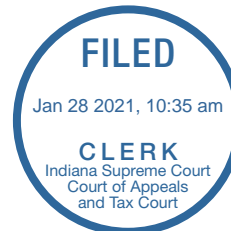


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE COURT OF APPEALS OF INDIANA

In Re: The Termination of the
Parent-Child Relationship of
B.O. (Minor Child);

T.D. (Mother);

Appellant-Respondent,

v.

The Indiana Department of
Child Services,

Appellee-Petitioner.

January 28, 2021

Court of Appeals Case No.
20A-JT-1426

Appeal from the Jasper Circuit
Court

The Honorable John D. Potter,
Judge

Trial Court Cause No.
37C01-1912-JT-201

Pyle, Judge.

Statement of the Case

[1] T.D. (“Mother”) appeals the termination of the parent-child relationship with her son, B.O. (“B.O.”), claiming that the Department of Child Services (“DCS”) failed to prove by clear and convincing evidence that: (1) there is a reasonable probability that the conditions that resulted in B.O.’s removal or the reasons for placement outside Mother’s home will not be remedied; (2) a continuation of the parent-child relationship poses a threat to B.O.’s well-being; and (3) termination of the parent-child relationship is in B.O.’s best interests. Concluding that there is sufficient evidence to support the trial court’s decision to terminate the parent-child relationship, we affirm the trial court’s judgment.¹

[2] We affirm.

Issue

Whether there is sufficient evidence to support the termination of the parent-child relationship.

Facts

[3] The facts most favorable to the termination reveal that Mother is the parent of B.O., who was born in May 2016. When B.O. was born, his meconium tested positive for marijuana. Mother admitted that she had smoked marijuana while she was pregnant with B.O. Mother and Father were also homeless. DCS

¹ The trial court previously terminated B.O.’s father’s (“Father”) parental rights in January 2018. Father is not a party to this appeal.

entered into an informal adjustment with both parents and assigned a family case manager from Family Focus (“the Family Focus Case Manager”) to assist B.O.’s parents with finding housing and to provide them with parenting education.

[4] During that time, Mother was living in a shelter with B.O., and Father was living with friends or relatives. When the Family Focus Case Manager visited Mother at the shelter, the case manager learned that Mother had been feeding one-month-old B.O. cereal. Mother had also frequently left B.O. with staff members and other families at the shelter so that she could visit Father. When B.O.’s tear duct became clogged and his eye became swollen shut, Mother took B.O. to the emergency room but did not pick up his prescription at the pharmacy. Also, while at the shelter, Mother was not working with the Family Focus Case Manager to find housing.

[5] DCS removed B.O. from both parents in June 2016 because they had failed to comply with the informal adjustment and had neglected B.O.’s medical needs. DCS placed five-week-old B.O. with a foster family in Rensselaer. Two days after B.O.’s removal, DCS filed a petition alleging that he was a child in need of services (“CHINS”).

[6] The trial court adjudicated B.O. to be a CHINS in August 2016 and entered a dispositional order in September 2016. The dispositional order required Mother to: (1) find employment within five days; (2) enroll in all DCS-recommended programs and participate in those programs; (3) keep all

appointments with service providers; (4) maintain suitable, safe, and stable housing; (5) maintain a stable source of income; (6) meet B.O.'s medical and mental health needs in a timely manner; and (7) attend all scheduled visits with B.O.

[7] One year later, in August 2017, Mother's compliance with the dispositional order had been sporadic. She had not completed services in a timely manner and had not maintained stable housing. In September 2017, DCS filed a petition to terminate the parental rights of both Mother and Father. Following a termination hearing in December 2017, the trial court terminated Father's parental relationship with B.O. in January 2018. However, the trial court did not terminate Mother's parental rights.

[8] At the January and May 2018 review hearings, the trial court found that Mother had begun complying with the dispositional order. Mother, who lived in Winamac, began unsupervised overnight visits with B.O. in her home in June 2018. At that time, two-year-old B.O., who had exhibited developmental delays, had been participating in weekly speech therapy and bi-weekly occupational therapy sessions for seven months. In August 2018, in anticipation of B.O. returning to Mother's home, the trial court ordered Mother to obtain daycare and occupational and speech therapists in her area for B.O.

[9] However, in October 2018, after Mother had given birth to her second child, the trial court found that Mother was no longer complying with the dispositional order in B.O.'s case. DCS filed a second petition to terminate

Mother's parental rights. Between October 2018 and February 2019, Mother participated in only two of the sixteen scheduled visits with B.O. In addition, Mother had failed to obtain a daycare provider and occupational and speech therapists in her area. In March 2019, DCS filed a motion to dismiss the termination petition to allow Mother to seek mental health services to determine whether possible mental health issues were the cause of Mother's failure to comply with the trial court's orders. Mother did not successfully complete the mental health services.

[10] Also in March 2019, the Court-Appointed Special Advocate ("the CASA") filed a request for an emergency hearing to modify Mother's visitation with B.O., who had begun to exhibit night terrors following unsupervised overnight visits with Mother. In addition, when B.O. saw his foster parents packing the overnight bag that he used for visits to Mother's house, B.O. cried, whimpered, tried to hide, and clung to his foster parents. During the ride to Mother's house, B.O. cried inconsolably and asked to return to his foster parents' home. When B.O. returned to his foster parents' home after overnight visits with Mother, B.O. smelled like smoke and as if he had not been bathed.

[11] The following month, in April 2019, the trial court ordered that the unsupervised overnight visits be modified to supervised therapeutic visits. Following a July 2019 case review hearing, the trial court found that Mother had not been complying with its orders. Specifically, Mother had not obtained a childcare provider or speech and occupational therapists in her area. In

addition, Mother had failed to attend almost half of her recently scheduled visits with B.O.

[12] Five months later, in December 2019, Mother still had not obtained a childcare provider or speech and occupational therapists in her area. In addition, her visits with B.O. continued to be inconsistent. Mother had also stopped meeting with a homebased therapist who had been assigned to Mother's case to help her locate speech and occupational therapists in her area. That same month, DCS filed a third petition to terminate Mother's parental relationship with B.O.

[13] At the June 2020 termination hearing, B.O.'s foster mother testified that then four-year-old B.O. was still seeing a speech therapist weekly and an occupational therapist bi-weekly. According to B.O.'s foster mother, B.O., who was still not potty trained, struggled to express himself and understand his emotions. For example, B.O. banged his head on the floor when he became frustrated. B.O. had weekly visits with a therapist to address these emotional and behavioral issues. The foster mother further testified that B.O. lacked the ability to realize when something was unsafe. For example, the foster mother specifically explained that, "[i]f he had to run across the road to get something that he was focused on and needed to get to, he would run right across that road." (Tr. Vol. 2 at 14). The foster mother also testified that the family gave B.O. "a heightened sense of attention" because of his special needs. (Tr. Vol. 2 at 16). B.O. also required a special diet because he had a sensitive stomach and a dairy allergy. In addition, the foster mother testified that B.O.'s pediatrician

had recommended that B.O. be evaluated for autism. The foster parents planned to adopt B.O. if Mother's parental rights were terminated.

[14] Also at the termination hearing, the DCS family case manager ("the DCS FCM") testified that, although the trial court had ordered Mother in 2018 to obtain a childcare provider and speech and occupational therapists for B.O., Mother had never complied with this order. When asked whether, based on her involvement in the case, the DCS FCM believed that there was a reasonable probability that the conditions that had resulted in B.O.'s removal would be remedied, the DCS FCM responded that she did not. The DCS FCM further testified that, based on Mother's inconsistent compliance with the trial court's orders, the DCS FCM was concerned that Mother would be unable to meet B.O.'s medical needs. At the time of the termination hearing, Mother had not attended a visitation with B.O. in five months.

[15] The CASA testified that she had been "pushing for permanency [for B.O.] . . . for years" and that it was "past time" for a termination of Mother's parental rights. (Tr. Vol. 2 at 66, 67). The CASA further testified that she was concerned that Mother would not be able to meet B.O.'s therapy and medical needs because DCS had "been trying to get [Mother] to set up occupational and speech therapy for a couple of years and ha[d] not received any proof of that." (Tr. Vol. 2 at 65).

[16] Mother testified that she lived in a two-bedroom house in Winamac with her fiancé and their one-year-old son. According to Mother, both she and her

fiancé were employed at Arby's. She further testified that she had contacted a clinic at the Winamac hospital that provided speech therapy. According to Mother, she had given this information to the DCS FCM. Mother also testified that she had been unable to find an occupational therapist in Winamac that worked with children. She explained that she would not be able to travel to another town for B.O.'s appointments because she worked and did not have reliable transportation. Mother later testified that if she had to take B.O. to another town for his appointments, she would find a way to do so. However, she testified that she preferred to take B.O. to appointments in Winamac.

[17] In July 2020, four years after B.O. had been adjudicated a CHINS, the trial court issued a detailed ten-page order terminating Mother's parental relationship with B.O. Mother now appeals the termination.

Decision

[18] Mother argues that there is insufficient evidence to support the termination of her parental rights. The Fourteenth Amendment to the United States Constitution protects the traditional right of parents to establish a home and raise their children. *In re K.T.K.*, 989 N.E.2d 1225, 1230 (Ind. 2013). However, the law provides for termination of that right when parents are unwilling or unable to meet their parental responsibilities. *In re Bester*, 839 N.E.2d 143, 147 (Ind. 2005). The purpose of terminating parental rights is not to punish the parents but to protect their children. *In re L.S.*, 717 N.E.2d 204, 208 (Ind. Ct. App. 1999), *trans. denied*.

[19] When reviewing the termination of parental rights, we will not weigh the evidence or judge the credibility of the witnesses. *K.T.K.*, 989 N.E.2d at 1229. Rather, we consider only the evidence and reasonable inferences that support the judgment. *Id.* Where a trial court has entered findings of fact and conclusions thereon, we will not set aside the trial court's findings or judgment unless clearly erroneous. *Id.* (citing Ind. Trial Rule 52(A)). In determining whether the court's decision to terminate the parent-child relationship is clearly erroneous, we review the trial court's judgment to determine whether the evidence clearly and convincingly supports the findings and the findings clearly and convincingly support the judgment. *Id.* at 1229-30.

[20] A petition to terminate parental rights must allege:

(B) that one (1) of the following is true:

(i) There is a reasonable probability that the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied.

(ii) There is a reasonable probability that the continuation of the parent-child relationship poses a threat to the well-being of the child.

(iii) The child has, on two (2) separate occasions, been adjudicated a child in need of services;

(C) that termination is in the best interests of the child; and

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

IND. CODE § 31-35-2-4(b)(2). DCS must prove the alleged circumstances by clear and convincing evidence. *K.T.K.*, 989 N.E.2d at 1231.

[21] Here, Mother argues that there is insufficient evidence to support the termination of her parental rights. Specifically, she contends that the evidence is insufficient to show that there is a reasonable probability that: (1) the conditions that resulted in B.O.'s removal or the reasons for placement outside the parent's home will not be remedied; and (2) a continuation of the parent-child relationship poses a threat to B.O.'s well-being.

[22] At the outset, we note that INDIANA CODE § 31-35-2-4(b)(2)(B) is written in the disjunctive. Therefore, DCS is required to establish by clear and convincing evidence only one of the three requirements of subsection (B). *In re A.K.*, 924 N.E.2d 212, 220 (Ind. Ct. App. 2010). We therefore discuss only whether there is a reasonable probability that the conditions that resulted in B.O.'s removal or the reasons for his placement outside Mother's home will not be remedied.

[23] In determining whether the conditions that resulted in a child's removal or placement outside the home will not be remedied, we engage in a two-step analysis. *In re E.M.*, 4 N.E.2d 636, 643 (Ind. 2014). We first identify the conditions that led to removal or placement outside the home and then determine whether there is a reasonable probability that those conditions will not be remedied. *Id.* The second step requires trial courts to judge a parent's fitness at the time of the termination proceeding, taking into consideration evidence of changed conditions and balancing any recent improvements against

habitual patterns of conduct to determine whether there is a substantial probability of future neglect or deprivation. *Id.* Habitual conduct may include parents' prior criminal history, drug and alcohol abuse, history of neglect, failure to provide support, and a lack of adequate housing and employment. *A.D.S. v. Ind. Dep't of Child Servs.*, 987 N.E.2d 1150, 1157 (Ind. Ct. App. 2013), *trans. denied*. The trial court may also consider services offered to the parent by DCS and the parent's response to those services as evidence of whether conditions will be remedied. *Id.* Requiring trial courts to give due regard to changed conditions does not preclude them from finding that a parent's past behavior is the best predictor of her future behavior. *E.M.*, 4 N.E.3d at 643.

[24] Here, our review of the evidence reveals that B.O. was removed from Mother because Mother failed to comply with the informal adjustment and neglected B.O.'s medical needs. Four years after B.O.'s removal, Mother had not fully complied with the CHINS dispositional order and the trial court's additional order that she find childcare and speech and occupational therapists for B.O. in her area. In addition, Mother had no realistic plan to address B.O.'s medical needs. Also at the time of the hearing, Mother had not visited B.O. in five months. This evidence supports the trial court's conclusion that there was a reasonable probability that the conditions that resulted in B.O.'s removal would not be remedied. We find no error.

[25] In a one-sentence argument that is unsupported by authority, Mother also argues that there is insufficient evidence that termination is in B.O.'s best interests. Mother has waived appellate review of this issue. *See Smith v. State*,

822 N.E.2d 193, 202-03 (Ind. Ct. App. 2005) (“Generally, a party waives any issue raised on appeal where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record.”), *trans. denied*. Waiver notwithstanding, we find no error.

[26] In determining whether termination of parental rights is in the best interests of a child, the trial court is required to look at the totality of the evidence. *In re D.D.*, 804 N.E.2d 258, 267 (Ind. Ct. App. 2004), *trans. denied*. In so doing, the court must subordinate the interests of the parents to those of the child involved. *Id.* Termination of the parent-child relationship is proper where the child’s emotional and physical development is threatened. *In re R.S.*, 774 N.E.2d 927, 930 (Ind. Ct. App. 2002), *trans. denied*. 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. *K.T.K.*, 989 N.E.2d at 1235. In addition, a child’s need for permanency is a central consideration in determining the child’s best interests. *In re G.Y.*, 904 N.E.2d 1257, 1265 (Ind. 2009).

[27] Here, while Mother struggled for four years to comply with the trial court’s orders, including finding the required speech and occupational therapists for her son, B.O. waited in foster care. When Mother chose to exercise her unsupervised overnight visits with B.O., and B.O. saw his foster parents packing the overnight bag that he used for those visits, B.O. cried, whimpered, tried to hide, and clung to his foster parents. During the ride to Mother’s house, B.O. cried inconsolably and asked to return to his foster parents’ home.

When B.O. returned to his foster parents' home after overnight visits with Mother, B.O. smelled like smoke and as if he had not been bathed. He also developed night terrors following overnight visits with Mother. This evidence supports the trial court's conclusion that termination is in B.O.'s best interests. There is sufficient evidence to support the termination of Mother's parental rights.²

[28] Affirmed.

Vaidik, J., and Brown, J., concur.

² Mother also raises the following one-paragraph issue:

The final issue is the denial of trial counsel's Motion to Vacate. On June 2, 2020, [Mother's counsel] filed a Motion to Vacate Public Defender Appointment, citing a conflict of interest, to wit, her representation of [one of the foster parents] in a different matter. (Appellant's Appx. Vol II, p. 34-35). The [trial] court found that no conflict existed. (Appellant's Appx. Vol. II, p. 36)[.] There is nothing in the record to reflect that this relationship would not result in a conflict of interest arising as to [Mother's counsel]'s representation of [Mother]. Further, [Mother] did not waive any such conflict.

(Mother's Br. 15).

However, Mother has waived appellate review of this issue for two reasons. First, Mother failed to raise this issue at trial. "It has long been the general rule in Indiana that an argument or issue presented for the first time on appeal is waived for the purposes of appellate review." *Ind. Bureau of Motor Vehicles v. Gurtner*, 27 N.E.3d 306, 311 (Ind. Ct. App. 2015). The reason for this general rule is exemplified in this case, where Mother's failure to raise the issue at trial has resulted in the lack of a record to review her claim. This lack of a record leads Mother to make a conclusory argument without citation to authority and portions of the record in support of her claim, which also results in waiver of this issue. *See Smith*, 822 N.E.2d at 202-03.