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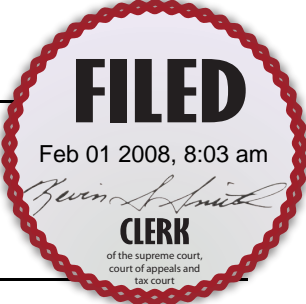
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**IN THE
COURT OF APPEALS OF INDIANA**



In the Matter of Termination of the Parent-Child)
Relationship of J.W., Minor Child, and her Mother,)
)
JESSICA WINCHELL,)
)
Appellant-Respondent,)
)
vs.)
)
MARION COUNTY DEPARTMENT OF)
CHILD SERVICES,)
)
Appellee-Petitioner,)
)
CHILD ADVOCATES, INC.,)
)
Co-Appellee-Guardian Ad Litem.)

No. 49A02-0705-JV-411

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Larry Bradley, Judge
Cause No. 49D09-0610-JT-41437

February 1, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Jessica Winchell (“Mother”) appeals the termination of her parental rights as to her minor daughter, J.W.

We affirm.

ISSUES

1. Whether the evidence is sufficient to support the trial court’s findings that there is a reasonable probability that the conditions resulting in J.W.’s removal from Mother’s care will not be remedied.
2. Whether there is sufficient evidence to support the trial court’s finding that continuation of the parent-child relationship poses a threat to J.W.’s well-being.
3. Whether there is sufficient evidence to support the trial court’s finding that termination of the parent-child relationship is in J.W.’s best interest.

FACTS

J.W. was born on July 8, 2005 while Mother was incarcerated in the Indiana Women’s prison after Mother’s forgery conviction. Mother could not provide an appropriate home for J.W., and J.W.’s father failed to pick up J.W. from the Marion County Department of Child Services (“MCDCS”). On July 19, 2005, MCDCS filed a Child in Need of Services (“CHINS”) petition. Mother admitted to the allegations contained in the CHINS petition and J.W. was found to be in need of services on August 3, 2005. The trial court proceeded to disposition and ordered J.W. to be removed from Mother’s care.

A Parental Participation Decree was made a part of the dispositional order. Mother was ordered to complete a parenting assessment and follow all recommendations,

complete parenting classes, home-based counseling, and provide stable housing and income. Before leaving her incarceration, Mother completed parenting classes, classes relating to domestic violence, and earned her G.E.D.

J.W.'s foster mother began taking J.W. to the prison to visit Mother when J.W. was approximately one month-old. J.W. was taken for four-hour visits with Mother almost every Saturday of Mother's incarceration.

Mother was released from prison on June 13, 2006. Within the first two months of Mother's release from prison, she reported three different addresses to her case manager. Mother initially stayed in a halfway house, but was kicked out for staying out without authorization. She then lived with a man she had known for a week and a half. While staying with this man, the house was raided and Mother was arrested for possession of cocaine and visiting a common nuisance. Mother then moved to a different address with the same man. Mother described the man as "no good, bad for me." (Tr. 125). Mother then moved to Fort Wayne in August of 2006 to live with her sister. After leaving her sister's home, she moved in with her husband, J.W.'s father, who has a criminal history involving dealing in cocaine.

Prior to being incarcerated, Mother claimed that she was working at Taco Bell. However, Mother had not provided any verification of that employment to her case manager. Mother could have found employment through her post-incarceration placement in a halfway house, but she was evicted for a rules violation before taking advantage of those services. After being released from prison, Mother worked in a

clothing store, but left that job to return to Fort Wayne. While living in Fort Wayne, Mother was able to visit J.W. once or twice a month.

Mother tested positive for cocaine during a drug screen in September of 2006. Mother claimed that she tested positive because she was intimate again with her husband who was using cocaine. Mother's case manager suggested to Mother that she participate in drug treatment after testing positive for cocaine. Mother declined the treatment and told her case manager that she did not have a drug problem. Mother's parenting assessor stated that with the cocaine charge and positive screen for cocaine pending against Mother, some sort of treatment would be warranted. The parenting assessor did recommend a reassessment in the event substance abuse became an issue. The parenting assessor was concerned by Mother's history of choosing men with drug issues. Mother's husband was a crack cocaine dealer, the father of Mother's son had an arrest for marijuana, and the father of her older daughter had a problem with heroin.

Mother did not successfully complete home-based counseling. That service is not available while a person is incarcerated, only when a parent has established suitable housing. Home-based counseling also was not an option as long as Mother continued to live with her husband. J.W.'s father had appeared in court twice. He was ordered to complete a parenting assessment, drug and alcohol assessment, random drug screens, drug treatment and home-based counseling. Of those requirements, J.W.'s father had only completed the parenting assessment. At one point, Mother had a restraining order against her husband resulting from an instance of domestic violence.

On October 11, 2006 the MCDCS filed a petition to involuntarily terminate the parent-child relationship of Mother and J.W. Mother was arrested for a parole violation on January 2, 2007. Mother's release date from incarceration was December 26, 2007. Therefore, Mother was incarcerated at the time of the termination hearing, April 25, 2007. Mother was allowed to participate in the proceedings telephonically.

J.W. had been placed with a foster family since January 2007. The foster mother had known J.W. since she was six days-old, and wished to adopt J.W. Both the case manager and the guardian ad litem recommended adoption to the court. The trial court ordered the termination of the parent-child relationship on April 27, 2007. Mother now appeals from that order.

DECISION

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).

When a county office of family and children seeks to terminate parental rights, the office must plead and prove in relevant part the following:

(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, the trial court need find only one of the two elements by clear and convincing evidence. *Bester v. Lake County Office of Family and Children*, 839 N.E.2d 143, 153 n. 5 (Ind. 2005).

In reviewing termination proceedings on appeal, this court will not reweigh the evidence nor assess the credibility of witnesses. *L.S.*, 717 N.E.2d at 208. We consider only the evidence that supports the trial court's decision and the reasonable inferences drawn from that evidence. *Id.* In deference to the trial court's unique position to assess the evidence, we set aside the judgment terminating a parent-child relationship only if it is clearly erroneous. *Id.* If the evidence and inferences support the trial court's decision, we must affirm. *Id.*

1. Remedy of Conditions

Mother asserts that there was not sufficient evidence to demonstrate a reasonable probability that the conditions resulting in J.W.'s removal have not been 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 A.L.H.*, 774 N.E.2d 896, 899 (Ind. Ct. App. 2002). However, recognizing the permanent effect of termination, this court has stated that the trial court must also evaluate the parent's habitual patterns of

conduct to determine whether there is a substantial probability of future neglect or deprivation of the children. *Id.* Based on that rule, trial courts have properly considered evidence of a parent's prior criminal history, drug and alcohol abuse, history of neglect, failure to provide support, lack of adequate housing, and employment. *Id.*

The record reflects that Mother was incarcerated at the time of the termination hearing. Approximately two weeks after her initial release from prison, Mother was arrested for cocaine related felonies. Those charges were reduced to a misdemeanor charge of visiting a common nuisance. Mother took random drug screens as part of her probation. Mother tested positive for cocaine once in her drug screen in September 2006. Mother has had four different places of residence between June of 2006 to January of 2007. One of those places was a halfway house from which she was evicted for a rules violation. Two of those places were with a man who she knew for two weeks prior to moving in with him. One of those places was the subject of the raid resulting in Mother's arrest on cocaine charges. Mother then lived with her husband, J.W.'s father, in Fort Wayne and was living with him when she tested positive for cocaine.

Mother reported having worked for Taco Bell in Fort Wayne for three months prior to be re-incarcerated. Mother's testimony about her future plan for employment after her release in December of 2007 varied from resuming work at Taco Bell in Fort Wayne to contacting someone about employment at a Subway in Indianapolis. Mother's testimony about her future housing upon release varied from getting financial help from family members in order to live in an efficiency to finding housing in a halfway house that accepts children until she can "get on her feet."

Mother has two children in addition to J.W. Those children are in the custody of others. Mother has not seen her older daughter since January of 2006, and has not seen her son since early 2004.

Upon Mother's release from incarceration, Mother would have to secure adequate housing and income. Mother would have to complete treatment prior to receiving any home-based counseling. The home-based counseling would take a significant amount of time.

Based upon the record in this case, there is ample evidence that the conditions resulting in J.W.'s removal will not be remedied. Consequently, the trial court's finding that the conditions were not likely to be remedied is not clearly erroneous.

2. Threat to Well-Being

Mother has also challenged the trial court's finding that continuation of the parent-child relationship poses a threat to J.W.'s well-being. However, as mentioned above, because subsection (b)(2)(B), the subsection dealing with the child's well-being and the likelihood of the conditions responsible for the child's removal being remedied is written in the disjunctive, the trial court need find only one of the two elements by clear and convincing evidence. Because of our determination that the trial court's finding was not clearly erroneous, with regard to the remedy of conditions, we need not address Mother's contention here. *See A.N.J.*, 690 N.E.2d at 721 n. 2.

3. Best Interests of the Child

Mother also contends that there is insufficient evidence to support the trial court's finding that termination of Mother's parental rights is in J.W.'s best interest. For the

“best interest of the child” statutory element, the trial court is required to consider the totality of the evidence to 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 totality of the evidence in this case demonstrates a clear showing that termination of the parent-child relationship between Mother and J.W. was proper. Mother has been unable to maintain stable employment and her future plans for employment after her release from incarceration varied during the course of her testimony at the termination hearing. Mother has been unable to establish suitable and stable housing prior to her re-incarceration. Her testimony during the termination hearing showed that her future plans upon release from incarceration varied from living in Fort Wayne with J.W.’s father to obtaining some sort of housing in Indianapolis. Both the caseworker and the guardian ad litem recommended that J.W.’s best interests would be served by allowing her to be adopted by her foster family. Her foster family wanted to adopt J.W.

The record establishes sufficient evidence that termination of Mother’s rights is in the best interests of J.W. Thus, the elements necessary to sustain the termination of Mother’s parental relationship with J.W. was established by clear and convincing evidence.

Affirmed.

BAKER, C.J., and BRADFORD, J., concur.