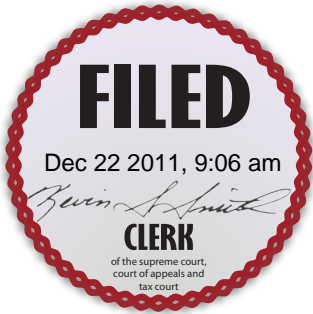


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**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF THE TERMINATION)
OF THE PARENT-CHILD RELATIONSHIP)
OF:)
)
T.C. & K.N. (Minor Children))
)
AND)
)
A.N. (Mother) & J.C. (Father),)
)
Appellants-Respondents,)
)
vs.)
)
INDIANA DEPARTMENT OF CHILD)
SERVICES,)
)
Appellee-Petitioner.)

No. 72A01-1104-JT-249

APPEAL FROM THE SCOTT CIRCUIT COURT
The Honorable Roger L. Duvall, Judge
Cause No. 72C01-1005-JT-5 & 72C01-1005-JT-6

December 22, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellants-Respondents, A.N. (Mother) and J.C. (Father), appeal the trial court's termination of their parental rights to their minor children, K.N. and T.C.

We affirm.

ISSUE

Mother and Father raise four issues on appeal, one of which we find dispositive and restate as the following issue: Whether the State presented sufficient evidence to support the termination of their parental rights to their minor children, K.N. and T.C.

FACTS AND PROCEDURAL HISTORY

Mother and Father are the parents of K.N., born October 28, 2006, and T.C., born March 17, 2008. When Mother gave birth to K.N., she was incarcerated in Florida for forgery and theft convictions and Father lived in Indiana. Consequently, K.N. lived with a relative until Mother was released from incarceration on January 24, 2007. Following Mother's release, she and K.N. moved to Indiana on May 2, 2007 to live with Father.

When they first moved to Indiana, Mother and K.N. lived with Father in a residence on Cross Street in Austin, Indiana that did not have “livable” conditions. (Transcript p. 67). Therefore, shortly after their move, Mother and Father left K.N. in the care of a family friend while they searched for a new place to live. While K.N. was living with the family friend, K.N. got sick and the family friend took her to the Department of Child Services (DCS). Because the family friend claimed that the Mother and Father had abandoned K.N., DCS filed a petition alleging that K.N. was a child in need of services (CHINS). Mother and Father admitted that K.N. was a CHINS and continued to search for suitable housing. They found a one-bedroom apartment on West Cherry Street in Austin, Indiana, and DCS returned K.N. to their care shortly after their move. Subsequently, Mother and Father participated in services offered by the State, including classes on parenting.

In September 2007, DCS visited Mother and Father’s home and discovered that it was “cluttered.” (Transcript p. 69). According to Mother, Father had cleaned out an impounded vehicle and had covered the floor with the vehicle’s contents. She admitted that the living room was not a safe place for K.N. to crawl, so DCS again removed K.N. from Mother and Father’s home. DCS returned K.N. “a few days” later when their residence was clean. (Tr. p. 69). In August 2008, Father found suitable employment and DCS closed the CHINS case involving K.N.

On October 28, 2008, Mother and Father got into an altercation. Father was on the computer “talking to friends and flirting with other girls,” and Mother wanted him to get

off the computer so that they could talk. (Tr. p. 72). Father eventually did get off the computer, but he wanted to go to bed rather than talk. When Mother asked Father to talk to her, Father “choked [her] to the point that [she] passed out and [] was almost dead.” (Tr. p. 70). Consequently, Father was arrested for domestic battery against Mother, was incarcerated for approximately three months, and lost his employment.

During Father’s incarceration, Mother married another man, but her new husband went to prison two days after their marriage for charges of driving under the influence. While her new husband was incarcerated, Mother kept contact with Father and reunited with him when he was released from incarceration in January of 2009. Mother divorced her husband in June of 2009 and continued to live with Father.

On April 26, 2009, Mother was arrested for disorderly conduct and Father was arrested for domestic battery. According to Mother, their neighbor had “[come] up the stairs, plowed into [their] apartment and pushed [Father].” (Tr. p. 75). In retaliation, Father had hit the neighbor and Mother had “[gotten] loud.” (Tr. p. 75). When the arresting officers called DCS for assistance with K.N. and T.C., DCS family case manager Carol Patterson (FCM Patterson) placed the children in foster care with a woman that went to church with Mother and Father. Mother was released from incarceration on the day after her arrest, but she asked DCS if the children could remain in foster care because she and Father were about to be evicted from their residence and she needed time to look for replacement housing. DCS retained the children in foster care and, on April 30, 2009, filed petitions alleging that both K.N. and T.C. were CHINS.

Mother and Father admitted to the allegations. Mother bailed Father out of prison in May 2009, and he and Mother then moved to a residence on Mann Avenue in Austin, Indiana.

Shortly after DCS filed its CHINS petitions regarding K.N. and T.C., their family case manager, Andrea Nay (FCM Nay), became concerned because T.C. was thirteen months old and could not get up on his elbows and knees to crawl. She arranged an appointment for T.C. at Riley Hospital for Children (Riley Hospital), where T.C. was diagnosed with “failure to thrive.” (Tr. p. 80). At the time, T.C. was below the fifth percentile for his weight to age ratio on the Center for Disease Control’s growth chart, and he was diagnosed with osteopenia, a condition that caused his bones to develop at a slower rate than the rest of his body. Even though he was thirteen months old, T.C.’s bones had the same development as the bones of a three to four month old child. K.N. was also tested at Riley Hospital and was diagnosed with a non-specific developmental delay.

On July 23, 2009, the trial court held a dispositional hearing and adopted the recommendations of DCS for reunification services, which included, among other provisions, stipulations that Mother and Father should work with a service provider for family preservation and counseling to address the following issues: (1) communication issues and mental health needs from a past mental health evaluation; (2) maintaining appropriate housing; (3) budgeting skills; and (4) understanding the nutritional and developmental needs of their children, including appropriate parenting skills to deal with the children’s behavioral issues. Because Mother also disclosed incidents of domestic

violence, DCS referred Father to a men's non-violence program. Both Mother and Father participated in the services ordered by the court. However, while they met with service providers, they made "limited, if any, progress." (Tr. p. 245).

DCS first referred Mother and Father to Andrea Puckett (Puckett), a home-based therapist with New Hope Services. After completing an initial assessment, Puckett determined that Mother exhibited symptoms of depression and anxiety and Father exhibited symptoms of anxiety. Both Mother and Father identified relationship difficulties including issues with trust, honesty, communication, domestic violence, anger management, and budgeting. Puckett worked with Mother and Father as a couple and also with Mother individually, but the parents later admitted that they failed to implement the communication skills that Puckett attempted to teach them. Similarly, Puckett developed a budget with Mother and Father at least once a month, but Mother and Father did not adhere to the budget when managing their income. Mother and Father's only source of income was \$674.00 per month that Mother received from social security disability, and Puckett determined that they would have a surplus of \$38.00 a month after meeting their basic needs if they followed their budget. Instead, Mother and Father used their income to buy items such as cellular phones, cable television, internet access, and cigarettes rather than paying their rent.

Mother and Father's failure to adhere to their budget led DCS to have concerns that they could not maintain stable housing for K.N. and T.C. DCS also became concerned because the parents' criminal activity further depleted their available income.

Mother and Father lived in their residence on Mann Street from May 2009 until April 30, 2010, when they moved because they were about to be evicted. Prior to the move, Mother had spent \$1,000 to bail Father out of jail and had gotten behind on rent. When they left the residence on Mann Street, they moved into a trailer on North First Street. At the time of the termination hearing, Mother and Father were \$1,350 dollars behind on their rent because, among other reasons, Mother had paid \$505 to bail Father out of jail for failing to pay child support for his children with another woman. Also, in June of 2010 Mother and Father were involved in an altercation with Ashley Kaelin who was supervising a visit between them and the children. As a result of that incident, Mother was charged with battery and Father was charged with criminal mischief. Both pled guilty to their respective charges, were placed on probation, and were required to pay probation fees.

DCS became further concerned that Mother and Father could not maintain safe and sanitary housing for K.N. and T.C. Prior to the parents' move from their Mann Street residence, DCS had noted that the condition of the residence was unacceptable due to pets that used the bathroom inside and were infested with fleas. Similarly, Mother and Father's trailer on Mann Street had a roach infestation when they first moved in. Mother and Father treated the trailer once a week to get rid of the roaches and believed that the infestation had been taken care of at the time of the termination hearing, but DCS workers smelled the odor of animal urine when they visited the trailer.

With respect to safety, Mother and Father allowed J.T., a registered sex offender, to reside with them in early 2010. When FCM Nay learned that J.T. was a registered sex offender, she “informed [Mother] that he was [an] inappropriate individual and that he did not need to be around her or obviously around the children.” (Tr. p. 243). The parents “adamantly denied” that J.T. resided with them. (Tr. p. 243). However, Mother later admitted that J.T. had resided with them and that he had raped her in October 2010. J.T. moved out of Mother and Father’s residence after the rape, but was still living next door at the time of the termination hearing on December 2, 2010.

In addition to counseling, DCS provided Mother and Father with family preservation services to help educate them about K.N. and T.C.’s special development needs and about implementing appropriate disciplinary techniques to manage K.N. and T.C.’s behaviors. Initially, Faith Murphy was the family preservation worker assigned to help Mother and Father. She suggested that they use a disciplinary technique called 1-2-3 Magic, whereby K.N. and T.C. had to the count of three to correct their behaviors. If they had not changed their behaviors by the count of three, the parents were then supposed to place the children in time out. Mother had not been disciplined as a child and felt guilty disciplining her children. She believed the technique was “stupid” and refused to use it or any other technique during visits. In contrast, Father did believe in discipline, but DCS found some of his methods “a bit more concerning” because he admitted to yelling at and spanking the children. (Tr. p. 238).

In July of 2010, Libby Caudill (Caudill), a family preservation worker, began working with the family. Mother and Father had a good relationship with Caudill and were cooperative. Caudill also suggested that Mother and Father use the 1-2-3 Magic technique with K.N. and T.C., and Mother and Father did make progress. However, Mother admitted that she only used the technique “to make [Child Protective Services] happy” and still did “not really” discipline the children. (Tr. pp. 94, 96).

Also in July of 2010, Dr. Jill Christopher (Dr. Christopher) and her interns conducted psychological evaluations of Mother, Father, and K.N. Dr. Christopher diagnosed Mother with major depressive disorder, generalized anxiety disorder, acute stress disorder, and borderline intellectual functioning. Father was diagnosed with intermittent explosive disorder, attention deficit/hyperactivity disorder, adjustment disorder, and borderline intellectual functioning. Dr. Christopher diagnosed K.N. with developmental delay. She concluded that due to K.N.’s developmental delay, K.N. would likely learn at a slower rate than other children and was at risk of being diagnosed as mentally retarded if her intellectual functioning did not improve. At the time of the evaluation, Dr. Christopher received background information from K.N.’s foster mother that K.N. was “hitting other adults,” had “a lot of difficulty focusing” and was “very hyperactive and impulsive” with no sense of danger. (Tr. p. 307). Dr. Christopher explained that such behavior was characteristic of Attention Deficit/Hyperactivity Disorder and Reactive Attachment Disorder, but that K.N. was too young to be formally diagnosed with either disorder.

On May 11, 2010, DCS filed petitions for the involuntary termination of Mother and Father's parental rights to both minor children. The trial court held an initial hearing on June 3, 2010, entered a denial to the petitions on behalf of Mother and Father, and appointed counsel for them. Subsequently, the trial court held factfinding hearings on October 28, 2010; November 30, 2010; December 2, 2010; January 13, 2011; and February 17, 2011. On April 20, 2011, the trial court entered an order of involuntary termination of Mother and Father's parental relationships with K.N. and T.C.

Mother and Father now appeal. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

On appeal, Mother and Father argue that the evidence was insufficient to support the termination of their parental rights to K.N. and T.C. because DCS did not prove that the conditions that led to the children's removal from the home would not be remedied. In support of this contention, they argue that the services DCS provided failed to address their special needs because DCS did not have them evaluated by a psychiatrist until late 2010, when the termination proceedings were imminent. Mother and Father point to statements by FCM Nay that they had made some improvements in the last few months as evidence that they would have made more progress if "professional mental and emotional counseling, especially medication[,]” had been provided sooner. (Appellant's Br. p. 11). Accordingly, they argue, there was not sufficient evidence that they would not have remedied the conditions for K.N. and T.C.'s removal if they had been given more time after receiving proper treatment.

We recognize that the Fourteenth Amendment to the United States Constitution protects the traditional right of parents to establish a home and raise their children. *In re J.S.O.*, 938 N.E.2d 271, 274 (Ind. Ct. App. 2010). A parent's interest in the care, custody, and control of his or her children is arguably one of the oldest of our fundamental liberty interests. *Id.* However, the trial court must subordinate the interests of the parents to those of the children when evaluating the circumstances surrounding a termination of a parent-child relationship. *In re J.H.*, 911 N.E.2d 69, 73 (Ind. Ct. App. 2009), *trans. denied*. Parental rights may therefore be terminated when the parents are unable or unwilling to meet their parental responsibilities. *Id.*

In reviewing termination proceedings on appeal, this court must not reweigh the evidence nor assess the credibility of the witnesses. *Id.* We consider only the evidence that supports the trial court's decision and the reasonable inferences drawn therefrom. *Id.* Where, as here, the trial court has entered findings of fact and conclusions of law, we apply a two-tiered standard of review. *Id.* First, we determine whether the evidence supports the findings, and second, whether the findings support the conclusions of law. *Id.* In deference to the trial court's position to assess the evidence, we set aside the trial court's findings and judgment terminating the parent-child relationship only if they are clearly erroneous. *Id.*

In the instant case, Mother and Father challenge the trial court's conclusions of law terminating their parental rights rather than the trial court's findings of fact. In order to terminate their rights, DCS was required to prove by clear and convincing evidence:

- (B) that one of the following [was] true:
- (i) There [was] a reasonable probability that the conditions that resulted in the child[ren]’s removal or the reasons for placement outside the home of the parents [would] not be remedied.
 - (ii) There [was] a reasonable probability that the continuation of the parent-child relationship[s] [posed] a threat to the well-being of the child[ren].
 - (iii) The child[ren] [had], on two (2) separate occasions, been adjudicated [] in need of services[.]
- (C) that termination [was] in the best interests of the child[ren].

Ind. Code § 31-35-2-4(b)(2)(B), -(C); *Bester v. Lake Cnty. Office of Family and Children*, 839 N.E.2d 143, 148 (Ind. 2005). Clear and convincing evidence as a standard of proof requires the existence of a fact to “be highly probable.” *Hardy v. Hardy*, 910 N.E.2d 851, 859 (Ind. Ct. App. 2009). It need not reveal that “the continued custody of the parents is wholly inadequate for the child’s very survival.” *Bester*, 839 N.E.2d at 148 (quoting *Egly v. Blackford Cnty. Dep’t of Pub. Welfare*, 592 N.E.2d 1232, 1233 (Ind. 1992)). Rather, it is sufficient to show that the child’s emotional and physical development are threatened by the parent’s custody. *Id.*

Here, DCS contends that Mother and Father waived their argument that DCS did not properly provide them with services by failing to raise it before the trial court. We must agree, because it is well-established in Indiana that issues not raised before the trial court are waived on appeal. *In re B.R.*, 875 N.E.2d 369, 373 (Ind. Ct. App. 2007), *trans. denied*. “In order to properly preserve an issue on appeal, a party must, at a minimum, ‘show that it gave the trial court a *bona fide* opportunity to pass upon the merits of the claim before seeking an opinion on appeal.’” *Id.* (quoting *Cavens v. Zaberdac*, 849

N.E.2d 526, 533 (Ind. 2006)) (emphasis added). Nevertheless, we recognize the importance of the issues at stake, and we will address the merits of Mother and Father's arguments notwithstanding waiver.

Based on our review of the record, we cannot agree with Mother and Father that there was insufficient evidence that the conditions that led to K.N. and T.C.'s removal would not be remedied. We have previously held that a trial court may properly consider the services that the State has offered to the parent and the parent's response to those services in a termination hearing. *In re M.W.*, 943 N.E.2d 848 (Ind. Ct. App. 2011), *trans. denied*. However, as we held in *E.E.*, "the provision of family services is not a requisite element of our parental rights termination statute. A failure to provide services, or the provision of services in an allegedly discriminatory manner, does not serve as a basis on which to directly attack a termination order as contrary to law." *In re E.E.*, 736 N.E.2d 791, 796 (Ind. Ct. App. 2000).

Under this standard, we cannot find that DCS failed to properly provide Mother and Father with psychiatric services as DCS was not required to provide services at all. Moreover, it is clear that Mother and Father did receive services. Puckett provided therapy to both Mother and Father together and Mother individually. She identified that Mother "had a lot of symptoms that indicated depression and anxiety," so she decided to "focus on that." (Tr. p. 380). Also, it is apparent that Mother had already been taking medication for her anxiety and depression before Dr. Christopher evaluated her. According to Dr. Christopher's report, "[Mother] stated she has been taking Cymbalta for

the past year and a half and it is beneficial to alleviating her depression and pain. She reportedly has been taking Buspar for the past three months. [Mother] stated it has been helpful in lessening her anxiety.” (Appellant’s Second Amended App. p. 114). Based on this evidence, we find Mother’s contention that she would have made more progress if she had received medication sooner without merit.

Instead, we find that there was sufficient evidence for the trial court to conclude that the conditions that led to K.N. and T.C.’s removal would not be remedied. When determining whether there is a reasonable probability that a parent will not remedy the conditions justifying a child’s removal from the home, the trial court must judge a parent’s fitness to care for his or her child at the time of the termination hearing. *Rowlett v. Vanderburgh Cnty. Office of Family and Children*, 841 N.E.2d 615, 621 (Ind. Ct. App. 2006). The trial 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 child. *C.T. v. Marion Cnty. Dept. of Child Services*, 896 N.E.2d 571, 578 (Ind. Ct. App. 2008), *trans. denied*. DCS is not required to rule out all possibilities of change; rather, it need only establish “that there is a reasonable probability that the parent’s behavior will not change.” *Id.* (quoting *In re Kay L.*, 867 N.E.2d 236, 242 (Ind. Ct. App. 2007)). Moreover, the trial court may properly consider a parent’s criminal history, drug and alcohol abuse, historical failure to provide support, and lack of adequate housing and employment. *Matter of D.G.*, 702 N.E.2d 777, 779 (Ind. Ct. App. 1998).

Here, the trial court found that:

24. Since the removal of the children in April, 2009, the nature of the housing for the family and the budgeting of limited funds has been a critical obstacle to reunification.

25. The parents have had multiple residences. There have been ongoing pest infestations of varying degrees in their homes. The parents have had multiple pets in the home resulting in animal feces in the home and under [the] best circumstances [an] odor of animals in the home.

26. The financial issues have persisted throughout the case. The parents have had multiple residences. The parents have repeatedly been behind in their rent[,] making the possibility of eviction from their home a constant threat to the stability of the household. Scarce funds have been diverted for the payment of criminal bonds, fines, and costs. The parents have a tobacco habit that has drained necessary funds. [Father] appears to have an obsession with having internet services that also drain the limited funds of the parents.

27. The issue of the internet causes an ongoing source of friction between the parents as an extravagant expense for the family and the preoccupation of [Father] with social networking on the internet. This has been the source of domestic violence conflicts between the parents and ongoing jealousy by [Mother] towards that activity by [Father]. All of this contributes to the finding and belief of the [c]ourt that the parents cannot form a stable household for the children.

* * *

29. Several other events took place since placement of the children out of the home that give the [c]ourt reason to find that the conditions will not improve to the degree to allow the return of the children. [Mother] was charged with battery and Father was charged with mischief during the pendency of the CHINS cases arising from a confrontation with service providers at Kids Place, a facility of New Hope Services. This resulted in both parents being placed on probation. [Father] also had an additional incarceration from a child support obligation on an unrelated child.

* * *

32. [Mother's rape] was perpetrated by someone living in the home with the parents. This person was a sex offender and was among several people who lived with the parents on occasion and that [DCS] had warned the parents as being people inappropriate to be around children. These warnings went unheeded. After the incident, the perpetrator lived in the neighborhood. [Father] has not been supportive of [Mother] and has continued his friendship with the alleged perpetrator.

(Appellant's Br. pp 18-19). We determine that these findings are sufficient to support the trial court's conclusion that the conditions leading to the removal of K.N. and T.C. from Mother and Father's home would not be remedied. As Mother and Father do not dispute these findings, we also determine that they are sufficient to support the trial court's termination of Mother and Father's parental rights.¹

CONCLUSION

Based on the foregoing, we conclude that the DCS provided sufficient evidence to support the termination of Mother and Father's parental rights to their minor children, K.N. and T.C.

Affirmed.

FRIEDLANDER, J. and MATHIAS, J. concur

¹ Mother and Father also list three additional issues in their brief, but do not develop arguments for any of the issues. Accordingly, we deem them waived.