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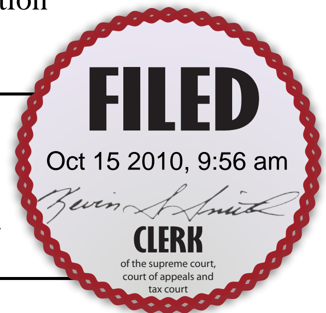

IN THE COURT OF APPEALS OF INDIANA

IN THE MATTER OF THE INVOLUNTARY TERMINATION OF THE PARENT-CHILD RELATIONSHIP OF E.Y. and L.Y.,

C.Y. (Father),

Appellant-Respondent,

vs.

MONTGOMERY COUNTY DEPARTMENT of CHILD SERVICES,

Appellee-Petitioner.

No. 54A01-1005-JT-229

APPEAL FROM THE MONTGOMERY CIRCUIT COURT
The Honorable Steven David, Special Judge
Cause No. 54C01-0909-JT-300
54C01-0909-JT-301

October 15, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

C.Y. ("Father") appeals the involuntary termination of his parental rights to his children, L.Y. and E.Y., alleging there is insufficient evidence to support the trial court's judgment. Concluding clear and convincing evidence supports the trial court's judgment, we affirm.

Facts and Procedural History

Father is the biological father of L.Y., born in May 1998, and E.Y., born in May 1999 (collectively referred to as "the children").[1] The facts most favorable to the judgment reveal that in October 2008 the Indiana Department of Child Services, Montgomery County ("MCDCS"), filed a petition alleging L.Y. and E.Y. were children in need of services ("CHINS") after receiving and substantiating several reports of neglect and lack of supervision involving the children during the previous month. Reports to MCDCS alleged, among other things, both parents were partying, drinking alcohol, and using and selling their prescription drugs in the home while the children were present. Subsequent investigations revealed the family home had not had running water for over a month, the children were often observed outside late at night without supervision, and the mother would frequently

[1] The children's biological mother voluntarily relinquished her parental rights to the children in February 2009 and is not a party to this appeal. A third child, who is a half-sibling to L.Y. and E.Y. but is not Father's biological child, was also living in the family home. The third child is not subject to the trial court's termination order involved herein. Consequently, we limit our recitation of the facts to those pertinent solely to Father's appeal of the termination order pertaining to L.Y. and E.Y.

drink alcohol while taking morphine for pain to the extent that the children were oftentimes unable to wake her when they returned home from school. In addition, Father had been incarcerated since August 2008 on domestic abuse charges involving the mother and other charges.

In early November 2008, Father pled guilty and was convicted of Class D felony domestic battery and contributing to the delinquency of a minor (stemming from an unrelated charge filed in April 2008). Father was sentenced to twenty-four months[2] on the domestic battery charge and thirty days time served on the contributing to the delinquency of a minor charge. Father was later released from incarceration and placed on probation. The terms of Father's probation required Father to consult his doctor to find a non-addictive, non-habit-forming alternative to the prescriptions he had been taking and to comply with the court's no-contact order relating to the mother.

On November 22, 2008, law enforcement personnel discovered Father had violated the trial court's no-contact order when Father was found hiding behind a closet door at the mother's home. Father was arrested and later plead guilty to Class A misdemeanor invasion of privacy and to violating the terms of his probation. He remained incarcerated until February 2009.

Meanwhile, although still incarcerated, Father attended a hearing on MCDCS's CHINS petition in December 2008. Father admitted to the allegations of the CHINS petition,

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[2] Of the twenty-four-month sentence, the court ordered 120 days executed, the balance suspended, and Father placed on probation. In addition, the court found Father had accrued 116 days good time credit against his sentence.

the children were adjudicated CHINS, and the trial court proceeded to disposition the same day. The dispositional order allowed the children to remain in the mother's care with the aid of home-based services and directed Father to participate in a variety of services upon his release from incarceration, including individual therapy and couples' counseling. Several weeks later, however, the dispositional order was modified, and the children were placed in licensed foster care.

Upon his release from incarceration in February 2009, Father contacted MCDCS and began participating in reunification services. Although Father failed to secure full-time employment and independent housing, Father regularly participated in visitation with the children, which progressed from fully supervised visits to "semi-supervised," and ultimately to trial overnight visits. Transcript at 75. Father was also referred to Family Interventions for family preservation services including budgeting and housing assistance, as well as individual therapy to address anger management and substance abuse issues.

Although Father participated in individual counseling, he continued to minimize his problems with domestic violence and substance abuse. In addition, Father remained homeless and was living with friends until May 2009 when he obtained independent housing after receiving rent assistance through HUD. Shortly thereafter, MCDCS began receiving reports that Father was allowing unauthorized people to come into the home during his visits with the children. During the children's second overnight visit with Father in July 2009, Father was arrested in the presence of the children after Father's probation officer visited the

residence and discovered a bottle of Xanax in the home containing several pills, as well as persons in the home with whom Father had been ordered not to associate.

In September 2009, MCDCS filed a petition seeking the involuntary termination of Father's parental rights to the children. An evidentiary hearing on the termination petition was held in February 2010. At the time of the termination hearing, Father, who plead guilty to class D felony possession of a controlled substance and to violating the terms of his probation, remained incarcerated with an earliest projected release date of May 2011. In addition, Father had not completed any of the court-ordered reunification services and had not maintained any contact with MCDCS or the children while incarcerated. On May 18, 2010, the trial court issued an order terminating Father's parental rights to L.Y. and E.Y. 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 neither reweigh the evidence nor 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 trial 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 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. However, a trial 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 . . . .

Ind. Code § 31-35-2-4(b)(2)(B) (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 1257, 1260-61 (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's sole allegation on appeal challenges the sufficiency of the evidence supporting the trial court's findings as to subsection 2(B) of the termination statute cited above. See Ind. Code § 31-35-2-4(b)(2)(B).

II. Conditions Not Remedied

Initially, we observe that Indiana Code section 31-35-2-4(b)(2)(B) is written in the disjunctive. It therefore requires the trial 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. 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

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

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).

Father claims that because the children were removed from their mother while he was incarcerated, coupled with the facts he contacted MCDCS "immediately" upon his release from incarceration and began participating in reunification services, that he "complied with all of the services requested of him." Appellant's Brief at 10. Father further asserts his "progress in services is reflected by the fact that his visitation with his [children] had been expanded . . . to overnights." Id. at 9-10. Father therefore contends MCDCS failed to present clear and convincing evidence that there is a reasonable probability the conditions resulting in the children's removal or continued placement outside his care will not be remedied.

In making such a determination, 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, 512 (Ind. Ct. App. 2001), trans. denied. The trial 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 trial 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 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 trial court acknowledged Father's initial participation in services upon his release from incarceration in February 2009, stating Father "did attempt to set up and be a father" during the "interim period before his second and current incarceration." Appellant's Appendix at 20. The court also acknowledged that Father "has always worked 'side jobs,'" but thereafter found that Father's side jobs "cannot support the two children." In addition, the trial court found:

> 31. While [sic] [Father] testified that he wants to "get out of jail and get services," he has no place to live when he is released and no plan for himself or his children. He stated he wanted to "start over." . . . The children deserve better. [Father] has promised to "do what he has to do to stay out of trouble[,]" but he has said that before.
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> * * *
>
> 34. [Father] testified that he "pretty much blames" [the children's mother] for his problems. This is not a fair statement and reflects poorly upon his ability to take responsibility for his actions and does not bode well for his future. [Father] knowingly allowed persons to have contact with the children that [MCDCS] had specifically told him could not be present during his time with his [children]. [Father] admitted to not following the rules of [MCDCS].
>
> 35. [Father's] future is uncertain. Currently[,] his outdate, assuming good behavior, is May of 2011, one year from now. This is much too long for the children to remain in limbo awaiting their father's release from jail. In addition[,] his release from jail, if it happens, will be followed by the necessity of him seeking basic housing, a real job, and re-engaging with the children . . .

[T]his is of course speculative and dependent [up]on his success in staying out of trouble. His track record is not very good. Moreover, as of the date of the termination hearing, [Father] had no plan.

* * *

37. During the pendency of this matter, [Father] has been homeless on numerous occasions and has had to rely on friends for a place "to crash."

* * *

42. Father's future is uncertain at best. Consequently[,] his future ability to adequately parent the children is unlikely. . .

43. [Father] has serious work to do just to get his own life together, let alone be able to effectively parent two young [children].

* * *

46. [Father] has not written to [the children] or otherwise attempted to contact them. He has not requested to see them.

* * *

53. The [court-appointed special advocate ("CASA")] testified in favor of termination and adoption. He described in great detail . . . his support for the termination. He was very concerned that [Father] just cannot do what would be required of him to be a real father to the children. He also [alluded] to the great amount of work that needs to be done with the two [children] to get them mentally and emotionally healthy[,] due to all the previous damage done to them and that [Father] just can't do it.

57. [Father] has demonstrated that he loves his [children] very much[,] but that is all that he has demonstrated. He is not even able to subsist on his own without assistance[,] and he lacks even a remote understanding of his [children's] needs, particularly their mental and emotional issues.

* * *

60. [Father] has no place to live, no job prospects, no real job skills[,] and no real life skills. He has no plan other than to get out of jail and "start over."

> He has made no attempt to contact his children while incarcerated, no telephone calls, no letters, nothing.

Id. at 20-23. 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, at the time of the termination hearing, Father's circumstances remained largely unchanged inasmuch as Father was incarcerated and thus unavailable to parent the children. In addition, Father remained incapable of demonstrating he could provide the children with a safe and stable home environment. During the termination hearing, MCDCS case manager Harmony Jensen confirmed that Father failed to contact her regarding the children following the filing of the CHINS petition until his release from incarceration in February 2009. Jensen also confirmed that Father remained "homeless" and living with friends following his release from incarceration until May 2009. Tr. at 73. She further testified that in addition to receiving housing assistance from HUD, Father also received "utility assistance," "food stamps," and that his income was "inconsistent" and limited to "odd job roofing." Id. at 77.

Current MCDCS case manager Heidi Knoerzer also testified during the termination hearing. When asked whether, based on her involvement with the case, she agreed with the recommendation to terminate Father's parental rights to L.Y. and E.Y., Knoerzer answered in the affirmative. She further explained that she based her opinion on various factors including Father's "inconsistency" and his inability to "maintain suitable housing and environment for the children." Id. at 111. When asked if Father had informed her of "any indication of his

plans should he be released," Knoerzer informed the trial court that Father indicated he wanted to have his children, but he "didn't give [Knoerzer] any specifics in what he was going to do to accomplish that." Id. at 108.

In recommending termination of Father's parental rights, CASA Donald Thompson testified his initial concerns when assigned to the case were that Father "did not have a place of residence," was "unemployed," and "did not have any stable income to provide for the [children]." Id. at 138. Thompson later testified that when he met with Father at the Montgomery County Jail in December 2009 to discuss whether Father had a plan in mind "if and when the [children] were reunited with him," Father indicated he "did not have a plan at that time," and "he would just have to wait and see how things went." Id. at 143. Thompson was also "concerned" by the facts Father had not contacted Thompson since he was assigned to Father's case and "had not made any attempts or efforts to contact the [children] either [in writing] or otherwise" while incarcerated. Id.

Similarly, Family Interventions therapist Terry Randall informed the trial court that the issues he addressed with Father during therapy sessions focused on domestic violence, anger management, substance abuse, and how Father's anger and anxiety "contributed to family problems." Id. at 157. Randall further testified, however, that although there were "a couple of sessions" during which Father seemed to gain some "insight" into his problems, these sessions were followed shortly thereafter by "a rapid deterioration back to lots of blaming and minimizing statements." Id. at 158. When asked whether Father ultimately made any progress in therapy, Randall replied:

> [T]here was some progress in terms of his understanding how his behaviors would impact the children, but again it seemed to quickly deteriorate near the end of our sessions and ultimately with his actions of relapse and having substances in the home[,] I would have to say whatever [Father] had learned had not been applied.

Id. at 159. 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).

A careful review of the record leaves us satisfied that MCDCS presented clear and convincing evidence to support the trial 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 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, Father was incarcerated at the time of the termination hearing with an earliest possible release date not until May 2011, more than one year after the hearing. In addition, Father had failed to successfully complete a single court-ordered service and remained unable to demonstrate an ability to provide the children with a safe and stable home environment.

It was the trial court's responsibility to judge Father's credibility and to weigh his testimony regarding his future ability to properly care for the children against the abundant evidence demonstrating Father's history of domestic violence and drug use, failure to complete home-based counseling services, and past and current inability to provide the

children with a consistently safe and stable home environment, due in large part to his refusal to accept responsibility for his own actions and his repeated incarcerations. It is clear from the language of the judgment that the trial 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). Father's arguments to the contrary amount to an invitation to reweigh the evidence, and this we may not do. D.D., 804 N.E.2d at 264.

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 trial court's judgment terminating Father's parental rights to L.Y. and E.Y. is supported by clear and convincing evidence.

Affirmed.

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