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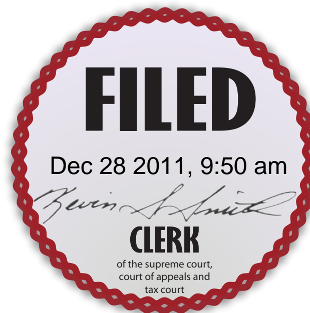

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IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF THE INVOLUNTARY TERMINATION OF THE PARENT-CHILD RELATIONSHIP OF:

A.W. (Minor Child)

And

N.W. (Mother)

Appellant-Respondent,

vs.

INDIANA DEPARTMENT OF CHILD SERVICES,

Appellee-Petitioner.

No. 48A02-1105-JT-416

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable G. George Pancol, Judge
Cause No. 48D02-1005-JT-240

December 28, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

N.W. ("Mother") appeals the involuntary termination of her parental rights to her child, A.W. Concluding that the Indiana Department of Child Services, local office in Madison County ("MCDCS"), presented clear and convincing evidence to support the trial court's judgment, we affirm.

Facts and Procedural History

Mother is the biological mother of A.W., born in October 2008. The facts most favorable to the trial court's judgment reveal that A.W. was born while Mother was incarcerated. At the time of A.W.'s birth, Mother had an open CHINS case involving another child, R.W., who was removed by MCDCS based on substantiated neglect allegations.[1] Mother's boyfriend, J.I., was permitted to take A.W. home from the hospital and care for her until Mother's release in January 2009.

As part of the terms or her release from incarceration, Mother was ordered to participate in the Madison County Drug Court program. In June 2009, MCDCS received a report from Drug Court personnel indicating Mother had refused to participate in mandatory drug screens and a warrant for her arrest had been issued. The report also

[1] Mother's parental rights to R.W. were later terminated in July 2009. Another panel of this Court affirmed the trial court's termination order pertaining to R.W. in an unpublished memorandum decision in March 2010. *See In re N.W.*, 924 N.E.2d 677 (Ind. Ct. App. 2010).

indicated that there were grave concerns about A.W.'s living arrangements with J.I. due to alleged incidents of domestic violence in the home.

When MCDCS case manager Rebekah Johnson visited the family home the next day, Mother had already been arrested. In addition, J.I., who claimed to be A.W.'s biological father, was unable to produce any legal documentation to support this claim.[2] A.W. was therefore taken into emergency protective custody and placed in foster care.

Mother remained incarcerated for approximately thirty days and was thereafter released to participate in the Stepping Stones drug rehabilitation program. Mother again refused to comply with the terms of the Drug Court program and was re-incarcerated in August 2009. In October 2009, Mother was sentenced to thirteen years of incarceration, with an earliest possible release date in November 2014.

Meanwhile, A.W. was adjudicated a CHINS on August 5, 2009. Following a hearing in September 2009, the trial court entered a dispositional order formally removing A.W. from Mother's care and custody. The court's dispositional order also incorporated a Parental Participation Plan and directed Mother to participate in a variety of services designed to enhance her parenting abilities and to facilitate reunification with A.W. Among other things, Mother was ordered to participate in home-based counseling services, submit to random drug screens, attend NA/AA classes, obtain stable

[2] Since this time, J.I. was proven not to be A.W.'s biological father. L.F. was thereafter alleged to be A.W.'s biological father, but L.F. denies paternity. In November 2010, L.F. filed a motion requesting that the court dismiss him as a Respondent in this case. In its termination order, the trial court terminated any parental rights L.F. may have had in A.W. Because L.F. does not participate in this appeal, we limit our recitation of the facts to those pertinent solely to Mother's appeal of the termination of her parental rights to A.W.

employment and housing, establish paternity, and, if incarcerated, apply for and participate in any programs or services available through IDOC.

In May 2010, MCDCS filed a petition seeking the involuntary termination of Mother's parental rights to A.W. During a permanency hearing in June 2010, the trial court granted MCDCS's request that the permanency plan be changed from reunification to termination of parental rights and adoption. The court also granted MCDCS's petition that was made pursuant to Indiana Code section 31-34-21-5.6 that reasonable efforts to reunify Mother and A.W. were not required.

An evidentiary hearing on the termination petition was eventually held in December 2010. During the termination hearing, MCDCS presented evidence of Mother's (1) ongoing incarceration with an earliest possible release date not until November 2014; (2) significant criminal history, including convictions for residential entry, theft, receiving stolen property, forgery, and fraud; (3) lengthy history of involvement with MCDCS, including the termination of her parental rights to another older child; (4) unresolved substance-abuse issues; and (5) current inability to provide A.W. with a safe and stable home environment. At the conclusion of the termination hearing, the trial court took the matter under advisement. In April 2011, the trial court issued its judgment terminating Mother's parental rights to A.W. Mother now appeals.

Discussion and Decision

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). When reviewing the termination of parental rights, we will neither reweigh

the evidence nor judge witness credibility. *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 most favorable to the judgment. *Id.* Moreover, in deference to the trial court's unique position to assess the evidence, we will set aside a 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*.

Here, in terminating Mother's parental rights, the trial court entered specific findings and conclusions. When a trial court's judgment contains specific findings of fact and conclusions thereon, we apply a two-tiered standard of review. *Bester v. Lake Cnty. Office of Family & Children*, 839 N.E.2d 143, 147 (Ind. 2005). First, we determine whether the evidence supports the findings, and second, we determine whether the findings support the judgment. *Id.* "Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference." *Quillen v. Quillen*, 671 N.E.2d 98, 102 (Ind. 1996). If the evidence and inferences support the trial court's decision, we must affirm. *L.S.*, 717 N.E.2d at 208.

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*. These parental interests, however, are not absolute and must be subordinated to the child's interests when determining the proper disposition of a petition to terminate parental rights. *Id.* In addition, although the right to raise one's own child should not be terminated solely because there is a better

home available for the child, parental rights may be terminated when a parent is unable or unwilling to meet his or her parental responsibilities. *K.S.*, 750 N.E.2d at 836.

Before an involuntary termination of parental rights may occur in Indiana, the State is required to allege and prove, among other things:

> (B) that one (1) of the following is true:
>
> > (i) 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.
> >
> > (ii) There is a reasonable probability that the continuation of the parent-child relationship poses a threat to the well-being of the child.
> >
> > (iii) The child has, on two (2) separate occasions, been adjudicated a child in need of services;
>
> (C) termination is in the best interests of the child . . . .

Ind. Code § 31-35-2-4(b)(2)(B) & (C). "The State's burden of proof in termination of parental rights cases is one of 'clear and convincing evidence.'" *In re G.Y.*, 904 N.E.2d 1257, 1260-61 (Ind. 2009) (quoting Ind. Code § 31-37-14-2). If the juvenile court finds that the allegations in a petition described in section 4 of this chapter are true, the court shall terminate the parent-child relationship. Ind. Code § 31-35-2-8(a). Mother challenges the sufficiency of the evidence supporting the trial court's findings as to subsections (b)(2)(B) and (C) of the termination statute cited above.

We begin our review by observing that Indiana Code section 31-35-2-4(b)(2)(B) is written in the disjunctive. Thus, a trial court need find only one of the two requirements of subsection (b)(2)(B) has been established by clear and convincing evidence to properly

terminate parental rights. *See L.S.*, 717 N.E.2d at 209. Because we find it to be dispositive under the facts of this case, we only consider whether MCDCS established, by clear and convincing evidence, that there is a reasonable probability the conditions resulting in A.W.'s removal or continued placement outside Mother's care will not be remedied. *See* I.C. § 31-35-2-4(b)(2)(B)(i).

In challenging the sufficiency of the evidence supporting the trial court's determination that there is a reasonable probability the conditions resulting in A.W.'s removal will not be remedied, Mother claims that the trial court's Finding No. 18, which states that Mother failed to complete any court[-]ordered services, is "contrary to the evidence" and directs our attention to Mother's testimony during the termination hearing that she completed the "Power of Prediction" and "Twelve Steps to Celebrate Recovery" classes while incarcerated and that she was currently enrolled in a GED program, as well as the "PLUS Program." Appellant's Br. p. 21. In addition, Mother asserts that the trial court's findings that she will be released from incarceration in 2014 (Finding No. 21) and that A.W. is thriving in foster care (Finding No. 25) "precludes the Court from reaching a conclusion that there is a reasonable probability that the condition[s] resulting in removal (incarceration and developmental delays) would not be remedied." *Id.* at 22. Mother therefore contends she is entitled to reversal.

A trial court must judge a parent's fitness to care for his or her child 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 trial 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 Cnty. Office of Family & Children*, 762 N.E.2d 1244, 1251 (Ind. Ct. App. 2002), *trans. denied*. Moreover, a county department of child services is not required to provide evidence ruling out all possibilities of change; rather, it need only establish 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). Finally, we have previously explained that Indiana's termination statute makes clear that "it is not just the basis for the initial removal of the child that may be considered for purposes of determining whether a parent's rights should be terminated, but also those bases resulting in the continued placement outside of the home." *In re A.I.*, 825 N.E.2d 798, 806 (Ind. Ct. App. 2005), *trans. denied*.

Here, in determining there is a reasonable probability that the conditions leading to A.W.'s removal and/or continued placement outside Mother's care will not be remedied, the trial court made several pertinent findings regarding Mother's past and present inability to provide A.W. with a safe and stable home environment. Specifically, the trial court noted Mother's extensive history of involvement with MCDCS, including the fact Mother's parental rights to another child had already been involuntarily terminated despite the "benefit of services" in that case, as well as Mother's failure to complete the Drug Court program and all other court-ordered services in the underlying case. Appellant's App. p. 48. The court also found that Mother was not due to be released

from incarceration until 2014, and although "developmentally delayed" when first removed from Mother, A.W. has "thrived" since being in foster care. *Id.* Based on these and other findings, the trial court concluded as follows:

> There is a reasonable probability that the conditions resulting in the removal of the child from [Mother] . . . will not be remedied. . . . [Mother] has failed to complete any court[-]ordered services, is incarcerated and is not due to be released until on or about 2014, and has [had] her parental rights involuntarily terminated in the past. . . .

Id. at 48-48A. A thorough review of the record reveals that these findings and conclusions are supported by abundant evidence.

At the time A.W. was born, Mother was incarcerated and thus was unavailable to care for her daughter. Notwithstanding Mother's release in January 2009, A.W. was removed from Mother's care in June 2009 due to Mother's re-incarceration for refusing to comply with the drug screen mandates of the Madison County Drug Court program, allegations of domestic violence in the home, and Mother's involved in a separate open CHINS case involving A.W.'s older sibling.

By the time of the termination hearing in December 2011, testimony from MCDCS case manager Johnson, court-appointed special advocate Nellie Elsten, and one of A.W.'s foster parents makes clear that Mother's circumstances remained largely unchanged. Specifically, Mother was once again incarcerated for failing to abide by Drug Court program mandates following a second release from incarceration during the summer of 2009. Moreover, Mother's earliest possible release date was not until November 2014, and she had failed to successfully complete any of the specific court-ordered reunification services including participating in home-based counseling services,

attending NA/AA meetings, submitting to random drug screens, obtaining stable employment and housing, and establishing paternity. Based on the foregoing, we conclude that the trial court's Finding No. 18 is supported by the evidence.

Although Mother testified during the termination hearing that she had completed classes while incarcerated and was currently participating in a GED program, Mother failed to introduce into evidence any documentation to support this self-serving testimony. Moreover, MCDCS case manager Johnson informed the trial court that she had never "heard anything from [Mother] as far as what she's completed or done in the [IDOC]" and that she was unable to "follow-up" with Mother in this matter because Mother had requested that Johnson "only contact her through letters." *Id.* Even if we were to conclude, as Mother would have us do, that Finding No. 18 is erroneous based on Mother's testimony that she participated in a few classes while incarcerated, reversal is not warranted under the facts of this particular case.

As previously mentioned, a court on review must determine whether the specific findings are adequate to support the trial court's decision. *In re B.J.*, 879 N.E.2d 7, 19 (Ind. Ct. App. 2008), *trans. denied*. Additionally, we are obliged to disregard any special finding that is not proper or competent, and such a finding cannot form the basis of a conclusion of law. *Id.* Nevertheless, we may only reverse a trial court's judgment if its findings constitute prejudicial error. *Id.* Accordingly, the trial court's Finding No. 18 would be cause for reversal only if it were the '"sole support for any conclusion of law necessary to sustain the judgment of the court.'" *Id.* (quoting *Riehle v. Moore*, 601 N.E.2d 365, 369 (Ind. Ct. App. 1992)).

After reviewing the judgment in its entirety, we have determined that specific Finding No. 18 does not constitute the sole support for any conclusion of law necessary to sustain the trial court's judgment in this case, including the court's finding that there is a reasonable probability the conditions resulting in A.W.'s removal will not be remedied. Even if we were to disregard Finding No. 18 as erroneous, multiple additional findings, including the court's findings that Mother: (1) is currently incarcerated and not due to be released until 2014; (2) refused to successfully complete the Drug Court program; and (3) failed to benefit from services offered in a previous CHINS case involving another child resulting in the eventual involuntary termination of her parental rights to that child, all support the trial court's determination that there is a reasonable probability the conditions resulting in A.W.'s removal and continued placement outside Mother's care will not be remedied. Mother's arguments on appeal, emphasizing her self-serving testimony, rather than the evidence cited by the trial court in its termination order, amount to an invitation to reweigh the evidence, which we may not do. *See D.D.*, 804 N.E.2d at 265.

Because there is clear and convincing evidence to support the trial court's ultimate findings on the elements necessary to sustain the judgment, we hold that even assuming, arguendo, that Finding No. 18 is erroneous, it did not prejudice Mother and, consequently, is not grounds for reversal. Moreover, we find Mother's additional arguments that the trial court's findings pertaining to her release date and A.W.'s now-improved condition somehow "preclude" the court from finding that the conditions resulting in A.W.'s removal will not be remedied to be disingenuous and also unavailing. The facts that Mother will eventually be released from incarceration at some future date

several years after the termination hearing and A.W. is thriving in the care of her pre-adoptive foster family have absolutely no bearing on whether Mother will ever take the initiative to overcome her addiction to illegal substances, refrain from engaging in criminal activities, and demonstrate she is capable of providing A.W. with a safe and stable home environment.

We next consider Mother's assertion that MCDCS failed to prove termination of her parental rights is in A.W.'s best interests. In determining what is in the best interests of a child, the trial court is required to look beyond the factors identified by the Indiana Department of Child Services and look to the totality of the evidence. *McBride v. Monroe Cnty. 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.* A trial court need not wait until a child is irreversibly harmed such that his or her physical, mental, and social development is permanently impaired before terminating the parent-child relationship. *Id.* at 199. Moreover, we have previously held that the recommendations of both the case manager and child advocate to terminate parental rights, coupled with evidence that the conditions resulting in removal will not be remedied, is sufficient to show by clear and convincing evidence that termination is in the child's best interests. *In re M.M.*, 733 N.E.2d 6, 13 (Ind. Ct. App. 2000).

In addition to the specific findings previously cited, the trial court also found that when A.W. was first removed and placed in foster care, she was "developmentally delayed." Appellant's App. p. 48. The court further found that "[s]ince being in placement, the child has thrived," and is "currently placed in a pre[-]adoptive home." *Id.*

The trial court also noted in its findings that both the family case manager and CASA "believe that it is in the child's best interest[s] that parental rights be terminated." *Id.* These findings, too, are supported by the evidence.

During the termination hearing, former foster parent Barbara Freeman informed the trial court that although A.W. was eight months old when removed from Mother and placed in foster care, the child "could not sit alone," did not "reach out," could not "roll over," and "just laid on her back." Tr. p. 7. Occupational Therapist Sheryl Wolfert likewise confirmed that A.W. was "not sitting independently," "rolling [over]," "eating baby food, or able to crawl" when she first began working with A.W. *Id.* at 13. Additionally, CASA Elsten testified that when A.W. was removed from the family home she was "very limp and [had] no muscle tone." *Id.* at 24.

In recommending termination of Mother's parental rights as in A.W.'s best interests, both case manager Johnson and CASA Elsten confirmed that A.W. had improved significantly while in foster care. In so doing, Elsten testified that A.W. is "doing very well" now developmentally and is "[v]ery bonded" to her pre-adoptive foster parents. *Id.* at 22-23. Elsten further stated that A.W. needed a "permanent home" and "parents who can provide for her physically and emotionally." *Id.* at 24. When asked why she believed Mother would not be able to provide A.W. with the stability and permanency she needs once released from incarceration, Elsten answered, "Well, for one thing, [Mother] can't stay out of jail for very long." *Id.* Elsten then proceeded to recount Mother's significant history of repeated incarcerations both before and after A.W.'s birth. Case manager Johnson likewise confirmed that A.W. was "doing great" in her current

foster home, “all of [A.W.’s] needs” were being met, and A.W. had found the “stability and permanency” she needed in her current foster home. *Id.* at 38. Based on the totality of the evidence, including Mother’s significant history of criminal activities, unresolved substance-abuse issues, and current inability to provide A.W. with a safe and stable home environment due to her incarceration, coupled with the testimony from Johnson and Elsten recommending termination of Mother’s parental rights, we conclude that clear and convincing evidence supports the trial court’s determination that termination of Mother’s parental rights is in A.W.’s best interests.

This Court will reverse a termination of parental rights ‘“only upon a showing of ‘clear error’– 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) (quoting *Egly v. Blackford Cnty. Dep’t of Pub. Welfare*, 592 N.E.2d 1232, 1235 (Ind. 1992)). We find no such error here.

Affirmed.

ROBB, C.J., and NAJAM, J., concur.