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IN THE
COURT OF APPEALS OF INDIANA

In the Matter of the Termination of the Parent-Child Relationship of D.B. and A.B., Minor Children, and R.B., Their Father.	)	
R.B.,	)	
Appellant-Respondent,	)	
vs.	)	No. 87A01-1001-JT-107
INDIANA DEPARTMENT OF CHILD SERVICES,	)	
Appellee-Petitioner,	)	

APPEAL FROM THE WARRICK SUPERIOR COURT
The Honorable Keith A. Meier, Judge
Cause No. 87D01-0903-JT-18 and -19

September 17, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

R.B. ("Father") appeals the involuntary termination of his parental rights to his children D.B. and A.B. Father challenges the sufficiency of the evidence supporting the trial court's termination order.

We affirm.

FACTS AND PROCEDURAL HISTORY

Father is the biological father of D.B., born in September 1999, and A.B., born in May, 2001.[1] The facts most favorable to the trial court's judgment reveal that in July 2008, the children were taken into emergency protective custody after the Indiana Department of Child Services, Warrick County ("WCDCS"), received a referral from local law enforcement that the children, who had been left in the care of an unrelated third party two days earlier, had been found home alone. Mother's whereabouts were unknown, but it was later determined that Mother had been arrested on several charges including criminal trespass, criminal mischief, and possession of paraphernalia. Father was also incarcerated at the time of the children's removal and unavailable to care for the children.

WCDCS filed petitions under separate cause numbers alleging D.B. and A.B. were children in need of services ("CHINS"), and following a detention hearing, the children were placed in relative care with their maternal grandmother. In September 2008, the trial court adjudicated both children CHINS, and in October 2008, following a dispositional hearing, D.B. and A.B. were formally removed from the care and custody of

[1] The children's biological mother, L.B., voluntarily relinquished her parental rights to both children in March 2009 and does not participate in this appeal. Consequently, we limit our recitation of the facts to those pertinent solely to Father's appeal.

both parents. Reunification services were never referred for Father due to his ongoing incarceration.

In March 2009, WCDCS filed petitions seeking the involuntary termination of Father's parental rights to D.B. and A.B. A consolidated evidentiary hearing was held in December 2009. Father was not present, but was represented by counsel. Evidence presented during the termination hearing indicated, among other things, that Father continued to be incarcerated in the Oklahoma Department of Correction serving a two-count sentence for rape and assault and battery with a dangerous weapon stemming from an act that occurred in February 2004, several years after the children were born. Father had been sentenced to serve forty years incarceration for the rape conviction and twenty years for the assault and battery conviction. The two counts were ordered to run concurrently, with all but the first twenty years suspended. Consequently, at the time of the termination hearing in December 2008, Father's earliest possible release date, assuming he continued to receive all good-time credits, was March 2014.

Following the evidentiary hearing, the trial court took the matter under advisement. In January 2010, the trial court issued its judgment terminating Father's parental rights to D.B. and A.B. 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 case, we will not reweigh the evidence or judge the credibility of the

witnesses. *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 that are most favorable to the judgment. *Id.* Moreover, 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, 208 (Ind. Ct. App. 1999), *trans. denied*.

Here, in terminating Father's parental rights, the trial court entered specific findings and conclusions. When a trial 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 trial 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*. These parental interests, however, are not absolute and must be subordinated to the child's interests when determining the proper disposition of a petition to terminate parental rights. *Id.* In addition, 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. *K.S.*, 750 N.E.2d at 836.

Before an involuntary termination of parental rights may 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]
>
> (C) termination is in the best interests of the child[.]

Ind. Code § 31-35-2-4(b)(2)(B) and (C) (2008).[2] Moreover, "[t]he 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 (2008)).

Father challenges the sufficiency of the evidence supporting the trial court's findings as to subsections (B) and (C) of the termination statute cited above. *See* Ind. Code § 31-35-2-4(b)(2). We pause to observe, however, that Indiana Code section 31-35-2-4(b)(2)(B) is written in the disjunctive. Thus, WCDCS was required to establish, by clear and convincing evidence, only one of the two requirements of subsection (b)(2)(B). *See L.S.*, 717 N.E.2d at 209. Although the trial court found both prongs of this subsection had been satisfied, because we find the issue to be dispositive, we need only consider

[2] 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 petition herein, they are not applicable to this case.

whether sufficient evidence supports the trial court's determination 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.

I. Remedy of Conditions

Father does not direct our attention to any evidence that he has participated in parenting, educational, or drug rehabilitation programs while incarcerated nor to any testimony presented during the termination hearing that supports his contention that WCDCS failed to satisfy its burden of establishing that there is a reasonable probability the conditions resulting in the children's removal or continued placement outside his care will not be remedied. Rather, Father simply makes the bald assertion that because he "was not sentenced to life in prison without parole," this particular circumstance "can and will be remedied." *Appellant's Br.* at 6.

In determining whether conditions causing removal or continued placement outside the care of a parent will 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 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*. Finally,

we point out that 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 its judgment terminating Father's parental rights to D.B. and A.B., the trial court specifically found that, at the time of the children's removal, the children "could not be placed with [Father] due to his incarceration in Oklahoma." *Appellant's App*. at 12. The court further found that neither child had ever been placed with Father during the underlying CHINS proceedings due to Father's "continued incarceration," a "No Contact Order" had been issued in January 2009 by the court forbidding contact between Father and the children, and Father had not seen D.B. and A.B. since the children were five and three years old respectively. *Id.*

Regarding Father's extensive criminal history, the trial court found Father had "a felony criminal record in both Indiana and Oklahoma and is currently serving a forty (40) year sentence in Oklahoma . . . ." *Id.* The court also acknowledged Father's criminal record consisted of convictions dating back to August 1994 and included convictions for rape, assault and battery with a dangerous weapon, residential entry and theft, receiving stolen property, resisting law enforcement, and operating a vehicle while intoxicated. The court also noted that the "sex offenses in Oklahoma occurred after the children were born . . . ." *Id.* at 13. In addition, the trial court found:

> 25. [Father] has had approximately seventeen (17) months in which to remedy the reasons for the children's initial and continued placement outside of his care. [Father's] history of involvement with the

> criminal justice system, incarceration during the pendency of the [CHINS] cases and the likelihood of more years of incarceration indicate that he is unlikely to remedy the reasons for continued placement of the child[ren] outside of his care.
>
> * * *
>
> 27. [Father's] current incarceration is a condition that is unlikely to be remedied before 2014. Given his criminal history and history of incarcerated sentences, his ability to be available for and supervise the children is by no means certain.
>
> 28. Due to [Father's] incarceration in Oklahoma, no services have been provided to [Father] to assist him in reunification with the children.

Id. The evidence most favorable to the judgment supports these findings, which in turn support the trial court's conclusion that there is a reasonable probability the conditions resulting in the children's removal from Father's care will not be remedied.

Testimony from various witnesses during the termination hearing makes clear that Father was incarcerated at the time of the children's removal, remained incarcerated at the time of the termination hearing, and would continue to be incarcerated until at least March 2014, a minimum of four years following the termination hearing *if* he continues to earn good-time credits. In addition, the record is completely devoid of any evidence Father ever participated in any services or programs while incarcerated that were designed to improve his ability to parent D.B. and A.B. upon his release. Finally, in recommending termination of Father's parental rights to the children, WCDCS family case manager Misty Patterson ("Patterson") confirmed that the children had not seen Father since their removal from Mother in 2008, "ha[d] not indicated that they remember anything about their father," and testified that "the only time [Father] wasn't incarcerated

would be when [D.B.] was between three and five [years old] and [A.B.] was between one and three [years old.]" *Tr*. at 19-20.

As noted above, 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 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, at the time of the termination hearing, Father was incarcerated, not eligible for release until March 2014 at the earliest, and unable to demonstrate he would be capable of providing D.B. and A.B. with a safe and stable home environment upon his eventual release from incarceration. This court has repeatedly recognized that "[i]ndividuals who pursue criminal activity run the risk of being denied the opportunity to develop positive and meaningful relationships with their children." *Castro v. State Office of Family & Children*, 842 N.E.2d 367, 375 (Ind. Ct. App. 2006), *trans. denied*. Based on the foregoing, we find Father's unsubstantiated assertions on appeal amount to nothing more than an invitation to reweigh the evidence, which we may not do. *D.D.*, 804 N.E.2d at 265.

II. Best Interests

We next consider Father's assertion that WCDCS failed to prove that termination of his parental rights is in the children's best interests. Father admits he was incarcerated at the time of the termination hearing "because he ha[d] been convicted of some serious and troubling crimes." Appellant's Br. at 7. Father nevertheless asserts, however, that because the children were in the care of their maternal grandmother at the time WCDCS filed its termination petitions and would likely remain there, there "was no reason to

proceed with the termination [as far as the children's daily lives were concerned] and every reason in the world [to Father] to maintain the status quo for just a little while longer." *Id.* Father further asserts that terminating his parental rights "before he had a chance to participate in services . . . when he expected to be available in the relatively near future was unnecessary overkill . . . akin to amputation when a band-aid would suffice." *Id.* Father's assertions are unpersuasive.

In determining what is in the best interests of a child, the trial 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 trial 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 both the case manager and child 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 addition to the findings previously cited, the trial court made several additional pertinent findings in determining that termination of Father's parental rights is in the children's best interests, including the following:

> 30. The children have waited for over a year for permanency. They are thriving in their current placement and have bonded with their

maternal grandmother, the current foster parent. The children are receiving support and services from [WCDCS].

31. The plan of care recommended by [WCDCS] and the Court Appointed Special Advocate ["CASA"] for the children if parental rights are terminated is to continue in foster placement with their grandmother and adoption. Adoption by the grandmother will allow the children to remain in placement with each other. The children have been in the grandmother's care for approximately seventeen (17) months.

32. [T]ermination of the parental rights of [Father], followed by adoption, is in the best interests of the children.

33. There is no evidence that [Father] will be able to bond with the children, seek legal custody of either or both of them, parent them appropriately and obey the law following release from his current incarceration.

34. The children are in immediate need of permanency and should not be required to wait for [Father] to be released from prison to have such permanency established.

Appellant's App. at 14. These findings, too, are supported by the evidence.

In recommending termination of Father's parental rights and adoption of the children by their maternal grandmother, case manager Patterson informed the court that when first removed from the family home, the children required up to nine hours a week of in-home therapy to address various behavioral issues including D.B.'s "violent tantrums," "bed-wetting," "outbursts" that lasted for hours, as well as A.B.'s "boundary issues," "nightmares," "crying," and "very whiney and clingy" behaviors. *Tr*. at 17. Patterson went on to state that, as of the date of the termination hearing, the children's demeanor had improved significantly, both children were on the honor roll at school, the bed-wetting had stopped, the outbursts and "whiney" behavior had lessened, and both

children were "doing really, really well." *Id.* at 18. Patterson also informed the court that the children "have not indicated that they remember anything about their father," and that D.B. "won't talk about [Father]" with service providers. *Id.* at 19-20.

Similarly, in recommending termination of Father's parental rights, CASA Peggy Forbes ("Forbes") confirmed that D.B. was "doing very well in school," was "proud of her accomplishments," and was no longer "inward and hard to communicate with," but instead could now communicate "very well" and was "eager to talk" about the activities she was involved in. *Id.* at 29. Forbes also stated that A.B. was less "clingy," and "proud also of her accomplishments." *Id.* When asked about how the children get along with their grandmother, Forbes replied, "[T]hings are going very well at home from [the children's] perspective and their sharing with me," further commenting that the children "respect their grandmother" and "speak well of her." *Id.* at 30. When asked to explain why she believed termination of Father's parental rights is in the children's best interests, Forbes answered:

> The [children] have not had stability in their lives. And the grandmother is offering them a safe, nurturing environment with rules[,] and is offering them programming opportunities, [] Scouts, [and] . . . has complied with all of the training opportunities and had been eager to complete the process and has shown a genuine interest in the [children]. . . . [S]he has done everything . . . that needed to be done to provide a good, safe, warm environment and nurturing [sic] for the [children].

Id. at 30-31.

Based on the totality of the evidence, including Father's ongoing incarceration and current inability to provide the children with a safe and stable home environment, extensive criminal history, and lack of prior involvement in the children's lives, coupled

with the testimony from Patterson and Forbes recommending termination of Father's parental rights referenced above, we conclude that there is sufficient evidence to support the trial court's determination that termination of Father's parental rights is in D.B.'s and A.B.'s best interests. *See, e.g.*, *In re A.I.*, 825 N.E.2d 798, 811 (Ind. Ct. App. 2005) (concluding that testimony of court-appointed 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*.

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.

Affirmed.

RILEY, J., and BAILEY, J., concur.