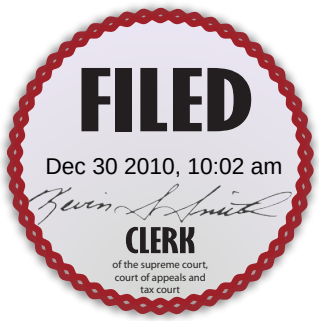

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IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF THE TERMINATION OF THE PARENT CHILD RELATIONSHIP OF: S.H., A.M., Jr., AND A.H. (Minor Children) AND A.M.,	)	
A.M. (Father)	)	
Appellant-Respondent,	)	
vs.	)	No. 49A02-1005-JT-623
THE INDIANA DEPARTMENT OF CHILD SERVICES,	)	
Appellee-Petitioner,	)	
AND	)	
CHILD ADVOCATES, INC.,	)	
Co-Appellee (Guardian ad Litem).	)	

APPEAL FROM THE MARION SUPERIOR COURT - JUVENILE DIVISION
The Honorable Marilyn Moores, Judge
The Honorable Larry Bradley, Magistrate
Cause Nos. 49D09-0911-JT-054230, 49D09-0911-JT-054231 & 49D09-0911-JT-054232

December 30, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

A.M. ("Father") appeals the involuntary termination of his parental rights to his children. Concluding that (1) Father was not denied due process of law, (2) the Indiana Department of Child Services, local office in Marion County ("MCDCS"), presented clear and convincing evidence to support the juvenile court's judgment, and (3) the juvenile court did not abuse its discretion in denying Father's motion for a continuance of the termination hearing, we affirm.

Facts and Procedural History

Father is the alleged father of S.H., born in December 2004, and A.H., born in June 2007. Father is the legal father of A.M., Jr. ("A.M."), born in May 2006.[1] In October 2008, MCDCS filed petitions under separate cause numbers alleging S.H., A.H., and A.M. were children in need of services ("CHINS") after a MCDCS case manager dropped by the family home to perform an unannounced visit and discovered then three-year-old S.H. and one-year-old A.H. home alone. At the time, MCDCS was providing

[1] Father's paternity of A.M. was established at the hospital following the child's birth, and Father's name appears on A.M.'s birth certificate. Father's paternity of S.H. and A.H. was never formally established, but it is not disputed by Father or the children's biological mother.

home-based services to the family pursuant to the terms of an Informal Adjustment[2] due to a previous incident involving lack of supervision by the children's biological mother, M.H. ("Mother"), resulting in injury to one of the children. At the time of the children's removal, Father was incarcerated for violating his probation on a previous conviction for Class B felony dealing in cocaine and was therefore unavailable to care for the children.

During a subsequent hearing on the CHINS petitions, Mother admitted to the material allegations contained therein, and the juvenile court adjudicated all three children CHINS. The juvenile court also appointed Father counsel. Later, during the dispositional hearing in March 2009, the juvenile court noted that Father remained incarcerated with an earliest possible release date in 2012. Consequently, no dispositional services were ordered for Father. Although Father was not physically present during the dispositional hearing, he was represented by counsel and no objections were made.

Mother's participation in court-ordered reunification services proved unsuccessful, and MCDCS eventually filed petitions seeking the involuntary termination of both Mother's and Father's parental rights in November 2009. A consolidated evidentiary hearing on the termination petitions was held on March 24, 2010.

At the commencement of the termination hearing, Father, by counsel, made an oral motion to continue the termination hearing until sometime following his release from incarceration, which was not scheduled to occur for more than two years. In so doing,

[2] A program of Informal Adjustment is a negotiated agreement between a family and a local office of the Indiana Department of Child Services whereby the family agrees to participate in various services provided by the county in an effort to prevent the child/children from being formally deemed CHINS. *See* Ind. Code ch. 31-34-8 *et seq.*

Father informed the juvenile court that he was currently participating in or planned to participate in several programs which, if successfully completed, could result in significant time cuts from his sentence. MCDCS countered by introducing evidence showing that Father had failed to complete several such programs in the past and that he had already received three separate thirty-day extensions of time on his current sentence as punishment for bad behavior. In addition, it was argued that further delay was not in the children's best interests.

The juvenile court denied Father's request for a continuance and proceeded with the termination hearing. During the hearing, MCDCS presented evidence showing Father had failed to maintain regular contact with MCDCS, to provide emotional or financial support for the children, and/or to improve his ability to parent the children, especially in light of the children's special needs. In addition, Father admitted that he was not scheduled to be released until September 2012. At no time during the CHINS or termination cases did Father ever claim that he had been denied due process of law or that he had not been provided with case plans and/or other CHINS documents concerning what needed to be done in order to achieve reunification with the children upon his release from incarceration.

At the conclusion of the termination hearing, the juvenile court took the matter under advisement. On May 19, 2010, the juvenile court issued an order terminating Father's parental rights to S.H., A.H., and A.M. Father now appeals.

Discussion and Decision

This Court has long had a highly deferential standard of review in cases concerning the termination of parental rights. *In re K.S.*, 750 N.E.2d 832, 836 (Ind. Ct. App. 2001). When reviewing the termination of parental rights, we will neither reweigh the evidence nor judge witness credibility. *In re D.D.*, 804 N.E.2d 258, 265 (Ind. Ct. App. 2004), *trans. denied*. Instead, we consider only the evidence and reasonable inferences most favorable to the judgment. *Id.* Moreover, in deference to the juvenile court's unique position to assess the evidence, we will set aside a judgment terminating a parent-child relationship only if it is clearly erroneous. *In re L.S.*, 717 N.E.2d 204, 208 (Ind. Ct. App. 1999), *trans. denied*.

Here, in terminating Father's parental rights, the juvenile court entered specific findings and conclusions. When a juvenile court's judgment contains specific findings of fact and conclusions thereon, we apply a two-tiered standard of review. *Bester v. Lake County Office of Family & Children*, 839 N.E.2d 143, 147 (Ind. 2005). First, we determine whether the evidence supports the findings, and second, we determine whether the findings support the judgment. *Id.* "Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference." *Quillen v. Quillen*, 671 N.E.2d 98, 102 (Ind. 1996). If the evidence and inferences support the juvenile court's decision, we must affirm. *L.S.*, 717 N.E.2d at 208.

On appeal, Father asserts he was denied due process of law during the underlying proceedings because there was "no effort made on the part of [MCDCS] to preserve the parent-child relationship" due to Father's incarceration and "projected release date of

2012." Appellant's Br. p. 7. Father also challenges the sufficiency of the evidence supporting the juvenile court's judgment and argues the juvenile court abused its discretion in denying his motion to continue the termination hearing.

I. Due Process

We begin our review by considering Father's assertion that he was denied due process of law because there was "no effort made on the part of [MCDCS] to preserve the parent-child relationship and [Father] was ignored by [MCDCS], the CASA [court-appointed special advocate], and the CHINS and termination court until this case went to trial." *Id.* at 2.

A parent's interest in the care, custody, and control of his or her children is arguably one of the oldest of our fundamental liberty interests. *Bester*, 839 N.E.2d at 147. Hence, "[t]he traditional right of parents to establish a home and raise their children is protected by the Fourteenth Amendment of the United States Constitution." *In re M.B.*, 666 N.E.2d 73, 76 (Ind. Ct. App. 1996), *trans. denied*. A case involving the State's authority to permanently sever a parent-child bond therefore demands the close consideration the Supreme Court has long required when a family association so undeniably important is at stake. *M.L.B. v. S.L.J.*, 519 U.S. 102, 103 (1996).

The Due Process Clause of the United States Constitution "prohibits state action that deprives a person of life, liberty, or property without a fair proceeding." *In re B.J.*, 879 N.E.2d 7, 16 (Ind. Ct. App. 2008), *trans. denied*. To be sure, the right to raise one's child is an "essential, basic right that is more precious than property rights." *In re C.C.*, 788 N.E.2d 847, 852 (Ind. Ct. App. 2003), *trans. denied*. Thus, when the State seeks to

terminate a parent-child relationship, it must do so in a manner that meets the constitutional requirements of the Due Process Clause. *Hite v. Vanderburgh County Office of Family & Children*, 845 N.E.2d 175, 181 (Ind. Ct. App. 2006). Although due process has never been precisely defined, the phrase embodies a requirement of "fundamental fairness." *In re J.T.*, 740 N.E.2d 1261, 1264 (Ind. Ct. App. 2000), *trans. denied*.

Notwithstanding the significance of the rights involved herein, it is well-established that a party on appeal may waive a constitutional claim. *McBride v. Monroe County Office of Family & Children*, 798 N.E.2d 185, 194 (Ind. Ct. App. 2003). In particular, we have previously held that a parent may waive a due process claim in a CHINS or termination case when it is raised for the first time on appeal. *Id.* at 194-95; *see also In re K.S.*, 750 N.E.2d 832, 834 n.1 (Ind. Ct. App. 2001) (concluding mother waived claim that trial court violated her due process rights in failing to follow statutory requirements governing permanency hearings, case plans, and dispositional orders because she raised constitutional claim for first time on appeal); *Smith v. Marion County Dep't of Public Welfare*, 635 N.E.2d 1144, 1148 (Ind. Ct. App. 1994) (concluding father waived constitutional right to appointment of counsel in CHINS proceeding because father presented issued for first time on appeal), *trans. denied*. This is in keeping with the long-standing general rule that an issue cannot be raised for the first time on appeal. *McBride*, 798 N.E.2d at 194.

In asserting he was denied due process of law, Father claims MCDCS failed to comply with statutory requirements to make reasonable efforts to preserve and reunify

him with his children during the CHINS proceedings, as is required by Indiana Code section 31-34-21-5.5. Father also complains that he was "ignored" by MCDCS, that there is no evidence MCDCS ever "included [Father] in a case plan" or that the juvenile court ever ordered any services for Father during the CHINS proceedings, and that there were no "expectations on the part of [MCDCS] communicated to [Father] during the CHINS or termination proceedings." Appellant's Br. p. 18.

The record reveals that Father, who was represented by counsel throughout the entirety of the CHINS and termination proceedings, did not object to any alleged deficiencies regarding MCDCS's case plans,[3] lack of services, or lack of communication with Father at any time during the CHINS proceedings, nor did Father argue during the termination proceedings that these alleged deficiencies constituted a due process violation. Rather, Father has raised his procedural due process claim for the first time on appeal. In addition, Father correctly acknowledges that "the provision of family services is not a requisite element of the parental rights termination statute, and that the failure to provide services does not serve as a basis on which to directly attack a termination order as contrary to law." *Id.* at 18. *See also* Ind. Code § 31-35-2-4 (2008); *In re E.E.*, 736 N.E.2d 791, 793 (Ind. Ct. App. 2000) (stating provision of family services is not a requisite element of our parental rights termination statute). We therefore conclude that Father has waived his constitutional challenge.

[3] We observe that Father has failed to provide us with any copies of the allegedly defective MCDCS case plans, the parent participation plans, and/or any MCDCS CHINS case review reports submitted to the juvenile court during the underlying proceedings.

II. Sufficiency of the Evidence

We next consider Father's assertion that there is insufficient evidence supporting the juvenile court's judgment terminating his parental rights. Although the traditional right of parents to establish a home and raise their children is recognized as a constitutionally protected right, a juvenile court must nevertheless subordinate the interests of the parent to those of the child when evaluating the circumstances surrounding a termination. *K.S.*, 750 N.E.2d at 837. Termination of a parent-child relationship is proper where a child's emotional and physical development is threatened. *Id.* Although the right to raise one's own child should not be terminated solely because there is a better home available for the child, parental rights may be terminated when a parent is unable or unwilling to meet his or her parental responsibilities. *Id.* at 836.

Before an involuntary termination of parental rights can occur, the State is required to allege and prove, among other things:

> (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; [and]
>
> (C) termination is in the best interests of the child[.]

Ind. Code § 31-35-2-4(b)(2).[4] "The State's burden of proof in termination of parental rights cases is one of 'clear and convincing evidence.'" *In re G.Y.*, 904 N.E.2d 1257,

[4] Indiana Code section 31-35-2-4 was amended by Pub. L. No. 21-2010, § 8 (effective March 12, 2010). The changes to the statute became effective after the filing of the termination petitions involved herein and are not applicable to this case.

1260-61 (Ind. 2009) (quoting Ind. Code § 31-37-14-2). If the juvenile court finds the allegations in a petition described in section 4 of this chapter are true, the court shall terminate the parent-child relationship. Ind. Code § 31-35-2-8(a). Father challenges the sufficiency of the evidence supporting the juvenile court's findings as to subsections 2(B) and (C) of the termination statute cited above. *See* Ind. Code § 31-35-2-4(b)(2).

A. Conditions Remedied

Indiana Code section 31-35-2-4(b)(2)(B) is written in the disjunctive. Thus, the juvenile court need only find that one of the two requirements of subsection 2(B) has been established by clear and convincing evidence. *See L.S.*, 717 N.E.2d at 209. Because we find it to be dispositive under the facts of this case, we need only consider whether MCDCS established, by clear and convincing evidence, that there is a reasonable probability the conditions resulting in the children's removal or continued placement outside of Father's care will not be remedied. *See* Ind. Code § 31-35-2-4(b)(2)(B)(i).

A juvenile court must judge a parent's fitness to care for his or her child at the time of the termination hearing, taking into consideration evidence of changed conditions. *In re J.T.*, 742 N.E.2d 509, 512 (Ind. Ct. App. 2001), *trans. denied*. The juvenile 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, a county department of child

services is not required to provide evidence ruling out all possibilities of change; rather, it need establish only that there is a reasonable probability the parent's behavior will not change. *In re Kay L.*, 867 N.E.2d 236, 242 (Ind. Ct. App. 2007).

In determining there is a reasonable probability that the conditions leading to the children's removal and continued placement outside Father's care will not be remedied, the juvenile court made several findings regarding Father's inability to parent the children at the time of the termination hearing. Specifically, the juvenile court found Father "unavailable" to parent the children because he remained incarcerated on a Class B felony dealing in cocaine conviction and his "current outdate from prison is listed as September 2012." Appellant's App. p. 28. Although the juvenile court acknowledged Father "may receive a sentence reduction down to an outdate of February or March 2012 for attending substance abuse classes," the court further observed that Father "has had his outdate increased by thirty (30) days on three occasions for bad behavior." *Id.* Moreover, even though the juvenile court found Father had completed a parenting class called "Inside Out Dads" and had testified that he had completed Phase I and Phase II substance abuse classes, the juvenile court pointed out in its findings that "[n]o certificates of completion were tendered, and the work would have come between March 16, 2010[,] and today's trial date." *Id.*

A thorough review of the record reveals that these findings are supported by the evidence. At the time of the termination hearing, Father remained incarcerated and had approximately two years and four months remaining on his sentence. Although it was possible for Father to achieve some time cuts to his sentence by successfully completing

various programs, his past record of three disciplinary actions resulting in time being added to his sentence, as well as several previously-failed attempts at completing time-cut programs while incarcerated, such as a GED program and substance abuse self-help program, weighed against any future time-cuts actually coming to fruition. Testimony during the termination hearing from various caseworkers and service providers also makes clear that Father (1) never established paternity of two of the children, (2) failed to follow court orders to maintain contact with MCDCS, and (3) neglected to maintain any relationship with the children during his incarceration. Finally, evidence submitted during the termination hearing indicates Father has a history of involvement with MCDCS including prior CHINS and Informal Adjustment cases pertaining to the children.

As previously explained, a juvenile 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. Moreover, this Court has 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." *Castro v. State Office of Family & Children*, 842 N.E.2d 367, 374 (Ind. Ct. App. 2006), *trans. denied*. Here, given Father's inability to care for the children at the time of the termination hearing, coupled with Father's September 2012 projected release date, history of involvement with MCDCS, and habitual neglectful conduct in failing to provide the children with a safe and stable home environment, we conclude that MCDCS presented clear and convincing evidence to support the juvenile court's findings and ultimate determination that there is a

reasonable probability the conditions resulting in the children's removal and continued placement outside Father's care will not be remedied. Father's arguments to the contrary, which emphasize his unsubstantiated, self-serving testimony concerning possible early release from incarceration and future employment, rather than the evidence relied upon by the juvenile court, amount to an invitation to reweigh the evidence, which we may not do. *D.D.*, 804 N.E.2d at 264.

B. Best Interests

Father also asserts that MCDCS failed to prove termination of his parental rights is in the children's best interests. In determining what is in the best interests of a child, the juvenile court is required to look beyond the factors identified by the Indiana Department of Child Services and look to the totality of the evidence. *McBride*, 798 N.E.2d at 203. In so doing, the juvenile court must subordinate the interests of the parent to those of the child. *Id.* The 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 the case manager and child advocate to terminate parental rights, in addition to evidence that the conditions resulting in removal will not be remedied, is sufficient to show by clear and convincing evidence that termination is in the child's best interests. *In re M.M.*, 733 N.E.2d 6, 13 (Ind. Ct. App. 2000).

Beyond the findings discussed above, the juvenile court made several additional pertinent findings when it determined that termination of Father's parental rights is in the children's best interests. Specifically, the juvenile court found that all three children have special needs which have required psychological evaluations, counseling, and

developmental assistance. The court also found Father "does not have a grasp as to the magnitude of the children's special needs, feeling all that [S.H.] needs is attention and that [A.H.] is just small." Appellant's App. p. 28. In addition, the juvenile court determined that "[c]ontinuation of the parent-child relationship would pose a barrier to the children obtaining the permanency that they need," and that remaining "in limbo" pending Father's release from incarceration would not be in the children's best interests. *Id.* Finally, the juvenile court found that the children were "dealing" with their special needs and "thriving physically" under the care of their pre-adoptive foster mother who was "trained to meet the children's special needs" and had been providing the children with a "safe and stable environment" for over one year. *Id.* These findings are likewise supported by the evidence.

The record reveals that MCDCS case manager Crystal Johnson recommended termination of Father's parental rights as in the children's best interests. In so doing, Johnson informed the court that S.H. was diagnosed with a development disorder known as "adjustment disorder with mixed mood" and therefore struggles with "social interaction and communication." Tr. p. 180. Johnson further explained that A.H. and A.M. were both diagnosed with "autism spectrum disorder and expressive language disorder" which significantly impacts the children's ability to communicate verbally. *Id.* at 180-81. Johnson also described A.M. as "very angry and aggressive." *Id.* at 182. In recommending termination of Father's parental rights, Johnson stressed the children's need for a "safe" and "permanent" home and acknowledged that the children's "mental

health conditions emphasize[d] [their] need for that even more than a normal child . . . ." *Id.* at 187.

Similarly, Guardian ad Litem Erin Cahoon ("Cahoon") recommended termination of Father's parental rights, stating the children had been "thriving" since they were placed in their current foster care home. *Id.* at 200. Cahoon also emphasized the children's need for a set rountine and stated that, based on her observations of the children and how "change can be hard on them," she did not believe that "permanency" for the children should be delayed until Father is released from incarceration. *Id.* at 203.

Father's own testimony supports the juvenile court's findings, including the court's determination regarding Father's failure to "grasp the magnitude of the children's special needs." Appellant's App. p. 28. When asked during the termination hearing to explain what he knows about S.H.'s special needs, Father answered that S.H. is "nice" and "just needs a little bit of attention, that's all. . . . If you love her and take care of her . . . there's nothing else wrong. She won't be bad." Tr. p. 233. Regarding A.M.'s "particular need," Father testified that A.M. was "smaller than the average kids." *Id.* As for A.H., Father simply stated A.H. "was very healthy." *Id.*

Based on the totality of the evidence, including Father's ongoing incarceration and historical inability to provide the children with a safe and stable home environment, coupled with the testimony from Johnson and Cahoon, we conclude that clear and convincing evidence supports the juvenile court's determination that termination of Father's parental rights is in the best interests of S.H., A.H., and A.M.

III. Motion to Continue

In addressing Father's final contention that the juvenile court erred in denying his motion to continue the termination hearing, we point out that the ruling on a non-statutory motion for a continuance is within the sound discretion of the trial court. *Rowlett v. Vanderburgh County Office of Family & Children*, 841 N.E.2d 615, 619 (Ind. Ct. App. 2006), *trans. denied*. Discretion is a privilege afforded a juvenile court to act in accord with what is fair and equitable in each circumstance. *McCullough v. Archbold Ladder Co.*, 605 N.E.2d 175, 180 (Ind. 1993). A decision on a motion for continuance will thus be reversed only upon a showing of an abuse of discretion and prejudice resulting from such an abuse. *Rowlett*, 841 N.E.2d at 619. Finally, while the facts and reasonable inferences in certain instances might allow for a different conclusion, we will not substitute our judgment for that of the juvenile court. *McBride v. McBride*, 427 N.E.2d 1148, 1151 (Ind. Ct. App. 1981).

Turning to the merits of Father's argument, Father claims he was prejudiced by the juvenile court's denial of his motion to continue because he had "just been transferred to the new institution the day before the termination trial began" and was trying to re-engage in services, including a program that he had nearly completed before his transfer. Appellant's Br. p. 21. Father goes on to assert that had he "been given a continuance to allow time to show the court his progress in completing services and achieving time cuts, it is likely that his parental rights would not have been terminated." *Id.* Father's arguments are unpersuasive.

The trial court's findings make clear the court was aware of Father's past and future plans to participate in various time-cut programs while incarcerated. For example, the court found Father "may receive a sentence reduction down to an outdate of February or March 2012, for attending substance abuse classes." *Id.* at 25. Nevertheless, it is also apparent that the juvenile court found this evidence to be tempered by the facts that Father had "increased his outdate by thirty (30) days on three occasions for bad behavior" in the past, that "no certificates of completion" had been tendered by Father, and that the substance abuse classes allegedly completed by Father had not been done until the final months before the termination hearing. Clearly, the juvenile court was in a position where it could only speculate as to whether Father would actually achieve any time cuts on his sentence in the future. Under these circumstances, we cannot conclude that the juvenile court abused its discretion in denying Father's motion to continue.

This Court will reverse a termination of parental rights "'only upon a showing of "clear error" – that which leaves us with a definite and firm conviction that a mistake has been made.'" *In re A.N.J.*, 690 N.E.2d 716, 722 (Ind. Ct. App. 1997) (quoting *Egly v. Blackford County Dep't of Pub. Welfare*, 592 N.E.2d 1232, 1235 (Ind. 1992)). We find no such error here.

Affirmed.

BAKER, C.J., and BARNES, J., concur.