

MEMORANDUM DECISION

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IN THE
Court of Appeals of Indiana

In the Termination of the Parent-Child Relationship of:

H.Z. and N.Z. (Minor Children)

and

Z.Z. (Father),

Appellants-Respondents

v.

Indiana Department of Child Services,

Appellee-Petitioner

March 27, 2024

Court of Appeals Case No.
23A-JT-1621

Appeal from the Allen Superior Court

The Honorable Lori Morgan, Judge

Trial Court Cause No.
02D08-2206-JT-158
02D08-2206-JT-159

Memorandum Decision by Judge Bailey
Judges Crone and Pyle concur.

Bailey, Judge.

Case Summary

- [1] Z.Z. (“Father”) appeals the involuntary termination of his parental rights to H.Z. (born in 2014) and N.Z. (born in 2016) (collectively, “the Children”), upon the petition of the Allen County Department of Child Services (“DCS”). Father presents a single issue for review, restated as: whether the termination order is clearly erroneous because DCS failed to present clear and convincing evidence to establish the requisite statutory elements as to the remediation of conditions and the best interests of the Children. We affirm.

Facts and Procedural History

- [2] Father and C.S. (“Mother”) are the biological parents of the Children.¹ DCS became involved with Father and Mother in April 2017. At that time, Father, Mother, and the Children lived in a hotel with Mother’s parents (“Maternal Grandparents”). On April 13, DCS filed a petition alleging the Children to be Children in Need of Services (“CHINS”) because of Father’s alleged drug use—

¹ Mother consented to the Children’s adoption and does not participate in this appeal. Thus, we largely limit our recitation of the facts to those pertinent to the termination of Father’s parental rights.

Father had tested positive for cocaine— and incidents of domestic violence between Father and Mother.² The Children were removed from Father and Mother’s care and placed, first, in foster care, then in relative care with Maternal Grandparents.

[3] On June 19, the Children were adjudicated CHINS. The CHINS court entered a dispositional decree ordering that Father, among other things: refrain from all criminal activity; maintain suitable and sustainable housing; notify DCS of any changes in address within forty-eight hours of the change; cooperate with service providers; maintain contact with DCS; submit to diagnostic, drug, and alcohol assessments; attend, participate in, and successfully complete a weekly group substance abuse treatment program; enroll in and complete an individual counseling program; take all prescribed medications; obtain a psychiatric evaluation; follow all recommendations resulting from assessments or evaluations; submit to drug screens; refrain from the use of alcohol and illegal substances; participate in visitation with the Children; and enroll in a home-based services program, participate in all sessions, and successfully complete the program. The court ordered the Children to remain in relative care with Maternal Grandparents and granted Father supervised visitation with the Children.

² DCS amended the petition alleging the Children to be CHINS in May 2017.

[4] Over the course of the CHINS proceedings, Father was frequently incarcerated for committing various offenses and violating probation. Father had “pretty much [been] incarcerated throughout the duration of [the CHINS] case” and spent only fifteen months on release. (Tr. Vol. II, pg. 54.) When Father was not incarcerated, he was partially compliant with the services he was offered. However, Father’s incarceration was a major contributor to his failure to fully participate in and complete the services.

[5] For example, in November 2018, Father completed diagnostic, drug, and alcohol assessments, and he was referred for substance abuse services, medication evaluation, individual therapy, behavioral therapy, random drug screens, and individual counseling. Father attended one or two sessions but did not complete the services because he was arrested and convicted of theft and was incarcerated for four months. Father was released on probation and was successful in completing an inpatient substance abuse program. A few months later, however, Father violated his probation by failing to return from work release. Father’s probation was revoked, and he spent fifteen months in jail. In 2020, Father was convicted of resisting law enforcement and operating a vehicle while intoxicated and was incarcerated for three months. Shortly after his release, Father was found guilty of being a habitual traffic violator and was sentenced to three months in jail.

[6] Around May or June 2022, Father was able to participate in home-based services, but he did not complete the services because he became incarcerated in July 2022 for an incident that had occurred in April. Father—who had an

outstanding warrant for his arrest and was only supposed to have supervised visitation with the Children—was involved in a high-speed police chase while Mother and the Children were in the vehicle with him. When Father eventually stopped the vehicle, he exited and ran from the police. Father was arrested and charged with the offenses of battery on a public safety officer, resisting law enforcement, being a habitual traffic violator, and being a habitual offender.

- [7] In addition to his violations of the law and his frequent incarceration, Father suffered from several mental disorders. During the CHINS proceedings, Father completed a psychological evaluation, and he was diagnosed with bipolar disorder, antisocial personality disorder, stimulant use disorder, disruptive impulse and conduct disorder, attention deficit disorder, attention deficit hyperactivity disorder, and depressive disorder. Father was prescribed medication, but he had not taken the medication for three years due to his frequent incarceration and his inability to afford the medication.
- [8] Father also struggled with substance abuse and with submitting to drug screens. Father submitted to “[p]robably about” six drug screens “in the beginning” of the CHINS proceedings, in “early 2017,” and no drug screens thereafter. (*Id.* at 100.) Following a periodic review hearing held in October 2017, Father was found to have consistently tested positive for cocaine during that review period.
- [9] Father’s frequent incarceration also negatively affected his ability to exercise visitation with the Children. While Father did participate in supervised

visitation with the Children at the beginning of the CHINS proceedings, the visits “tapered off.” (*Id.* at 101.) And between 2021 and 2022, Father visited with the Children only three times—once in August 2021, and twice in June 2022, after Father’s visitation with the Children had been changed to therapeutically supervised visitation due to his long separation from the Children. Father’s last visit with the Children was on June 30, 2022.

[10] During the six-year-long CHINS case, the Children had various placements. The Children were first placed with Maternal Grandparents but were removed and placed with Father’s mother (“Paternal Grandmother”) because Mother—who had been permitted to live with Maternal Grandparents and the Children—had an altercation with the maternal grandfather, allegedly because the maternal grandfather had inappropriately touched H.Z.

[11] In May 2020, H.Z. was removed from Paternal Grandmother’s care and placed in licensed foster care because she was “sexually acting out[.]” (*Id.* at 93.) N.Z. remained in Paternal Grandmother’s care. In October 2021, the Children were placed back with Mother for a trial in-home visit, but they were again removed in April 2022, following the high-speed-police-chase incident. The Children were never placed in Father’s care.

[12] On September 23, 2022, DCS filed its petition to terminate Father’s parental rights. Fact-finding hearings on the termination petition were held on February 27, March 13, and March 16, 2023. At that time, Father was incarcerated with an expected release date of between six months and three years, based upon the

outcome of Father's purposeful incarceration. Father appeared at the first two hearings in person and by counsel. He appeared at the final hearing telephonically.

[13] At the hearings, DCS family case manager Laura Masterson, who was assigned to the CHINS case from 2017 until early 2020, testified that Father participated in some of the recommended services and "visited the [C]hildren occasionally[,] but Father had "several incarcerations[.]" (*Id.* at 83.) DCS family case manager Michelle Garigen ("FCM Garigen"), who was assigned to the CHINS case in February 2020, testified that Father was incarcerated "on and off throughout the case" and "sometimes [FCM Garigen] wouldn't know that [Father] was out of jail." (*Id.* at 96.) She further testified that Father "didn't follow through" with the recommended services and that he did not benefit from the services because his "behavior patterns" of "repeated incarceration [and] criminal activity" had not changed. (*Id.* at 98, 102.) FCM Garigen told the trial court that Father did not submit to any drug screens after 2017, and his housing situation changed "frequently because he was incarcerated quite a bit[.]" (*Id.* t 103.)

[14] Father testified that the "longest" he had been "out [of jail] since this case has been going on is a period of four [] months[, b]ut every time [he] was out [of jail, he] was in contact with [DCS] to put in referrals [for] some kind of services." (*Id.* at 56.) Father further testified that he believed he had "benefited very well" from his substance abuse treatment and that he had "overc[o]me an addiction twice." (*Id.* at 167, 171.) He admitted to making a "couple of

mistakes” when he “violated probation and got re-incarcerated,” but told the court that “other than that I think I’ve benefited pretty substantially.” (*Id.* at 167.)

[15] FCM Garigen and the Children’s guardian ad litem (“the GAL”) both testified that the termination of Father’s parental rights is in the best interests of the Children. FCM Garigen told the court that she was concerned for the Children’s safety, stability, permanency, and well-being. The GAL testified that Father had not “done anything to make himself available to be a father ... to the [C]hildren[,]” and his “continued litigation and criminal activity ... remove[d] him from being able to [be] a positive, meaningful parent in their lives.” (*Id.* at 152.)

[16] On June 20, 2023, the trial court entered its findings, conclusions thereon, and order terminating Father’s parental rights. The court concluded, among other things, that there is a reasonable probability the conditions leading to the Children’s removal will not be remedied and termination is in the Children’s best interests. Father now appeals.

Discussion and Decision

[17] Father contends that the trial court’s order terminating his parental rights is clearly erroneous. We begin our review of this issue by acknowledging that the traditional right of parents to establish a home and raise their children is protected by the Fourteenth Amendment of the United States Constitution.

See, e.g., In re C.G., 954 N.E.2d 910, 923 (Ind. 2011). However, a trial court must subordinate the interests of the parents to those of the child when evaluating the circumstances surrounding a termination. *In re K.S.*, 750 N.E.2d 832, 837 (Ind. Ct. App. 2001). Although the right to raise one’s own child should not be terminated solely because there is a better home available for the child, parental rights may be terminated when a parent is unable or unwilling to meet his or her parental responsibilities. *Id.* at 836.

[18] Before an involuntary termination of parental rights can occur in Indiana, DCS is required to allege and prove, among other things:

(A) that one (1) of the following is true:

(i) The child has been removed from the parent for at least six (6) months under a dispositional decree;

* * *

(B) that one (1) of the following is true:

(i) There is a reasonable probability that the conditions that resulted in the child’s removal or the reasons for placement outside the home of the parents will not be remedied.

(ii) There is a reasonable probability that the continuation of the parent-child relationship poses a threat to the well-being of the child.

(iii) The child has, on two (2) separate occasions, been adjudicated a child in need of services.

* * *

(C) [and] that termination is in the best interests of the child

Ind. Code § 31-35-2-4(b)(2). DCS need establish only one of the requirements of subsection (b)(2)(B) before the trial court may terminate parental rights. *Id.* DCS’s “burden of proof in termination of parental rights cases is one of ‘clear and convincing evidence.’” *In re G.Y.*, 904 N.E.2d 1257, 1260-61 (Ind. 2009) (quoting I.C. § 31-37-14-2). If the trial court finds that the allegations in the termination petition are true, it “shall” terminate the parent-child relationship and enter findings supporting its conclusions. I.C. § 31-35-2-8.

- [19] When reviewing a termination of parental rights, we will not reweigh the evidence or judge the credibility of the 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 that are most favorable to the judgment. *Id.* Furthermore, in deference to the trial court’s unique position to assess the evidence, we will set aside the court’s judgment terminating a parent-child relationship only if it is clearly erroneous. *In re L.S.*, 717 N.E.2d 204, 208 (Ind. Ct. App. 1999), *trans. denied*.
- [20] When, as here, a trial court’s judgment contains special findings and conclusions, we first determine whether the evidence supports the findings and, second, we determine whether the findings support the judgment. *Bester v. Lake Cnty. Off. of Fam. & Child.*, 839 N.E.2d 143, 147 (Ind. 2005). “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 trial court’s decision, we must affirm. *In re L.S.*, 717 N.E.2d at 208. Also, when—as here—a parent does not specifically challenge any of the trial court’s findings of fact, the unchallenged findings are accepted as true on review. *Madlem v. Arko*, 592 N.E.2d 686, 687 (Ind. 1992). Thus, we need only determine whether the unchallenged findings and the reasonable inferences support the termination judgment. *See In re S.S.*, 120 N.E.3d 605, 610 (Ind. Ct. App. 2019). Finally, we note that because Indiana Code Section 31-35-2-4(b)(2)(B) is written in the disjunctive, we need only conclude that DCS has met its burden as to one of the three elements. *See In re L.S.*, 717 N.E.2d at 209.

[21] Father challenges the sufficiency of the evidence DCS presented to satisfy the elements of Indiana Code Section 31-35-2-4, inclusive of subsections (B) (remediation of conditions) and (C) (best interests of the Children). We address the contentions in turn.

I. Remediation of Conditions

[22] As to the likelihood of remediation of conditions, we engage in a two-step analysis. *In re E.M.*, 4 N.E.3d 636, 643 (Ind. 2014). “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.* (quotations and citations omitted). In the first step, we consider not only the initial reasons for removal, but also the reasons for continued placement outside

the home. *In re N.Q.*, 996 N.E.2d 385, 392 (Ind. Ct. App. 2013). In the second step, the trial court must judge a parent’s fitness to care for his or her children at the time of the termination hearing, taking into consideration evidence of changed conditions. *In re E.M.*, 4 N.E.3d at 643.

[23] However, the court must also “evaluate the parent’s habitual patterns of conduct to determine the probability of future neglect or deprivation of the child.” *Moore v. Jasper Cnty. Dep’t of Child Servs.*, 894 N.E.2d 218, 226 (Ind. Ct. App. 2008) (quotations and citations omitted); *see also In re M.S.*, 898 N.E.2d 307, 311 (Ind. Ct. App. 2008) (noting the “trial court need not wait until a child is irreversibly harmed such that his physical, mental, and social development are permanently impaired before terminating the parent-child relationship”). In evaluating the parent’s habitual patterns of conduct, the court may disregard efforts made shortly before the termination hearing and weigh the history of the parent’s prior conduct more heavily. *In re K.T.K.*, 989 N.E.2d 1225, 1234 (Ind. 2013). And DCS is not required to rule out all possibilities of change; rather, it need establish only that there is a reasonable probability the parent’s behavior will not change. *Moore*, 894 N.E.2d at 226.

[24] Habitual conduct may include parents’ prior criminal history, drug and alcohol abuse, history of neglect, failure to provide support, and a lack of adequate housing and employment. *A.D.S. v. Ind. Dep’t of Child Servs.*, 987 N.E.2d 1150, 1157 (Ind. Ct. App. 2013), *trans. denied*. The trial court may also consider the services offered to the parent by DCS and the parent’s response to those services as evidence of whether conditions will be remedied. *Id.*

[25] Here, the Children were initially removed from Father’s care due to their exposure to drug use and domestic violence in the home, and the Children were never returned to Father’s care. While Father did attempt to participate in some of the services recommended to him—and he should be commended for his completion of the inpatient drug treatment program—Father was unable to consistently participate in the majority of the services provided because of his frequent incarceration. In the six years that the CHINS case was pending, Father spent just fifteen months on release from incarceration. He admitted that he had remained free for no more than four months at a time before committing a new offense and being returned to jail. Father’s offenses included theft, resisting law enforcement, and operating a vehicle while intoxicated.

[26] At the time the termination hearings took place, Father had been incarcerated for at least seven months due to his arrest following his involvement in the high-speed-police-chase incident. Father had pleaded guilty to the charges arising from the incident, and he testified during the hearings that he hoped to be released from jail within six months. However, he further testified that his incarceration could last three years.

[27] Father’s numerous incarcerations also interfered with his ability to establish regular visitation with the Children. Father exercised visitation with the Children on just three occasions between 2018 and 2022. Also, during the six-year-long CHINS proceeding, Father submitted to only six drug screens—all in early 2017—and he consistently tested positive for cocaine. And Father did not take the medication that he had been prescribed to treat his mental disorders.

[28] In addition, Father failed to adequately communicate with DCS, and FCM Garigen did not always know when Father had been released from jail. Father testified that on the occasions when he had been released from incarceration, he would contact DCS and asked to be referred for services. However, FCM Garigen testified that Father had reached out to her regarding reinstating his services on just two occasions by leaving her voicemail messages that she termed “condescending.” (Tr. Vol. II, pg. 104.)

[29] Father maintains that the evidence presented during the termination hearings “supported the position that [he] has a strong support network,” that he “benefited from [the court-ordered] services[,] that upon his release from incarceration he would likely have stable housing,” and that he “wanted to cultivate a stronger bond with [the Children].” Appellant’s Br. at 14. However, this is simply a request to reweigh the evidence, which we will not do. *See In re D.D.*, 804 N.E.2d at 265. Given Father’s criminal history; his frequent incarceration; his failure to exercise consistent visitation with the Children; and his inability to complete the services offered to him, submit to drug screens, and take his prescribed medications, we cannot say the trial court clearly erred when it concluded that there is a reasonable probability that the conditions that led to the Children’s removal from Father are unlikely to be remedied.

II. Best Interests of the Children

[30] Father also challenges the trial court’s conclusion that termination of the parent-child relationship was in the Children’s best interests. In making such a determination, the trial court is required to look at the totality of the evidence.

In re A.K., 924 N.E.2d 212, 224 (Ind. Ct. App. 2010). “A parent’s historical inability to provide adequate housing, stability and supervision coupled with a current inability to provide the same will support a finding that termination of the parent-child relationship is in the child’s best interests.” *Castro v. State Off. of Fam. & Child.*, 842 N.E.2d 367, 374 (Ind. Ct. App. 2006), *trans. denied*.

“Additionally, a child’s need for permanency is an important consideration in determining the best interests of a child, and 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 at 224. Such evidence, “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 A.D.S., 987 N.E.2d at 1158-59.

[31] Here, the evidence established that Father had a profound inability to complete the services offered to him, submit to drug screens, take his prescribed medication, exercise consistent visitation with the Children, refrain from violating the law, and remain free from incarceration. Indeed, at the time the termination hearings took place, nearly six years after the CHINS proceedings commenced, Father was incarcerated on charges arising from the high-speed-chase incident—and therefore, unable to provide adequate housing for the Children—and Father had not completed any of the services that had been offered to him. *See Castro*, 842 N.E.2d at 374 (noting that a parent who had been incarcerated for most of his child’s life had a “historic[] inability to provide adequate housing, stability and supervision” for the child and that continued

incarceration at the time of the termination hearing was strong evidence of a current inability to provide the same). Furthermore, Father's frequent incarceration impacted the provision of his services and his ability to exercise visitation with the Children. Father's last visit with the Children occurred in June 2022.

[32] In addition, the GAL testified that the Children need permanency and "deserve to have ... a home and ... to move forward with both of their lives.... So[,] making [the Children] wait another four [] years[, until Father is released from incarceration,] to see if [Father] can do what he needs to do I don't think is appropriate." (Tr. Vol. II, pg. 152.) FCM Garigen testified that the Children had been in their pre-adoptive placement since April 2022, and were doing well. The GAL and the FCM also testified that they believe termination of Father's parental rights is in the Children's best interests. And as we have already discussed, there is evidence that the conditions resulting in the Children's removal will not likely be remedied. Thus, the totality of the evidence is such that the trial court did not clearly err in concluding that termination of Father's rights is in the Children's best interests.

Conclusion

[33] DCS presented sufficient evidence to establish the requisite statutory elements for termination of Father's parental rights as to the remediation of conditions

and the best interests of the Children. Accordingly, the order terminating Father's parental rights to the Children is not clearly erroneous.

[34] Affirmed.

Crone, J., and Pyle, J., concur.

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