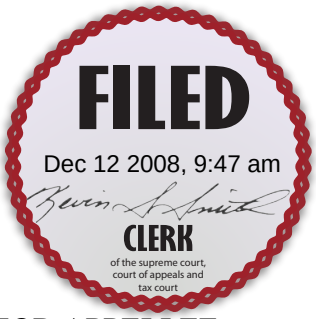

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IN THE COURT OF APPEALS OF INDIANA

IN THE MATTER OF R.H. III, T.H., and A.H., Minor Children,	)	
ROY H. II, Father,	)	
Appellant-Respondent,	)	
vs.	)	No. 20A05-0805-JV-263
ELKHART COUNTY DEPARTMENT OF CHILD SERVICES,	)	
Appellee-Petitioner.	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
The Honorable Deborah A. Domine, Juvenile Magistrate
Cause Nos. 20C01-0710-JT-61, 20C01-0710-JT-62, 20C01-0710-JT-63

December 12, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Roy H. II appeals the termination of his parental rights to R.H. III, T.H., and A.H. Because the evidence supports that judgment, we affirm.

FACTS AND PROCEDURAL HISTORY

The marriage of Roy and Pamela H. produced three children: R.H. was born March 22, 2002, T.H. was born August 31, 2003, and A.H. was born October 12, 2005.

On November 14, 2005, police stopped the car Roy was driving. Pamela and the children were passengers in the car. The officer noticed a smell of alcohol coming from the car. Further investigation uncovered seventy-five to one hundred open beer cans, some of which still contained beer, strewn around the car. In the diaper bag was an open can of beer with a straw in it. The officer also noted the car contained rotting food. Roy was arrested because he had warrants pending.

The next day, while Roy was still in jail, two-year-old T.H. sustained first and second degree burns to his groin area. Pamela reported T.H. pulled a hot cup of coffee from the microwave and spilled it on himself while he was naked. After receiving treatment at the hospital, T.H. was placed in protective custody.

In December, the family underwent a Rapid Family Assessment to determine what services might assist with reuniting the family. Then, on December 22, 2005, the Department of Child Services ("DCS") entered an Informal Adjustment agreement with Roy and Pamela. Pursuant to the agreement, T.H. was returned to the family home. The parents agreed to attend parenting classes, to participate with Family Support Services case managers, to undergo an addictions assessment and follow all recommendations, to use all recommended child safety devices for their home, to submit to and pass random

drug screens, to never leave the children home alone, and to cooperate and maintain contact with DCS. Pamela agreed to undergo a mental health assessment. However, DCS had to extend the length of the Informal Adjustment because the parents had not complied with the agreement to engage in services.

In October 2006, while the Informal Adjustment was still active, police found three-year-old T.H. riding his tricycle in the middle of a busy intersection. As a result, all three children were taken into protective custody and the court placed them in foster care on October 5, 2006.

The State filed petitions alleging the children were in need of services (CHINS). The court adjudicated the children CHINS and, on January 4, 2007, entered dispositional orders that required, as to Roy: "Continuation of existing Orders"; supervised visitation with the children on release from his incarceration; payment of $34.59 per week in child support; completion of a psycho-parenting assessment and implementation of recommendations; completion of Addictions Assessment and recommendations therefrom; and submission to random drug screens without receiving positive results. (State's Exhibit 13 at 8-9.)

On October 29, 2007, the State filed petitions to terminate Roy's and Pamela's rights to the children. On the morning of the hearing, Pamela voluntarily terminated her rights. After the hearing, the court found the State had proven by clear and convincing evidence, as to Roy, that the conditions resulting in the children's removal were not likely to be remedied, that continuation of the parent-child relationship was a threat to the children's well-being, and that termination was in the children's best interests.

Thereupon the court terminated Roy's parental rights.

DISCUSSION AND DECISION

We are highly deferential when reviewing termination of parental rights. *In re K.S.*, 750 N.E.2d 832, 836 (Ind. Ct. App. 2001). We do not reweigh evidence or judge the credibility of witnesses. *In re D.D.*, 804 N.E.2d 258, 264 (Ind. Ct. App. 2004), *trans. denied sub nom. Peterson v. Marion County OFC*, 822 N.E.2d 970 (Ind. 2004). Instead, we consider only the evidence and reasonable inferences therefrom that are most favorable to the judgment. *Id.*

When a court enters specific findings of fact, we apply a two-tiered standard of review. First, we determine whether the evidence supports the findings, and second, whether the findings support the judgment. *Bester v. Lake County Office of Family & Children*, 839 N.E.2d 143, 147 (Ind. 2005). In deference to the juvenile 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 sub nom. Swope v. Noble County Office of Family & Children* 735 N.E.2d 226 (Ind. 2000), *cert. denied* 534 U.S. 1161 (2002). A judgment is clearly erroneous only if the findings do not support the juvenile court's conclusions or the conclusions do not support the judgment thereon. *Quillen v. Quillen*, 671 N.E.2d 98, 102 (Ind. 1996).

A petition to terminate a parent-child relationship must allege:

> (A) [o]ne (1) of the following exists:
>
> (i) the child has been removed from the parent for at least six (6) months under a dispositional decree;
>
> * * * * *

(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).

Roy challenges the court's findings under parts (B) and (C) of that test.

A. (B)(i) Reasonable Probability

When determining whether there is a reasonable probability the conditions justifying a child's removal and continued placement outside the home will not be remedied, the juvenile 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 sub nom. Timm v. Office of Family & Children*, 753 N.E.2d 12 (Ind. 2001). However, 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* 774 N.E.2d 515 (Ind. 2002). The court may also properly consider the services offered to a parent, and

the parent's response to those services, as evidence of whether conditions will be remedied. *Id.* A department of child services is not obliged to rule out all possibilities of change; it need establish only a reasonable probability a parent's behavior will not change. *See In re Kay L.*, 867 N.E.2d 236, 242 (Ind. Ct. App. 2007). "[A] pattern of unwillingness to deal with parenting problems and to cooperate with those providing social services, in conjunction with unchanged conditions, support a finding that there exists no reasonable probability that the conditions will change." *Lang v. Starke County Office of Family & Children*, 861 N.E.2d 366, 372 (Ind. Ct. App. 2007), *trans. denied* 869 N.E.2d 456 (Ind. 2007).

The trial court found:

> While the [H.] children have been under the formal supervision of the DCS for seventeen months in this case, the DCS has actually been involved with the [H.] family for two and a half years. And during that period of time little has changed. In November of 2005, two reports of neglect were substantiated by the DCS against Roy and Pamela [H.]. Case manager Lisa Morris-Carr testified that first a report was made that [T.] had been seriously burned (Exhibit #1) and then a subsequent report was made that all three children, at the time between the ages of 5 months and three years old, were found in a car filled with nearly 100 open beer cans, and rotting food; [Roy] had been driving the vehicle and smelled of alcohol (Exhibit #2). Case manager Lisa Morris-Carr testified that reported neglect was substantiated in both cases. As a consequence of substantiated neglect, the parents agreed to enter into an Informal Adjustment with the DCS; both parents agreed to participate in services, but they failed to follow through with the agreement that each parent signed. Because of the parents[']failure to follow through, the Informal Adjustment was extended. Then on October 4, 2006, when then 3-year old [T.] was found riding his tricycle at the bottom of an overpass on a busy street, all three children were taken into protective custody and a CHINS Petition was filed (Exhibits #6, #7, and #8). Parents were ordered to participate in services, and again they failed to follow through with the services ordered. As a consequence, little has changed since the children were removed from the parents' care, and

there is no evidence to support a finding that the conditions which resulted in the children's removal from their parents will likely change in the near future.

Roy [H.], II, has been incarcerated twice since DCS involvement with the family began. He is presently incarcerated in the Elkhart County Jail, and pursuant to a plea agreement he expects to be approved, he also expects to be released from custody later this month. [Roy] testified that upon release he will become involved in court ordered services. The court is unpersuaded, however, by the promises made in court because of [Roy's] history of noncompliance in this case. [Roy] signed an Agreement of Informal Adjustment on December 27, 2005, promising to follow through with services; but he did not. Services have been ordered in this case and [Roy] has not followed through. Addictions treatment has been ordered twice, [Roy] has failed to follow through twice; he claims he does not need treatment, but five out of seven drug screens administered since the formal CHINS Petitions were filed have been positive for illegal drugs. Today, [Roy] testified that he was not involved in treatment because of a lack of transportation. The In-home case manager Tony Joshick, however, testified that while he was working with the family [Roy] complained about transportation, but also told him he could get a ride. [Roy] today continues to make excuses for not stepping up and doing what is necessary to care for his children and keep them safe. Based upon his testimony, and his history of noncompliance, the court finds no reason to believe that he will do any better if an anticipated Plea Agreement is approved and he is released from incarceration later this month.

[Roy] is presently unable to care for his children because he is incarcerated. He cannot tuck them in at night, he cannot wash their clothes or faces, he cannot make them dinner, help them with homework, or attend to their medical needs. And even if the Plea Agreement is approved later this month, as [Roy] is hoping, and [Roy] is released from incarceration, his history would suggest that he will not be in the community and available to care for his children for long. [Roy] is currently being held in the Elkhart County Jail on charges of Criminal Confinement, contrary to IC § 35-42-3-3(b)(1) (Class C Felony), Strangulation, contrary to IC § 35-42-2-9 (Class D Felony), and Domestic Battery, contrary to IC § 35-42-2-1.3(a)(2) (Class A Misdemeanor). (Exhibit # 16). The Bail Review Pretrial Release Report also filed under this cause documents that he has been arrested a total of twenty-five times and has a criminal history dating back to November 8, 1977. Very little has changed since the children were removed from the parents' care, and evidence suggests that it will not change in the future. The children were removed from their parents because their parents were unable to supervise and care for them; because of incarceration and because

> of a failure to follow through with services the father is still unable to care for his children today.
>
> The three [H.] children . . . have been involved with the DCS, either informally or formally, because of neglect perpetrated by their parents for much of their lives. . . . Dr. Jay Shetler, PsyD, HSPP, completed a Psychoparenting Assessment of [Roy] on May 29, 2007 and he concluded, at that time, that the prognosis for [Roy] to make the necessary changes in his life and changes in parenting skills was "poor." . . . . The children's therapist, Elizabeth O'Conner, MSW, opined that the children are in need of stability, and routine, in order to thrive. These are qualities that cannot be provided by the parents if they have not changed the conditions resulting in the children's removal.

(App. at 36-38) (paragraph lettering removed).

Roy does not challenge the accuracy of any of those findings. Instead, Roy sets out the evidence favorable to himself and asserts:

> The fact that Father had quit using marijuana, that his parental activities were appropriate, that he was a loving, nurturing parent, that he had made progress in parenting, and that he would be released from jail within a short period of time did not support the court's decision that the DCS clearly and convincingly proved the conditions which resulted from [sic] the children's removal from the parents[']home could not be remedied by the father.

(Appellant's Br. at 20.)

The record supports the court's findings. Despite the improvements Roy cites, the facts remain that Roy is incarcerated on a regular basis; he has not received treatment for his alcohol and substance abuse; he did not pay the child support ordered while the children were in foster care; five of his seven random drug screens were positive for marijuana use; and when he was not incarcerated, he did not keep appointments with the home-based case manager. Between December of 2005 and April of 2008, Roy did not complete the assessments and treatments ordered by the court. In light of the court's

extensive findings, we find no error in the determination the circumstances leading to the children's removal were not likely to be remedied.[1]

B. Best Interests

In determining what is in the best interest of the child, the trial court must look beyond the factors identified by the Department of Child Services 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 court must subordinate the interests of the parent to those of the children. *Id.* The recommendations of a caseworker and guardian ad litem that parental rights be terminated support a finding that termination is in the child's best interest. *Id.*

The trial court found:

> Both [sic] the case manager, CASA, and the children's therapist, testified that termination is in the child's best interest, the Court's findings reflect that conclusion. While many acknowledged that [Roy] loves his children and his children love him, the case manager, CASA and therapist all testified that [Roy] is unable to provide the boys with the parenting demanded if they are to thrive. These children have come a long way since removal from their parents[']home. The children were placed in the home of Terri Turner when first removed from their parents. Ms. Turner testified that when first placed in her home the children were very aggressive. She testified that [T.] was so aggressive that he killed one of the family pets. She testified that the children were difficult to control and ate out of the trashcan. Nonetheless, according to Ms. Turner, the children improved their behaviors while in her home and the current foster parents testified that the children's behaviors have continued to improve dramatically since placement in their homes. It is in the best interest of the children . . . that

[1] Roy also alleges DCS did not prove continuation of the parent-child relationship posed a threat to the children's well-being. Because Ind. Code § 31-35-2-4(b)(2)(B) is written in the disjunctive, the juvenile court needed to find by clear and convincing evidence only one of the two requirements of part (B). *See L.S.*, 717 N.E.2d at 209. Where, as here, the juvenile court found both, we may affirm if the evidence supports either. *See In re B.J.*, 879 N.E.2d 7, 22 n.4 (Ind. Ct. App. 2008), *trans. denied sub nom. Watkins/Johnson v. Marion County DCS*, 891 N.E.2d 42 (Ind. 2008). Accordingly, we need not review the sufficiency of the evidence supporting the finding continuation of the parent-child relationship was a threat to the children.

> they continue in environments that will allow them to thrive. When parents have failed to follow through with services intended to help them change conditions that put their children at risk, resulting in the children's removal, there is evidence to support a finding that they cannot thrive if returned to the parents[']home care. All three children need permanency now, and cannot wait indefinitely for parents to change. It is therefore in the best interest of the children that the rights of the parents be terminated.

(App. at 38-39.)

Roy asserts termination is not in the children's best interests because: "Permanency and stability could result if reunification procedures were to begin when Father was released from incarceration." (Appellant's Br. at 23.) Roy's release from incarceration is not the only hurdle standing in the way of reunification. Roy did not keep appointments with the home-based counselor so DCS could confirm the home had been made safe for children, he did not complete substance abuse treatment, and he did not abstain from drug use. The finding that termination was in the children's best interests was not erroneous.

CONCLUSION

The evidence supports the findings the circumstances leading to the children's removal were not likely to be remedied and that termination is in the children's best interests. Those findings support the judgment terminating Roy's parental rights. Therefore, we affirm.

Affirmed.

NAJAM, J., and ROBB, J., concur.