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IN THE COURT OF APPEALS OF INDIANA

IN THE MATTER OF A.N.W. and A.C.W.:	)	
	)	
C.W.,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 71A03-0909-JV-428
	)	
INDIANA DEPARTMENT OF CHILD SERVICES,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE SAINT JOSEPH PROBATE COURT
The Honorable Peter J. Nemeth, Judge
The Honorable Barbara Johnston, Magistrate
Cause No. 71J01-0809-JT-188
Cause No. 71J01-0809-JT-189

April 14, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Charles W. (Father) appeals the involuntary termination of his parental rights to his children, A.N.W. and A.C.W. Father challenges the sufficiency of the evidence supporting the trial court's judgment.

We affirm.

In 2005, Father established paternity of A.N.W., born on April 24, 2003, and A.C.W., born on November 25, 2004 (collectively, the children).[1] The facts most favorable to the trial court's judgment reveal that in late December 2006, the local St. Joseph County office of the Indiana Department of Child Services (SCDCS) took A.N.W. and A.C.W. into protective custody and filed separate petitions alleging they were children in need of services (CHINS). At the time the children were removed, Mother was homeless, addicted to illegal drugs, and unable to provide the children with appropriate food and housing. In addition, although Father had established paternity of the children, he was not married to Mother and was unavailable to parent the children because he was living in Ohio with his own mother.[2]

Father admitted to the allegations of the CHINS petition during an initial hearing in January 2007. A dispositional hearing was then scheduled for the following month. During the dispositional hearing in February 2007, the court learned that Father had an outstanding

[1] The parental rights of the children's biological mother, Crystal W. (Mother), were also involuntarily terminated by the trial court in its August 2009 termination order. Mother, who remains married and living with Father, does not participate in this appeal. Consequently, we shall limit our recitation of the facts to those pertinent solely to Father's appeal.

[2] Father and Mother were eventually married in April 2007. Mother has a total of eight biological children, and was pregnant at the time of the termination hearing. All of the children had been removed, either voluntarily or involuntarily, from the parents except for the couple's youngest child, who was born during the pendency of the underlying CHINS case. Mother was due to deliver another baby in September 2009, approximately one month following the termination hearing. During the termination hearing, Father informed the court that he and Mother were seeking the return of all the children to their joint care even though Father was not the biological father of all of Mother's children.

warrant for failing to pay child support. Father was subsequently arrested and remained incarcerated for approximately thirty-one days.

Following the dispositional hearing, the trial court entered an order directing Father to participate in a variety of services in order to achieve reunification with the children. Specifically, Father was ordered to, among other things, successfully participate in and complete individual and family counseling, submit to a parenting/psychological assessment, and exercise regular supervised visitation with the children. Father was also ordered to obtain and maintain stable housing and employment. Father was subsequently referred to a substance abuse treatment program after informing Dr. Berardi during his psychological examination that he smoked as much as one quarter of an ounce of marijuana on a daily basis.

Upon his release from incarceration, Father, together with Mother, lived in a South Bend homeless shelter for several months. The record is unclear as to whether Father voluntarily left the shelter or was evicted. Regarding Father's participation in services, Father initially participated in supervised visits with the children and parenting classes. Father also submitted to a parenting/psychological assessment. Father refused, however to participate in individual counseling, which prevented him from being referred for family counseling. Father also failed to participate in a substance abuse treatment program and was unable to maintain steady employment. In addition, visits with the children seemed to worsen over time, and service providers reported that visits were oftentimes "chao[tic]," and that Father and Mother "tend[] to yell a lot." *Transcript* at 105-6.

In March 2008, Father's visitation privileges with the children were discontinued altogether, largely due to Father's lack of participation and decision to move back to Ohio. Father also failed to participate in a drug rehabilitation program and continued to test positive for illegal substances. SCDCS eventually filed petitions seeking the involuntary termination of Father's parental rights to A.N.W. and A.C.W. in September 2008.

A consolidated evidentiary hearing on the termination petitions was held in August 2009. At the conclusion of the termination hearing, the trial court took the matter under advisement. On August 24, 2009, the trial court issued its judgment terminating Father's parental rights to A.N.W. and A.C.W. The following appeal ensued.

Father challenges the sufficiency of the evidence supporting the trial court's termination order, claiming SCDCS failed to prove by clear and convincing evidence that there is a reasonable probability the conditions resulting in the children's removal from his care will not be remedied. In so doing, Father claims he was "in basic compliance with this case plan but for two failed drug tests" and thus, the trial court "should have reunited him with his family." *Appellant's Brief* at 7.

We begin our review by acknowledging that 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 (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 (Ind. Ct. App. 2004), *trans. denied*. Instead, we consider only the evidence and reasonable inferences that are most favorable to the judgment. *Id*. In deference to the

trial 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 (Ind. Ct. App. 1999), *trans. denied*. If the evidence and inferences support the trial court's decision, we must affirm. *Id.*

Here, the trial court concluded that the elements set forth in Indiana's termination statute, *see* Ind. Code Ann. § 31-35-2-4(b)(2) (West, Westlaw through 2009 1st Special Sess.), were satisfied. The parties did not request, however, nor did the trial court include, specific findings of fact in its judgment. The judgment is therefore general in nature. When a trial court enters a general judgment, it should be affirmed upon any theory supported by the evidence. *Lang v. Starke County Office of Family & Children*, 861 N.E.2d 366, 371 (Ind. Ct. App. 2007), *trans. denied*. We will reverse a judgment as clearly erroneous only if, after reviewing the record, we have a "firm conviction that a mistake has been made." *Id.*

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*. Although parental rights are of a constitutional dimension, the law provides for the termination of these rights when parents are unable or unwilling to meet their parental responsibilities. *In re R.H.*, 892 N.E.2d 144 (Ind. Ct. App. 2008). In addition, a trial court must subordinate the interests of the parents to those of the child when evaluating the circumstances surrounding the termination. *In re K.S.*, 750 N.E.2d 832.

To terminate a parent-child relationship, the State is required to allege and prove,

among other things, that 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 . . . .

I.C. § 31-35-2-4(b)(2)(B) (West, Westlaw through 2009 1st Special Sess.). The State's burden of proof for establishing these allegations in termination cases "is one of 'clear and convincing evidence.'" *In re G.Y.*, 904 N.E.2d 1257, 1260-61 (Ind. 2009) (quoting Ind. Code Ann. § 31-37-14-2 (West, Westlaw through 2009 1st Special Sess.)). 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. I.C. § 31-35-2-8 (West, Westlaw through 2009 1st Special Sess.).

In the present case, the trial court found SCDCS presented sufficient evidence to satisfy both elements of I.C. § 31-35-2-4(b)(2)(B). This statute, however, is written in the disjunctive. Thus, SCDCS was required to establish, by clear and convincing evidence, only one of the two requirements of subsection 2(B). *See L.S.*, 717 N.E.2d 204. Because we find it dispositive under the facts of this case, we consider only whether clear and convincing evidence supports the trial court's findings regarding I.C. § 31-35-2-4(b)(2)(B)(i).

In determining whether there is a reasonable probability the conditions resulting in a child's removal or continued placement outside the family home will be remedied, a trial 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 (Ind. Ct. App. 2001), *trans. denied*. The court must also evaluate the parent's habitual

patterns of conduct to determine whether there is a substantial probability of future neglect or deprivation of the child. *In re M.M.*, 733 N.E.2d 6 (Ind. Ct. App. 2000). 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 (Ind. Ct. App. 2002), *trans. denied*. The trial 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, 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 (Ind. Ct. App. 2002).

The record reveals that since the time of the children's removal, Father has been unable to achieve stability for any significant period of time. Although Father did initially accomplish several of the trial court's dispositional goals by exercising regular visitation with the children, participating in parenting classes, and submitting to a parenting/psychological exam, Father was unable to sustain his progress. By the time of the termination hearing, Father had failed to successfully complete a majority of the court's dispositional goals, including obtaining and maintaining suitable housing and employment sufficient to support his family, refraining from the use of illegal drugs, completing a substance abuse program, completing individual and family counseling, and exercising regular visitation with the children.

During the termination hearing, SCDCS family case manager James Baker testified that he was assigned to Father's case from summer 2007 through summer 2008. Baker informed the trial court that he was never able to recommend reunification of the family because the parents had not "completed" or "actively participat[ed]" in court-ordered services. *Transcript* at 26. Baker further testified that housing was a "huge issue throughout this case" and that there "wasn't a lot of progress" in services while he was involved. *Id.*

Similarly, current SCDCS family case manager Tracy Fisher informed the court that as of the time of the termination hearing, Father remained married to and living with Mother in Ohio, was unemployed, and had not participated in home-based services since Fisher was assigned to the case in the summer of 2008. Fisher also confirmed that Father had not participated in individual or family counseling. When asked to describe Father's visits with the children, Fisher indicated Father "never requested" and "never had visits" with the children while she was the ongoing case manager. *Id.* at 69. Father likewise testified during the termination hearing that he had not visited with the children in over one year. We have previously stated that "the failure to exercise the right to visit one's child demonstrates a lack of commitment to complete the actions necessary to preserve the parent-child relationship." *Lang v. Starke County Office of Family & Children*, 861 N.E.2d at 372.

When asked whether she believed the conditions that resulted in the children's removal would be "remedied anytime soon," Fisher answered in the negative and specifically referenced Father's continuing use of marijuana, ongoing unemployment, and lack of contact with SCDCS concerning the children and/or their well-being. *Id.* at 77-79. When questioned

as to whether she felt Father is currently "able to meet his responsibilities as a parent," Fisher replied, "No." *Transcript* at 78.

Finally, Father's own testimony also supports the trial court's decision to terminate his parental rights to A.N.W. and A.C.W. Father acknowledged during the termination hearing that he was unemployed and living with Mother in a two-bedroom apartment. Father also confirmed that he had never spoken with the children's therapists throughout the underlying proceedings nor asked about the children's respective special needs. In addition, Father admitted he had tested positive for illegal substances on several occasions, including a positive screen for marijuana as recently as June 2009. When asked whether he was "worried" about how he and Mother would handle the stress of providing for the children should they be returned to his care, Father replied, "No." *Id.* at 211. When asked why he wasn't concerned, Father answered, "'Cause (sic) we hit rock bottom. There's . . . only one way up from here." *Id.*

As previously explained, a trial 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 258 (Ind. Ct. App. 2004), *trans. denied*. Where there are only temporary improvements and the parent's pattern of conduct shows no overall progress, the court might reasonably infer that, under the circumstances, the problematic situation will not improve. *In re A.H.*, 832 N.E.2d 563 (Ind. Ct. App. 2005). Here, although Father appears to love the children and has, at times, made some progress in services, Father

nevertheless has been unable to demonstrate an ability to consistently provide the children with a safe and stable home environment. Consequently, the conditions that resulted in the children's continued placement outside Father's care have remained largely unchanged. This is true despite Father having received approximately three-and-one-half years of services designed to facilitate his reunification with A.N.W, and A.C.W.

"A pattern of unwillingness to deal with parenting problems and to cooperate with those providing services, in conjunction with unchanged conditions, support[s] a finding that there exists no reasonable probability that the conditions will change." *Lang v. Starke County Office of Family & Children*, 861 N.E.2d at 372. Based on the foregoing, we conclude that clear and convincing evidence supports the trial court's determination that there is a reasonable probability the conditions leading to the children's removal or continued placement outside Father's care will not be remedied. Father's argument on appeal amounts to an invitation to reweigh the evidence, which we may not do. *In re D.D.*, 804 N.E.2d 258. This court will reverse a termination of parental rights "'only upon a showing of "clear error" – that which leaves us with a definite and firm conviction that a mistake has been made.'" *Matter of A.N.J.*, 690 N.E.2d 716, 722 (Ind. Ct. App. 1997) (*quoting Egly v. Blackford County Dep't of Pub. Welfare*, 592 N.E.2d 1232, 1235 (Ind. 1992). We find no such error here.

Judgment affirmed.

KIRSCH, J., and ROBB, J., concur.