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IN THE COURT OF APPEALS OF INDIANA

IN THE MATTER OF THE TERMINATION OF THE PARENT-CHILD RELATIONSHIP OF: G.W. (minor child), and J.W. (mother), Appellant-Respondent,	)	
vs.	)	No. 48A02-0910-JV-01042
INDIANA DEPARTMENT OF CHILD SERVICES, Appellee-Petitioner.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable G. George Pancol, Judge
Cause No. 48D02-0811-JT-276

June 24, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

J.W. ("Mother") appeals the involuntary termination of her parental rights to her child, G.W. Concluding that the Indiana Department of Child Services, Madison County ("MCDCS"), presented clear and convincing evidence to support the trial court's judgment, we affirm.

Facts and Procedural History

Mother is the biological mother of G.W., born on January 16, 1997.[1] The evidence most favorable to the trial court's judgment reveals that in February 2008 MCDCS took G.W. into custody because Mother was arrested and later incarcerated for operating a vehicle while intoxicated. MCDCS subsequently filed a petition alleging G.W. was a child in need of services ("CHINS"), Mother admitted to the allegations contained therein, and the trial court thereafter adjudicated G.W. a CHINS.

Following a dispositional hearing in April 2008, the trial court issued an order formally removing G.W. from Mother's care and directing Mother to "utilize all opportunities to better herself while in the custody of the Department of Correction[] or the Henry County Jail." Appellant's App. p. 15. The court's dispositional order further directed Mother to "take G.E.D., parenting, mental health, and drug treatment courses if available to her." *Id.*

In May 2009 MCDCS filed a petition seeking the involuntary termination of Mother's parental rights to G.W. An evidentiary hearing on the termination petition was

[1] At the time of the termination hearing, paternity of G.W. had not been established. The parental rights of G.W.'s alleged biological father, J.C. ("Father"), however, were also terminated by the trial court in its September 2009 judgment. Because Father does not participate in this appeal, we limit our recitation of the facts to those pertinent solely to Mother's appeal.

held in July 2009, and in September 2009 the trial court issued its judgment terminating Mother's parental rights to G.W. Mother now appeals.

Discussion and Decision

This Court has long had a highly deferential standard of review in cases concerning the termination of parental rights. *In re K.S.*, 750 N.E.2d 832, 836 (Ind. Ct. App. 2001). When reviewing the termination of parental rights, we will not reweigh the evidence or judge the credibility of the witnesses. *In re D.D.*, 804 N.E.2d 258, 264 (Ind. Ct. App. 2004), *trans. denied*. Instead, we consider only the evidence and reasonable inferences that are most favorable to the judgment. *Id*. Moreover, in deference to the trial court's unique position to assess the evidence, we will set aside the court's judgment terminating a parent-child relationship only if it is clearly erroneous. *In re L.S.*, 717 N.E.2d 204, 208 (Ind. Ct. App. 1999), *trans. denied*. If the evidence and inferences support the trial court's decision, we must affirm. *Id.*

Here, in terminating Mother's parental rights, the trial court entered specific findings and conclusions. When a trial court's judgment contains specific findings of fact and conclusions thereon, we apply a two-tiered standard of review. *Bester v. Lake County Office of Family & Children*, 839 N.E.2d 143, 147 (Ind. 2005). First, we determine whether the evidence supports the findings, and second, we determine whether the findings support the judgment. *Id*. "Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference." *Quillen v. Quillen*, 671 N.E.2d 98, 102 (Ind. 1996). If the evidence and inferences support the trial court's decision, we must affirm. *L.S.*, 717 N.E.2d at 208.

"The traditional right of parents to establish a home and raise their children is protected by the Fourteenth Amendment of the United States Constitution." *In re M.B.*, 666 N.E.2d 73, 76 (Ind. Ct. App. 1996), *trans. denied*. A trial court must subordinate the interests of the parent to those of the child, however, when evaluating the circumstances surrounding a termination. *K.S.*, 750 N.E.2d at 837. Although the right to raise one's own child should not be terminated solely because there is a better home available for the child, parental rights may be terminated when a parent is unable or unwilling to meet his or her parental responsibilities. *Id.* at 836.

When seeking an involuntary termination of parental rights, the State is required to allege and prove, among other things, 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; [and]
>
> (C) termination is in the best interests of the child . . . .

Ind. Code § 31-35-2-4(b)(2)(B), (C).[2] The State's burden of proof for establishing these allegations in termination cases "is one of 'clear and convincing evidence.'" *In re G.Y.*, 904 N.E.2d 1257, 1260-1261 (Ind. 2009) (quoting Indiana Code section 31-37-14-2). If the court finds that the allegations in a petition described in section 4 of this chapter are true, the court *shall* terminate the parent-child relationship. Ind. Code § 31-35-2-8(b).

[2] Indiana Code section 31-35-2-4 was amended by Pub. L. No. 21-2010, § 8 (eff. March 12, 2010). Because the changes to the statute became effective in March 2010 following the filing of the termination petition herein, they are not applicable to this case.

Mother challenges the sufficiency of the evidence supporting the trial court's findings as to subsections 2(B) and (C) of the termination statute cited above. *See* I.C. § 31-35-2-4(b)(2)(B), (C).

Initially, we point out that Indiana Code section 31-35-2-4(b)(2)(B) is written in the disjunctive. The trial court was therefore required to find only one of the two requirements of subsection 2(B) had been met before issuing an order to terminate Mother's parental rights. *See In re L.V.N.*, 799 N.E.2d 63, 69 (Ind. Ct. App. 2003). Here, the trial court determined that MCDCS presented sufficient evidence to satisfy both requirements of subsection (B), that is to say, that MCDCS established, by clear and convincing evidence, that there is a reasonable probability the conditions resulting in G.W.'s removal from Mother's care will not be remedied and that continuation of the parent-child relationship poses a threat to G.W.'s well-being. *See* I.C. § 31-35-2-4(b)(2)(B)(i), (ii). Mother does not challenge the trial court's latter determination. In failing to do so, Mother has waived review of this issue. *See Davis v. State*, 835 N.E.2d 1102, 1113 (Ind. Ct. App. 2005) (concluding that failure to present a cogent argument or citation to authority constitutes waiver of issue for appellate review), *trans. denied*. Nevertheless, given our preference for resolving a case on its merits, we will review the sufficiency of the evidence supporting the trial court's judgment with regard to subsection (B)(i) of the termination statute.

In determining whether there exists a reasonable probability that the conditions resulting in a child's removal or continued placement outside a parent's care will not be remedied, a trial court must judge a parent's fitness to care for his or her child at the time

of the termination hearing, taking into consideration evidence of changed conditions. *In re J.T.*, 742 N.E.2d 509, 512 (Ind. Ct. App. 2001), *trans. denied*. The court must also "evaluate the parent's habitual patterns of conduct to determine the probability of future neglect or deprivation of the child." *Id.* Pursuant to this rule, courts have properly considered 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. *A.F. v. Marion County Office of Family & Children*, 762 N.E.2d 1244, 1251 (Ind. Ct. App. 2002), *trans. denied*. A trial court may also properly consider the services offered to the parent by a county department of child services and the parent's response to those services as evidence of whether conditions will be remedied. *Id.* Finally, we point out that a county department of child services is not required to provide evidence ruling out all possibilities of change; rather, it need establish only that there is a reasonable probability a parent's behavior will not change. *In re Kay L.*, 867 N.E.2d 236, 242 (Ind. Ct. App. 2007).

In terminating Mother's parental rights to G.W. the trial court specifically found G.W. was left "without an appropriate caregiver" when Mother was arrested and subsequently incarcerated for driving while intoxicated. Appellant's App. p. 22. The court also noted Mother "had been convicted as a habitual offender for driving while intoxicated," was incarcerated at the time of the termination hearing, and was not eligible for release from incarceration until November 2011. *Id.* at 23. The trial court further found Mother had been directed by the court in its dispositional order to "utilize all opportunities to better herself while in custody of the Department of Correction[] or the

Henry County Jail and that she take G.E.D., parenting, mental health, and drug treatment courses," but that Mother had "failed to provide any documentation to the [f]amily [c]ase [m]anager as to her completion or participation in any services while incarcerated." *Id.* at 23. The trial court then concluded that there was a reasonable probability the "conditions that resulted in [G.W.'s] removal from [Mother] will not be remedied as [Mother] has not made any progress by way of adhering to this Court['s] Orders." *Id.* at 24.

A thorough review of the record reveals that clear and convincing evidence supports the trial court's findings set forth above. These findings, in turn, support the trial court's ultimate decision to terminate Mother's parental rights to G.W. G.W. was taken into custody by MCDCS following Mother's arrest and incarceration for operating a vehicle while intoxicated because there was no family member or appropriate caregiver available to care for G.W. At the time of the termination hearing, these conditions had not changed, as Mother remained incarcerated with an earliest possible release date in November 2011. In addition, the evidence further confirms that there is a reasonable probability the conditions resulting in G.W.'s removal and continued placement outside of Mother's care will not be remedied upon Mother's release.

During the termination hearing, MCDCS family case manager Tashia Cox informed the trial court that Mother had been the subject of several prior investigations by MCDCS involving either G.W. and/or his older half-siblings. The pre-dispositional report submitted into evidence further confirms that MCDCS substantiated allegations of neglect against Mother involving either G.W. or G.W.'s older siblings in 1999, 2005, and 2007 for various reasons including: (1) lack of supervision; (2) lack of food, clothing and

shelter; (3) environmental life/health endangerment; and/or (4) medical neglect. Cox also testified that before the initiation of the current CHINS case, MCDCS had provided Mother with case management services, housing, and psychiatric referrals through The Center for Mental Health, but that despite Mother's participation in these services, she had nevertheless been arrested over six times for "substance abuse[-]related crimes" between 2005 and 2008. Tr. p. 79.

Also significant, although Mother testified that while incarcerated she had enrolled in G.E.D. classes, participated in a stress management course entitled, "[T]hinking for a [C]hange," and completed a phase one substance abuse program called, "[M]others [A]gainst [M]eth," the record reveals that Mother failed to provide Cox with any documents substantiating her actual participation in and/or successful completion of these programs. To the contrary, when asked if she had "ever received any certificates from [Mother] indicating that she had completed any services while . . . incarcerated," Cox testified, "No[.] I have not." *Id.* at 80.

Court-appointed special advocate Nellie Elsten likewise informed the trial court that she had asked Mother "on many occasions" to "update me on anything" Mother had done while incarcerated, but that Elsten had not received any "documentation of completion." *Id.* at 92-93. When later questioned as to whether she "believe[d] at this time that the conditions that . . . necessitated [G.W.'s] removal can be remedied," Elsten replied "No" and further explained that "the [case] documentation indicates that even with treatment . . . [Mother] has relapsed in her substance abuse . . . ." *Id.* at 81-82.

Mother's own testimony is also contradictory and further supports the trial court's findings. When asked during the termination hearing whether she had received "any substance abuse counseling" while incarcerated at Rockville Correctional Facility, Mother answered, "[N]ot substance abuse treatment, no." *Id.* at 100. When further pressed about her earlier testimony concerning the phase one substance abuse class she allegedly completed while incarcerated Mother replied, "I have done phase one[,] but it was just . . . it was at my own pace and my own level. . . . I really didn't have a counselor in front of me[,] I just did it out of a book on my own past history with relapses in substance abuse." *Id.* Mother then admitted that it only took her "like three weeks" to complete phase one, and that she was merely on the waiting list for the various remaining parenting and self-improvement classes she had mentioned previously to the trial court. *Id*. With regard to her addiction to alcohol, Mother testified, "My abusive [sic] alcohol is not like a daily thing. . . . I could be sober for a year [or] six or seven mo[n]ths and then I have a relapse. Umm . . . so I was sober quit[e] a while before I relapsed this time." *Id.* at 110.

Based on the foregoing, we conclude that ample evidence supports the trial court's determination that there is a reasonable probability the conditions resulting in G.W.'s removal and continued placement outside Mother's care will not be remedied. As previously explained, a trial court must judge a parent's fitness to care for his or her children at the time of the termination hearing, taking into consideration the parent's habitual patterns of conduct to determine the probability of future neglect or deprivation of the children. *D.D.*, 804 N.E.2d at 266. At the time of the termination hearing, Mother

was incarcerated and thus unable to care for G.W. In addition, Mother's habitual pattern of failing to successfully complete and/or benefit from substance abuse treatment and parenting programs indicates there is a strong probability Mother will continue to struggle with these issues following her release from incarceration, thereby subjecting G.W. to future neglect and/or deprivation of his basic needs should he be returned to Mother's care. *See In re A.H.*, 832 N.E.2d 563, 570 (Ind. Ct. App. 2005) (concluding where a parent's "pattern of conduct shows no overall progress, the court might reasonably find that under the circumstances, the problematic situation will not improve").

A parent's "unwillingness to deal with parenting problems and to cooperate with those providing services, in conjunction with unchanged conditions, supports a finding that there exists no reasonable probability that the conditions will change." *Lang v. Starke County Office of Family & Children*, 861 N.E.2d 366, 372 (Ind. Ct. App. 2007), *trans. denied*. Mother's arguments on appeal, emphasizing her self-serving testimony regarding the services she *planned* to participate in while incarcerated, rather than the evidence cited by the trial court in its termination order, amount to an invitation to reweigh the evidence, which we may not do. *D.D.*, 804 N.E.2d at 265.

We next consider Mother's assertion that MCDCS failed to prove that termination of her parental rights is in G.W.'s best interests. We are mindful that, in determining what is in the best interests of a child, the trial court is required to look beyond the factors identified by the Department of Child Services and look to the totality of the evidence. *McBride v. Monroe County 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).

In addition to the findings previously discussed, the trial court made several additional pertinent findings in arriving at its determination that termination of Mother's parental rights is in G.W.'s best interests, including:

> 13. [Mother] has visited with her child, [G.W.,] on two separate occasions while she has been residing at the Indiana DOC.
> 14. The last visit with [G.W.] was on or about January of 2009.
>
> * * * * *
>
> 16. The child is placed in a pre-adoptive home.
> 17. The child is doing well in his current placement.
> 18. The CASA, Nellie Elsten, testified that [G.W.] wants to be adopted by said placement.
> 19. Both CASA and [f]amily [c]ase [m]anager Tashia Cox concurred that termination would be in [G.W.'s] best interest[s].

Appellant's App. p. 23-24. These findings, too, are supported by the evidence.

During the termination hearing, Specialized Alternatives for Families and Youth ("SAFY") Case Manager and Family Youth Specialist Andrea Gasaway was asked to describe her observations of G.W. when interacting with his foster parents. Gasaway informed the court that G.W. "seem[ed] just to really feel comfortable" in his foster home. Tr. p. 16. Gasaway further stated that she believed G.W. was "very bonded" with

his foster parents and that he "fits right in with the foster family." *Id.* When asked whether she had noticed "any improvements" in G.W.'s behavior from the time he first arrived at the foster home until "today," Gasaway answered in the affirmative, stating G.W. appeared to be "happier," that he had maintained good grades, and that there had been "no major behavior concerns with [G.W.]" *Id.* at 18-19.

In recommending termination of Mother's parental rights, CASA Elsten testified, "I do believe that . . . [Mother's] rights should be terminated as to [G.W.] because it's his desire and he is doing very well. He's twelve years old and he's got a need for permanency and a future." *Id.* at 63. When likewise asked whether she believed that it was in G.W.'s best interests to terminate Mother's parental rights, Cox answered in the affirmative referring to Mother's "significant history of substance abuse," her "involvement with child protection," and her "legal issues . . . even while getting treatment," concluding that "it doesn't appear [Mother] is able to remain sober [and] to provide for her children even while in treatment." *Id.* at 85-86.

Based on the totality of the evidence, including Mother's history of substance abuse, criminal history, and inability to provide G.W. with a safe and stable home environment, coupled with Mother's unavailability to parent G.W. at the time of the termination hearing due to her ongoing incarceration as well as the above-cited testimony from Gasaway, Cox, and Elsten, we conclude that there is sufficient evidence to support the trial court's conclusion that termination of Mother's parental rights is in G.W.'s best interests. *See, e.g., In re A.I.*, 825 N.E.2d 798, 811 (Ind. Ct. App. 2005) (concluding that testimony of court-appointed advocate and family case manager, coupled with evidence

that conditions resulting in continued placement outside home will not be remedied, is sufficient to prove by clear and convincing evidence termination is in child's best interests), *trans. denied*. This Court will reverse a termination of parental rights "only upon a showing of 'clear error'– that which leaves us with a definite and firm conviction that a mistake has been made." *In re A.N.J.*, 690 N.E.2d 716, 722 (Ind. Ct. App. 1997) (quoting *Egly v. Blackford County Dep't of Public Welfare*, 592 N.E.2d 1232, 1235 (Ind. 1992)). We find no such error here.

Affirmed.[3]

NAJAM, J., and BROWN, J., concur.

[3] Mother also claims MCDCS failed to make reasonable efforts at reunification, asserting that the trial court's dispositional order failed to direct Mother and the foster parents to maintain visitation between Mother and G.W. We note that Mother failed to object to the trial court's dispositional order during the underlying CHINS proceedings and never presented this issue to the trial court, but instead presents it for the first time on appeal. An appellant who presents an issue for the first time on appeal under these circumstances waives the issue for purposes of appellate review. *See McBride*, 798 N.E.2d at 194 (concluding failure to raise constitutional due process challenge in trial court waives issue for appellate review); *see also Smith v. Marion County Dep't of Pub. Welfare*, 635 N.E.2d 1144, 1148 (Ind. Ct. App. 1994) (stating time for appealing issue in CHINS proceeding commences when CHINS dispositional decree is entered), *trans. denied*.