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ATTORNEY FOR APPELLANT:

ALISON T. FRAZIER
Dupont, Indiana

ATTORNEY FOR APPELLEE:

KERRY THOMPSON
Houston & Thompson
Scottsburg, Indiana

IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF THE TERMINATION OF THE PARENT-CHILD RELATIONSHIP OF C.N., the child, and Valerie Newman, the child's mother, and Josh Newman, the child's father,	)	
VALERIE NEWMAN,	)	
and	)	
JOSH NEWMAN,	)	
Appellants-Respondents,	)	
vs.	)	No. 72A01-0705-JV-234
SCOTT COUNTY DEPARTMENT OF CHILD SERVICES,	)	
Appellee-Petitioner.	)	

APPEAL FROM THE SCOTT CIRCUIT COURT
The Honorable Roger L. Duvall, Judge
Cause No. 72C01-0605-JT-6

October 30, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Valerie Newman ("Mother") and Josh Newman ("Father") appeal the trial court's termination of their parental rights. Mother and Father raise five issues, which we revise and restate as:

I. Whether the trial court abused its discretion by denying Father's motion to continue;

II. Whether the Mother's right against self-incrimination was violated;

III. Whether Mother and Father were denied the effective assistance of counsel; and

IV. Whether the trial court's order terminating Mother and Father's parental rights to C.N. is clearly erroneous.

We affirm.

The relevant facts follow. Mother and Father are the parents of C.N., born on January 5, 2005. On March 8, 2005, Mother and Father reported to medical personnel that C.N. had been placed in a bassinet and that some time later they heard C.N. scream. A doctor at Clark Memorial Hospital told Mother that C.N. had broken his legs, that the injuries looked suspicious, and that he was going to report the injury to Child Protective Services. Medical personnel at Clark Memorial Hospital called the Scott County Department of Child Services ("SCDCS") and informed them that both of C.N.'s legs were broken.

C.N. was transferred to Kosair Children's Hospital for further evaluation and care. A clinical forensic medical examination revealed that C.N.'s injuries were "most consistent with non-accidental trauma and are considered infliction." Appellee's

Appendix at 5. On March 9, 2005, the SCDCS contacted the Indiana State Police regarding C.N.'s injuries. Indiana State Police Detective William Wibbels, Jr., interviewed Mother, and Mother indicated that she did not know what happened to C.N. Detective Wibbels also interviewed Father who also indicated, at first, that he did not know what happened to C.N. Later Father stated that he had injured C.N. by jamming him into the bassinet too hard. Father told Detective Wibbels that Mother was present in the home and that he informed Mother of the injuries and what had happened on the day the injuries occurred. Father also indicated that his actions were a result of an argument that he was having with Mother. Father stated that Mother chose to lie about the incident. Father wrote a letter of apology to C.N. as part of the interview process. Father was arrested in connection with C.N.'s injuries. When Father was arrested, Detective Wibbels told Mother that Father had admitted that he was responsible for C.N.'s injuries, and Mother responded by saying, "So." Transcript at 64.

Father's statements to police were given to forensic medical examiners at Kosair Children's Hospital. The medical examiners indicated that Father's statements were not consistent with C.N.'s fractures. The medical examiners indicated that C.N.'s injuries were "consistent with torsional forces in association with bending forces." Appellee's Appendix at 5.

After Father was released from jail, he participated "minimally" in services provided by SCDCS. Transcript at 76. Father went to a counselor a few times, but the counselor discharged him in September 2005 because he missed several appointments

and denied that he needed any services. In August 2005, LifeSpring discharged Mother for her failure to cooperate. Mother denied any knowledge of what happened to C.N. and indicated to the SCDCS that her main concern was Father and not C.N. By the fall of 2005, Shannon Deaton, a caseworker with SCDCS, observed no bonding between either Mother or Father and C.N. Della Hutton, a homemaker with SCDCS, observed "very little bonding" between Mother and C.N. Id. at 114.

On May 26, 2006, the SCDCS filed a petition to involuntarily terminate Mother and Father's parental rights. C.N. has been in foster care since his removal. In May 2006, Mother and Father moved into separate residences but indicated that they were still a couple.

After the filing of the petition for termination, Father started counseling again. Father attended his appointments fairly regularly but did not make progress regarding anger management, mental health, and parenting issues. The main issue Father needed to address in counseling was his anger issues, but Father failed to do so. Father and Mother both used the criminal charge against Father as an excuse not to participate in services. By January 2007, Mother was in counseling but had made no progress towards C.N.'s safety.

Father filed a motion to continue the termination hearing until the resolution of his criminal case. Father argued that, due to the pending criminal case, he was unable to fully participate in counseling, which would require him to make a statement or

admission that could be used against him in the criminal case. The trial court denied Father's motion to continue.

At the termination hearing, Father did not testify. Mother and Father did not object to the trial court's consideration of the written report of the foster parents. During the cross examination of Mother, the SCDCS's attorney asked Mother if she had talked with Father about what had happened with C.N. on March 8, 2005. Mother's attorney objected and indicated that Mother did not understand the concept of the Fifth Amendment, and the trial court allowed Mother's attorney to assert her Fifth Amendment right on her behalf during questioning. The SCDCS's attorney asked Mother whether she had talked with Father about what happened with C.N. since the day that C.N. was injured. Mother's attorney objected, but Mother answered the question. Later in the cross examination, the SCDCS's attorney asked Mother if she would cover for Father if he was in trouble. Mother invoked her rights under the Fifth Amendment. Mother's attorney stated, "You have to answer." Transcript at 193. The SCDCS's attorney asked Mother if she had stated that she would lie to protect Father in a previous deposition. Mother's attorney stipulated to Mother's deposition.

The trial court granted the petition to terminate Mother and Father's parental rights and entered the following order:

* * * * *

> 6. By clear and convincing evidence the allegation of the Petition is true that the child has been removed from his parents for at least six (6) months under a dispositional decree of the Scott Circuit Court

dated June 27, 2005 in cause no. 72C01-0503-JC-9. The child was placed in foster care on March 10, 2005 after it was determined on March 8, 2005 that he had suffered broken tibia to both legs. The child has remained in foster care since that initial placement.

7. By clear and convincing evidence the allegations of the Petition concerning the [Father] are true that there is a reasonable probability that the conditions that resulted in the child's removal will not be remedied and that continuation of the parent-child relationship poses a threat to the well being of the child:

    1. The child suffered serious and traumatic injuries to his legs. The clinical forensic examination revealed injuries that were consistent with non-accidental trauma and considered to be inflicted and not consistent with the explanation offered by the father for the cause of the injuries.

    2. The father was subsequently charged and arrested in Washington County, Indiana (the injury to the child was thought to have occurred at the home of he [sic] paternal grandparents in Washington County). The father made admissions that he had caused the injuries when he placed the child in his bassinet with excessive force. The father wrote a letter of apology to the child. The mother could give no explanation for the injuries even though she was at her in-laws home at the relevant time.

    3. The father was incarcerated but upon posting bail the father and the mother resumed living together and continued to do so until the Petition was filed. Thereafter the mother and father maintained a relationship.

    4. The father was prohibited from contact with the child as a condition of bond in the criminal case. The dispositional order of June 27, 2005 provided that if the father was allowed visitation as a bail condition then the DCS would arrange visitation in a suitable and appropriate manner. There is no evidence before the

Court to suggest that the father ever sought permission from the Washington County Court to allow visitation and no visitation was exercised by the father. Visitation with the child was not prohibited either by the dispositional order of June 27, 2005 or the DCS. The father has had no contact with the child since removal of the child.

5. The father participated minimally in the services offered by the DCS. This included being discharged from counseling after missing several meetings; denying the need for counseling; failing to undergo an evaluation for almost a year and using the criminal charges as an excuse for his lack of participation in services. After the Petition was filed the father then started counseling and moved to a separate residence from the mother but continued to maintain a relationship with the mother.

6. At the time of the hearing on the Petition there had been no progress in addressing mental health issue of the father, parenting skills and anger management issues.

8. By clear and convincing evidence the allegations of the Petition concerning the mother are true in that there is a reasonable probability that the conditions that resulted in the child's removal will not be remedied and that continuation of the parent-child relationship poses a threat to the well being of the child:

1. The mother was required by the terms of the dispositional order of June 27, 2005 to submit to a psychological evaluation; participate in counseling to address domestic violence, child abuse and past traumas; participate in parenting classes; be present and actually participate in all services; find and maintain employment; find and maintain suitable housing.

2. The mother did submit to a psychological evaluation in a timely manner.

3. Prior to the filing of the Petition the mother did commence counseling but was discharged for a failure to cooperate in the counseling. When in counseling the mother denied the involvement of the father in the injuries to the child, and expressed that she didn't think she needed to be in counseling and didn't think that the father needed to be in counseling.

4. The mother admitted that she had struggled with going to counseling.

5. The mother was warned by the DCS that failure to cooperate could result in the institution of termination proceedings.

6. The mother was last employed in August of 2006 however it has only been in the thirty (30) days prior to the hearing on the Petition that the mother took steps to obtain a driver's license and obtain her GED. While these factors do not directly address safety issues of the child they are relevant in the mother's ability to live independently of the father.

7. While the counseling was restarted after the filing of the Petition the evidence is that there has been little progress in addressing the issues that most directly relate to the safety of the child, namely the anger management issues, parenting skills and dealing with those issues that would insure that the child is not exposed to an environment that could result in harm to the child. As to this last factor the mother continues to deny the involvement of the father in the injuries to the child.

8. In evidence that the Court attributes great weight in its decision, the mother gave a deposition in the criminal proceeding against the father on January 12, 2007, less than three (3) weeks before the hearing that was conducted in this cause on the Petition. During that deposition and in testimony elicited at the hearing on

the Petition the mother admitted that her testimony had been that she didn't need the counseling, had voluntarily quit the counseling earlier, that she was waiting for the criminal charges against the father to end, that she didn't believe the father injured the child and that she and the father were still a couple. She further admitted that she would lie to protect the father.

9. Testimony from witnesses for service providers concerning the mother's interaction with the child during visitation was that the visits appeared scripted and robotic. That while the mother would address the physical needs of the child there was little nurturing or bonding.

9. As to both the mother and the father the facts that are set forth in this Order are an indication of the inability or unwillingness to appreciate the serious nature of the injury that was suffered by the child and an inability or unwillingness to understand the urgency in addressing issues that will insure the safety of the child. Indiana has consistently held that termination of parental rights and in particular the mother's parental rights is appropriate where the mother fails to demonstrate a willingness or ability to alter the conditions which led to the removal of the child. *McBride v. Monroe* [*C*]*ounty Office of Family and Children*, 798 N.E.2d 185, (Ind.App. 2003), *Ferbert v. Marion County OFC*, 743 N.E.2d 766, (Ind.App. 2001). This Court will not minimize the injury suffered by this child. The Court accepts on its face the admission by the father including the letter of apology which would indicate an argument or dispute between the mother and father. The purpose of terminating parental rights is not to punish the parents but to protect their children. *Matter of ANJ*, 690 N.E.2d 716 (Ind.App. 1997); *Ferbert*, *supra* at 773. The trial court need not wait until a child is irreversibly harmed such that their physical, mental and social development is permanently impaired before terminating the parent-child relationship. *JLL v. Madison County Dept. of Public Welfare*, 628 N.E.2d 1223 (Ind.App. 1994); *Ferbert*, *supra* at 773.

10. Services that were designed to provide for the safety of the child and facilitate reunification of the child were offered to the parents. The

evidence is clear that the parents did not embrace the measures that were needed to accomplish reunification and provide for the safety of the child. The parents chose to place their relationship with each other above their relationship with their child. The father chose to assert his rights within the criminal proceeding to the detriment of his rights concerning the child without undertaking any effort that would have allowed an accommodation to utilize the offered services. The mother refused to recognize the serious nature of the injury that had been perpetrated on her two month old child and thereafter placed the interests of her husband before the child. The Court cannot be comfortable in the future safety of the child under these circumstances. Parents cannot claim failure to provide services as a ground for reversing termination if they did not actively seek services. *Jackson v. Madison County Dept. of Family*, 690 N.E.2d 792, (Ind.App. 1998). A parent may not "sit idly by" for an extended period without asserting a need and desire for services then argue that she was denied services to assist in parenting. *Jackson*, *supra* at 793. Parents must make appropriate and timely efforts to obtain assessments or evaluations and to participate in rehabilitation services. *In Re BDJ*, 728 N.E.2d 195 (Ind.App. 2000). Further a trial court can ignore or discredit evidence from the parent that she started to comply with dispositional orders shortly before the termination hearing. *Matter of CM*, 675 N.E.2d 1134, (Ind.App. 1997). Receiving services alone is not sufficient if the services do not result in the needed change or only temporary change and the parents do not acknowledge a need for a change. See *In re MM*, 733 N.E.2d 6, (Ind.App. 2000); *Matter of DLW*, 485 N.E.2d 139 (Ind.App. 1985); *Matter of Fries*, 416 N.E.2d 908 (Ind.App. 1981).

11. By clear and convincing evidence the allegation of the Petition is true that termination is in the best interest of the child. In support of this finding the Court incorporates the findings that have been reported in this Order. The Court further finds that all service providers testified that there was a lack of "bonding" or "nurturing" between the mother and the child during visits. The Court notes that this was not expert testimony and is a reflection of those witnesses' observation of the interaction between the mother and child. This evidence is not dispositive of the issue but cumulative to the other facts previously noted by the Court. The Court also finds that the young age of the child is another factor in determining that termination of the parent-child relationship is in the best interest of

the child. While not making any finding as to the nature of bonding of a child with its caregiver, common sense dictates that given the young age of the child at the time of removal that it would have been very important if not essential for the mother or father to take the appropriate steps to develop and expand their relationship with a child of only two (2) months of age. The dilatory approach of the mother and father to services designed to assist in reunification of the family facilitated the development of the relationship that has evolved between the child and the foster family to such an extent that the Court now finds, as an additional factor in determining the best interests of the child, the damage that could occur to the child by terminating the child-foster parent relationship.

12. By clear and convincing evidence the DCS has a satisfactory plan for the care and treatment of the child. The foster parents have indicated a desire to adopt the child. All evidence before the Court strongly suggest that the foster parents would be an appropriate permanent placement for the child.

13. The Court also observes that this finding and order does not follow the recommendations of the Co-Guardian Ad Litems and specifically the written report filed by the Co-Guardian Ad Litem, Mary Fondrisi. Co-Guardian Ad Litem Mary Fondrisi did not have available to her the statements made by the mother on January 12, 2007 nor did the mother disclose to the Co-Guardian Ad Litem the beliefs and attitude held by the mother towards the incident involving her child, the services and her willingness to be untruthful as evidenced by that sworn statement and for that reason and with the full consideration of the evidence presented at the hearing, the Court deviates from the recommendations of the Co-Guardian Ad Litems.

IT IS THEREFORE ORDERED AND DECREED that the parent-child relationship between [C.N.], the child and [Valerie] Newman, the mother and Josh Newman, the father, the parents be terminated and all rights, powers privileges, immunities, duties and obligations including the right to consent to an adoption, pertaining the [sic] relationship are hereby terminated.

* * * * *

Appellant's Appendix at 171-175.

I.

The first issue is whether the trial court abused its discretion by denying Father's motion to continue. The decision to grant or deny a motion for a continuance is within the sound discretion of the trial court. Litherland v. McDonnell, 796 N.E.2d 1237, 1240 (Ind. Ct. App. 2003), trans. denied. We will only reverse the trial court for an abuse of that discretion. Id. "An abuse of discretion may be found on the denial of a motion for a continuance when the moving party has shown good cause for granting the motion." Rowlett v. Vanderburgh County Office of Family & Children, 841 N.E.2d 615, 619 (Ind. Ct. App. 2006), trans. denied. No abuse of discretion will be found when the moving party has not shown that he was prejudiced by the denial. Id.

Father argues that "[b]y moving forward with the termination proceedings before the criminal case was resolved, the court paralyzed Father's ability to defend himself in the termination proceedings," and Father "could not testify in the termination proceedings for fear that it would hurt his criminal case." Appellant's Brief at 18. Father also argues that "as long as criminal charges are pending against a parent for injury allegedly inflicted on his child, the government cannot force a parent to choose between his right to parent and his absolute right not to incriminate himself in termination proceedings involving the same child." Id. at 20.

"The Due Process Clause of the U.S. Constitution and the Due Course of Law Clause of the Indiana Constitution prohibit state action that deprives a person of life,

liberty, or property without a fair proceeding." In re M.G.S., 756 N.E.2d 990, 1004 (Ind. Ct. App. 2001), trans. denied. The Due Process Clause provides heightened protection against state interference with certain fundamental rights and liberty interests. Id. at 1005. The right to raise one's children is an essential, basic right, more precious than property rights, within the protection of the Fourteenth Amendment. Id. However, these 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. Bester v. Lake County Office of Family & Children, 839 N.E.2d 143, 147 (Ind. 2005). Parental rights may be terminated when the parents are unable or unwilling to meet their parental responsibilities. Id. The purpose of terminating 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), reh'g denied, trans. denied, cert. denied, 534 U.S. 1161, 122 S. Ct. 1197 (2002).

The Fifth Amendment provides in relevant part that no person "shall be compelled in any criminal case to be a witness against himself."[1] U.S. Const. amend. V. Here, there was no governmental compulsion involved in the trial court's denial of Father's motion to continue. Father had the option to testify at the termination hearing, but was not required to testify and did not do so or invoke his Fifth Amendment rights.

[1] This privilege applies not only in criminal trials but also "to parties in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate them in future criminal proceedings." Pitman v. State, 749 N.E.2d 557, 561 (Ind. Ct. App. 2001), reh'g denied, trans. denied.

Regardless of whether or not he testified, Father also maintained the right to present witnesses or evidence and cross examine witnesses.

Father also fails to show any prejudice. In support of the termination of Father's parental rights, the SCDCS presented evidence that Father admitted that he was responsible for C.N.'s injuries and that his actions were a result of an argument that he was having with Mother. Further, Father failed to address his anger issues through counseling. Lastly, in terminating Father's parental rights, the trial court did not refer to Father's failure to testify at the termination hearing. See Everhart v. Scott County Office of Family & Children, 779 N.E.2d 1225, 1232 (Ind. Ct. App. 2002) (holding that any violation of due process which father may have suffered by the discussion of the invocation of his Fifth Amendment right against self-incrimination was harmless because the termination was based on other facts).[2] We conclude that the trial court did not abuse its discretion by denying Father's motion to continue because Father has failed to show any prejudice. See J.M. v. Marion County Office of Family & Children, 802 N.E.2d 40, 44-45 (Ind. Ct. App. 2004) (holding that the trial court did not abuse its discretion by

[2] Father argues that Everhart is distinguishable because the father's parental rights in Everhart were terminated after the criminal case was concluded by the father's guilty plea and the father was not forced to choose between his right not to incriminate himself and his right to parent in order to defend himself in the termination proceeding. We disagree. In Everhart, the father had several counseling sessions in which he invoked his Fifth Amendment right against self-incrimination while he was incarcerated pending action on criminal charges resulting from the abuse of his child. Everhart, 779 N.E.2d at 1227.

denying mother's motion for continuance because mother failed to show that she was prejudiced by the trial court's refusal to grant the motion for continuance).

II.

The next issue is whether the SCDCS violated Mother's right against self-incrimination when it continued to question her after she invoked her Fifth Amendment privilege concerning statements she made in the criminal case involving Father. Mother argues that that the SCDCS's questions violated her right against self-incrimination. Mother points to the following portions of the transcript:

> BY [SCDCS's Attorney]:
>
> Q My question to you, Mrs. Newman was whether or not you had talked with [Father] about what happened with [C.N.] since the day it happened and since the day you were at the State Police Post on March 9 of 2005?
>
> BY [Mother's Attorney]:
>
> I'm gonna object on the grounds I stated earlier and also I believe there's a marital privilege.
>
> BY [SCDCS's Attorney]:
>
> I'm not getting into what they said, but whether they had talked.
>
> BY THE COURT:
>
> She can answer that.
>
> BY [Mother]:
>
> A No.
>
> BY [SCDCS's Attorney]:

Q You have not?

A No.

Q And that's been almost 2 years ago, hasn't it?

A Yes.

Q And you have not asked him once, what happened to your son on that –

BY [Mother's Attorney]:

Objection,

BY [SCDCS's Attorney]:

. . . that date in 2 years have you?

BY [Mother's Attorney]:

Objection, that does get into what they discussed.

BY [SCDCS's Attorney]:

Whether you did or didn't, it's yes or no.

A No

BY [Mother's Attorney]:

It wasn't (inaudible)

BY THE COURT:

Wait, wait, wait. Restate your question Mr. Thompson.

BY [SCDCS's Attorney]:

Q So in 2 years, you have not asked [Father] what happened to [C.N.] have you?

A No.

BY [Mother's Attorney]:

Ah. Your Honor. (Indiscernable) [sic]

BY THE COURT:

Okay. Mam, [sic] you want to. Just a second. Mam, your attorney has asserted a certain privilege for you, all right, now normally what we tell people is you can't look at your lawyer every time a question is asked of you to determine whether or not you should ask (sic) it, but given the nature of some of this line of questioning and given the fact that [your attorney] has raised an objection, what you do need to do is give [your attorney] an opportunity to make an objection if he thinks you should not answer a question. Do you understand that?

BY THE WITNESS:

Yes. Sir.

BY THE COURT:

So while normally we appreciate the cooperation of people when they're on the stand, you should probably be a little deliberate a little slower here to allow your attorney to represent you in this matter.

BY [THE WITNESS]:

Okay.

* * * * *

Q And would you cover for each other if the other one was in trouble?

BY [Mother's Attorney]:

Objection, that's argumentative. I'm unsure it's relevant. What.

BY THE COURT:

Overruled.

BY [SCDCS's Attorney]:

Would you?

BY [Mother's Attorney]:

You have to answer. Yes.

BY [Mother]:

I plead the Fifth.

BY [SCDCS's Attorney]:

Q You're asserting your right not to answer that because the answer might incriminate you? Is that right Valerie? Is that what you wish to do?

A Yes.

Q You were asked questions about, in that deposition, on the subject matter of whether or not you would be truthful when it came to [Father] weren't you? Were you or were you not [Mother]?

BY [Mother's Attorney]:

Is the question, was she asked those questions?

BY [SCDCS's Attorney]:

Yes.

BY [Mother's Attorney]:

You have to answer.

BY [Mother]:

A Yes.

BY [SCDCS's Attorney]:

Q You were asked those questions weren't you?

A Yes.

Q And you answered those questions didn't you?

A Yes.

Q In fact, you told the attorney for [Father] in that deposition that you would lie, if necessary, to protect [Father] didn't you? Is that not what you said [Mother]?

A I believe so, I, I haven't been able to look at the deposition.

Q That's a fair question, let me show it to you. In the scheme of those questions, you, a question was asked on page 22, line 147, "That if you thought that [Father] was taking the blame for you, would you, would you take the blame for him, like he's doing for you?" and your answer was "yea", correct?

A Yes.

Q Question asked, "Even though you contend that you hadn't done it, you'd be willing to say that you'd done it, just to keep them from putting him in jail?", your answer was "probably", was it not?

A Yes.

Q And again you affirm that the two of you have that kind of relationship that, one would take responsibility for the actions of the other, is that correct?

A Yes.

Q Again, in that same deposition, on this same subject matter, Question asked on page 27, line 183. "Which one is the truth, would you lie for him to protect him?" Answer, "yea". Was that your answer [Mother]?

A Yes.

Q "Now tell me honestly, did he hurt and hurt (sic) [C.N.]?" Answer: "No" Was that your answer?

A Yes.

Q So you confirmed 20 days ago, that you would lie for [Father] if necessary to protect him, did you not?

A Yes.

Q That's just what we read, isn't it?

A Yes.

Transcript at 181-183, 193-195.

The exchanges reveal that Mother invoked her Fifth Amendment right when she was asked whether she would cover for Father. The SCDCS's attorney then asked Mother questions regarding Mother's deposition, and Mother and her attorney did not object to these questions on the basis of the Fifth Amendment. Mother has waived any error by failing to object to the questions of the SCDCS's attorney. See Hardin v. State ex rel. Van Natta, 176 Ind. App. 514, 518, 376 N.E.2d 518, 520 (1978) (holding that appellant waived any error because he failed to object to any of the State's questions on the basis of the Fifth Amendment privilege).

III.

The next issue is whether Mother and Father were denied the effective assistance of counsel.[3] "Where parents whose rights were terminated upon trial claim on appeal that their lawyer underperformed, we deem the focus of the inquiry to be whether it appears that the parents received a fundamentally fair trial whose facts demonstrate an accurate determination." Baker v. Marion County Office of Family & Children, 810 N.E.2d 1035, 1041 (Ind. 2004). The question is not whether the lawyer might have objected to this or that, but whether the lawyer's overall performance was so defective that the appellate court cannot say with confidence that the conditions leading to the removal of the children from parental care are unlikely to be remedied and that termination is in the child's best interest. Id.

Mother and Father argue that to the extent that an objection was required to the foster parents' report, Mother and Father's counsel were ineffective for failing to make the proper objection.[4] The foster parents' reports consist of letters to the courts, medical records, journal entries, and information on C.N.'s medical status and C.N.'s visits. The

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[3] Mother and Father argue that the written reports submitted by the foster parents should not have been considered because they contain third party statements reported by the foster mother, conclusory lay opinions about several issues in the case. Mother's attorney indicated that he had no objection to the trial court's consideration of the submission of the foster parents. Father did not object to the trial court's consideration of the of the foster parents' submission. Mother and Father have waived this issue by failing to object. See Joe v. Lebow, 670 N.E.2d 9, 21, 21 n.11 (Ind. Ct. App. 1996) (holding that mother waived issue by failing to object).

[4] Father appears to argue that his trial was not fundamentally fair because he was being forced to choose between his constitutional rights. We have already addressed Father's arguments. See supra Part I. Mother appears to argue that her trial was not fundamentally fair because she was forced to choose between her husband and her child. Mother fails to develop this argument and has waived it on appeal. See Castro v. State Office of Family & Children, 842 N.E.2d 367, 373 n.2 (Ind. Ct. App. 2006) (holding

trial court mentioned that it "considered . . . the submitted reports that have been presented and filed without objection," but did not emphasize the reports in its order. Appellant's Appendix at 171. Even without consideration of the foster parents' report, the evidence was sufficient to support the trial court's findings. See supra Part IV. We cannot say that the failure to object to the foster parents' submission led to a fundamentally unfair hearing. See Baker, 810 N.E.2d at 1042 (holding that the question is not whether the lawyer might have objected to this or that, but whether the lawyer's overall performance was so defective that the appellate court cannot say with confidence that the conditions leading to the removal of the children from parental care are unlikely to be remedied and that termination is in the child's best interest and concluding that attorney's representation did not result in a fundamentally unfair hearing).

IV.

The next issue is whether the trial court's order terminating Mother and Father's parental rights to C.N. is clearly erroneous. When reviewing a termination of parental rights, we will not reweigh the evidence or judge the credibility of the witnesses. Bester, 839 N.E.2d at 147. We will consider only the evidence and reasonable inferences therefrom that are most favorable to the judgment. Id. Here, the trial court made findings in granting the termination of Mother and Father's parental rights. When reviewing findings of fact and conclusions thereon entered in a case involving a

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that appellant failed to develop a cogent argument on this issue and has therefore waived it).

termination of parental rights, we apply a two-tiered standard of review. Id. First, we determine whether the evidence supports the findings. Id. Then, we determine whether the findings support the judgment. Id. The trial court's judgment will be set aside only if they are clearly erroneous. Id. "A judgment is clearly erroneous if the findings do not support the trial court's conclusions or the conclusions do not support the judgment." Id. (citation and internal quotations omitted).

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) provides that a petition to terminate a parent-child relationship involving a child in need of services 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 Ind. Code § 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.

The State must establish these allegations by clear and convincing evidence. Egly v. Blackford County Dep't of Pub. Welfare, 592 N.E.2d 1232, 1234 (Ind. 1992); Doe v. Daviess County Div. Of Children & Family Services, 669 N.E.2d 192, 194 (Ind. Ct. App. 1996), trans. denied. Mother and Father challenge the trial court's findings that: (A) the continuation of the parent-child relationship posed a threat to the well-being of C.N.; and (B) the conditions that resulted in C.N.'s removal will not be remedied.

Initially, we address Mother's arguments regarding whether the evidence supports two of the trial court's finding. First, Mother argues that the evidence does not support the following finding:

> In evidence that the Court attributes great weight in its decision, the mother gave a deposition in the criminal proceeding against the father on January 12, 2007, less than three (3) weeks before the hearing that was conducted in this cause on the Petition. During that deposition and in testimony elicited at the hearing on the Petition the mother admitted that her testimony had been that she didn't need the counseling, had voluntarily quit the counseling earlier, that she was waiting for the criminal charges against the father to end, that she didn't believe the father injured the child and that she and the father were still a couple. She further admitted that she would lie to protect the father.

Appellant's Appendix at 173.

Mother argues that the trial court erred when it considered her deposition because it was not offered into evidence or admitted. The SCDCS argues that Mother's deposition was not admitted into evidence but that Mother's testimony supports the trial court's finding.

The SCDCS's attorney asked Mother questions regarding her deposition that was taken by Father's attorney in the criminal case. Mother admitted that she had stated in her deposition that she would lie to protect Father and that she did not believe that Father hurt C.N. The cross examination of Mother also addressed Mother's need for counseling and relationship with Father. Mother's testimony supports the trial court's finding, and we cannot say that the trial court's finding is clearly erroneous. See Cochran v. Rodenbarger, 736 N.E.2d 1279, 1283 (Ind. Ct. App. 2000) (holding that the trial court's finding was not clearly erroneous because it was supported by father's testimony).

Mother also appears to argue that the evidence does not support the trial court's following finding:

> Testimony from witnesses for service providers concerning the mother's interaction with the child during visitation was that the visits appeared scripted and robotic. That while the mother would address the physical needs of the child there was little nurturing or bonding.

Appellant's Appendix at 173.

Mother argues that she made an effort to make the visits work well and that even though "[t]he DCS homemaker observed Mother kiss C.N. and tell him that she loved him about one-half of the time," "[i]t must be remembered that the visits were supervised

for only one-half of the time," and "[i]t is possible that Mother was emotional and nurturing with C.N. during the time that she was not being watched by outsiders." Appellant's Brief at 29. Mother also argues that the trial court's findings ignore the guardian ad litem's statement that bonding is a complex process. The record reveals that a caseworker with SCDCS observed no bonding between either Mother or Father and C.N. and that a homemaker with SCDCS observed "very little bonding" between Mother and C.N. Transcript at 114. Mother requests that we reweigh the evidence, which we cannot do.[5] Bester, 839 N.E.2d at 147.

A. Conditions Will Not Be Remedied

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). In addition, the court must look at the patterns of conduct in which the parent has engaged to determine if future changes are 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

[5] Mother relies on In re E.T., 808 N.E.2d 639, 644 (Ind. 2004), to argue that "[t]he subjective impressions and lay opinions of the service providers are not sufficient." Appellant's Brief at 30. In E.T., the court addressed inclusion of opinions in business records and held that "our courts have long recognized, at least in the context of medical or hospital records, that the expertise of the opinion giver must be established." 808 N.E.2d at 644. The court concluded that "We believe no less is required when the decision of the trial court to terminate 'one of the most valued relationships in our culture,' could very well rest on the opinion of a person who has never been placed under oath and whose expertise and opinion have never been subjected to the crucible of cross-examination." Id. (internal citation omitted). Here, unlike in E.T., the caseworker and the homemaker were placed under oath and available for cross-examination.

services. Id. The trial court must evaluate the parent's habitual patterns of conduct to determine the probability of future neglect or deprivation of the child. In re D.J., 755 N.E.2d 679, 684 (Ind. Ct. App. 2001), reh'g denied, trans. denied. "A termination of parental rights cannot be based entirely upon conditions which existed in the past, but which no longer exist." In re T.C., 630 N.E.2d 1368, 1374 (Ind. Ct. App. 1994), reh'g denied, trans. denied.

Mother argues that the trial court failed to consider the possibility that Father is innocent of the charges filed against him. Mother also argues that the trial court erred by discounting the reports and testimony of the guardian ad litems. Mother requests that we reweigh the evidence, which we cannot do. Bester, 839 N.E.2d at 147.

Father stated to Detective Wibbels that he had injured C.N. by jamming him into the bassinet too hard. Father also told Detective Wibbels that Mother was present in the home and that he informed Mother of the injuries and what had happened on the day the injuries occurred. Father also indicated that his actions were a result of an argument that he was having with Mother. Father stated that Mother chose to lie about the incident. When Father was arrested, Detective Wibbels told Mother that Father had admitted that he was responsible for C.N.'s injuries, and Mother responded by saying, "So." Transcript at 64.

Father did not make progress regarding anger management, mental health, and parenting issues. Father and Mother both used the criminal charge against Father as an excuse not to participate in services. Mother started counseling but was discharged for

denial and unwillingness to formulate treatment goals. Mother indicated to the SCDCS that her main concern was Father and not C.N. Mother also admitted that she had no safety plan to protect C.N. from Father and that nothing was different than it was on the date that C.N. was injured. Further, the following exchange occurred during direct examination of Shannon Deaton, a caseworker with SCDCS:

> Q Is there any indication today, or at least the last time you were in charge of this case, that [C.N.] would be any safer in the home today than he was when the injury occurred March 8, 2005?
>
> A No, because [Father] and [Mother] are still together even though they're not living in the same house.
>
> Q And, as far as you know, to this date they have neither one yet confronted the issue of what happened to the child or why it happened –
>
> A That's correct.
>
> Q -- if or preventing that happening again?
>
> A That's correct.

Transcript at 90-91.

We cannot say that the trial court's finding that there was a reasonable probability that the conditions that resulted in C.N.'s removal or placement outside the home would not be remedied is clearly erroneous. See, e.g., In re C.C., 788 N.E.2d 847, 854-855 (Ind. Ct. App. 2003) (holding that the trial court's finding that the conditions resulting in child's removal from father's care were not likely to be remedied because father failed to

complete the required services and failed to stay in contact with the caseworker), trans. denied.

B. Threat to the Well-Being of C.N.

Mother and Father also argue that the trial court erred by finding that the continuation of the parent-child relationship posed a threat to the well-being of C.N. Ind. Code § 31-35-2-4(b)(2)(B) required the SCDCS to demonstrate by clear and convincing evidence a reasonable probability that *either*: (1) 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* (2) the continuation of the parent-child relationship poses a threat to the well-being of C.N. The trial court specifically found that the conditions that resulted in C.N.'s removal will not be remedied, and there is sufficient evidence in the record to support the trial court's conclusion. See supra Part A. Thus, we need not determine whether the trial court's conclusion that the continuation of the parent-child relationship poses a threat to the well-being of C.N. is clearly erroneous. See, e.g., In re T.F., 743 N.E.2d 766, 774 (Ind. Ct. App. 2001), trans. denied.

For the foregoing reasons, we affirm the trial court's involuntary termination of Mother and Father's parental rights to C.N.

Affirmed.

RILEY, J. and FRIEDLANDER, J. concur