

MEMORANDUM DECISION

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ATTORNEY FOR APPELLANT

Justin R. Wall
Wall Legal Services
Huntington, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Robert J. Henke
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

In Re: The Termination of the
Parent Child Relationship of
A.S. (Minor Child);

T.S. (Father),

Appellant-Respondent,

v.

The Indiana Department of
Child Services,

Appellee-Petitioner.

September 29, 2021

Court of Appeals Case No.
21A-JT-389

Appeal from the Huntington
Superior Court

The Honorable Jennifer E.
Newton, Judge

Trial Court Cause No.
35D01-1901-JT-1

Pyle, Judge.

Statement of the Case

- [1] T.S. (“Father”) appeals the termination of the parent-child relationship with his daughter, A.S. (“A.S.”). He argues that there is insufficient evidence to support the termination. Concluding that there is sufficient evidence to support the termination, we affirm the trial court’s judgment.¹
- [2] We affirm.

Issue

Whether there is sufficient evidence to support the termination of Father’s parental relationship with A.S.

Facts

- [3] The evidence and reasonable inferences that support the judgment reveal that A.S. was born in July 2014. Mother has another daughter, K.G., who was born in April 2010. In September 2016, six-year-old K.G. and two-year-old A.S. lived with Mother and Father, who were not married, in Huntington, Indiana.
- [4] At the end of the school day on September 6, 2016, a school bus driver was unable to drop K.G. off at her bus stop because there was no adult waiting for her. The bus driver took K.G. back to the school, where a school official attempted to contact Mother. When the school official was unable to reach

¹ The trial court also terminated A.S.’s mother’s (“Mother”) parental rights; however, Mother is not a party to this appeal.

Mother, the official contacted K.G.'s maternal grandmother, who was listed as K.G.'s emergency contact. K.G.'s grandmother told the school official that Mother was an active heroin user and that A.S. was in Mother's care. The school official contacted the Department of Child Services ("DCS"), and a DCS case manager and a sheriff's department deputy went to Mother and Father's home. As the case manager and the deputy approached the house, they noticed that a broken window was covered with cardboard.

[5] When Mother eventually came to the door, Mother admitted that she had been using heroin. The case manager and the deputy noticed track marks on Mother's arms. Mother was holding A.S., who had soiled herself and appeared to need a bath. While waiting for Mother to change A.S.'s diaper, the case manager noticed that the home was so cluttered with trash, food, and clothing that the case manager could not see the floor. In addition, the kitchen was full of dirty dishes and trash. There was very little food and no running water in the house.

[6] DCS removed both K.G. and A.S. from Mother because of her active heroin use and the inappropriate living conditions in the home. At the time of the removal, Father was unable to care for A.S. because he had been admitted to an inpatient substance abuse and mental health program at Parkview Behavioral Health. A.S. was placed with her maternal grandparents, and K.G. was placed with her paternal grandmother.

[7] The following week, DCS filed a petition alleging that A.S. was a child in need of services (“CHINS”). In January 2017, Father, who was residing in a mental health center group home, admitted that A.S. was a CHINS. In February 2017, the trial court issued a CHINS dispositional order. This order required Father to: (1) maintain weekly contact with the DCS family case manager; (2) maintain suitable and stable housing; (3) abstain from the use of illegal substances; (4) complete a parenting assessment and follow all recommendations; (5) complete a substance abuse assessment and follow all recommendations; (6) submit to random drug screens; (7) participate in the Fatherhood Engagement Program; and (8) participate in counseling services.

[8] Father was initially compliant with the dispositional order. Specifically, in an August 2017 periodic case review order, the trial court found that Father had completed the Fatherhood Engagement Program and the substance abuse assessment. In addition, Father’s drug screens had been negative, and he had been participating in home-based services to improve his physical and mental health. Father had also been attending supervised visits with A.S. and was progressing toward unsupervised visitation.

[9] In November 2017, DCS learned that Mother and Father had been actively using methamphetamine and staying at maternal grandparents’ home, where A.S. had been placed. In addition, there was an allegation that then-three-year-old A.S. had been sexually abused by a maternal uncle who was also staying in the grandparents’ home. DCS removed A.S. from maternal grandparents’ home and placed her in foster care. The foster mother (“Foster Mother”)

picked up A.S. from a sexual trauma center where A.S. had been evaluated for sexual abuse. When Foster Mother took A.S. to the foster parents' home, A.S. was fearful and wanted to be held constantly. During family dinners, A.S. sat under a desk in another room and rocked back and forth. A.S. also frequently wet the bed and inappropriately touched herself in a manner that Foster Mother would not have expected from a three-year-old child. Based on Foster Mother's concerns about A.S.'s behavior, A.S. began attending therapy sessions with Therapist Erin Hollowell ("Therapist Hollowell") at the Bowen Center ("the Bowen Center").

[10] In a March 2018 periodic case review order, the trial court found that Father had entered a group home to address his substance abuse issues. Four months later, in a July 2018 periodic case review order, the trial court noted that Father, who suffered from Type 1 diabetes, had been hospitalized and had then been moved to a nursing home. Father, who was suffering from end-stage renal failure, required kidney dialysis three times each week. Although he had been physically unable to care for A.S., Father had been able to attend visits with her at Huntington House, where Mother was receiving substance abuse treatment. In September 2018, DCS referred Father to the Bowen Center for a mental health assessment and a psychiatric evaluation.

[11] In October 2018, Mother had obtained employment and housing, and Father's health had improved enough for him to move in with her. Based upon both parents' substantial compliance with the CHINS dispositional order, DCS recommended that A.S. have a trial home placement with her parents. During

the course of the trial home placement, Father attended the mental health assessment and psychiatric evaluation at the Bowen Center. Based on the assessment and evaluation, the Bowen Center recommended that Father participate in individual counseling and in-home case management. Before Father could receive the home-based services from the Bowen Center, Father had to return to the Bowen Center to complete a care plan with a licensed therapist, who would be able to determine Father's specific needs. After Father had completed the care plan, the Bowen Center indicated that it would be able to provide him with in-home services. However, during the course of the trial home placement, and before Father had completed the care plan at the Bowen Center, both parents tested positive for methamphetamine and amphetamine.

[12] DCS ended A.S.'s trial home placement in December 2018, six weeks after it had begun, and returned her to the foster parents' home. When foster parents took A.S. back to the preschool that she had attended before the failed trial home placement, the teacher noticed that the previously happy A.S., who had been excited to attend school, had become aggressive and loud. A.S. frequently cried and rocked back and forth. A.S. also worried that Foster Mother would not pick her up at the end of the day.

[13] Foster parents also noticed changes in A.S.'s behavior when she returned to their home after the failed trial home placement. For example, when A.S. heard a loud noise, such as a blender, A.S. began rocking herself. A.S. also refused to go to the restroom by herself. Specifically, she would "pee her pants" unless someone went into the restroom with her. (Tr. Vol. 3 at 91). Foster

Mother took A.S. back to see Therapist Hollowell, who diagnosed A.S. as suffering from post-traumatic stress disorder.

[14] Following the failed trial home placement, Father stopped participating in the court-ordered services and did not return to the Bowen Center to complete his care plan. Also in December 2018, Father was admitted to the hospital because of complications from his diabetes. In January 2019, DCS filed a petition to terminate Father's parental relationship with A.S.

[15] One month later, in February 2019, the hospital transferred Father to Hickory Creek ("Hickory Creek"), a skilled nursing facility. In June 2019, Father and A.S. participated in a therapeutic telephonic visit, which Therapist Hollowell supervised. During the telephone call, Father did not attempt to speak with almost five-year-old A.S. "on her own level[.]" (Tr. Vol. 3 at 132). Rather, Father talked about his health conditions. A.S. did not know what to say or how to respond to Father and asked if she could end the telephone conversation.

[16] In September 2019, Therapist Hollowell submitted to the trial court a letter wherein she recommended that A.S. not have visitation with either Father or Mother "due to chronicity and severity of symptoms and adverse effects on [A.S.]'s mental, emotional and physical well-being." (App. Vol. 3 at 163). Also in September 2019, in an order following a permanency hearing, the trial court found that Father had not participated in any court-ordered services since the failure of A.S.'s trial home placement in December 2018. The trial court

also found that Father still resided at Hickory Creek so that his health needs could be better managed.

[17] In a February 2020 order on a periodic case review, the trial court found that Father had not: (1) maintained contact with DCS; (2) participated in any court-ordered services; or (3) contacted Bowen Center to schedule an appointment to begin services recommended during Father's October 2018 evaluation. In its order, the trial court concluded that Father had not enhanced his ability to fulfil his parental obligations.

[18] DCS Family Case Manager Aubri Cox ("Case Manager Cox") had attempted to contact Father several times after the failed trial home placement in December 2018. When Father eventually responded to her calls, he asked her what he needed to do. Case Manager Cox "reiterate[d]to him there [were] services that [he was] supposed to be completing . . . that . . . the referrals [were] in place, the appointments just need[ed] [to be] scheduled." (Tr. Vol. 3 at 195-96). Father also contacted Case Manager Cox shortly before the first day of the termination factfinding hearing and again asked her what he needed to do. Case Manager Cox "reiterated to him again these [were] the services and these [were] things [he] should be doing[.]" (Tr. Vol. 3 at 196). Case Manager Cox advised Father to contact the Bowen Center and schedule the services that the center had recommended in November 2018. However, Father never contacted the Bowen Center.

- [19] After numerous delays and continuances, the trial court held a three-day termination hearing in February 2020, September 2020, and December 2020. The trial court heard testimony about the facts as set forth above.
- [20] At the time of the February 2020 hearing, thirty-three-year-old Father, a double amputee confined to a wheelchair, was still living at Hickory Creek. He had recently had one eye removed and had no vision in his remaining eye. In addition, Father was still suffering from end-stage kidney failure and still attended kidney dialysis three times each week. Father further suffered from schizophrenia, bi-polar disorder, depression, and anxiety.
- [21] Hickory Creek nurse manager Kimberly Foster (“Nurse Manager Foster”) testified at the hearing that Hickory Creek’s staff administered Father’s medication and assisted him with his adult living skills. Nurse Manager Foster further testified that Father was capable of feeding himself, dressing himself, going to the restroom without assistance, and making telephone calls. According to Nurse Manager Foster, Father would be able to live on his own if he had someone to help him with his medication. Nurse Manager Foster further testified that Hickory Creek had contracted with a transportation service to transport Father to his dialysis appointments and could have transported him to the Bowen Center had Father requested this service.
- [22] Also at the termination factfinding hearing, Therapist Hollowell testified that A.S. “ha[d] the same needs as any other child, except increased because of [her] adverse experiences.” (Tr. Vol. 3 at 150). According to Therapist Hollowell,

those needs included stability, security, consistency, emotional support, and permanency. Therapist Hollowell further testified that A.S.'s needs had been met by her foster family, which included the foster parents and their four children.

[23] In addition, Case Manager Cox testified that A.S. was a “happy little girl[,]” who had been placed with the foster family for the previous three years and who had bonded with the foster family. (Tr. Vol. 3 at 197). Case Manager Cox pointed out it had been four years since A.S.'s removal from Father and opined that termination was in A.S.'s best interests. Guardian Ad Litem Lindsay Franklin also testified that termination was in A.S.'s best interests.

[24] In March 2021, the trial court issued a detailed order terminating Father's parental relationship with A.S. Father now appeals.

Decision

[25] Father argues that there is insufficient evidence to support the termination of his parental relationship with A.S. The Fourteenth Amendment to the United States Constitution protects the traditional right of parents to establish a home and raise their children. *In re K.T.K.*, 989 N.E.2d 1225, 1230 (Ind. 2013). However, the law provides for termination of that right when parents are unwilling or unable to meet their parental responsibilities. *Bester v. Lake County Office of Family and Children*, 839 N.E.2d 143, 147 (Ind. 2005). The purpose of terminating parental rights is not to punish the parents but to protect their children. *In re L.S.*, 717 N.E.2d 204, 208 (Ind. Ct. App. 1999), *trans. denied*.

[26] When reviewing the termination of parental rights, we will not reweigh the evidence or judge the credibility of the witnesses. *K.T.K.*, 989 N.E.2d at 1229. Rather, we consider only the evidence and reasonable inferences that support the judgment. *Id.* Where a trial court has entered findings of fact and conclusions thereon, we will not set aside the trial court's findings or judgment unless clearly erroneous. *Id.* (citing Ind. Trial Rule 52(A)). In determining whether the court's decision to terminate the parent-child relationship is clearly erroneous, we review the trial court's judgment to determine whether the evidence clearly and convincingly supports the findings and the findings clearly and convincingly support the judgment. *Id.* at 1229-30.

[27] A petition to terminate parental rights must allege:

(A) that one (1) of the following is true:

(i) The child has been removed from the parent for at least six (6) months under a dispositional decree.

* * * * *

(B) that one (1) of the following is true:

(i) There is a reasonable probability that the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied.

(ii) There is a reasonable probability that the continuation of the parent-child relationship poses a threat to the well-being of the child.

(iii) The child has, on two (2) separate occasions, been adjudicated a child in need of services;

(C) that termination is in the best interests of the child; and

(D) that there is a satisfactory plan for the care and treatment of the child.

IND. CODE § 31-35-2-4(b)(2). DCS must prove the alleged circumstances by clear and convincing evidence. *K.T.K.*, 989 N.E.2d at 1231.

[28] In addition, as a general rule, appellate courts grant latitude and deference to trial courts in family law matters. *Matter of D.P.*, 72 N.E.3d 976, 980 (Ind. Ct. App. 2017). “This deference recognizes a trial court’s unique ability to see the witnesses, observe their demeanor, and scrutinize their testimony, as opposed to this court[] only being able to review a cold transcript of the record.” *Id.*

[29] Here, Father specifically concedes that: (1) A.S. has been removed from his care for the requisite statutory period; (2) termination is in A.S.’s best interests; and (3) foster parent adoption is a satisfactory plan for A.S.’s care and treatment. (Father’s Br. 23). Father’s sole argument is that DCS failed to prove by clear and convincing evidence that: (1) there is a reasonable probability that the conditions that resulted in A.S.’s removal or the reasons for her placement outside the home will not be remedied; and (2) a continuation of the parent-child relationship poses a threat to A.S.’s well-being.

[30] However, we note that INDIANA CODE § 31-35-2-4(b)(2)(B) is written in the disjunctive. Therefore, DCS is required to establish by clear and convincing evidence only one of the three requirements of subsection (B). *In re A.K.*, 924 N.E.2d 212, 220 (Ind. Ct. App. 2010), *trans. dismissed*. We therefore discuss only whether there is a reasonable probability that the conditions that resulted in A.S.'s removal or the reasons for her placement outside the home will not be remedied.

[31] In determining whether the conditions that resulted in a child's removal or placement outside the home will not be remedied, we engage in a two-step analysis. *In re E.M.*, 4 N.E.3d 636, 643 (Ind. 2014). We first identify the conditions that led to removal or placement outside the home and then determine whether there is a reasonable probability that those conditions will not be remedied. *Id.* The second step requires a trial court to judge a parent's fitness at the time of the termination proceeding, taking into consideration evidence of changed conditions and balancing any recent improvements against habitual patterns of conduct to determine whether there is a substantial probability of future neglect or deprivation. *Id.* Habitual conduct may include a parent's prior criminal history, drug and alcohol abuse, history of neglect, failure to provide support, and a lack of adequate housing and employment. *A.D.S. v. Indiana Department of Child Services*, 987 N.E.2d 1150, 1157 (Ind. Ct. App. 2013), *trans. denied*. The trial court may also consider services offered to the parent by DCS and the parent's response to those services as evidence of whether conditions will be remedied. *Id.* Requiring a trial court to give due

regard to changed conditions does not preclude them from finding that a parent's past behavior is the best predictor of his future behavior. *E.M.*, 4 N.E.3d at 643.

[32] Here, our review of the evidence reveals that, at the time of A.S.'s removal, Father was unable to care for her because he had been admitted to an inpatient treatment program. Four years later, Father was unable to care for A.S. because he was a resident in a skilled nursing facility. During the four years of the CHINS proceedings, DCS offered Father a plethora of services, including home-based services, the Fatherhood Engagement Program, a parenting assessment, a substance abuse assessment, drug screens, and counseling. DCS also offered Father supervised visitation with A.S., which eventually led to a trial home placement. It was during this placement that Father used methamphetamine, and DCS returned A.S. to foster care. Following the failed trial home placement, and during the last two years of the CHINS proceedings, Father stopped participating in services and maintaining contact with DCS. Father had services available at the Bowen Center, but he failed to contact the center to schedule them. Also, at the time of the termination hearing, Father had not seen A.S. in two years. This evidence supports the trial court's conclusion that there is a reasonable probability that the conditions that resulted

in A.S.'s removal or the reasons for placement outside her home will not be remedied.²

[33] We note that Father further argues “that just because he is physically handicapped, and cannot currently take care of [A.S.], that those conditions are not determinative of Father’s ability to parent [A.S.] and maintain a relationship with [A.S.]” (Father’s Br. 32). However, this Court had previously stated that “[w]e are unwilling to put [a child] on a shelf until her parents are capable of caring for her appropriately.” *Matter of Campbell*, 534 N.E.2d 273, 275 (Ind. Ct. App. 1989).

[34] We 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.” *Egley v. Blackford County Department of Public Welfare*, 592 N.E.2d 1232, 1235 (Ind. 1992). We find no such error here and therefore affirm the trial court.

² Father also argues that there is insufficient evidence that there is a reasonable probability that the conditions that resulted in A.S.'s removal or the reasons for placement outside the home will not be remedied because DCS violated the Americans with Disabilities Act (“the ADA”) by failing to provide services that accommodated his physical and mental disabilities. However, Father has waived appellate review of this issue because he failed to raise it at the termination hearing. *See McBride v. Monroe County Office of Family and Children*, 798 N.E.2d 185, 194 (Ind. Ct. App. 2003) (finding that the issue was waived because it was not first presented to the trial court). Waiver notwithstanding, and although Father “concede[s] that caselaw does not support his position that DCS’ [alleged] noncompliance with the ADA is a basis for him challenging the termination of his parental rights, [see *Stone v. Daviess County Division of Child and Family Services*, 656 N.E.2d 824 (Ind. Ct. App. 1995), *trans. denied*], Father argues that [Stone’s] legal conclusion is faulty and outdated and should be changed by this Court.” (Father’s Br. 28). We decline Father’s request to change the law.

[35] Affirmed.

Bailey, J., and Crone, J., concur.