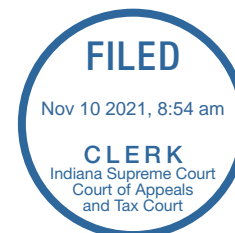


MEMORANDUM DECISION

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 Termination of the Parent-Child Relationship of:

S.R., L.R., and A.S. (Minor Children)

and

B.R. (Mother) and D.S. (Father),

Appellants-Respondents,

v.

The Indiana Department of Child Services,

Appellee-Petitioner.

November 10, 2021

Court of Appeals Case No.
21A-JT-1087

Appeal from the Huntington Superior Court

The Honorable Jennifer E. Newton, Judge

Trial Court Cause No.
35D01-2007-JT-9, 35D01-2007-JT-10, & 35D01-2007-JT-11

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellants-Respondents, B.R. (Mother) and D.S. (Father) (collectively, Parents)¹, appeal the trial court's termination of their parental rights to the minor children, S.R., L.R., and A.S. (collectively, Children).

[2] We affirm.

ISSUE

[3] Parents present this court with one issue on appeal, which we restate as: Whether the Indiana Department of Child Services (DCS) presented sufficient evidence to support its petition to terminate the parent-child relationship.

FACTS AND PROCEDURAL HISTORY

[4] Parents are the natural parents of S.R., born on December 12, 2015, A.S., born on July 1, 2017, and L.R., born on July 31, 2018. On July 17, 2018, DCS received a report that Mother had pushed A.S. down the stairs, that she was using methamphetamine, and that the needs of Children were not being met. During DCS's investigation of the report, Mother admitted to the drug use. On July 30, 2018, DCS and Mother entered into an agreed informal adjustment, in an effort to prevent Children from being adjudicated Children in Need of

¹ Mother and Father appealed the trial court's termination of their parental rights under separate cause numbers. We consolidated the appeals by order of July 20, 2021.

Services (CHINS). Meanwhile, two days prior, on July 28, 2018, Father became incarcerated for a probation violation stemming from his conviction for failure to register as a sex offender, a Level 6 felony.

- [5] On August 23, 2018, DCS removed Children from Mother's care after Mother tested positive for methamphetamine, lost her housing, and failed to participate in services under the terms of the informal adjustment. The day after Children were removed from her care by DCS, Mother was arrested and incarcerated for approximately two weeks. On August 24, 2018, DCS filed its CHINS petition, alleging, among other things, that Mother tested positive for methamphetamine several times, that Mother missed appointments with services designed to assist her to maintain sobriety and housing, that Mother was living with family, and that Father was incarcerated. On September 20, 2018, Parents admitted to the CHINS allegations and the trial court adjudicated Children to be CHINS. During the dispositional hearing that same day, the trial court ordered Parents to maintain contact with DCS and to keep all appointments, participate in all recommended services and assessments, secure and maintain suitable housing and a legal source of income, complete a substance abuse assessment and follow all treatment recommendations, submit to random drug screens, abstain from consuming illegal substances, and attend all visitation. In addition, Mother was ordered to participate in home-based casework to increase parenting skills and Father was ordered to participate in fatherhood engagement programs.

[6] During the following months, Parents failed to comply with DCS's case plan. Even though Father was released from incarceration in January 2019, he did not contact DCS upon his release and did not take any steps to begin services or start visitation with Children. In May 2019, Father was again incarcerated for violating his probation and for new charges of possession of methamphetamine and an habitual offender enhancement. His earliest possible release date was June 2021.

[7] Mother consistently missed appointments for substance abuse assessments, did not submit to drug screens, and failed to maintain contact with DCS. She became incarcerated again in November 2018 on a Level 6 felony unlawful possession of a syringe and driving without ever receiving a license. Upon her release, Mother did not contact DCS because she "was running." (Transcript Vol. II, p. 62). She claimed to have been free from drugs from January 2019 until about March 2019, when she relapsed. After her relapse, Mother was in a halfway house from November 2019 until March 2020. Mother left the halfway house before completing the program and after she left, she was incarcerated for thirty days on a probation violation charge. After her release from incarceration, she was sober until June 2020. However, she relapsed again and became homeless. Mother stopped engaging in services in May of 2020 and between June and October 2020, she was living on the streets. She was incarcerated again on October 5, 2020.

[8] Mother's visitations with Children were sporadic. From August 2019 through May 2019, Mother only attended three visits with Children. Beginning mid-

May 2019, Mother's engagement with Children increased, unless she was incarcerated or resided in the halfway house. Mother's last visit was June 8, 2020, after which she did not maintain contact with DCS.

[9] On July 14, 2020, the trial court conducted a permanency hearing and found that Father had not complied with Children's case plan and that he had been incarcerated for most of Children's CHINS proceedings. Mother had been inconsistent in participating in services, had been missing therapy sessions, had tested positive for illegal substances, and had violated her probation. The trial court changed the permanency plan to termination of parental rights. On July 29, 2020, DCS filed its petition to terminate Parents' parental rights to the Children.

[10] On February 11, 2021, after several continuances, the trial court conducted a factfinding hearing on DCS's petition to terminate. At the time of the proceedings, Parents were incarcerated. During the hearing, DCS's family case manager (FCM) testified that after Children's removal and CHINS adjudication, they were never returned to Parents. FCM testified that Mother was not in compliance throughout the entirety of the case and continued to use illegal substances. Father did not engage in services when not incarcerated, did not maintain contact with DCS, and refused to submit to drug screens.

[11] FCM testified that Children had resided in the same foster home for almost two years and five months by the time of the termination hearing. Children identified their foster parents as their parents and the foster home as their home.

FCM advised the trial court that after visits with Mother, Children would act out. S.R.'s pediatrician treated S.R. for stress-related issues, including pulling out his hair. The pediatrician opined that S.R.'s issues were related to Parents not visiting and causing him stress. S.R.'s therapist informed the trial court that Mother's inconsistent behavior harmed S.R. and his development was "disturbed." (Tr. Vol. II, p. 234). Children's foster parents testified that when S.R. came to reside in the foster home, he was confused, disoriented, could not speak, and was still in pull-ups despite being three years old. His behavior improved "significantly over time," especially after the visits with Mother stopped. (Tr. Vol. III, p. 4). At the time of the fact-finding hearing, Children were not having any problems. Foster parents believe Children are doing great in their care and want to adopt them. Children's Guardian Ad Litem (GAL) testified that Children were doing well in their foster placement, they had made progress in their behaviors, they were comfortable in the home, and had bonded with their foster parents. She recommended that "the parental rights of both parents be terminated." (Tr. Vol. III, p. 17).

[12] On May 12, 2021, the trial court issued its Order, terminating Parents' parental rights and concluding, in pertinent part, that

5. There is a reasonable probability that the conditions that resulted in the [C]hildren's removal or the reasons for the placement outside the parent's home will not be remedied in that Father has been incarcerated for most of the Children's [lives] and he has not participated in services even when he was not incarcerated. Father refused to take a drug test when requested by DCS and did not try to do anything he needed to in order to

even visit with the [C]hildren. Mother has admittedly chosen drugs over her Children at every turn. She has only sporadically participated in services and visits and has used illegal drugs while participating in those visits. Further, Mother has gone long stretches of time with DCS having no way of contacting her. Mother has been given many opportunities to get sober, including participating in a halfway house. She has not taken any of those opportunities. She always chooses drugs. Mother has never had stable employment or housing. The [c]ourt believes Mother will continue to choose her current lifestyle over her Children.

6. There is a reasonable probability that the continuation of the parent-child relationship poses a threat to the well-being of the [C]hildren. After visits began with Mother in 2019, [S.R.] began demonstrating aggressive and negative behaviors and [A.S.] started urinating and defecating on herself after visits. There were little to no visits with Mother in 2020 and those behaviors stopped. The Children are all doing well and thriving in foster placement.

7. Termination is in the best interests of the [C]hildren in that: the [C]hildren are thriving with their foster parents. The Children have bonded with their foster parents. [L.R.] was only weeks old when she was removed from Mother and knows no other parents. [S.R.] and [A.S.] experienced negative behaviors when they visited with Mother. [S.R.] even believed his Mother was dead because he could not deal with her coming in and out of his life.

(Appellants' App. Vol. II, p. 52).

[13] Parents now appeal. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

[14] Parents challenge the trial court’s termination of their parental rights to their Children. The Fourteenth Amendment to the United States Constitution protects the traditional right of parents to establish a home and raise their children. *Bester v. Lake Cnty. Off. of Family & Children*, 839 N.E.2d 143, 147 (Ind. 2005). “A parent’s interest in the care, custody, and control of his or her children is ‘perhaps the oldest of the fundamental liberty interests.’” *Id.* (quoting *Troxel v. Granville*, 530 U.S. 57, 65 (2000)). However, parental rights “are not absolute and must be subordinated to the child’s interests in determining the proper disposition of a petition to terminate parental rights.” *Id.* If “parents are unable or unwilling to meet their parental responsibilities,” termination of parental rights is appropriate. *Id.* We recognize that the termination of a parent-child relationship is “an ‘extreme measure’ and should only be utilized as a ‘last resort when all other reasonable efforts to protect the integrity of the natural relationship between parent and child have failed.’” *K.E. v. Ind. Dep’t of Child Servs.*, 39 N.E.3d 641, 646 (Ind. 2015) (quoting *Rowlett v. Vanderburgh Cty. Off. of Family & Children*, 841 N.E.2d 615, 623 (Ind. Ct. App. 2006)).

[15] Indiana courts rely on a “deferential standard of review in cases concerning the termination of parental rights” due to the trial court’s “unique position to assess the evidence.” *In re A.K.*, 924 N.E.2d 212, 219 (Ind. Ct. App. 2010), *trans. dismissed*. Our court neither reweighs evidence nor assesses the credibility of witnesses. *K.T.K. v. Ind. Dep’t of Child Servs.*, 989 N.E.2d 1225, 1229 (Ind.

2013). We consider only the evidence and any reasonable inferences that support the trial court’s judgment, and we accord deference to the trial court’s “opportunity to judge the credibility of the witnesses firsthand.” *Id.*

I. *Termination of Parental Rights*

[16] To terminate a parent’s rights to his or her child, DCS must prove:

(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.

* * * *

(iii) The child has been removed from the parent and has been under the supervision of a local office . . . for at least fifteen (15) months of the most recent twenty-two (22) months, beginning with the date the child is removed from the home as a result of the child being alleged to be a [CHINS] . . . ;

(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 [CHINS];

(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 each of the foregoing elements by clear and convincing evidence. *C.A. v. Ind. Dep't of Child Servs.*, 15 N.E.3d 85, 92 (Ind. Ct. App. 2014). “[C]lear and convincing evidence requires the existence of a fact to be highly probable.” *Id.*

[17] It is well-established that “[a] trial court must judge a parent’s fitness as of the time of the termination hearing and take into consideration evidence of changed conditions.” *Stone v. Daviess Cty. Div. of Children & Family Servs.*, 656 N.E.2d 824, 828 (Ind. Ct. App. 1995), *trans. denied*. In judging fitness, a trial court may properly consider, among other things, a parent’s substance abuse and lack of adequate housing and employment. *McBride v. Monroe Co. OFC*, 798 N.E.2d 185, 199 (Ind. Ct. App. 2003). The trial court may also consider a parent’s failure to respond to services. *Lang v. Starke Co. OFC*, 861 N.E.2d 366, 372 (Ind. Ct. App. 2007), *trans. denied*. “[H]abitual patterns of conduct must be evaluated to determine whether there is a substantial probability of future neglect or deprivation.” *Stone*, 656 N.E.2d at 828. A trial court “need not wait until the child[] [is] irreversibly influenced by [its] deficient lifestyle such that [its] physical, mental and social growth is permanently impaired before terminating the parent-child relationship.” *Id.* Furthermore, “[c]lear and convincing evidence need not reveal that the continued custody of the parents is wholly inadequate for the child’s very 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." *K.T.K.*, 989 N.E.2d at 1230.

[18] Father—but not Mother—focuses his challenge on the trial court's conclusion that there was a reasonable probability that Father would not remedy the conditions that resulted in Children's removal and continued placement outside the home, namely his incarceration, his inability to parent Children, and his failure to complete any of the court-ordered services.

[19] Father has been incarcerated for most of Children's lives. At the time when DCS investigated its initial report in July 2018, Father became incarcerated for his conviction for failure to register as a sex offender. When he was released from prison, in January 2019, he failed to contact DCS even though he was under a court order to do so. He did not take steps to visit with Children, did not engage in services, and did not submit to drug screens. He became incarcerated again in May 2019. Despite being able to access two years of reunification services by the time of the termination hearing, Father never took advantage of the opportunities offered by DCS but instead continued to engage in criminal conduct throughout these proceedings.

[20] Father now analogizes his situation to that of *K.E. v. Indiana Department of Child Services*, 39 N.E.3d 641, 643 (Ind. 2015), which held, among other things, that incarceration, standing alone, is an insufficient basis for terminating parental rights. *Id.* The father in *K.E.* was incarcerated when the CHINS case began, and, because of the father's incarceration, DCS provided services only to the

mother. *Id.* In finding there was a reasonable probability that the reasons for removal would not be remedied, the trial court found, in part: 1) the father was unable to receive services from DCS because he was incarcerated; 2) the father had a long criminal history; 3) the father's release date was more than two years after the date of the fact-finding hearing; and 4) the father had a history of drug and alcohol use. *Id.* at 647. The Indiana supreme court, however, reversed the termination of parental rights, stating, in part:

Although at the time of the termination hearing [the father's] possible release was still over two years away[,] that alone is insufficient to demonstrate that the conditions for removal will not be remedied. Indiana courts have upheld parental rights of incarcerated parents who still had a year or more to serve before possible release, and we have not established a bright-line rule for when release must occur to maintain parental rights.

Id. at 648. *K.E.* is distinguishable. Here, unlike the incarcerated father in *K.E.* who was unable to participate in services due to his incarceration, Father had a five-month window in which he could have availed himself of DCS's opportunities and recommendations to demonstrate his commitment to complete the actions necessary to preserve the parent-child relationship. Father never contacted DCS during these five months to initiate services or commence visitation. This was not a situation in which parental rights were terminated solely due to Father's incarceration, as in *K.E.*; rather the trial court based its termination on Father's continuing criminal behavior, his inability to remain sober, and his refusal to engage in services during the time he was released from incarceration. *K.E.* does not compel reversal.

[21] Father’s historical life-style—including his habitual drug-related criminal conduct and incarcerations, his not taking responsibility to visit Children when he was not incarcerated, his failure to make any remedial measures when not incarcerated, and then his re-incarceration for further substance use and probation violations—demonstrate the requisite reasonable probability that the conditions that resulted in Children’s removal will not change.²

II. *Best Interests of the Children*

[22] Parents contend that DCS failed to establish that termination is in the best interests of Children and that there is a satisfactory plan for Children, which would be adoption. To determine whether termination is in a child’s best interests, the trial court must look to the totality of the evidence. *In re A.D.S.*, 987 N.E.2d 1150, 1158 (Ind. Ct. App. 2013), *trans. denied*. The court must subordinate the interests of the parents to those of the child and need not wait until a child is irreversibly harmed before terminating the parent-child relationship. *Id.*

[23] In support of their argument, Parents claim that DCS did not bring forth any witnesses who testified specifically that termination was in Children’s best interests. However, we have previously held that the recommendation by both

² Because we affirm the trial court’s conclusion on the basis that there was a reasonable probability that Father would not remedy the conditions that led to the removal of Children, we need not address whether the continuation of Father’s parent-child relationship posed a probable threat to Children’s wellbeing as Indiana Code section 31-35-2-4(b)(2)(B) is written in the disjunctive.

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). Here, the record reflects that Children's GAL was asked whether, "based on your experience as a [GAL] ... have you formed a recommendation regarding, whether it be in the best interest to terminate parental rights." (Tr. Vol. III, p. 16). GAL responded, "Yes, I did submit a written report." (Tr. Vol. III, p. 16). This report was filed with the court, and the trial court could take judicial notice of the report pursuant to Indiana Evidence Rule 201. The trial court specifically referenced the GAL's report in its termination order, which specifically recommended that Parents' rights be terminated:

The [C]hildren have been placed in their current foster home since September 2018. The foster parents provide structure and support, and the [C]hildren are very bonded with their caregivers. The foster parents have been able to address educational and behavioral needs, and they are able to help the [C]hildren manage their expectations as [a] coping mechanism. The [C]hildren have experienced periods of stress and anxiety due to Mother's inconsistent involvement in the case and it is in their best interest to obtain permanency. The foster parents encourage the [C]hildren to maintain the relationship with their maternal grandmother and other family members. Based on [the] totality of the circumstances, I recommend that both Mother and Father's parental rights be terminated.

(Appellants' App. Vol. II, p. 142). During her testimony, GAL reiterated that based on the history of the case, including the trauma Children had incurred

and their recovery in their foster home, she recommended that parental rights be terminated. FCM testified that, due to Parents' noncompliance with Children's case plan, including their continued substance abuse and periods of incarceration, Children's permanency plan included the termination of Parents' parental rights.

[24] With respect to Parents' argument that no witness specifically testified that adoption was a satisfactory plan, we note that we have previously held that for a plan to be satisfactory, as required under the statute, it need not be detailed, as long as it offers a general sense of the direction in which the child will be going after the parent-child relationship is terminated. *In re A.S.*, 17 N.E.3d 994, 1007 (Ind. Ct. App. 2014). DCS's plan for a child is satisfactory if the plan is to attempt to find suitable parents to adopt the children. *Id.* There need not be a guarantee that a suitable adoption will take place, "only that DCS will attempt to find a suitable adoptive parent." *Id.* A DCS post-termination plan is "not unsatisfactory if DCS has not identified a specific family to adopt the children." *Id.* "Part of the reason is that it is within the authority of the adoption court, not the termination court, to determine whether an adoptive placement is appropriate." *Id.* Here, the record established that DCS's FCM recommended adoption and foster parents indicated that they wanted to adopt Children. Based on these standards, we conclude that it was satisfactory that DCS's plan for Children was adoption.

[25] Throughout the entirety of these proceedings, Parents failed to avail themselves of the opportunities and services offered by DCS to reunite with Children and

made no progress nor commitment during the proceedings of the case. Instead, they continued on the path of substance abuse and incarceration. “[C]hildren cannot wait indefinitely for their parents to work toward preservation or reunification.” *In re E.M.*, 4 N.E.3d 636, 648 (Ind. 2014). Even though “the ultimate purpose of the law is to protect the child, the parent-child relationship will give way when it is no longer in the child’s interest to maintain this relationship.” *In re B.D.J.*, 728 N.E.2d 195, 200 (Ind. Ct. App. 2000). Accordingly, we affirm the trial court’s conclusion that termination of Parents’ parental rights is in the best interests of Children.

CONCLUSION

- [26] Based on the foregoing, we conclude that DCS presented sufficient evidence to support the trial court’s Order terminating Parents’ parental rights to Children.

- [27] Affirmed.

- [28] Najam, J. and Brown, J. concur