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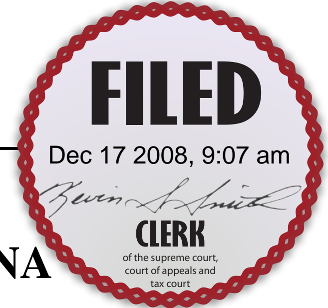

IN THE
COURT OF APPEALS OF INDIANA

IN RE THE MATTER OF M.W., A.W. AND H.W., CHILDREN ALLEGED TO BE IN NEED OF SERVICES,

DERRICK WRIGHTSMAN (FATHER),

Appellant-Respondent,

vs.

INDIANA DEPARTMENT OF CHILD SERVICES VIGO COUNTY OFFICE,

Appellee-Petitioner.

No. 84A05-0806-JV-372

APPEAL FROM THE VIGO CIRCUIT COURT
The Honorable R. Paulette Stagg, Magistrate
The Honorable David R. Bolk, Judge
Cause Nos. 84C01-0712-JT-1169, 84C01-0712-JT-1170 & 84C01-0712-JT-1171

December 17, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Derrick Wrightsman ("Father") appeals the involuntary termination of his parental rights to his children and raises several issues on appeal. We find the following restated issue to be dispositive: whether the trial court's finding that there is a reasonable probability the conditions which resulted in the children's removal from Father's care *have not been remedied* strictly complies with Indiana's termination statute. Concluding that the trial court's judgment terminating Father's parental rights does not comply with Indiana Code § 31-35-2-4(b)(2)(B), we reverse and remand.

Facts and Procedural History

Father is the biological father of A.W., born July 12, 1999, H.W., born July 11, 2001, and M.W., born February 20, 2004. The facts most favorable to the judgment reveal that on or about February 22, 2006, the Vigo County Department of Child Services ("VCDCS") received a report that the children, who had been left alone with their mother,[1] had called 911 because they could not wake up their mother. An investigation ensued, and the children were removed from the family home, which was reported to be filthy. The VCDCS investigator had also observed marijuana and a scale in one of the bedrooms.

A detention hearing was held on February 23, 2006, and the children were ordered to remain in foster care. The VCDCS subsequently filed three separate petitions alleging

[1] The children's mother, Jessica Wrightsman ("Mother"), does not participate in this appeal. Consequently, we limit our recitation of the facts solely to those pertinent to Father's appeal.

Father's children were children in need of services ("CHINS").[2] On March 21, 2006, Father, who was represented by counsel, admitted to the allegations contained in the CHINS petitions, and the trial court proceeded to disposition. At the conclusion of the dispositional hearing, the trial court issued its dispositional order approving and incorporating the VCDCS's pre-dispositional recommendations and case plan. According to the dispositional order, Father was required to participate in a variety of services in order to achieve reunification with his children. Father was ordered to, among other things: (1) refrain from using mind-altering substances; (2) submit to random drug screens; (3) work on strengthening the family by participating in parenting classes and counseling services; and (4) keep the family home clean.

Both parents initially began participating in services, and on June 28, 2006, the children were returned to their care for a trial in-home placement. After the children's return home, however, both Father's and Mother's participation in services and cooperation with the VCDCS began to wane. On August 15, 2006, the children were again removed from the family home due to both parents' failure to cooperate with service providers and to maintain contact with the VCDCS. The following day, Father submitted to a random drug screen and tested positive for marijuana.

The VCDCS subsequently prepared a new case plan, which included referrals for new service providers and provided for family therapy and intensive case management through the Friends of Family organization. Father again participated in services, and the children were eventually returned to the family home on June 20, 2007. On June 23,

[2] The parties disagree as to whether the CHINS petitions were properly signed and verified. We need not address this issue, however, in light of our resolution of this case.

2007, Mother was arrested for theft and possession of marijuana. Father was not involved in the incident leading to Mother's arrest. Father continued to progress in therapy and intensive home-based services were initiated in an attempt to allow the children to remain in the home. In August 2007, home-based service provider Molly Zeller discontinued services because she believed the family had improved to the point services were no longer required and that "the children would remain [in the] home." Tr. p. 39.

The successful completion of the CHINS case was anticipated to occur in December 2007; however, on or about November 29, 2007, the VCDCS learned that Mother had been arrested on a theft charge and had also tested positive for drugs, including amphetamines, benzodiazepines, opiates, and cannabinoids. As a result of Mother's arrest and recurrent positive drug screens, the VCDCS considered allowing the children to remain in the family home under the care and supervision of Father, provided that Mother agree to move out. This arrangement never transpired, however, because the VCDCS learned that Father had tested positive for marijuana on November 20, 2007. Consequently, on November 20, 2007, the children were again removed from Father's care. On December 21, 2007, the VCDCS filed petitions for the involuntary termination of both parents' rights to the children.[3]

Following the children's removal from his care, Father exercised his right to visitation on December 5, 2007, December 26, 2007, and consistently thereafter until the termination hearing. Father also voluntarily enrolled himself in a sixteen-week intensive

[3] In January 2008, Mother became incarcerated and remained so at the time of the termination hearing.

outpatient drug rehabilitation program ("IOP") with the Hamilton Center on February 4, 2008. A consolidated fact-finding hearing on the VCDCS's petitions for involuntary termination of both parent's rights to the children commenced on April 28, 2008. Father was present and represented by counsel.

At the termination hearing, Brenda Perry, Father's counselor from the Hamilton Center, testified that Father was "doing very well" in the IOP and was expected to successfully graduate on May 30, 2008. *Id*. at 74. When questioned as to whether she felt Father had "gotten a pretty good handle on whatever substance abuse issues he may have had[,]" Perry responded, "Absolutely. He's really demonstrated great insight into addiction. His addiction and addiction in general and has been a leader in our IOP group." *Id*. at 75. Perry also believed Father's success with the IOP would enable him to be a better parent with better life coping skills. Father testified that he had filed for divorce from Mother because he felt it was in the children's "best interest[s]." *Id*. at 192. At the conclusion of the termination hearing, the trial court terminated Father's parental rights to A.W., H.W., and M.W. Father now appeals.

Discussion and Decision

This Court has long had a highly deferential standard of review in cases involving 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, 265 (Ind. Ct. App. 2004), *trans. denied*. Instead, we consider only the evidence and reasonable inferences that are most favorable to the judgment. *Id*. In deference to the juvenile

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*. Clear error is 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).

In order to terminate a parent-child relationship, the State is required to allege, 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[.]

Ind. Code § 31-35-2-4(b)(2)(B) (emphasis added). If the court finds that the allegations in the termination petition are true, the court shall terminate the parent-child relationship. Ind. Code § 31-35-2-8(a).

Father asserts that the trial court's termination order did not comport with Indiana Code § 31-35-2-4(b)(2)(B) because the court found that the conditions resulting in the children's removal and placement outside the home *have not been remedied* instead of *will not be remedied* as dictated by the statute. Father therefore concludes that the trial court committed reversible error by applying an incorrect standard and by failing to consider evidence of his changed conditions. Father also asserts that because the trial court's termination order does not address the alternative requirement described in subsection (B)(ii) regarding whether continuation of the parent-child relationship poses a

threat to the children's well-being, the VCDCS failed to establish each element of Ind. Code § 31-35-2-4(b)(2) by clear and convincing evidence. The VCDCS counters that the complained of language in the trial court's finding is merely a scrivener's error and that the judgment terminating Father's parental rights should therefore be affirmed.

When determining whether a reasonable probability exists that the conditions justifying a child's removal and continued placement outside the home 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 involuntary termination of parental rights, however, is an extreme measure that terminates all rights of the parent to his or her child and is therefore designed to be used only as a last resort when all other reasonable efforts have failed. *In re E.S.*, 762 N.E.2d 1287, 1290 (Ind. Ct. App. 2002). In fact, "[t]he 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*. This constitutionally protected right of parents to establish a home and raise their children "mandates that the failure of a trial court to require compliance with any condition precedent to the termination of this right constitutes fundamental error[.]" *In re L.B. and S.C.*, 616 N.E.2d 406, 407 (Ind. Ct. App. 1993).

It is beyond dispute that the VCDCS has the burden of pleading and proving each element of Indiana Code § 31-35-2-4(b)(2) by clear and convincing evidence before the trial court can terminate Father's parental rights. I.C. §§ 31-35-2-4 and -8; *see also Egly*

v. Blackford County Dep't of Public Welfare, 592 N.E.2d 1232, 1234 (Ind. 1992) (stating that allegations of termination petition must be established by clear and convincing evidence). Indiana Code § 31-35-2-4(b)(2)(B) makes clear that one condition precedent to a trial court's authority to terminate parental rights is that it find either (1) that there is a reasonable probability the conditions resulting in a child's removal or continued placement outside the parent's care *will not be* remedied or (2) that continuation of the parent-child relationship poses a threat to the child's well-being. Here, the trial court's termination order reads, in pertinent part, as follows:

> The court now finds as follows:
>
> * * *
>
> 2. It was established by clear and convincing evidence that the allegations of the petitions are true in that:
>
>   a. The children were adjudicated as CHINS more than six months preceding the filing of the Petitions to Terminate Parent-Child Relationship;
>
>   b. There is a reasonable probability that the conditions which resulted in the removal of the children *have not been remedied*;
>
>   c. Termination is in the best interests of the children;
>
>   d. The VCDCS has a satisfactory plan for the care and treatment of the children which is adoption.

Appellant's App. p. 7 (emphasis added).

As set forth previously, the proper inquiry in a termination proceeding is whether there is a reasonable probability the conditions resulting in the children's removal "will not be" remedied. I.C. § 31-35-2-4(b)(2)(B)(i). In finding that the conditions resulting in

the children's removal *have not* been remedied, as opposed to finding there is a reasonable probability the conditions *will not* be remedied, it appears the trial court may have applied an incorrect standard in evaluating the evidence presented at the termination hearing by focusing on the conditions as they existed in the past, without considering evidence of Father's changed conditions. Our review of the termination order further reveals that the trial court declined to make a determination as to whether continuation of the parent-child relationship poses a threat to the children's well-being. In addition, the termination order does not contain any specific findings or conclusions based on the evidence admitted during the termination hearing findings, nor does it contain an explanation as to how its findings support its judgment. Rather, the findings are merely a recitation of Indiana Code § 31-35-2-4(b)(2).

We acknowledge that Indiana Code § 31-35-2-4(b)(2)(B) is written in the disjunctive. Thus, the trial court was not obliged to make findings both as to whether there is a reasonable probability the conditions resulting in removal will be remedied as well as whether continuation of the parent-child relationship poses a threat to the children's well-being. *See L.S.*, 717 N.E.2d at 209 (explaining that Indiana Code § 31-35-2-4(b)(2)(B) is written in the disjunctive and therefore requires trial court to find only one of the two requirements of subsection (B) by clear and convincing evidence). We also recognize that the trial court is not required to make findings in termination cases unless specifically requested to do so by the parties. *Parks v. Delaware County Dep't of Child Servs.*, 862 N.E.2d 1275, 1281 (Ind. Ct. App. 2007). Nevertheless, the termination of one's parental rights is of such importance that we must be convinced that the trial

court has based its judgment on proper considerations. *See id.* at 1280-81. We cannot make such a determination based on the trial court's termination order in the present case. *See In re J.Q.*, 836 N.E.2d 961, 966 (Ind. Ct. App. 2005) (concluding that the limited findings of the trial court provided no nexus between its findings and the conclusions it drew therefrom, thus making it difficult to determine whether or not a mistake had been made in adjudicating J.Q. a CHINS).

The record reveals that Father was successfully participating in an IOP at the time of the termination hearing. To that end, Perry testified Father was "doing very well" in the IOP and was expected to successfully graduate approximately one month following the termination hearing. Tr. p. 74. Perry further indicated that she believed Father's participation in the IOP would enable him to be a better parent with better life coping skills. Father was also participating in visitation with the children and informed the court that he had filed a petition for the dissolution of his marriage to Mother because he felt such a decision was in the best interests of the children due to Mother's unresolved substance abuse problem. Finally, although the children's court-appointed special advocate, Charles Fuhrer, recommended termination of Father's parental rights, Fuhrer admitted that this case was "extremely emotional[,]" that there is "apparent bonding" between Father and the children, and that he "[doesn't] think [Father] is hopeless at all." *Id.* at 214-15.

Indiana's termination statute requires a trial court to find that, at the time of the termination hearing, there is a reasonable probability the conditions resulting in a child's removal *will not be remedied*. I.C. § 31-35-2-4(b)(2)(B)(i). It was therefore incumbent

upon the trial court to consider Father's evidence of changed conditions and to weigh such evidence against any other evidence concerning his past pattern of conduct to determine whether there is a substantial probability of future neglect or deprivation of the children. *See In re M.M.*, 733 N.E.2d 6, 13 (Ind. Ct. App. 2000). Depending on how the trial court in the present case might have weighed such competing evidence, the difference between an analysis of the evidence using a "has not been remedied" standard versus a "will not be remedied" standard could have been determinative.

Our review of the record in its entirety yields evidence that could support either the termination of Father's parental rights or a dismissal of the VCDCS's termination petition. We are in no position, however, to weigh such evidence ourselves. *D.D.*, 804 N.E.2d at 265. Because the trial court's termination order simply does not provide us with reasonable assurances that it applied the proper standard when making its decision to terminate Father's parental rights, we reverse the trial court's judgment and remand this cause with instructions that the trial court enter a new order in accordance with Indiana Code § 31-35-2-4(b)(2). *See, e.g.*, *J.Q.*, 836 N.E.2d at 967 (concluding that in order to properly balance competing interests of parents in raising children with interests of State in protecting children from harm, trial court needs to "carefully follow the language and logic laid out by our legislature" in the CHINS and termination statutes). When entering its new order, the trial court is not obligated to hold a new hearing to take into account events that have transpired since the last hearing but rather can base its order on evidence presented at the past hearing. However, if the court wants to hold a new hearing to take into account events that have occurred since the last hearing in order to

get a more up-to-date picture of whether there is a reasonable probability that the conditions resulting in the children's removal will not be remedied, it may do so.

Reversed and remanded.

KIRSCH, J., and CRONE, J., concur.