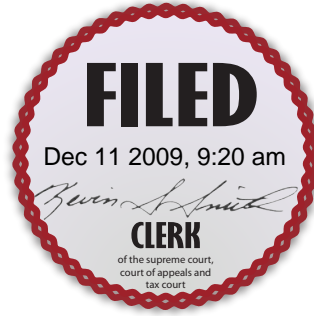


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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IN THE MATTER OF THE TERMINATION )  
OF PARENT-CHILD RELATIONSHIP OF )  
C.B., Minor Child, )  
And )  
A.S., Mother, )  
Appellant, )  
)  
vs. )  
)  
INDIANA DEPARTMENT OF )  
CHILD SERVICES, )  
Appellee. )

No. 82A01-0907-JV-350

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APPEAL FROM THE VANDERBURGH SUPERIOR COURT  
The Honorable Brett Niemeier, Judge  
Cause No. 82D01-0807-JT-72

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**December 11, 2009**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**MATHIAS, Judge**

April S. (“Mother”) appeals the order of the Vanderburgh Superior Court terminating her parental rights to her son C.B. On appeal, Mother presents two issues for our review, which we restate as: (1) whether the trial court erred in denying Mother’s motion for a continuance, and (2) whether the evidence is sufficient to support the trial court’s judgment. We affirm.

### **Facts and Procedural History**

Mother gave birth to C.B. on August 22, 2002. Mother used cocaine, and in 2006, she committed a burglary in an effort to fund her cocaine use. As a result, Mother was arrested, and the State charged her with burglary. At that point, Mother entrusted C.B. to the care of her mother (“Grandmother”). On April 25, 2007, Grandmother was hospitalized and could no longer care for C.B. Because Grandmother was unable to care for C.B. due to her health, and Mother could not care for C.B. due to her incarceration, the Indiana Department of Child Services (“DCS”) filed a petition alleging that C.B. was a child in need of services (“CHINS”). On May 1, 2007, the trial court found C.B. to be a CHINS.<sup>1</sup>

C.B. is, by any definition, a troubled child. He has been diagnosed with anxiety disorder, attention deficit hyperactivity disorder, and oppositional defiant disorder, and has been prescribed Ritalin and Risperdal. He demands almost constant one-on-one attention. He has physically attacked other children and frequently misbehaves in school.

Prior to her incarceration, Mother had difficulty finding a daycare provider for C.B., but ultimately found Ann H., who runs a daycare service in her home. Mother

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<sup>1</sup> C.B.’s biological father subsequently signed a voluntary consent to terminate his parental rights.

would leave C.B. in Ann H.'s care from 6:00 or 7:00 a.m. and leave him there until 9:00 or 9:30 p.m. Mother often had C.B. take a cab, by himself, to and from the daycare provider. Mother even asked Ann H. to watch C.B. on the weekends, but Ann H. refused. When Grandmother had custody of C.B. after Mother's incarceration, she too would take C.B. to daycare instead of watching him herself. After Grandmother's hospitalization, Ann H. became C.B.'s foster mother. Although C.B. still had some behavioral problems while in Ann H.'s care, his behavior did improve somewhat while with her.

Mother had a sporadic employment history. She worked at a temp service, then worked at Hardee's for approximately one month. She then worked at McDonald's for approximately six months before she quit because, she claimed, a customer was rude to her. She worked at a local factory for just one week. From July to October 2008, Mother worked as a telephone solicitor. Mother also had difficulty maintaining a stable place to live. She lived at a YMCA for less than a month, then lived at an apartment from November 2007 to May 2008. The DCS assisted Mother in paying the rent at this apartment and even purchased a bed for C.B. However, Mother failed to timely pay the rent and had to leave this apartment. She then moved in with Grandmother. From August to September of 2008, she lived in a hotel. She also lived in another apartment for two weeks.

Mother was eventually sentenced to a community corrections work-release facility known as the "Safehouse." While there, Mother did not follow the rules and generally behaved poorly. When Mother was released to house arrest, she violated the rules of

house arrest and was returned to the Safehouse. Mother then entered into a drug abuse prevention program. Mother, however, continued to use drugs from May through August of 2008. Mother tested positive for cocaine use in September 19, 2008, and was ordered to serve a week in jail. On October 10, 2008, Mother tested positive for oxycodone and did not have a prescription for this drug. As a result, Mother's probation was revoked, and she was ordered to serve three years executed. Thus, at the time of the termination hearing, Mother was incarcerated.

Mother did complete parenting skills classes, and showed initial progress. However, when C.B. participated in the classes, Mother did not fare so well. With C.B., Mother needed prompting and assistance, and her interaction with C.B. decreased. Mother's attempts to discipline C.B. did not improve as a result of the classes. Mother continued to yell constantly at C.B. and consistently gave in to the child. Mother also allowed C.B. to be around her boyfriend, who had not been approved by the DCS because he refused to cooperate with them.

Mother further refused to participate in counseling and refused psychological testing. Although she requested services for drug treatment, she later said she did not want to participate in such services.

By all accounts, C.B. needs highly-structured and consistent discipline to have any chance of improving his behavior. Indeed, C.B.'s behavior was at its worst when there were changes in his routine. Mother, however, demonstrated little concern to provide the structure and consistency C.B. needs, as well as a general inability to handle C.B.'s many and serious problems.

On July 22, 2008, the DCS filed a petition to terminate Mother's parental rights to C.B. Prior to the hearing date of January 20, 2009, Mother sought a continuance, claiming that she had entered an intensive drug treatment program which could reduce her sentence by six months. Thus, Mother claimed, she could be released as soon as October 2009. The trial court denied the motion to continue, and the trial court held a termination hearing on January 20 and 21, 2009. On March 30, 2009, the trial court entered an order terminating Mother's parental rights to C.B. Mother now appeals.

### **I. Continuance**

Mother first claims that the trial court erred in denying her motion to continue the termination hearing until she was released from incarceration. The decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court, and we will reverse the trial court only when there has been an abuse of discretion. In re A.D.W., 907 N.E.2d 533, 537 (Ind. Ct. App. 2008). An abuse of discretion may be found in a denial of a motion for continuance when the moving party has shown good cause for granting the motion, but no abuse of discretion will be found if the denial did not result in prejudice to the moving party. Id.

Mother claims that the trial court should have granted her motion for continuance because she claimed that she would be released from prison "only" nine months later. At that point, Mother claims, she would be able to participate in services and have a "strong foundation of drug treatment behind her." Appellant's Br. p. 5. Therefore, she argues, the trial court should have granted her a continuance. We are unable to agree.

First, Mother testified that she would be released in October 2009, but only if she successfully completed a seven and a half month drug treatment program. Even if she successfully completed the program, she would not be released until October, which was nine months after the hearing. Given Mother's history of drug abuse and disinterest in ceasing to use drugs, her success in the program was by no means guaranteed. Moreover, Mother had been incarcerated since October 10, 2008, yet apparently did not inform the trial court of her participation in a drug treatment program until shortly before the January 20, 2009 hearing date. Thus, Mother requested a lengthy continuance shortly before the scheduled hearing and premised her request upon her unproven ability to complete a drug treatment program. Further, as noted by the DCS, the denial of her request for a continuance did not prevent Mother from personally appearing at the hearing and testifying on her own behalf.

We further note that Indiana Code section 31-35-2-6 (2008) provides that “whenever a hearing is requested under this chapter [dealing with the termination of parental rights], the court *shall* . . . commence a hearing on the petition not more than ninety (90) days after a petition is filed under this chapter . . . .” Here, the petition to terminate Mother's parental rights was filed on May 1, 2008. Therefore, the hearing should have commenced no later than October 20, 2008. However, the trial court initially set the hearing date—with no apparent objection from either party—for December 11, 2008, outside the statutory time limits. The hearing date was later moved to January 12, 2009—again with no apparent objection from either party—and ultimately reset for January 20, 2009. Under these circumstances, we cannot fault the trial court for

denying Mother's request to further delay the hearing date to October 2009—over a year beyond the statutory time limit. Cf. Lawson v. Marion County Office of Family & Children, 835 N.E.2d 577, 580 (Ind. Ct. App. 2005) (noting that delays in the adjudication of a termination case “impose significant costs upon the functions of the government as well as an intangible cost to the lives of the children involved.”). In short, the trial court did not abuse its discretion in denying Mother's motion for continuance.

## **II. Sufficiency of the Evidence**

In reviewing Mother's challenge to the sufficiency of the evidence supporting the trial court's decision, we note that we have 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 trial court's order terminating a parent-child relationship, we will not set it aside unless it is clearly erroneous. Castro v. State Office of Family & Children, 842 N.E.2d 367, 372 (Ind. Ct. App. 2006), trans. denied. We will neither reweigh the evidence nor judge the credibility of the witnesses. Id. Instead, we consider only the evidence and reasonable inferences therefrom that are most favorable to the judgment. Id.

“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. Moreover, because termination severs all rights of a parent to his or her child, the involuntary termination of parental rights is arguably one of the most extreme sanctions a court can impose. In re T.F., 743 N.E.2d 766, 773 (Ind. Ct. App. 2001), trans. denied. Thus, such a sanction is intended as

a last resort, available only when all other reasonable efforts have failed. Id. Nevertheless, parental rights are not absolute and must be subordinated to the child's interests in determining the proper disposition of a petition to terminate a parent-child relationship. Id. Because the purpose of terminating parental rights is to protect the child, not to punish the parent, parental rights may be properly terminated when a parent is unable or unwilling to meet his or her parental responsibilities. Id. The trial court need not wait until the children are irreversibly harmed such that their physical, mental, and social development is permanently impaired before terminating the parent-child relationship. Id.

In order to terminate a parent-child relationship, the DCS 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;
- (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) (2008); see also Ind. Code § 31-35-2-8 (2008). The DCS must establish each of these allegations by clear and convincing evidence. Ind. Code § 31-37-14-2 (2008). We also note that Indiana Code Section 31-35-2-4(b)(2)(B) is written in the disjunctive, and the DCS need therefore establish only one of the two requirements of subsection (B). In re L.S., 717 N.E.2d 204, 209 (Ind. Ct. App. 1999), trans. denied.



In the present case, Mother first claims that the DCS failed to prove that the conditions which led to C.B.'s removal would not be remedied. We have previously recognized that a trial court should examine not only the parent's fitness at the time of the termination hearing, but also consider the parent's habitual patterns of conduct to determine whether there is a substantial probability of future neglect or deprivation of the child. McBride v. Monroe County Office of Family & Children, 798 N.E.2d 185, 199 (Ind. Ct. App. 2003). A 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. Id.

Here, both parties agree that the condition which resulted in C.B.'s removal was Mother's incarceration and her resulting inability to care for the child.<sup>2</sup> Mother argues, as she did in her motion for continuance, that when she finishes her intensive drug treatment program, she will be released from incarceration in October 2009. Again, however, this presumes that Mother will successfully complete the drug treatment program, which was not assured given Mother's history of repeated use of illicit drugs—even after having been convicted of burglary.

Regardless, the DCS need only prove that there is a reasonable probability that *either*: (1) the conditions which resulted in the child's removal will not be remedied, *or* (2) the continuation of the parent-child relationship poses a threat to the well-being of the child. Thus, even if the DCS did not adequately establish the former, the trial court's decision will be upheld if it established the latter. See McBride, 798 N.E.2d at 202 n.13;

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<sup>2</sup> Neither party has provided us with a copy of the termination petition filed by the DCS.

In re L.S., 717 N.E.2d at 209. In addition, the DCS must also establish the related proposition that termination of the parent-child relationship is in the best interests of the child. In determining what is in the best interests of the children, the court is required to look beyond the factors identified by the DCS, and look to the totality of the evidence. See McBride, 798 N.E.2d at 203. Here, Mother claims that the DCS failed to prove either of these statutory requirements. Under our deferential standard of review, we are unable to agree.

Mother has consistently been unable to maintain stable housing or steady employment. She admits that she has a substance-abuse problem, and she was unable to control her substance abuse even after she had been incarcerated and C.B. was removed from her care. Indeed, Mother admittedly used illicit drugs after she was sentenced for the burglary, and she was subsequently re-incarcerated as a result of that use.

While in Mother's care, C.B. had little stability, except perhaps that provided by his day-care provider and eventual foster mother. When C.B. was still in Mother's care, Mother would send him to daycare for the better part of the day and even asked if he could go to daycare on the weekends. Mother even sent the child, by himself, in a cab to and from daycare. Although Mother may have completed parenting classes, and showed initial progress, her parenting skills were still completely inadequate. Mother could not control C.B., failed to consistently discipline him, and quickly gave in to his demands. As noted by the trial court, Mother lacks the ability to care for C.B., especially given his special needs. All children need stability, but C.B. particularly needs stability given his

behavioral problems. Mother has repeatedly demonstrated that she is unable to provide such stability.

Furthermore, Mother refused to participate in counseling, refused psychological testing, and, after initially requesting substance abuse treatment, later declined to participate. Mother did finally enter into a drug treatment program after she was re-incarcerated. At the time of the termination hearing, C.B. had been a ward of the State for almost two and a half years. Mother wanted the trial court to delay the termination hearing by nine months to see if she could successfully complete a drug treatment program. However, given Mother's prior behavior, we cannot fault the trial court for not waiting even longer to give Mother yet another chance to change her behavior.

Given our highly-deferential standard of review in such matters, we are unable to conclude that Mother has shown that the trial court clearly erred when it concluded that the continuation of the parent-child relationship posed a danger to C.B.'s well being. Similarly, we cannot say that the trial court clearly erred when it concluded that termination of the parent-child relationship was in C.B.'s best interest, a conclusion that was further supported by the testimony of C.B.'s court-appointed special advocate.

Our supreme court has recently addressed two cases in which the parental rights of incarcerated parents were addressed. In the first of these cases, In re G.Y., 904 N.E.2d 1257 (Ind. 2009), the court reversed the trial court's determination that the mother's parental rights to her child should be terminated. With regard to the mother's criminal history, the court noted that all of her criminal offenses had occurred before the child had been conceived, and since that time, there had been no indication that the mother "was

anything but a fit parent.” Id. at 1262. While incarcerated, the mother completed a drug therapy program and had stopped using drugs. Id. Therefore, the court found that the chance of the mother reoffending was insufficient to conclude that termination of her parental rights was warranted. Id. at 1263. The court further determined that, even though the mother would serve four years on probation after her release, she had made good-faith efforts to complete the required services available to her in prison. Id. Importantly, she obtained suitable housing and gainful employment upon her release. Id. Throughout her incarceration, the mother maintained a “consistent, positive relationship with [her child].” Id. at 1264. With regard to the need for permanency and stability in the child’s life, the court acknowledged that “[p]ermanency is a central consideration in determining the best interests of a child.” Id. at 1265. However, the court noted that the child was still quite young, under the age of five, and that the mother’s release from prison was “imminent.” Id. Taking all these factors into consideration, the court concluded that the trial court erred when it terminated the mother’s parental rights. Id. at 1265-66.

In contrast to In re G.Y., Mother’s misbehavior here did not stop once C.B. was conceived and born. Instead, Mother committed burglary—the crime for which she was incarcerated—after C.B. was born. Mother also continued to use cocaine and other illicit drugs after C.B. was born and even after she was arrested and initially incarcerated for burglary. Indeed, after Mother was released from incarceration, she continued to use illicit drugs and was eventually re-incarcerated as a result. And although Mother now claims to have entered a drug treatment program, she had not yet completed the program

as of the hearing date, unlike the mother in In re G.Y. Furthermore, there is no indication that Mother had obtained suitable housing or secured gainful employment. To the contrary, Mother had a history of unstable housing and inconsistent employment. Thus, the facts before us are readily distinguishable from those in In re G.Y.

In the second case, In re J.M., 908 N.E.2d 191 (Ind. 2009), our supreme court affirmed the trial court's denial of the DCS's petition to terminate a mother and father's parental rights due to the parents' incarceration. In so holding, the court noted that the parents had maintained their relationship with their child despite their incarceration, the parents were soon to be released from incarceration, the parents fully cooperated with services while incarcerated, and the parents had taken steps to provide permanency and stability for their child after their incarceration—including securing a home and a job. Id. at 195-96. Here, in contrast, the trial court did not find that Mother's parental rights should not be terminated, and our standard of review is highly deferential to the decision of the trial court. Moreover, as detailed above, Mother did not demonstrate the same sort of positive change or willingness to participate in offered services as did the parents in In re J.M. We therefore conclude that neither In re G.Y. nor In re J.M. are controlling under the present facts and circumstances.

### **Conclusion**

The trial court did not abuse its discretion in denying Mother's motion to continue the termination hearing until after she completed a drug treatment program. The trial court's decision to terminate Mother's parental rights to C.B. was not clearly erroneous.

Affirmed.

BARNES, J., and BROWN, J., concur.