MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In the Involuntary Termination of the Parent-Child Relationship of: M.S. and M.M. (Minor Children), and Mi.S. (Father),

Appellant-Defendant,

v.

Indiana Department of Child Services,

Appellee-Plaintiff.

November 30, 2022

Court of Appeals Case No. 22A-JT-1620

Appeal from the Vanderburgh Superior Court

The Honorable Brett J. Niemeier, Judge

The Honorable Beverly K. Corn, Referee

Trial Court Cause Nos. 82D04-2109-JT-1385 82D04-2109-JT-1386

Brown, Judge.

[1] Mi.S. ("Father") appeals the involuntary termination of his parental rights to his children, M.S. and M.M., and asserts the trial court erred in denying his motion to dismiss and in terminating his parental rights. We affirm.

Facts and Procedural History

[2] Father and R.M. ("Mother," and together with Father, "Parents") are the parents of M.M., born in 2008, and M.S., born in 2010. Father had little contact with the children and spent most of the time prior to February 2020 incarcerated. In the fall of 2019, Mother suffered a stroke. In February 2020, the children moved in with Father.

[3] In June 2020, the Department of Child Services ("DCS") received reports alleging the children were victims of abuse or neglect due to Father's substance abuse and mental health concerns. On June 17, 2020, DCS filed petitions alleging that M.M. and M.S. were children in need of services ("CHINS"). It alleged Father was observed appearing delusional with erratic thoughts and grandiose claims and denied having any mental health issues. It also alleged that the children reported Father used K2 or synthetic marijuana in the home and that they were scared to stay there due to his erratic and delusional behavior. That same month, the children were removed. On July 28, 2020, the children were adjudicated as CHINS.

[4] On August 12, 2020, Father was charged with two counts of stalking his ex-girlfriend. On October 29, 2021, Father pled guilty to stalking as a level 4

felony and was sentenced to four years with credit for 450 days. On August 25, 2020, the court entered a dispositional order.

[5] On September 28, 2021, DCS filed petitions for the involuntary termination of the parent-child relationship between Parents and the children.[1] On November 2, 2021, the court held a hearing, informed Parents of their rights, and appointed counsel for them. The court later scheduled a pretrial conference for January 25, 2022, and a trial for February 3, 2022.

[6] An entry dated February 3, 2022, in the chronological case summary ("CCS") states the hearing was canceled due to judicial action. A February 9, 2022 CCS entry indicates the court held a hearing at which Father's counsel was present on behalf of Father who was incarcerated. It also states:

> Father's fact finding was vacated due to the inclement weather last week and needs to be reset. Court sets father's fact finding before Referee Corn on April 13, 2022, at 8:00 a.m. for the morning. Pretrial will be set before Judge Niemeier on April 5, 2022, at 9:00 a.m. Referee Corn will make the decision as to whether father will be transported for fact finding or DCS will make arrangements to have him appear by phone. [Father's counsel] thinks that father will sign a consent to adoption. DCS and CASA do not believe he will.

[1] In its June 15, 2022 order, the court found that Mother remained a resident of a nursing home and consented to adoption.

Appellant's Appendix Volume II at 3. A CCS entry dated April 5, 2022, indicates that a hearing was held, Father's counsel appeared, and the "[f]act-finding set for 04/13/2022 at 8:00 am until 12:00 pm is affirmed." *Id.*

[7] On April 12, 2022, Father filed motions to dismiss requesting that the court dismiss the petitions pursuant to Ind. Code § 31-35-2-6 due to the failure to hold the hearing within the statutorily required time period.

[8] On April 13, 2022, the court held a hearing. DCS's counsel argued that Father had waived his right to move for a dismissal because his counsel acquiesced on February 9, 2022, when the hearing was rescheduled. The court noted the inclement weather during the week of February 3rd, observed that no motions were filed on February 9th when the hearing was rescheduled, and denied Father's motion.

[9] Father testified that DCS went to his house with police officers in June 2020 after his doctor, Dr. Stephanie Gardner, kept calling him and he did not know why she was calling. He indicated he talked to Dr. Gardner about sodium pentothal and that he recalled waking up one day to "some people in my home with a needle in my arm and . . . one of them saying sodium P." Transcript Volume II at 22. He indicated that the sodium pentothal had an effect on his memory, and he initially thought methamphetamine would help his memory. He testified that he completed substance abuse treatment prior to 2013, had a DUI in 2013, and continued to use illegal substances after his DUI. He indicated he was enrolled in Recovery While Incarcerated. He testified that he

began using drugs again when "COVID hit and [he] was financially unable to take care" of the children. *Id.* at 28. When asked if he was using while he had custody of the children, he answered: "Because COVID shut everything down, yes. I was stressed out and depressed. I couldn't provide for my kids." *Id.* at 29.

[10] DCS also presented the testimony of Gabriel Cabrillas, a clinical manager employed by Maglinger Home Based Services, Permanency Family Case Manager Serena Gravil ("FCM Gravil"), and Court Appointed Special Advocate Stephanie Johnson ("CASA Johnson").

[11] On June 15, 2022, the court entered nineteen-page orders terminating Father's parental rights. It found there was a reasonable probability that the conditions which resulted in the children's removal or the continued placement outside the home would not be remedied, continuation of the parent-child relationship posed a threat to the children's well-being, and termination was in the children's best interests. Appellant's Appendix Volume II at 23.

Discussion

I.

[12] The first issue is whether the trial court erred in denying Father's motion to dismiss. Father argues the trial court erred when it failed to dismiss the case pursuant to Ind. Code § 31-35-2-6. He asserts that Ind. Trial Rule 53.5, which governs continuances, is inapplicable because neither party requested a continuance.

[13] Ind. Code § 31-35-2-6 sets forth the timeline for commencing and completing factfinding hearings in parental rights termination proceedings. *Matter of N.C.*, 83 N.E.3d 1265, 1266 (Ind. Ct. App. 2017). The statute provides:

> (a) Except when a hearing is required after June 30, 1999, under section 4.5 of this chapter, the person filing the petition shall request the court to set the petition for a hearing. Whenever a hearing is requested under this chapter, the court shall:
>
> > (1) commence a hearing on the petition not more than ninety (90) days after a petition is filed under this chapter; and
> >
> > (2) complete a hearing on the petition not more than one hundred eighty (180) days after a petition is filed under this chapter.
>
> (b) If a hearing is not held within the time set forth in subsection (a), upon filing a motion with the court by a party, the court shall dismiss the petition to terminate the parent-child relationship without prejudice.

The interpretation of a statute presents a question of law, which this Court reviews de novo. *Matter of N.C.*, 83 N.E.3d at 1267. Our primary goal is to determine and effectuate the legislative intent. *Id.*

[14] In *Matter of M.S.*, 140 N.E.3d 279 (Ind. 2020), the Indiana Supreme Court addressed a similar timeline in the CHINS statute.[2] The Court observed that

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[2] The Court addressed Ind. Code § 31-34-11-1, which governs the amount of time a court may take to complete a factfinding hearing in a CHINS case and provides:

> (a) Except as provided in subsection (b), unless the allegations of a petition have been admitted, the juvenile court shall complete a factfinding hearing not more than sixty (60)

the mother moved for a continuance for a good reason and explicitly waived the 120-day period. 140 N.E.3d at 284. The Court held that, despite a similar timeline in the CHINS statute, Ind. Trial Rule 53.5 allows a court for good cause shown to continue a hearing beyond those deadlines. *See id.* ("Because our trial rules trump statutes on matters of procedure, Rule 53.5 allows extension of the 120-day deadline in Indiana Code section 31-34-11-1(b) provided a party can show 'good cause.' Where . . . the circumstances dictate good cause for a continuance, Trial Rule 53.5 controls and a trial court has discretion to grant a continuance without the risk of mandatory dismissal for failure to complete the factfinding hearing" within the statutory period). Ind. Trial Rule 53.5 provides, "[u]pon motion, trial may be postponed or continued in the discretion of the court, and shall be allowed upon a showing of good cause established by affidavit or other evidence." There are no mechanical tests for determining whether a request for a continuance was made for good cause. *Matter of M.S.*, 140 N.E.3d at 285. Rather, the decision to grant or deny a continuance turns on the circumstances present in a particular case. *Id.*

> days after a petition alleging that a child is a child in need of services is filed in accordance with IC 31-34-9.
>
> (b) The juvenile court may extend the time to complete a factfinding hearing, as described in subsection (a), for an additional sixty (60) days if all parties in the action consent to the additional time.
>
> * * * * *
>
> (d) If the factfinding hearing is not held within the time set forth in subsection (a) or (b), upon a motion with the court, the court shall dismiss the case without prejudice.

140 N.E.3d at 282.

[15] The February 9, 2022 CCS entry states that Father's attorney was present, the factfinding hearing was vacated due to inclement weather, and Father's counsel thought Father would sign a consent to adoption. The entry contains no indication that Father objected to the scheduling of the hearing for April 13, 2022. In its June 15, 2022 order, the court noted that the original trial had been scheduled for February 3, 2022, but was canceled "due to inclement weather and hazardous roads which resulted in the courts, other government offices and businesses being closed on February 3 and 4, 2022." Appellant's Appendix Volume II at 9. It stated that, "[o]n February 9, 2022, the trial was reset to April 13, 2022, and Father's counsel acquiesced to said date" and "[a] pre-trial conference occurred on April 4, 2022, and the trial date was again affirmed, without objection." *Id.* In his argument, without citation to the record, Father asserts that he "orally moved for dismissal at the pretrial." Appellant's Brief at 16. We cannot say that Father provided support for his assertion given that he did not request a transcript of the February 9, 2022 hearing at which the court scheduled the hearing for April 13, 2022. *See Matter of K.W.*, 178 N.E.3d 1199, 1208 (Ind. Ct. App. 2021) (addressing Ind. Code § 31-34-11-1, which governed the amount of time a court may take to complete a hearing in a CHINS case, and holding that father provided no support for his assertion because he had not provided a transcript for a hearing) (citing *Kocher v. Getz*, 824 N.E.2d 671, 675 (Ind. 2005) ("The defendant does not provide any transcript of the trial court's hearing . . . . We have only the assertions in the parties' filed motions, responses, and attachments. Upon this record, we cannot find that the trial court abused its discretion.")). Further, Father does not challenge the

conclusion that the inclement weather constituted good cause to continue the hearing. To the extent Father argues that Ind. Trial Rule 53.5 is inapplicable because neither party requested a continuance, we disagree. *See Matter of K.T.*, 188 N.E.3d 479, 480-482 (Ind. Ct. App. 2022) (holding that, while Ind. Code § 31-34-11-1 required a CHINS hearing to be conducted within 120 days of the petition, the juvenile court had good cause to continue the hearing on its own motion under Ind. Trial Rule 53.5); *Matter of K.W.*, 178 N.E.3d at 1209 n.2 (holding that father's argument that the trial court could not sua sponte order a continuance pursuant to Ind. Trial Rule 53.5 failed). Based upon the record, we cannot conclude that reversal is warranted on this basis.

II.

[16] The next issue is whether the trial court erred in terminating Father's parental rights. Father argues DCS failed to prove that the conditions that resulted in the children's removal will not be remedied or that continuation of the parent-child relationship posed a threat to the children's well-being. He acknowledges that there is no question that he suffers from mental illness and that his symptoms were consistent with a person suffering from a "Grandiose type of Delusional Disorder" but asserts that his mental illness did not constitute a danger to the children. Appellant's Brief at 23. He argues that he did not injure his children, his drug use was a temporary relapse, he was making reasonable efforts to remedy the issue, and he was not responsible for M.M.'s size and weight. He also contends that termination of the parent-child relationship is not in the children's best interests.

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

> (B) that one (1) of the following is true:
>
> > (i) There is a reasonable probability that the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied.
> >
> > (ii) There is a reasonable probability that the continuation of the parent-child relationship poses a threat to the well-being of the child.
> >
> > (iii) The child has, on two (2) separate occasions, been adjudicated a child in need of services;
>
> (C) that termination is in the best interests of the child; and
>
> (D) that there is a satisfactory plan for the care and treatment of the child.

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

[18] A finding in a proceeding to terminate parental rights must be based upon clear and convincing evidence. Ind. Code § 31-37-14-2. We do not reweigh the evidence or determine the credibility of witnesses but consider only the evidence that supports the judgment and the reasonable inferences to be drawn from the evidence. *In re E.M.*, 4 N.E.3d 636, 642 (Ind. 2014). We confine our review to two steps: whether the evidence clearly and convincingly supports the

findings, and then whether the findings clearly and convincingly support the judgment. *Id*. We give due regard to the trial court's opportunity to judge the credibility of the witnesses firsthand. *Id*. "Because a case that seems close on a 'dry record' may have been much more clear-cut in person, we must be careful not to substitute our judgment for the trial court when reviewing the sufficiency of the evidence." *Id*. at 640.

[19] In determining whether the conditions that resulted in a child's removal will not be remedied, we engage in a two-step analysis. *See id.* at 642-643. 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.* at 643. In the second step, the trial court must judge a parent's fitness as of the time of the termination proceeding, taking into consideration evidence of changed conditions, balancing a parent's recent improvements against habitual patterns of conduct to determine whether there is a substantial probability of future neglect or deprivation. *Id.* 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 a parent's past behavior is the best predictor of future behavior. *Id.* The statute does not simply focus on the initial basis for a child's removal for purposes of determining whether a parent's rights should be terminated, but also those bases resulting in the continued placement outside the home. *In re N.Q.*, 996 N.E.2d 385, 392 (Ind. Ct. App. 2013). A court may consider evidence of a parent's

drug abuse, history of neglect, failure to provide support, lack of adequate housing and employment, and the services offered by DCS and the parent's response to those services. *Id.* Where there are only temporary improvements and the pattern of conduct shows no overall progress, the court might reasonably find that under the circumstances the problematic situation will not improve. *Id.*

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

[21] The trial court found Father's criminal record spanned from 2007 to the present, Father testified that he did not seek mental health treatment because he "didn't feel like he needed it," and he failed to comply with the court's July 28, 2020 orders even before he was incarcerated. Appellant's Appendix Volume II at 15. It also found that "Father does not appear to have any insight into how his mental health, drug use and instability may have impacted his children and their cases." *Id.* at 17.

[22] Cabrillas, the clinical manager, testified that he received a referral for therapeutic supervised visits, met with Father once on August 7, 2020, to complete opening paperwork for visits, and supervised one therapeutic visit. He indicated that, during the August 7, 2020 visit, Father made several statements "along the lines of that he had saved the country . . . a large sum of

money," "[h]e's the reason the President at the time had been elected," and "[h]e was involved in the lowering of gas prices nationally." Transcript Volume II at 51. He testified that Father chose not to sit and stated that the facility was not clean enough for him to sit down. He indicated that the visit with the children occurred the following day, the visit was less than ten minutes, and Father "had an issue with not being able to curse" during the visit, "brought a piece of paper as a way to filter himself," "attempted to write down his questions to interact with his children," and left after a heated exchange with M.M. *Id.* at 51-52. On cross-examination, he indicated that Father was incarcerated shortly after services began.

[23] FCM Gravil testified that she became involved in the case in June 2020. She indicated that Father made several statements that concerned her including that he saved the nation a trillion dollars, he was "the reason that Trump was elected," he was "the reason for Magic Mike and Frozen," and a "story about being injected in the middle of the night by the priest, his uncle, and the government." *Id.* at 64. She testified that she attempted to address Father's mental health with him, and he was willing to be referred for an evaluation, but "there was a lot of denial that he had any mental health issues" and was "convinced that what he has said is reality." *Id.* at 65. She testified that Father had not remedied any of the reasons that the children were removed. When asked why she believed so, she answered:

> At this point in time, aside from his recovery while incarcerated class, he has not really received substance abuse treatment.

> Aside from the evaluation through the prison he has not received any kind of mental health treatment. And he also has a significant criminal history where he had been arrested and convicted of a crime that he had already been convicted of previously. So there's concern that he could do the same thing. Along with that, I've had several conversations while he is incarcerated and he continuously brings up [his ex-girlfriend and the victim of the stalking in prior cases] and obtaining that information.

Id. at 66.

[24] CASA Johnson testified that M.M. had significant medical issues when first placed with foster parents, but since placement, her bone density dramatically improved and her weight has increased. She testified the children did not live with Father until February 2020 after Mother suffered a stroke and, prior to that, they never spent long periods of time with Father because of his incarceration. In light of the unchallenged findings and the evidence set forth above and in the record, we cannot say the trial court clearly erred in finding a reasonable probability exists that the conditions resulting in the children's removal and the reasons for placement outside Father's care will not be remedied.

[25] While the involuntary termination statute is written in the disjunctive and requires proof of only one of the circumstances listed in Ind. Code § 31-35-2-4(b)(2)(B), we note that the trial court also found that continuation of the parent-child relationship posed a threat to the children's well-being. "Clear and convincing evidence need not reveal that 'the continued custody of the parents

is wholly inadequate for the child's very survival.'" *In re G.Y.*, 904 N.E.2d 1257, 1261 (Ind. 2009) (quoting *Bester v. Lake Cnty. Office of Family & Children*, 839 N.E.2d 143, 148 (Ind. 2005) (quoting *Egly v. Blackford Cnty. Dep't of Pub. Welfare*, 592 N.E.2d 1232, 1233 (Ind. 1992))), *reh'g denied*. "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." *Id.* (quoting *Bester*, 839 N.E.2d at 148 (quoting *Egly*, 592 N.E.2d at 1234)).

[26] The court found that Father "failed to provide the necessary medication for treatment of one child's osteogen[e]sis imperfecta and blue sclerae, saying he lost the medication." Appellant's Appendix Volume II at 18. The court also found that the children had been "engaged with mental health treatment, since their removal, to address PTSD and emotional trauma." Appellant's Appendix Volume II at 14.

[27] To the extent Father argues that the court's reference to the children's PTSD improperly implied that the cause was a result of the four months the children lived with him, we note that an assessment from Southwestern Behavioral Healthcare, Inc. mentions the children moved "around a lot" and Mother's "abusive relationships" as well as that M.M. presented "with issues related to experiencing trauma," "[s]he and her 9 year old sister were removed from [Father] by DCS due to [Father] experiencing substance abuse issues and psychotic episodes," and M.M. "noted that [Father] had cops called on him as well." Exhibits Volume III at 121.

[28] The record also reveals Father admitted to calling M.M. a "disrespectful b----" in a room full of people at his home. Transcript Volume II at 17. FCM Gravil testified that she met with Father the day before the hearing, she gave Father a letter from M.M., and Father read the letter, critiqued the grammar, and said: "You wonder why I called her an ungrateful b----." *Id.* at 65. Further, CASA Johnson testified that she believes the continuation of the relationship would pose a threat to the children. She testified:

> [The children] have come a long way through therapy to overcome the trauma that they've had in their life. And I think to reintroduce [Father] into that they would suffer severe setbacks. They're very open and articulate about what has happened to them. Almost surprisingly so. My first encounter with them they were very blunt about what they had seen in the household, about how they had no food, about the drugs that were laying out. I was a little taken aback, quite frankly, because I'd never had a child speak to me so adult like about what they had encountered. Everything that they said had matched the records that I had read previously. I don't know what physical harm would come to them, but the mental detriment of being placed with [Father] would be a huge concern for me.

Id. at 75. We conclude that clear and convincing evidence supports the trial court's determination that there is a reasonable probability that the continuation of the parent-child relationship poses a threat to the children's well-being.

[29] In determining the best interests of children, the trial court is required to look to the totality of the evidence. *McBride v. Monroe Cnty. Office of Family & Children*, 798 N.E.2d 185, 203 (Ind. Ct. App. 2003). The court must subordinate the interests of the parent to those of the children. *Id.* The court need not wait until

a child is irreversibly harmed before terminating the parent-child relationship. *Id.* The recommendation of a case manager and child advocate to terminate parental rights, in addition to evidence that the conditions resulting in removal will not be remedied, is sufficient to show by clear and convincing evidence that termination is in the children's best interests. *A.D.S. v. Ind. Dep't of Child Servs.*, 987 N.E.2d 1150, 1158-1159 (Ind. Ct. App. 2013), *trans. denied*.

[30] CASA Johnson testified that she agreed with the plan to terminate Father's parental rights and for the children to be adopted. When asked if she believed it was in the children's best interests to have the parent-child relationship terminated, she answered:

> I do, based on my personal observations as well as what the children have told me. In my conversations with them they have point blank told me that they want to be adopted. They want [Father] to no longer be involved in their lives. They refer to him not as Dad. He is only [M.] or also known as the sperm donor.

Transcript Volume II at 74. Based on the totality of the evidence, we conclude the trial court's determination that termination is in the children's best interests is supported by clear and convincing evidence.

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

[32] Affirmed.

Altice, J., and Tavitas, J., concur.