ATTORNEY FOR APPELLANT:

LILABERDIA BATTIES
Batties & Associates
Indianapolis, Indiana

ATTORNEY FOR APPELLEE DEPARTMENT OF CHILD SERVICES:

STEPHANIE E. SLUSS
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF THE INVOLUNTARY TERMINATION OF PARENT-CHILD RELATIONSHIP OF Y.O., D.N. AND C.O., MINOR CHILDREN AND THEIR FATHER, N.O.,	)	
N.O. (Father)	)	
Appellant-Respondent,	)	
vs.	)	No. 49A05-0908-JV-483
INDIANA DEPARTMENT OF CHILD SERVICES,	)	
Appellee-Petitioner,	)	
AND	)	
CHILD ADVOCATES, INC.,	)	
Co-Appellee (Guardian ad Litem).	)	

APPEAL FROM THE MARION SUPERIOR COURT - JUVENILE DIVISION
The Honorable Marilyn Moores, Judge
The Honorable Larry Bradley, Magistrate
Cause Nos. 49D09-0901-JT-1623, 49D09-0901-JT-1624 & 49D09-0901-JT-1625

March 15, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

N.O. ("Father") appeals the involuntary termination of his parental rights to his children, Y.O. and C.O. Concluding that the Indiana Department of Child Services, Marion County ("MCDCS"), presented clear and convincing evidence to support the juvenile court's judgment, we affirm.

Facts and Procedural History

Father is the biological father of Y.O., born on September 24, 1997, and C.O., born on March 11, 2001 (collectively, "the children").[1] The evidence most favorable to the juvenile court's judgment reveals that in August 2007, the MCDCS filed petitions under separate cause numbers alleging Y.O. and C.O. were children in need of services ("CHINS").[2] The CHINS petitions further indicated that the MCDCS had taken the

[1] The parental rights of Y.O.'s and C.O.'s biological mother, S.N. ("Mother"), were terminated in the juvenile court's July 2009 judgment. Mother does not participate in this appeal. Consequently, we limit our recitation of the facts to those pertinent solely to Father's appeal.

[2] For clarification purposes, we note that a third child, D.N., was also removed from Mother's care and included in the MCDCS's CHINS petitions. During the ensuing CHINS proceedings, however, it was determined through DNA testing that D.N. is not the biological child of Father. Father does not challenge the juvenile court's judgment with respect to D.N.

children into emergency temporary custody because Mother had been incarcerated for violating her probation by testing positive for marijuana, leaving no one with legal responsibility to care for the children. The petition further alleged Mother had exposed the children to ongoing domestic violence and illegal drug use in the family home. At the time of the children's removal, Father's identity and whereabouts were unknown.

During a pretrial hearing on the CHINS petitions in September 2007, Mother's public defender, Rosanne Ang, informed the court that Father was the alleged biological father of Y.O. and C.O. The MCDCS thereafter amended its CHINS petitions to include Father as a party. In November 2007 the juvenile court issued an order adjudicating the children CHINS.

A dispositional hearing was held in December 2007. Father did not appear. Following the dispositional hearing, the juvenile court issued an order formally removing the children from Mother's care and incorporating the MCDCS's proposed parental participation plan ("Participation Decree"). The Participation Decree directed Mother to successfully complete a variety of services in order to achieve reunification with the children.

During a placement review hearing in April 2008, Father presented himself to the juvenile court for the first time. Father, who was residing in Alabama, was provided a copy of the CHINS petitions and parental rights form. The juvenile court also granted Father's request for a public defender.

During a hearing in June 2008, Father's attorney entered an admission to the CHINS petitions on Father's behalf. The matter was then set for disposition in July 2008

and Father was ordered to appear in court without further notice. Father appeared for the dispositional hearing in July after which the court entered an order formally removing the children from Father's care and incorporating a Participation Decree, similar to Mother's, whereby Father was ordered to participate in and successfully complete various dispositional goals in order to achieve reunification with Y.O. and C.O. Specifically, Father was ordered to, among other things, (1) secure and maintain a legal and stable source of income, (2) obtain and maintain suitable housing for all residing within, (3) establish paternity of the children, (4) participate in and successfully complete a home-based counseling program and follow any recommendations of the home-based counselor, and (5) exercise consistent and regular visitation with the children.

A permanency hearing was held in January 2009. Father was not present for the hearing but was represented by counsel. During the hearing, Father's attorney informed the juvenile court that she had been in contact with Father and that he was unable to take custody of the children at that time. Following the hearing, the juvenile court issued an order directing the children to remain in foster care and ordering the children's permanency plan be changed from reunification to adoption.

The MCDCS filed petitions seeking the involuntary termination of Father's parental rights to Y.O. and C.O. also in January 2009. A two-day fact-finding hearing on the termination petitions was held. Father appeared for the first day but failed to appear for the second day.

During the termination hearing, the MCDCS presented evidence showing Father had failed to successfully complete court-ordered services, such as participating in home-

based counseling and formally establishing paternity of Y.O. and C.O. In addition, at the time of the termination hearing, Father had been unemployed for approximately one month, was living in a two-bedroom apartment with his girlfriend and her two daughters, and had failed to visit with Y.O. and C.O. for over two years.

At the conclusion of the termination hearing, the juvenile court took the matter under advisement. On July 15, 2009, the juvenile court issued its judgment terminating Father's parental rights to Y.O. and C.O. Father now appeals.

Discussion and Decision

This Court has long had a highly deferential standard of review in cases concerning the termination of parental rights. *In re K.S.*, 750 N.E.2d 832, 836 (Ind. Ct. App. 2001). When reviewing the termination of parental rights, we will not reweigh the evidence or judge the credibility of the witnesses. *In re D.D.*, 804 N.E.2d 258, 264 (Ind. Ct. App. 2004), *trans. denied*. Instead, we consider only the evidence and reasonable inferences that are most favorable to the judgment. *Id*. Moreover, in deference to the juvenile court's unique position to assess the evidence, we will set aside the court's judgment terminating a parent-child relationship only if it is clearly erroneous. *In re L.S.*, 717 N.E.2d 204, 208 (Ind. Ct. App. 1999), *trans. denied*.

The juvenile court's judgment in the present case contains specific findings and conclusions, as per the request of Mother. When a juvenile court's judgment contains specific findings of fact and conclusions thereon, we apply a two-tiered standard of review. *Bester v. Lake County Office of Family & Children*, 839 N.E.2d 143, 147 (Ind. 2005). First, we determine whether the evidence supports the findings, and second, we

determine whether the findings support the judgment. *Id.* A finding is clearly erroneous when there are no facts or inferences drawn therefrom that support it. *D.D.*, 804 N.E.2d at 265. A judgment is clearly erroneous only if the findings do not support the juvenile court's conclusions or the conclusions do not support the judgment thereon. *Bester*, 839 N.E.2d at 147. Thus, if the evidence and inferences support the juvenile court's decision, we must affirm. *L.S.*, 717 N.E.2d at 208.

"The traditional right of parents to establish a home and raise their children is protected by the Fourteenth Amendment of the United States Constitution." *In re M.B.*, 666 N.E.2d 73, 76 (Ind. Ct. App. 1996), *trans. denied*. A juvenile court must subordinate the interests of the parent to those of the child, however, when evaluating the circumstances surrounding a termination. *K.S.*, 750 N.E.2d at 837. Although the right to raise one's own child should not be terminated solely because there is a better home available for the child, parental rights may be terminated when a parent is unable or unwilling to meet his or her parental responsibilities. *Id.* at 836.

"The State's burden of proof in termination of parental rights cases is one of 'clear and convincing evidence.'" *In re G.Y.*, 904 N.E.2d 1257, 1260-61 (Ind. 2009) (quoting Ind. Code § 31-37-14-2). Clear and convincing evidence need not reveal that the continued custody of the parents is wholly inadequate for the child's very survival. *Id.* at 1261. Rather, it is sufficient to show by clear and convincing evidence that the child's emotional and physical development is threatened by the parent's custody. *Id.*

When seeking an involuntary termination of parental rights, the State is required to allege and prove, among other things, that:

(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; [and]

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

Ind. Code § 31-35-2-4(b)(2). If the court finds that the allegations in a petition described in section 4 of this chapter are true, the court *shall* terminate the parent-child relationship. *See* Ind. Code § 31-35-2-8. Father challenges the sufficiency of the evidence supporting the juvenile court's findings pertaining to subsections 2(B) and 2(C) of the termination statute set forth above.

I. Remedy of Conditions

In reviewing Father's first allegation of error, we observe that Indiana Code section 31-35-2-4(b)(2)(B) is written in the disjunctive. The juvenile court therefore had to find that only one of the two requirements of subsection 2(B) had been met before issuing an order to terminate Father's parental rights. *See In re L.V.N.*, 799 N.E.2d 63, 69 (Ind. Ct. App. 2003). Nevertheless, the juvenile court found sufficient evidence had been presented to satisfy the evidentiary requirements as to both prongs of subsection 2(B). Because we find it to be dispositive, we need only consider whether clear and convincing evidence supports the juvenile court's finding as to subsection 2(B)(i) of Indiana's termination statute under the facts of this case.

In determining whether there is a reasonable probability that the conditions resulting in a child's removal or continued placement outside the family home will not be

remedied, a juvenile court must judge a parent's fitness to care for his or her child at the time of the termination hearing, taking into consideration evidence of changed conditions. *In re J.T.*, 742 N.E.2d 509, 512 (Ind. Ct. App. 2001), *trans. denied*. The court must also "evaluate the parent's habitual patterns of conduct to determine the probability of future neglect or deprivation of the child." *Id.* Pursuant to this rule, courts have properly considered 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. *A.F. v. Marion County Office of Family & Children*, 762 N.E.2d 1244, 1251 (Ind. Ct. App. 2002), *trans. denied*. A juvenile court may also properly consider the services offered to the parent by a county department of child services and the parent's response to those services as evidence of whether conditions will be remedied. *Id.* Finally, we point out that a county department of child services (here, the MCDCS) is not required to provide evidence ruling out all possibilities of change; rather, it need establish only that there is a reasonable probability a parent's behavior will not change. *In re Kay L.*, 867 N.E.2d 236, 242 (Ind. Ct. App. 2007).

In determining there is a reasonable probability the conditions resulting in the children's removal or continued placement outside of Father's care will not be remedied, the juvenile court made multiple findings concerning Father's "minimal" participation in the underlying CHINS proceedings, current unemployment and lack of appropriate housing, continued and "admitted" use of marijuana as recently as one month before the termination hearing, and lack of participation in court-ordered services. Appellant's App. p. 37. With regard to visitation, the juvenile court found Father "last saw his children in

December 2006" and that before their removal from Mother in April 2007, Father's relationship with the children consisted of "phone contact about one time a month." *Id.* The juvenile court further found as follows:

> [Father's] lack of contact before and after the filing of the CHINS action, and his lack of participation in services and not establishing paternity demonstrates his unwillingness to parent. His ability to parent is unknown at this time, with the exception of his lack of income and housing, and his continued drug use.

Id. Based on these findings, the juvenile court then concluded as follows:

> [The MCDCS] has prove[n] by clear and convincing evidence that there is a reasonable probability that [the] conditions that resulted in [the children's] removal will not be remedied by [Father]. [Father] has only participated minimally in these proceedings and by his behavior before and after the filing of the CHINS [petitions], he has shown he is not interested in parenting his children.

Id. at 38-39. After reviewing the record, it is clear that abundant evidence supports the juvenile court's findings and conclusion set forth above, which in turn support the court's ultimate decision to terminate Father's parental rights to Y.O. and C.O.

During the termination hearings, MCDCS case manager Beverly Bowling recommended termination of Father's parental rights. In so doing, Bowling testified that when Father initially became involved in the case, he told Bowling he "could not take care of his children at the time." Tr. p. 172. Bowling further confirmed that Father had failed to participate in home-based services despite having approximately a year and a half to do so and her offer to contact local service providers in Alabama if he would provide her with the appropriate names, addresses, or phone numbers.

Guardian ad Litem ("GAL") Nataki Pettigrew also recommended termination of Father's parental rights. When asked whether she believed that Father's lack of contact with the children both before and after their removal from the family home "speaks at all to [Father's] willingness to parent [the children]," Pettigrew answered in the affirmative and further explained, "[I]t says that [Father's] not necessarily willing to parent the children . . . . And so based on the fact that . . . eighteen or twenty months or so have passed and we're still at point A[,] it shows that there's a lack of willingness." *Id.* at 250.

Father's own testimony provides further support for the juvenile court's findings. When asked during the termination hearing whether he had completed any court-ordered services, Father answered, "No . . . I'm starting my services Monday." *Id.* at 125. Father also confirmed that he had not seen Y.O. and C.O. in "over two years," that he had used marijuana "about three weeks" or "a month or so" before the termination hearing, and that he uses marijuana when he "run[s] into problems or depression." *Id.* at 126. Finally, Father admitted he had been unemployed for approximately one month, was currently living with his girlfriend and her two daughters in a two-bedroom apartment in Alabama, and was not able to take custody of the children "at the moment" but would have to wait until his "lease is up in July." *Id.* at 144.

As previously explained, a juvenile court must judge a parent's fitness to care for his or her children *at the time of the termination hearing*, taking into consideration the parent's *habitual patterns of conduct* to determine the probability of future neglect or deprivation of the children. *D.D.*, 804 N.E.2d at 266. In addition, where "the pattern of conduct shows no overall progress, the court might reasonably find that under the

circumstances, the problematic situation will not improve." *In re A.H.*, 832 N.E.2d 563, 570 (Ind. Ct. App. 2005). Given Father's unavailability to take custody of the children at the time of the termination hearing, coupled with his persistent unwillingness throughout the underlying proceedings to take the actions necessary to demonstrate he is willing and able to provide Y.O. and C.O. with a safe, stable, and drug-free home, we conclude the MCDCS established by clear and convincing evidence that there is a reasonable probability the conditions leading to the children's removal or continued placement outside of Father's care will not be remedied. Father's arguments on appeal, emphasizing his reliance on Mother to successfully complete her services and regain custody of the children and his assertion that the children should have been placed with the children's maternal aunt, as opposed to the evidence cited by the juvenile court in its termination order, amount to an invitation to reweigh the evidence, which we may not do. *See D.D.*, 804 N.E.2d at 264.

II. Best Interests of the Children

We next consider Father's contention that the MCDCS failed to prove that the termination of his parental rights is in Y.O.'s and C.O.'s best interests. In determining what is in the best interests of a child, a juvenile court is required to look beyond the factors identified by the Indiana Department of Child Services and to look to the totality of the evidence. *McBride v. Monroe County Office of Family & Children*, 798 N.E.2d 185, 203 (Ind. Ct. App. 2003). In so doing, the juvenile court must subordinate the interests of the parent to those of the child. *Id.* The court need not wait until a child is irreversibly harmed before terminating the parent-child relationship. *Id.* Moreover, we

have previously held that the recommendations of the case manager and court-appointed advocate to terminate parental rights, in addition to evidence that the conditions resulting in removal will not be remedied, is sufficient to show by clear and convincing evidence that termination is in the child's best interests. *In re M.M.*, 733 N.E.2d 6, 13 (Ind. Ct. App. 2000).

In its judgment terminating Father's parental rights to Y.O. and C.O., the juvenile court found that the children had been living together in a pre-adoptive foster home since August 2007 and were "bonded in their [current] placement." Appellant's App. p. 27. The court also found that termination of Father's parental rights "would provide the opportunity for the children to be adopted into a safe, stable[,] and secure environment and achieve permanency." *Id.* at 38. The juvenile court further found:

> Taking into consideration the children's wishes, the parents' lack of progress in services, length of time, and placement, Guardian ad Litem Nataki Pettigrew agrees with [the MCDCS's] recommendation of termination and adoption as being in the children's best interests. She has observed a tremendous improvement in the children and that they are thriving and feel safe and secure with [their foster mother].

Id. Based on the foregoing, the juvenile court concluded that the MCDCS had proven by clear and convincing evidence that termination "is in the best interests of the children so they can move forward in a permanent home. This is especially important to [Y.O.] . . . who ha[s] emotional needs." *Id.* at 39. The record supports these findings and conclusions.

In recommending termination of Father's parental rights, case manager Bowling confirmed that the children were living together and were "stable in the home" of the

foster mother. Tr. p. 194. GAL Pettigrew also recommended termination of Father's parental rights as being in the children's best interests. In so doing, Pettigrew informed the court that she had visited the children in their current foster placement approximately nine times since March 2008. Pettigrew went on to testify that Y.O., who suffers from post traumatic stress disorder and adjustment disorder, was no longer experiencing nightmares and "ha[d] shown significant progress" in her behavior at school since her removal from the family home. *Id.* at 224-25. Pettigrew also indicated that the children were "better able to articulate their thoughts," less "bashful," "more calm," and "just seem to be well adjusted." *Id.* at 226-27. When asked if it would be in the best interests of Y.O. and C.O. to be placed with Father "right now," Pettigrew answered, "No." *Id.* at 250.

Based on the totality of the evidence, including Father's failure to successfully complete virtually all of the juvenile court's dispositional goals and current inability to provide the children with a safe, stable, and drug-free home, coupled with the unwavering testimony of Bowling and Pettigrew recommending termination of Father's parental rights, we conclude there is clear and convincing evidence supporting the juvenile court's determination that termination of Father's parental rights is in Y.O.'s and C.O.'s best interests. *See, e.g.*, *In re A.I.*, 825 N.E.2d 798, 811 (Ind. Ct. App. 2005) (concluding that testimony of the court-appointed special advocate and family case manager, coupled with evidence that conditions resulting in continued placement outside the home will not be remedied, is sufficient to prove by clear and convincing evidence termination is in child's best interests), *trans. denied*. Since the time of the children's removal in 2007, Father has

failed to make any significant or sustained improvement in his ability to demonstrate that he is both willing and capable of caring for his children. It is unfair to ask Y.O. and C.O. to continue to wait until Father is willing to do so. *See In re Campbell*, 534 N.E.2d 273, 275 (Ind. Ct. App. 1989) (stating that the court was unwilling to put the children "on a shelf" until their mother was capable of caring for them).

Affirmed.

RILEY, J., and CRONE, J., concur.