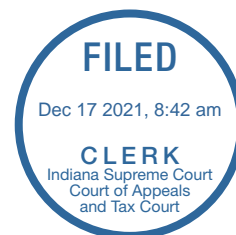


MEMORANDUM DECISION

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.



ATTORNEY FOR APPELLANT

Elizabeth A. Flynn
Michigan City, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Robert J. Henke
Assistant Section Chief, Civil
Appeals
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

In the Termination of the Parent-
Child Relationship of: J.E. &
K.E., (Minor Children),

and

B.E. (Father),

Appellant-Respondent,

v.

Indiana Department of Child
Services,

Appellee-Petitioner.

December 17, 2021

Court of Appeals Case No.
21A-JT-1173

Appeal from the LaPorte Circuit
Court

The Honorable Thomas J.
Alevizos, Judge

The Honorable W. Jonathan
Forker, Magistrate Judge

Trial Court Cause Nos.
46C01-2002-JT-6
46C01-2002-JT-8

Tavitas, Judge.

Case Summary

- [1] B.E. (“Father”) appeals from the termination of his parental rights to J.E. and K.E. (“the Children”). Father challenges the sufficiency of the evidence to support the termination of his parental rights. Concluding that the LaPorte County Department of Child Services (“DCS”) presented sufficient evidence to support the termination of Father’s parental rights, we affirm.

Issue

- [2] Father raises two issues on appeal, which we consolidate and restate as whether sufficient evidence supports the termination of Father’s parental rights.

Facts

- [3] Father and A.E. (“Mother”)¹ are the biological parents of J.E., who was born in June 2010; Jo.E., who was born in May 2015; and K.E., who was born in May 2017.² On May 22, 2018, Father was arrested for domestic battery against Mother while children were present; he was incarcerated for approximately two weeks. On June 16, 2018, Father returned from work to find all of the children alone at home. Father became enraged, punched a mirror, and required medical attention. The maternal grandmother took the children to her home

¹ Mother consented to the termination of her parental rights to the Children, meaning J.E. and K.E. only, during the underlying proceedings and is not a party to this appeal.

² Mother gave birth to a child, A., in October 2020. Neither A. nor Jo.E. is a subject of this appeal.

and refused to release them to Mother when Mother appeared. Law enforcement was notified and sought DCS's assistance with the children.

[4] Family Case Manager ("FCM") Selina Flores observed that four-year-old Jo.E. had rotten teeth. K.E., who was approximately thirteen months old, had "severe abrasions on his thigh due to severe diaper rash," and was surrounded by feces in his playpen. Tr. Vol. II p. 169. Mother told FCM Flores that she moved into a hotel on June 14, 2018, due to a domestic dispute with Father. Father admitted that he used Suboxone without a prescription and tested positive for amphetamine, cocaine, hydrocodone, methamphetamine, and THC.³ Due to Mother's and Father's history of domestic violence, DCS placed the Children in foster care.⁴

[5] On June 19, 2018, DCS filed petitions alleging that J.E., K.E., and Jo.E. were children in need of services ("CHINS"). On August 27, 2018, the State charged Father with unlawful possession of a syringe, Level 6 felony. The trial court conducted a fact-finding hearing on September 4, 2018, subsequently adjudicated the Children as CHINS, and ordered Father into reunification services. Following a hearing, the trial court entered a dispositional order on September 26, 2018, wherein Father was required to, among other things: (1) attend supervised visits; (2) participate in a substance abuse assessment and

³ Mother also tested positive for amphetamine and methamphetamine.

⁴ DCS removed J.E., K.E., Jo.E., and Mother's prior-born child K.B. (born in May 2008). K.B. is not a subject of this appeal.

comply with ensuing recommendations; (3) undergo a parenting assessment and comply with recommendations; and (4) submit to random drug screens.⁵

[6] After the parenting assessment, the service provider recommended that Father should participate in couple's counseling to address the domestic violence in the home. Also, following the substance abuse assessment, the service provider recommended that Father should participate in a substance abuse treatment program and continue with random drug screens. DCS referred Father to appropriate service providers.

[7] In the meantime, Father continued to abuse drugs. Between August 13, 2018, and January 2019, when Father stopped submitting to drug screens altogether, he failed twenty-two of twenty-three court-ordered drug screens, which revealed his uninterrupted use of methamphetamine and amphetamine, as well as opiates and/or fentanyl. Father's continued drug use resulted in a probation violation, new criminal charges, and periods of incarceration during the pendency of the underlying appeal. On March 6, 2019, the State charged Father with four counts of neglect of a dependent stemming from the removal of the Children. On March 20, 2019, Father was arrested for possession of heroin, possession of a syringe, and neglect of a dependent. Father has

⁵ In October 2018, Mother appealed the trial court's CHINS adjudications to this Court. On May 28, 2019, this Court remanded to the trial court with instructions to enter findings of fact and conclusions thereon. Following the trial court's reissuance of its amended CHINS adjudication order and dispositional order on July 23, 2019, we affirmed the trial court's CHINS adjudications on September 4, 2019. *See Matter of K.B.*, No. 19A-JC-1956 (Ind. Ct. App. Dec. 30, 2019).

remained incarcerated since, and his earliest possible release date from the Department of Correction (“DOC”) is in March 2022.

[8] On June 14, 2019, the State arrested Father for possession of controlled substances in the LaPorte County Jail. On November 27, 2019, Father pleaded guilty to two felony counts of possession of a narcotic drug and was sentenced to consecutive terms as follows: five years in the DOC, with two years suspended; and two years in the DOC, with six months suspended. Additionally, on February 28, 2020, Father pleaded guilty to unlawful possession of a syringe and neglect of a dependent and was sentenced to suspended sentences of 730 days and 545 days, respectively.

[9] On February 14, 2020, DCS filed a petition to terminate Father’s parental rights to the Children, meaning J.E. and K.E only.⁶ The trial court conducted a fact finding hearing on October 2, 2020. At the time of the hearing, J.E. and K.E. were ten and three years old, respectively. DCS’s key witnesses included DCS FCM Jennifer Howard, child therapist Diana Wyszynski, and court appointed special advocate (“CASA”) Tracey Pollock.

[10] As discussed below, DCS’s witnesses testified that, while in foster care, the Children: (1) have made significant strides regarding their trauma and behavioral issues; (2) are thriving and bonded in a stable and loving home; (3) want to be adopted in their current foster placement; and (4) are likely to suffer

⁶ DCS filed an amended petition on September 24, 2020.

serious emotional setbacks should a permanency decision be delayed to allow for Father's release from the DOC.

[11] Father, who appeared in the custody of the DOC, testified, in part, that: (1) he has struggled to “get his life back on track [since he relapsed,]” Tr. Vol. III p. 15; (2) he “does not want to lose the[] [Children] forever[,]” *id.*; (3) his substance addiction is his greatest parenting challenge; (4) he was consistent with his substance abuse treatment before he was incarcerated; (5) he has been on the waiting list for the DOC substance abuse program since January 2019, and no other services are available to him at the DOC; (6) he achieved sobriety in prison; (7) in the past, he relapsed after a five-year period of sobriety; (8) he has not contacted FCM Howard since he entered the DOC; and (9) he will return to his pre-incarceration employment upon his release from prison. On February 19, 2021, the trial court entered its order terminating Father's parental rights to the Children.⁷ Father now appeals.

Analysis

[12] The Fourteenth Amendment to the United States Constitution protects the traditional rights of parents to establish a home and raise their children. *In re K.T.K. v. Indiana Dep't. of Child Serv., Dearborn Cnty. Off.*, 989 N.E.2d 1225, 1230 (Ind. 2013). “[A] parent's interest in the upbringing of [his or her] child is ‘perhaps the oldest of the fundamental liberty interests recognized by th[e]

⁷ In its order, the trial court also granted Mother's relinquishment of her parental rights to the Children.

[c]ourt[s].” *Id.* (quoting *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054 (2000)). We recognize that parental interests are not absolute and must be subordinated to the child’s best interests when determining the proper disposition of a petition to terminate parental rights. *Id.*; see also *Matter of Ma.H.*, 134 N.E.3d 41, 45 (Ind. 2019) (“Parents have a fundamental right to raise their children—but this right is not absolute.”), *cert. denied*, 140 S. Ct. 2835 (2020), *reh’g denied*. “When parents are unwilling to meet their parental responsibilities, their parental rights may be terminated.” *Ma.H.*, 134 N.E.3d at 45-46.

[13] Pursuant to Indiana Code Section 31-35-2-8(c), “[t]he trial court shall enter findings of fact that support the entry of the conclusions required by subsections (a) and (b)” when granting a petition to terminate parental rights.⁸ Here, the trial court entered findings of fact and conclusions thereon in granting DCS’s petition to terminate Father’s parental rights. We affirm a trial court’s termination of parental rights decision unless it is clearly erroneous. *Ma.H.*, 134 N.E.3d at 45. A termination of parental rights decision is clearly erroneous when the trial court’s findings of fact do not support its legal conclusions, or

⁸ Indiana Code Sections 31-35-2-8(a) and (b), governing termination of a parent-child relationship involving a delinquent child or CHINS, provide as follows:

- (a) Except as provided in section 4.5(d) of this chapter, if the court finds that the allegations in a petition described in section 4 of this chapter are true, the court shall terminate the parent-child relationship.
- (b) If the court does not find that the allegations in the petition are true, the court shall dismiss the petition.

when the legal conclusions do not support the ultimate decision. *Id.* We neither reweigh the evidence nor judge witness credibility, and we consider only the evidence and reasonable inferences that support the court’s judgment. *Id.*

[14] Indiana Code Section 31-35-2-8(a) provides that “if the court finds that the allegations in a petition described in [Indiana Code Section 31-35-2-4] are true, the court shall terminate the parent-child relationship.” Indiana Code Section 31-35-2-4(b)(2) provides that a petition to terminate a parent-child relationship involving a child in need of services must allege, in part:

- (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.

DCS must establish these allegations by clear and convincing evidence. *In re V.A.*, 51 N.E.3d 1140, 1144 (Ind. 2016).

I. Unchallenged Findings and Conclusions

[15] Father does not challenge several of the trial court’s findings of fact. He has, thereby, waived any arguments relating to the unchallenged findings. *See In re S.S.*, 120 N.E.3d 605, 614 n.2 (Ind. Ct. App. 2019) (noting this Court accepts unchallenged trial court findings as true). Also, as noted above, because Indiana Code Section 31-35-2-4(b)(2) is written in the disjunctive, DCS was only required to prove one of the enumerated factors therein. The trial court found that DCS proved, by clear and convincing evidence, that there was a reasonable probability that: (1) the conditions that resulted in the Children’s removal or the reasons for placement outside the home of the parents will not be remedied, *see* I.C. § 31-35-2-4(b)(2)(B)(i); *and* (2) the continuation of the parent-child relationship poses a threat to the well-being of the Children, *see* I.C. § 31-35-2-4(b)(2)(B)(ii). On appeal, Father only alleges error from the trial court’s conclusion regarding I.C. § 31-35-2-4(b)(2)(B)(i); he has thereby conceded that the trial court did not clearly err regarding Indiana Code Section 31-35-2-4(b)(2)(B)(ii).⁹ Accordingly, Father has waived his challenge to Indiana Code Section 31-35-2-4(b)(2)(B). *See A.D.S. v. Indiana Dep’t of Child Servs.*, 987 N.E.2d 1150, 1156 n.4 (Ind. Ct. App. 2013) (noting that where

⁹ In his reply brief, Father “acknowledges that his Appellant’s Brief does contain not [sic] a section specifically challenging the trial court’s conclusion that there is a reasonable possibility that the continuation of the parent-child relationship poses a threat to the well-being of the children”; however, he maintains that his “remedial of conditions” and “best interests” arguments encompass this unexpressed issue. *See* Father’s Reply Br. p. 6. We decline Father’s invitation to import an omitted argument into his brief.

parent fails to raise specific, cogent argument challenging trial court's conclusions, those challenges are waived on appeal), *trans. denied*; see also Ind. Appellate Rule 46(A)(8)(a). Waiver notwithstanding, we proceed with our review of Father's claims.

II. Sufficiency of the Evidence

A. Remedied Conditions for Removal

[16] Father argues that the trial court clearly erred in finding that there was a reasonable probability that the conditions that resulted in the Children's removal or the reasons for placement outside the home of the parents will not be remedied. "In determining whether 'the conditions that resulted in the [the Children's] removal . . . will not be remedied,' we 'engage in a two-step analysis.'" *In re E.M.*, 4 N.E.3d 636, 642-43 (Ind. 2014) (quoting *K.T.K.*, 989 N.E.2d at 1231). "First, we identify the conditions that led to removal; and second, we 'determine whether there is a reasonable probability that those conditions will not be remedied.'" *Id.*

[17] In analyzing this second step, the trial court judges the parent's fitness "as of the time of the termination proceeding, taking into consideration evidence of changed conditions." *Id.* (quoting *Bester v. Lake Cnty. Off. of Fam. & Child.*, 839 N.E.2d 143, 152 (Ind. 2005)). "We entrust that delicate balance to the trial court, which has discretion to weigh a parent's prior history more heavily than efforts made only shortly before termination." *Id.* "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." *Id.*

[18] Here, DCS removed the Children because, in part: (1) the Children were unsupervised and showed signs of medical neglect; (2) Father was taking Suboxone without a prescription and tested positive for amphetamine, cocaine, hydrocodone, THC, and methamphetamine; and (3) there was domestic abuse in Father's and Mother's relationship. At the fact finding hearing, the trial court heard evidence indicating that key conditions for removal remained unaddressed or unchanged. In May 2018, Father was arrested and jailed for domestic violence against Mother. At the fact finding hearing, Father admitted that, after he underwent a parenting assessment, he failed to comply with the service provider's recommendation that he should participate in couple's counseling to address the domestic violence. Father testified: "It wasn't that I wasn't compliant, it's just that . . . it was just hard, because we was [sic] doing the substance abuse classes, and then having the counselor come, and then having to do the couple's therapy on top of that." *See* Tr. Vol. III p. 9.

[19] FCM Howard testified that, even before his current period of incarceration, Father was complacent, inconsistent in his efforts, and unwilling to follow through with recommendations. Father was referred to drug testing in late June 2018, but did not submit to a random drug screen until September 2018, when drug testing revealed that Father was still abusing methamphetamine. When Father began to comply with court-ordered random drug screens from October 2018 through the end of February 2019, he failed twenty-two of twenty-three

drug tests. FCM Howard testified that she then recommended inpatient substance abuse treatment to Father in February 2019, which Father declined; and she recommended a three-day to seven-day “detox program[,]” but Father “never started that process.” *Id.* FCM Howard testified that Father has produced no documentation regarding his participation in services in the DOC.

[20] In addition to her testimony regarding Father’s commission of new drug offenses and his sentence of incarceration while the Children were under DCS’s wardship, FCM Howard testified that Father failed to maintain contact with the Children from jail or prison. Despite being granted permission to send letters to the Children from jail, Father sent none. Father also stopped communicating with FCM Howard, who had not heard from Father since he entered the DOC.

[21] Father’s past behavior and various unchanged conditions at the time of the fact finding hearing support the trial court’s conclusion that there was a reasonable probability that the conditions that resulted in the Children’s removal will not be remedied, where Father: (1) did not complete domestic violence counseling as recommended; (2) rejected inpatient treatment and short-term detoxification services before he was incarcerated; (3) continued to abuse drugs, commit drug-related crimes, and go to jail or prison during the Children’s wardship; (4)

received no substance abuse treatment since March 2019;¹⁰ and (5) has not had contact with the Children in nearly three years, despite opportunities to do so.

[22] The evidence supports the findings, and the findings support the trial court's conclusion that there is a reasonable probability that the conditions that resulted in the Child's removal will not be remedied. *See G.F.*, 135 N.E.3d at 661 ("a trial court need not wait until a child is irreversibly influenced by a deficient lifestyle such that her physical, mental, and social growth is permanently impaired before terminating the parent-child relationship"). The trial court did not clearly err in so concluding.

B. Best Interests

[23] Father also contends that DCS failed to present evidence, "other than [his] prior substance abuse problems, and the fact of his incarceration," that termination of his parental rights was in the Children's best interests. Father's Br. p. 40. In determining what is in the best interests of a child, the trial court is required to look at the totality of the evidence. *Z.B. v. Indiana Dep't of Child Servs.*, 108 N.E.3d 895, 903 (Ind. Ct. App. 2018), *trans. denied*. In so doing, the trial court must subordinate the interests of the parents to those of the child involved. *Id.*

¹⁰ By Father's own account, his substance addiction is severe, as evidenced by his twenty-two failed random drug screens and his arrest for a new drug-related offense while he was in jail. Although Father's present sobriety is commendable, given his prior history of relapsing after a long period of sobriety, it is worrisome that he has not received any substance abuse treatment since March 2019.

[24] Termination of a parent-child relationship is proper where the child's emotional and physical development is threatened. *K.T.K.*, 989 N.E.2d at 1235. A trial court need not wait until a child is irreversibly harmed such that his or her physical, mental, and social development is permanently impaired before terminating the parent-child relationship. *Id.* Although not dispositive, permanency and stability are key considerations in determining the child's best interests. *In re G.Y.*, 904 N.E.2d 1257, 1265 (Ind. 2009). Likewise, "the testimony of the service providers may support a finding that termination is in the child's best interests." *In re A.K.*, 924 N.E.2d 212, 224 (Ind. Ct. App. 2010), *trans. dismissed*.

[25] Here, the trial court found:

. . . [I]t is in the children's best interest to have permanency through placement in a loving, caring, and stable home that is free of domestic violence and illicit drug use. However, at this time, Father cannot provide the children the permanency they need and there is nothing to lead the Court to believe he will ever provide the children with permanency and stability. Father will be incarcerated until at least March 2022. Once he is released, Father will have to find employment, get stable housing and successfully deal with his addiction. However, Father has not demonstrated that he can or will accomplish these things. In fact, he has not had any treatment for his severe drug addiction since his current placement in the DOC.

The children have suffered a great deal and it would be harmful to delay permanency any longer Waiting for Father would only cause more instability and trauma for the children. [] [T]he Court finds it is not in the children's best interest to wait any longer for the remote possibility of reunification with Father.

The children wish to be adopted by their current foster family. They have found love and stability . . . and it would be emotionally harmful for them to be removed from their foster family.

Conf. App. Vol. II p. 176.

[26] In addition to her testimony, *supra*, FCM Howard testified that the Children: (1) “are currently working with a therapist” to address “behavioral concerns due to past trauma that they have experienced,” Tr. Vol. II p. 187; (2) have demonstrated progress, which notably “started . . . when both parents were [] incarcerated and [] no longer participating in [supervised] visits[,]” *id.* at 189; and (3) are closely bonded to, and wish to remain with, their current foster parents. FCM Howard testified that adoption is in the Children’s best interests “[d]ue to Father’s past substance abuse history as well as [his arrest on new drug-related criminal] charges while being involved with [DCS]” *Id.* at 194.

[27] Therapist Wyszynski, who is certified in “trauma focused cognitive behavior therapy” for children, testified that J.E., in particular, previously exhibited “traumatic symptoms[,]” including “temper tantrums[,] nightmares[,] night terrors[,]” and bed-wetting. *Id.* at 206, 224. Both Children began to demonstrate progress in October 2019, which coincided with Mother’s incarceration. J.E. made “really great strides” from October until May 2019, when Mother’s visitation resumed. *Id.* at 215. Thereafter, Therapist Wyszynski testified that the Children “declin[ed],” and therapy essentially had

to “start[] all over again.” *Id.* at 216, 219. The following colloquy ensued regarding Therapist Wyszynski’s opposition to reunification efforts:

A: [] [T]hese children have gone through so much, and they don’t really know [Father]. [] [T]hey’ve been in the system for such a long time. They have finally found a very loving family that would provide for them and— and, no disrespect, I don’t know [Father], and it’s not against him personally, it’s just what I see through the kids of how they’re reacting to this new family and what they’ve gone through. The trauma they’ve gone through. If you’re going to uproot them from the family that they know and love, it’s going to be another emotional mental breakdown. They don’t want to be in limbo. . . .

* * * * *

Q: If the children were to be told by [FCM] Howard, the case manager, that we’re going to wait for [Father] to be released and try to reunify you with him, you know, possibly in a couple years, what do you think would happen to the children?

A. They’ll go back to the way they were. They’ll have an emotional mental breakdown.

Q. Do you think it would be dangerous to them to have to wait for that?

A. Yes, I do.

Q. Why?

A. Well again, because they have not had stability. They were not able to trust. They were not able to have the normal—

normal life. [] And, you know, to live that kind of life and then not knowing what's going to happen, you know, in the future; that's instability for a child. . . . I think they're going to have a lot of anxiety, compression [sic], anger. All of that uncertainty.

Id. at 221-22, 223. Therapist Wyszynski added that J.E. has “been . . . gone so long from [Father that] she doesn't really know him anymore[.]” *Id.* at 218.

[28] CASA Tracey Pollock testified that: (1) the Children have made marked progress in a loving home and “[a]re like different children”; and (2) “to have them go back to where they were, that's not in their best interests.” *Id.* at 237.

Additionally, she testified as follows under direct examination:

. . . [Father] has a long history of criminal behavior, [] these children cannot sit around and wait any longer for him to finish out his prison sentence and then get his life in order. [J.E.] . . . just wants to move on and live a normal life. These kids need permanency and stability. . . . [T]hey have experienced more trauma . . . in their life that no children their ages should [] have to experience. . . . I don't believe that they should have to sit and wait for the adults in their lives to figure it out and get straight.

Id. at 241-42.

[29] We reject Father's contention that the trial court only terminated his parental rights because there was a better home available. Here, FCM Howard, Therapist Wyszynski, and CASA Pollock each testified that the Children are certain to regress emotionally if a permanency decision is delayed to facilitate reunification with Father. *See McBride*, 798 N.E.2d at 203 (finding CASA's and

case manager’s testimony that termination would serve children’s best interests was sufficient to support court’s best interests determination).

[30] We doubt neither Father’s love for the Children nor the sincerity of his desire to provide a stable home. The record, however, establishes that Father has not had contact with the Children since 2019, and—by FCM Howard’s and CASA Pollock’s accounts, as well as the testimony of service provider Therapist Wyszynski—is basically a stranger to them. Most troubling, Father has not received substance abuse treatment for his acute addiction in nearly three years.¹¹ The foregoing evidence and reasonable inferences therefrom are sufficient to support the trial court’s conclusion that termination of Father’s parental rights is in the Children’s best interests. The trial court did not clearly err in so concluding.

Conclusion

[31] Sufficient evidence supports the termination of Father’s parental rights. We affirm.

[32] Affirmed.

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

¹¹ It is unfortunate that Father was waitlisted for DOC substance abuse treatment for so long, but it is undisputed that Father resisted inpatient substance abuse treatment and short-term detox treatment even before he was incarcerated.