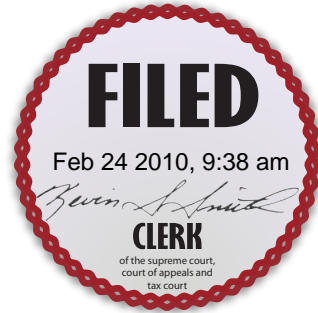


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**IN THE
COURT OF APPEALS OF INDIANA**

IN RE: THE MATTER OF THE)
TERMINATION OF THE PARENT)
CHILD RELATIONSHIP OF X.H.,)
MINOR CHILD and)
)
S.H. and R.M., Parents,)
)
Appellants-Petitioners,)
)
vs.)
)
INDIANA DEPARTMENT OF)
CHILD SERVICES,)
)
Appellee-Respondent.)

No. 34A02-0910-JV-1027

APPEAL FROM THE HOWARD CIRCUIT COURT
The Honorable Lynn Murray, Judge
Cause No. 34C01-0809-JT-24

February 24, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

S.H. (“Mother”) and R.M. (“Father”) (collectively, “Parents”) appeal the juvenile court’s order terminating their parent-child relationship with X.H. Parents raise one issue for our review, which we restate as whether clear and convincing evidence supports the termination of their parental rights. Concluding the evidence is sufficient, we affirm.

Facts and Procedural History

X.H. was born on April 27, 2007, with hemophilia, specifically, “severe Factor VIII deficiency.” Transcript at 9. Children with severe hemophilia like X.H. “often experience bleeding episodes that are qualified as spontaneous, meaning the normal activities of every day life may precipitate bleeding episodes.” *Id.* at 10. Parents’ other child is a daughter, J.H., who was two years old at the time of X.H.’s birth.¹

In May and June, 2007, X.H. was taken to the emergency room four times: on May 24 after a fall from the bassinet; on June 10 for abdominal pain; on June 18 after a fall from the couch; and again on the evening of June 18 after being kicked in the abdomen by J.H. According to Mother, the fall from the bassinet and the fall from the couch were also caused by J.H. X.H.’s treating physician, Dr. Shapiro, testified the fall from the bassinet was “not a normal childhood bump” because “the bassinet would have to be turned over in order for that

¹ Mother has three other biological children, all boys with hemophilia; one was adopted by his foster parents after parental rights were terminated in 2007, and the other two live with their maternal grandmother pursuant to guardianships. However, these children are not children of Father, and the court proceedings pertaining to them are not part of the record in this case.

to occur.” Id. at 22. Mother told a case manager with the Howard County Department of Child Services (“DCS”) she “was having a difficult time caring for both [X.H.] and [J.H.] together” and “had a hard time controlling [J.H.’s] behaviors which were causing injury to [X.H.]” Id. at 52. As a result of its initial investigation of X.H.’s injuries, DCS entered into an “Informal Adjustment” agreement with Mother. Id. at 53. Upon further medical examination, X.H. was diagnosed with healing rib fractures, which in the opinion of Dr. Shapiro were due to non-accidental trauma. After learning X.H. suffered from healing rib fractures, DCS sought his removal from Mother’s custody. Father at the time was not living with X.H. and Mother and had not established paternity, although he began living with them by September 2007 and established paternity in October 2008. Following a detention hearing on July 30, 2007, the juvenile court found DCS had substantiated X.H.’s healing rib fractures and hemophilia, X.H. was “extremely medically fragile,” and placement outside of Mother’s custody was “required for the safety and protection” of X.H. Petitioner’s Exh. 7. Thus, the juvenile court granted custody of X.H. to DCS.

Subsequently, DCS filed a petition alleging X.H. was a child in need of services (“CHINS”), and the juvenile court appointed a special advocate (“CASA”) to represent X.H.’s interests. Following a fact-finding hearing, the juvenile court adjudicated X.H. to be a CHINS on September 17, 2007, and entered a dispositional order continuing his placement in foster care and ordering Mother to work with a family educator and submit to random drug screens. Thereafter, DCS allowed both Mother and Father supervised visitation with X.H. twice weekly, and visits remained fully supervised throughout the case. In January 2008, the

juvenile court held a review hearing in which it added an order that Mother participate in family counseling, Parents work with a family educator, and Father establish paternity and thereafter submit to random drug screens and participate in family counseling. Mother and Father did submit to drug screens, which they completed as part of a methadone clinic they attended regularly. However, neither Mother nor Father participated in family counseling.

Marleta Roberts, visitation facilitator at The Villages, supervised visits between Parents and X.H. between August 2007 and September 2008; J.H. was also present at most of the visits. J.H. often “pushed” X.H. and “with each visit there were always some incidents along that line.” Id. at 128. “Sometimes [X.H.]’d have a goose egg or a bruise or something like that which we have to keep a close eye on.” Id. at 128-29. During the visits there “were a lot of arguments” between Mother and Father, id. at 129, and they were “always arguing at all times about everything . . . right in front of the children . . . ,” id. at 140. Jackie Daugherty, a family educator from The Villages, worked with Parents for seven months beginning in October 2007. Daugherty was in Parents’ home once weekly and “pretty much every time” Parents engaged in “a lot of bickering, cussing at each other.” Id. at 71. On one occasion Mother and Father “continued to scream at each other” such that Daugherty “had to ask [Father] to leave the home because we could not leave with them in this volatile situation.” Id. In November 2007, Mother informed Daugherty that Father had recently hit her in front of J.H., and again on January 11, 2008, Mother alleged at a case conference that Father was physically aggressive with her. Although Father admitted he would benefit from

therapy or counseling, neither Mother nor Father cooperated with Daugherty's referrals for family counseling.

Raina Daily was the family case manager for six months beginning in February 2008. On at least one occasion when Daily met with Mother out of Father's presence, Mother "made comments about not knowing if they were going to stay together, about not having him live there." Id. at 89. Additionally, Mother "stated on numerous occasions that she did not want [Father] to have paternity of [X.H.] and she did not want him to be able to parent [X.H.] if something ever happened to her." Id. During Daily's tenure as family case manager Mother was "for the most part" consistent in visiting X.H. Id. at 98. However, Mother missed several of her appointments with Daily. According to Daily, Mother was cooperative with DCS "[a]t times," but the "majority of the time she didn't keep in contact or didn't return phone calls or did not show up for a meeting." Id. at 94. Mother left early from a case conference on April 30, 2008, and Father did not attend that conference. Daily never recommended that Parents have unsupervised visits with X.H.

Todd Powell was Parents' visitation supervisor from April to August 2008 and family educator from May to November 2008. During visits, Powell observed that J.H. would "a lot of times" grab X.H. by the head with "unnecessary force." Id. at 183. Powell was concerned for X.H.'s safety during the visits and concerned regarding Mother's "lack of intervention" and "lack of attentiveness to the situation." Id. at 199. Parents showed "hardly any cooperation" with the in-home parenting education Powell attempted to provide. Id. at 180. Powell recommended to Parents that they attend couples counseling, but they never did so.

During a supervised visit at Parents' home on August 29, 2008, visitation supervisor

Tisha Larkin observed the following:

While playing in the front room, [J.H.] knocked [X.H.] down—[Mother] warned her that she would go to time out. [J.H.] then put her arms around [X.H.], trying to pick him up around his neck—almost choking him—[Mother] again warned [J.H.] that she would go to a timeout. [Mother] went into the kitchen; [J.H.] grabbed a nose syringe and went to [X.H.]. She held his head back and was going to put it in [X.H.]'s nose, I stopped her, and told her how [sic] and took it away from her. . . . While in the kitchen, [J.H.] was sitting on her bike, every time [X.H.] got close, she kicked him. [Mother] was cleaning her face at the kitchen sink.

Appellant's Appendix at 25. At the same visit,

[Mother] was putting some laundry in the washer. [X.H.] played with toys. [J.H.] took it away and poked him in the eyes—I told [J.H.] to be nice and not hurt [X.H.] She yelled, No. [Mother] went upstairs, and [X.H.] played with the toy stroller. [J.H.] took it away and pushed him down. I got after her—[Mother] then said her name as she came down the stairs.

Id.

Larkin supervised additional visits during September, October, and November 2008.

During the visits Larkin became concerned for “[t]he safety of [X.H.]” as a result of times “when [Mother] was busy doing things and I had to intervene with [X.H.]” to stop J.H. from being physically aggressive with him. Tr. at 145. At times X.H. “had marks from scratches.”

Id. at 147. At a visit on September 10, 2008, J.H. pulled X.H. down, and on September 19, 2008, X.H. fell from a step and hit his head and cheek; Mother admitted to Larkin that “she should have been by him.” Id. at 154. At “every visit,” some incident happened between X.H. and J.H. Id. at 156. However, Larkin observed that Parents were inconsistent with disciplining J.H. In addition, “there were times . . . that [X.H.] was yelling and [Mother]

continued to do what she was doing.” Id. at 166. On one such occasion, Larkin intervened to stop J.H. from climbing on top of X.H. because Mother was “busy” and inattentive. Id. at 167. There was also, between Parents, “[a] lot of arguing going on, a lot of hateful speaking to each other.” Id. at 146. Heidi Query, visitation facilitator with The Villages, supervised fourteen visits of Parents with X.H. starting in September 2008. Query observed J.H. pushing X.H. and throwing toys at him and pulling things out of his hand; at times J.H. was “very aggressive and a little more than I’ve ever seen another child be towards their sibling.” Id. at 217.

In November 2008, Larkin became the family educator working with Parents on parenting skills. The parenting skills instruction “didn’t get too far” because Parents “would have to leave some times or they would have errands to run or other things to do.” Id. at 165. Larkin suggested to Parents that they take J.H. to counseling but Parents never followed through on that recommendation. Mother did take J.H. to Howard Regional Behavioral Health Center for an intake assessment on June 18, 2008, but missed follow-up appointments and did not reschedule them.

In February, March, and April 2009, the juvenile court held a fact-finding hearing on the TPR petition, which DCS had filed on September 12, 2008. Prior to the hearing, the CASA, Shawna Pierson, filed a report stating,

CASA has read through all of the visit logs, and generally feels that the visitation was a positive experience for [X.H.]. [Father] and [Mother] were attentive to him, loving toward him, and feed [sic] him during the visits. However, there were several reports of arguing, fighting, inappropriate comments made between [Mother] and [Father] that are of concern. There were several incidents of [J.H.] hitting [X.H.], or grabbing him by the neck, or

kicking him. This CASA understands that siblings fight, but with [X.H.] being a hemophiliac, he has to be protected from [J.H.]’s acts of aggression. [Mother] also needed to supervise the children more and be more consistent with her disciplining of [J.H.]. * * * [T]his CASA does not think it is safe for [X.H.] to be with [Mother], [Father] and [J.H.] unsupervised. This CASA is concerned that it would be dangerous for [X.H.] to return to their care as their parenting skills have not changed for the better.

* * *

This CASA feels that terminating parental rights is in the best interest of [X.H.].

Appellant’s App. at 27-28. Dr. Shapiro testified that because of X.H.’s hemophilia, Parents need to provide him a safe environment. All of the visitation supervisors and family educators—Daugherty, Larkin, Powell, Roberts, and Query—testified they did not see any improvement in Mother’s or Father’s ability to care for X.H. during their times of involvement in the case. Laura Redding, who took over as case manager in September 2008, testified DCS never recommended that visits progress to semi-supervised or unsupervised because of “the inability of [Mother] and [Father] to make sure that [J.H.] doesn’t cause danger to [X.H.]” and “because of the lack of supervision during the visits as well.” Tr. at 234. Redding opined that “X.H.’s safety is my number one concern” and Parents had not “made any progress toward insuring that they can provide a safe, stable environment for him due to his medical condition.” Id. at 237-38. Redding testified that for the same reasons, termination of Mother’s and Father’s rights was in X.H.’s best interest. The CASA testified she had not observed any improvement in either Mother’s or Father’s ability to be a parent to X.H. and continued to have concerns about “[X.H.]’s safety and the lack of supervision during the visits.” Id. at 316. The CASA opined that termination of Mother’s and Father’s parental rights would be in X.H.’s best interests.

On July 13, 2009, the juvenile court entered its order terminating Parents' parental rights as to X.H. The juvenile court's factual findings read, in relevant part:

22. Since [X.H.]'s removal from [Mother]'s care on July 27, 2007, neither [Mother] nor [Father] has demonstrated a consistent ability to parent and provide a safe environment for [X.H.].

* * *

35. . . . The two family case managers from DCS, [X.H.]'s CASA, and each service provider (five in total) all had concerns about [X.H.]'s safety when [X.H.] was being watched by [Mother] or [Father] or when [J.H.] was around [X.H.]. Their concerns were also due to the relationship between [Mother] and [Father] being volatile and unstable with frequent arguments and disagreements coupled with angry outbursts. During visitations, [J.H.] repeatedly would be physically aggressive with [X.H.], by kicking, choking, or hitting him. Neither [Mother] nor [Father] demonstrates an ability to control or manage [J.H.]'s harmful behaviors. Frequently during visitations with [X.H.], [Mother] would be inattentive toward him, preferring to talk on her cell phone, read the newspaper or argue with [Father]. While there is no doubt that both [Father] and [Mother] love [X.H.], they lack the fundamental abilities to provide a safe environment for [X.H.].

* * *

37. . . . [Father] and [Mother] were both ordered to participate in family counseling to address their volatile and chaotic relationship; however, neither parent did so. They were also ordered to cooperate in therapy for [J.H.] to address her aggressive behaviors and their inability to control them, but they failed to do so. They were also ordered to cooperate with DCS and service providers so to address their lack of parenting skills. [Mother] and [Father] both have exhibited a pattern of not cooperating with service providers, and missing and avoiding appointments with family case managers and service providers.

* * *

39. The court finds by clear and convincing evidence that it is reasonably probable that the conditions that led to the removal and the reasons for placement outside the home; namely the parents' lack of parenting skills, lack of being able to adequately supervise and care for [X.H.], their volatile relationship, and lack of participation in services will not be remedied to the degree that they will be able to provide [X.H.] with the nurturing, stable, and appropriate care and environment that [X.H.] requires on a long term basis. . . .

40. The court further finds by clear and convincing evidence that the continuation of the parent-child relationship between [X.H.] and his parents poses a threat to his well-being.

* * *

44. The court further finds by clear and convincing evidence that termination of the parent-child relationship . . . is in the best interests of the child in that further efforts to reunite the parent and child are unlikely to succeed. . . . The failure to terminate the relationship will deny the child the stability and permanency to which he is entitled, and has too long been denied.

Appellant's App. at 12-15, 20. Parents now appeal.

Discussion and Decision

I. Standard of Review

When reviewing the sufficiency of the evidence to support a termination of parental rights where the juvenile court has entered findings of fact and conclusions thereon, we apply a two-tiered standard of review. In re G.Y., 904 N.E.2d 1257, 1260 (Ind. 2009). First, we determine whether the evidence supports the juvenile court's findings, and second, we determine whether the findings support the judgment. Id. In making this determination, we neither reweigh the evidence nor judge the credibility of witnesses, and we consider only the evidence and reasonable inferences most favorable to the judgment. Id. We will reverse a termination of parental rights only if the juvenile court's judgment is clearly erroneous. Id. A judgment is clearly erroneous if the findings do not support the juvenile court's conclusions or the conclusions do not support the judgment. Id.

II. Termination of Parent-Child Relationship

The traditional right of parents to establish a home and raise their children is protected by the Fourteenth Amendment to the United States Constitution. Bester v. Lake County Office of Family & Children, 839 N.E.2d 143, 147 (Ind. 2005). However, parental rights are not absolute, and the juvenile court must subordinate parents' interests to those of the child

when evaluating DCS's petition to terminate the parent-child relationship. Id. "Thus, parental rights may be terminated when the parents are unable or unwilling to meet their parental responsibilities." Id. (quotation and alteration omitted).

To terminate Parents' parental relationship with X.H., DCS must prove that, among other conditions:

- (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). DCS's burden of proof in termination of parental rights cases is one of clear and convincing evidence. See Ind. Code § 31-37-14-2. Clear and convincing evidence need not demonstrate the parents' custody is "wholly inadequate for the child's very survival." Egly v. Blackford County Dep't of Pub. Welfare, 592 N.E.2d 1232, 1233 (Ind. 1992). Rather, it is sufficient to show by clear and convincing evidence that "the child's emotional and physical development are threatened" as a result of the parents' inability or unwillingness to fulfill parental responsibilities. Id. at 1234.

Under Indiana Code section 31-35-2-4(b)(2)(B), DCS must prove by clear and convincing evidence either (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," but need not prove both. In re L.S., 717 N.E.2d 204, 209 (Ind. Ct. App. 1999), trans. denied,

cert. denied, 534 U.S. 1161 (2002). Thus, although the juvenile court found DCS proved both prongs (i) and (ii), we need only address the sufficiency of the evidence supporting prong (i). As the basis for finding prong (i) met, the juvenile court cited Parents’ “lack of parenting skills, lack of being able to adequately supervise and care for [X.H.], their volatile relationship, and lack of participation in services” and found it was reasonably probable these conditions would not be remedied. Appellant’s App. at 17.

The evidence favorable to the judgment shows Parents have a long history of unresolved parenting problems causing an inability to provide X.H. a safe, stable home environment. X.H. was removed from Mother’s care because on multiple occasions within the span of a few weeks he suffered physical injuries necessitating emergency room treatment. His rib fractures were diagnosed as non-accidental and Mother admitted she was having a difficult time keeping X.H. safe from his older sister, J.H. Thereafter, over the course of eighteen months, despite Parents having the opportunity to work with family educators and visit X.H. twice weekly, all of the visitation supervisors had concerns about X.H.’s physical safety under Parents’ care. Visitation supervisors Larkin, Powell, Roberts, and Querry documented numerous instances when X.H. was pushed, kicked, knocked down, or climbed upon by his older sister, J.H. The visitation supervisors observed that Parents were frequently inattentive to X.H.’s physical safety and inconsistent in disciplining J.H., even though close attention to X.H.’s safety was particularly important due to the increased bleeding risk from his hemophilia. As a result, no one involved in the case ever recommended Parents’ visits with X.H. be unsupervised. Further, all of the service providers

questioned on the matter testified they did not observe any sustained improvement in Mother's or Father's ability to be effective parents to X.H. Thus, the evidence supports the juvenile court's finding that neither Mother nor Father "has demonstrated a consistent ability to parent and provide a safe environment for [X.H.]." Appellant's App. at 12.

The juvenile court's findings regarding Parents' volatile relationship and their lack of participation in services are also supported by the record. The visitation supervisors and family educators testified Mother and Father had frequent, heated arguments in the presence of X.H. and J.H., Father was physically abusive to Mother, and Mother said she was unsure about the future of their relationship. Family educators Powell and Larkin testified Parents were generally unreceptive and uncooperative in improving their parenting skills, and it is undisputed Parents never attended family counseling, which they were court-ordered to do. See J.M. v. Marion County Office of Family & Children, 802 N.E.2d 40, 45 (Ind. Ct. App. 2004) (juvenile court may consider "the services offered by [DCS] to the parent and the parent's response to those services") (quotation omitted), trans. denied.

Parents contend the juvenile court's findings are unsupported by the record because X.H. was never injured so as to require medical attention during his visits with Parents; the visits were generally a positive experience for X.H. according to the CASA's report; the DCS case managers' testimony was not based upon substantial time observing Parents' interactions with X.H.; and there was evidence X.H. was injured on various occasions while in the custody of his foster parents. Although these factors were appropriate for the juvenile court to consider in reaching its decision, Parents' argument they are grounds for reversal on

appeal is essentially a request to reweigh the evidence, which we may not do. See G.Y., 904 N.E.2d at 1260. Moreover, the lack of serious physical injury to X.H. during his supervised visits with Parents is not dispositive; X.H. was seriously injured while in Mother's care prior to his removal, and to terminate the parent-child relationship DCS is not required to show the continued custody of the parent is "wholly inadequate for the child's very survival." Egly, 592 N.E.2d at 1233. Rather, "[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." L.S., 717 N.E.2d at 210.

Parents further contend there is insufficient evidence to support termination of their parental rights because termination "is an extreme measure to be used only as a last resort when all other reasonable efforts to protect the integrity of the natural relationship between parent and child have failed." Appellant's Brief at 26 (quoting Rowlett v. Vanderburgh County Office of Family & Children, 841 N.E.2d 615, 623 (Ind. Ct. App. 2006), trans. denied). In Rowlett, this court concluded there was insufficient evidence to support termination of the father's parental rights when evidence of the father's substance abuse, unstable housing and employment, and neglect of his children related predominantly to the time before the CHINS or TPR petitions were filed and since then father had, although incarcerated, participated in substance abuse treatment, secured employment, and "taken strides" toward maintaining the parental relationship. 841 N.E.2d at 621-23. Here, by contrast, neither Mother nor Father showed improvement in their parenting ability or

increased initiative to preserve the parent-child relationship, despite having the opportunity to do so for seventeen months between the CHINS adjudication and the TPR fact-finding hearing. Thus, the evidence favorable to the juvenile court's judgment showed reasonable efforts to preserve Parents' relationship with X.H. had failed.

For these reasons, we conclude clear and convincing evidence supports the juvenile court's finding that there is a reasonable probability the conditions resulting in X.H.'s removal and continued placement outside of Parents' home will not be remedied. Further, Parents do not challenge the sufficiency of the evidence supporting the juvenile court's findings that termination is in X.H.'s best interests and there is a satisfactory plan for his care and treatment. Therefore, clear and convincing evidence supports the juvenile court's judgment terminating Parents' rights as to X.H.

Conclusion

Clear and convincing evidence supports the termination of Parents' rights as to X.H. Thus, we affirm the judgment of the juvenile court.

Affirmed.

BAKER, C.J., and BAILEY, J., concur.