

MEMORANDUM DECISION

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IN THE
Court of Appeals of Indiana

In the Termination of the Parent-Child Relationship of:

A.B., Am.B, and M.B. (Minor Children)

and

L.B. (Father),

Appellant-Respondent

v.

Indiana Department of Child Services,

Appellee-Petitioner

March 25, 2024

Court of Appeals Case No.
23A-JT-2293

Appeal from the Madison Circuit Court
The Honorable Stephen J. Koester, Judge
The Honorable T. Grey Chandler, Magistrate

Trial Court Cause Nos.
48C02-2301-JT-15

Memorandum Decision by Judge Riley
Judges Brown and Foley concur.

Riley, Judge

STATEMENT OF THE CASE

- [1] Appellant-Respondent, L.B. (Father), appeals the trial court's Order, terminating his parental rights to the minor children A.B., Am.B., and M.B. (collectively, Children).
- [2] We affirm.

ISSUES

- [3] Father presents this court with two issues, which we restate as:
- (1) Whether an inconsistency between the trial court's oral and written judgments requires remand; and
 - (2) Whether the trial court's Order terminating Father's parental rights to Children is clearly erroneous.

FACTS AND PROCEDURAL HISTORY

[4] Father and J.B. (Mother)¹ are the biological parents of A.B., born May 9, 2017, Am.B., born August 12, 2018, and M.B., born April 24, 2020. In 2018, Father was convicted of domestic battery against Mother. Father was allowed to serve his battery sentence on work release, but he absconded. On April 7, 2020, the State filed an Information, charging Father with failure to return to lawful detention. That same day, a warrant for Father's arrest was issued. As a result of his failure to return to lawful detention, the State also filed a petition to revoke Father's work release placement in the battery case. Father lived with his mother while he was a fugitive from justice, although he continued to have contact with Mother and Children.

[5] The Indiana Department of Child Services (DCS) became involved with this family in March of 2021 after receiving a report that Children had been left alone in Mother's home after a fight between Mother and Father. After Mother failed several drug screens, on May 18, 2021, DCS filed petitions seeking to have Children adjudicated as children in need of services (CHINS). On May 24, 2021, after a hearing, Children were removed from Mother's care based on allegations of domestic violence between Father and Mother, their violation of a no-contact order entered in Father's battery case, and drug abuse by Mother.

¹ Mother executed consents to Children's adoption. Mother does not participate in this

Children were placed with their maternal great aunt (Aunt), where they have remained ever since.

[6] On August 11, 2021, Mother admitted the allegations contained in the CHINS petition. Father's whereabouts were unknown to DCS. On September 1, 2021, the trial court entered a dispositional decree for Mother, ordering her to engage in reunification services. Mother did not comply with Children's case plan. Father remained at large, did not contact DCS, and did not appear for any of the CHINS hearings, including periodic review hearings, a June 15, 2022, permanency hearing, and an August 10, 2022, hearing to determine whether Children's permanency plan should include a concurrent plan of adoption.

[7] On October 18, 2022, Father was arrested on his active warrants. On November 9, 2022, the trial court held Father's initial hearing on DCS' CHINS petition, and Father admitted that he was unable to care for Children due to his incarceration. That same day, the trial court entered its dispositional decree directing Father to, among other things, contact DCS' Family Case Manager (FCM) every week to monitor compliance with the CHINS case, complete a substance abuse assessment and treatment, complete a domestic violence assessment and programming, and complete Fatherhood Engagement. Father subsequently pleaded guilty to failure to return to lawful detention and to violating the terms of his work release placement in his battery case, and on November 15, 2022, he was sentenced to two years in the Department of Correction (DOC), two years of Continuum of Sanctions (COS), and one year of probation.

- [8] After the entry of the dispositional decree, Father wrote one letter to FCM. FCM sent paperwork to Father's DOC facility but received no response. Despite the fact that substance abuse and parenting programs were available to him in the Department of Correction (DOC), Father did not complete either. While he was incarcerated, Father never requested visits with Children.
- [9] On January 26, 2023, DCS filed petitions to terminate Father's and Mother's parental rights to Children. On May 12, 2023, Mother executed consents to Children's adoption. On June 5 and June 12, 2023, the trial court held hearings on DCS' petitions. Children were doing well in their placement with Aunt, who provided appropriate care for them. Aunt acknowledged that Children had already been through "huge trauma[.]" (Transcript p. 108). The two older Children were scheduled to begin therapy. FCM opined that adoption of Children by Aunt was in their best interests and that Father could not care for Children due to his incarceration. Children's court appointed special advocate (CASA) observed that Children had adapted well to life with Aunt and that to pull them out of that life would be harmful to them. CASA felt that Children's adoption by Aunt was in their best interests and that even waiting six additional months for that to happen would be harmful to Children. CASA testified that it was also in Children's best interests that they grow up without DCS' continued presence in their lives and that prolonging the CHINS and termination proceedings kept that from happening. Mother testified that she and Father abused opioids and that he needed substance abuse treatment.

[10] Father also testified at the termination fact-finding hearing. Father felt that he was very involved in Children's lives, but he did not provide their correct ages when asked. Father had lived with his mother from July 2019 to July 2022 and, prior to his incarceration, he had seen Children on a weekly basis. Since his incarceration, Father had contact with Children on the phone through telephone calls with his mother. Father maintained that he was not aware of DCS' involvement with Children prior to his initial hearing in the CHINS proceedings. Father was scheduled to begin Fatherhood Engagement and was enrolled in a culinary arts class. Father acknowledged that he had not completed substance abuse or domestic violence assessments. Father had worked for Prairie Farms in the past. Father planned to return to that work, but he had not been in contact with his former employer since his incarceration. Father contested the termination of his parental rights, but he felt that it was appropriate for Aunt to care for Children. At the conclusion of the termination hearing, the parties stipulated that the DOC's website was accurate for the purpose of determining Father's earliest possible release date. The trial court ruled orally that DCS had established that there was a reasonable probability that the conditions that resulted in Children's removal and continued placement outside the home would not be remedied, but the trial court declined to find that Father's continued relationship with Children posed a threat to their well-being.

[11] On August 29, 2023, the trial court issued its written Order, terminating Father's parental rights to Children. The trial court entered the following relevant findings and conclusions:

16. [Father] had outstanding warrants during the pendency of the CHINS actions. A warrant was issued for [Father's] arrest on April 7, 2020, a year before the CHINS petitions were filed in May of 2021.

17. [Father] was aware of the warrant[s] but chose not to contact the police or turn himself in.

18. After the CHINS [p]etitions were filed [Father] had contact with [C]hildren but actively avoided contact with DCS and the [c]ourt because he did not wish to address the warrants[.]

19. [Father] took no action to surrender himself on the warrants so that he could participate in services and parent [C]hildren. In so doing, he placed his own desire to evade the law over his parental obligations.

* * * *

25. Even upon release, [F]ather would not be in a position to parent [C]hildren, being placed on [COS] and needing to establish housing and employment before he could offer any level of stable parenting for [C]hildren.

* * * *

28. Since being under [the] dispositional order of the [c]ourt, [Father] has not completed any services.

* * * *

31. [] The [c]ourt does not place great weight on [Father's] testimony that he was always there for [C]hildren and helped raise them when he doesn't know their ages.

* * * *

37. [C]hildren are very settled, content[,] and well cared for in their current placement.

38. Review of the [o]rders issued by the CHINS court, which this [c]ourt finds significant regarding the overall trajectory of those cases, reflects Father's absence followed by [no] attempt to avail himself of opportunities and services that would allow him to safely reunify with [C]hildren.

* * * *

40. [Aunt] has adequate space in her home for [C]hildren to grow and thrive there.

41. [Aunt] has access to adequate financial resources to ensure that [C]hildren's basic needs are met going forward.

42. To allow [C]hildren to continue to languish in the child welfare system [in] the hope that Father will, at this late date, be shortly released from his current incarceration, establish himself sufficiently to meet his own needs, and overcome years of lack of personal stability sufficiently to be able to meet [C]hildren's needs is unrealistic and not in [C]hildren's best interest[s].

(Appellant's App. Vol. II, pp. 12-13). The trial court noted that, according to the DOC's website, as of the signing of its Order, Father's earliest possible release date was December 12, 2023. The trial court concluded that DCS had established that there was a reasonable probability that the conditions that

resulted in Children’s removal and continued placement outside the home would not be remedied by Father; however, in contravention to its oral ruling, the trial court’s written order provided that DCS has also established that Father’s continued relationship with Children posed a threat to their well-being. The trial court also concluded that termination of Father’s parental rights was in Children’s best interests.

[12] Father now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Standard of Review

[13] Father appeals the trial court’s Order, terminating his parental rights to Children. The standard of review applicable to such matters is as follows:

We affirm a trial court’s termination decision unless it is clearly erroneous; a termination decision is clearly erroneous when the court’s findings of fact do not support its legal conclusions, or when the legal conclusions do not support the ultimate decision. We do not reweigh the evidence or judge witness credibility, and we consider only the evidence and reasonable inferences that support the court’s judgment.

Matter of Ma.H., 134 N.E.3d 41, 45 (Ind. 2019) (internal citations omitted). A trial court’s findings of fact are only clearly erroneous if there is no evidence or reasonable inferences from the evidence in the record to support them. *X.S. v. Ind. Dep’t of Child Servs.*, 117 N.E.3d 601, 605 (Ind. Ct. App. 2018). For the purpose of our review, we take any uncontested factual findings as true. *Matter of C.C.*, 170 N.E.3d 669, 678 (Ind. Ct. App. 2021). A trial court’s judgment

terminating a parent's rights is clearly erroneous only if "the findings do not support the court's conclusions or the conclusions do not support the judgment thereon." *A.B. v. Ind. Dep't of Child Servs.*, 61 N.E.3d 1182, 1188 (Ind. Ct. App. 2016).

II. *Termination of Father's Parental Rights*

[14] The United States Supreme Court and the Indiana Supreme Court have both observed that a parent's right to raise his children is "perhaps the oldest of the fundamental liberty interests." *Matter of Bi.B.*, 69 N.E.3d 464, 466-67 (Ind. 2017) (quoting *Bester v. Lake Cnty. Office of Family & Children*, 839 N.E.2d 143, 147 (Ind. 2005), in turn quoting *Troxel v. Granville*, 120 S.Ct. 2054, 2060 (2000)). This traditional right of parents to raise their children, although cherished and protected, is not absolute, and that right may be terminated if parents are unable or unwilling to meet their parental responsibilities. *In re N.G.*, 51 N.E.3d 1167, 1169 (Ind. 2016). Termination of parental rights is an extreme sanction that is intended as a measure of last resort that is available only when all other reasonable efforts have failed. *M.E. v. Ind. Dep't of Child Servs.*, 119 N.E.3d 1098, 1103 (Ind. Ct. App. 2019). Given that termination is an extreme remedy impacting a significant parental right, before a termination of parental rights is merited, our legislature has required DCS to allege and prove certain facts by clear and convincing evidence, including that one of the following is true:

- (i) There is a reasonable probability that the conditions that resulted in the child's removal or the reasons for placement outside the home will not be remedied[;]

(ii) There is a reasonable probability that 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)(i-ii). In addition to these facts, DCS must also establish that termination is in the best interests of the child. I.C. § 31-35-2-4(b)(2)(C). Father challenges the trial court's conclusions regarding his remediation of the conditions that resulted in Children's removal and that termination is in Children's best interests.

A. Discrepancy Between the Trial Court's Oral and Written Orders

[15] Before we reach the merits of Father's claims, we address his contention that remand is necessary because the trial court orally ruled at the conclusion of the termination fact-finding hearing that DCS had not established that his relationship posed a threat to Children's well-being, while its written Order provided that it did. In the criminal law context, when a trial court's written and oral sentencing statements conflict, we examine both statements to discern the trial court's intent, rather than presuming the superior accuracy of the oral statement. *McElroy v. State*, 865 N.E.2d 584, 589 (Ind. 2007). We then have the option of crediting the accurate statement or remanding for resentencing. *Id.* Father urges us to accept the trial court's oral judgment and to remand for correction of the written Order.

[16] We conclude that no remand is necessary. As set forth above, the statutory factors at issue are written in the disjunctive, meaning that DCS may make its case by proving either the 'conditions' element or the 'threat' element. I.C. §

31-35-2-4(b)(2)(B)(i-ii); *see also Bester*, 839 N.E.2d at 153 n.5 (noting that DCS is required to prove either of the factors listed in section 31-35-2-4(b)(2)(B), but not both). As set forth more fully below, DCS established by clear and convincing evidence that there was a reasonable probability that the conditions that resulted in Children’s removal and continued placement outside of Father’s care would not be remedied, and the trial court concluded in both its oral and written judgments that DCS had established the ‘conditions’ element. We will not reverse on appeal unless a party’s substantial rights have been affected. Ind. Trial Rule 61. On appeal, Father does not argue that he has been prejudiced in any way by the trial court’s written judgment, let alone that a failure to remand on this issue would be “inconsistent with substantial justice.” *Id.* Given the disjunctive nature of the statute, we conclude that Father’s substantial rights have not been prejudiced by the discrepancy. Accordingly, we do not remand for alteration of the trial court’s judgment.

B. Conditions Resulting in Children’s Removal and Continued Placement

[17] Father challenges the evidence supporting the trial court’s determination on this statutory element. When reviewing a trial court’s determination that there is a reasonable probability that the conditions that resulted in a child’s removal or the reasons for continued placement outside the home will not be remedied, we engage in a two-step analysis. *Matter of J.S.*, 133 N.E.3d 707, 715 (Ind. Ct. App. 2019) (citing *In re E.M.*, 4 N.E.3d 636, 643 (Ind. 2014)). First, we must identify the conditions that led to removal; second, we determine whether the evidence supports the trial court’s conclusion that there is a reasonable probability that those conditions will not be remedied. *Id.* When engaging in the second step of

this analysis, a trial court must judge a parent's fitness as of the time of the termination hearings, taking into account evidence of changed conditions, and balancing any recent improvements against habitual patterns of conduct to determine whether there is a substantial probability of future neglect or deprivation. *Id.* This delicate balance is entrusted to the trial court, and a trial court acts within its discretion when it weighs a parent's prior history more heavily than efforts made only shortly before termination. *Id.* Requiring a trial court to give due regard to changed conditions does not preclude it from finding that parents' past behavior is the best predictor of their future behavior. *Id.* When assessing whether a parent will remediate the conditions that resulted in removal, a trial court may properly consider the parent's prior criminal history, drug and alcohol abuse, and history of neglect, among other factors. *McBride v. Monroe Cnty. Office of Family and Children*, 798 N.E.2d 185, 199 (Ind. Ct. App. 2003). "The trial court may also consider the services offered to the parent and the parent's response to those services as evidence of whether conditions will be remedied." *S.L. v. Ind. Dep't of Child Servs.*, 997 N.E.2d 1114, 1123 (Ind. Ct. App. 2013).

[18] The reason for Children's continued placement outside of Father's care was his inability to care for Children, first while his whereabouts were unknown while he was a fugitive from justice from April 2020 to October 2022, and thereafter due to his incarceration. During the time when Father was a fugitive, he had contact with Children but did not make contact with DCS or attend any of the CHINS hearings because he wished to avoid being arrested on the active

warrants for his arrest. In doing so, as aptly found by the trial court, Father placed his own needs over those of Children. After Father was arrested, he admitted the CHINS allegations and was ordered to participate in reunification services as part of the CHINS dispositional decree, including completing a substance abuse assessment, a domestic violence assessment, and a parenting program. Father was also ordered to maintain weekly contact with DCS. Although substance abuse and parenting programs were available to Father while he was in the DOC, in the seven months prior to the termination fact-finding hearing, he had not completed either, and he had not completed any other programs to increase his ability to provide for Children's basic needs. Father's issues with domestic violence also went unaddressed. Although Father was scheduled to begin Fatherhood Engagement and was taking a culinary arts class, the trial court acted within its discretion when it declined to give weight to these actions taken shortly before the termination hearing. *Matter of J.S.*, 133 N.E.3d at 715. In addition, Father did not maintain contact with DCS, as Father wrote only one letter to DCS after he was incarcerated but made no attempt at communication with DCS thereafter. Although Father planned to return to his former employer and he had lived with his mother prior to being incarcerated, Father had not been in contact with his employer to confirm that he would be re-employed there, and there is no evidence before us that Father's mother's home is suitable for Children. In light of this evidence, we conclude that the trial court's determination that there was a reasonable probability that Father's inability to care for Children, even upon his release from incarceration, would not be remedied was supported by clear and convincing evidence.

[19] On appeal, Father only challenges the evidence supporting one of the trial court's factual findings, namely its oral finding that he "never" lived with Children. (Tr. p. 149). This finding does not appear in the trial court's written judgment. We agree with Father that this finding is not supported by the record, as there is evidence in the record that Father lived with Mother during the periods that they were getting along. However, given the other evidence supporting the trial court's 'conditions' conclusion, our confidence in the trial court's determination is not undermined. *See In re O.G.*, 159 N.E.3d 13, 19 (Ind. Ct. App. 2020) (concluding that the trial court's unsupported findings did not constitute reversible error where there was still sufficient evidence to support the trial court's ultimate conclusions), *trans. denied*.

[20] Father's main contention on appeal is that his incarceration was not sufficient to terminate his parental rights to Children. Our supreme court has held that incarceration alone is an insufficient basis for terminating parental rights. *K.E. v. Ind. Dept's of Child Servs.*, 39 N.E.3d 641, 643 (Ind. 2015). However, Father's rights were not terminated solely because he was incarcerated. Rather, Father had demonstrated a pattern of placing his own needs above those of Children when he refused to turn himself in on his active arrest warrants and failed to participate in the CHINS proceedings until he was arrested. In addition, after his incarceration, Father did not participate in the services that were available to him while he was in prison and, thus, did not make any progress toward reunification. Contrary to his implications on appeal that he might be available to parent Children while in COS after his release from the DOC, there is no

evidence before us that Father will qualify for a placement while in COS that will allow him to live with Children while working to support them. Father's argument that he is not chargeable with Mother's neglect because he was not living with Mother at the time of removal is equally unpersuasive, as Father's status as a fugitive from justice rendered placement of Children with him upon removal from Mother impossible, and it rendered Children's continued placement outside the home necessary. Lastly, Father argues that there was no evidence that he had the ability to comply with the trial court's dispositional decree while he was incarcerated. However, FCM specifically testified that substance abuse treatment such as Recovery While Incarcerated and parenting programming such as Thinking for a Change were available to Father, but he had not completed those programs. We have previously acknowledged that it would be unfair to hold a parent accountable for services that are not available in prison. *See, e.g., Matter of A.B.*, 130 N.E.3d 122, 129 (Ind. Ct. App. 2019) (declining "to hold against Mother her inability to participate in referred services because she was incarcerated"). However, here, where some services were available to Father in prison, yet he made no effort to avail himself of those services until shortly before the termination hearing, we conclude that the trial court's determination was supported by the evidence.

C. *Best Interests*

[21] Father also challenges the evidence supporting the trial court's determination that termination of his parental rights was in Children's best interests. Our supreme court has recognized that one of the most difficult aspects of a termination of parental rights determination is the issue of whether the

termination is in the child's best interests. *In re E.M.*, 4 N.E.3d at 647 (noting that the question "necessarily places the children's interest in preserving the family into conflict with their need for permanency"). The trial court's determination that termination was in a child's best interests requires it to look at the totality of the evidence of a particular case. *In re D.D.*, 804 N.E.2d 258, 267 (Ind. Ct. App. 2004), *trans. denied*. "In doing so, the trial court must subordinate the interests of the parents to those of the children involved." *Id.* We will uphold a trial court's 'best interests' determination where the evidence supports its conclusion that the conditions that warranted a child's removal and/or continued placement outside the home will not be remedied and the child's FCM and CASA recommend termination. *In re A.S.*, 17 N.E.3d 994, 1005 (Ind. Ct. App. 2014), *trans. denied*.

[22] Here, as we have already concluded, the evidence supported the trial court's 'conditions' conclusion. FCM and CASA both opined that termination was in Children's best interests. In addition, Children have adjusted to life with Aunt, are doing well in school, and will remain together in Aunt's household. While Father's release from incarceration was imminent when the trial court issued its Order, Father had made no progress towards being capable of providing stability for Children. This evidence supports the trial court's 'best interest' determination. *See id.*

[23] In arguing to the contrary, Father draws our attention to his bond with Children, his release date, which was approximately three months away from the date the trial court issued its termination Order, his employment prospects,

and the lack of evidence that prolonging the proceedings would negatively impact Children. However, prior to his incarceration, Father was not a daily presence in his Children's lives. After he was incarcerated, Father did not request visitation with Children. At the termination hearing, FCM acknowledged that, due to Children's young ages, she would not have them visit Father in prison, but Father did not request any other form of visitation such as regular telephone calls or videoconferencing. Father maintained that he spoke to Children through telephone calls with his mother, but there is no evidence before us as to how frequently that occurred. Therefore, it is unclear that Father actively maintained a bond with Children after he was incarcerated, something which was underscored by the fact that he did not know Children's correct ages at the termination hearing. In addition, Father had not been in contact with his prior employer, and he did not testify at the termination hearing that a job was guaranteed there upon his release, so his contention that he "had employment waiting for him when he was released" is not supported by the record. (Appellant's Br. p. 18). In addition, contrary to Father's argument on appeal, it was CASA's opinion that it was in Children's best interests that DCS no longer be an intrusive presence in their lives and that additionally delaying their adoption by Aunt for even six months would be harmful to them. A child's need for permanency is a central consideration in determining the child's best interests, and "children cannot wait indefinitely for their parents to work toward preservation or reunification." *In re E.M.*, 4 N.E.3d at 648. Father's arguments on this issue are largely requests that we consider evidence that does not support the trial court's determination and that

we reweigh the evidence. These arguments are unpersuasive, as they are contrary to our standard of review. *See Matter of Ma.H.*, 134 N.E.3d at 45. Accordingly, we find no clear error by the trial court. *See id.*

CONCLUSION

- [24] Based on the foregoing, we hold that Father has failed to demonstrate that any discrepancy between the trial court's oral and written termination Orders requires remand or that the trial court's termination Order is clearly erroneous.
- [25] Affirmed.

Brown, J. and Foley, J. concur

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