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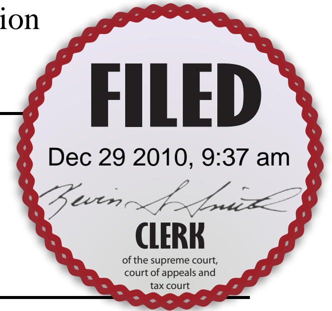

IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF THE INVOLUNTARY TERMINATION OF THE PARENT-CHILD RELATIONSHIP OF N.B., Minor Child, and

N.B., Mother,

Appellant-Respondent,

vs.

INDIANA DEPARTMENT OF CHILD SERVICES,

Appellee-Petitioner.

No. 32A01-1007-JT-321

APPEAL FROM THE HENDRICKS CIRCUIT COURT
The Honorable J.V. Boles, Judge
Cause No. 32C01-1002-JT-3

December 29, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary and Issues

In this case, a juvenile court removed a baby from his drug-addicted mother and placed him with his grandfather. When the juvenile court found the baby to be a child in need of services ("CHINS"), the court ordered the mother to refrain from alcohol and illegal drug use, submit to and pass random drug tests, visit her son regularly, seek employment and stable housing, participate in intensive mental health and drug rehabilitation treatment, and participate in parenting skills programs. Six months later, the court found that the mother had been uncooperative with the Department of Child Services ("DCS") and held her in contempt of court for failing to submit to the drug tests or participate in rehab and visitation. Two months later, the court found her in contempt again for failing to follow orders regarding treatment and visitation. After months of the mother using drugs and failing to follow court orders, the DCS filed a petition to involuntarily terminate the mother's parental rights and have the child be adopted by the grandfather.

The juvenile court terminated the parental relationship between N.B. ("Mother") and her baby ("N.B."). Mother now appeals, claiming that the juvenile court erred in considering her prior criminal record and that the evidence is insufficient to support the court's termination order. Finding no error, we affirm.

Facts and Procedural History

On October 24, 2008, Mother gave birth to N.B. The identity of N.B.'s father is unknown. At the time of N.B.'s birth, Mother was addicted to methadone, and N.B. tested positive for methadone addiction. On December 15, 2008, DCS filed a CHINS petition, and

the juvenile court found that probable cause existed that N.B. was a CHINS. On that day, N.B. was removed from Mother's care and placed with his maternal grandfather.

On February 5, 2009, the juvenile court found that N.B. was a CHINS based on N.B.'s and Mother's addiction to methadone, Mother's instability and inappropriate housing, and Mother's admitted need for parenting skills. In its February 5, 2009 dispositional order, Mother was required to (1) participate in home-based services recommended by DCS; (2) submit to random drug screens with twenty-four hours' notice and test clean; (3) receive intensive outpatient mental health counseling; (4) refrain from alcohol and illegal drug use; (5) undergo intensive inpatient services to address drug use and pain management; (6) participate in routine visitation with N.B.; and (7) seek employment. Appellee's App. at 6.

On August 17, 2009, the juvenile court entered a permanency plan for termination, finding that Mother had failed to maintain regular contact with DCS and had failed to participate in visitation with N.B. On August 31, 2009, the juvenile court found Mother in contempt for failing to submit to random drug screens, failing to complete intensive in- or outpatient treatment programs or even provide documentation, and failing to participate in regular visitation with N.B.

On October 21, 2009, the juvenile court held a parental review and participation hearing. Again, the court held Mother in contempt for her continued failure to comply with court-ordered services and obligations. The court admonished her that such continued noncompliance could lead to the termination of her parental rights. As of a March 25, 2010 review hearing, Mother remained noncompliant with the case plan. She had failed to submit

to a drug screen since October 2009. Throughout the CHINS proceedings, she tested positive for drugs, and she admitted to using heroin, methamphetamine, and cocaine. She failed to complete the drug treatment programs she entered and reverted to using drugs each time she left a treatment program. At one point, while committed to Richmond State Hospital for court-ordered drug rehab, she received a pass to appear in court, but did not return to the hospital as ordered. Instead, she used drugs for three weeks and finally was taken back to the hospital in handcuffs.

On February 11, 2010, the DCS filed a petition to involuntarily terminate Mother's parental rights. On June 1, 2010, the juvenile court held a hearing. Among the evidence admitted at the hearing was Mother's criminal record, which included a 2002 operating while intoxicated ("OWI") conviction, a 2007 battery conviction, and a 2007 probation violation. On June 15, 2010, the juvenile court entered an involuntarily termination order. As of the date of termination, Mother had been in Richmond State Hospital's rehab program for forty-seven days. Mother now appeals. Additional facts will be provided as necessary.

Discussion and Decision

I. Evidence of Mother's Criminal History

Mother contends that the juvenile court abused its discretion by admitting evidence of her criminal history during the termination hearing. The decision to admit or exclude evidence is within the juvenile court's sound discretion. *In re S.L.H.S.*, 885 N.E.2d 603, 614 (Ind. Ct. App. 2008). We review such a decision for an abuse of discretion. *Id.* An abuse of

discretion occurs when the juvenile court's decision is against the logic and effect of the facts and circumstances before it. *Id*.

Mother asserts that evidence regarding her criminal history is irrelevant and therefore inadmissible. *See* Ind. Evidence Rule 401 (defining relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"); *see also* Ind. Evidence Rule 402 (stating in part, "Evidence which is not relevant is not admissible"). Mother's relevancy claim is predicated on the fact that her 2002 and 2007 convictions and her 2007 probation violation occurred before N.B. was even conceived. Thus, she contends that the criminal history is too remote to be taken into account when judging her fitness as a parent. *See In re A.L.H.*, 774 N.E.2d 896, 899 (Ind. Ct. App. 2002) (observing that a court should judge a parent's fitness to care for her child as of the time of the termination proceeding, taking into account changes in conduct during pendency of proceedings).

As discussed *infra*, however, the juvenile court must

> evaluate the parent's habitual patterns of conduct to determine whether there is a substantial probability of future neglect or deprivation of the children. 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. (emphasis added) (citation and quotation marks omitted).

Here, the juvenile court did not even address Mother's convictions or probation violation in its findings. However, the court mentioned Mother's two contempt citations for failure to follow court orders during the pendency of the CHINS proceedings. Clearly, the

court was more concerned with Mother's current lack of regard for the law than about her prior convictions. Thus, although the court had discretion to consider Mother's criminal history among the many factors that contribute to a full assessment of her fitness to parent, such history clearly was not a major consideration in this case. We find no abuse of discretion here.

II. Sufficiency of Evidence

Mother contends that the evidence is insufficient to support the juvenile court's termination order. When reviewing a juvenile 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 evidence nor judge witness credibility. *In re A.I.*, 825 N.E.2d 798, 805 (Ind. Ct. App. 2004), *trans. denied*. Rather, we will consider only the evidence and inferences most favorable to the judgment. *Id*.

In *Bester v. Lake County Office of Family & Children*, 839 N.E.2d 143 (Ind. 2005), our supreme court stated,

> The Fourteenth Amendment to the United States Constitution protects the traditional right of parents to establish a home and raise their children. A parent's interest in the care, custody, and control of his or her children is perhaps the oldest of the fundamental liberty interests. Indeed the parent-child relationship is one of the most valued relationships in our culture. We recognize of course that parental interests are not absolute and must be subordinated to the child's interests in determining the proper disposition of a petition to terminate parental rights. Thus, parental rights may be terminated when the parents are unable or unwilling to meet their parental responsibilities.

Id. at 147 (citations, quotation marks, and alteration omitted).

To obtain a termination of the parent-child relationship, DCS must establish that

> (A) one (1) of the following exists:
>
> > (i) the child has been removed from the parent for at least six (6) months under a dispositional decree;
> >
> > (ii) a court has entered a finding under IC 31-34-21-5.6 that reasonable efforts for family preservation or reunification are not required, including a description of the court's finding, the date of the finding, and the manner in which the finding was made; or
> >
> > (iii) after July 1, 1999, the child has been removed from the parent and has been under the supervision of a county office of family and children for at least fifteen (15) months of the most recent twenty-two (22) months;
>
> (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) (emphasis added).[1] In recognition of the seriousness with which we address parental termination cases, Indiana has adopted a clear and convincing evidence standard. *Castro*, 842 N.E.2d at 377.

Mother first challenges the sufficiency of evidence to support the juvenile court's conclusion that a reasonable probability exists that conditions leading to N.B.'s removal will not be remedied. The juvenile court's findings include the following:

> 6. [Mother] has failed to enhance her ability to parent her child, [N.B.]
>
> 7. [Mother] has failed to complete the services offered to her by DCS.

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[1] To the extent Mother relies on the juvenile court's failure to find that her continued parenting would pose a threat to N.B.'s well-being, we note that such a showing is not required since the statute is phrased in the disjunctive. Ind. Code § 31-35-2-4(b)(2)(B).

8. [Mother] has failed to visit the child for months, not since September 2009.

9. [Mother] has attempted suicide on multiple occasions. [Mother] has chosen drug use for years and throughout the life of this case, including methamphetamine.

10. [Mother] was found in contempt of court for failing to follow the Court's orders in the CHINS matter on two separate occasions.

11. [Mother] does not have a stable home or employment with which to raise the child.

12. [Mother] has not demonstrated a willingness, ability, or desire to raise her child, [N.B.]

....

14. There is a reasonable probability that the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied.

15. Termination of the parent/child relationship is in the best interest of the child.

Appellant's App. at 36.

When assessing whether there is a reasonable probability that conditions that led to the child's removal will not be remedied, we must consider not only the initial basis for the child's removal, but also the bases for continued placement outside the home. *In re A.I.*, 825 N.E.2d at 806. As previously discussed, the juvenile court should judge a parent's fitness to care for her child as of the time of the termination hearing. *In re J.T.*, 742 N.E.2d 509, 512 (Ind. Ct. App. 2001), *trans. denied*. It must take into consideration the parent's habitual patterns of conduct as well as evidence of changed conditions, since these are important in determining the probability of future neglect or deprivation of the child. *Id*. We reiterate that

in making such a determination, the court may properly consider evidence of a parent's criminal history, substance abuse, lack of employment or adequate housing, history of neglect, and failure to provide support. *McBride v. Monroe County Office of Family & Children*, 798 N.E.2d 185, 199 (Ind. Ct. App. 2003). In making its case, the "DCS need not rule out all possibilities of change; rather, [it] need establish only that there is a reasonable probability that the parent's behavior will not change." *In re Kay.L.*, 867 N.E.2d 236, 242 (Ind. Ct. App. 2007). "A trial court need not wait until a child is irreversibly influenced by a deficient lifestyle such that his or her physical, mental, and social growth is permanently impaired before terminating the parent-child relationship." *Castro*, 842 N.E.2d at 372.

Here, Mother argues that the court's initial basis for removing N.B. from her care, methadone addiction, no longer applies since neither she nor N.B. remains addicted to methadone. However, we must examine not only the initial basis for N.B.'s removal, but also the reasons for his continued placement away from Mother. During the pendency of the CHINS and termination proceedings, Mother continued to use illegal drugs. She admitted that she had used meth, cocaine, and heroin throughout N.B.'s life. She was in and out of drug treatment programs, and as of the date of termination, had yet to complete a program. When she left the programs, she would return to her life of drugs. One time, while out on a pass from her court-ordered inpatient treatment, she failed to return and instead spent three weeks on a drug binge and had to be taken in handcuffs back to the hospital. Moreover, her visits with N.B. were inconsistent, due in part to her treatment programs. While her most recent forty-seven-day participation in a rehab program is laudable, her pattern of behavior

suggests that she lives an unstable and unpredictable lifestyle that is not conducive to successful parenting. Finally, her two contempt citations during the course of this case demonstrate a disdain for authority rather than a resolve to change her deficient lifestyle. The juvenile court's conclusion regarding the improbability of remedied conditions is not clearly erroneous.

Mother also challenges the sufficiency of evidence to support the juvenile court's finding that termination is in N.B.'s best interests. In determining whether termination is in the child's best interests, the juvenile court must look beyond the factors identified by DCS to the totality of the evidence. *C.T. v. Marion County Dep't of Child Servs.*, 896 N.E.2d 571, 585 (Ind. Ct. App. 2008), *trans. denied* (2009). In so doing, the court must subordinate the interests of the parent to those of the child. *Id.*

Both the DCS case manager and the guardian ad litem ("GAL") recommended that Mother's parental rights be terminated and that it was in N.B.'s best interests to be adopted by his grandfather. Such evidence alone is sufficient to support the juvenile court's conclusion that termination is in N.B.'s best interests. *McBride*, 798 N.E.2d at 203. Moreover, the DCS case manager testified that Mother told her several times that she wished to voluntarily terminate her parental rights. Tr. at 74.

Mother asserts that the fact that N.B. is placed with his grandfather instead of in foster care is sufficient to merit the continuation of wardship instead of the termination of her parental rights. As support, she relies on *In re H.T.*, 901 N.E.2d 1118 (Ind. Ct. App. 2009), and *Rowlett v. Vanderburgh County Office of Family & Children*, 841 N.E.2d 615 (Ind. Ct.

App. 2006), *trans. denied*, both of which involved the placement of the child with relatives rather than in foster care. In both cases, we reversed orders terminating the father's parental rights where the father was incarcerated and the child had been placed with a relative during the course of the proceedings.

In *H.T.*, the father was incarcerated four months before H.T.'s birth for violating his probation, and H.T. was placed with her mother. During his incarceration, the father made regular weekly calls to H.T. Authorities told him that he could obtain an early release if he participated in certain programs. As a result, he completed a substance abuse program and a parenting program and earned a college degree, all while imprisoned, with the intent of parenting H.T. upon his release. Meanwhile, the DCS filed a CHINS action regarding H.T., and H.T. was removed from her mother's care and placed with grandparents. The father communicated by mail with the grandparents and also sent H.T. letters and cards. Upon his release from prison, the father went immediately to visit H.T.'s guardian ad litem to inquire about starting the court-ordered services, but DCS refused to provide the services. Less than one month after his release, the juvenile court ordered that his relationship with H.T. be terminated, finding that, although the father was "willing and able to complete any services and become the custodial parent of his daughter" his efforts were "too late." *Id.* at 1122. We reversed, concluding that the father was willing and able but had not been afforded the chance to participate in DCS services, post-release. We also noted that continuation of the wardship would not negatively impact H.T., largely because she was thriving in the custody of her grandparents and was not in a temporary foster care situation. *Id.*

We find *H.T.* to be distinguishable. There, the father completed the programs offered during his incarceration and demonstrated an overwhelming eagerness to participate in and complete any and all services post-release, but was denied the opportunity by DCS. Here, Mother was not denied any such opportunities; she simply refused to complete the services. Her noncompliance was so egregious that the court twice held her in contempt. Thus, her reliance on *H.T.* is misplaced.

Likewise, *Rowlett* involved an incarcerated father whose children had been placed with relatives during the pendency of the CHINS and termination proceedings. However, in *Rowlett*, the incarcerated father's appeal was predicated upon the trial court's denial of his motion to continue the dispositional hearing, due to his inability to assist his counsel in preparing a defense. Also, the father was incarcerated during all but two months of the proceedings and had not received any communications from the Office of Family and Children during that time. 841 N.E.2d at 622. While incarcerated, he participated in nearly 1100 hours of parenting and substance abuse services and had earned college credit. *Id.* He maintained a relationship with the children the entire time he was incarcerated and had made great strides in improving himself. *Id.* at 623. Thus, we held that termination was not warranted. Here, however, Mother has not demonstrated a persistent effort to improve her deficient lifestyle. Instead, she has defied court orders and repeatedly returned to drug use. Thus, her reliance on *Rowlett* is misplaced.

The mere fact that a child has been placed with a relative instead of in a temporary foster care situation does not, by itself, warrant the continuation of wardship instead of

involuntary termination. Instead, we must consider such placement in relation to the other factors present in the case. Based on Mother's continued deficient lifestyle and her defiance of court orders, we conclude that the juvenile court's finding that termination is in N.B.'s best interests is not clearly erroneous. The evidence most favorable to the judgment is therefore sufficient to sustain the juvenile court's termination order. Accordingly, we affirm.

Affirmed.

KIRSCH, J., and BRADFORD, J., concur.