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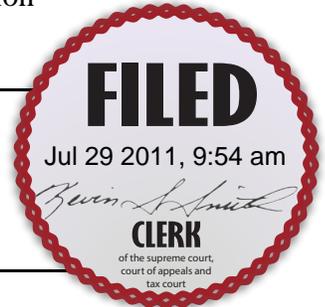
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**IN THE
COURT OF APPEALS OF INDIANA**



TERMINATION OF THE PARENT-CHILD)
RELATIONSHIP OF S.M., Minor Child)
)
M.M.,)
Appellant-Respondent,)
)
vs.)
)
INDIANA DEPARTMENT OF)
CHILD SERVICES,)
Appellee-Petitioner.)

No. 20A03-1101-JT-3

APPEAL FROM THE ELKHART CIRCUIT COURT
JUVENILE DIVISION

The Honorable Terry C. Shewmaker, Judge
The Honorable Deborah Domine, Magistrate
Cause No. 20C01-1009-JT-59

July 29, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Respondent, M.M. (Mother), appeals the trial court's Order terminating her parental rights to her minor child, S.M.

We affirm.

ISSUE

Mother raises one issue for our review, which we restate as follows: Whether the evidence was sufficient to support the termination of her parental rights.

FACTS AND PROCEDURAL HISTORY

Mother is the biological parent of S.M., born on April 16, 2006. On April 27, 2009, the Indiana Department of Child Services, Division of Elkhart County, (DCS), received a report that Mother had failed a drug screen given by her probation officer when she tested positive for methamphetamine, amphetamines, and marijuana. Mother had previously been arrested on April 8, 2009, for possession of marijuana. The DCS received another report on May 21, 2009, alleging that there was a methamphetamine lab in the home. Based on this allegation, Elkhart County Sheriff's Department Officer Jeremy Shotts (Officer Shotts) conducted a welfare check at the home and reported to DCS that the home had no electricity; the food in the refrigerator was spoiled; dishes were piled in the sink; there was a cat litter box in the kitchen with feces inside and outside of the box; the furniture and carpets were dirty; and S.M. had been sleeping on a loveseat in the living room that was "dirty and torn up." (Transcript p. 5). Officer Shotts also noted that "two men were in the home; one had a warrant and was arrested by the police. A 15-year-old boy had been passed out in the living

room and ran once police arrived. Reportedly, [Mother] had been overheard asking if one of the men had taken the product with him.” (Tr. p. 5).

As a result of Officer Shotts’ observations, DCS removed S.M. from the care of Mother into foster care. On May 26, 2009, an emergency hearing was held and then, on June 2, 2009, Mother admitted the allegations and S.M. was adjudicated as a child in need of services (CHINS). On July 2, 2009, a dispositional hearing was held. The trial court adopted the DCS’s case plan, stating, in relevant part, that S.M. remain in foster care, Mother have supervised visitation which would eventually move to unsupervised visitation at the discretion of the DCS and the court-appointed special advocate (CASA), Mother complete an addictions assessment and complete drug treatment if recommended by the assessment, successfully pass random drug screens, complete a psycho-parenting assessment and follow recommendations, and maintain stable housing.

During the course of DCS’s involvement, S.M. remained in foster care. Mother initially participated in supervised visitations with S.M. until she was incarcerated in July 2009 on charges of dealing and manufacturing methamphetamine. Mother was sentenced to fourteen years in the Indiana Department of Correction with six years suspended to probation for an executed sentence of eight years. Prior to her incarceration, though, Mother failed to complete the psycho-parenting assessment and three of her drug screens came back positive. Mother is scheduled for release in 2013.

On September 3, 2010, DCS filed a petition to terminate Mother’s parental rights. The trial court conducted a fact-finding hearing on December 13, 2010. The next day, the

trial court made findings of fact and conclusions thereon. Relying on these findings and conclusions, the trial court entered an Order terminating Mother's parental rights.

Mother now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION¹

I. *Standard of Review*

In reviewing termination proceedings on appeal, this court will not reweigh the evidence nor assess the credibility of the witnesses. *In re Involuntary Termination of Parental Rights of S.P.H.*, 806 N.E.2d 874, 879 (Ind. Ct. App. 2004). We consider only the evidence that supports the trial court's decision and reasonable inferences drawn therefrom. *Id.* Where, as here, the trial court enters findings of fact and conclusions thereon in its termination of parental rights, our standard of review is two-tiered. *Id.* First, we determine whether the evidence supports the findings, and second, whether the findings support the conclusions of law. *Id.*

In deference to the trial court's unique position to assess the evidence, we set aside the trial court's findings and judgment terminating a parent-child relationship only if they are clearly erroneous. *Id.* A finding of fact is clearly erroneous when there are no facts or inferences drawn therefrom to support it. *Id.* A judgment is clearly erroneous only if the

¹ As an initial matter, Mother argues that the State did not submit into evidence the termination petition, did not present testimony at the evidentiary hearing regarding the petition, or request that the trial court take judicial notice of the petition, and thus, failed to prove by clear and convincing evidence that Mother's parental rights should be terminated. We find this argument to be nonsensical. A petition for termination constitutes a civil pleading. *Keen v. Marion Cnty. Dep't of Public Welfare*, 523 N.E.2d 452, 455 (Ind. Ct. App. 1988). Thus, the termination pleading is an inherent part of the record which is properly considered before the trial court.

conclusions of law drawn by the trial court are not supported by its findings of fact or the conclusions of law do not support the judgment. *Id.* We review conclusions of law *de novo*. *Bowyer v. Ind. Dep't of Natural Res.*, 882 N.E.2d 745, 761 (Ind. Ct. App. 2008).

II. Termination

The Fourteenth Amendment of the United States Constitution protects the traditional right of parents to establish a home and raise their children. *Bester v. Lake Cnty. Office of Family and Children*, 839 N.E.2d 143, 147 (Ind. 2005). Our supreme court has acknowledged that the parent-child relationship is “one of the most valued relationships in our culture.” *Id.* (quoting *Neal v. DeKalb County Div. of Family and Children*, 796 N.E.2d 280, 285 (Ind. 2003)). That being said, parental interests are not absolute and must be subordinated to the child’s interest in determining the proper disposition of a petition to terminate parental rights. *Id.*

To effect the involuntary termination of a parent-child relationship, the State must present clear and convincing evidence establishing 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 I.C. § 31-34-21-5.6 that reasonable efforts for family preservation or reunification are not required, including a description of the court’s finding, the date of the finding, and the manner in which the finding was made.

(iii) The child has been removed from the parent and had been under the supervision of a county officer of family and children for at least fifteen (15) months of the most recent twenty-two (22) months, beginning with the date the child is removed from the home as a result

of the child being alleged to be a child in need of services or a delinquent child;

(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.

I.C. § 31-35-2-4(b)(2).

Mother argues that the DCS failed to prove by clear and convincing evidence that the conditions that resulted in S.M.'s removal or the reasons for placement outside the home will not be remedied. She also argues that "[t]he best interests of the child were not shown because mother's release from incarceration is imminent and because the age of her daughter was less than five at the time of the evidentiary hearing, it cannot be concluded that continued foster care until reunification would negatively impact the child." (Appellant's Br. p. 5).

A. Remedy of Conditions

In determining whether a reasonable probability exists that the conditions justifying a child's removal and continued placement outside the home will not 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 patterns of conduct must also be evaluated to determine the probability of future negative behavior. *Id.* The trial court may properly consider the services offered by DCS, and the parent's response to those services, as evidence of whether the conditions that resulted in the child's removal from the home will or will not be remedied. *R.W., Sr. v. Marion Cnty. Dep't of Child Serv.*, 892 N.E.2d 239, 248 (Ind. Ct. App. 2008). The DCS need not rule out all possibilities of change; rather, it must establish that there is a reasonable possibility that the parent's behavior will not change. *In re B.J.*, 879 N.E.2d 7, 18-19 (Ind. Ct. App. 2008), *trans. denied.*

Here, in concluding that there is a reasonable probability that the conditions resulting in S.M.'s removal and continued placement outside Mother's care will not be remedied, the trial court made the following findings and conclusions, in relevant part:

c. At the time of the termination trial in this case, [Mother] testified that she is presently still unable to care for her child. She is currently incarcerated on a conviction for Dealing in Methamphetamine, a Class B Felony. The mother testified that her earliest possible release from prison is an unspecified date in 2013; stated differently, her earliest possible release date is two years from now. The DCS case manager testified that [Mother] made no arrangements to have someone care for her daughter while she is incarcerated; there is no relative able to care for the child. []

d. [Mother] is not only incarcerated at this time, she is unemployed, she is without a home and she acknowledged in her testimony that it will take six to eight months for her to find a home after she is released from incarceration.

e. The DCS case manager Boyer described that if the child is ever to return to [Mother's] care, a stable home is necessary to insure the safety of the

child. Also critical to the safety of the child, she said, is [Mother's] participation in services ordered through this case.

g. Here, [Mother] acknowledged that she, herself, is in need of services. But because of her incarceration, and because of overcrowding at the Indiana Women's Prison, she is presently not involved in services of any kind.

i. Applying relevant case law, no matter what the reason [Mother] has not participated in services to date, the fact that she has not participated[] supports a finding that there is a reasonable probability that the conditions resulting in removal will not be remedied. []

(Appellant's App. p. 8).

Our review of the record reveals that this finding is supported by the evidence that the conditions will not be remedied because Mother has not demonstrated that she can provide proper care and supervision that S.M. needs once she is released from incarceration. S.M. was initially removed from the home because DCS received a report that there was a methamphetamine lab in the home. After the report, Officer Shotts conducted a welfare check and found that the home was in no condition for S.M. to live in. Specifically, there was no electricity in the home; the food in the refrigerator was spoiled; and the home was unsanitary with dirty dishes piled in the sink and cat feces inside and outside the cat litter box in the kitchen. Because of these findings, S.M. was removed from the home.

After S.M.'s removal and before Mother's incarceration, Mother failed to participate in court-ordered services. Pursuant to the trial court's case plan, Mother agreed to remain drug-free. However, Mother tested positive for methamphetamine during all three drug

screens. Additionally, Mother did not participate in the court ordered addictions assessment or a parenting assessment because she was incarcerated before the assessments could be scheduled.

At the time of the termination trial, Mother testified that she is unable to care for S.M. because she is currently incarcerated and her earliest possible release from prison is in 2013. As for when she is released, Mother testified that she does not have a prospective job or stable housing in place. Instead, Mother testified that upon her release she plans on living with her boyfriend until she is able to support herself and live on her own, which she stated could take at least six to eight months.

Mother has also been unable to participate in services while incarcerated at DOC. She testified that she started taking parenting classes in the county jail prior to being transferred to the DOC, but did not complete the classes due to her transfer. Additionally, she testified that she is unsure as to whether she would be able to pursue any form of addiction treatment or parenting classes in the future due to overcrowding in the prison.

Based on Mother's own testimony, it is clear that when she is released from prison she will likely be returning to the same conditions that led to S.M.'s removal. As such, the DCS has demonstrated by clear and convincing evidence that the conditions that resulted in S.M.'s removal will not be remedied.

B. Best Interests

Mother also contends that it is not in S.M.'s best interest to sever her relationship with Mother. In determining what is in the best interests of a child, the trial court is required to

look beyond the factors identified by the DCS and look to the totality of the evidence. *McBride v. Monroe Cnty. Office of Family & Children*, 798 N.E.2d 185, 203 (Ind. Ct. App. 2003). In so doing, the trial court must subordinate the interests of the parent to those of the child. *Id.* The court need not wait until a child is irreversibly harmed before terminating the parent-child relationship. *Id.* Moreover, we have previously held that the recommendations of both the case manager and child advocate to terminate parental rights, in addition to evidence that the conditions resulting in removal will not be remedied, is sufficient to show by clear and convincing evidence that termination is in the child's best interests. *In re M.M.*, 733 N.E.2d 6, 13 (Ind. Ct. App. 2000). A parent's historical inability to provide a suitable environment along with the parent's current inability to do the same supports a finding that termination of parental rights is in the best interest of the children. *Lang v. Starke Cnty. Office of Family and Children*, 861 N.E.2d 366, 373 (Ind. Ct. App. 2007).

Mother directs our attention to *In re G.Y.*, 904 N.E.2d 1257, 1265 (Ind. 2009), *reh'g denied*, where our supreme court held that involuntary termination of the parental rights of an incarcerated parent was not warranted.² In that case, G.Y.'s mother, who was incarcerated for an executed time of eight years due to offenses committed before the child's conception, appealed the termination of her parental rights, arguing that the State did not present clear and convincing evidence that termination of her parent-child relationship with G.Y. was in the child's best interests. *Id.* at 1261. Our supreme court

² Mother cites this case as *R.Y. v. Ind. Dep't of Child Servs.*, 904 N.E.2d 1257 (Ind. 2009). However, the correct citation is *In re G.Y.*, 904 N.E.2d 1257 (Ind. 2009), *reh'g denied*.

agreed, observing that G.Y.'s mother had not committed any criminal offenses during G.Y.'s lifetime and, while incarcerated, had undertaken numerous steps to secure an earlier release date and provide for G.Y.'s care. *Id.* at 1263. Mother had completed a drug rehabilitation program and a parenting class, engaged in individualized drug counseling, was actively participating in an "inmate to work mate program," was pursuing an associate's degree, had secured a full-time job, and had arranged alternative sources of post-release housing, either through family members or a specific program. *Id.* Furthermore, the court noted that while incarcerated, mother maintained a consistent positive relationship with G.Y. through the jail's visitation program and by sending him cards, pictures and letters. *Id.* at 1264. Most importantly, our supreme court noted that while permanency is a central consideration in determining the best interests of a child, G.Y.'s mother's release from prison was imminent. *Id.*

Here, the facts are distinguishable from *G.Y.* First, unlike in *G.Y.*, Mother's drug use and eventual incarceration due to methamphetamine occurred after S.M.'s birth. In the two months before her arrest and incarceration, Mother unsuccessfully participated in ordered services by failing drug screens and failing to properly care for S.M. Second, unlike the mother in *G.Y.*, who had planned living arrangements and job after her release, Mother has made no provisions for living arrangements or a job once she is released from prison. Also, Mother did not make arrangements to have someone care for S.M. while she was incarcerated nor has she continued visitation with S.M. after her incarceration. Finally, Mother's release date is not only more than a year away, but she also testified that she will

need six to eight months after her release before she is able to provide a stable home environment for S.M. Despite her argument that when she moves to a new correctional facility that she will have the opportunity to do “double time cut,” S.M. has waited long enough and cannot stay in the system forever. (Tr. p. 126).

In addition to the differences between *G.Y.* and the present case, at the time of S.M.’s removal, S.M. was suffering from emotional and physical maladies. S.M.’s therapist testified that she was acting “very aggressively” towards others. (Transcript p. 86). Furthermore, S.M.’s foster mother testified that S.M. had severe dental problems to the point that “every tooth was bad[,]” which was likely attributed to S.M.’s exposure to methamphetamine and malnutrition. (Tr. p. 97).

At the termination hearing, both S.M.’s therapist and foster mother testified that after receiving significant dental care, S.M.’s behavior dramatically changed. Additionally, S.M. no longer needs therapy, as she has worked through her emotional issues. Both the family case manager and the CASA testified that because of S.M.’s improvement, termination of Mother’s parental rights was in S.M.’s best interest. Based on the totality of the evidence, including how well S.M. is doing in her current placement, the fact that Mother is unable to provide S.M. with a safe and stable home environment after her release, the testimonies of

the CASA, family case manager, therapist and foster mother, we conclude that termination of Mother's parental rights is in S.M.'s best interest.

CONCLUSION

Based on the foregoing, we conclude that the evidence was sufficient to support the termination of Mother's parental rights.

Affirmed.

NAJAM, J., and MAY, J., concur.