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IN THE COURT OF APPEALS OF INDIANA

IN THE MATTER OF THE INVOLUNTARY TERMINATION OF THE PARENT-CHILD RELATIONSHIP OF M.B., A.B. AND C.B.,	)	
M.R. (FATHER),	)	
Appellant-Respondent,	)	
vs.	)	No. 49A02-1002-JT-109
MARION COUNTY DEPARTMENT OF CHILD SERVICES,	)	
Appellee- Petitioner,	)	
CHILD ADVOCATES, INC.,	)	
Co-Appellee (Guardian Ad Litem).	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Marilyn Moores, Judge
The Honorable Larry Bradley, Magistrate
Cause No. 49D09-0903-JT-14973
49D09-0903-JT-14974

August 27, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

M.R. ("Father") appeals the involuntary termination of his parental rights to his children, claiming there is insufficient evidence to support the juvenile court's judgment. Concluding there is clear and convincing evidence to support the juvenile court's termination order, we affirm.

Facts and Procedural History

Father is the biological father of M.B., born in May 1999, A.B., born in August 2003, and C.B., born in August 2006 (collectively referred to as "the children").[1] The facts most favorable to the judgment reveal that in February 2006 the Indiana Department of Child Services, Marion County ("MCDCS") filed a petition with the juvenile court alleging M.B. and A.B. were children in need of services ("CHINS") because the children's mother, Cr.B.

[1] The children's biological mother signed voluntary consents for the children's maternal grandmother to adopt the children in January 2008 and is not a party to this appeal. Consequently, we limit our recitation of the facts to those pertinent solely to Father's appeal.

("Mother"), had abandoned then-six-year-old A.B. and later admitted to being homeless and to using marijuana and cocaine. The investigation by MCDCS also revealed that Father had not established paternity for M.B. and A.B. and did not have stable housing.[2] During the initial hearing on the CHINS petition, Father submitted an agreed entry admitting that the allegations in the CHINS petition were true. The juvenile court then proceeded to disposition and formally removed M.B. and A.B. from Father's care and custody. The dispositional order also directed Father to participate in a variety of services to achieve reunification with M.B. and A.B. including: (1) a parenting assessment, (2) parenting classes, (3) drug and alcohol assessment and any resulting recommended treatment, and (4) home-based counseling. In April 2006, M.B. and A.B. were placed in relative foster care with their maternal grandmother, ("Grandmother").

In August 2006, C.B. was born, taken into protective custody, and placed with Grandmother when only three days old. At the time of C.B.'s removal, Father was incarcerated due to an incident of domestic violence involving Mother, and therefore unavailable to care for C.B. Similarly, Mother was also unable to care for C.B. because she was unemployed, had recently been evicted from her home, and had failed to complete the court-ordered services in the CHINS case involving M.B. and A.B.

Father admitted to the allegations of the CHINS petition involving C.B. in November 2006. The juvenile court proceeded to disposition, formally removed the child from Father's

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[2] Both prior to and throughout the duration of the underlying proceedings, Father and Mother maintained an on-again-off-again relationship. They were not married when M.B. was born; however, they were married but not living together at the time M.B. and A.B. were removed from Mother's care. By the time

care and custody, and directed Father to complete domestic violence classes in addition to the services previously ordered in C.B.'s siblings' CHINS case. For the next several months, Father failed to consistently participate in court-ordered services, and during a CHINS hearing in June 2007, both Father and Mother informed the juvenile court that they might be interested in having Grandmother adopt all three children.

In July 2007, MCDCS filed petitions seeking the involuntary termination of Father's parental rights to all three children, and the following month, the juvenile court changed the permanency plan for the children from reunification to adoption. Meanwhile, Father began to actively participate in reunification services and to regularly visit with the children. By the first termination hearing in January 2008, Father had completed all of the court-ordered services, except home-based counseling. In addition, home-based counselor Brettany Ervin informed the juvenile court that although she could not yet recommend reunification, she believed Father was making progress and was capable of becoming a better parent. Consequently, the juvenile court issued an order denying MCDCS's involuntary termination petition.

Shortly after the juvenile court's ruling, Father's participation in home-based services began to wane. Father missed at least five scheduled appointments in July and August 2008 and failed to contact Ervin. Due to Father's continuing non-participation, Ervin eventually closed Father's case as unsuccessful. At the time she closed his case, Ervin remained concerned as to Father's ability to independently parent the children, especially in light of Father's tendency to become "overwhelmed" with the children's needs during visits, and his

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of the termination hearing, Father had filed for divorce.

"inappropriate [parenting] choices," including letting the children play with a pocket knife. Transcript at 132-33. Father also failed to show for scheduled court hearings in September and December 2008.

During a review hearing in March 2009, Father requested, and the juvenile court ordered, a second referral for home-based services. The juvenile court also ordered Father to pay child support to Grandmother in the amount of twenty dollars per week, per child. In April 2009, Father attended an initial intake appointment with home-based counselor Amanda Richey. Father failed to appear, however, for the scheduled in-home follow-up appointment with Richey the next week and therefore Richey was unable to complete her initial assessment. Thereafter, Father never contacted Richey again. After repeated unsuccessful attempts to locate Father, Richey closed the case in June 2009.

MCDCS filed its second petition seeking the involuntary termination of Father's parental rights on March 31, 2009. The juvenile court thereafter again ordered the permanency plan changed from reunification to termination of parental rights, and in May 2009, the court ordered Father's visitation privileges changed from unsupervised visits to supervised visits. Father subsequently failed to appear in court for scheduled review hearings in July and October 2009.

A second termination hearing was held in December 2009. At the time of the second termination hearing, Father had still not completed the home-based counseling services ordered by the juvenile court. At the conclusion of the evidentiary hearing, the juvenile court took the matter under advisement. On January 11, 2010, the juvenile court issued its

judgment terminating Father's parental rights to M.B., A.B., and C.B. Father now appeals.

Discussion and Decision

I. Standard of Review

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, 836 (Ind. Ct. App. 2001). When reviewing the termination of parental rights, we will not reweigh the evidence or judge witness credibility. 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 most favorable to the judgment. Id. Moreover, in deference to the juvenile court's unique position to assess the evidence, we will set aside a 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.

Here, in terminating Father's parental rights, the juvenile court entered specific findings of fact. 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. "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). 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. However, a juvenile court must subordinate the interests of the parent to those of the child when evaluating the circumstances surrounding a termination. K.S., 750 N.E.2d at 837. Termination of a parent-child relationship is proper where a child's emotional and physical development is threatened. Id. 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.

Before an involuntary termination of parental rights can occur, 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
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> (C) termination is in the best interests of the child . . . .

Ind. Code § 31-35-2-4(b)(2)(B) & (C) (2009).[3] "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

[3] Indiana Code section 31-35-2-4 was amended by Pub. L. No. 21-2010, § 8 (eff. March 12, 2010). Because the changes to the statute became effective in March 2010 following the filing of the termination

1257, 1260-1261 (Ind. 2009) (quoting Ind. Code § 31-37-14-2). If the court finds the allegations in a petition described in section 4 of this chapter are true, the court shall terminate the parent-child relationship. Ind. Code § 31-35-2-8(a). Father challenges the sufficiency of the evidence supporting the juvenile court's findings as to subsections (B) and (C) of the termination statute cited above. See Ind. Code § 31-35-2-4(b)(2).

II. Conditions Not Remedied

At the outset, we observe that Indiana Code section 31-35-2-4(b)(2)(B) is written in the disjunctive. It therefore requires the juvenile court to find that only one of the two requirements of subsection 2(B) has been established by clear and convincing evidence. See L.S., 717 N.E.2d at 209. Here, the juvenile court found both prongs of subsection 2(B) had been satisfied. Because we find it to be dispositive under the facts of this case, we need only consider whether MCDCS established, by clear and convincing evidence, that there is a reasonable probability the conditions resulting in the children's removal or continued placement outside Father's care will not be remedied. See Ind. Code § 31-35-2-4(b)(2)(B)(i).

In support of his assertion that MCDCS failed to sufficiently establish there is a reasonable probability the conditions resulting in the children's removal and continued placement outside his care will not be remedied, Father claims his circumstances had significantly improved by the time of the termination hearing because he was self-employed, living in a suitable home, and had completed "everything under the case plan[,] except having home[-]based counseling, which he participated in for nearly ten (10) months." Appellant's Brief at 24. Father therefore argues that the mere fact home-based counseling

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petition herein, they are not applicable to this case.

was closed as unsuccessful was "insufficient to meet the standard of clear and convincing evidence to take away his constitutional right to parent his children." Id.

When determining whether there is a reasonable probability 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. However, the juvenile 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. The juvenile court may also consider any services offered to the parent by the county department of child services, and the parent's response to those services, as evidence of whether conditions will be remedied. Id. Moreover, a county department of child services is not required to provide evidence ruling out all possibilities of change; rather, it need establish only that there is a reasonable probability the parent's behavior will not change. In re Kay L., 867 N.E.2d 236, 242 (Ind. Ct. App. 2007).

In determining that there is a reasonable probability the conditions leading to the children's removal and continued placement outside Father's care will not be remedied, the juvenile court recognized that Father had completed all the "recommended services" with the

exception of home-based counseling, which the court characterized as "the mechanism [used] to determine whether the children can be placed into [Father's] care." Appellant's Appendix at 38. The court further acknowledged that although home-based counselor Ervin had observed Father as being "eager and motivated in the beginning of services to the point that unsupervised visitation was recommended," Father had "quit participating" in July 2008, and his case was thereafter closed as unsuccessful. Id. The court also found that Ervin could not recommend reunification of the children with Father at the time she closed Father's case based on her concerns regarding Father's inability to "handle the children when unsupervised, sometimes resulting in [Father] shortening visits," and Father's tendency to become "overwhelmed very quickly." Id. at 39.

The juvenile court also acknowledged in its findings that MCDCS had made a second attempt at home-based counseling services, but that Father had failed to attend any appointment following the initial intake session, and that home-based counselor Ritchey felt home-based services were important for addressing "adjustment and transition" issues associated with reunification, and "medical concerns." Id. In addition, the juvenile court found as follows:

> 19. [Father] obviously loves his children and has a bond with them. He has maintained he will not give up his children, but has failed to complete services to successfully and safely reunify. . . . In addition, [Father] failed to maintain contact with the [MCDCS] Family Case Manager from early August 2008 until March 2009, and has failed to attend some hearings in the CHINS proceedings.
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> 20. There is a reasonable probability that the conditions for continued placement of the children outside the home will not be remedied by [Father]. The original CHINS Petition was filed in February 2006, and some three[-]and[-]one[-]half years later, [Father] has failed to complete home[-]based

> services to sufficiently address issues. It is relevant to note that in denying a previous termination, the Court at that time found that [Father] was currently participating in home[-]based counseling and was making progress, therefore not being able to find by clear and convincing evidence that conditions would not be remedied. . . . It has now been twenty-two months since the first termination trial and not only did [Father] fail to complete the home[-]based counseling in place at the time of trial, but failed to attend all but an intake session in a second home[-]based counseling referral.

Id. A careful review of the record reveals that these findings are supported by the evidence.

Testimony from various caseworkers and service providers makes clear that despite a wealth of services available to him for approximately three-and-one-half years, at the time of the second termination hearing in December 2009, Father's circumstances remained largely unchanged, and he was still incapable of showing he could provide the children with a safe and stable home environment. During the termination hearing, Ervin confirmed she had worked with Father during home-based counseling sessions on issues such as "parenting education, [and] ways to discipline the children effectively using rules and consequences," as well as had monitored supervised Father's visits with the children and even recommended Father receive unsupervised visitation privileges. Tr. at 128. Nevertheless, when asked about her "overall impression of [Father's] participation in [her] services," Ervin informed the court Father had been "very motivated in the beginning," but then he stopped participating in services and after "a couple [of] months" of attempting to locate Father, Ervin closed Father's case as "unsuccessful[]." Id. at 130-31.

When asked whether she had "any remaining concerns with [Father] . . . parenting the children" at the time she closed Father's case, Ervin answered in the affirmative and explained, "[Father] . . . was not able to handle his children all together. . . . He would

become overwhelmed very quickly with them. He would let them do things that were not appropriate[,] like giving them pocket knives as gifts." Id. at 132. Ervin also stated that during unsupervised visits, Father would "take the kids to see [Mother,] which was not authorized by the Court during that time." Id. at 133. Father also "shorten[ed] visits if the children got out of hand," and "would bring the kids right back to [Grandmother] and just leave them with her . . . ." Id. In addition, Ervin indicated she believed continued home-based counseling for Father was still needed, and that she would not have been "comfortable" recommending reunification with the children at the time she closed Father's case. Id.

Similarly, home-based counselor Ritchey testified she had only met with Father once for the initial "intake appointment" because Father had failed to show for the scheduled follow-up appointment. Id. at 153. Ritchey later indicated she "never saw [Father] again after that," despite "several attempts to get back in touch with him to set other appointments." Id. at 154. Ritchey further testified that it was "concerning to [her] in general when people do not participate in home[-]based therapy" because it had been her experience that "when parents refuse to cooperate with home[-]based [therapy] it's because there's an underlying reason, an underlying fear in their parenting ability or some issue that they're going to have in parenting that they do not want a professional to discover." Id. at 161-62.

MCDCS family case manager Stephanie Neal confirmed during the termination hearing that it took her approximately one month to reach Father, despite multiple attempts to do so after she was assigned to his case in July 2008, and that after the initial contact, Father

did not communicate with her again until March 2009. When asked if she believed Father should get "another shot at home[-]based counseling," Neal responded in the negative and explained:

> [Father] has failed two home[-]based counselors by not participating in services. He has indicated to me before that he. . . doesn't feel like he needs home[-]based services. He may say that he wants to do home[-]based services in Court and that he will do it, but when it comes down to it[,] he has shown that he is not going to complete home[-]based services."

Id. at 210-11. When asked if she agreed with Ritchey's "assessment of why home[-]based counseling is important," Neal answered, "One hundred percent." Id.

Where a parent's "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). After a careful review of the record, we conclude that MCDCS presented clear and convincing evidence to support the juvenile court's findings and ultimate determination that there is a reasonable probability the conditions leading to the children's removal and continued placement outside of Father's care will not be remedied. As noted earlier, 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 the parent's habitual patterns of conduct to determine the probability of future neglect or deprivation of the child. D.D., 804 N.E.2d at 266. Here, the juvenile court had the responsibility of judging Father's credibility and of weighing his testimony of recently improved conditions against the abundant evidence demonstrating Father's history of domestic violence, refusal to complete home-based counseling services, and past and current

inability to demonstrate he is willing and able to provide the children with a consistently safe and stable home environment. It is clear from the language of the judgment that the juvenile court gave more weight to evidence of the latter, rather than the former, which it was permitted to do. See Bergman v. Knox County Office of Family & Children, 750 N.E.2d 809, 812 (Ind. Ct. App. 2001) (concluding trial court was permitted to and in fact gave more weight to abundant evidence of mother's pattern of conduct in neglecting her children during several years prior to termination hearing than to mother's testimony she had changed her life to better accommodate her children's needs).

III. Best Interests of the Children

We next turn to Father's assertion that there is insufficient evidence supporting the juvenile court's determination that termination of his parental rights is in M.B.'s, A.B.'s, and C.B.'s best interests. In making this assertion, Father states that the children should not be "taken from their Father because [MCDCS] believes that the maternal grandmother can provide a 'better or best' place for them." Appellant's Br. at 28.

We are mindful that, in determining what is in the best interests of a child, the juvenile court is required to look beyond the factors identified by the Indiana Department of Child Services and 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 recommendations by a case manager and child

advocate to terminate parental rights, coupled with evidence demonstrating that the conditions resulting in removal will not be remedied, are 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 addition to the specific findings previously discussed, the juvenile court made several additional pertinent findings in support of its determination that termination of Father's parental rights is in the children's best interests. Specifically, the juvenile court found that "[a]ll three children reside with [Grandmother,]" that M.B. and A.B. had been placed with Grandmother for three years and had lived with her "on and off" before becoming wards of the State, and that C.B. had lived with Grandmother "all his life." Appellant's App. at 39. The court further found that family case manager Neal had observed a "very positive interaction" between the children and Grandmother, and felt they were "close" and "bonded" with Grandmother. Id. at 39-40. In addition, the court noted that the children's special needs were being met by their "[G]randmother caregiver," and that although "[n]o one doubts the bond that exists between [Father] and his children," waiting additional time for Father "to change his belief that he does not need further services would only create a barrier to permanency, which is an important goal for these children." Id. at 40.

The juvenile court then found:

> Termination of the parent-child relationship is in the children's best interests. Termination would provide for the opportunity for [Grandmother] to adopt the children into a safe, stable[,] and permanent environment where their needs will be met throughout their childhood, and also adopted by someone who realizes the importance of maintaining contact with their father.

Id. The juvenile court also found that Chris Mundy, the children's Guardian ad Litem ("GAL"), "agrees with the plan of termination and adoption as being in the children's best interests." Id. Clear and convincing evidence supports the juvenile court's findings and conclusions cited above, which in turn support the court's ultimate decision to terminate Father's parental rights to M.B., A.B., and C.B.

In recommending termination of Father's parental rights as in the children's best interests, MCDCS case manager Neal testified she had observed the children in Grandmother's home and thereafter described the interactions between them as "very positive," stating the children were "very respectful towards [Grandmother]," that she had observed them "hugging" and "kissing" and telling each other "they love [each other]," and that they appeared "to have a very close bond." Tr. at 210. Although Neal acknowledged Father also had a strong bond with his children, she nevertheless informed the court that she believed termination was in the children's best interests, stating MCDCS had "tried less severe permanency outcomes such as a third party guardianship" but such arrangements were "not able to be agreed upon." Id. at 234. Neal further testified:

> We have to move towards permanency for these children. We're going on four years of this case, especially for [M.B.]. [M.B.] is very aware that his placement is not permanent. And for [C.B.], he's been in the system his entire life. . . . We've been left with no choice than to file [for] termination. Father has not been cooperative with me until the termination[,] which is what I understand happened last time. He does not do anything for the case until, until it gets to termination and then that's when he decides that he wants to do things.

Id. at 234-35.

GAL Mundy testified that he agreed with MCDCS's plan for termination and adoption as being in the children's best interests. Mundy further testified that the case was "soon to be four years old," and that "[M.B.] is at a point in his life where he is very torn, wanting to . . . know what's going on, which way he is going to go." Id. at 250. Mundy also agreed that permanency was important for all of the children and that Grandmother's home could "provide [the] permanency these children need." Id.

Based on the totality of the evidence, including Father's refusal to complete home-based counseling and current inability to demonstrate he can provide them with a safe and stable home environment, coupled with the testimony from Neal and Mundy recommending termination of the parent-child relationships, we conclude that clear and convincing evidence supports the juvenile court's determination that termination of Father's parental rights is in all three children's best interests. See e.g., In re A.I., 825 N.E.2d 798, 811 (Ind. Ct. App. 2005) (concluding that testimony of child advocate and family case manager, coupled with evidence that conditions resulting in continued placement outside home will not be remedied, is sufficient to prove by clear and convincing evidence termination is in child's best interests), trans. denied.

Conclusion

As this court observed in Matter of D.T., 547 N.E.2d 278, 286 (Ind. Ct. App. 1989), trans. denied, "[C]hildren continue to grow up quickly; their physical, mental, and emotional development cannot be put on hold while their recalcitrant parent fails to improve the conditions that led to their being harmed and that would harm them further." A thorough

review of the record reveals that the juvenile court's judgment terminating Father's parental rights to M.B., A.B., and C.B. is supported by clear and convincing evidence. We therefore find no error.

Affirmed.

MAY, J., and VAIDIK, J., concur.