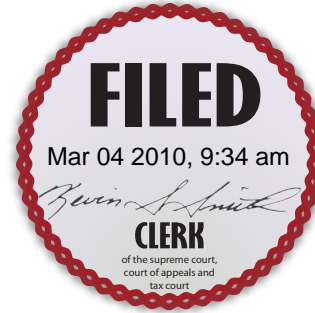


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF: E.J., S.H. (Mother),

Appellant,

vs.

INDIANA DEPARTMENT OF CHILD
SERVICES and LAKE COUNTY COURT
APPOINTED SPECIAL ADVOCATE,

Appellees.

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No. 45A05-0911-JV-669

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Mary Beth Bonaventura, Judge
Cause No. 45D06-0803-JT-212

March 4, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

S.H. (“Mother”) appeals the termination of her parental rights as to her daughter, E.J.

We affirm.

ISSUE

Whether there was clear and convincing evidence to support the termination of Mother’s parental rights.

FACTS

E.J. was born on September 26, 2001, to Mother and B.J. (“Father”). In 2003, the Lake County Division of Child Services (“DCS”) took temporary custody of E.J. after Father broke her femur. Mother participated in court-ordered counseling. Subsequently, the trial court dismissed DCS’s wardship and returned E.J. to Mother’s care.

On or about November 6, 2004, DCS received a report that E.J. had been admitted to the University of Chicago Comer Children’s Hospital with “acute blunt abdominal trauma, acute blunt trauma to the liver, [and] bruising to the back,” necessitating surgery “to repair her bowels.” (DCS’s Ex. A). Father, who had been caring for E.J. while

Mother was at work, admitted to striking E.J.¹ After the hospital discharged E.J., DCS placed her in protective custody, pending an investigation.

Following a detention hearing on November 30, 2004, the trial court ordered Mother to submit to a psychological evaluation and “any recommended treatment”; and participate in parenting classes. (App. 5). The trial court also ordered supervised visitation with E.J.

On January 4, 2005, DCS filed a petition, alleging E.J. to be a child in need of services (“CHINS”). On March 16, 2005, the trial court held an initial hearing on the CHINS petition. Mother denied the allegations of the CHINS petition.

On January 25, 2006, the trial court held an omnibus hearing, during which Mother admitted the allegations of the CHINS petition. The trial court therefore ordered Mother to submit to parenting and substance abuse assessments. The trial court also ordered Mother to “complete a psychological evaluation and any recommended treatment, individual counseling and parenting classes.” (Tr. 46).

On March 6, 2008, DCS filed a petition to terminate Mother’s parental rights. Mother failed to attend four subsequent review hearings. The trial court held a fact-finding hearing on DCS’s petition to terminate Mother’s parental rights on August 12, 2008; the trial court continued the hearing to March 24, 2009, and again to July 14, 2009.

Jessica Montella, the family case manager, testified that Mother completed her court-ordered psychological evaluation. Mother also “was consistent with individual

¹ Father subsequently pleaded guilty to class B felony aggravated battery. On June 6, 2005, the trial court sentenced him to eight years.

counseling sessions” between January 13, 2005, and February 10, 2005. According to Montella, however, Mother sporadically participated in counseling during the time between April 7, 2005, and June 23, 2005. Mother failed to attend her counseling sessions scheduled during the time periods from September 29, 2005, through October 27, 2005; May 18, 2006, through June 8, 2006; and July 6, 2006, through August 31, 2006. Montella further testified that Mother “was constantly late” to her supervised visitations with E.J. (Tr. 48). Mother, however, did complete her parenting classes.

Montella also testified that DCS placed E.J. with foster parents Arthur and Bertha Sims on March 3, 2005. On June 5, 2006, DCS returned E.J. to Mother’s care “for a trial home visit.” (Tr. 49). DCS, however, removed E.J. from Mother’s care on September 25, 2006, due to Mother “missing several individual and family counseling sessions”; Mother’s inability to “provide [E.J.] with a stable home environment,” including failing to provide E.J. with her own bed; Mother’s failure to maintain employment; Mother’s failure “to attend a review hearing”; and Mother “taking [E.J.] across State’s [sic] lines without permission[.]” (Tr. 49-50).

Upon removing E.J. from Mother’s care, DCS again placed her with the Sims, where she remains. Montella testified that Mother last visited with E.J. on May 3, 2007, more than two years from the date of the hearing.

Montella opined that termination of Mother’s parental rights would be in E.J.’s best interests because Mother “wasn’t able to provide her with a stable home

environment” (Tr. 52). She testified that E.J. “has thrived very well in [her] foster home” (Tr. 53).

Denise Travis, a director and therapist with Human Beginnings, Inc., testified that Mother completed her initial diagnostic assessment on December 8, 2004, and consistently attended counseling sessions until March of 2005. Mother, however, then began to miss counseling sessions. She testified that Mother “would come and then not come for a couple times and then come.” (Tr. 71). When DCS placed E.J. with Mother in June of 2006, Mother’s “[a]ttendance was very inconsistent,” with “multiple no-shows[.]” (Tr. 73).

Travis further testified that on one occasion, during a counseling session with both Mother and E.J., E.J.’s “play was very sexualized.” (Tr. 74). According to Travis, E.J. “had not exhibited any sexualized acting out behavior prior” to being placed with Mother in June of 2006. (Tr. 74). Accordingly, Travis recommended that DCS remove E.J. from Mother’s care because, in her opinion, four-year-old children do not exhibit such behavior “without exposure.” (Tr. 76).

Travis also expressed concern regarding Mother’s living arrangements. Travis testified that Mother “left a job in Indiana, moved to Chicago without stable living conditions.” (Tr. 79). Although Mother informed Travis that she was living with E.J.’s maternal grandfather, E.J. informed Travis that they were living with her maternal grandmother.

Travis recommended that E.J. not be returned to Mother, due to “the instability in housing, the sexualized acting out behavior, [and] the inconsistency in following through with the case plan.” (Tr. 81). According to Travis, “as the years have gone by, [E.J.] speaks of her mother less frequently than she did initially.” (Tr. 81). Travis expressed concern that placing E.J. with Mother would cause “a period of regression for her.” (Tr. 81). She further testified that E.J. is “doing very well” in her foster home. (Tr. 82).

E.J.’s foster mother, Bertha Sims, testified that she is seventy-two years old and her husband is eighty years old. She further testified that they would like to adopt E.J. and had a plan in place in the event they could no longer care for E.J.

Mother testified that she has had no contact with Father since November of 2004. She further testified that she missed several counseling sessions because her aunt was ill. Mother also testified that between June 18, 2008, and November 19, 2008, she attended three counseling sessions with a private therapist. She further testified that she worked as a certified nurses’ assistant and had been residing in the same apartment for “a little over a year.” (Tr. 155).

On July 16, 2009, the trial court entered its order, finding clear and convincing evidence to support the termination of Mother’s parental rights.

DECISION

Mother asserts that DCS failed to prove by clear and convincing evidence that there is a reasonable probability that the conditions that led to E.J.’s removal will not be remedied; that the continuation of her relationship with E.J. poses a threat to the child;

that termination of her parental rights is in E.J.'s best interests; and that DCS has a satisfactory plan for E.J. 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. *A.N.J.*, 690 N.E.2d at 720. We consider only the evidence most favorable to the judgment. *Id.* 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. *L.S.*, 717 N.E.2d at 208.

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.

1. Conditions Remedied

Mother asserts that DCS failed to prove by clear and convincing evidence that there is a reasonable probability that the conditions leading to E.J.'s removal will not be remedied. She acknowledges that she did not participate in counseling but argues that the trial court failed to recognize that her "participation became sporadic when she was living in Chicago, working in Valparaiso, lost her apartment, and had her car totaled in a[] car accident." Mother's Br. at 12.

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 presented evidence that while Mother initially adhered to the case plan, her attendance at the court-ordered counseling sessions became erratic. Mother quit her job in Indiana and moved to Illinois, where she secured neither employment nor stable housing.

DCS placed E.J. with Mother on a temporary basis in June of 2006. DCS, however, removed E.J. after only three months when she began exhibiting sexualized behavior. Furthermore, Mother often missed counseling sessions during the three months E.J. resided with her. Given Mother’s pattern of conduct, particularly her failure to attend counseling sessions, we find that DCS has established by clear and convincing evidence that there is a reasonable probability that the conditions that resulted in E.J.’s removal from Mother’s home will not be remedied.

2. Best Interests and Satisfactory Plan

Mother also asserts that termination of her parental rights is not in E.J.'s best interests and that DCS has failed to show that there is a satisfactory plan for the placement of the E.J. because "it is unreasonable to believe that Mr. and Mrs. Sims will live to see E.J. even reach her teenage years." Mother's Br. at 12. She contends that E.J. should be placed with either her maternal grandmother or grandfather.

For the "best interest of the child" statutory element, the trial court is required to consider the totality of the evidence. *In re B.J.*, 879 N.E.2d 7, 22 (Ind. Ct. App. 2008), *trans. denied*. "[I]n determining the best interests of the children, the trial court must subordinate the interests of the parents to those of the children." *Id.* The testimony of a caseworker regarding the child's need for permanency supports a finding that termination is in the child's best interests. *McBride*, 798 N.E.2d at 203.

Before the trial court may terminate the parent-child relationship, however, it must find that there is a satisfactory plan for the care and treatment of the child. *In re S.L.H.S.*, 885 N.E.2d 603, 618 (Ind. Ct. App. 2008). "This plan need not be detailed, so long as it offers a general sense of the direction in which the child will be going after the parent-child relationship is terminated." *Id.* Generally, adoption is a satisfactory plan. *See id.*

E.J.'s grandfather testified that he last saw her in September of 2006. He also testified that he has not contacted DCS regarding having E.J. placed in his home. E.J.'s grandmother testified that she too last saw E.J. in September of 2006. She further

testified that when she inquired into having E.J. placed in her home, DCS informed her that she was ineligible because she resided in Illinois.

Both the family case manager and E.J.'s therapist testified that E.J. is doing well in her foster home and has bonded with her foster family. They further testified that they believed termination of Mother's parental rights to be in E.J.'s best interests. Montella also testified that DCS's plan for permanency is adoptive placement.

Here, the record shows that E.J. was removed from Mother's care in November of 2004 and has lived with her foster family for one-half of her life. Although Mother had the opportunity to care for E.J. in 2006, conditions necessitated E.J. being removed after only three months. Neither grandparent has taken the necessary steps to have E.J. placed with them. Given the evidence, we find no error in concluding that termination of Mother's rights would be in E.J.'s best interests.

Finally, DCS presented evidence that E.J. has bonded with, and is thriving in the care of, her foster family. DCS's permanency plan for E.J. is adoption, and E.J.'s foster family has expressed interest in adopting her. Therefore, DCS has proved that there is a satisfactory plan in place.² *In re Termination of Parent-Child Relationship of D.D.*, 804 N.E.2d 258, 268 (Ind. Ct. App. 2004) (finding of suitable plan was not erroneous where plan was for child "to be adopted, either by the current foster family or another family,"

² To the extent Mother alleges the DCS plan for E.J.'s future is insufficient because the foster parents who wish to adopt her are older than typical foster parents, we decline to reverse the termination on this basis. *See, e.g., In re D.J.*, 755 N.E.2d 679, 685 (Ind. Ct. App. 2001) (appropriateness of foster family as adoption home would be determined in a later proceeding, such that LCDFC's plan of adoption into an "appropriate and suitable . . . home" was sufficient to support trial court finding the satisfactory plan for the children's care that is required for termination), *trans. denied* 774 N.E.2d 509 (Ind. 2002).

because MCOFC indicated general direction for child's future), *trans. denied* 822 N.E.2d 970 (Ind. 2004).

Based on the totality of the evidence, we find that there is sufficient evidence that the conditions that resulted in E.J.'s removal will not be remedied; termination of Mother's parental rights is in the best interests of E.J.; and that DCS has a satisfactory plan. Accordingly, the elements necessary to sustain the termination of Mother's parental relationship with E.J. were established by clear and convincing evidence.

Affirmed.

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