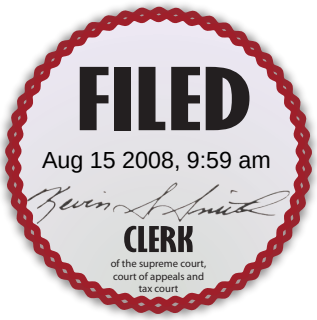

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IN THE COURT OF APPEALS OF INDIANA

IN THE MATTER OF S.S., a Child in Need of Services,	)	
AMBER S., Mother, Appellant,	)	
vs.	)	No. 29A02-0801-JV-0002
HAMILTON COUNTY DEPARTMENT OF CHILD SERVICES, Appellee.	)	

APPEAL FROM THE HAMILTON CIRCUIT COURT
The Honorable Judith S. Proffitt, Judge
Cause No. 29C01-0706-JT-1033

August 15, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Amber S. ("Mother") appeals the involuntary termination of her parental rights to her son, S.S., in Hamilton Circuit Court. Concluding that the trial court's judgment terminating Mother's parental rights is supported by clear and convincing evidence, we affirm.

Facts and Procedural History

Mother is the biological mother of S.S., born on June 18, 2001, and his deceased younger sister, H.S., born on June 25, 2005. The facts most favorable to the trial court's judgment reveal that on Friday, October 20, 2006, the Hamilton County Department of Child Services ("HCDCS") received a report alleging S.S. was continuously complaining of hunger and asking for food, and that S.S. was not receiving proper nutrition. The HCDCS initiated an investigation and discovered Mother's home to be filthy and littered with trash, spoiled food, and mold. Additionally, the HCDCS investigator and accompanying law enforcement officers observed various medications, both prescription and non-prescription, strewn about the house within easy reach of S.S. The family home also had several safety issues, including open electrical sockets and an unsanitary bathroom. S.S. was immediately taken into protective custody.

On October 24, 2006, the trial court issued an order authorizing S.S.'s emergency detention, finding his detention was "essential to protect the child[,]" and further finding "continuation of residence in the home of the mother would be contrary to the welfare of [S.S.] because it appears the residence . . . is in such condition as to cause immediate harm to the child and it appears the child is not receiving adequate nutrition." Appellant's

App. p. 28. The trial court's detention order also authorized the HCDCS to file a child in need of services ("CHINS") petition, which the HCDCS did on the same day. The detention order and findings cited above were later entered as stipulated facts for the trial court's consideration during the termination hearing.

On November 20, 2006, an initial hearing on the CHINS petition was held wherein Mother was present and represented by counsel. Mother denied the allegations contained in the petition. The trial court, however, found that allowing S.S. to be returned to Mother's care would be "contrary to the welfare of [S.S.]" because of "the conditions of the home and the conduct of the mother toward the child" which "created a substantial risk of danger to the health and safety of [S.S.]." Id. at 38. The trial court therefore ordered S.S. to remain in licensed foster care. The trial court's findings and order on the initial CHINS hearing were later entered as stipulated facts for the trial court's consideration at the termination hearing as well. A fact-finding hearing on the CHINS petition was eventually set for April 16, 2007.

Meanwhile, on October 27, 2006, Mother had been arrested on two counts of neglect of a dependent causing serious bodily injury, both Class A felonies, stemming from the death of S.S.'s younger sibling, H.S. H.S. had died several months earlier, on May 17, 2006, while in Mother's care and custody. An autopsy indicated that eleven-month-old H.S. had died of extreme dehydration and starvation. On March 5, 2007, Mother entered into a plea agreement with the State wherein she plead guilty to one count of neglect resulting in serious bodily injury as a Class B felony. The plea agreement, which was later admitted into evidence at the termination hearing, was submitted to and

approved of by the criminal trial court on March 27, 2007. On the same day, Mother was sentenced to eight years incarceration in the Department of Correction, with two years suspended.

On April 4, 2007, the HCDCS filed an amended CHINS petition. The amended petition included the details of Mother's arrest and criminal charges stemming from H.S.'s death, the autopsy findings, and the plea agreement Mother had reached with the State. The new CHINS petition also alleged that Mother was unable to provide S.S. with necessary food, shelter, clothing, medical care, education, and support due to her incarceration. A fact-finding hearing on the amended CHINS petition was held on April 16, 2007. Mother was present for the hearing and admitted to the allegations contained in the petition. The order from this hearing and its findings were entered as stipulated facts for the trial court's consideration at the termination hearing.

A dispositional hearing was held on May 14, 2007, and the trial court determined the HCDCS was not required to use reasonable efforts to reunify Mother with S.S. pursuant to Indiana Code Section 31-34-21-5 et seq.[1] The HCDCS subsequently filed a petition to involuntarily terminate Mother's parental rights to S.S. on May 30, 2007, and

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[1] Indiana Code Section 31-34-21-5.6 provides in relevant part:

> (b) Reasonable efforts to reunify a child with the child's parent, guardian, or custodian . . . are *not* required if the court finds any of the following:
>
> * * *
>
> (3) A parent, guardian, or custodian of a child who is a child in need of services:
>
> * * *
>
> (B) has been convicted of:
>
> * * *
>
> (F) neglect of a dependent (IC 35-46-1-4) as a Class B felony[.]

(1998 & Supp. 2007) (emphasis added).

a fact-finding hearing on the termination petition commenced on October 11, 2007. At the time of the termination hearing, Mother has been continuously incarcerated since her initial arrest and had a projected release date in April 2009.

At the conclusion of the termination hearing, the trial court took the matter under advisement. On December 3, 2007, the trial court issued its judgment terminating Mother's parental rights to S.S. This appeal ensued.

Standard of Review

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). Thus, 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. We consider only the evidence and reasonable inferences that are most favorable to the judgment. Id.

Here, the trial court made specific findings in terminating Mother's parental rights. Where the trial court enters specific findings of fact, we must first determine whether the evidence supports the findings, and second, we determine whether the findings support the judgment. Bester v. Lake County Office of Family & Children, 839 N.E.2d 143, 147 (Ind. 2005). We will set aside the trial court's judgment terminating parental rights only if it is clearly erroneous. Id. A finding is clearly erroneous when there are no facts or inferences drawn therefrom that support it. In re D.D., 804 N.E.2d at 264. A judgment is clearly erroneous only if the findings do not support the trial court's conclusions or the

conclusions do not support the judgment thereon. Quillen v. Quillen, 671 N.E.2d 98, 102 (Ind. 1996).

I. Remedy of Conditions

The Fourteenth Amendment to the United States Constitution protects the traditional right of parents to establish a home and raise their children. Bester, 839 N.E.2d at 147. A parent's interest in the care, custody, and control of his or her children is perhaps the oldest of our fundamental liberty interests. Id. However, these parental interests are not absolute and must be subordinated to the child's interests when determining the proper disposition of a petition to terminate parental rights. In re M.B., 666 N.E.2d 73, 76 (Ind. Ct. App. 1996), trans. denied. Thus, parental rights may be terminated when the parents are unable or unwilling to meet their parental responsibilities. In re K.S., 750 N.E.2d at 836.

In order to terminate a parent-child relationship, the State is required to allege and prove that:

> (A) [o]ne (1) of the following exists:
>
> (i) the child has been removed from the parent for at least six (6) months under a dispositional decree;
>
> * * *
>
> (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) and -8 (1998). The State must establish each of these allegations by clear and convincing evidence. Egly v. Blackford County Dep.'t of Pub. Welfare, 592 N.E.2d 1232, 1234 (Ind. 1992). We further note that even where a trial court finds that reasonable efforts to reunify the child with the parent or guardian are not required, the trial court and Department of Child Services are still required to follow the statutory procedures in termination cases. G.B. v. Dearborn County Div. of Family & Children, 754 N.E.2d 1027, 1032 (Ind. Ct. App. 2001), trans. denied.

Mother does not challenge the trial court's findings that S.S. had been removed for more than six months under a dispositional decree and that the HCDCS had a satisfactory plan for the care and treatment of S.S., namely, reunification with S.S.'s biological father, or, in the alternative, adoption by S.S.'s current foster parents. Rather, Mother asserts the HCDCS failed to prove by clear and convincing evidence that there was a reasonable probability the conditions resulting in S.S.'s removal from her care would not be remedied and that termination of her parental rights is in S.S.'s best interests. Specifically, Mother asserts that "the [HCDCS] did not present clear and convincing evidence that established the statutory factors requisite for termination of parental rights" but "only presented evidence of [Mother's] conviction of Neglect of a Dependant and her resulting incarceration until April 2009." Br. of Appellant at 6.

Initially, we note that Indiana Code section 31-35-2-4(b)(2)(B) is written in the disjunctive. Thus, the trial court need find by clear and convincing evidence only one of

the two requirements of subsection (B). See In re L.S., 717 N.E.2d 204, 209 (Ind. Ct. App. 1999), trans. denied. The trial court found both requirements of subsection (B) to be true; that is to say, the trial court determined, based on the evidence, both that there was a reasonable probability the conditions resulting in S.S.'s removal and continued placement outside Mother's care would not be remedied and that continuation of the parent-child relationship poses a threat to S.S.'s well-being. However, Mother does not challenge the trial court's latter finding that continuation of the parent-child relationship poses a threat to S.S.'s well-being in her brief to this Court. 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. Waiver notwithstanding, we will address the merits of Mother's claim.

When determining whether a reasonable probability exists that the conditions justifying a child's removal and continued placement outside the home will or will not be remedied, the 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 evidence of changed conditions. In re J.T., 742 N.E.2d 509, 512 (Ind. Ct. App. 2001), trans. denied. Additionally, 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. Moreover, the HCDCS is not required to rule out all possibilities of change; rather, it need establish only that there is a reasonable probability the parent's behavior will not change. In re Kay L., 867 N.E.2d 236, 242 (Ind. Ct. App. 2007).

The evidence most favorable to the judgment reveals that S.S. was initially removed from Mother's care due to the filthy and unsafe conditions of the family home, in addition to the fact it appeared S.S. was not receiving adequate nutrition. The reason for S.S.'s continued placement outside of Mother's care was Mother's inability to provide S.S. with food, clothing, shelter, and other life necessities due to her incarceration stemming from her Class B felony neglect of a dependent conviction. At the time of the termination hearing, these conditions had not changed. Mother remained incarcerated with no ability to provide S.S. with the basic necessities of life. Moreover, Mother would not be available to even attempt to care for S.S. until sometime after her release date in April 2009, approximately one-and-a-half years after the termination hearing. As stated earlier, the trial court "must assess the parent's ability to care for the children as of the date of the termination hearing." Rowlett v. Vanderburgh County Office of Family & Children, 841 N.E.2d 615, 621 (Ind. Ct. App. 2006), trans. denied.

A thorough review of the record further reveals there is no evidence Mother availed herself of any services whatsoever while incarcerated, such as parenting classes, nutrition classes, or individual therapy, in an attempt to better equip herself to properly care for her son once released from incarceration. Additionally, although the record is void of any evidence indicating Mother will ever be willing or able to appropriately

provide for S.S upon her release from incarceration, the record is replete with evidence to the contrary. The amended CHINS petition contains allegations that S.S.'s eleven-month-old younger sister died as a result of "severe dehydration and starvation" while she and S.S. were in the sole care and custody of Mother. Appellant's App. p. 46. Despite H.S.'s unconscionable demise, additional CHINS documents, including the trial court's findings and orders detailing the deplorable conditions of Mother's home and S.S.'s apparent state of malnutrition, indicate that five months after H.S.'s untimely death Mother was still either unable or unwilling to remedy the conditions in which she and S.S. were living. Moreover, Mother admitted to the veracity of the allegations contained in the amended CHINS petition.

A pattern of unwillingness to deal with parenting problems, 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 and Children, 861 N.E.2d 366, 372 (Ind. Ct. App. 2007), trans. denied. Here, not only was Mother unavailable to parent S.S. at the time of the termination hearing, but the documents and stipulated facts entered into evidence during the termination hearing provided detailed evidence of Mother's persistent neglectful conduct. This evidence supports the trial court's finding that the HCDCS proved, clearly and convincingly, that a reasonable probability of future neglect and deprivation of S.S. exists should he be returned to Mother's care in the future. Moreover, we agree with the HCDCS that "[t]he trial court [was] entitled to make the reasonable inference that it [took] consistent and prolonged deprivation of food and water to dehydrate and starve [H.S.]" Br. of Appellee at 9.

Based on the foregoing, we conclude the HCDCS presented clear and convincing evidence the conditions resulting in S.S.'s removal and continued placement outside the home will not be remedied. We are unwilling to put S.S. on a shelf until Mother is willing and capable of caring for him. See In re Campbell, 534 N.E.2d 273, 275 (Ind. Ct. App. 1989) (holding that the Welfare Department "does not have to rule out any possibility of change" but just has to show that there is a reasonable probability that the parent's behavior will not change).

II. Best Interests

Next, we address Mother's assertion the HCDCS failed to prove that termination of her parental rights is in S.S.'s best interests.

We are mindful that in determining what is in the best interests of the child, the 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 trial 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 a court-appointed special advocate that parental rights be terminated support a finding that termination is in the child's best interest. In re M.M., 733 N.E.2d 6, 13 (Ind. Ct. App. 2000).

In addition to the fact Mother had been unable to remedy the conditions necessitating S.S.'s removal and continued placement outside her care, the record further

reveals that the HCDCS family case manager and Guardian ad Litem ("GAL") both recommended termination of Mother's parental rights to S.S. as well. In so doing, HCDCS family case manager Francais Austin testified that S.S. "started at a fairly low point, what I would call environmentally delayed[,]" but that he'd made "significant progress" " and was "thriving" in his current foster care placement. Tr. pp. 19-20. Similarly, Joan Lawrence, attorney for the GAL, also testified that "[t]he position of the [GAL] is supporting the termination of the parent/child relationship between [M]other and child[.]" Id. at 34-35.

Based on the totality of the evidence, including Mother's continuing incarceration, Mother's persistent neglectful conduct that resulted in both S.S.'s initial removal from her care and the untimely death of S.S.'s younger sibling, and testimony from the HDCDS case manager and attorney for the GAL, we conclude the trial court's determination that termination of Mother's parental rights is in S.S.'s best interests is supported by clear and convincing evidence. See In re A.I., 825 N.E.2d 798, 811 (Ind. Ct. App. 2005) (concluding that testimony of the court-appointed special 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.

Conclusion

The trial court's judgment terminating Mother's parental rights to S.S. is supported by clear and convincing evidence. Accordingly, we find no error.

Affirmed.

MAY, J., and VAIDIK, J., concur.