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IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF THE TERMINATION OF THE PARENT-CHILD REALATIONSHIP OF A.B.,	)	
ZACHARY W.,	)	
Appellant-Respondent,	)	
vs.	)	No. 23A05-0806-JV-323
INDIANA DEPARTMENT OF CHILD SERVICES,	)	
Appellee-Petitioner.	)	

APPEAL FROM THE FOUNTAIN CIRCUIT COURT
The Honorable Susan Orr Henderson, Judge
Cause Nos. 23C01-0801-JT-12

December 11, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Zachary W. ("Father") appeals the involuntary termination of his parental rights, in Fountain Circuit Court, to his son, A.B. On appeal, Father claims there is insufficient evidence supporting the trial court's judgment terminating his parental rights to A.B. Concluding that the trial court's judgment is supported by clear and convincing evidence, we affirm.

Facts and Procedural History

Father is the biological father of A.B., born October 29, 2003.[1] The facts most favorable to the judgment reveal that on or about June 23, 2006, the Fountain County Department of Child Services ("FCDCS") received a report of possible neglect involving A.B. FCDCS family case manager Brandy Holt and supervisor Cathy Booe initiated an investigation and visited the home. Upon their arrival, Holt observed the trailer and its premises to be in very poor condition. Junk and trash, including beer cans and bottles, littered the yard, and a toilet was observed on the front porch. The front door was open, and more trash, dirty dishes, and spoiled food could be seen strewn about the kitchen and living areas. It was reported that there were seven people living in the home, including A.B., his half-sister, J.B., and his mother. Holt observed that there was only one bed, no working toilet, and that portions of the bathroom floor were completely gone, exposing the pipes underneath. A "horrible stench" permeated the home and the children appeared to not have

[1] A.B.'s mother, Amber P., agreed to voluntarily relinquish her parental rights to A.B. on September 28, 2007, and does not participate in this appeal. Father is not the biological father of A.B.'s half-sister, J.B. Consequently, we limit our recitation of the facts solely to those pertinent to Father's appeal of the termination of his parental rights to A.B.

been bathed for some time. Transcript at 53.

During the caseworkers' visit, A.B.'s mother admitted that the children could not continue to live in their current environment and attempted to contact her father to pick them up. The children could not be placed with Father because he was incarcerated. When A.B.'s mother was unable to reach her father, the caseworkers decided to take the children into emergency protective custody.

On June 28, 2006, FCDCS filed a petition alleging A.B. was a child in need of services ("CHINS"). Mother subsequently admitted to the allegations contained in the CHINS petition, and a dispositional decree was entered on August 14, 2006. No services were provided to Father due to his incarceration.

On January 18, 2008, FCDCS filed a petition for the involuntary termination of Father's parental rights. A hearing on the termination was held on April 11, 2008. Father, who was still in the custody of the Department of Correction, appeared and was represented by counsel. On May 2, 2008, the trial court issued its judgment terminating Father's parental rights to A.B. Father now appeals.

Discussion and Decision

I. Standard of Review

Father challenges the sufficiency of the evidence supporting the trial court's judgment terminating his parental rights to A.B. Initially, we note our standard of review. This court has long held 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 neither reweigh the evidence nor judge the credibility of the witnesses. In re Kay L., 867 N.E.2d 236, 239 (Ind. Ct. App. 2007). Instead, we consider only the evidence that supports the trial court's decision and the reasonable inferences drawn therefrom. Id.

Here, the trial court made specific findings in its judgment terminating Father's parental rights. Where the trial court enters specific findings 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. 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, cert. denied, 534 U.S. 1161 (2002). Thus, if the evidence and inferences support the trial court's decision, we must affirm. Id.

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. Parental rights may therefore be terminated when a parent is unable or

unwilling to meet his or her parental responsibilities. K.S., 750 N.E.2d at 836.

In order to terminate a parent-child relationship, the State is required to allege that:

(A) one (1) of the following exists:

(i) the child has been removed from the parent for at least six (6) months under a dispositional decree;
(ii) a court has entered a finding under IC 31-34-21-5.6 that reasonable efforts for family preservation or reunification are not required . . .; or
(iii) the child has been removed from the parent and has been under the supervision of a county office of family and children for at least fifteen (15) months of the most recent twenty-two (22) months;

(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)(2). 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). "[I]f the court finds that the allegations in a [termination] petition . . . are true, the court shall terminate the parent-child relationship." Ind. Code § 31-35-2-8.

II. Remedy of Conditions

Father's first allegation on appeal is that FCDCS failed to prove by clear and convincing evidence that there is a reasonable probability the conditions resulting in A.B.'s

removal and continued placement outside his care will not be remedied. In so doing, Father insists that the trial court failed to assess his ability to care for A.B. as of the date of the termination hearing because it relied on Father's extensive criminal history and current incarceration instead of focusing on the "numerous steps to improve his life, job, and parenting skills" that Father has taken while incarcerated. Brief of Appellant at 4.

When determining whether there is a reasonable probability 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 children 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, "trial 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. In addition, FCDCS need not provide evidence ruling out all possibilities of change; rather, it need establish only that there is a reasonable probability Father's behavior will not change. Kay L., 867 N.E.2d at 242.

In determining whether a reasonable probability exists that the conditions resulting in A.B.'s removal and continued placement outside Father's care will not be remedied, the trial court made the following pertinent findings:

3. There is clear and convincing evidence that a reasonable probability [exists] that the conditions that resulted in the removal of the child from the home will not be remedied. The court bases its findings on the following factors:

* * *

b. At the time of the removal[,] [F]ather was incarcerated and has remained incarcerated since the child was removed from [M]other's home. Father is currently serving a sentence of ten years for Dealing in Cocaine, a Class B felony, with the earliest possible release date being March 20, 2011. Father is thereafter sentenced to a term in federal prison for Felon in Possession of Firearm and Ammunition with the earliest possible release date being sometime in 2013. Father has an extensive criminal record and has spent most of the child's life incarcerated[.]

c. Father has been incarcerated since the filing of the underlying CHINS proceeding. Father had infrequent involvement in the child's life and provided sporadic, at best, financial support for the benefit of the child. Father made no attempts to communicate with the child since his removal nor did he make any effort to participate in the CHINS proceedings, even though he was provided with notices of the proceedings as by law required[.]

d. Father has participated in programs offered at the Dept. of Correction, specifically drug and alcohol counseling while incarcerated in the Fountain County Jail[,] a 3 phase gospel study program[,] and AA classes[.]

* * *

g. Father has [a] 10th grade education and is currently attempting to obtain his GED. . . . Father has been unable to remain free from incarceration long enough to establish a reliable work history[.]

h. Father's earliest possible release date from incarceration is 2013 at which time child will be ten years old. Father will have missed a significant part if not all of the child's developmental years. His ability to provide support, emotional or financial, will

> be limited during this time with no guarantee of any ability to provide a stable home for the child upon his release[.]

Appellant's App. at 4-5. Our review of the record reveals that clear and convincing evidence supports the trial court's findings and conclusions set forth above. These findings, in turn, support the court's ultimate decision to terminate Father's parental rights.

The evidence establishes that A.B. was initially removed from his mother's home because of his mother's neglectful conduct and because of Father's inability to care for A.B. due to Father's incarceration. The reason for A.B.'s continued placement outside of Father's care was Father's continuing incarceration which rendered Father incapable of providing A.B. with food, clothing, shelter, and other basic life necessities. At the time of the termination hearing, these conditions had still not been remedied. Specifically, Father remained incarcerated with an earliest possible release date in August of 2013. Additionally, although we readily acknowledge that the law does not require a parent to "guarantee" that he or she is an exemplary parent before being allowed to attempt to achieve a meaningful reunification with his or her children, in the present case, Father's extensive criminal history, coupled with his prior inability to obtain stable employment and to maintain a safe home environment, supports the trial court's finding that upon his release in 2013, Father's "ability to provide support, emotional or financial, will be limited during this time with no guarantee of any ability to provide a stable home for [A.B.] upon his release[.]" Id. at 5.

Based on the foregoing, we find Father's argument that the trial court committed reversible error when it gave more weight to Father's current incarceration and habitual pattern of neglectful conduct than to Father's self-serving testimony of changed conditions

due to his participation in various services while incarcerated, including a bible study and drug and alcohol counseling, to be unpersuasive. As FCDCS argues on appeal, in assessing Father's fitness to parent, the trial court was not required to "take [Father] at his present word and be blind to his long and consistent history." Br. of Appellee at 9. The trial court was permitted to judge Father's credibility and weigh his testimony of changed conditions against the significant evidence demonstrating his habitual pattern of conduct in failing to maintain a stable home environment, failing to secure steady employment, and failing to obey the law and avoid incarceration. See In re D.D., 804 N.E.2d 258, 266 (Ind. Ct. App. 2004) (concluding that trial court permitted to judge mother's credibility and fitness to parent and weigh her testimony against significant testimony of failing to address mental health problems and provide safe and consistent nurturing residence for child), trans. denied; see also Bergman v. Knox County Office of Family & Children, 750 N.E.2d 809, 812 (Ind. Ct. App. 2001) (holding that it was not an abuse of discretion for the trial court to give more weight to abundant evidence of mother's pattern of conduct in neglecting children during several years prior to termination hearing than to mother's evidence she had changed her life to better accommodate children's needs). Moreover, Father's argument on appeal ignores the fact that, at the time of the termination hearing, he was still incapable of caring for A.B. due to his incarceration and that this incapability would continue for at least five additional years.

Father's attempt to liken his situation to that of the father in Rowlett v. Vanderburgh County Office of Family & Children, 841 N.E.2d 615, 621 (Ind. Ct. App. 2006), trans. denied, is likewise unavailing. In Rowlett, the father facing termination of his parental rights

submitted evidence to the trial court that he had participated in approximately 1100 hours of individual and group services while incarcerated including classes in anger management, parenting skills, domestic violence, self-help, and substance abuse. Rowlett also had maintained consistent contact with his children throughout the duration of his incarceration, completed twelve hours of college credit and was enrolled in an additional eighteen hours of classes, secured employment doing construction work upon his release, made future housing arrangements, and expressed great remorse for his past bad conduct as well as his dedication to remaining sober. Finally, unlike Father in the present case, Rowlett was scheduled to be released from incarceration only six weeks following the termination hearing, and his children were living in relative placement. Because of the extraordinary circumstances and significant positive strides in parenting and personal improvement achieved by Rowlett, we concluded that, under those particular circumstances, termination of Rowlett's parental rights seemed "particularly harsh." Id. at 623.

Rowlett is easily distinguishable from the present case. Although we commend Father for attempting to improve his situation by participating in several services while incarcerated, including a Bible study and drug and alcohol counseling, he nevertheless has failed to show how this handful of classes and counseling will significantly impact his ability to properly parent A.B., to secure and maintain employment, and to provide upon his release from incarceration in 2013 a safe, stable, and nurturing home environment to A.B. Also significant, the record reveals that Father failed to participate in any of the CHINS proceedings and failed to request visitation or initiate communication with A.B. throughout

the duration of this case. Such a failure suggests a lack of commitment to complete the actions necessary to preserve the parent-child relationship. Cf. Lang v. Starke County Office of Family & Children, 861 N.E.2d 366, 372 (Ind. Ct. App. 2007) (stating that failure to exercise one's right to visitation with children demonstrates a lack of commitment to complete actions necessary to preserve the parent-child relationship), trans. denied.

Based on the foregoing, we conclude that clear and convincing evidence supports the trial court's conclusion that there is a reasonable probability the conditions resulting in A.B.'s removal and continued placement outside Father's care will not be remedied. See Castro v. State Office of Family & Children, 842 N.E.2d 367, 374 (Ind. Ct. App. 2006) (concluding that trial court did not commit clear error in finding conditions leading to child's removal from father would not be remedied where father, who had been incarcerated throughout CHINS and termination proceedings, was not expected to be released until after termination hearing), trans. denied. Moreover, we have previously 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." Id. Such is the case here. A.B. should not be required to continue to wait for at least another five years until Father is released from incarceration and able to demonstrate that he is capable of assuming his parental responsibilities. A.B. has waited long enough. See In re Campbell, 534 N.E.2d 273, 275 (Ind. Ct. App. 1989) (stating that county welfare department does not have to rule out "any possibility" of change and concluding that approximately two years without improvement is "long enough").

III. Best Interests

Next, we address Father's contention that FCDCS failed to prove that termination of his parental rights is in A.B.'s best interests. Specifically, Father asserts the trial court failed to consider the totality of the circumstances and "merely adopted" the recommendation made by FCDCS. Br. of Appellant at 5. In so doing, Father claims FCDCS "completely ignored" the fact his parents were "ready, willing and able to care for both [A.B. and his half-sister]." Id. at 10.

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 FCDCS and to 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 children. Id. In addition, we have previously determined that the recommendations of the caseworkers and child advocate that parental rights be terminated support a finding that termination is in the child's best interest. Id.

In determining that termination of the parent-child relationship is in A.B.'s best interests, the trial court made the following specific findings:

> 3.
>
> * * *
>
> f. Father would like child to be placed with his mother until such time [as] he is released from incarceration and can assume his parental responsibilities[.]
>
> * * *

h. Father's earliest possible release date from incarceration is 2013 at which time child will be 10 years old. Father will have missed a significant part if not all of the child's developmental years. His ability to provide support, emotional or financial, will be limited during this time with no guarantee of any ability to provide a stable home for the child upon his release[.]

i. Child has an older sibling in a related proceeding . . . . Father is not the father of this older sibling. Children have never been separated from one another, are very bonded to one another, and should remain together as a family unit.

j. [FCDCS] was aware of paternal grandmother's willingness to take the child. [FCDCS] also considered mother's request to keep the siblings together. [FCDCS] weighed the possibility of placing the child with paternal grandmother and determined the goal of keeping the children together was in the child's best interest.

k. GAL testified that termination was in the child's best interest[.]

l. Child has supportive and loving foster family. He was developmentally delayed at the time of removal and is improving in his placement. Based on the testimony of the child's case manager child is happy and outgoing and has been provided much needed stability in foster care.

Appellant's App. at 5-6. The trial court then concluded, "Based on the foregoing[,] the Court finds that termination is in the best interest of the child[.]" Id. at 6. The evidence supports the trial court's findings and conclusions set forth above.

Caseworker Anna Bowling recommended that A.B. not be returned to Father's care. When questioned as to whether FCDCS ever considered placing A.B. with Father's parents, Bowling responded in the affirmative, but went on to explain that FCDCS ultimately determined that such a placement would not be in A.B.'s best interests. Bowling further testified that A.B. was doing "extremely well" in his pre-adoptive foster home and that

although he was developmentally behind when initially removed, A.B. had "made a lot of strides" and was now a "happy" and "outgoing" child. Tr. p. 64. Bowling also informed the court that A.B. and his half-sister were "bonded to each other." Id. at 73. Similarly, Caseworker Jennifer Canfield recommended termination of Father's parental rights as well. Finally, in recommending termination of Father's parental rights, Guardian ad Litem ("GAL") Donald E. Gibson emphasized that A.B.'s relationship with his half-sister was a "very strong brother and sister" relationship and stated, "I do think it's in the best interest of the two children to be kept together[,] yes[,] and the rights [of Father] be terminated." Id. at 81-82.

Based on the totality of the evidence, including Father's extensive criminal history, prior inability to secure and maintain suitable housing and employment, and current incarceration, coupled with the testimony from Bowling, Canfield, and Gibson, all recommending termination and adoption, we conclude that clear and convincing evidence supports the trial court's determination that termination of Father's parental rights is in A.B.'s best interests. See In re A.I., 825 N.E.2d 798, 811 (Ind. Ct. App. 2005) (concluding that testimony of 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 that termination is in child's best interest), trans. denied.

Conclusion

The trial court's judgment terminating Father's parental rights to A.B. is supported by

clear and convincing evidence. Accordingly, we find no error.

Affirmed.

NAJAM, J., and MAY, J., concur.