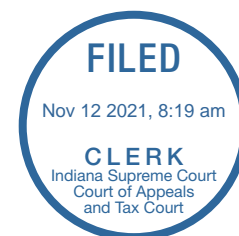


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE COURT OF APPEALS OF INDIANA

In the Matter of the Involuntary
Termination of the Parent-Child
Relationship of M.W. (Minor
Child) and

J.B. (Father),

Appellant-Respondent,

v.

Indiana Department of Child
Services,

Appellee-Petitioner

November 12, 2021

Court of Appeals Case No.
21A-JT-1079

Appeal from the Vigo Circuit
Court

The Honorable Daniel W. Kelly,
Magistrate

Trial Court Cause No.
84C01-1812-JT-1403

Crone, Judge.

Case Summary

- [1] J.B. (Father) appeals an order involuntarily terminating his parent-child relationship with his daughter, M.W. (Child). He contends that the evidence is insufficient to support the trial court's conclusions that there is a reasonable probability that the conditions that led to Child's removal will remain unremedied or that continuing the parent-child relationship poses a threat to Child's well-being. We affirm.

Facts and Procedural History

- [2] In 2011, J.W. (Mother) gave birth to Child. Father was present at the time but was not married to Mother and did not sign a paternity affidavit. For almost all of her life, she has been in the care of her maternal grandparents (Grandparents). In the spring of 2017, the Indiana Department of Child Services (DCS) acted on a report of drug use by Mother and her husband. In April 2017, DCS filed a petition seeking to have Child adjudicated a child in need of services (CHINS), alleging that Mother failed to provide Child with a drug-free environment, failed to manage her mental health issues, and was unsuccessfully discharged from informal adjustment. Father's whereabouts were unknown at the time, but he was known to DCS because of a 2015 involuntary termination of his relationship with another of his children, due in part to his drug use. He was incarcerated at the time of the July 2017 CHINS adjudication but admitted to the CHINS allegations in July 2017. Father was ordered to participate in services, stay in contact with DCS, and establish paternity. Throughout the pendency of the CHINS case, Father was in and out

of incarceration for various offenses including battery, criminal confinement, and dealing in methamphetamine and for violating placement in community programs. During this time, he did not maintain communication with DCS and did not participate in services through DCS. He did complete substance abuse programs through the Indiana Department of Correction (DOC), i.e., Inside Recovery and Club Soda.

- [3] In July 2018, DCS changed the permanency plan from reunification to termination and adoption by Grandparents. Father appeared at the initial hearing, held in February 2019. In April 2019, he tested positive for methamphetamine and amphetamine. Father failed to appear for the May 6, 2019 factfinding hearing, and Mother consented to termination, so on May 21, 2019, the trial court entered an order of involuntary termination.
- [4] In December 2020, the trial court received a letter from Father inquiring about his parental rights as to Child. The court reviewed its records and discovered that Father's notice of the May 2019 hearing had been returned as undeliverable. The court therefore set aside the 2019 termination order over DCS's objection.
- [5] In 2021, Father participated in a new initial hearing and factfinding. His defense during the factfinding was that DCS had not offered him services. The DCS family case managers (FCMs) and the court-appointed special advocate (CASA) testified that termination and adoption were in Child's best interests.

The trial court issued an order with findings of fact and conclusions thereon terminating the relationship between Father and Child. Father now appeals.

Discussion and Decision

[6] Father contends that the trial court erred in terminating his parental relationship with Child. At the outset, we note that it appears that Father did not sign a paternity affidavit at Child's birth and has not since taken steps to establish paternity. Notwithstanding, because a February 2019 DNA test report admitted at the hearing showed a ninety-nine-percent probability of paternity, *see* Petitioner's Ex. 1, we address his arguments on the merits on this basis.¹

[7] When reviewing a trial court's findings of fact and conclusions thereon in a case involving the termination of parental rights, we first determine whether the evidence supports the findings and then whether the findings support the judgment. *In re E.M.*, 4 N.E.3d 636, 642 (Ind. 2014). We will set aside the trial court's judgment only if it is clearly erroneous. *Bester v. Lake Cnty. Off. of Fam. & Child.*, 839 N.E.2d 143, 147 (Ind. 2005). "A judgment is clearly erroneous if the findings do not support the trial court's conclusions or the conclusions do not support the judgment." *In re A.G.*, 45 N.E.3d 471, 476 (Ind. Ct. App. 2015), *trans. denied* (2016). Unchallenged findings stand as proven. *Matter of De.B.*, 144 N.E.3d 763, 772 (Ind. Ct. App. 2020). In conducting our review, we neither reweigh evidence nor judge witness credibility. *E.M.*, 4 N.E.3d at 642.

¹ Curiously, Father argues that he did not know that his DNA sample was being tested for paternity.

Rather, we consider only the evidence and inferences most favorable to the judgment. *Id.* “[I]t is not enough that the evidence might support some other conclusion, but it must positively require the conclusion contended for by the appellant before there is a basis for reversal.” *Best v. Best*, 941 N.E.2d 499, 503 (Ind. 2011) (citations omitted).

[8] “Parents have a fundamental right to raise their children – but this right is not absolute. When parents are unwilling to meet their parental responsibilities, their parental rights may be terminated.” *Matter of Ma.H.*, 134 N.E.3d 41, 45-46 (Ind. 2019) (citation omitted), *cert. denied* (2020). To obtain a termination of a parent-child relationship, DCS is required to establish in pertinent part:

(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).

[9] In recognition of the seriousness with which we address parental termination cases, Indiana has adopted a clear and convincing evidence standard. *In re R.S.*, 56 N.E.3d 625, 629 (Ind. 2016); Ind. Code § 31-37-14-2. “Clear and convincing evidence need not reveal that the continued custody of the parents is wholly inadequate for the child’s survival. Rather, it is sufficient to show by clear and convincing evidence that the child’s emotional and physical development are threatened by the respondent parent’s custody.” *In re K.T.K.*, 989 N.E.2d 1225, 1230 (Ind. 2013) (citation omitted). “[I]f the court finds that the allegations in a [termination] petition ... are true, the court *shall* terminate the parent-child relationship.” Ind. Code § 31-35-2-8(a) (emphasis added).

[10] Father focuses his insufficiency challenge on the requirements found in subparagraph (B) of the termination statute, that is, whether there is a reasonable probability that the conditions that led to Child’s removal or continued placement outside the home will not be remedied or a reasonable probability that continuation of the parent-child relationship poses a threat to

Child's well-being. The trial court found as follows with respect to these statutory elements:²

12. At the fact-finding hearing, Father's defense to the petition was that DCS had not offered him services. However, the evidence indicated that he was ordered to keep DCS notified of his address and phone number so that DCS could meet with him and determine his needs. But Father failed to do so for the entire duration of the CHINS case. **When he was not incarcerated, he was not in contact with DCS to receive services and when he was incarcerated, he was not available for services. Moreover, although it would appear that if Father had stayed in contact with DCS as ordered, he likely would have been recommended for a substance use assessment, the reason that Child was not placed with Father and his stipulation for CHINS was based upon his incarceration and lack of availability to parent his Child. The evidence indicated he has never requested a visit with Child through DCS and his pattern of incarceration has continued. Therefore, there is a reasonable probability that the reasons for placement outside the home of Father have not, and will not, be remedied.**

13. Father has a lengthy criminal history, which would indicate that he is unlikely to be available for Child or to be an appropriate caregiver. His criminal record as an adult includes arrests for receiving stolen auto parts, battery on law enforcement, criminal confinement, invasion of privacy, battery, interference with reporting of a crime, residential entry, battery resulting in bodily injury, battery on a public safety official, and dealing in methamphetamine among others. He has several felony convictions and pending petitions for revocation of

² To the extent that the trial court identifies the parties by proper name or other designations, we refer to them as indicated above.

probation and new felony charges.

14. At the time of the fact-finding hearing on the petition for involuntary termination of parental rights on April 19, 2021, Father was again incarcerated and had the following pending felony cases:

A. A probation revocation under Cause No. 84D06-1602-F4-434. In this case, Father entered a plea agreement on November 16, 2017, whereby he pled guilty to Dealing in Methamphetamine as a Level 4 felony.

B. Cause No. 84D04-2009-F6-3206 for Domestic Battery with a Prior Conviction.

C. Cause No. 84D06-2011-F4-3743 for Unlawful Possession of a Firearm by a Serious Violent Felon, Intimidation where defendant draws or uses a deadly weapon, Pointing a Firearm, Criminal Recklessness with a Deadly Weapon.

....

17. The evidence indicated that Father made no contact with DCS, made no efforts to legally establish paternity and made no efforts to visit with Child since the case was opened in 2017, including from April 1, 2019, when he was placed on probation, to the end of the year when he was picked up on the Failure to Appear warrant.

18. As mentioned about, Child is now a six-year-old ... who has lived nearly her entire life with Grandparents who have filed a petition to adopt her. Father, who is a stranger to Child, has never followed up with DNA testing to establish paternity. Therefore, continuation of the parent-child relationship poses a threat to Child's well-being. The CASA urged termination for Child's benefit in the strongest possible terms.

Appealed Order at 4-6.

[11] Because Indiana Code Section 31-35-2-4(b)(2)(B) requires DCS to prove only one of the three circumstances listed and because we find no error concerning the trial court's conclusion that there is a reasonable probability that the conditions leading to Child's removal or continued placement outside the home will remain unremedied, we need not address whether there is a reasonable probability that the continuation of the parent-child relationship will pose a threat to Child's well-being. When assessing whether there is a reasonable probability that conditions that led to a child's removal will not be remedied, we must consider not only the initial basis for the child's removal but also the bases for continued placement outside the home. *In re A.I.*, 825 N.E.2d 798, 806 (Ind. Ct. App. 2005), *trans. denied*. Moreover, "the trial court should judge a parent's fitness to care for his 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*. "Requiring trial courts to give due regard to changed conditions does not preclude them from finding that parents' past behavior is the best predictor of their future behavior." *E.M.*, 4 N.E.3d at 643.

[12] "Due to the permanent effect of termination, the trial court also must evaluate the parent's habitual patterns of conduct to determine the probability of future neglect or deprivation of the child." *J.T.*, 742 N.E.2d at 512. In making its case, "DCS need not rule out all possibilities of change; rather, [it] need establish only that there is a reasonable probability that the parent's behavior

will not change.” *In re Kay.L.*, 867 N.E.2d 236, 242 (Ind. Ct. App. 2007). A trial court may properly consider evidence of a parent’s substance abuse, criminal history, lack of employment or adequate housing, history of neglect, and failure to provide support. *McBride v. Monroe Cnty. Office of Fam. & Children*, 798 N.E.2d 185, 199 (Ind. Ct. App. 2003).

[13] Father specifically challenges only certain statements contained in finding 12, i.e., that he failed to stay in touch with DCS “for the entire duration of the CHINS case” and that “when he was not incarcerated, he was not in contact with DCS to receive services and when he was incarcerated, he was not available for services.” Appealed Order at 4. He essentially complains that DCS failed to provide him services both when he was in the DOC and out on release. “If the parent feels the services ordered by the court are inadequate to facilitate the changes required for reunification, then the onus is on the parent to request additional assistance from the court or DCS.” *Prince v. Dep’t of Child Servs.*, 861 N.E.2d 1223, 1231 (Ind. Ct. App. 2007). The onus was on Father to request assistance from DCS or the trial court in getting the services. The record supports the trial court’s finding that he did not do so.

[14] In examining the evidence concerning the conditions that precipitated Child’s initial removal, Father correctly points out that those conditions were attributable not to him but to Mother and her substance abuse. At the time of the CHINS adjudication, Father was incarcerated and was unable to provide a safe and sober environment for Child due to his own issues, which included illegal drug use and frequent stints of incarceration. He admitted to the CHINS

allegations, acknowledging that he was incarcerated and could not provide adequate supervision for Child. Father also is correct in his assertion that his parental rights should not be terminated solely on the basis of his incarceration. Our supreme court has emphasized that incarceration is an insufficient basis upon which to terminate a parent's rights. *K.E. v. Ind. Dep't of Child Servs.*, 39 N.E.3d 641, 644 (Ind. 2015) (citing *In re G.Y.*, 904 N.E.2d 1257, 1264-66 (Ind. 2009)). Here, Father was not simply serving a long prison term for a criminal act committed in the throes of youthful immaturity. Rather, he has an established pattern of committing new offenses, some of which have involved violent conduct. His pattern has continued throughout the pendency of the proceedings and is not conducive to providing a safe and stable home for Child. By his own admission, “[w]hen he was not incarcerated, Father was not as diligent as he should have been, about maintaining contact with the DCS.” Appellant’s Br. at 16. The record here shows that the trial court relied not only on what Father did not or could not do as a result of his incarceration but also on what he failed to do when he was not incarcerated.

[15] Father also claims that the trial court failed to account for his expectation of returning to his construction job, the close proximity of his expected release date, and his strides toward drug-free living by completing the Inside Recovery and Club Soda drug programs while in the DOC. With respect to the proximity of his earliest expected release date, which he claimed would be in May 2021 (just one month after the factfinding), we note that this date does not take into account the charges pending against him in three other causes. While his

completion of DOC drug programs is laudable, we note that Father did not engage in any services aimed at parenting or anger management. Nor did he maintain contact with DCS or establish paternity as ordered.

[16] The current proceedings have lasted more than four years, and, as of the time of the factfinding hearing, Father had not taken steps to visit Child or even to establish paternity. This failure demonstrates his lack of commitment to complete the steps necessary to preserve the parent-child relationship. *See Lang*, 861 N.E.2d at 372 (failure to exercise right to visit one's children demonstrates lack of commitment to complete actions necessary to preserve parent-child relationship).

[17] Finally, we note that although Father does not challenge the best interests or satisfactory plan elements of the statute, he addresses them implicitly by arguing that the court should have continued Child's placement with Grandparents while affording him more time to engage in services and establish a relationship with Child. While there is some precedent for extending a child's relative placement in the form of a guardianship in limited circumstances where the child has a bond with the parent and guardianship with continued visitation by the parent is recommended by service providers, *see e.g., In re R.S.*, 56 N.E.3d 625, 630 (Ind. 2016), this is not one of those cases. Father and Child did not have any bond, and Father testified that he had seen Child only a few times since her birth. Moreover, FCM Erin Boyll addressed this issue directly during the factfinding hearing, testifying that the DCS team had explored the

guardianship option and decided against it, concluding that adoption was ultimately in Child's best interests. Tr. Vol. 2 at 33.

[18] In sum, the trial court's decision to terminate Father's relationship with Child was not based solely on the fact that he was incarcerated, nor was it simply a matter of Grandparents providing a "better" home. See *In re R.A.*, 19 N.E.3d 313, 321 (Ind. Ct. App. 2014) (mere fact children are in better home cannot be sole basis for termination), *trans. denied* (2015). Rather, as discussed, the court considered numerous factors, including Father's pattern of engaging in criminal behavior and failure to participate in services or visitation or to seek assistance from the court or DCS to receive such services. The trial court vacated the initial termination order and re-opened Father's case to ensure that he was afforded a full and fair opportunity to present evidence. The protracted proceedings have afforded Father ample opportunities to turn his life around and demonstrate a resolve to make the changes necessary to parent Child. He has not taken advantage of those opportunities. The evidence supports finding 12, and the unchallenged findings and conclusions sufficiently support the trial court's termination order. Accordingly, we affirm.

[19] Affirmed.

Bailey, J., and Pyle, J., concur.