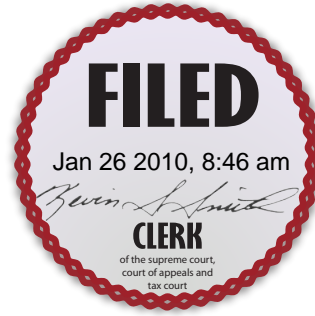


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF THE INVOLUNTARY)
TERMINATION OF THE PARENT-CHILD)
RELATIONSHIP OF I.B.,)

D.W. (Father),)
)
Appellant-Respondent,)

vs.)

No. 49A02-0907-JV-696

MARION COUNTY DEPARMENT OF CHILD)
SERVICES,)

Appellee-Petitioner,)

and)

CHILD ADVOCATES, INC.)

Co-Appellee (Guardian Ad Litum).)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Gary Chavers, Judge Pro Tempore
The Honorable Danielle Gaughan, Commissioner
Cause No. 49D09-0812-JT-55700

January 26, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

David W. (Father) appeals the involuntary termination of his parental rights to his son, I.B. Father presents the following restated issue for review: Did the Marion County Department of Child Services (DCS) prove by clear and convincing evidence that the reasons for placement outside Father's home will not be remedied or that continuation of the parent-child relationship poses a threat to the well-being of the child?

We affirm.

I.B. was born cocaine-positive in February 2008. The newborn's mother, Heather B. (Mother), had an extensive history of drug usage and admitted using illegal drugs while pregnant with I.B. Within days of the child's birth, DCS filed a CHINS petition alleging, with respect to Father:

[Father] was aware of [Mother's] drug usage and has taken no steps to attempt to protect this child. [Father] is uninterested and unconcerned about this child. While he believes the child to be his biological son, he has taken no steps to establish paternity and is uncertain if he wants to do so. Due to [Father's] hostile and inappropriate behavior with DCS and nursing staff, there is some concern that [Father] may have a substance abuse or mental health issue. As [Father] has not demonstrated the ability or willingness to appropriately parent this child, [I.B.] would be endangered in his care.

Exhibits at 4.

On April 10, 2008, an initial hearing was held on the CHINS petition. Father appeared in person and by counsel¹ and admitted generally that I.B. was a CHINS. Pursuant to the participation decree, Father was ordered to participate in services. Specifically, he was

¹ Mother did not appear in person, though she was represented by counsel.

ordered to stay in contact with his case manager, secure and maintain a legal and stable source of income, obtain and maintain suitable housing, participate and successfully complete a home-based counseling program, complete a parenting assessment, participate in and successfully complete a drug and alcohol assessment and complete all recommendations, submit to random urine screens, and establish paternity. While Father complied with some of the mandates of the participation decree, he did not obtain suitable housing nor successfully complete home-based counseling or alcohol treatment, despite several referrals. Most notably, as will be discussed more fully below, Father could not remain alcohol and drug free and continued to be in and out of jail due to alcohol-related offenses.²

On December 10, 2008, DCS filed a petition for the involuntary termination of the parent-child relationship between I.B. and his mother and father. A fact-finding hearing began on May 28, 2009 and concluded with a second day on June 10. At the time of the hearing, Father was incarcerated with a projected out-date of July 1. Father's and Mother's parental rights were terminated by an order dated June 17, 2009. Father now appeals the termination of his parental rights. Additional information will be provided below as necessary.

While parents have a traditional right, protected by the Fourteenth Amendment of the United States Constitution, to establish a home and raise their children, the interests of parents are not absolute and must be subordinated to the children's best interests. *In re D.D.*, 804 N.E.2d 258 (Ind. Ct. App. 2004), *trans. denied*. Courts can order the involuntary

² Between I.B.'s birth and the termination hearing, Father had been incarcerated three times.

termination of parental rights when parents are unable or unwilling to meet their parental responsibilities. *Id.* The goal in terminating parental rights is not to punish parents but to protect children. *Id.*

We have long applied a “highly deferential” standard of review in cases involving the termination of parental rights. *In re L.B.*, 889 N.E.2d 326, 336 (Ind. Ct. App. 2008). In conducting such a review, we do not reweigh the evidence or judge witness credibility. *Bester v. Lake County Office of Family & Children*, 839 N.E.2d 143 (Ind. 2005). We consider only the evidence and reasonable inferences that are most favorable to the judgment. *Id.* We will not set aside a trial court’s order to terminate parental rights unless it is clearly erroneous. *In re A.H.*, 832 N.E.2d 563 (Ind. Ct. App. 2005).

The juvenile court here entered specific findings and conclusions in terminating Father’s parental rights. Therefore, we apply a two-tiered standard of review, first determining whether the evidence supports the findings and then whether the findings support the judgment. *In re L.B.*, 889 N.E.2d 326. “Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference.” *Quillen v. Quillen*, 671 N.E.2d 98, 102 (Ind. 1996).

Relevant to the issue presented in this appeal, Ind. Code Ann. § 31-35-2-4(b)(2) (West, PREMISE through 2009 1st Regular Sess.) provides that in a petition to terminate a parent-child relationship the State must allege that:

(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 interests of the child; and

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

The State is required to establish these allegations by clear and convincing evidence. *Egly v. Blackford County Dep't of Pub. Welfare*, 592 N.E.2d 1232 (Ind. 1992). Contrary to Father's assertion on appeal, "[c]lear and convincing evidence need not reveal that 'the continued custody of the parents is wholly inadequate for the child's very survival.'" *Bester v. Lake County Office of Family & Children*, 839 N.E.2d at 148 (quoting *Egly v. Blackford County Dep't of Pub. Welfare*, 592 N.E.2d at 1233). Rather, clear and convincing evidence that the child's emotional and physical development are threatened is sufficient to establish that termination is in the child's best interests. *See Bester v. Lake County Office of Family & Children*, 839 N.E.2d 143.

In the instant case, Father challenges the trial court's findings only with regard to I.C. § 31-35-2-4(b)(2)(B). In other words, he does not challenge whether I.B. has been removed for a sufficient period of time, whether termination is in the child's best interest, or whether

there is a satisfactory plan for I.B.'s care and treatment.³

The juvenile court entered the following relevant findings, regarding I.C. § 31-35-2-4(b)(2)(B), in its termination order:

22. [Father] completed a Comprehensive Family Profile on May 10, 2008. Julie Jackson was the parenting assessor with Children's Bureau that interviewed [Father]. At the time of the assessment, [Father] was living in an apartment that was very small, had a lot of exposed wiring, and [Father] admitted to Julie Jackson that he knew that the apartment was not a safe place for [I.B.]...

23. Intensive Outpatient Treatment was referred on May 9, 2008. His initial assessment was completed by Al Johnson at Family Services.... Al Johnson diagnosed [Father] with alcohol dependence and recommended Intensive Outpatient Program, random drug screens and AA meetings.

24. ...[Father] had participated in substance abuse treatment in 2007 through CASI. He had signed up for treatment because he felt that he was having problems with alcohol but then he missed sessions and withdrew after only a brief period of time.

25. After the assessment with Family Services, [Father] began attending classes, as scheduled, on June 10, 2008 and continued to attend through September 30, 2008. He was unsuccessfully discharged on October 30, 2008 and re-referred on November 30, 2008. [Father] went back in January 2009 but was incarcerated shortly thereafter, so that referral was closed. [Father] was re-referred in March 2009 when he was released from jail, but he did not show up for that assessment.

26. Home based counseling was referred on June 23, 2008. [Father] told the home based counselor he had been sober since 2007 and acknowledged he could not drink on a recreational basis. [Father] admitted to the home based counselor at the first appointment that he last drank beer the month before.

27. The main goal of home based counseling was for [Father] to become substance free. Home based counseling was closed unsuccessfully because of [Father's] inconsistent participation and inability to remain substance free.

28. Random Drug Screens through Mozaic were referred on November 17, 2008. [Father] did not successfully complete the random drug screens.

29. [Father] did not consistently visit with [I.B.] At one point in time, [I.B.] was in relative care. [Father] did not visit with [I.B.], first complaining that the relative was not allowing him to visit, and then later admitting he was not comfortable in her home. In his own words, "It just wore on him."

³ I.B.'s foster parents wish to adopt him.

30. [Father] has a 1987 conviction for Operating a Motor Vehicle While Intoxicated as a Class A misdemeanor, a 2006 conviction for Operating a Motor Vehicle While Intoxicated as a Class A misdemeanor, two 2007 convictions for Driving While Suspended as a Class A misdemeanor, and a 2009 conviction for Operating a Motor Vehicle While Intoxicated as a Class D felony. These convictions were all in Marion County.

31. The 2009 conviction...was for an arrest that occurred on July 4, 2008. This arrest occurred while [Father] was participating in home based counseling and drug treatment.

32. [Father] also has a 2009 conviction out of Hancock County for Operating a Motor Vehicle While Intoxicated. His arrest on that case was in March 2007 but his sentencing was in March 2009 because he was involved in a drug treatment program. He did not successfully complete that program.

33. [Father] is presently in Putnamville Correctional Facility serving a 6 month sentence for his 2009 conviction for Operating a Motor Vehicle While Intoxicated as D felony. His anticipated outdate is July 1, 2009. However, he has a hold from Hancock County for violation of probation.

34. [Father] never had appropriate housing for [I.B.]...

35. Though [Father] states that if he was not in jail, he would be in rehab and go to every visitation with [I.B.], the Court give [sic] little weight to his intentions and finds his testimony less than credible. [Father] may want to complete treatment and consistently visit with [I.B.] but his past pattern of behavior has been to begin treatment and not complet [sic] it. When given the opportunity to visit with [I.B.], he missed visits because he did not like going to the caregiver's home. [Father's] criminal history further reflects a pattern of substance abuse and inability to follow through with services and treatment.

36. There is reasonable probability that the conditions that resulted in the removal of [I.B.] or the reasons for continued placement outside the home of his father...will not be remedied. [Father's] history and pattern of behavior involving alcohol abuse pre-dates the birth of [I.B.] By his own admission, [Father] was depressed after his father died in 2002, and he "drank everyday like a fish", distancing himself from and avoiding his family. In 2005 or 2006, he felt that he needed help with his alcohol problem but did not seek help until 2007. That help was the CASI program which he did not complete. After DCS's involvement in his life..., he continued the same pattern. He did not complete the Intensive Outpatient Treatment Program in spite of re-referrals and he did not complete home based counseling. He did not successfully complete the drug screens. He had two arrests, one in Hancock County and one in Marion County, for Operating a Motor Vehicle While Intoxicated. He did not complete the Hancock County drug treatment program. He is currently incarcerated. Given his repeated failure to remain substance free in spite of all of the service referrals, it is unlikely [Father] will be able to appropriately

parent [I.B.] and provide him with [sic] a safe and stable home environment. 37. The continuation of the parent-child relationship between [Father] and [I.B.] poses a threat to the well-being of [I.B.] Given [Father's] substance abuse problem, and his incarcerations, [Father] is not able to provide [I.B.] with a safe and stable home environment.

Appendix at 15-18.

Father does not directly attack any of the above findings. Rather, he generally argues that he “took great efforts to comply with the Participation Decree issued by the CHINS court” and either completed or attempted to complete ordered services. *Appellant's Brief* at 6. Father seems to indicate that his inability to successfully complete alcohol treatment and home-based counseling was due to his multiple incarcerations during the pendency of the CHINS and termination proceedings. We do not agree, and we reject Father's invitation to reweigh the evidence.

The record reveals that Father has had ample time to comply with services and, most importantly, deal with his high degree of alcohol dependence. Father's income instability, inadequate housing, and frequent incarcerations are all rooted in his addiction to alcohol. Although he initially entered the intensive outpatient program (IOP), he was unsuccessfully discharged after several months due to poor attendance (attending only twenty-three out of sixty meetings) and positive drug and alcohol screens. In fact, within a month of starting the IOP Father committed another offense of operating while intoxicated (OWI). During this time, Father also failed to comply with provisions of the drug court program out of Hancock County, which resulted in an OWI conviction in March 2009.⁴

⁴ The original charges were filed in 2007.

As a result of Father's positive drug and alcohol screens, he was discharged from home-based services after about five months. The home-based counselor testified that Father's greatest barrier was substance abuse. Further, the record reveals Father never obtained stable employment or adequate housing⁵ during the CHINS or termination proceedings.

Contrary to Father's assertions on appeal, the record does not establish that his failure to successfully complete services was caused solely by his incarcerations. Actually, it appears that Father was not incarcerated for any lengthy period of time until his incarceration at the end of December 2008, which was after the termination proceedings had begun and after Father had already been unsuccessfully discharged from several services.

Father is fifty-six years old and has been given well over a year to comply with court-ordered services. In that time, Father has not shown consistent cooperation with services or significant progress. As the GAL testified, there is no evidence suggesting that Father is in a better position to care for I.B. now than he was when I.B. was born. I.B. has been in the foster-care system since he was born and has never lived with Mother or Father. I.B. has a loving foster family that wishes to adopt him, and he deserves permanency now.

In sum, we agree with the juvenile court that in light of Father's habitual pattern of behavior involving alcohol abuse, both before and during the instant proceedings, there is a

⁵ Father testified that one of his back-up plans upon release from prison was to move in with his seventy-seven-year-old mother. His future plans, however, were not evidence on which the juvenile court could base its opinion because the court is to assess the parent's fitness to care for the child as of the time of the termination hearing. *See In re B.D.J.*, 728 N.E.2d 195, 202 n. 1 (Ind. Ct. App. 2000).

reasonable probability that the reasons for continued placement outside Father's home will not be remedied.⁶ *See In re B.D.J.*, 728 N.E.2d at 203 (“court must consider a parent’s habitual patterns of conduct). Therefore, we affirm the termination order.

Judgment affirmed.

NAJAM, J., and BRADFORD, J., concur.

⁶ Father also argues that the DCS failed to establish that continuation of the parent-child relationship poses a threat to I.B. Because I.C. § 31-35-2-4(b)(2)(B) is written in the disjunctive, a juvenile court need find by clear and convincing evidence that only one of the two requirements of subsection (B) have been met. Here, the juvenile court found that both were met. Having affirmed the finding with respect to I.C. § 31-35-2-4(b)(2)(B)(i), we need not address the alternative basis under I.C. § 31-35-2-4(b)(2)(B)(ii). *See R.W., Sr. v. Marion County Dep’t of Child Servs.*, 892 N.E.2d 239 (Ind. Ct. App. 2008).