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**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF THE TERMINATION)
OF THE PARENT-CHILD RELATIONSHIP)
OF M.M.J.R., child AND)
MELVIN G. NICHOLS, FATHER,)
)
Appellant-Defendant,)
)
vs.)
)
INDIANA DEPARTMENT OF CHILD)
SERVICES, DECATUR COUNTY OFFICES,)
)
Appellee-Plaintiff.)

No. 16A01-0702-JV-105

APPEAL FROM THE DECATUR CIRCUIT COURT
The Honorable John A. Westhafer, Judge
Cause No. 16C01-0607-JT-133

July 30, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Melvin G. Nichols (“Nichols”) appeals the trial court’s order terminating his parental rights to his daughter, M.M.J.R. Concluding that the Indiana Department of Child Services, Decatur County Office (“DCDCS”), proved by clear and convincing evidence that there is a reasonable probability that the conditions that resulted in M.M.J.R.’s removal will not be remedied and that the termination is in the best interests of M.M.J.R., we affirm the termination of Nichols’ parental rights to M.M.J.R.

Facts and Procedural History

On September 24, 2002, Nichols was sentenced to a term of six years in prison with three years suspended to probation for committing burglary. On September 29, 2003, Nichols was released from prison. While on probation, Nichols met and maintained a relationship with Amber Roszell (“Roszell”) for a short period of time. On December 7, 2004, Roszell gave birth to M.M.J.R.

M.M.J.R. was born with traces of illegal narcotics in her system. As a result, on December 9, 2004, the DCDCS filed a Petition for Emergency Custody of Child that was granted by the Decatur Circuit Court (“trial court”). Thereafter, the trial court ordered M.M.J.R. removed from Roszell’s care because she was born testing positive for illegal controlled substances. At the time of her removal, DCDCS did not know the identity of M.M.J.R.’s father.

Thereafter, M.M.J.R. was placed in a foster care home under the care of Diane Simmonds (“Simmonds”). On December 17, 2004, while on probation, Nichols was arrested and incarcerated on two misdemeanor charges. On January 19, 2005, Nichols

was released from prison. On January 31, 2005, the trial court adjudged M.M.J.R. to be a child in need of services (“CHINS”). On February 16, 2005, after a dispositional hearing, the trial court ordered custody of M.M.J.R. to the DCDCS for placement and supervision. On April 4, 2005, Nichols was re-incarcerated for violating probation.

While incarcerated, on October 6, 2005, Nichols was adjudicated to be the father of M.M.J.R. On December 8, 2005, Nichols was transported from prison to the trial court for a CHINS parental participation and review hearing. Thereafter, the trial court entered an Order of Participation, which required Nichols to “[p]articipate in whatever programs and services are available at the Department of Corrections Facility where he is located which relate to education and parenting skills [and to] [f]ollow through and complete a psychological evaluation and comply with the recommendations made.” Appellant’s App. p. 17 (formatting altered). The trial court further stated, “Failure to comply as required by this Order can lead to the termination of the parent-child relationship.” *Id.* Nichols attempted to participate in certain educational programs available at the Department of Correction Facility but was not allowed to enroll in some of them due to several write-ups he received while incarcerated. Additionally, although Nichols attempted to take GED classes, he was refused entry because he tested below the eighth grade level.

On June 8, 2006, Nichols was again transported from prison to the trial court for a CHINS review hearing. Thereafter, the trial court determined that it was in M.M.J.R.’s best interests to allow DCDCS to have continued custody of M.M.J.R. and for M.M.J.R. to remain under the care of Simmonds.

After learning that Nichols would be released from prison sometime between August and October of 2006, the DCDCS, on July 13, 2006, sent a letter to Nichols that instructed him to contact them within seventy-two hours of his release from prison to schedule a meeting time so that a case plan could be implemented that if followed might result in Nichols gaining custody of M.M.J.R. After this letter was sent and received by Nichols, Pam Meyer (“Meyer”), a court-appointed special advocate (“CASA”), went to the Plainfield Correctional Facility and met with Nichols. During this meeting, Nichols informed Meyer that he had received the letter sent from the DCDCS. Meyer read the DCDCS’s letter together with Nichols and made sure that he knew what they were expecting of him, including that he was to contact the DCDCS within seventy-two hours of his release from prison. Nichols assured Meyer that he would contact the DCDCS within seventy-two hours of his release.

On August 3, 2006, Nichols was released from the Plainfield Correctional Facility and into a community transition program. He did not contact the DCDCS. On August 8, 2006, DCDCS sent a second letter to Nichols indicating that if he wanted to have any chance to gain custody of M.M.J.R., he needed to contact the DCDCS so that a case plan could be put into place. Again, he did not contact the DCDCS. On September 10, 2006, Nichols was arrested and incarcerated on a felony charge of domestic battery. Nichols has never had any contact with M.M.J.R.

On October 13, 2006, the DCDCS filed a petition requesting the involuntary termination of Nichols and Roszell’s parental rights as to M.M.J.R. In its petition, the DCDCS alleged, in pertinent part, that there is a reasonable probability that the

conditions that resulted in the child's removal from the parents will not be remedied and that the termination of the parent-child relationship is in the best interests of the child. On January 16, 2007, the trial court held a fact-finding hearing regarding the termination of Nichols and Roszell's parental rights. Nichols was transported from prison to the hearing, as he remained incarcerated pending trial regarding his September 10, 2006, arrest. At this hearing, family case manager Christine Overby ("Overby") and CASA Meyer testified that due to Nichols' criminal history, failure to contact the DCDCS when he was released from prison, and most recent incarceration, Nichols' parental rights should be terminated. Additionally, Meyer testified that M.M.J.R. was happy, well-adjusted, and thriving under the care of Simmonds.

On January 18, 2007, the trial court ordered that the parent-child relationship between Nichols, Roszell and M.M.J.R. be terminated after finding "that it was established by clear and convincing evidence that the allegations of the petitions for involuntary termination of the parent-child relationship are true and that said petitions should be granted." Appellant's App. p. 31. Nichols now appeals.

Discussion and Decision

Nichols argues that the trial court erred when it terminated his parental rights to M.M.J.R. We will not set aside a trial court's judgment terminating a parent-child relationship unless it is clearly erroneous. *In re J.W.*, 779 N.E.2d 954, 959 (Ind. Ct. App. 2002), *trans. denied*. When reviewing a termination of parental rights, this Court neither reweighs the evidence nor judges the credibility of witnesses. *Bester v. Lake County Office of Family & Children*, 839 N.E.2d 143, 147 (Ind. 2005). Rather, we will consider

only the evidence and reasonable inferences therefrom which are most favorable to the judgment. *Id.*

We begin by emphasizing that a trial court need not wait until a child is irreversibly influenced by a deficient lifestyle such that his or her physical, mental, and social growth is permanently impaired before terminating the parent-child relationship. *In re E.S.*, 762 N.E.2d 1287, 1290 (Ind. Ct. App. 2002). Rather when the evidence shows that the emotional and physical development of a child in need of services is threatened, termination of the parent-child relationship is appropriate. *Id.* This Court has stated:

The involuntary termination of parental rights is an extreme measure that terminates all rights of the parent to his or her child and is designed to be used only as a last resort when all other reasonable efforts have failed. The Fourteenth Amendment to the United States Constitution provides parents with the rights to establish a home and raise their children. However, the law allows for termination of those rights when the parties are unable or unwilling to meet their responsibility as parents. This policy balances the constitutional rights of the parents to the care and custody of their children with the State's limited authority to interfere with these rights. Because the ultimate purpose of the law is to protect the child, the parent-child relationship must give way when it is no longer in the child's best interest to maintain the relationship.

M.H.C. v. Hill, 750 N.E.2d 872, 875 (Ind. Ct. App. 2001) (citations omitted). In sum, the purpose of terminating parental rights is not to punish parents but to protect children. *In re A.I.*, 825 N.E.2d 798, 805 (Ind. Ct. App. 2005), *trans. denied*.

Indiana Code § 31-35-2-8(a) provides that “if the court finds that the allegations in a petition described in [Indiana Code § 31-35-2-4] are true, the court shall terminate the parent-child relationship.” Indiana Code § 31-35-2-4(b)(2) provides, in pertinent part, that a petition to terminate a parent-child relationship involving a child in need of services must allege, among other things:

- (B) there is a reasonable probability that:
 - (i) the conditions that resulted in the child’s removal or the reasons for placement outside the home of the parents will not be remedied;
 - or
 - (ii) the continuation of the parent-child relationship poses a threat to the well-being of the child;

- (C) termination is in the best interests of the child.

(Formatting altered). Because subsection (b)(2)(B) is written in the disjunctive, the trial court need only find one of the two elements by clear and convincing evidence. *Bester*, 839 N.E.2d at 148 n.5. The petitioner must prove the elements of Indiana Code § 31-35-2-4(b)(2) by clear and convincing evidence. Ind. Code § 31-37-14-2; *see also In re D.L.*, 814 N.E.2d 1022, 1026 (Ind. Ct. App. 2004), *trans. denied*.

Nichols argues that the trial court’s decision to terminate his parental rights to M.M.J.R. is clearly erroneous because the DCDCS failed to present clear and convincing evidence that there is a reasonable probability that the conditions leading to M.M.J.R.’s removal will not be remedied. He also asserts that the trial court erred in finding that termination of his parental rights is in M.M.J.R.’s best interests. We disagree with both contentions.¹

¹ On May 23, 2007, the DCDCS filed a Motion to Strike Section II of the argument section of Nichols’ appellate brief. The second issue stated in Nichols’ appellate brief is as follows: “Did the [DCDCS] prove by clear and convincing evidence that the continuation of the parent-child relationship poses a threat to the well-being of the child?” Appellant’s Br. p. iii. Claiming that this issue is not pertinent to this appeal because it was not alleged in the DCDCS’s petition for involuntary termination and the trial court did not make any findings or judgments regarding this issue, the DCDCS contends that this issue is immaterial and impertinent pursuant to Indiana Appellate Rule 42. Although we agree with the DCDCS that this is not an issue because the trial court did not find a threat to the well-being of the child, we will, nonetheless, consider anything in that section that may relate to our consideration of whether the DCDCS proved that there was a reasonable probability that the reasons for the trial court’s removal of M.M.J.R. will not be remedied and whether the DCDCS adequately proved that the termination of Nichols’ parental rights is in the best interests of M.M.J.R. Accordingly, we deny the DCDCS’s motion to strike.

Nichols argues that in finding that there is a reasonable probability that the conditions resulting in M.M.J.R.'s removal will not be remedied, the trial court ignored the facts that he completed a parenting class in 2003, sought to acquire additional assistance on his own accord, and was in prison or under house arrest for the vast majority of M.M.J.R.'s life and therefore did not have the opportunity to visit M.M.J.R. "To determine whether there is a reasonable probability that the conditions which resulted in the removal of the children will not be remedied, the trial court should judge a parent's fitness to care for his children at the time of the termination hearing, taking into consideration evidence of changed conditions." *In re M.M.*, 733 N.E.2d 6, 13 (Ind. Ct. App. 2000). 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 children. *Id.* In making such a determination, the trial court may consider "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." *Matter of D.G.*, 702 N.E.2d 777, 779 (Ind. Ct. App. 1998).

Here, the record reflects that Nichols has an extensive criminal history. In fact, Nichols' criminal history is such that he has been incarcerated for all but a little over one month of M.M.J.R.'s life. While on release from prison, Nichols was given specific instructions to contact the DCDCS to put into place a plan that could have ultimately lead to him gaining custody of M.M.J.R. Nichols never contacted the DCDCS. Shortly thereafter, Nichols was again incarcerated and to this day has never had any contact with M.M.J.R. We cannot say that the trial court committed clear error when it found that

there is reasonable probability that the conditions leading to M.M.J.R.'s removal from Nichols will not be remedied.

Nichols also contends that the DCDCS failed to present clear and convincing evidence that termination of the parent-child relationship is in M.M.J.R.'s best interests. A parent's historical inability to provide adequate housing, stability, and supervision coupled with a current inability to provide the same will support a finding that termination of the parent-child relationship is in the child's best interests. *In re A.L.H.*, 774 N.E.2d 896, 900 (Ind. Ct. App. 2002), *trans. denied*. In other words, "[a]lthough parental rights have a constitutional dimension, the law allows for their termination when parties are *unable* or unwilling to meet their responsibility as parents." *In re S.P.H.*, 806 N.E.2d 874, 880 (Ind. Ct. App. 2004) (emphasis added). Because he has been incarcerated since before M.M.J.R.'s birth, Nichols has an historical inability to provide adequate housing, stability, and supervision for her. Likewise, Nichols' continued incarceration at the time of the January 16, 2007, termination hearing is strong evidence of his current inability to provide the same.

Keeping in mind that the purpose of terminating parental rights is not to punish parents but to protect children, *In re A.I.*, 825 N.E.2d at 805, several other factors weigh in favor of the trial court's conclusion that the termination of Nichols' parental rights is in M.M.J.R.'s best interests: (1) M.M.J.R. is in need of stability and permanency now; (2) M.M.J.R. is doing well in her current placement; and (3) there is no guarantee that Nichols will be a suitable parent once he is released or that he would even obtain custody. *See In re S.P.H.*, 806 N.E.2d at 883 (holding that the needs of the children are too

substantial to force them to wait while determining if their incarcerated father would be able to be a parent for them).

This Court has recognized that “[i]ndividuals who pursue criminal activity run the risk of being denied the opportunity to develop positive and meaningful relationships with their children.” *Matter of A.C.B.*, 598 N.E.2d 570, 572 (Ind. Ct. App. 1992). Nichols was incarcerated when M.M.J.R. was born *and* when the termination hearing was held.² M.M.J.R. is now almost three years old and has lived in foster care since she was three days old. Furthermore, family case manager Overby and CASA Meyer testified that due to Nichols’ criminal history, failure to contact the DCDCS when he was released from prison, and most recent incarceration, Nichols’ parental rights should be terminated. Even assuming that Nichols will eventually develop into a suitable parent, we must ask how much longer M.M.J.R. should have to wait to enjoy the permanency that is essential to her development and overall well-being. The trial court’s conclusion that termination of Nichols’ parental rights is in M.M.J.R.’s best interests is supported by clear and convincing evidence and therefore is not clearly erroneous.

Affirmed.

ROBB, J., concurs.

SULLIVAN, J., concurs in result.

² The record reflects that at the time of the termination hearing, Nichols was incarcerated and awaiting trial for the felony domestic battery charge. The record is unclear as to whether Nichols is currently incarcerated.