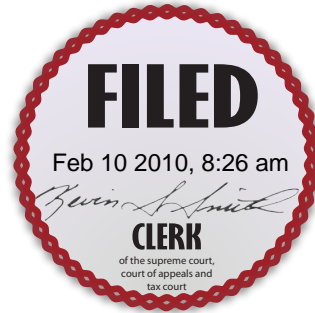


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**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF: The Involuntary)
Termination of the Parent-Child Relationship of)
The Minor Children, N.M., A.M., and R.S.,)
Mother, K.S.,)

Appellant,)

vs.)

HAMILTON COUNTY DEPARTMENT OF)
CHILD SERVICES,)

Appellee.)

No. 29A02-0907-JV-616

APPEAL FROM THE HAMILTON CIRCUIT COURT
The Honorable Paul A. Felix, Judge
Cause Nos. 29C01-0806-JT-1012, 1013, and 1014

February 10, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

K.S. (“Mother”) appeals the termination of her parental rights as to her minor children, N.M., A.M., and R.S. (collectively, the “Children”).

We affirm.

ISSUES

1. Whether there was clear and convincing evidence to support the termination of Mother’s parental rights.
2. Whether the trial court violated Mother’s due process rights.

FACTS

N.M. was born on November 25, 2003; A.M. was born on February 7, 2005; and R.S. was born on November 27, 2006. On March 19, 2007, the Hamilton County Department of Child Services (“DCS”) filed petitions alleging the Children to be in need of services (“CHINS”). According to the petitions, DCS received a report on March 15, 2007, that the Children had been left alone in Mother’s apartment. N.M. and A.M. were found locked in their bedroom, which contained “broken metal, broken glass, assorted wood pieces, and other sharp . . . objects all around them.” (DCS’s App. 1, 3, 5). Feces covered the walls. R.S. “was found lying unattended on the couch and had a blanket over his face.” *Id.* He was soaking wet with sweat and appeared to be having trouble breathing.” *Id.* Upon investigation, a DCS case manager found the apartment as

reported. She also found “junk and garbage all over the kitchen.” *Id.* Police officers discovered marijuana in one of the rooms. DCS immediately removed the Children. Following a detention hearing on March 19, 2007, the trial court ordered that the Children remain in the custody of DCS and appointed a guardian ad litem (“GAL”).

As a result of the DCS investigation, the State charged Mother with three counts of class D felony neglect of a dependent; and two counts of class D felony criminal confinement. On May 17, 2007, the trial court conditionally released Mother on pre-trial provided that she was to have no contact with the Children; attend parenting classes and counseling; and obtain employment. On August 6, 2007, the trial court modified its order, allowing Mother to have physical contact with the Children, “subject to Court’s Order in the CHINS proceeding.” *Id.* at 66.

On August 1, 2007, the trial court held a hearing on the CHINS petitions. Mother appeared in person and with counsel. The trial court found the Children to be CHINS. The trial court therefore ordered Mother to submit to parenting and substance abuse assessments. The trial court also ordered substance abuse counseling for Mother. Accordingly, DCS referred Mother to Family Works, Inc. for services. Following a dispositional hearing on October 15, 2007, however, the trial court found that Mother had not commenced services.

Following a periodic case review on December 6, 2007, the trial court found that Mother had exercised visitation with the Children and cooperated with DCS. The trial court ordered additional services for Mother, as determined by DCS.

On December 7, 2007, Mother pleaded guilty to one count of class D felony neglect of a dependent. On January 4, 2008, the trial court sentenced Mother to three years, with one year to be served on probation.¹

Following a hearing on March 10, 2008, during which Mother was present and represented by counsel, the trial court ordered Mother to resume services upon her release from prison. The Children's GAL recommended that upon her release, Mother have only supervised visitation with the Children, pending the completion of a parenting assessment.

On June 6, 2008, DCS filed petitions for the involuntary termination of Mother's parental rights. Following a hearing on September 4, 2008, during which Mother was present and represented by counsel, the trial court again ordered Mother to submit to a parenting assessment upon her release from custody "to determine the type and level of any services necessary to pursue reunification" *Id.* at 34, 36, 38. The trial court also ordered Mother to "participate, complete, and follow any service provider recommendations once she is released from prison." *Id.* at 35, 37, 39.

On September 22, 2008, the trial court held an initial hearing on DCS's petitions for the involuntary termination of Mother's parental rights. Mother denied the allegations in support of the petitions.

The Department of Correction released Mother on October 30, 2008. The trial court held a review hearing on December 1, 2008; Mother, however, did not appear. Her

¹ Mother gave birth to a fourth child while incarcerated. That child is not involved in the instant termination proceeding.

appointed counsel informed the trial court that he had had no contact with Mother since her release. The trial court found that Mother also had failed to contact DCS or the Children's GAL, "making it impossible to schedule a parenting assessment per prior court orders; [and] has failed to initiate services or initiate a plan of consistent visitation with the" Children. *Id.* at 40, 43, 46. The trial court ordered that further services were not required "to pursue reunification, as the approved permanency plan is for termination and adoption"; that Mother shall provide DCS and the Children's GAL with her contact information; and that Mother's visits with the Children be supervised by their maternal grandmother. *Id.* at 41, 44, 47.

On December 8, 2008, Mother met with Pamela Ross-Taylor, the family case manager. Mother informed Ross-Taylor that she wished to terminate her parental rights. In addition to signing consents to terminate her parental rights as to the Children, she also signed an advisement of rights, acknowledging that she understood her "constitutional and other legal rights and the consequences of [her] actions prior to giving [her] written consent to the termination of [her] parent-child relationship[s]" (Mother's App. 22, 82, 136).

The trial court commenced a fact-finding hearing on the petitions for involuntary termination of Mother's parental rights on December 15, 2008. Although Mother's counsel appeared for the hearing, Mother did not. The trial court heard testimony from DCS regarding the consent forms signed by Mother. Specifically, Ross-Taylor testified that Mother telephoned her on December 9, 2008, "and asked if the papers [to consent to

voluntary termination of her parental rights] could be drawn up” (Tr. 21). When Ross-Taylor met with Mother later that day, she “asked [Mother] multiple times if this is exactly what she wanted to do[.]” *Id.* According to Ross-Taylor, Mother said that “this is what she wanted to do and this is in the best interests of her children.” *Id.* Ross-Taylor suggested that Mother speak with her attorney first, but Mother reiterated that “this was what she wanted to do.” *Id.* at 22. Ross-Taylor testified that Mother “wasn’t upset or anything” and “was pretty normal” *Id.* She also testified that she informed Mother that “she still needed to come to court” for the fact-finding hearing. *Id.* DCS filed the signed consent forms with the trial court on December 9, 2008.

The trial court refused to accept the consent forms “without the signature of counsel” *Id.* at 23. The trial court therefore continued the hearing. On February 2, 2009, the trial court reconvened the fact-finding hearing. After hearing limited testimony, the trial court again continued the hearing to May 4, 2009.

On February 4, 2009, the State filed a notice of probation violation, alleging that Mother had violated her probation in a case arising out of a conviction for theft in Marion County. The notice alleged, among other things, that Mother had failed to submit to drug tests on December 12, 2008; December 23, 2008, and January 5, 2009; reported for a drug test on November 24, 2008, but failed to submit a sample; failed to maintain employment; and failed to report to her probation officer. The State filed a second notice of probation violation under the same cause number on April 8, 2009, alleging that

Mother had failed to submit to drug tests on three separate occasions in March of 2009; failed to maintain employment; and failed to perform community service.

The first notice of probation violation resulted in Mother being remanded into custody from February 23, 2009, until March 6, 2009. The second notice of probation violation again resulted in her being remanded into custody; as of May 4, 2009, Mother remained in custody, awaiting a hearing.

The trial court reconvened the fact-finding hearing on the petitions to terminate Mother's parental rights on May 4, 2009. Over Mother's objection, Ross-Taylor again testified regarding the events of December 9, 2008, when Mother signed the consents to terminate her parental rights.

Ross-Taylor also testified that Mother had failed to complete the court-ordered parenting assessment; according to Ross-Taylor, DCS required a parenting assessment to determine "if any further services should be started." *Id.* at 58. She further testified that Mother had not provided proof that she completed parenting classes while incarcerated for the conviction for neglect of a dependent.

Ross-Taylor further testified that DCS placed N.M. and A.M. with T.S., their maternal grandmother, in May of 2007; DCS placed R.S. with T.S. in November of 2007. She testified that T.S.'s home "is very appropriate" for the Children; that T.S.'s relationship with the Children is "[l]oving and caring"; and that the Children are "very attached" to T.S. *Id.* at 79. She opined that termination of Mother's parental rights would be in the Children's best interests.

Michael Brown testified that he was appointed as the Children's GAL on March 19, 2007. He testified that he had not observed Mother with the Children due to her being incarcerated and because he was not able to contact Mother due to her "chang[ing] residences quite frequently." *Id.* 140. He testified that Mother never initiated contact with him. According to Brown, he believed termination of Mother's parental rights to be in the Children's best interests given Mother's multiple incarcerations and lack of stability in maintaining a residence and employment. He further testified that T.S.'s interactions with the Children were "[v]ery positive" and that the Children were "very well cared for and loved in their grandmother's house." *Id.* at 139.

Carol Adkisson, a home-based therapist with Family Works, Inc., testified that on July 16, 2007, she received a referral to provide services for Mother, including parenting education, parenting skills, and relationship building. She testified that she met with Mother on July 19, 2007. She, however, did not meet with Mother again until November of 2007 because she could not contact Mother. She testified that Mother moved several times and failed to provide contact information. Once Mother provided DCS with her contact information in November of 2007, Adkisson resumed services. She testified that she met with Mother six times during the time period from November 15, 2007, through January 3, 2008, just prior to Mother's incarceration. In November of 2007, Adkisson scheduled a visit with Mother and the Children in order to observe Mother's interactions with the Children. Adkisson cancelled, however, because the visit coincided with a

birthday party, and T.S. was uncomfortable having a stranger in the home during a family celebration.

Mother testified that while incarcerated on the conviction for neglect of a dependent, she took three parenting classes and a prenatal class. She, however, did not provide a certificate of completion for admission into evidence. According to Mother, she failed to report for her drug tests because she could not “afford to put minutes on [her] cell phone” *Id.* at 178. Thus, she “couldn’t call the drug test line” *Id.* Mother also testified that her driver’s license was suspended and that she had not secured employment.

T.S. testified that Mother maintained weekly contact with the Children via telephone while the no-contact order was in place; thereafter, Mother visited with the Children at least once a week until her incarceration on January 4, 2008. According to T.S., she observed marijuana in Mother’s home on December 24, 2008; she believed, however, that it did not belong to Mother. T.S. testified that she became a licensed foster parent in February of 2008, and that she would be willing to adopt the Children.

On June 3, 2009, the trial court entered findings of fact and conclusions of law.

The trial court found, in pertinent part, as follows:

11. At the first scheduled fact-finding hearing on this cause, . . . the mother failed to appear, and again had failed to contact DCS, the GAL, or her attorney, as well as the Court, to explain why she failed to appear. Mother had signed on 12/8/08 consent to the termination of parental rights without the advice of her counsel and it appears that she did not appear on 12/15/08 for this reason. The court did not proceed at that time on the consent but continued the matter so that Mother could confer with her

counsel. After conferring with counsel, Mother determined to proceed with a fact-finding hearing.

....

20. Mother had failed to comply with services prior to her incarceration for Neglect of a Dependent on 1/4/08. Mother has failed to comply with Court orders to participate in services and complete a parenting assessment since her release from incarceration on 10/30/08. Mother has engaged in conduct resulting in re-incarceration two times since her extended prison sentence ending on 10/30/08. Mother did not successfully gain any reduction in her prison sentence through any available programs. Mother does not have the financial means or resources to adequately provide for the [Children], nor has she acquired a job since her release on 10/30/08 to begin to gain such means or resources.

21. These actions constitute clear and convincing evidence of the reasonable probability that the conditions which resulted in the removal of the [Children] and reasons for the continued placement of the [Children] outside the mother's home will not be remedied, and that continuation of the parent-child relationship poses a threat to the child's well-being.

22. These actions demonstrate a lack of interest in pursuing a course of conduct sufficient to reunite with the [Children] and constitutes clear and convincing evidence that it is in the best interests of the [Children] to grant the Petition to Terminate the Parent-Child Relationship.

23. Mother's course of conduct, criminal history, lack of participation in services, failures to appear for court hearings, and continuing failure to be able to provide for the basic necessities of the [Children], in combination with the bonding and attachment of the [Children] to the maternal grandmother, the appropriateness of maternal grandmother's home, and the [GAL]'s assessment, constitute clear and convincing evidence that it is in the [Children]'s best interests that the Petition now be granted.

(Mother's App. 49-51; 105-07; 161-63).

DECISION

Mother asserts that the evidence does not support the trial court's findings. She also asserts that the trial court violated her due process rights by admitting into evidence the forms she signed, indicating her consent to the termination of her parental rights.

Although parental rights are of a constitutional dimension, the law allows for termination of these rights when parties are unable or unwilling to meet their responsibility. *In re A.N.J.*, 690 N.E.2d 716, 720 (Ind. Ct. App. 1997). The purpose of termination of 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), *trans. denied, cert. denied*, 534 U.S. 1161 (2002).

In reviewing the termination of parental rights, we will neither reweigh the evidence nor judge the credibility of witnesses. *Bester v. Lake County Office of Family and Children*, 839 N.E.2d 143, 147 (Ind. 2005). We consider only the evidence most favorable to the judgment. *Id.* Where the trial court has entered findings of fact and conclusions of law, we apply a two-tiered standard of review. *Id.* We must determine whether the evidence supports the findings and then whether the findings support the judgment. *Id.* We will set aside a judgment terminating a parent-child relationship only if it is clearly erroneous. *Id.* A judgment is clearly erroneous if the findings do not support the conclusions or the conclusions do not support the judgment. *Id.*

1. Whether the Evidence Supports the Findings

Mother contends that the evidence does not support the trial court's findings that the conditions that led to the removal of the Children will not be remedied; that the continuation of her parental relationship poses a threat to the Children's well-being; and that termination of her parental rights is in the Children's best interests. We disagree.

When DCS seeks to terminate parental rights, it must plead and prove in relevant part that:

- (B) there is a reasonable probability that:
 - (i) the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied; or
 - (ii) the continuation of the parent-child relationship poses a threat to the well-being of the child;
- (C) termination is in the best interests of the child; and
- (D) there is a satisfactory plan for the care and treatment of the child.

Ind. Code § 31-35-2-4(b)(2). These allegations must be established by clear and convincing evidence. *A.N.J.*, 690 N.E.2d at 720.

Because subsection (b)(2)(B) is written in the disjunctive, however, DCS need prove only one of the two elements by clear and convincing evidence. *See Bester v. Lake County Office of Family and Children*, 839 N.E.2d 143, 153 n.5 (Ind. 2005). Thus, if we hold that the evidence sufficiently shows that the conditions resulting in removal will not be remedied, we need not address whether the continuation of the parent-child relationship poses a threat to the well-being of the children. *See* I.C. § 31-35-2-4(b)(2)(B); *A.N.J.*, 690 N.E.2d at 721 n.2.

Mother argues that the evidence does not support the trial court's findings that the conditions that led to the Children's removal will not be remedied. To determine whether the conditions are likely to be remedied, the trial court must examine the parent's fitness to care for the child "as of the time of the termination hearing and take into account any evidence of changed conditions." *In re S.P.H.*, 806 N.E.2d 874, 881 (Ind. Ct. App. 2004). The trial court, however, also must determine whether there is a substantial probability of future neglect or deprivation. *Id.* In so doing, the trial court "may properly consider evidence of a parent's prior criminal history, drug and alcohol abuse, history of neglect, failure to provide support, and lack of adequate housing and employment." *McBride v. Monroe County Office of Family and Children*, 798 N.E.2d 185, 199 (Ind. Ct. App. 2003).

The trial court may also consider the services offered to the parent and the parent's response to those services. *Id.* "Finally, we must be ever mindful that parental rights, while constitutionally protected, are not absolute and must be subordinated to the best interests of the child when evaluating the circumstances surrounding termination." *Id.* Thus, the trial court need not wait until a child is irreversibly harmed such that the child's physical, mental, and social development is permanently impaired before terminating the parent-child relationship. *Id.*

Here, DCS initiated the CHINS proceedings upon finding that Mother had left the Children unattended; the Children were living in deplorable conditions; and Mother possessed marijuana. DCS removed the Children from Mother's home and referred her

for services. The trial court heard testimony that Mother often failed to provide her contact information to DCS, the Children's GAL, or the service provider. The service provider therefore could only provide intermittent services. In fact, the service provider testified that because she could not contact Mother, approximately four months elapsed from her first meeting with Mother to her second meeting.

Brown testified that he had not observed Mother with the Children due to her being incarcerated and "chang[ing] residences quite frequently." (Tr. 140). He testified that although the trial court ordered Mother to contact him, she never did.

The trial court heard testimony that, despite the trial court's orders, Mother did not contact DCS or the Children's GAL upon her release from the Department of Correction on October 30, 2008. She therefore did not complete the court-ordered parenting assessment. Ross-Taylor testified that without a parenting assessment, DCS could not refer Mother for additional services.

Furthermore, DCS presented evidence that Mother had served a sentence of approximately ten months for her neglect of a dependent conviction. DCS also presented evidence that, as a result of alleged probation violations arising from a prior theft conviction, Mother served an additional 39 days following her release from prison on October 30, 2008. Accordingly, of the approximately 780 days from the time of the CHINS petitions to the final fact-finding hearing, Mother had spent 340 days in custody.

The trial court also heard testimony from Mother that following her initial incarceration, she had been unable to secure permanent housing, employment, or a

driver's license. Although Mother attested that she had completed parenting classes while incarcerated, she failed to provide proof to either DCS or the trial court. The evidence also revealed that Mother had contact with illegal drugs on at least one occasion following the initiation of the CHINS proceedings.

Given Mother's pattern of conduct, we find that DCS established by clear and convincing evidence that there is a reasonable probability that the conditions that resulted in the Children's removal from her home will not be remedied.

Mother, however, also contends that the evidence does not support the finding that termination of her parental rights is in the Children's best interests. For the "best interest of the child" statutory element, the trial court is required to consider the totality of the evidence and determine whether the custody by the parent is wholly inadequate for the child's future physical mental, and social growth. *In re J.K.C.*, 470 N.E.2d 88, 91 (Ind. Ct. App. 1984). In making this determination, the trial court must subordinate the interest of the parent to that of the child involved. *Id.* The recommendations of a child's GAL and caseworker that parental rights be terminated support a finding that termination is in the child's best interests. *See A.J. v. Marion County Office of Family and Children*, 881 N.E.2d 706, 718 (Ind. Ct. App. 2008), *trans. denied*.

Both Brown and Ross-Taylor recommended that Mother's parental rights be terminated, given Mother's lack of stability. The trial court heard testimony that the Children were thriving in T.S.'s home and that T.S. was willing to adopt them. The recommendations and testimony, along with the evidence of Mother's incarcerations;

failure to complete services; and failure to obtain stable housing and employment, support the trial court's finding that termination of Mother's parental rights is in the Children's best interests.

Upon review, we find that DCS established its allegations against Mother by clear and convincing evidence. Such evidence supports the trial court's findings that the conditions that resulted in the removal of the Children will not be remedied and that termination is in their best interests.²

2. Due Process

Mother asserts that the trial court violated her due process rights by admitting into evidence the consents to termination of her parental rights because DCS knew that she “was represented by an attorney and that [she] had not communicated with her attorney about the termination of the parent-child relationship” (Mother's Br. at 22). Mother also contends that the filing of the consents with the trial court “without knowledge or consent of [her] attorney” violated her due process rights. *Id.*

[T]he Due Process Clause of the United States Constitution prohibits state action that deprives a person of life, liberty, or property without a fair proceeding. When the State seeks to terminate the parent-child relationship, it must do so in a manner that meets the requirements of due

² Mother also asserts that the trial court's finding as to her consent to terminate her parental rights is erroneous “because the consent[s] [are] invalid and not relevant to the involuntary termination of parental rights.” Mother's Br. at 20. Even after disregarding this finding, sufficient evidence and findings remain to support the trial court's conclusion. Thus, any error is harmless as it does not affect Mother's substantial rights. *Cf. In re Termination of Parent-Child Relationship of E.T.*, 808 N.E.2d 639, 645-46 (Ind. 2004) (“The improper admission of evidence is harmless error when the judgment is supported by substantial independent evidence to satisfy the reviewing court that there is no substantial likelihood that the questioned evidence contributed to the judgment.”).

process. “The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.”

The nature of process due in a termination of parental rights proceeding turns on the balancing of three factors: (1) the private interests affected by the proceeding; (2) the risk of error created by the State’s chosen procedure; and (3) the countervailing governmental interest supporting use of the challenged procedure. The balancing of these factors recognizes that although due process is not dependent on the underlying facts of the particular case, it is nevertheless “flexible and calls for such procedural protections as the particular situation demands.”

D.A. v. Monroe County Dep’t of Child Serv., 869 N.E.2d 501, 510 (Ind. Ct. App. 2007) (internal citations omitted).

Both the private interests and the countervailing governmental interests that are affected by the proceeding are substantial. *Id.* “In particular, the action concerns a parent’s interest in the care, custody, and control of h[er] children, which has been recognized as one of the most valued relationships in our culture.” *Id.* The right to raise one’s children is an essential and basic right. *Id.* Thus, “a parent’s interest in the accuracy and justice of the decision is commanding.” *Id.* “On the other hand, the State’s parens patriae interest in protecting the welfare of the children involved is also significant.” *Id.*

When balancing the competing interests of a parent and the State, we must consider the risk of error created by the challenged procedure. Here, DCS filed petitions for the involuntary termination of Mother’s parental rights. On December 9, 2008, six days prior to the fact-finding hearing on the petitions, DCS filed the signed consents to the termination of Mother’s parental rights. Although Mother did not appear at the

hearing, her counsel did and objected to the filing of the consents. The trial court refused to consider the consent forms and continued the hearing to allow Mother to appear. The trial court subsequently resumed the hearing on DCS's original petitions.

During the hearing, the trial court heard extensive testimony in support of the petitions to terminate Mother's parental rights. Furthermore, Mother had the opportunity to, and in fact did, cross-examine witnesses and present evidence. The trial court then entered its findings of fact and conclusions of law. Although the trial court made findings that the Mother had signed consents to the termination of her parental rights, it acknowledged that Mother did so without benefit of counsel. The trial court made no finding as to Mother's state of mind when she signed the consent forms.

Given these facts, we find no significant compromise of Mother's rights. Accordingly, we conclude that the filing, and subsequent admission, of the consents to voluntary termination of parental rights into evidence did not deny Mother due process of law.

Affirmed.

KIRSCH, J., and MAY, J., concur.