter under advisement and ultimately entered an order terminating Stone's parental rights on April 4, 2007. In relevant part, the trial court found:

> 6. After their birth, [T.M. and S.M.] were placed in a foster home where they have lived ever since.
>
> 7. Since their removal, [T.M. and S.M.] were never returned to the care and custody of their father Shelby Stone, because he has remained incarcerated throughout the proceedings. Shelby Stone has never seen [T.M. and S.M.]
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> ***
>
> 13. [T.M. and S.M.] were born premature and drug exposed and have some developmental delays. They had breathing problems which required frequent

visits to the doctor, and the use of breathing machines and inhalers. For approximately a year the children had physical developmental delays and needed assistance by First Steps service providers for walking and standing. They are now returning to First Steps for speech therapy.

14. Shelby Stone wants his wife, Sherry Stone, to parent the children perhaps through a guardianship, while he is incarcerated. Sherry Stone plans for Shelby Stone to live with her after he is released from jail. Shelby Stone and Sherry Stone were married in April 2006 while Shelby Stone was incarcerated. They have only lived together for about four months because of Shelby Stone's incarceration. . . .

15. [DCS's] plan for the future care and custody of [T.M. and S.M.] is adoption.

16. The current pre-adoptive foster home has been assessed and approved by DCS for the adoption of [T.M. and S.M.].

17. The pre-adoptive foster home has been licensed for nine years as a special needs foster family. The foster home has structure and provides effective care for the children in their home. The foster parents love the children and are committed to providing for all their needs, and they are committed to adopting the children, should they be available for adoption.

18. [DCS] is still considering Sherry Stone's home as a possible placement for the children but is leaning toward keeping the children in their pre-adoptive foster home.

19. Shelby Stone's chief obstacle to reunifying with the children is his history of criminal activity, which has led to repeated incarcerations and keeps him from being a parent who could care and provide for his children.

20. Even after his expected release in September of 2009, he would have to complete services before reunification, including the bonding assessment portion of the Parenting Assessment. The Agreed Entry required parenting classes, home based counseling, and completion of other recommendations of the Parenting Assessment. Therefore, there would be an additional amount of time to complete services before the children could be reunified with Shelby Stone.

21. There is a reasonable probability that the conditions that resulted in the children's removal from Shelby Stone will not be remedied. . . .

> 22. It is in the best interests of [T.M. and S.M.] that the parent-child relationship with their father, Shelby Stone, be terminated, so they may achieve permanency with the pre-adoptive family with whom they have been placed since leaving the hospital after their birth.

Appellant's App. p. 15-17. Stone now appeals.

DISCUSSION AND DECISION

I. Sufficiency of the Evidence

Stone argues that DCS failed to prove the statutory elements that are required to terminate his parental rights to T.M. and S.M. Specifically, Stone argues that DCS did not prove (1) that there is a reasonable probability that the conditions resulting in the children's removal would not be remedied, (2) that termination was in the children's best interests, or (3) that DCS had a satisfactory plan for the children's care.

When reviewing termination of parental rights proceedings on appeal, we will not set aside the trial court's judgment terminating a parent-child relationship unless it is clearly erroneous. In re A.A.C., 682 N.E.2d 542, 544 (Ind. Ct. App. 1997). We neither reweigh the evidence nor judge the credibility of witnesses. Id. We consider only the evidence that supports the trial court's decision and the reasonable inferences that may be drawn therefrom. Id. If the evidence and the inferences support the trial court's decision, we must affirm. In re L.S., 717 N.E.2d 204, 208 (Ind. Ct. App. 1999).

We acknowledge that the involuntary termination of parental rights is the most extreme sanction that a court can impose because termination severs all rights of a parent to his or her children. Id. Therefore, termination is intended as a last resort, available only

when all other reasonable efforts have failed. Id. The purpose of terminating parental rights is not to punish the parents but, instead, to protect their children. Id. Thus, although parental rights are of a constitutional dimension, the law provides for the termination of these rights when the parents are unable or unwilling to meet their parental responsibilities. Id.

To effect the involuntary termination of a parent-child relationship, the State must present clear and convincing evidence establishing the elements of Indiana Code section 31-35-2-4(b)(2):

> (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).

In construing this statute, this court has held that when determining whether certain conditions that led to the removal of the children will be remedied, the trial court must judge the parent's fitness to care for the children at the time of the termination hearing, taking into consideration evidence of changed conditions. In re D.J., 755 N.E.2d 679, 684 (Ind. Ct. App. 2001). A parent's habitual pattern of conduct must also be evaluated to determine the probability of future negative behavior. Id. The trial court need not wait until a child is irreversibly harmed such that his physical, mental, and social development are permanently impaired before terminating the parent-child relationship. Id.

Additionally, the trial court may consider the services offered as well as the parent's response to those services. Id. Parental rights may be terminated when parties are unable or unwilling to meet their responsibilities. Ferbert v. Marion County OFC, 743 N.E.2d 766, 776 (Ind. Ct. App. 2001). Also, when determining what is in the best interests of the children, the interests of the parents are subordinate to those of the child. Id. at 773. Thus, parental rights will be terminated when it is no longer in the child's best interests to maintain the relationship. In re B.D.J., 728 N.E.2d 195, 200 (Ind. Ct. App. 2000). 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 at 684.

Stone argues that the trial court committed clear error when it concluded that there was a reasonable probability that the conditions leading to T.M. and S.M.'s removal would not be remedied. Stone has been incarcerated since T.M. and S.M. were born. He has never

seen his sons, and the boys will be more than four years old by the time Stone is expected to be released from prison in September 2009. Stone has a lengthy criminal history, including a conviction for class B felony dealing in cocaine and two convictions for class C felony possession of cocaine. Furthermore, as the trial court noted, even upon his release, Stone would still have to complete additional services before he could possibly gain custody of his sons. While we applaud Stone's efforts to improve himself during his incarceration by taking parenting and substance abuse classes, we cannot say that the trial court committed clear error when it found that there is a reasonable probability that the conditions leading to T.M. and S.M.'s removal will not be remedied.

Stone also contends that DCS failed to present clear and convincing evidence that terminating his parental rights is in T.M. and S.M.'s best interests. However, "[a] parent's historical inability to provide adequate housing, stability and supervision coupled with a current inability to provide the same will support a finding that termination of the parent-child relationship is in the child's best interests." Castro v. State Office of Family and Children, 842 N.E.2d 367, 374 (Ind. Ct. App. 2006), trans. denied. In other words, "[a]lthough parental rights have a constitutional dimension, the law allows for their termination when parties are unable or unwilling to meet their responsibility as parents." Id. (emphasis in original). Like the father in Castro, because Stone has been incarcerated since the twins' birth, he has a historical inability to provide adequate housing, stability, and supervision for his children. Thus, the trial court's finding that terminating Stone's parental rights was in T.M. and S.M.'s best interests was not clearly erroneous.

Additionally, T.M. and S.M. have been with the same pre-adoptive foster home since their birth. The home is a licensed special needs foster family and "has structure and provides effective care for the children in the home." Appellant's App. p. 16. Not only do the foster parents provide for T.M. and S.M.'s needs, they are committed to adopting the twins should that opportunity arise. Id. Thus, the trial court's conclusion that it was in T.M. and S.M.'s best interests to terminate Stone's parental rights was not clearly erroneous.

Stone also contends that DCS did not prove that there was a satisfactory plan for the care and treatment of the children. However, a DCS caseworker testified that the plan was for T.M. and S.M. "[t]o be adopted by the pre-adoptive foster family." Tr. p. 38. Adoption is generally a satisfactory plan. In re C.C., 788 N.E.2d 847, 856 (Ind. Ct. App. 2003). While Stone emphasizes that evidence was also presented that DCS had not ruled out placing T.M. and S.M. with Sherry, we have previously held that "a plan need not be detailed, so long as it offers a general sense of the direction in which the child[ren] will be going after the parent-child relationship is terminated." In re D.D., 804 N.E.2d 258, 268 (Ind. Ct. App. 2004); see also Matter of D.G., 702 N.E.2d 777, 781 (Ind. Ct. App. 1998) (holding that testimony that DCS "intends to seek adoptive parents" demonstrates a satisfactory plan for the child). We conclude that the evidence presented at the hearing established that DCS planned to have the pre-adoptive foster family adopt T.M. and S.M., and the trial court's conclusion that this was a satisfactory plan was not clearly erroneous.

Finally, Stone argues that DCS did not adequately consider placing T.M. and S.M. with Sherry. Stone emphasizes that Sherry "completed courses and become [sic] certified to

care for special needs children." Appellant's Br. p. 17. While this may be true, DCS case manager Kelly Silver testified that Sherry did not show an interest in obtaining custody of T.M. and S.M. until September 2006, approximately six months before the termination hearing. Silver informed Sherry at that time that she would need to conduct a background check and a relative placement assessment and Sherry would need to have her fingerprints taken. Tr. p. 99. After DCS completed a background check, Silver needed additional information from Sherry before she could conduct the relative placement assessment. Although Silver contacted Sherry, she did not receive a response. Id. Sherry failed to attend a scheduled visitation and, at the time of the termination hearing, Silver "still [did not] have fingerprints for [Sherry]." Id. While Sherry may have "jumped through several hoops," appellant's br. p. 17, she did not take all of the necessary steps. Therefore, although Stone may have preferred for T.M. and S.M. to be placed with Sherry, Sherry did not meet the qualifications for placement. Furthermore, as the trial court noted in its findings, Sherry had never seen T.M. and S.M. and, in fact, had only lived with Stone for four months before his incarceration. Therefore, DCS's decision to leave the twins with the pre-adoptive foster parents was in the best interests of the children, and the trial court correctly reached that conclusion.[1]

In sum, as we have previously held, "'[i]ndividuals who pursue criminal activity run the risk of being denied the opportunity to develop positive and meaningful relationships

[1] Stone makes a separate argument that DCS's "refus[al] to consider [his] plan for providing for the children through his wife" violated his right to due process and a fair trial. Appellant's Br. p. 25. But as we have

with their children.'" Castro, 842 N.E.2d at 374 (quoting Matter of A.C.B., 598 N.E.2d 570, 572 (Ind. Ct. App. 1992)). Even assuming that Stone could eventually become a suitable parent, we must ask how much longer T.M. and S.M. should have to wait to enjoy the permanency that is essential to their proper development and overall well-being. The twins have been with their pre-adoptive family since birth and have become "more outgoing, more loving, [and] more friendly . . . ." Tr. p. 116. The family plans to adopt T.M. and S.M. if the opportunity arises. Therefore, the trial court's conclusion that terminating Stone's parental rights is in T.M. and S.M.'s best interests is supported by clear and convincing evidence and, therefore, is not clearly erroneous.

II. Guardian ad Litem

Stone argues that he was denied due process because T.M. and S.M.'s guardian ad litem (GAL) acted as a "rubber stamp" for DCS instead of as an independent advocate for the twins. Appellant's Br. p. 13. Stone contends that the GAL violated her statutory duty by not "represent[ing] and protect[ing] the best interests" of the children pursuant to Indiana Code section 31-9-2-50.

The gravamen of Stone's argument is that he was denied due process and a fair trial because the GAL's performance was deficient. Stone critiques the GAL's testimony from the termination hearing, specifically, when she stated, "When I get an assignment I am supposed to contact the case manager, follow the child in the place that they are living right

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already noted, DCS and the trial court did consider that plan. That a different course of action was ultimately selected does not affect Stone's due process rights.

now, whether it be a foster family, a relative care, whatever, my job is to follow the child in that care." Tr. p. 115 (emphasis added). While Stone contends that this testimony amounts to an admission from the GAL that she does not independently represent the children and, instead, submits to DCS's decisions, we do not agree with his interpretation. Instead, the GAL's comment simply explains the process she follows to form an opinion regarding the children's best interests—a process that requires her to observe the children in their current living situation. Here, the GAL visited T.M. and S.M. in the pre-adoptive foster home numerous times and witnessed their positive development and the loving relationship they had developed with that family. While the GAL admitted that she did not have contact with Stone or Sherry, there is no evidence in the record that the GAL was responsible for this communication breakdown.

Even though Stone argues that the GAL's determination of T.M. and S.M.'s best interests "was based solely on her observation of the children in the foster placement," appellant's br. p. 23, the twins had spent their entire lives in that home. Thus, it was necessary for the GAL to observe the children in that setting to determine how they were adjusting to determine what would be in their best interests. Moreover, the GAL could not observe T.M. or S.M. with Stone or Sherry because Stone was incarcerated and, as previously detailed, Sherry did not meet the requirements for placement and failed to attend a scheduled visitation. While it would have been preferable for the GAL to talk with Stone and Sherry, as we have previously noted, there is no evidence that the GAL was responsible for this communication breakdown. Thus, we cannot conclude that the GAL's performance

was deficient or that she acted as a rubber stamp for DCS in determining T.M. and S.M.'s best interest. Therefore, Stone's argument that the GAL's performance violated his due process rights fails.

The judgment of the trial court is affirmed.

BAILEY, J., and VAIDIK, J., concur.