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IN THE COURT OF APPEALS OF INDIANA

IN THE INVOLUNTARY TERMINATION OF THE PARENT/CHILD RELATIONSHIP OF D.M., a minor child, and A.M., her Father Appellant-Respondent, vs. INDIANA DEPARTMENT OF CHILD SERVICES, Appellee-Petitioner and CHILD ADVOCATES, INC., Appellee-Guardian Ad Litem	)	No. 49A04-1001-JT-116

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Marilyn Moores, Judge
The Honorale Larry Bradley, Magistrate
Cause No. 49D09-0906-JT-030027

September 7, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

A.M. ("Father") appeals the involuntary termination of his parental rights to his child, D.M., claiming there is insufficient evidence supporting the juvenile court's termination order. We affirm.

Facts and Procedural History

Father is the biological father of D.M., born in April 1998. The facts most favorable to the juvenile court's judgment reveal that in early April 2008, the Indiana Department of Child Services, Marion County ("MCDCS") filed a petition alleging D.M. was a child in need of services ("CHINS") because D.M.'s biological mother and sole legal guardian had failed to successfully complete substance abuse treatment and other services offered through a November 2007 Informal Adjustment agreement, tested positive for cocaine on multiple occasions, and failed to ensure that D.M. regularly attended school. D.M. was subsequently adjudicated a CHINS, removed from the care of his mother, and placed in relative care.[1]

At the time of D.M.'s removal, Father was neither married to nor living with D.M.'s mother. Despite diligent efforts and a recent address, MCDCS was unable to make contact with Father. In September 2008, Father's whereabouts remained unknown and, following a default hearing, the juvenile court entered a default judgment against

[1] D.M.'s biological mother, C.H., signed a voluntary consent for D.M.'s adoption prior to the termination hearing and does not participate in this appeal. In addition, D.M.'s half-siblings who were also removed from D.M.'s mother in April 2008 are not Father's biological children and are not subject to the juvenile court's termination petition. Consequently, we limit our recitation of the facts to those pertinent solely to Father's appeal of the termination of his parental rights to D.M.

Father, proceeded to disposition, and formally removed D.M. from Father's care. The dispositional order further stated that no services were to be ordered for Father until he appeared in court and demonstrated a desire and ability to care for D.M.

In December 2008, Father appeared for a review hearing, denied the allegations of the CHINS petition, and requested counsel. Following Father's appearance in court, MCDCS immediately referred Father for a comprehensive family profile in order to determine what, if any services, Father might need. Based upon the resulting recommendations, MCDCS referred Father for random drug screens and home-based counseling. MCDCS also informed Father that he would need to obtain suitable housing in order to achieve reunification with D.M. At the time, Father lived with his girlfriend and her minor son in the girlfriend's small, one-bedroom apartment.

Father tested positive for alcohol in June 2009, although the original request had been made a month earlier. In addition, Father's compliance with random drug screen requests continued to be inconsistent, allegedly due to Father's work schedule, so MCDCS authorized the home-based counselor to administer the drug screens to Father at his home. The home-based counselor became concerned, however, when she began to observe "suspicious" activities occurring and unusual people visiting during Father's supervised visits with D.M. Tr. p. 27. Consequently, in July 2009, the home-based counselor recommended Father undergo a complete drug and alcohol assessment. The home-based counselor also requested supervised visits with D.M. be moved from Father's home to a "safer" place outside the community. Id. Father never participated in the substance abuse evaluation and tested positive for cocaine in October 2009.

Regarding visitation, although Father's visits with D.M. were fairly consistent, Father would oftentimes bring friends and extended family members to participate in his visits with D.M., rather than spend the time alone with D.M. developing his father-son relationship, as was repeatedly recommended by MCDCS and service providers.

MCDCS filed a petition seeking the involuntary termination of Father's parental rights to D.M. in June 2009. An evidentiary hearing on the termination petition was held in January 2010. Father failed to appear for the termination hearing, but was represented by counsel. During the hearing, evidence was presented showing Father was homeless, unemployed, had an extensive criminal history, and had failed to successfully complete home-based counseling. Father had also failed to pay any court-ordered child support for D.M. and had failed to visit with D.M. for the two scheduled visits immediately preceding the termination hearing.

At the conclusion of the termination hearing, the juvenile court took the matter under advisement. On January 15, 2010, the juvenile court issued its judgment terminating Father's parental rights to D.M. Father now appeals.

Discussion and Decision

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 a termination of parental rights, we will not reweigh the evidence or judge witness credibility. In re D.D., 804 N.E.2d 258, 265 (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 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.

Here, in terminating Father's parental rights, the juvenile court entered specific factual findings and conclusions. 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 parents 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 . . . .

Ind. Code § 31-35-2-4(b)(2)(B).[2] The State's burden of proof for establishing these allegations is one of "clear and convincing evidence." Ind. Code § 31-37-14-2. If the juvenile 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. Ind. Code § 31-35-2-8(a).

Father's sole allegation on appeal challenges the sufficiency of the evidence supporting the juvenile court's findings as to subsection 2(B) of the termination statute set forth above. Initially, 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).

[2] Indiana Code section 31-35-2-4 was amended by Pub. L. No. 21-2010, § 8 (eff. March 12, 2010). The changes to this statute became effective in March 2010 following the filing of the termination petition herein and are not applicable to this case.

When 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. 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 (here, MCDCS) 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 resulting in D.M.'s removal and continued placement outside of Father's care will not be remedied, the juvenile court made several pertinent findings. Specifically, the juvenile court found as follows:

> 4. There is a reasonable probability that the conditions that resulted in [D.M.'s] removal and continued placement outside the home will not be remedied by his father. [Father] appeared in the CHINS proceeding in September 2008. [MCDCS] referred services in which [Father] has either not participated [in] or successfully completed. Family case manager Mulvey felt there was nothing more [MCDCS] could do to motivate [Father] in completing services. At the time of this trial, [Father] did not have the ability to provide for [D.M.'s] needs due to unemployment and being homeless. He has demonstrated an unwillingness to be a parent to [D.M.] by words as well as by not completing services. This is especially demonstrated by the lack of visitation and participation with home[-]based services in the weeks prior to trial. [Father] failed to attend his last pre-trial[hearing], mediation, and trial in this termination matter.

Appellant's App. p. 10. The juvenile court also specifically found that Father had "not addressed [his] substance use. . . ." Id. at 11. A thorough review of the record leaves us satisfied that clear and convincing evidence supports these findings, which in turn support the juvenile court's ultimate decision to terminate Father's parental rights to D.M.

Testimony from family case manager Mary Mulvey and other service providers makes clear that, at the time of the termination hearing in 2010, Father had failed to complete reunification services and remained unable to demonstrate he is both capable of and willing to provide D.M. with a safe and stable home environment. During the termination hearing, Mulvey confirmed that MCDCS had been unable to locate Father despite multiple attempts to do so for approximately eight months at the beginning of the CHINS case. Mulvey went on to explain that after Father finally contacted MCDCS, he explained he had been "in and out of jail," and "working in Chicago" and therefore had not been able to participate in services even though he "had a pretty good idea what was going on" in D.M.'s case. Tr. p. 24. Mulvey also confirmed that Father had failed to

complete home-based services, including a substance abuse evaluation, had not paid child support or taken any financial responsibility for D.M. during the underlying proceedings, and had tested positive for alcohol and cocaine. In addition, Mulvey testified Father admitted to her the week before the termination hearing that he was unemployed and living with various friends and relatives.

Regarding visitation, Mulvey informed the court that although Father had been "pretty consistent" in the past, he had failed to attend the two most recent scheduled visits with D.M. Id. at 29. In addition, Mulvey testified that although she informed Father D.M. felt "uncomfortable" with Father regularly bringing other family members to their visits and requested that Father refrain from doing so in the future so that he and D.M. could "establish a better relationship one[-]on[-]one," Father continued to regularly bring guests to visits with D.M. Id. We have previously explained 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 366, 372 (Ind. Ct. App. 2007), trans. denied (internal quotation omitted).

Finally, when asked whether Father should be given additional time to "complete services and reunify with [D.M.]," Mulvey answered in the negative and explained:

> [Father] has had since January 2009 . . . and has not made any headway in any [services]. [Home-based counseling,] in particular, . . . is the service that comes to you, comes to your home and they've . . . bent over backwards to get in touch with him and communicate with him to make sure he knows what he needs to do . . . they [services] just have not been completed. . . . He wanted us to look into placing [D.M.] with [Father's] brother. It seemed as though [Father] just didn't want to have his [parental]

> rights terminated[,] but if [D.M.] was somewhere, that it was okay. So we never got a really strong impression that [Father] was incredibly motivated to reunify with [D.M.].

Id. at 34-35. Similarly, in explaining why he recommended termination of Father's parental rights, Guardian ad Litem Mark Bass testified:

> [Father], the legal father of [D.M.,] has expressed to us that he thought [D.M.] was in the best place for him [in foster care] and [Father] hasn't shown for the mediation . . . for this case or for this [termination] hearing. And he hasn't completed all the. . . services offered to him to show that he's a capable parent for [D.M.].

Id. at 42.

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, we conclude that MCDCS presented clear and convincing evidence to support the juvenile court's findings cited above and its ultimate conclusion that there is a reasonable probability the conditions leading to D.M.'s removal or 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.

We 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.

Affirmed.

BAKER, C.J., and NAJAM, J., concur.