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ATTORNEY FOR APPELLANT:

LILABERDIA BATTIES

Batties & Associates
Indianapolis, Indiana

ATTORNEY FOR APPELLEE

DEPARTMENT OF CHILD SERVICES:

DONNA LEWIS

Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

IN RE: THE MATTER OF THE)
INVOLUNTARY TERMINATION)
OF THE PARENT-CHILD)
RELATIONSHIP OF O.E., S.E.,)
AND M.E.,)

DESIRAE EVANS,)
)
Appellant-Respondent,)

vs.)

No. 49A05-0701-JV-31

MARION COUNTY DEPARTMENT)
OF CHILD SERVICES,)
)
Appellee-Petitioner,)

and)

CHILD ADVOCATES, INC.,)
)
Appellee – Guardian ad Litem.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Victoria Ransberger, Judge Pro Tem
Cause No. 49D09-0603-JT-12043

November 29, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Desirae Evans appeals from the trial court's order terminating the parent-child relationship between her and M.E., O.E., and S.E (referred to collectively as the "Children").

Desirae raises two issues, which we restate as: 1) whether the trial court abused its discretion in denying Desirae's motion for a continuance; and 2) whether sufficient evidence exists to support the trial court's order. Concluding that the trial court acted within its discretion in denying Desirae's motion for a continuance and that sufficient evidence supports the order, we affirm.

Facts and Procedural History

Stephen and Desirae Evans are the Children's biological parents. When M.E., the youngest child, was born, her meconium tested positive for cocaine. On August 1, 2005, shortly after M.E.'s birth, the Marion County Department of Child Services (the "DCS") filed a petition alleging the Children to be Children in Need of Services ("CHINS") based on this positive test and O.E.'s statements indicating that her parents frequently argued and possibly used drugs in the Children's presence. On the same day, Stephen and Desirae admitted the CHINS petition's allegations and promised to complete parenting services, follow the recommendations of therapists and counselors, demonstrate that they have sufficient income and housing, visit the Children regularly, and reimburse the DCS for

expenses. The trial court adjudicated the Children to be CHINS and removed them from their parents' care. The Children have been in the care of their paternal grandparents since the removal, except for a period of approximately two months when the Children resided with Stephen.

Soon after the CHINS proceeding, Desirae completed her parenting assessment and began parenting classes. On January 30, 2006, the State charged Desirae with forgery, a Class C felony, and theft, a Class D felony. On March 7, 2006, Desirae pled guilty to theft and was sentenced to 365 days on house arrest and two years of probation. Desirae violated the terms of her house arrest¹ and was ordered to execute her sentence in the Indiana Women's Prison, where she remained until November 8, 2006. On March 23, 2006, the DCS changed its permanency plan from reunification to adoption by the paternal grandparents, and filed a petition for termination of parental rights.

The termination proceedings commenced on December 4, 2006. At the conclusion of the hearing, the trial court scheduled the remainder of the trial for December 13, 2006. Desirae's counsel requested that the date be set back, as Desirae had recently been released from prison, but the trial court denied this request, stating that "[i]t's really not the children's fault that she got herself in an incarcerated situation." Transcript at 56. Prior to the December 13 hearing, Stephen consented to his parents' adoption of the Children.² At the December 13 hearing, Desirae again moved for a continuance, and the trial court again denied her request. On January 2, 2007, the trial court issued its order along with findings of

¹ The record is not entirely clear as to when this violation occurred.

² Stephen is therefore not a party to this appeal, and the termination order entered by the court

fact and conclusions of law terminating Desirae's parental rights. The relevant findings are as follows:

9. Pursuant to the terms of the Agreed Entry, Desirae and Stephen Evans were ordered to complete an array of services including: contacting the caseworker weekly, participate in a program of homebased counseling and successfully complete it and any recommendations of the homebased counselor, undergo a parenting assessment and follow all recommendations of the home based counselor, complete a substance abuse evaluation and follow all recommendations stemming from that assessment, participate in random drug screens, successfully complete a program of age appropriate parenting classes and implement/demonstrate the assimilation of the skills learned, demonstrate that they had secured and could maintain a legal, stable source of income adequate to support themselves and their children, demonstrate that they had obtained and could maintain suitable housing with functional utilities and adequate provisions for themselves and their children, and visit their children on a consistent basis.

10. Desirae Evans completed a parenting assessment in a timely manner. Her parenting assessment recommended that she complete an intensive outpatient drug treatment program and submit random urine screens in order to ensure that she was staying clean and free from drugs.

11. The [DCS] has made four (4) separate referrals, November 2005, May 2006, June 2006, and November 2006, for Desirae to complete an intensive outpatient drug treatment program. Ms. Evans has never successfully completed the program, although she is continuing to attend the classes.

12. Desirae testified that she was receiving addiction treatment from her Ob/Gyn, Dr. James Nocon, from approximately April 2005 thru June of 2006, but no proof of this was ever submitted to the [DCS]. Until November of 2005, Ms. Evans refused DCS' attempts to refer her for intensive outpatient drug treatment due to her treatment with Dr. Nocon. Despite allegedly being in treatment with Dr. Nocon, Ms. Evans continued to test positive for cocaine.

Dr. Nocon has a certification for treatment of drug-related problems.

13. Ms. Evans has a known problem with cocaine since the birth of her first child, [O.E.], more than seven (7) years ago. Since that time she has tried at least five (5) or six (6) times to stop using, but she has never been successful.

14. Ms. Evans was incarcerated in January of 2006.

15. Prior to her incarceration, Ms. Evans had five months to engage in her services. Other than the parenting assessment, Ms. Evans did not complete a single service during those 5 months.

16. Ms. Evans never completed parenting classes.

pertains to Desirae only.

17. Ms. Evans never successfully completed homebased counseling, as ordered by the court. In fact, Ms. Evans never reached a point in her services where homebased counseling would be referred, as she could never successfully complete a drug treatment program.

20. During the time that Ms. Evans was on home detention, she could have participated in court ordered services. Ms. Evans did not [] do so.

21. Ms. Evans testified that transportation to her services was a significant problem for her, but admitted that taking the bus was an option; she chose not to do so because it was “too complicated.”

22. Desirae Evans currently resides with Stephen Evans . . . and has stated that it is her intent to remain with him and make their marriage work. However, on the final day of trial after Mr. Evans signed voluntary consents, Desirae then said that she would leave Mr. Evans and move to Kentucky to be with relatives if the children were returned to her. Mr. Evans has tested positive for cocaine during the course of this case and has never successfully completed a program to address drug issues, as he was court[-]ordered to do.

23. Although Ms. Evans testified that she would choose her children over her husband, at the time of trial, she had taken no steps to separate from him or to ensure, in any other way that her children would not be exposed to an untreated drug user if they were returned to her care. Mr. Evans had refused to participate in a drug treatment program, including the months immediately prior to trial when both he and Desirae were aware of the trial date and the absolute need for both of them to complete services if they intended to parent their children.

28. Since her release from incarceration in November of 2006, Ms. Evans has participated in IOP and has not tested positive for illegal drugs. Mother therefore has an approximate 45 day record of non-use since release from prison.

30. Due to Ms. Evans’ failure to consistently participate in IOP prior to this, her failure to submit clean random urine screens and to continue to parent her children for more than six years while using cocaine periodically, the court concludes that Ms. Evans’ primary motivation is to remain out of prison and not to provide a safe, stable drug-free home environment for the return of her children. Once Ms. Evans is no longer on probation, she will have no further motivation to remain drug free.

32. At the time of the second day of trial, Ms. Evans had been employed for one (1) day.

33. . . . [T]here is simply no possibility that home based [services (which would be necessary for reunification)] will be instituted so long as Desirae

continues to live with a parent who has voluntarily given up his rights to the three children, continues to use cocaine and has never completed services.

38. Given the children's need for permanency and a stable, loving home and their mother's lack of demonstrated ability to provide for those needs, it is in the children's best interest to terminate the parent-child relationship.

Appellant's Appendix at 14-17. Based on these findings, the trial court then concluded: 1) there is a reasonable probability that the conditions resulting in the Children's removal will not be remedied; 2) the continuation of the parent-child relationships poses a threat to the Children's well-being; 3) termination of the relationships is in the Children's best interests; and 4) the DCS has a satisfactory plan in place for the Children. Desirae now appeals.

Discussion and Decision

I. Denial of Motion for Continuance

We review a trial court's decision to grant or deny a motion for continuance for an abuse of discretion. Trinity Baptist Church v. Howard, 869 N.E.2d 1225, 1230 (Ind. Ct. App. 2007), trans. denied. We will conclude the trial court abused its discretion if its decision was clearly against the logic and effect of the facts and circumstances. Id. In order to find an abuse of discretion for denial of a motion, the party appealing must show both that good cause existed to grant the motion and that it was prejudiced by the denial of the motion. See Troyer v. Troyer, 867 N.E.2d 216, 219 (Ind. Ct. App. 2007).

In arguing the trial court abused its discretion, Desirae relies on this court's decision in Rowlett v. Vanderburgh County Office of Family and Children, 841 N.E.2d 615, 619 (Ind. Ct. App. 2006), trans. denied. In Rowlett, the father was incarcerated roughly two months after the DCS filed its CHINS petition and remained incarcerated throughout the termination

proceedings. Id. at 618. Another panel of this court concluded that the father had shown good cause, as granting the continuance would give him the opportunity to participate in the DCS's services. Id. at 619. Further, the father demonstrated prejudice as the trial court assessed his ability to care for the children while he was incarcerated and before he had the opportunity to participate in services or demonstrate his ability to care for his children. Id. The court also noted that the children were in the care of their maternal grandmother and the DCS's plan was for her to adopt the children. Id. Therefore, the court recognized that they would not have "long periods of their childhoods in foster care or other settings designed to be temporary." Id. (quoting Phelps v. Sybinsky, 736 N.E.2d 809, 813 (Ind. Ct. App. 2000), trans. denied).

We find Rowlett distinguishable. Desirae, unlike the father in Rowlett, was not incarcerated at the time of her termination hearing, and instead had been released from incarceration roughly one month prior to the termination hearings. Second, in Rowlett, the father was incarcerated roughly two months after the filing of the CHINS petitions. Here, Desirae was not arrested until roughly six months after the DCS filed the CHINS petition, giving her sufficient time to demonstrate her willingness and ability to care for her children. Also, Desirae was on house arrest for part of this time, at which point DCS services were also available. Further, as the court in Rowlett recognized, it was Desirae's own acts that led to her incarceration during the termination petition's pendency. When given the opportunity to serve her sentence on house arrest and take advantage of DCS services, Desirae chose instead to violate her house arrest terms, leading to her incarceration. Such choices demonstrate Desirae's lack of commitment to fulfilling the DCS's requirements and completing services.

Given these circumstances, we conclude the trial court acted within its discretion in denying Desirae's motion for continuance.

II. Sufficiency of the Evidence

When reviewing a termination of parental rights, we neither reweigh evidence nor judge witness credibility; instead we consider only the evidence most favorable to the judgment and the reasonable inferences that can be drawn from the evidence. In re J.W., 779 N.E.2d 954, 959 (Ind. Ct. App. 2002), trans. denied. When a trial court enters findings of fact along with its judgment, we use a two-tiered review, first deciding if the evidence supports the findings and then deciding if the findings support the judgment. Id. We will not set aside a finding unless it is clearly erroneous. McBride v. Monroe County Office of Family and Children, 798 N.E.2d 185, 198 (Ind. Ct. App. 2003). A finding is clearly erroneous when no facts or inferences support it. In re J.W., 779 N.E.2d at 959. We will reverse a judgment as clearly erroneous if we review the record and have “a firm conviction that a mistake has been made.” Id.

A parent has a constitutional right to raise his or her children, but this right is “not absolute and must be subordinated to the children's interests when the children's emotional and physical development is threatened.” A.F. v. Marion County Office of Family and Children, 762 N.E.2d 1244, 1249 (Ind. Ct. App. 2002), trans. denied. Although parental rights are afforded constitutional protections, these rights may be terminated when parents are unable or unwilling to meet their parental responsibilities. In re R.S., 774 N.E.2d 927, 930 (Ind. Ct. App. 2002), trans. denied. We do not terminate these rights to punish a parent, but to protect a child. Id.

The elements that must be proved by clear and convincing evidence in order to terminate a parent-child relationship are set out in Indiana Code section 31-35-2-4(b)(2):

(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;

(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 interest of the child; and

(D) there is a satisfactory plan for the care and treatment of the child.

Desirae does not argue that the Children have not been removed from her care for at least six months or that the DCS does not have a satisfactory plan for the Children's care, and argues only that insufficient evidence supports the remaining factors.

A. Reasonable Probability that the Conditions that Resulted in the Children's Removal

Will Not Be Remedied³

When making this determination, trial courts should judge a parent's fitness at the time of the termination hearing, considering any change in conditions since the removal. In re D.J., 755 N.E.2d 679, 684 (Ind. Ct. App. 2001), trans. denied. The trial court may consider previous patterns of conduct when determining a parent's current fitness. McBride, 798 N.E.2d at 199. "A pattern of unwillingness to deal with parenting problems and to

³ Because subsection (B), is written in the disjunctive, we will affirm if clear and convincing evidence supports either condition. Castro v. State Office of Family and Children, 842 N.E.2d 367, 373 (Ind. Ct. App. 2006), trans. denied. Therefore, we do not discuss whether the evidence supports the trial court's conclusion that a reasonable probability exists that the continuation of the parent-child relationship poses a threat to the children's well-being because we conclude that clear and convincing evidence supports the trial court's conclusion that a reasonable probability exists that the conditions that led to the children's removal will not be remedied.

cooperate with those providing social services, in conjunction with unchanged conditions, support a finding that there exists no reasonable probability that the conditions will change.” In re L.S., 717 N.E.2d 204, 210 (Ind. Ct. App. 1999), trans. denied, cert. denied, 534 U.S. 1161 (2002). “Indeed, a trial court need not wait until a child is irreversibly harmed such that his physical, mental, and social development is permanently impaired before terminating the parent-child relationship.” McBride, 798 N.E.2d at 199.

Desirae points out that after being released from prison, she has passed a drug screen, secured employment, and participated in DCS services. The trial court also recognized Desirae’s efforts to improve her life. However, the trial court also recognized Desirae’s history of failed drug tests and failed attempts at completing DCS services, and found that her current efforts were motivated more by her desire to stay out of jail than her desire to provide a stable environment for her children. It is the trial court’s duty to judge witness credibility. McBride, 798 N.E.2d at 202. Given Desirae’s pattern of past behavior and previous disregard for the Children’s well-being, we cannot say that the trial court’s findings and conclusions in this regard are clearly erroneous.

More importantly, as the trial court found, Desirae was living with Stephen at the time of the termination. In determining whether termination of parental rights is warranted, a trial court may properly consider the character and behavior of others who will be a substantial part of the children’s life if the parent-child relationship continues. See McBride, 798 N.E.2d at 202 (considering evidence that mother maintained contact with an abusive partner after child services recommended that she cease contact); In re D.G., 702 N.E.2d 777, 781 (Ind.

Ct. App. 1998) (noting that the trial court considered the parent’s choice of partners as a reason for termination and examining the danger posed to the child by the parent’s current partner). Although Desirae testified that she was willing to leave Stephen if that was the only way for her to keep her parental rights, it was the trial court’s province to judge the credibility of this testimony. Moreover, a trial court should judge a parent’s fitness at the time of the trial, and is not required to take a parent’s plans for future change at face value. See In re B.D.J., 728 N.E.2d 195, 202 n.1 (Ind. Ct. App. 2000) (recognizing that although a parent indicated his future plans to obtain housing, these “future plans were not evidence on which the trial court could base its opinion”).

In sum, although Desirae appears to be making admirable attempts at putting her life on track, evidence was submitted at trial supporting the trial court’s finding that a reasonable probability exists that the condition that led to the children’s removal—Desirae and Stephen’s drug use—will not be remedied at any point in the foreseeable future. We afford trial courts considerable deference in such determinations, and we are unable to say that the trial court’s finding in this case is clearly erroneous.

B. Best Interests of the Children

When determining whether termination is in children’s best interests, a trial court should look to the totality of the evidence. In re J.W., 779 N.E.2d at 962. In making this determination, the trial court should subordinate parents’ interests to those of the children. Id. “[T]he trial court need not wait until the child is irreversibly influenced such that his or her physical, mental and social growth is permanently impaired before terminating the parent-child relationship.” Id.

Here, the trial court found that the Children had formed a strong bond with their paternal grandparents, who plan to adopt the Children. See In re A.H., 832 N.E.2d 563, 571 (Ind. Ct. App. 2005); M.H.C. v. Hill, 750 N.E.2d 872, 878-79 (Ind. Ct. App. 2001) (identifying trial court's finding that children had been in another's care and had developed a relationship with that person's children as support for trial court's finding that termination was in the child's best interests). Also, the CASA and the DCS caseworker both indicated that termination would be in the children's best interests. See In re T.F., 743 N.E.2d 766, 776 (Ind. Ct. App. 2001) (opinions of Guardian ad Litem and family case manager considered evidence supporting finding that termination of parental rights was in the child's best interests), trans. denied; cf. In re R.J., 829 N.E.2d 1032, 1038-39 (Ind. Ct. App. 2005) (noting that recommendations of DCS caseworkers are not alone a basis for termination of parental rights, but that such recommendations are factors for the trial court to consider).

The suitability of the Children's placement with the paternal grandparents, the recommendations of the DCS and CASA, the Children's need for stability, and the evidence cited above indicating the reasonable probability that the conditions leading to the Children's removal will not be remedied provide support for the trial court's finding that termination is in the best interests of the Children. Considering the discretion we afford trial courts in these cases, we are unable to say that the trial court's finding in this regard is clearly erroneous.

Conclusion

We conclude the trial court acted within its discretion in denying Desirae's motion for a continuance. We also conclude that the trial court's findings of a reasonable probability that the conditions that led to the Children's removal will not be remedied and that

termination of the parent-child relationship is in the Children's best interests are not clearly erroneous. These findings, along with the uncontested findings that the Children have been removed from Desirae's care for at least six months and that the DCS has a satisfactory plan in place for the Children support the trial court's judgment terminating Desirae's parental rights.

Affirmed.

KIRSCH, J., and BARNES, J., concur.