

MEMORANDUM DECISION

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ATTORNEY FOR APPELLANT

Matthew J. McGovern
Fishers, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Abigail R. Recker
Robert J. Henke
Deputy Attorneys General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

In the Matter of the Parent-Child
Relationship of L.B., J.B., and
A.B. (Minor Children)

S.B. (Father),

Appellant-Respondent,

v.

Indiana Department of Child
Services,

Appellee-Petitioner.

October 7, 2021

Court of Appeals Case No.
21A-JT-549

Appeal from the Floyd Circuit
Court

The Honorable J. Terrance Cody,
Judge

Trial Court Cause Nos.
22C01-1912-JT-766
22C01-1912-JT-767
22C01-1912-JT-768

Brown, Judge.

[1] S.B. (“Father”) appeals the involuntary termination of his parental rights with respect to his three children. We affirm.

Facts and Procedural History

[2] J.B. was born to Father and C.B. (“Mother”) on May 29, 2015, and L.B. was born on April 27, 2016. According to the trial court’s findings, J.B. and L.B. were removed on May 5, 2016, due to allegations that Mother used controlled substances during her pregnancy with L.B. and Father was not cooperating with the Department of Child Services (“DCS”), and DCS alleged J.B. and L.B. were children in need of services (“CHINS”). The court found J.B. and L.B. were CHINS in July 2016 and signed dispositional orders on August 15, 2016. Father was incarcerated on March 15, 2017. According to the Odyssey Case Management System, the State charged Father on March 9, 2017, with burglary as a level 5 felony alleging he committed the offense on or about September 2, 2016, and charged him on April 21, 2017, with dealing in methamphetamine as a level 4 felony alleging he committed the offense on or about December 12, 2016, Father pled guilty on both counts, and the court sentenced him to consecutive sentences of two years for burglary and six years for dealing in methamphetamine. A.B. was born on May 18, 2017. According to the court’s findings, A.B. was removed from Mother on May 19, 2017, due to allegations that Mother used controlled substances during her pregnancy with A.B. and that Father was incarcerated, DCS alleged and the court found that A.B. was a CHINS, and the court signed a dispositional order in September 2017.

[3] On December 17, 2019, DCS filed petitions to terminate Father’s parental rights with respect to the three children. In September 2020, the court held a factfinding hearing. Paris Scott with Ireland Home Based Services testified that she received referrals for Father in May 2016 for home-based casework services, supervised visitation, and parenting and substance abuse assessments. She indicated the referral for home-based services was not successful, Father showed up twice, and the parenting and substance abuse assessments were not successful because the agency could not locate him. With respect to the referral for supervised visitation, she testified there were only two visits between May 2016 and February 2017, one visit occurred in May, and the other visit occurred in July. She testified Father was not successful due to his lack of participation.

[4] Family Case Manager Supervisor Sam Charbonneau (“FCM Charbonneau”) testified DCS began its assessment in April 2016 after receiving a report that L.B. was born drug-exposed and allegations that Mother admitted to heroin and methamphetamine use and that both parents were using drugs. He testified that, during the course of the investigation, both parents “were using methamphetamine pretty regularly during that time.” Transcript Volume II at 82. He felt Father and Mother had not made progress and testified “[i]t was just so hard to get them sober,” they were “always either avoiding us or we couldn’t locate them,” “the most contact we had with [Father] is when he got incarcerated. We [were] able to find him and talk to him. Other than that, they were, you know, I hate to say, just ripping and running. We couldn’t . . . get ahold of them,” and “[e]very time we did get ahold of them, they were testing

positive for meth.” *Id.* at 83. He testified no one could reach Father from April through August 2016. He testified that Father and Mother “had signed off on multiple safety plans,” “agreed to come to the visits [and] show up on time,” “we knew the visits were two times a week, everybody knew when the visits were,” and “[w]e just couldn’t get them to show up.” *Id.* at 84. He testified “I think we worked extremely hard . . . to try to get the parents engaged,” “[w]e offered them intensive substance abuse treatment, detox, residential, provided all the services that anybody could that had an addiction,” “[w]e included relatives within the family,” and “[w]e had located a . . . relative home for the children, kept . . . the siblings together.” *Id.* He testified that in October of 2016 a family case manager “met with them, gave them the case plans, the safety plans, and the Dispositional court orders, saying . . . ‘This is what you need to actually do to get your children back’” and “their addiction was just so strong, they just couldn’t do it.” *Id.* at 85.

[5] Jasmine Grier testified that she used to work for DCS and it was difficult to contact Father prior to his incarceration, she “was only able to drug screen him a total of eight times, with maybe two of those drug screens testing negative,” “[h]e usually wouldn’t show up to visits,” and “[t]here were two visits in 2016 that he did show up to.” *Id.* at 109. She testified that she supervised a visit with the children when Father was at the jail in March 2017, the two younger children were hesitant to interact with him and observed him from a distance, and J.B. warmed up to Father “after a little bit.” *Id.* She indicated that there was some better communication with Father after his incarceration and that he

told her he had been using drugs since he was thirteen or fourteen years old. When asked about her concerns about reunification, she referred to the length of Father's incarceration, DCS becoming involved in 2016, the length of time J.B. and L.B. had been placed outside the home, and the lack of consistent visitation. She indicated Father was cooperative in wanting to complete the parenting and substance abuse assessments at the jail. She testified, "[i]nitially, we did the visits at Floyd County [Jail]," "[w]hen he was getting ready to go to Putnamville, he did indicate to me that he did not want them to go all the way up there," and "he just said that it would be a very long drive for them and because they're so young." *Id.* at 124-125. She indicated Father did not consistently participate in services when not incarcerated, he participated in two visits from the time the case was opened until he was incarcerated which was about forty-five or fifty weeks, those visits started out twice a week, and he did not take advantage of any of the services provided by DCS when he had the ability and was free in the community. She recommended termination petitions be filed due to the parents' inconsistency and failure to follow the dispositional orders, the fact the children were together in a stable home, and her belief that termination was in the children's best interests. She indicated J.B. and L.B. had not been placed with either parent since their removal in May 2016 and A.B. had not been placed in the home after her removal in May 2017.

[6] Family Case Manager Rachel Ballard-Mil ("FCM Ballard-Mil") testified that L.B. and A.B. went from the hospital to placement and had never been out of DCS's custody. She testified that, in January 2018, Father did not believe it

was best for the children to visit him due to their ages and the travel required and, in December 2018 he sent her a letter requesting to start visitation, and there were four visits between March 2019 and January 2020, one in March 2019, one in April 2019, one in July 2019, and the last one on January 31, 2020. She indicated the visits did not go very well, the children were very uncomfortable and did not seem to know who Father was, and they did not appear to be bonded in any way. She indicated that, while at the DOC, Father completed an approved parenting program and approved substance abuse education and was referred to Narcotic Anonymous and Alcoholics Anonymous. She testified Father's estimated release was in September 2022. She indicated the older children had been in the custody of DCS for over four years and A.B. had been in its custody for over three years, waiting on Father to be released would make it around six years, Father would have to find housing and employment, and "there would be a lot of therapeutic work necessary for the bond between him and the children." *Id.* at 139. She believed reunification was not in the children's best interest. She testified Father had not shown the ability to provide for the children or maintain sobriety outside of an incarceration setting. She stated "I think while he had the opportunity to have visits while incarcerated, he did turn those down, which I do understand why he did that, but at the same time, it did not allow him to form a bond with the children," "if they were to be reunited with [Father], it would be very traumatic" to them, especially L.B. and A.B., and "they do not have a relationship with [him and] were unable to form any attachment to him or develop any kind of parental bond." *Id.* at 141. She believed the children had

established “a really strong bond” with the expected adoptive parents. *Id.* at 142. She testified the reason there had not been a visit since January 31, 2020, was because Putnamville stopped accepting contact visitations due to the coronavirus. She indicated the children do not know Father as their father and refer to their expected adoptive parents as their mom and dad and it would be detrimental to their well-being to be removed from their family unit.

[7] Court Appointed Special Advocate Lorie Edwards (“CASA”) testified the children were very happy, settled, and thriving in their current foster placement, she was in favor of adoption by the foster parents, and there is a strong bond between the children and their foster parents. She indicated she did not support reunification of the children with their biological parents, from her experience they had not shown the stability to be able to care for them, and she did not believe it was appropriate to wait for Father to be released from incarceration.

[8] Father testified, when asked what was going on for him to admit the children were CHINS, that he “was getting high” and did not have a job. *Id.* at 174. When asked what happened with all the services he was offered while he was not incarcerated, he answered “I didn’t participate in them” and “I went to a few of the visits, submitted to drug screens. Been to one family case meeting, and that was it.” *Id.* at 175. He testified that he never expressed a desire for help and “I was so wrapped up in the drugs that I just didn’t want to go get help.” *Id.* at 176. He testified he had been incarcerated since March 15, 2017, and was serving consecutive sentences for burglary and dealing, and when asked if he knew “the out date,” he replied: “Right now, it’s September 11th,

2022.” *Id.* He testified regarding the programs in which he participated while incarcerated and mentioned the PLUS Program, the Prison Greyhound Program, Breaking the Cycle, Recovery While Incarcerated, and Bridges of Life. When asked if he would be prepared to take and raise the children, he replied “once I got out, and got a job, and got stable housing.” *Id.* at 187. He also indicated that he had communicated with the prosecutor’s office and his understanding was that it was possible that he might have a modification of his sentence and be released to a community corrections program. When asked the longest period he had maintained sobriety outside of incarceration, he answered “[m]aybe a month, maybe.” *Id.* at 196.

[9] On March 8, 2021, the trial court entered orders terminating Father’s parental rights. It found that DCS worked with Father to set up visitation with the children, Father was able to have visits with the children during the life of the case, and Father had been incarcerated for the prior three years and unable to parent due to his incarceration. It found that Father’s earliest release date would be in 2022, he acknowledged he would not be ready to take custody of the children when released, and he testified he had struggled with sobriety while not incarcerated. It found the children had been placed together for the prior three years and were thriving, the pre-adoptive family had formed a strong and loving bond with the children, and the children have no strong bond or connection with Father. The court concluded there is a reasonable probability the conditions that resulted in the children’s removal will not be remedied and the parents were unable to provide for the children’s needs throughout the

pendency of the CHINS cases and have not shown they are capable of providing for the children's reasonable needs. It found there is a reasonable probability the children's mental and emotional health would be damaged by the continuation of the relationship, L.B. and J.B. had been continuously removed from Father and Mother for fifty-two months and A.B. had been removed for thirty-nine months, and trauma would occur by inserting Father into the children's lives. It concluded there is a reasonable probability that continuation of the parent-child relationship poses a threat to the children's well-being, termination of parental rights is in the children's best interests, and there is a satisfactory plan for the care and treatment of the children.

Discussion

[10] Father asserts the trial court's findings do not support the termination of his parental rights. He argues the findings related to the children not being bonded with him, his incarceration, his admission that he was not ready to take custody of them upon his release, and the children's stability with the foster parents are "all just restatements of one another – a list of consequences of [his] incarceration." Appellant's Brief at 23. He asserts that visitations ended in March 2020 due to the coronavirus pandemic and that incarceration is an insufficient basis for terminating parental rights.

[11] In order to terminate a parent-child relationship, DCS is required to allege and prove, among other things:

(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). If the court finds that the allegations in a petition described in Ind. Code § 31-35-2-4 are true, the court shall terminate the parent-child relationship. Ind. Code § 31-35-2-8(a).

[12] A finding in a proceeding to terminate parental rights must be based upon clear and convincing evidence. Ind. Code § 31-37-14-2. We do not reweigh the evidence or determine the credibility of witnesses but consider only the evidence that supports the judgment and the reasonable inferences to be drawn from the evidence. *In re E.M.*, 4 N.E.3d 636, 642 (Ind. 2014). We confine our review to two steps: whether the evidence clearly and convincingly supports the findings, and then whether the findings clearly and convincingly support the judgment. *Id.* We give due regard to the trial court's opportunity to judge the credibility of the witnesses firsthand. *Id.* "Because a case that seems close on a 'dry record' may have been much more clear-cut in person, we must be careful not to substitute our judgment for the trial court when reviewing the sufficiency

of the evidence.” *Id.* at 640. In addressing the conditions resulting in a child’s removal, the trial court must judge a parent’s fitness as of the time of the termination proceeding, taking into consideration evidence of changed conditions, balancing a parent’s recent improvements against habitual patterns of conduct. *Id.* at 643. A court may consider evidence of a parent’s prior criminal history, drug and alcohol abuse, history of neglect, failure to provide support, lack of adequate housing and employment, and the services offered by DCS and the parent’s response to those services. *In re N.Q.*, 996 N.E.2d 385, 392 (Ind. Ct. App. 2013). Where improvements are merely temporary, the court may reasonably find under the circumstances that the problematic situation will not improve. *Id.*

[13] To the extent Father does not challenge the court’s findings of fact, the unchallenged facts stand as proven. *See In re B.R.*, 875 N.E.2d 369, 373 (Ind. Ct. App. 2007) (failure to challenge findings by the trial court resulted in waiver of the argument that the findings were clearly erroneous), *trans. denied.*

[14] The record reveals that J.B. was born in May 2015, L.B. was born on April 27, 2016, both children were removed on May 5, 2016, and Father was incarcerated over ten months later on March 15, 2017, for committing burglary as a level 5 felony in September 2016 and dealing in methamphetamine as a level 4 felony in December 2016. A.B. was born on May 18, 2017, and removed the following day, and the children have never been placed back with Father. The evidence demonstrates that, prior to Father’s incarceration, DCS attempted to provide numerous services and substance abuse treatment options

to him, Father participated in two visits with J.B. and L.B. which were initially scheduled twice a week, he often could not be located and avoided DCS, and he used methamphetamine. Father acknowledged that he was using drugs during that period, did not seek or express a desire for treatment, and for the most part did not attempt to participate in services. Father committed his burglary and dealing in methamphetamine offenses after J.B. and L.B. were born and the CHINS actions were initiated, and the court found that Father's release date would be in 2022 and that he acknowledged he would not be ready to take custody of the children upon his release. In January 2018, Father indicated he did not want the children to visit him due to their ages and the travel required, in December 2018 he requested to start visitation, there were four visits between March 2019 and January 31, 2020, after which visitation was limited due to pandemic-related restrictions, and the visits showed the children did not seem to know Father. The court found that Father had been unable to provide for the children during the CHINS cases, noted the length of time the children had been removed from Father, which is most of their lives, and found that trauma would occur if he were to reenter their lives. We conclude that clear and convincing evidence supports the trial court's determinations that there is a reasonable probability that the conditions which resulted in the children's placement outside the home will not be remedied and

that the continuation of the parent-child relationship poses a threat to their well-being.¹

[15] In determining the best interests of a child, the trial court is required to look to the totality of the evidence. *McBride v. Monroe Cty. Office of Family & Children*, 798 N.E.2d 185, 203 (Ind. Ct. App. 2003). The 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.* The recommendation of a 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. *A.D.S. v. Ind. Dep't of Child Servs.*, 987 N.E.2d 1150, 1158-1159 (Ind. Ct. App. 2013), *trans. denied*. Here, the case managers and CASA testified that they believed termination of Father's parental rights was in the children's best interests. The court heard extensive testimony regarding the children's relationship with Father and with the pre-adoptive foster parents. "A parent's historical inability to provide adequate housing, stability and supervision coupled with a current inability to provide the same will support a finding that termination of the parent-child relationship is in the child's best interests." *Castro v. State Off. of Fam. & Child.*, 842 N.E.2d

¹ To the extent Father argues the trial court improperly shifted the burden of proof to him and points to the finding that he has "not provided any proof [he is] presently capable of providing for [the children's] reasonable needs in a safe, healthy, and appropriate manner," *see* Appellant's Appendix Volume II at 134, 147, 161, we conclude based upon a review of the court's numerous findings and conclusions as a whole that the court did not impermissibly shift any burden to Father.

367, 374 (Ind. Ct. App. 2006), *trans. denied*. Although Father may now have a sincere desire to reunite with the children, he has been unable to do so for all or most of the children’s lives due to his conscious decisions to use illegal drugs and commit burglary and dealing in methamphetamine after J.B. and L.B. were born, resulting in his prolonged incarceration and absence from the children’s lives. 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.* (citation omitted). Based on the totality of the evidence, including the recommendations of the case managers and CASA, we conclude the trial court’s determination that termination is in the children’s best interests is supported by clear and convincing evidence.²

² The cases cited by Father are distinguishable. In *In re I.A.*, the trial court terminated the father’s parental rights despite finding he complied with the case plan and visited regularly with the child. 934 N.E.2d 1127, 1130-1131 (Ind. 2010). The Indiana Supreme Court reversed, noting the father never cancelled or missed a single visit, visits were increased from once to twice a week, a case plan for reunification was never developed, and other than a parent aide who supervised the visits no services were provided. *Id.* at 1135-1136. Here, DCS worked to reunite the children with Father and offered him numerous services including substance abuse treatment and opportunities for visits before and after his incarceration. In *In re G.Y.*, the mother was her child’s sole caretaker for the first twenty months of his life. 904 N.E.2d 1257, 1258 (Ind. 2009), *reh’g denied*. A year before the child’s birth, Mother had delivered drugs to a police informant, she was arrested and incarcerated for the offense thirty-two months later when the child was twenty months old, and the trial court later terminated her parental rights. *Id.* at 1258-1259. The Court reversed and observed the mother’s offense occurred before she became pregnant, there was no indication that she was anything but a fit parent during the first twenty months of the child’s life, and she obtained post-release employment and suitable housing. *Id.* at 1262-1263. It also observed the mother maintained a consistent, positive relationship with her child while incarcerated, she had a lot of interaction with the child during their visits, and there was evidence of her commitment to reunification from the moment of her arrest including her attempt to arrange foster care with her sister and a friend. *Id.* at 1264-1265. Here, Father did not maintain a consistent relationship with the children and, following the births of J.B. and L.B., continued to use methamphetamine, did not cooperate with DCS or service providers, and committed burglary and dealing in methamphetamine resulting in his incarceration. Also, unlike the father in *In re K.E.*, who was incarcerated at the time of the

Conclusion

[16] 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.” *Egly v. Blackford Cnty. Dep’t of Public Welfare*, 592 N.E.2d 1232, 1235 (Ind. 1992). We find no such error here.

[17] For the foregoing reasons, we affirm the trial court.

[18] *Affirmed.*

Najam, J., and Riley, J., concur.

child’s birth, 39 N.E.3d 641, 644 (Ind. 2015), Father was not incarcerated when J.B. and L.B. were born and continued to use methamphetamine and committed level 4 and 5 felony offenses after they were born resulting in his incarceration, and he failed to cooperate with DCS or service providers or seek substance abuse treatment prior to his incarceration.