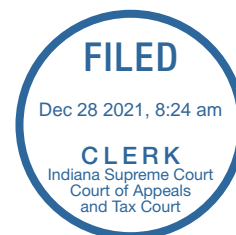


MEMORANDUM DECISION

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 Involuntary Termination
of the Parent-Child Relationship
of: O.W. (Minor Child), and
K.W. (Father),
Appellant-Respondent,

v.

Indiana Department of Child
Services,
Appellee-Petitioner

December 28, 2021

Court of Appeals Case No.
21A-JT-1549

Appeal from the Hendricks
Superior Court

The Honorable Mary G. Willis,
Senior Judge

Trial Court Cause No.
32D03-2011-JT-26

May, Judge.

[1] K.W. (“Father”) appeals the involuntary termination of his parental rights to his child, O.W. (“Child”). He argues the trial court’s findings do not support its conclusions that the conditions under which Child was removed from Father’s care would not be remedied and the continuation of the Father-Child relationship posed a threat to Child’s well-being. We affirm.

Facts and Procedural History

[2] Child was born to P.K. (“Mother”)¹ and Father (collectively, “Parents”) on March 20, 2020. On the same day, the Department of Child Services (“DCS”) received a report that Child’s “cord blood tested positive for morphine, codeine, THC, and heroin metabolites, and Child has been suffering symptoms of withdrawal in the days immediately following Child’s birth.” (Ex. Vol. 3 at 20.) Upon investigation, DCS also discovered Father had “previously [been] addicted to heroin and ha[d] multiple criminal charges regarding the possession and sale of controlled substances.” (*Id.*) Based thereon, DCS filed a petition alleging Child was a Child in Need of Services (“CHINS”) on March 24, 2020.

[3] The trial court held its initial hearing on March 24, 2020, during which Father was appointed counsel and denied the allegations set forth in DCS’s petition. Child was released to Parents’ care “with live-in family supports.” (*Id.* at 19.) The trial court held a fact-finding hearing on May 20, 2020. DCS presented

¹ Mother’s parental rights to Child were also involuntarily terminated. She does not participate in this appeal, and we limit our recitation of the facts to those relevant to Father.

evidence during the fact-finding hearing that Father had submitted to eight random drug screens, all of which were positive for THC, Opiates, Buprenorphine, or various combinations of those substances. Parents admitted Child was a CHINS. The trial court adjudicated Child as a CHINS and ordered Parents to participate in services including random drug screens, visitation with Child, substance abuse treatment, homebased services, and maintenance of stable housing and income. Child was placed with paternal grandmother and paternal step-grandfather, where Child has remained for the entirety of these proceedings.

[4] From March to August 2020, Father consistently tested positive for illegal substances. Father also did not participate in services and did not visit regularly with Child. After the permanency hearing in August 2020, the trial court changed Child's permanency plan from reunification to adoption based on Parents' noncompliance with services. On October 26, 2020, Father pled guilty to Level 2 felony dealing in methamphetamine² and Class A misdemeanor possession of a handgun without a license,³ which were two of the eight⁴ charges resulting from an April 2019 traffic stop in which police found cash, drugs, and a handgun in Father's car. Father's plea agreement left sentencing

² Ind. Code § 35-48-4-1.1(e).

³ Ind. Code § 35-47-2-1(e).

⁴ The State also charged Father with two counts of Level 3 felony dealing in a schedule-IV controlled substance and one count each of Level 2 felony dealing in cocaine, Level 2 felony dealing in a narcotic drug, Level 6 felony dealing in a schedule I controlled substance, and Level 6 felony dealing in marijuana.

open, with the minimum being 5,843 days. Father's sentencing hearing was scheduled for December 14, 2020.

[5] On November 6, 2020, the trial court held another permanency hearing. The trial court noted Father's pending sentencing hearing, his failure to comply with services, and his positive drug screens. The trial court agreed with DCS that Child's permanency plan should remain adoption. On November 23, 2020, Father entered inpatient substance abuse treatment. On November 26, 2020, DCS filed its petition to involuntarily terminate Parents' parental rights to Child.

[6] On December 31, 2020, Father successfully completed inpatient substance abuse treatment. On January 26, 2021, Father was sentenced to an aggregate term of 3,650 days with 1,460 days to be served in the Indiana Department of Correction and the remainder to be served on a combination of probation, work release, and home detention. His earliest possible release date is January 23, 2024. On April 13, 2021, the trial court held a fact-finding hearing on DCS's termination petition. On June 21, 2021, the trial court entered its order involuntarily terminating Parents' parental rights to Child.

Discussion and Decision

[7] We review termination of parental rights with great deference. *In re K.S.*, 750 N.E.2d 832, 836 (Ind. Ct. App. 2001). We will not reweigh evidence or judge credibility of witnesses. *In re D.D.*, 804 N.E.2d 258, 265 (Ind. Ct. App. 2004),

trans. denied. Instead, we consider only the evidence and reasonable inferences most favorable to the judgment. *Id.* In deference to the juvenile court's unique position to assess the evidence, we will set aside a judgment terminating a parent's rights only if it is clearly erroneous. *In re L.S.*, 717 N.E.2d 204, 208 (Ind. Ct. App. 1999), *reh'g denied, trans. denied, cert. denied* 534 U.S. 1161 (2002).

[8] "The traditional right of parents to establish a home and raise their children is protected by the Fourteenth Amendment of the United States Constitution." *In re M.B.*, 666 N.E.2d 73, 76 (Ind. Ct. App. 1996), *trans. denied*. A trial court must subordinate the interests of the parents to those of the children when evaluating the circumstances surrounding a termination. *In re K.S.*, 750 N.E.2d at 837. The right to raise one's own children should not be terminated solely because there is a better home available for the children, *id.*, but parental rights may be terminated when a parent is unable or unwilling to meet parental responsibilities. *Id.* at 836.

[9] To terminate a parent-child relationship, the State must allege and prove:

(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). The State must provide clear and convincing proof of these allegations. *In re G.Y.*, 904 N.E.2d 1257, 1260-61 (Ind. 2009), *reh'g denied*. If the court finds the allegations in the petition are true, it must terminate the parent-child relationship. Ind. Code § 31-35-2-8.

[10] When, as here, a judgment contains specific findings of fact and conclusions thereon, we apply a two-tiered standard of review. *Bester v. Lake Cty. Office of Family & Children*, 839 N.E.2d 143, 147 (Ind. 2005). We determine whether the evidence supports the findings and whether the findings support the judgment. *Id.* “Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference.” *Quillen v. Quillen*, 671 N.E.2d 98, 102 (Ind. 1996). If the evidence and inferences support the juvenile court’s decision, we must affirm. *In re L.S.*, 717 N.E.2d at 208.

[11] A trial court must judge a parent’s fitness to care for his child at the time of the termination hearing. *In re A.B.*, 924 N.E.2d 666, 670 (Ind. Ct. App. 2010). Evidence of a parent’s pattern of unwillingness or lack of commitment to address parenting issues and to cooperate with services “demonstrates the requisite reasonable probability” that conditions will not change. *Lang v. Starke*

Cty. OFC, 861 N.E.2d 366, 372 (Ind. Ct. App. 2007), *trans. denied*. Father argues the trial court’s findings do not support its conclusion that the conditions under which Child was removed from Father’s care would not be remedied.

[12] To support that conclusion, the trial court found:

9. On May 20, 2020, the Child was adjudicated a CHINS . . . Mother and Father admit that they have historically struggled with use of illegal or controlled substances, that Child’s umbilical cord blood tested positive for heroin metabolites, codeine, morphine, and THC, and that Child has suffered symptoms of neonatal intoxication or withdrawal. The aforementioned conditions negatively impact [Parents’] ability to care for the Child and the coercive intervention of the Court is needed in this matter.

* * * * *

During the reporting period [ending November 4, 2020], [Father] had not been compliant in completing referred services. [Father] is compliant with weekly random drug screens but has missed some scheduled appointments. [Father] continues to provide positive drug screens for THC, heroin and morphine. [Father] also tested positive for 7-aminoclonazepam on 8/28/20 and MDMA on 10/1/20. [Father] has attained employment but not stable/appropriate housing during this reporting period. [Father] has stated that he wants to do inpatient rehab for his substance abuse but has not followed through with it. [Father] was provided a list of in-patient rehab facilities DCS can provide referrals for. [Father] took an open plea deal on 10/26/20 related to his criminal charges for a minimum of 5,843 days. His sentencing date is 12/14/20.

* * * * *

The cause of [Child's] out-of-home placement or supervision has not been alleviated. Due to [Parents'] continued drug use, lack of willingness to use their supports and the services being offered to them, and lack of willingness to constantly [sic] [v]isit with their daughter; [sic] DCS requests a concurrent plan of adoption be added to the case. DCS has offered services to [Parents] since [Child's] birth in May⁵ and the [Family Case Manager] makes multiple attempts to make contact with [Parents] to offer support. [Parents] also had services available to them through their own insurance to aide in the recovery process and their extended family has offered stable housing which would allow unlimited [v]isitation and bonding time with their daughter therefore, adding a concurrent plan of adoption is in the best interest to prevent delay in permanency for [Child] shall the family continue to refuse to participate.

* * * * *

[During the reporting period ending January 14, 2021], [Father] has partially complied with [Child's] case plan. Father has been admitted to an in-patient substance abuse program since November 25, 2020. [Father] was successfully discharged from in-patient treatment on December 31, 2020 and he was actively engaged in all programming and completed all assignments for his treatment team. Father is now enrolled in an intensive outpatient program, attends NA/AA meetings with his sponsor daily. While [Father] has had a month of positive progress while in-patient, this period was preceded by an approximately eight (8) months period of consistently producing positive drug screens or refusing to screen on a weekly basis for multiple illegal or controlled substances, including heroin, morphine, and buprenorphine. Father's compliance with ongoing intensive

⁵ Child was born in March. Neither party challenges this language, and it is likely a typographical error.

outpatient services and maintaining his sobriety will be critical in the coming weeks as he has now exited in-patient treatment.

* * * * *

11. On January 26, 2021, Father was sentenced for Amended Count 4 [Level 2 felony dealing in methamphetamine] to 3650 days at the Indiana Department of Corrections [sic], with credit for 2 + 1 days served, with 730 days suspended and the balance to be served as follows: 1460 days at the Indiana Department of Corrections [sic] followed by 730 days Work Release, followed by 730 days Home Detention, and 730 days of probation. Father was sentenced for Count 8 [Class A misdemeanor carrying a handgun without a license] to 365 days at the Hendricks County Jail with credit for 2 + 1 days served and 0 days suspended. These sentences are to run concurrently.

* * * * *

59. Permanency through guardianship alone is not an appropriate plan for a one-year-old child based on the duration of Father's incarceration and durations of his proceeding time in work release, home, [sic] detention, and probation. Father's earliest anticipated release date is currently January 23, 2024. Child will be nearly four years old at that time.

60. While Father had demonstrated significant progress in addressing his substance abuse, this progress occurred in the month directly before he faced sentencing in his criminal matter, which also commenced within the same month that the DCS filed its Verified Petition for Involuntary Termination. While Father may accrue credit time while incarcerated, the potential modifications to his sentence and proceeding time in work release, home detention, and on probation . . . outweigh the

aggravating circumstances and history of Father’s substance abuse.

61. Father has demonstrated a uniquely pervasive, and severe level of substance use throughout the underlying CHINS case. Father’s original sentencing hearing in his criminal matter was set on December 3, 2020. Father obtained a continuance of this sentencing date after checking in to substance abuse treatment – sentencing was finalized on January 26, 2021.

62. It is troubling that only when faced with the imminent consequences of his criminal sentencing that Father finally enrolled and made meaningful progress in addressing his sobriety. While again, Father’s progress is laudable, this behavior is more consistent with a desire to mitigate the consequences in his criminal sentencing hearing than efforts primarily focused on enhancing his ability to parent or remedy the issues that prompted Child’s removal from his care.

63. Moreover, Father’s substance abuse issues had extended beyond substance use and into substantial and exceptionally dangerous levels of dealing. Parents were pulled over with an abundance of illegal and controlled substances in April 2019. Father himself admitted at fact-finding that he was wearing a ballistic vest and in possession of a loaded gun because he was “prepared to fire or be fired upon” to protect himself, Mother, and the contraband in his vehicle.

* * * * *

74. Although the Father loves [Child], he does not have the ability to meet [Child’s] needs. It is not safe for [Child] to be in the care of Mother or Father at this time. . . . To continue the parent-child relationship would be detrimental to [Child]. [Child] needs permanency now.

75. There is a reasonable probability that the conditions that resulted [in] the removal of [Child] from [Parents'] care or the reasons for continued placement outside the home will not be remedied. Neither parent has yet to demonstrate the ability or willingness to make lasting changes in past behaviors. There is no reasonable probability that either parent will be able to maintain stability and remain substance free in order to care and provide adequately for [Child].

(App. Vol. II at 26-52.) Father does not challenge specific findings, and thus they must be accepted as correct. *See Madlem v. Arko*, 592 N.E.2d 686, 687 (Ind. 1992) (“Because Madlem does not challenge the findings of the trial court, they must be accepted as correct.”).

[13] Father contends the trial court’s findings do not support its conclusion that the conditions under which Child was removed from his care would not be remedied because the findings ignored Father’s progress in substance abuse treatment and sobriety. While Father’s completion of substance abuse treatment is commendable, DCS also presented evidence that he would be incarcerated until Child is four years old and he was sober because he was incarcerated. Father’s argument is an invitation for us to reweigh the evidence and judge the credibility of witnesses, which we cannot do. *See In re D.D.*, 804 N.E.2d at 265 (appellate court cannot reweigh evidence or judge the credibility of witnesses).

[14] Child cannot be made to languish, waiting for permanency, until Father demonstrates he can provide her with a safe, stable home. *See Baker v. Marion Cnty. OFC*, 810 N.E.2d 1035, 1040 n.4 (Ind. 2004) (limitations on trial court’s

ability to approve long-term foster care are designed to ensure a child does not “languish, forgotten, in custodial limbo for long periods of time without permanency”) (quoting *In re Priser*, No. 19861, 2004 WL 541124 at *6 (Ohio Ct. App. March 19, 2004)). Father has a history of substance abuse that persisted throughout the CHINS matter in this case. He did not seek treatment until days before DCS filed its petition to termination his parental rights, when the permanency plan for Child had been adoption for many months. Father will be incarcerated for drug-related offenses until Child is at least four years old. Therefore, we conclude the trial court’s findings support its conclusion that the conditions under which Child was removed from Father’s care would not be remedied.⁶ See *In re G.M.*, 71 N.E.3d 898, 908 (Ind. Ct. App. 2017) (affirming the trial court’s conclusion that the conditions under which child was removed from mother’s care would not be remedied based on mother’s continued drug use and noncompliance with services); and see *Castro v. State Office of Family & Children*, 842 N.E.2d 367, 373 (Ind. Ct. App. 2006) (father’s incarceration rendered him unable to remedy conditions that led to child’s removal “within a meaningful timeframe”), *trans. denied*.

⁶ Father also argues the trial court’s findings do not support its conclusion that the continuation of the Father-Child relationship would pose a risk to Child’s well-being. Because Indiana Code section 31-35-2-4(b)(2)(B) is written in the disjunctive, and we have concluded the trial court’s findings supported its conclusion that the conditions under which Child was removed from Father’s care would not be remedied, we need not examine Father’s argument under the other subsection of that statute. See *In re L.S.*, 717 N.E.2d at 209 (because statute written in disjunctive, court needs find only one requirement to terminate parental rights).

Conclusion

[15] The trial court's findings support its conclusion that the conditions under which Child was removed from Father's care would not be remedied. Accordingly, we affirm the trial court's decision to involuntarily terminate Father's parental rights to Child.

[16] Affirmed.

Brown, J., and Pyle, J., concur.