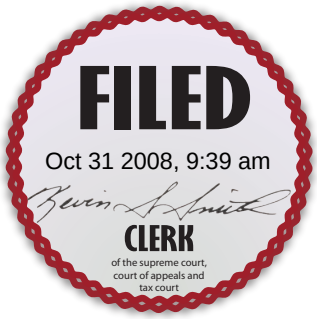


ATTORNEY FOR APPELLANT:

**AMY KAROZOS**
Indianapolis, Indiana

ATTORNEY FOR APPELLEE:

**MARJORIE A. MILLMAN**
Indiana Department of Child Services
Seymour, Indiana

# IN THE
# COURT OF APPEALS OF INDIANA

| | | |
|---|---|---|
| R.Y. (Mother), | ) | |
| | ) | |
| Appellant-Respondent, | ) | |
| | ) | |
| vs. | ) | No. 49A02-0804-JV-394 |
| | ) | |
| MARION COUNTY DEPARTMENT OF CHILD SERVICES, | ) | |
| | ) | |
| | ) | |
| Appellee-Petitioner. | ) | |

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Marilyn A. Moores, Judge
Cause No. 49D09-0705-JT-20577

**October 31, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**NAJAM, Judge**

## STATEMENT OF THE CASE

R.Y. ("Mother") appeals the trial court's order terminating her parental rights to her minor child G.Y. ("G.Y." or "the child"). Mother presents two issues for review:

1. Whether the evidence is sufficient to support the order terminating her parental rights.

2. Whether Mother's due process rights were violated in the termination proceedings.

We affirm.

## FACTS AND PROCEDURAL HISTORY

Mother gave birth to a son, G.Y., on April 23, 2004.[1] On December 12, 2005, police arrested Mother for delivering cocaine to a police informant in April 2003. At the time of the arrest, the arresting officer allowed Mother to phone her sister, Amy Roberts, to take custody of and care for G.Y. The State charged Mother with dealing in cocaine, as a Class A felony. Subsequently, Mother pleaded guilty to dealing in cocaine, as a Class B felony, and, on April 11, 2006, the court entered a judgment of conviction and sentenced Mother to twelve years, with four years suspended, and four years of probation.

On January 3, 2006, the Marion County Department of Child Services ("the DCS"), received a report that G.Y. had been left in the care of a man in Indianapolis who had no refrigerator, stove, or food. On January 4, 2006, the DCS filed a petition alleging

[1] The court also ordered the termination of the parental rights of G.Y.'s father, also named G.Y. ("Father"). Father is not a party to this appeal.

G.Y. to be a CHINS.[2] And on May 11, 2006, Mother admitted the allegations in the CHINS petition. After a hearing, the court entered a dispositional order ("Dispositional Order") on July 28, 2006, incorporating a Parental Participation Decree ("Participation Decree"). The Dispositional Order provided that the plan for permanency was reunification with Mother. Under the Participation Decree, Mother was ordered, in part, to obtain a source of income, suitable housing, home-based counseling, a parenting assessment, and a drug and alcohol assessment; to remain in contact with the caseworker; to develop a protection plan; to establish paternity as to the child; to visit with the child on a regular basis as recommended by a counselor or the caseworker; and to take parenting classes.

On May 18, 2007, the DCS filed a petition to terminate Mother's parental rights to G.Y. Following a fact-finding hearing on January 30, 2008 and February 22, 2008, the court entered its order on March 26, 2008, granting the petition ("Termination Order"). In the Termination Order, the court made special findings and conclusions, in part, as follows:

**FINDINGS OF FACT**

The Court now finds by clear and convincing evidence that:

* * *

2. A Petition Alleging Children in Need of Services "CHINS" was filed on [G.Y.] on January 4, 2005[,] under Cause Number 40D090601JC000260. Allegations in the Petition included [G.Y.'s] mother and father both being incarcerated leaving no one legally

[2] Mother did not include in her Appendix copies of the pleadings, Chronological Case Summary, or other documents from the CHINS proceedings. However, the CHINS petition and the court's orders following the initial, fact-finding, and dispositional hearings in the CHINS proceeding are in the record on appeal as exhibits admitted at the termination hearing.

responsible to care for him. Further, the Petition alleged that [G.Y.] had been left with a friend who did not have a refrigerator, stove or food.

* * *

4. The CHINS was admitted to by Mother on May 11, 2006. [G.Y.] was formally removed from his mother on July 28, 2006[,] pursuant to a Disposition[al] Decree. [G.Y.] has never been returned to his mother.

5. Mother received a twelve[-]year sentence on April 11, 2006[,] for Dealing in Cocaine, with four of the twelve years suspended. Her current out date is May 30, 2010. At one time, as the result of bad behavior, Mother's out date was in 2011. It was recently moved up due to good behavior. Mother has future plans to obtain her Associates Degree which may move her out date up to May of 2009.

6. In the 2000 [sic], Mother received a three[-]month sentence in Delaware County on a conviction of Theft/Receiving Stolen Property. On February 14, 2001[,] Mother was convicted of two counts of Theft in Randolph County for which she received a sentence of three years on each count. Mother subsequently violated her probation on the Randolph County convictions and was sentenced to seventeen months in jail on September 18, 2003. Mother has another Theft conviction out of Huntington County for which she received one and one-half years on August 30, 2006.

* * *

8. There is a reasonable probability that the conditions that led to the removal and continued placement outside the home will not be remedied by Mother. Mother remains incarcerated and unavailable to parent. Upon her release, she will be on probation for an additional four years. Prior to reunification, she will have to complete a parenting assessment, parenting classes, and drug treatment classes. These services will need to be successfully completed as well as Mother obtaining suitable housing and gainful employment, prior to a referral for home[-]based counseling. During the twenty-six months of Mother's incarceration, she has taken one substance abuse education class, one parenting class and some college courses.

9. Given Mother's pattern of criminal activity, resulting in periods of incarceration, it is unlikely that conditions will change to where Mother will remain available to parent.

10. [G.Y.] has resided in the same foster care placement since January of 2006, at which time he was less than two years old. He is doing exceptionally well and is very attached to his foster parents and foster brothers. This home is pre-adoptive.

11. Mother has consistent visitation at her prison facility. Visitation is monthly for one[-] or two[-]hour period[s]. There have been no concerns raised by the monitoring case manager, Wendy Budwig.

12. Termination of the parent-child relationship is in [G.Y.'s] best interests. Termination and a subsequent adoption will provide [G.Y.] the opportunity to be adopted within the safe, stable home he sees as his. He has resided in the home for the last two years of his short life.

13. The MCDCS plan for [G.Y.] is adoption by his foster parents. This plan is satisfactory for his care and treatment.

14. [G.Y.'s] Guardian ad Litem, Renee Fishel, agrees with MCDCS's plan and that termination of parent-child relationship is in the best interests of [G.Y.] because of the time that has elapsed and the stability and permanency [G.Y.] would receive. Ms. Fishel would have liked for Mother to have had continued visitation with [G.Y.] because she observed some kind of bond between them and thought it would be nice for [G.Y.] to know her in the future.

**CONCLUSIONS OF LAW**

* * *

2. There is a reasonable probability that the conditions that resulted in [G.Y.'s] removal and continued placement outside the home will not be remedied by [Mother]. She is still unavailable to parent and will remain unavailable to parent for quite some time. She has taken minimal classes to educate herself on parenting and substance abuse issues and has a disturbing history of criminal activity.

3. Termination of the parent-child relationship is in [G.Y.'s] best interests so that he will be free for adoption where his needs will be met by a consistent caretaker in a permanent environment. To

> provide Mother additional time to be released from jail and try to remedy conditions would only necessitate [G.Y.] being put on a shelf instead of providing paramount permanency.
>
> * * *
>
> IT IS THERFORE ORDERED, ADJUDGED AND DECREED the parent-child relationship between [G.Y.] and [Mother] is hereby terminated. . . .

Appellant's App. at 23-25 (emphasis original). Mother now appeals.

## DISCUSSION AND DECISION

Mother alleges that the trial court's order terminating her parental rights to G.Y. is not supported by sufficient evidence. Specifically, Mother asserts that the DCS did not prove (a) a reasonable probability that the conditions that resulted in [G.Y.'s] removal and continued placement outside the home would not be remedied, and (b) the DCS did not prove that termination of Mother's parental rights is in G.Y.'s best interests. She also contends that the DCS failed to comply with the statutory requirements during the termination proceeding, denying Mother of her due process rights. We address each contention in turn.

### Issue One: Sufficient Evidence

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. Instead, we consider only the evidence and reasonable inferences therefrom 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 apply a two-tiered standard of review. First, we must determine whether the evidence supports the findings. Bester v. Lake County Office of Family & Children, 839 N.E.2d 143, 147 (Ind. 2005). Second, we determine whether the findings support the judgment. Id. 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. A judgment is clearly erroneous if the findings do not support the trial court's conclusions or the conclusions do not support the judgment. Bester, 671 N.E.2d at147.

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:

(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) (1998).[3] If the trial court finds the allegations in the termination petition described in section four to be true, the court shall terminate the parent-child relationship. Ind. Code § 31-35-2-8 (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).

The clear and convincing evidence standard requires a stricter degree of proof than a mere preponderance of the evidence. K.J.P. v. State, 724 N.E.2d 612, 615 (Ind. Ct. App. 2000), trans. denied. In ordinary civil actions, a fact in issue is usually sufficiently proved by a preponderance of the evidence. Id. However, "clear and convincing proof is a standard frequently imposed in civil cases where the wisdom of experience has demonstrated the need for greater certainty, and where this high standard is required to sustain claims which have serious social consequences or harsh or far reaching effects on individuals." Id. (quoting Travelers Indem. Co. v. Armstrong, 442 N.E.2d 349, 360-61 (Ind. 1982)). Such is the case with termination of parental rights proceedings. When reviewing a judgment requiring proof by clear and convincing evidence, an appellate

[3] Additional conditions not at issue in this case are also required to be alleged and proved before the termination of parental rights may occur pursuant to Indiana Code Section 31-35-2-4(b)(2)(A) and (D).

court may not impose its own view as to whether the evidence is clear and convincing, but must determine, by considering only the probative evidence and reasonable inferences supporting the judgment and without weighing the evidence or assessing witness credibility, whether a reasonable trier of fact could conclude that the judgment was established by clear and convincing evidence. In re B.H., 770 N.E.2d 283, 288 (Ind. 2002).

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. The court must also, however, "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 DCS 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).

Here, Mother contends that the DCS did not prove by clear and convincing evidence that there is a reasonable probability that the conditions that resulted in G.Y.'s

removal and continued placement outside the home would not be remedied by Mother. The CHINS petition alleged that G.Y. was a CHINS because, on January 3, 2006, "there was no one legally responsible to care for [G.Y.] [Mother and Father] are both incarcerated and has [sic] failed to make the appropriate arrangement for the care of the child. . . . In addition, the child was left with a friend, who does not have a refrigerator, stove or food." Petitioner's Exhibit 1 at 2. Mother admitted the allegations in the CHINS petition, and the trial court adjudicated G.Y. to be a CHINS.

At the time of the termination hearing in January and February 2008, G.Y. was three and one-half years old, he had been in the same foster home for the preceding two years, Mother was still incarcerated, and her projected release date was more than two years away, May 30, 2010.[4] G.Y. was adjudicated to be a CHINS because there was no one legally responsible to care for him during Mother's incarceration. But, curiously, Mother contends that the reason for G.Y.'s removal "was remedied as evidence showed he was being well cared for in foster care while [Mother] completed her prison sentence." Appellant's Brief at 17. Mother misses the point. The DCS has provided for G.Y.'s care through placement in a foster family precisely because Mother had not adequately provided for G.Y.'s care during her incarceration.[5] At the time of the termination

[4] Mother observes that her release date may be moved earlier if she completes coursework to obtain her associates degree. But, again, the decision to terminate parental rights is based on conditions at the time of the termination hearing, not on contingencies.

[5] In the Statement of Facts segment of her appellate brief, Mother states that family members and friends were willing to provide care for G.Y. but were unable to complete the foster parenting classes required by the DCS for such a placement to be made. But Mother does not show when such arrangements were pending. Thus, we cannot determine whether Mother's attempts to make those arrangements for G.Y. were reasonable. In any event, Mother does not argue that her attempts to make such arrangements for G.Y. are evidence that would rebut the trial court's finding that there is a reasonable probability that the conditions leading to G.Y.'s removal would not be remedied.

hearing, Mother had not arranged for someone to be legally responsible for G.Y., nor did she show that she had made reasonable attempts to do so. Thus, the evidence shows a reasonable possibility that Mother would not remedy the situation that resulted in G.Y.'s CHINS adjudication.

In her brief, Mother argues that the trial court's findings of fact and conclusions of law were not supported by the evidence. In particular, she contends that the finding that she had taken "minimal classes" is not supported by the evidence. Mother points out that she complied with certain parts of the Parental Participation Decree by participating in a parenting program and a substance abuse treatment program, which were requirements in the Decree that she could accomplish in prison. But this court has recognized that "'individuals who pursue criminal activity run the risk of being denied the opportunity to develop positive and meaningful relationships with their children.'" Castro v. State Ofc. of Family & Children, 842 N.E.2d 367, 374 (Ind. Ct. App. 2006) (quoting Matter of A.C.B., 598 N.E.2d 570, 572 (Ind. Ct. App. 1992)). Mother was incarcerated as a result of her criminal activity. Mother cannot hold the DCS responsible for her inability, due to her incarceration, to complete the requirements in the Parental Participation Decree. See id.

Finally, Mother disputes the trial court's finding that her "'pattern of criminal conduct, resulting in periods of incarceration' made it unlikely that the conditions would change to where [Mother] would be available to parent." Appellant's Brief at 17 (quoting Order Terminating Parent-Child Relationship Between [G.Y. and Mother], Appellant's App. at 13). Again, we must judge a parent's fitness to care for her child at

the time of the termination proceeding. In re J.T., 742 N.E.2d at 512. But we may also consider habitual patterns of conduct to "determine the probability of future neglect or deprivation of the child." Id. In that regard, we 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. A.F., 762 N.E.2d at 1251.

Here, Mother does not deny her criminal history. That history includes a 2001 conviction for theft and receiving stolen property in Delaware County, for which she was sentenced to three months;[6] 2001 convictions for two counts of theft in Randolph County, as Class D felonies, for which she was sentenced to an aggregate six years; a 2003 probation violation arising from the 2001 Randolph County convictions, for which she was sentenced to seventeen months; an August 2006 conviction for theft, as a Class D felony, in Huntington County, for which she was sentenced to one and one-half years, with one year suspended, and one year of probation; and the 2006 conviction for dealing in cocaine, as a Class B felony, for which she was sentenced to twelve years, with four years suspended, and four years of probation. Mother contends that her criminal history consisted of offenses dating before G.Y.'s birth. But the record does not show when she committed the theft resulting in the 2006 Huntington County conviction. Mother also avers that she has not used cocaine since 2003. Even if that is true, the point is unconvincing standing alone, because Mother has been incarcerated for the last two years.

[6] The record does not include documentation or details regarding the Delaware County conviction.

The DCS showed by clear and convincing evidence that there was no one legally responsible to care for G.Y. when Mother was incarcerated and that Mother has not remedied that condition. Mother has taken some college courses and has participated in parenting and substance abuse programs in prison. But her incarceration, which, again, is the result of her own conduct, has prevented her from completing most of the requirements in her Parental Participation Decree. And, notably, Mother's incarceration, in itself, should not have been an obstacle to making arrangements for someone to be legally responsible for G.Y. Considering Mother's failure to arrange care for G.Y. along with her inability to complete the Decree requirements and her criminal history, Mother's contention that the DCS failed to prove a reasonable probability that the conditions resulting in G.Y.'s removal would not be remedied must fail.

Mother next contends that the DCS failed to prove by clear and convincing evidence that termination of her parental rights was in G.Y.'s best interests. "A parent's historical inability to provide adequate housing, stability and supervision coupled with a current inability to provide the same will support a finding that termination of the parent-child relationship is in the child's best interests." Castro, 842 N.E.2d at 374 (citation omitted). "In other words, 'although parental rights have a constitutional dimension, the law allows for their termination when parties are unable or unwilling to meeting their responsibility as parents.'" Id. (quoting In re S.P.H., 806 N.E.2d 874, 880 (Ind. Ct. App. 2004)) (emphasis added).

As of the date of the termination hearing, Mother had been unable to care for G.Y. for the preceding two years. Indeed, Mother's incarceration continues to date, and her

projected release date is May 30, 2010. G.Y. has been in the same foster placement for two years. He is doing well and is bonded with his foster family, and his foster parents wish to adopt him. As noted by the trial court, upon her release Mother would need to complete several requirements in the Parental Participation Decree before G.Y. could be placed with her. There is no guarantee that Mother will be able to satisfy those requirements. We conclude that the trial court's finding that termination of Mother's parental rights is in G.Y.'s best interest is supported by clear and convincing evidence. See id. (holding clear and convincing evidence showed termination to be in child's best interests where father was in prison, child was in need of stability and permanency, child was doing well in current placement, and there was no guarantee that father would be suitable once released or that he would even obtain custody).

**Issue Two: Due Process**

Mother next contends that the DCS "failed to comply with statutory requirements during the termination proceeding, thereby denying [her] due process." Appellant's Brief at 19.

> The Due Process Clause of the United States Constitution prohibits state action that deprives a person of life, liberty, or property without a fair proceeding. When the State seeks to terminate the parent-child relationship, it must do so in a manner that meets the requirements of due process. The nature of the process due in a termination of parental rights proceeding turns on the balancing of three factors: (1) the private interests affected by the proceeding, (2) the risk of error created by the State's chosen procedure, and (3) the countervailing governmental interest supporting use of the challenged procedure.

Karma v. Marion County Dep't of Child Servs. (In re B.J.), 879 N.E.2d 7, 16 (Ind. Ct. App. 2008) (citation omitted), trans. denied.

Mother maintains that the DCS "was required by statu[t]e to make 'reasonable efforts' during the CHINS proceedings 'to make it possible for the child to return safely to the child's home as soon as possible.'" Appellant's Brief at 20 (quoting Ind. Code § 31-34-21-5.5). Mother argues that the DCS did "not provide services under the Participation Decree and did not plan to do so until after [Mother] was released from prison." Id. But, again, Mother's incarceration, which was the result of her own conduct, was the obstacle to any services that could have been provided by the DCS. The DCS could not provide complete services to Mother during her incarceration. See Castro, 842 N.E.2d 377 (no due process violation where Office of Family and Children could not evaluate or provide services to father because of his incarceration on forty-year sentence). Therefore, she cannot be heard to complain that the DCS did not make reasonable efforts to make it possible for G.Y. to return home. And, contrary to Mother's contention that she "did everything she was required to do by the [DCS] during the CHINS proceedings," Mother's incarceration prevented her from satisfying the requirements in the Parental Participation Decree. Thus, again, she cannot be heard to blame the DCS for her inability to comply with the Decree.

**Conclusion**

G.Y. was made a CHINS because there was no one legally responsible for his care during Mother's incarceration. Mother was incarcerated beginning December 2005, and she remains incarcerated with a projected release date of May 30, 2010. Mother's incarceration prevented her from completing most of the requirements in the Parental Participation Decree. But, most importantly, Mother left G.Y.'s care to the DCS. In her

nearly three years of incarceration, she has not made arrangements for his care, nor has she shown that she has taken reasonable steps to do so. We conclude that the DCS proved by clear and convincing evidence a reasonable probability that Mother would not remedy the condition that had resulted in G.Y.'s removal from the home and that termination of Mother's parental rights is in G.Y.'s best interest.

Mother also has not shown that the DCS failed to make reasonable efforts for G.Y.'s return, thereby denying her due process. Again, G.Y. is a CHINS because Mother was incarcerated and failed to make arrangements for his care. The DCS could not offer complete services during Mother's incarceration.

Affirmed.

ROBB, J., and MAY, J., concur.