MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In the Matter of the Involuntary Termination of the Parent-Child Relationship of O.H. (Minor Child)

and

R.F. (Mother),

Appellant-Respondent,

v.

Indiana Department of Child Services,

Appellee-Petitioner

March 17, 2021

Court of Appeals Case No. 20A-JT-1847

Appeal from the Elkhart Circuit Court

The Honorable Michael A. Christofeno, Judge

The Honorable Deborah Domine, Magistrate

Trial Court Cause No. 20C01-1910-JT-83

Crone, Judge.

Case Summary

[1] R.F. (Mother) appeals the involuntary termination of her parental rights to her minor child O.H. (Child). She asserts that there is insufficient evidence to support the termination of her parental rights and that she received ineffective assistance of counsel during the termination proceedings. We disagree with both assertions and therefore affirm.

Facts and Procedural History

[2] The Indiana Department of Child Services (DCS) first became involved with Mother in St. Joseph County in 2013. DCS filed child-in-need-of-services (CHINS) petitions regarding Mother's six young children (Siblings) due to domestic violence and substance abuse in the home. Siblings were removed from Mother's care in October 2013 and reunited with Mother in June 2015 on a trial basis. Siblings were removed from Mother's care again in December 2015 after her youngest child scalded himself with hot bath water. During the assessment of the incident, which occurred in Elkhart County, Mother became "irrational" and specifically requested that her children "be taken from her care." Tr. Vol. 2 at 76. In the course of the CHINS cases involving Siblings, a psychological examination of Mother revealed that she was mentally unstable, at "high risk to physically abuse her children," and would be "unable to provide a safe and stable home due to [her] erratic, unstable, and unpredictable

functioning." DCS Ex. B at 16.[1] Mother currently does not have custody of any Siblings. Three Siblings were ultimately adjudicated CHINS and placed with their respective biological fathers, and those CHINS cases were closed. The other three Siblings have open CHINS cases in St. Joseph County and are currently placed with their biological father on a trial home visit. Mother is ordered to have no contact with those children.

[3] Child was born to Mother in Elkhart County on December 26, 2018. M.H. (Father)[2] is his biological father. At the time of his birth, Child tested positive for methamphetamine and marijuana. DCS determined that Mother lied about her living arrangements and that she had neither a place to live nor what she needed to take care of Child. DCS removed Child from Mother's care five days after his birth and filed a petition alleging that Child was a CHINS. On January 10, 2019, following a hearing, the trial court adjudicated Child a CHINS. Mother failed to appear at the hearing despite having notice. A dispositional hearing was subsequently held on February 4, 2019, during which the trial court entered a dispositional order requiring Mother's participation in various services, including substance abuse, mental health, and parenting services, with the permanency plan being reunification. Mother again failed to appear at the dispositional hearing despite having notice.

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[1] The examination could not be fully completed because Mother became aggressive. Specifically, Mother "became combative and assaultive with staff at the practice and she had to be escorted from the premises by law enforcement." *Id.*

[2] Father's parental rights were also terminated, but he does not participate in this appeal.

[4] DCS family case manager (FCM) Chastity Grant began working with Mother, and although Mother sporadically contacted FCM Grant, she continually lied about where she was living and failed to participate in required services. Mother attended only two supervised visits with Child, and her visits were ultimately suspended due to noncompliance. During the pendency of the CHINS proceedings, Mother was in and out of mental health facilities, was arrested multiple times, and spent a substantial amount of time incarcerated.[3]

[5] Both FCM Grant and the court appointed special advocate (CASA) went to the Elkhart County Jail and met with Mother for team meetings. Services offered in the jail were identified and discussed with Mother, but she failed to complete any services related to parenting offered in jail. During the periods she was released from incarceration, Mother continued to have positive drug screens, failed to address her mental illness, and failed to establish a stable living situation or support system.

[6] DCS filed a petition to terminate Mother's parental rights on October 16, 2019. A factfinding hearing was held on February 7, 2020, after which the trial court entered its findings of fact and conclusions thereon. In sum, the trial court concluded that: (1) there is a reasonable probability that the conditions that resulted in Child's removal and continued placement outside the home will not be remedied by Mother; (2) there is a reasonable probability that continuation

[3] Mother admits that she was incarcerated for all but 126 days during the thirteen-month period between the entry of the CHINS dispositional order and the order terminating her parental rights. Appellant's Br. at 12-13.

of the parent-child relationship between Mother and Child poses a threat to Child's well-being; (3) termination of the parent-child relationship between Mother and Child is in the Child's best interests; and (4) DCS has a satisfactory plan for Child's care and treatment, which is adoption. Accordingly, the trial court determined that DCS had proven the allegations of the petition to terminate by clear and convincing evidence and therefore terminated Mother's parental rights.

[7] Mother timely filed a notice of appeal that was later dismissed without prejudice so that she could first pursue an Indiana Trial Rule 60(B) motion to set aside with the trial court. Mother filed her motion to set aside the termination order on July 22, 2020. Following a hearing, the trial court entered a detailed order denying the motion and declining to set aside the termination of Mother's parental rights. This appeal of the trial court's original termination order ensued.[4]

Discussion and Decision

[8] "The purpose of terminating parental rights is not to punish the parents but, instead, to protect their children. 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." *In re A.P.*, 882 N.E.2d 799, 805 (Ind. Ct. App. 2008) (citation

[4] Mother does not mention or challenge the trial court's reasoning for denying her motion to set aside in her brief on appeal, so we likewise do not address it.

omitted). "[T]ermination is intended as a last resort, available only when all other reasonable efforts have failed." *Id*. A petition for the involuntary termination of parental rights must allege in pertinent part:

> (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 that termination is appropriate by a showing of clear and convincing evidence. *In re V.A.*, 51 N.E.3d 1140, 1144 (Ind. 2016). If the trial court finds that the allegations in a petition are true, the court shall terminate the parent-child relationship. Ind. Code § 31-35-2-8(a).

[9] "We have long had a highly deferential standard of review in cases involving the termination of parental rights." *C.A. v. Ind. Dep't of Child Servs.*, 15 N.E.3d 85, 92 (Ind. Ct. App. 2014).

> We neither reweigh evidence nor assess witness credibility. We consider only the evidence and reasonable inferences favorable to the trial court's judgment. Where the trial court enters findings of fact and conclusions thereon, we apply a two-tiered standard of review: we first determine whether the evidence supports the findings and then determine whether the findings support the judgment. In deference to the trial court's unique position to assess the evidence, we will set aside a judgment terminating a parent-child relationship only if it is clearly erroneous.

Id. at 92-93 (citations omitted). "A judgment is clearly erroneous if the findings do not support the trial court's conclusions or the conclusions do not support the judgment." *In re R.J.*, 829 N.E.2d 1032, 1035 (Ind. Ct. App. 2005).

Section 1 – Clear and convincing evidence supports the trial court's conclusion that there is a reasonable probability of unchanged conditions.

[10] Mother challenges the sufficiency of the evidence to support the termination of her parental rights.[5] Although unclear, she appears to challenge solely the trial court's conclusion that there is a reasonable probability that the conditions that resulted in Child's removal from and continued placement outside her care will not be remedied.[6] In determining whether there is a reasonable probability that

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[5] Mother does not challenge any of the trial court's findings of fact. Thus, those findings stand as proven. *See T.B. v. Ind. Dep't of Child Servs.*, 971 N.E.2d 104, 110 (Ind. Ct. App. 2012) ("Unchallenged findings stand as proven, and we simply determine whether the unchallenged findings are sufficient to support the judgment."), *trans. denied*.

[6] Because Indiana Code Section 31-35-2-4(b)(2)(B) is written in the disjunctive, to properly effectuate the termination of parental rights, the trial court need only find that one of the three requirements of that subsection has been established by clear and convincing evidence. *A.D.S. v. Ind. Dep't of Child Servs.*, 987 N.E.2d 1150, 1156 (Ind. Ct. App. 2013), *trans. denied*. Accordingly, we address only subsection 4(b)(2)(B)(ii).

the conditions that led to Child's removal and continued placement outside the home will not be remedied, we engage in a two-step analysis. *K.T.K. v. Ind. Dep't of Child Servs.*, 989 N.E.2d 1225, 1231 (Ind. 2013). First, "we must ascertain what conditions led to [his] placement and retention in foster care." *Id*. Second, "we 'determine whether there is a reasonable probability that those conditions will not be remedied.'" *Id*. (quoting *In re I.A.*, 934 N.E.2d 1132, 1134 (Ind. 2010)). In the second step, the trial court must judge a parent's fitness at the time of the termination proceeding, taking into consideration evidence of changed conditions, and balancing a parent's recent improvements against "habitual pattern[s] of conduct to determine whether there is a substantial probability of future neglect or deprivation." *In re E.M.*, 4 N.E.3d 636, 643 (Ind. 2014) (quoting *K.T.K.*, 989 N.E.2d at 1231). "A pattern of unwillingness to deal with parenting problems and to cooperate with those providing social services, in conjunction with unchanged conditions, support a finding that there exists no reasonable probability that the conditions will change." *Lang v. Starke Cnty. Office of Family & Children*, 861 N.E.2d 366, 372 (Ind. Ct. App. 2007) (citation omitted), *trans. denied*. The evidence presented by DCS "need not rule out all possibilities of change; rather, DCS need establish only that there is a reasonable probability that the parent's behavior will not change." *In re Kay L.*, 867 N.E.2d 236, 242 (Ind. Ct. App. 2007).

[11] Here, Child was originally removed from Mother's care just days following his birth after his umbilical cord tested positive for methamphetamine and marijuana. Mother also had no place to live and no means to take care of Child.

The record reveals that nothing has changed since that time. Mother still has positive drug screens, no stable place to live, and no support system. In sum, Mother has made no progress in improving her situation since the day Child was taken into protective custody. Sadly, in the thirteen months since his removal, Mother has visited with Child only twice and has formed no bond with him.

[12] Mother admits that the circumstances that led to Child's removal and retention in foster care remain largely unchanged, but she blames her lack of progress on her many incarcerations and argues that she "did not have adequate time to engage and complete outside services" and thus DCS failed to show that she would not be "able to remedy her conditions or situation once released from incarceration." Appellant's Br. at 11.[7] First, we would be remiss if we did not emphasize that Mother has repeatedly chosen criminal behavior over the opportunity to better her situation and to form a relationship with Child. Moreover, DCS presented ample evidence that it has offered services to Mother both in the community and while she was incarcerated to help her improve her parenting abilities. Mother has failed to participate in and/or benefit from any of those services, and consequently her ability to care for Child has never improved. From 2013 to the present, Mother has shown a clear pattern of inability or unwillingness to adequately deal with parenting problems and to fully cooperate with those providing social services. Clear and convincing

[7] At the time of the termination hearing, Mother had been released from incarceration and was serving home detention.

evidence of her recent failures, in conjunction with unchanged conditions, supports a finding that there exists no reasonable probability that the conditions that resulted in Child's removal from and continued placement outside of Mother's care will change.[8]

Section 2 – Mother has not demonstrated that she received ineffective assistance of counsel.

[13] Mother maintains that she did not receive effective assistance of counsel during the termination proceedings. Specifically, she complains that her counsel met with her on only a few brief occasions and failed to call certain witnesses. Our supreme court recently reiterated the method for assessing ineffective-assistance-of-counsel claims in termination proceedings as follows:

> 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. 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.

[8] Mother does not challenge the sufficiency of the evidence supporting the trial court's conclusions that termination of her parental rights is in Child's best interests or that DCS has a satisfactory plan for the care and treatment of Child.

A.M. v. State, 134 N.E.3d 361, 367-68 (Ind. 2019) (citations omitted), *cert. denied*, 141 S. Ct. 330 (2020). Indeed, "[b]ecause of the doctrine of Parens Patriae and the need to focus on the best interest of the child, the trial judge, who is the fact finder, is required to be an attentive and involved participant in the process." *Id*. (citation omitted). Since termination proceedings require "judicial involvement that is much more intensive" than in most criminal cases, "the role of the lawyer, while important, does not carry the deleterious impact of ineffectiveness that may occur in criminal proceedings." *Id*. (citation omitted).

[14] After a thorough review of the record before us, we conclude that Mother received a fundamentally fair termination hearing, and accordingly, she has failed to demonstrate that she received ineffective assistance. Mother testified extensively during the proceedings, and her counsel attempted repeatedly to elicit testimony from both Mother and other witnesses that was favorable to Mother. In short, we cannot say that Mother's counsel underperformed, much less that her overall performance was so defective as to cause us to lose confidence in the trial court's ultimate conclusions that the conditions leading to the removal of Child from Mother's care are unlikely to be remedied and that termination is in Child's best interests.[9] The trial court's termination order is affirmed.

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[9] Although Mother claims that certain uncalled witnesses would have testified that she participated in and made progress in offered services, this position is wholly inconsistent with her current claim that her incarceration prevented her from participating in or making progress in services. Nevertheless, Mother admitted during the termination proceedings that she is, in fact, not "in a better place" regarding her

[15] Affirmed.

Najam, J., and Riley, J., concur.

parenting abilities than she was at the time of Child's removal. Tr. Vol. 2 at 161. In other words, Mother has not demonstrated that counsel's alleged failure to call certain witnesses changed the outcome of this case.