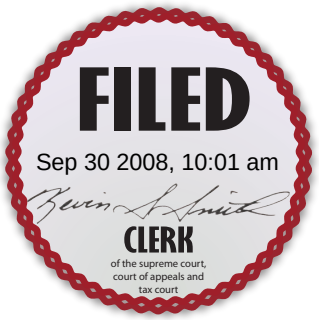

ATTORNEY FOR APPELLANTS:

BRETT M. HAYS
Marshall Law Office
Seymour, Indiana

ATTORNEYS FOR APPELLEE:

MARJORIE A. MILLMAN
Jackson County Department of Child Services
Seymour, Indiana

IN THE COURT OF APPEALS OF INDIANA

IN THE MATTER OF TERMINATION OF PARENT-CHILD RELATIONSHIP OF E.M.	)	
W.M., Father, and T.P., Mother,	)	
Appellants,	)	
vs.	)	No. 36A01-0712-JV-580
JACKSON COUNTY DEPARTMENT OF CHILD SERVICES,	)	
Appellee.	)	

APPEAL FROM THE JACKSON CIRCUIT COURT
The Honorable Bruce A. MacTavish, Judge
Cause No. 36D02-0801-JT-14

September 30, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Warren M. ("Father") appeals the involuntary termination of his parental rights to his son, E.M., in Jackson Circuit Court. Concluding that the trial court's judgment terminating Father's parental rights is supported by clear and convincing evidence, we affirm.

Facts and Procedural History

Father is the putative father of E.M., born on February 21, 2002. The facts most favorable to the trial court's judgment reveal that Father and Tina P. ("Mother") were never married, but had been in a "rocky" relationship for approximately five years and were living together, in Illinois, when E.M. was born. Tr. at 43. The parents separated approximately one year later, in February 2003, when Father moved out of the family home. Mother, who had maintained custody of E.M., left the family home the following day. All communication between Father, Mother, and E.M. thereafter ceased. Mother and the children subsequently moved to Indiana.

On January 13, 2004, the Jackson County Department of Child Services ("JCDCS") received a referral that E.M. had been left unsupervised in an automobile, had drunk gasoline from a can in the car, and had sustained burns in his mouth. The ensuing investigation revealed Mother had left E.M. and his half-brother, D.P., alone in the car and E.M. had sustained his injuries after D.P. poured gasoline on him. As a result of this incident, Mother signed a safety plan on January 14, 2004, and also signed a Program of Service Referral Agreement on January 22, 2004, thereby agreeing to participate in counseling services and case

management services through Quinco Behavioral Health Systems ("Quinco"). Mother never followed through with counseling and continually missed appointments with her caseworker. Mother also agreed to participate in parenting classes through Anchor House, but she only attended one session.

On May 28, 2004, Mother admitted herself to Quinco's inpatient drug rehabilitation program through Columbus Regional Hospital in Columbus, Indiana, in order to get help with her prescription drug problem. Mother initially placed the children with a cousin in Seymour, Indiana, and later moved them to other relatives' homes. Mother eventually contacted JCDCS caseworker Linda Griffith ("Griffith") stating that family members could no longer care for the children and requesting Griffith to place the children in foster care "until she could get her life together." Id. at 46. The JCDCS took custody of the children and filed a petition on June 15, 2004, alleging E.M. and his siblings were children in need of services ("CHINS") under separate cause numbers.

On July 27, 2004, an initial hearing on the CHINS petition was held wherein Mother admitted that the children were CHINS. Also at the hearing, Mother testified that Father was residing in West Salem, Illinois, but that she did not know his specific address because she had been avoiding contact with him due to Father's history of domestic violence. The trial court thereafter authorized the JCDCS to serve Father with notice of the dispositional hearing via publication.

A dispositional hearing was held on September 30, 2004. Father did not appear. Mother, who was still participating in in-patient treatment, also did not

appear. Following the hearing, the trial court ordered Mother to participate in a variety of services upon her release from in-patient treatment in order to achieve reunification with E.M. and his siblings.

For the majority of 2005, Mother was in and out of rehabilitation programs. When not in rehab, Mother lived in various places including family members' homes, with friends, and in shelters. At some point in 2005, Mother moved back to Illinois for approximately six months, but continued to visit with the children. During one visitation session with E.M., Mother asked Griffith if Father could accompany her to the next visitation. Griffith informed Mother that in order for Father to visit with E.M., the visitation would have to be supervised, and Father would have to bring picture identification, a criminal background history, and proof that he had either completed or was currently participating in domestic violence and substance abuse counseling. Mother stated she would provide Father with this information, and shortly thereafter, Mother gave Griffith some documentation indicating Father had participated in a domestic abuse intervention program. No additional information was provided to Griffith, however, and Father never attempted visitation with E.M.

In August 2005, following Mother's return to Indiana, E.M. and his siblings were returned to Mother through a reunification program in Georgetown, Indiana. However, Mother failed to comply with the requirements of the program and the children were again removed from Mother's care in February 2006. During the time she had regained custody of the children, Mother telephoned Father's sister

while Father happened to be visiting. Father spoke to both Mother and E.M. However, Father did not request visitation with E.M. Father did not speak with E.M. again.

On August 29, 2006, Father was taken into custody at the Illinois Department of Correction to begin serving sentences on convictions for residential burglary and aggravated battery. Father remained incarcerated until October 19, 2007. Meanwhile, Mother's compliance with court-ordered services did not improve. Mother also failed to maintain contact with the JCDCS. Similarly, Father had not made any contact with the JCDCS, participated in any court-ordered services, or appeared at any of the CHINS proceedings. Consequently, the JCDCS filed a petition to involuntarily terminate both Father's and Mother's parental rights to E.M.[1] Mother thereafter voluntarily terminated her parental rights to E.M. at a hearing held on February 22, 2007. Mother does not participate in this appeal.

A hearing on the termination petition pertaining to Father commenced on October 30, 2007. At the time of the termination hearing, Father, who had been released from prison approximately two weeks earlier, was unemployed and was living with his father. Father did not have a valid driver's license due to prior DUI convictions.

[1] Unfortunately, the record does not contain a copy of the petition to involuntarily terminate Father's and Mother's parental rights, thereby frustrating our review.

During the termination hearing, Father testified that he had attempted to contact Mother "a couple of times" by telephoning Mother's father ("Grandfather") after the couple initially separated, but that Grandfather had stated he did not know where Mother was living. Id. at 20. Father also testified that for approximately three-and-a-half years prior to his incarceration he had worked as a full-time roofer, but stated he had neither offered nor paid any financial support to E.M., either directly or through Grandfather, since the time he separated from Mother. Additionally, Father acknowledged he had never attempted to contact E.M. through Grandfather, had never sent any type of card, letter, or financial support to E.M., either through Grandfather or otherwise, and had made no attempt to contact Mother, E.M. or the JCDCS, either personally or through family members, at any time during his incarceration, even after learning of the termination proceedings. Father did, however, contact an attorney to represent him in opposing the involuntary termination of his parental rights to E.M. upon receiving notice of the termination proceedings. Father also admitted that his parental rights to two other biological children from a prior relationship with another woman had been terminated in 2005.

At the conclusion of the termination hearing, the trial court took the matter under advisement. On December 4, 2007, the trial court issued its order finding the JCDCS was not required to make reasonable efforts to reunify E.M. with Father and terminating Father's parental rights to E.M. This appeal ensued. On

August 25, 2008, upon request of this court, the trial court entered specific findings of fact and conclusions of law supporting its termination order.

Standard of Review

It is well-established that we observe 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). Thus, when reviewing the termination of parental rights, we will not reweigh the evidence or judge the credibility of the witnesses. In re D.D., 804 N.E.2d 258, 264 (Ind. Ct. App. 2004), trans. denied. We consider only the evidence and reasonable inferences that are most favorable to the judgment. Id.

Upon our request, the trial court made specific findings and conclusions in terminating Father's parental rights to E.M. Where the trial court enters specific findings of fact, we must first determine whether the evidence supports the findings, and second we determine whether the findings support the judgment. Bester v. Lake County Office of Family & Children, 839 N.E.2d 143, 147 (Ind. 2005). We will set aside the trial court's judgment terminating parental rights only if it is clearly erroneous. Id. A finding is clearly erroneous when there are no facts or inferences drawn therefrom that support it. In re D.D., 804 N.E.2d at 264. A judgment is clearly erroneous only if the findings do not support the trial court's conclusions or the conclusions do not support the judgment thereon. Quillen v. Quillen, 671 N.E.2d 98, 102 (Ind. 1996).

Discussion and Decision

The Fourteenth Amendment to the United States Constitution protects the traditional right of parents to establish a home and raise their children. Bester, 839 N.E.2d at 147. A parent's interest in the care, custody, and control of his or her children is perhaps the oldest of our fundamental liberty interests. Id. However, these parental interests are not absolute and must be subordinated to the child's interests when determining the proper disposition of a petition to terminate parental rights. In re M.B., 666 N.E.2d 73, 76 (Ind. Ct. App. 1996), trans. denied. Thus, parental rights may be terminated when the parents are unable or unwilling to meet their parental responsibilities. In re K.S., 750 N.E.2d at 836.

In order to terminate a parent-child relationship, the State is required to allege 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;
>
> (C) termination is in the best interests of the child; and
>
> (D) there is a satisfactory plan for the care and treatment of the child.

Ind. Code § 31-35-2-4(b) (1998).[2] If the trial court finds the allegations in the termination petition described in section four to be true, the court shall terminate the parent-child relationship. Ind. Code § 31-35-2-8 (1998). The State must establish each of these allegations by clear and convincing evidence. Egly v. Blackford County Dep.'t of Pub. Welfare, 592 N.E.2d 1232, 1234 (Ind. 1992). We further note that even if the trial court finds that reasonable efforts at reunification are not required, the JCDCS is still required to follow statutory procedures and present clear and convincing evidence establishing the elements of Ind. Code Section 31-35-2-4(b)(2). G.B. v. Dearborn County Div. of Family & Children, 754 N.E.2d 1027, 1032-33 (Ind. Ct. App. 2001), trans. denied.

Father asserts on appeal that the trial court's judgment is not supported by sufficient evidence. Specifically, Father argues the JCDCS failed to prove by clear and convincing evidence that continuation of the parent-child relationship poses a threat to E.M.'s well being, and that termination of his parental rights is in E.M.'s best interests. Initially, we note that Ind. Code Section 31-35-2-4(b)(2)(B) is written in the disjunctive. Thus, a trial court need only find one of the two requirements of subsection (B) have been satisfied. See In re L.S., 717 N.E.2d 204, 209 (Ind. Ct. App. 1999), trans. denied.

---

[2] Additional conditions not at issue in this case are also required to be alleged and proved before the termination of parental rights may occur pursuant to Indiana Code Section 31-35-2-4(b)(2)(A).

Here, the trial court found both requirements of subsection (B) to be true; that is to say, the trial court determined, based on the evidence, both that there is a reasonable probability the conditions resulting in E.M.'s removal and continued placement outside Father's care will not be remedied and that continuation of the parent-child relationship poses a threat to E.M.'s well-being. And in his brief to this court, Father does not challenge the trial court's finding that there is a reasonable probability the conditions resulting in E.M.'s removal and continued placement outside Father's care will not be remedied. In failing to do so, Father has waived review of this issue. See Davis v. State, 835 N.E.2d 1102, 1113 (Ind. Ct. App. 2005) (concluding that failure to present a cogent argument or citation to authority constitutes waiver of issue for appellate review), trans. denied. Nevertheless, given our preference to resolve a case on its merits, we will review the sufficiency of the evidence supporting the trial court's determination with regard to Indiana Code Section 31-35-2-4(b)(2)(B) by first considering whether the JCDCS presented clear and convincing evidence that there is a reasonable probability the conditions resulting in E.M.'s removal and continued placement outside Father's care will not be remedied.

When determining whether a reasonable probability exists that the conditions justifying a child's removal and continued placement outside the home will or will not be remedied, the 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. Additionally, the 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. Moreover, the JCDCS is not required to rule 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 a reasonable probability exists that the conditions leading to E.M.'s removal will not be remedied, the trial court made the following pertinent findings and conclusions:

> 5. That from the time [Father] left the child and his mother (approximately February 2003) thru the time he became incarcerated at the Illinois Department of Corrections (August of 2006) he provided no financial assistance to the child and had no contact with the child, other than one brief phone call six months prior to his incarceration. (Father stated he did not know where the child was located.)
>
> 6. That in 2005, the mother requested of the [JCDCS] that [Father] come for a visit with [E.M.], was told what paper work and identification he was to appear with but he did not appear.
>
> 7. That [Father] has convictions in the State of Illinois for the crimes of Residential Entry as a felony and Aggravated Battery as a felony.

8. That [Father] was incarcerated in the Illinois Department of Corrections from August 29th, 2006 thru October 19th, 2007 for the above[-]cited convictions.

9. That [Father] did make sporadic attempts to locate his child by contacting the child's maternal grandfather prior to his incarceration.

10. That [Father] did not hire an attorney or file any legal proceedings to try to gain custody or visitation with the child.

11. That [Father] testified he had no employment but planned to find a job, gain his driver's license back through the help of his parole program and live with his sister if he was allowed to be reunified with his child.

12. That the [JCDCS] has worked with this family since January 2004 (includes time working with the child in question[']s older siblings).

* * *

Conclusions of Law

1. Because [Father] had previously had his parental rights terminated as to two of his other children, this court entered an order on December 4th, 2007 finding that the [JCDCS] was not required to make reasonable efforts to reunify [Father] with his family as per Indiana Code [Section] 31-34-21-5.6(b)(4)(a).

* * *

3. That the [JCDCS] proved by clear and convincing evidence that there is a reasonable probability that 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, in the alternative, that the continuation of the parent-child relationship poses a threat to the well-being of the children.

a. Specifically, that part of the reason for the child's removal was the absence of the father from the home. That attempts to reunify him with his father who has a very limited plan for

> caring for himself and his child's health and well[-]being after having returned from over a four year absence from the child's life and after the child has no real recollection of his father poses a threat to the well-being of the child.

Trial Court's Judgment at 1-3. The evidence most favorable to the judgment supports the trial court's findings and conclusions set forth above. The record reveals that E.M. was initially removed from his parents' care because of their inability to care for and supervise him. At the time of E.M.'s removal, Father was no longer living with E.M. and his mother, was neither visiting with nor providing financial support for E.M., and was not participating in E.M.'s life in any way. The reason for E.M.'s continued placement outside of Father's care was his continuing absence and lack of emotional and financial support. Although the trial court acknowledged that Father had made "sporadic attempts" to get in contact with E.M. during the approximately two years prior to Father's incarceration, the evidence supports the trial court's additional finding that Father never hired an attorney or filed any legal proceedings in an attempt to gain custody of or visitation with E.M. 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.

At the time of the termination hearing, these conditions had not changed. Father, who had just recently been released from incarceration, was unemployed, did not have a valid driver's license, was living with a family member, and had no

ability to provide E.M. with the basic necessities of life. In addition, the record reveals that with the exception of one drug rehabilitation class, Father failed to avail himself of any services while incarcerated, such as parenting classes, nutrition classes, or individual therapy, in an attempt to better equip himself to properly care for E.M. upon his release from prison. The evidence further reveals that despite having received notification of the termination hearing and having hired an attorney to oppose said proceedings in February 2007, Father never contacted the JCDCS to request visitation with E.M., nor did Father attempt to contact E.M. by telephone or mail, either directly or through E.M.'s mother or grandfather.

The trial court "must assess the parent's ability to care for the children as of the date of the termination hearing." Rowlett v. Vanderburgh County Office of Family & Children, 841 N.E.2d 615, 621 (Ind. Ct. App. 2006), trans. denied. Moreover, a pattern of unwillingness to deal with parenting problems, in conjunction with unchanged conditions, supports a finding that there exists no reasonable probability that the conditions will change. Lang, 861 N.E.2d at 372. Based on the foregoing, we conclude the JCDCS presented clear and convincing evidence that there is a reasonable probability the conditions resulting in E.M.'s removal and continued placement outside of Father's care will not be remedied.[3]

[3] Having determined that clear and convincing evidence support's the trial court's determination regarding the remedy of conditions prong of Indiana Code Section 31-35-2-4(b)(2)(B), we need not address whether sufficient evidence supports the trial court's additional

We are unwilling to put E.M. on a shelf until Father is willing and capable of caring for him. The nearly four years he has already waited is long enough. See In re Campbell, 534 N.E.2d 273, 275 (Ind. Ct. App. 1989) (stating that the Welfare Department does not have to rule out "any possibility" of change and concluding that approximately two years without improvement is "long enough").

II. Best Interests

Next, we address Father's assertion that the JCDCS failed to prove termination of his parental rights is in E.M.'s best interests. We are mindful that in determining what is in the best interests of the child, the court is required to look beyond the factors identified by the 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 trial 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 a court-appointed special advocate that parental rights be terminated support a finding that termination is in the child's best interest. In re M.M., 733 N.E.2d 6, 13 (Ind. Ct. App. 2000).

---

finding that continuation of the parent-child relationship poses a threat to E.M.'s well-being. See In re L.S., 717 N.E.2d at 209.

In addition to the findings and conclusions set forth previously, the trial court made the following additional finding and conclusion in terminating Father's parental rights to E.M.:

> 3. * * *
>
> b. Further, although a parent's right to his or her children may not be terminated solely because a better place to live exists elsewhere, the child is in a stable placement at this time with his sibling and removing him from that placement and separating him from his sibling would place an additional threat to the well[-]being of the child and would not be in the child's best interest.
>
> 4. That the [JCDCS] proved by clear and convincing evidence that termination of the parent-child relationship is in the best interest of the child. That the [JCDCS] has a satisfactory plan for the care and treatment of the [child]. Specifically[,] that . . . [E.M] was to be adopted by his maternal grandfather who also is adopting the child's sibling. That the court finds that it is in [E.M.'s] best interest to remain with his sibling.

Trial Court's Judgment at 3. We conclude that the evidence supports this finding and conclusion as well. In addition to Father's continuing inability to remedy the conditions that necessitated E.M.'s removal, the record reveals that JCDCS family case manager Griffith recommended termination of Father's parental rights to E.M. as well. In so doing, Griffith testified she felt termination of Father's parental rights was in E.M.'s best interest because "[E.M.] doesn't even know his father . . . . He doesn't have any recollection of or memory of him. . . . [H]e is thriving where he is, he's with his family, he gets to see his brother who is also adopted. He's just, he's just doing very well where he's at." Tr. at 52.

Based on the totality of the evidence, including Father's persistent neglectful behavior, Griffith's testimony, and Father's current inability to provide E.M. with the basic necessities of life, we cannot say the trial court's conclusion that termination is in E.M.'s best interests is clearly erroneous. See In re A.I., 825 N.E.2d 798, 811 (Ind. Ct. App. 2005) (concluding that testimony of the court-appointed special 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

We will reverse a trial court's termination order only upon a showing of "clear error" -- that which leaves us with a definite and firm conviction that a mistake has been made. A.J. v. Marion County Office of Family & Children, 881 N.E.2d 706, 716 (Ind. Ct. App. 2008), trans. denied. We find no such error here. Accordingly, the trial court's judgment terminating Father's parental rights to E.M. is hereby affirmed.

Affirmed.

BAKER, C.J., and BROWN, J., concur.