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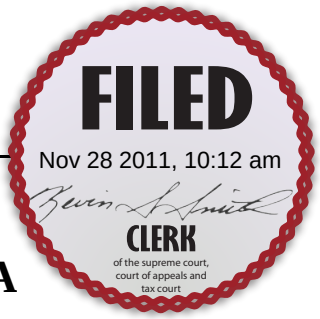

IN THE COURT OF APPEALS OF INDIANA

IN THE MATTER OF THE TERMINATION OF THE PARENT-CHILD RELATIONSHIP OF Z.S.	)	
C.S. (Father),	)	
Appellant-Respondent,	)	
AND	)	
L.S. (Grandmother),	)	
Appellant-Intervenor,	)	
vs.	)	No. 67A01-1104-JT-193
INDIANA DEPARTMENT OF CHILD SERVICES,	)	
Appellee-Petitioner.	)	

APPEAL FROM THE PUTNAM CIRCUIT COURT
The Honorable Matthew L. Headley, Judge
Cause No. 67C01-1009-JT-7

November 28, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Chief Judge

Case Summary and Issues

Soon after C.S. ("Father") and L.S. ("Mother") had their first child, Z.S., Mother divorced Father and sought a protective order. Shortly thereafter, Z.S. was diagnosed as failing to thrive and the Department of Child Services ("DCS") removed her from Mother's care. After altering his protective order, Father was able to begin weekly visitations with Z.S. For approximately two years, DCS oversaw Father's visitations with Z.S. At the end of that period, DCS petitioned for an involuntary termination of Father's parental rights pursuant to Indiana Code section 31-35-2-4(b)(2). Father's mother ("Grandmother") intervened in the proceeding. After a hearing, the trial court granted DCS's petition and terminated Father's parental rights. Father and Grandmother raise two issues for our review, which we restate as: whether we should abandon our clearly expressed standard of review for termination of parental rights cases and review the trial court's decision de novo, and whether the trial court's termination of Father's parental rights was clearly erroneous.

Concluding a clearly erroneous standard is appropriate and the trial court's judgment is not clearly erroneous, we affirm.

Facts and Procedural History

Father and Mother were married and living in Greencastle, Indiana, at the time of Z.S.'s birth. Soon thereafter, Mother filed for divorce and sought an ex parte protective order, which required Father to leave their home and refrain from contacting Mother or Z.S. Z.S. was referred to Riley Children's Hospital for medical care because she was underweight. DCS investigated concerns about Z.S.'s lack of weight gain in June 2009. Z.S. was diagnosed with failure to thrive and DCS placed her with foster parents in Putnam County. The trial court ordered that Z.S. should remain in foster care and, after a factfinding hearing, adjudicated her a child in need of services ("CHINS") in August 2009.

Due to Z.S.'s medical condition, it was difficult for anyone to get her to eat properly. She would only consume a few ounces of her bottle and required a lack of distractions in her environment to do so. After Father succeeded in getting the protective order modified, he contacted DCS to establish visitation with Z.S. The trial court held a dispositional hearing, at which Father appeared in person and by counsel. The trial court's dispositional order required Father to keep appointments with service providers, maintain suitable housing, meet the medical needs of the child, and visit Z.S. weekly. At this time, DCS's permanency plan for Z.S. was reunification with one of her parents. Father's weekly two-hour visitations began in September 2009 and took place at a McDonalds in Putnam County, over an hour from Grandmother's home in Shelby County where Father was staying.

Harmony Jensen, a DCS family case manager, prepared a report for a November 2009 dispositional hearing in which she recommended continued placement with Z.S.'s foster parents and noted that neither Father nor Mother had come forward as suitable and willing to care for Z.S. Robin DiRocco was appointed as Court Appointed Special Advocate ("CASA") for Z.S. in September 2009. Ms. DiRocco also prepared a report for the November 2009 dispositional hearing in which she noted Father indicated to her that he did not have the ability to care for Z.S. full-time because he was unemployed, living with his mother, and had no transportation of his own. In November 2009 and January 2010, Father declined additional visitation with Z.S. In April 2010, Father indicated for the first time his desire to participate in DCS parenting services and be reunified with Z.S.

Accordingly, in April 2010, Father began attending Z.S.'s therapy appointments, set goals for himself that would enable him to provide for Z.S., and increased his visitation with her to two times per week. In May 2010, Father was offered additional visitation but declined, and soon thereafter indicated that if he could not be reunified with Z.S., he wished for her foster parents to adopt her. Subsequently he requested his mother be considered for adoptive placement of Z.S. However, he did not sign a consent to adoption document despite being informed of its necessity. In July 2010, Cassandra McConn of McConn Partnerships, one contributor to overseeing Z.S.'s services, prepared a parenting assessment of Father. In pertinent part, it provided:

> [R]elatively little progress has been demonstrated over this past year by [Father] on behalf of daughter [Z.S.]. Specifically [Father] cannot provide for [Z.S.] the basics of minimal sufficiency for any child let alone a child diagnosed with the feeding and attachment challenges associated with failure-

> to-thrive. He has no home outside that of his own mother's. He has no transportation outside that his mother provides. His income is non-existent at this time. [Father] has been slow to respond to opportunities to see his daughter and slower to improve the quality of his interaction with his daughter as noted in the file and this report. His approach toward his daughter is not entirely dissimilar from what seems to be the approach for his life at this time in that it lacks the maturity, experience, fortitude, substance, focus and resourcefulness [Z.S.'s] condition demands.

Appellant's App. at 169.

Again in September 2010, McConn prepared another parenting assessment of Father. In pertinent part, it provided:

> Placement with [Father] remains not advisable, . . . in Writer's view [Z.S.] would continue to be placed in harm's way without a court-approved adult present if [Father] were to be relied on for her care to any appreciable extent. . . . In this case, [Father] although coming to visits with his daughter, remain [sic] detached and uninvolved for whatever reasons. . . . [Father] is reported to or otherwise is observed to remain essentially unmoved in whatever chair he originally sat at [a] visit's onset. Additionally [Z.S.'s] attempts to engage her father in conversation or to otherwise get her needs met via verbal interchange face-to-face with him continue to be without discernible reaction.

Id. at 170. Also in September 2010, pursuant to Indiana Code section 31-35-2-4, DCS filed a petition for involuntary termination of the parent-child relationship as to Z.S., Mother, and Father.

In October 2010, Susan McQueen, who supervised Father's visits with Z.S., noted that she prompted Father to go where Z.S. was playing but received no response from Father. She also noted that in December 2010, Father was asked to retrieve Z.S.'s diaper bag, but he only did so after twenty minutes passed by, and then he had to be prompted to change Z.S.'s diaper. Also in December 2010, Sueanne Milligan, a custody evaluator and guardian ad

litem, performed an independent parenting assessment of Father and concluded that she did not believe Father could care for Z.S. full-time.

On January 6, 2011, Grandmother filed a motion to intervene in the termination proceedings. On January 10, 2011, the trial court granted Grandmother's motion to intervene and conducted an evidentiary hearing on the termination petition. The hearing continued on February 8, 10, 11, and 22, 2011. On April 5, 2011, the trial court issued its findings of fact and conclusions of law, judgment, and order, and terminated the parental rights of both Father and Mother.[1] Father and Grandmother now appeal, filing separate briefs.

Discussion and Decision

I. Standard of Review

Our standard of review in involuntary termination of parental rights cases is as follows:

> When reviewing the termination of parental rights, we do not reweigh the evidence or judge witness credibility. We consider only the evidence and reasonable inferences that are most favorable to the judgment. We must also give "due regard" to the trial court's unique opportunity to judge the credibility of the witnesses. . . . When reviewing findings of fact and conclusions of law entered in a case involving a termination of parental rights, we apply a two-tiered standard of review. First, we determine whether the evidence supports the findings, and second we determine whether the findings support the judgment. We will set aside the trial court's judgment only if it is clearly erroneous. A judgment is "clearly erroneous" if the findings do not support the trial court's conclusions or the conclusions do not support the judgment.

In re I.A., 934 N.E.2d 1127, 1132 (Ind. 2010) (citations and quotations omitted).

[1] Mother does not appeal the termination of her parental rights.

Father contends we should abandon our supreme court's clearly expressed standard of review for three reasons: the trial court adopted the proposed findings and conclusions of the DCS and foster parents without changing them; termination of parental rights cases "deserve a more stringent standard of review than that applied historically by Indiana appellate courts"; and "significant findings made by the trial court are derived from paper reports included in the record which should be review [sic] de novo." Brief of the Appellant (Father) at 14.[2] For his first reason, Father refers us to Prowell v. State, 741 N.E.2d 704, 708-09 (Ind. 2001), where our supreme court concluded a trial court's verbatim use of findings and conclusions submitted by a party were clearly erroneous as a whole because they were significantly misleading. However, the court also noted that while verbatim use of submitted findings and conclusions is not preferred because it erodes confidence in the judiciary, it is not prohibited because of the enormous volume of cases and undersized budgets trial courts face.

Father's argument regarding the trial court's verbatim use of submitted findings and conclusions is misplaced. While Prowell provides an appellant an avenue for meeting the clearly erroneous standard of review, namely by showing that a trial court's findings and conclusions are significantly misleading, it does not even suggest using a different standard of review. This argument may warrant discussion if made in the second part of Father's appellate brief, where he argues the sufficiency of the evidence, but it only supports the use of our existing standard of review in termination of parental rights cases.

[2] Grandmother's appellate brief does not argue for a less deferential standard of review than our previously expressed clearly erroneous standard, so we refer only to Father's arguments in this section.

In regard to Father's second reason for abandoning our existing standard of review, Father quotes a section from Santosky v. Kramer, 455 U.S. 745, 762-63 (1982) which discusses the need for a standard of proof greater than by a "fair preponderance of the evidence" in termination of parental rights cases. Indeed, in Santosky the Supreme Court concluded that the appropriate standard of proof is at least by clear and convincing evidence. Id. at 747-48. Although Father does not challenge the standard of proof used by the trial court, and we note he could not because the trial court used the appropriate standard, he contends the rationale for a higher standard of proof than by a fair preponderance of the evidence at the trial court is also reason for us to apply a less deferential standard of review on appeal. We decline Father's invitation to do so. As our supreme court referenced in In re I.A., 934 N.E.2d at 1132, our jurisprudence has long recognized that trial courts have a unique and superior opportunity to judge the credibility of witnesses and evaluate evidence presented.

Father next argues we should review the trial court's findings de novo because of the extensive evidence contained in the paper record. Father quotes American Family Ins. Co. v. Ford Motor Co., 857 N.E.2d 971, 973 (Ind. 2006), for the contention that "[i]f factual determinations are based on a paper record, they are also reviewed de novo." Br. of the Appellant (Father) at 18. As DCS points out, however, this quote is in the context of a trial court ruling on a motion for transfer of venue, which is not the circumstance in this case. Further, while the record includes numerous reports and other forms of evidence on paper, it also includes a transcript exceeding 800 pages. This is precisely the type of situation in

which the trial court has a unique and superior opportunity to judge witness credibility and weigh evidence. We decline Father's invitation to amend our existing standard of review and proceed using the clearly erroneous standard.

II. Sufficiency of the Evidence

A. Are the Findings of the Trial Court Supported by the Evidence?

As we have previously stated, "the involuntary termination of parental rights is the most extreme sanction a court can impose on a parent because termination severs all rights of a parent to his or her children." In re M.S., 898 N.E.2d 307, 311 (Ind. Ct. App. 2008). "The purpose of terminating parental rights is not to punish the parents but, instead, to protect their children." Id. Considering only the evidence and reasonable inferences most favorable to the judgment of the trial court, the first step in our review is to ask whether the evidence supports the findings of the trial court. Although Father's arguments are couched in "lack of evidence" language, neither he nor Grandmother argue that the trial court's findings of fact were unsupported by evidence. Rather, they argue that the findings of fact do not present clear and convincing evidence that the requirements of Indiana Code section 31-35-2-4(b)(2) are met. As DCS points out, "'[w]here a party challenges only the judgment as contrary to law and does not challenge the special findings as unsupported by the evidence' a reviewing court does not look to the evidence but only to the findings to determine whether they support the judgment." Brief of Appellee at 25-26 (quoting Smith v. Miller Builders, Inc., 741 N.E.2d 731, 734 (Ind. Ct. App. 2000)). In any event, the evidence in the record supports the

trial court's findings of fact, especially when viewed in a light most favorable to the judgment of the trial court.

B. Is the Judgment of the Trial Court Supported by its Findings?

Appellants Father and Grandmother contend the trial court's findings of fact do not support its judgment that the requirements for termination of parental rights under Indiana Code section 31-35-2-4(b)(2) are met. That section provides:

> (b) The petition must meet the following requirements:
> * * *
> (2) The petition must allege:
> (A) that one (1) of the following is true:
> (i) The child has been removed from the parent for at least six (6) months under a dispositional decree.
> * * *
> (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.
> * * *
> (C) that termination is in the best interests of the child; and
> (D) that there is a satisfactory plan for the care and treatment of the child.

Ind. Code § 31-35-2-4(b)(2). In construing this statute, we have held that the trial court should judge a parent's ability to care for a child at the time of the termination hearing, taking into consideration evidence of changed conditions. In re M.S., 898 N.E.2d at 311. To predict future behavior, the trial court should look at a parent's habitual pattern of conduct, and it "need not wait until a child is irreversibly harmed such that his physical, mental, and social development are permanently impaired before terminating the parent-child relationship." Id. The trial court may also consider the services offered to a parent and his or her response to those services. Id. When concluding what is in the best interests of a child,

the parent's interests are subordinate to those of the child. Id. If a petition for termination of parental rights makes the allegations contained in Indiana Code section 31-35-2-4(b)(2) and the trial court finds that the allegations are true, the trial court "shall terminate the parent-child relationship." Ind. Code § 31-35-2-8(a).

Here, the trial court concluded that Z.S. was removed from her parents for more than six months, there is a reasonable probability that the conditions causing Z.S.'s placement outside of Father's and Grandmother's home will not be remedied, termination of Father's parental rights is in the best interests of Z.S., and a satisfactory plan for the care and treatment of Z.S. exists. The trial court therefore terminated Father's parental rights.

Appellants challenge the trial court's conclusions that the reasons for placement outside of Father's home will not be remedied and that termination of Father's parental rights is in Z.S.'s best interests. Although Appellants both argue as to whether the facts supporting the judgment of the trial court are clear and convincing, that is not our standard of review. As stated above, we review the trial court's judgment to determine if it is clearly erroneous, but we do not reweigh the evidence.

Initially the reason Z.S. was placed outside of Father's home was because a protective order prevented him from being in contact with Z.S. Once the protective order was lifted in regard to Z.S., the reason became Z.S.'s fragile medical condition, Father's lack of ability to care for Z.S., Father's apparent lack of interest in improving his parenting skills, and Father's unemployment and financial instability. The trial court's findings reveal that the time period from DCS's initial involvement to the termination hearing was almost two years. In those

two years, Father failed to significantly remedy any of the reasons preventing Z.S.'s placement in his care. He was still unemployed and dependent on Grandmother for financial support. His ability to handle the basic demands of child rearing did not improve and he remained ill-equipped to handle Z.S.'s care without the intervention and help of others.

While we acknowledge that a young child, especially one with medical issues, requires more parental care than a healthy child of school-age, basic parenting skills and the ability to provide necessary resources are required at all phases of childhood. Thus, we are not persuaded by Father's contention that his parenting issues will be remedied once Z.S.'s condition improves. Further, while the Appellants assert that Z.S.'s fragile medical condition removes Father's fault for his apparent inability to care for her, we note that this only makes it more important that she is placed with someone who can clearly handle her needs and that, despite Appellants' contentions that Z.S.'s condition prevents anyone from adequately caring for her, the evidence reveals Z.S.'s condition has improved due to the care of her foster parents – her diagnosis of failure to thrive was downgraded to underweight. The trial court's conclusion that there is a reasonable probability that the reasons for Z.S.'s placement outside the home of Father will not be remedied is therefore not clearly erroneous.[3]

Father next contends there is insufficient evidence that termination of his parental rights is in the best interests of Z.S. In support of this contention, Father argues that his

[3] Although the trial court made no conclusion regarding Indiana Code section 31-35-2-4(b)(2)(B)(ii), Father argues it does not apply. Since we conclude the trial court's determination that Indiana Code section 31-35-2-4(b)(2)(B)(i) applies is not clearly erroneous, and since Indiana Code section 31-35-2-4(b)(2)(B) only requires that one of the three allegations listed be proven by clear and convincing evidence to the trial court, we need not address the allegation under Indiana Code section 31-35-2-4(b)(2)(B)(ii) that there is a reasonable probability that the continuation of the parent-child relationship poses a threat to the well-being of the child.

struggles with Z.S. during supervised visitation were the result of her medical condition and not due to his lack of parenting ability or effort. He points us to In re M.S., where we reviewed the termination of a mother's parental rights and concluded such termination was premature. 898 N.E.2d at 314. There, one of the mother's children suffered from a personality disorder similar to autism that made him aggressive, unruly, and dangerous to have around her other children. Id. at 308-09. The mother voluntarily sought help from DCS, admitting the child was a CHINS so that she could receive help in caring for him. After several years of the mother's repeated efforts, DCS petitioned for involuntary termination of mother's parental rights, and the trial court granted the petition.

We concluded the evidence was insufficient to determine that terminating the mother's parental rights was in the best interests of the child. Id. at 308. Everyone who testified at the termination hearing revealed that the problem was not the mother, but the child's personality disorder, and that the mother "loves her children and did everything that was asked of her." Id. at 311-12. The mother completed all services recommended and made every effort to provide what her child needed. Further, we noted that terminating mother's parental rights under the circumstances would have meant penalizing her for seeking help for her child – a message we did not want to send other parents in Indiana with children who need ongoing medical or psychological assistance. Id. at 314.

Despite Father's efforts at analogizing his case to In re M.S., we conclude the rationale for finding the evidence insufficient in that case is lacking here. Father did not voluntarily pursue assistance in caring for Z.S., a factor which revealed the mother's maturity

in In re M.S. and gave us concern for the message we would send to her and other parents if we terminated her parental rights. Father does not have other children without developmental issues that would serve as evidence of his ability to adequately provide parenting for a child. Father did not do everything that was asked of him or make every effort to provide what Z.S. needed. On the contrary, testimony revealed on-going frustration by those assisting Father due to his lack of improvement and lack of effort or interest in parenting Z.S. Although his attendance at weekly visitations was promising, he was hands-off with Z.S. much of the time he was with her, failed to respond to her basic needs on several occasions, and caused those evaluating him to conclude he could not adequately provide parenting for Z.S. if she were placed with him permanently. Beyond his demonstrated inability to provide care for Z.S., he also demonstrated an inability to provide financially for Z.S.; a situation which did not improve during the two-year period at issue. The evidence sufficiently shows terminating Father's parental rights is in the best interests of Z.S., and we conclude the trial court's judgment is not clearly erroneous.

Appellants also contend DCS did not prove to the trial court that it sufficiently attempted to enable Father to adequately parent Z.S. Grandmother even requests on appeal that we order DCS to develop a clearly written case plan so that Father and/or Grandmother can know what is expected of them. As DCS points out, however, the applicable statute contains no requirement that DCS prove to the trial court its efforts at enabling Father to become an adequate parent, and Appellants cite to no source providing such a requirement. Father correctly states that we view termination as a last resort, but we also do not require

actual injury or permanent impairment to a child prior to a termination. See In re M.S., 898 N.E.2d at 311. In stating the requirements of an appellant's argument section of his or her brief, Appellate Rule 46(A)(8)(a) provides "[t]he argument must contain the contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on . . . ." The brief of neither appellant satisfies this Rule because neither cites to an authority providing for the requirement that DCS make reasonable efforts to cure Father's parenting limitations.

Last, Grandmother argues she should have been considered for placement of Z.S. As the trial court pointed out in its findings of fact, however, prior to the termination of Father's parental rights, DCS was amenable to the idea of Grandmother adopting Z.S., but neither Father nor Mother signed the necessary consent to adoption document. Further, DCS concluded Grandmother was not a suitable care giver because Z.S. was not eating properly while in her care and Grandmother indicated to DCS that she merely wanted to co-parent Z.S. with Father if she was deemed Z.S.'s care giver. Given the trial court's conclusions regarding Father's parenting ability, even assuming Grandmother has the legal right to pursue placement of Z.S. in her care, the trial court's conclusion that DCS appropriately sought termination of Father's parental rights and did not place Z.S. in the care of Grandmother is not clearly erroneous.

Conclusion

The trial court's findings support its conclusion that the requirements of Indiana Code section 31-35-2-4(b)(2) are met and its judgment is not clearly erroneous. We therefore affirm the trial court's termination of Father's parental rights.

Affirmed.

BARNES, J., and BRADFORD, J., concur.