

MEMORANDUM DECISION

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IN THE
Court of Appeals of Indiana

In re the Termination of the Parent-Child Relationship of
R.G. (Minor Child) and K.G. (Father)

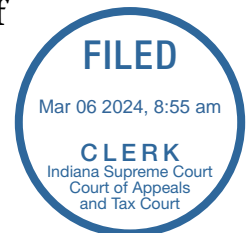
K.G. (Father),

Appellant-Respondent

v.

Indiana Department of Child Services,

Appellee-Petitioner



March 6, 2024

Court of Appeals Case No.
23A-JT-2430

Appeal from the Allen Superior Court

The Honorable Lori Morgan, Judge
The Honorable Beth Ann Webber, Magistrate

Trial Court Cause No.
02D08-2302-JT-32

Memorandum Decision by Judge Vaidik
Judges May and Kenworthy concur.

Vaidik, Judge.

Case Summary

- [1] K.G. (“Father”) appeals the termination of his parental rights. We affirm.

Facts and Procedural History

- [2] Father and E.S. (“Mother”) are the biological parents of R.G. (“Child”), born in September 2020. In June 2021, Father was on probation in Adams County for Class A misdemeanor possession of marijuana. That same month, Mother and Father were found in a car after overdosing on fentanyl. Child was found alone in a different car nearby. The Indiana Department of Child Services (DCS) removed Child from the parents as they had to be transported to the hospital and there was no sober caregiver available at the time. The next day, DCS filed a petition alleging Child to be in need of services (CHINS), and Child was placed with his paternal grandmother.
- [3] In July, the trial court found Child to be a CHINS and issued a dispositional order requiring Father to, among other things, refrain from criminal activity, undergo assessments and follow all recommendations, submit to random drug screens, and participate in visitation. Father initially complied by completing a substance-use assessment and attending visitation during the first month.

However, later in July, Father was found in violation of his probation in Adams County for the overdose and for testing positive for fentanyl and cocaine on a separate occasion. From there, Father fell into a cycle of criminal activity and probation violations. In August, the State filed two petitions alleging Father violated his probation by failing to submit to a drug screen on one date and testing positive for fentanyl on another. In September, Father was charged in connection with the overdose incident with Level 6 felony possession of a narcotic drug and Level 6 felony neglect of a dependent. Additionally, in October, Father was charged with Class A Misdemeanor resisting law enforcement. The following week, his probation was revoked after he admitted to the violations, and he served the remainder of his sentence in the Adams County jail. He completed the sentence and was released in April 2022. Later that month, Father pled guilty to resisting law enforcement and was sentenced to 365 days with 335 suspended.

[4] A permanency hearing was held in May. The trial court found that Father hadn't regularly visited with Child, had tested positive for illegal substances, had been noncompliant with services due to incarceration, and hadn't demonstrated an ability to benefit from services. The court adopted a permanency plan of reunification with Mother and ordered that Father have no visitation due to his incarceration. The following week, Father pled guilty in the felony case and was sentenced to two years suspended to probation.

[5] DCS referred Father to the Bowen Center for family, individual, and group counseling in June. Father completed an intake to start the individual

counseling but didn't follow up after the intake, and he never attended family or group counseling.

- [6] In July, Mother and Father overdosed on fentanyl at the paternal grandmother's house while Child was present. Mother died from the overdose, and Father was hospitalized. A detention hearing was held, after which Child was placed with his maternal grandmother and Father was ordered to participate in supervised visitation. DCS put in a visitation referral to the Bowen Center in September, but Father never showed up to any visits.
- [7] Following the July overdose, a petition for revocation of probation was filed in the felony case, and a warrant was issued for Father's arrest. Father's whereabouts were unknown for the next several months.
- [8] On February 1, 2023, DCS petitioned to terminate Father's parental rights. Later that month, Father was picked up on the warrant in the felony case during a traffic stop. In March, Father's probation was modified to the Hope Probation Program, a zero-tolerance program for drugs and alcohol, and he was sentenced to six months of home detention. As a condition, Father underwent a substance-abuse assessment and was ordered to complete a thirty-day inpatient treatment program at Park Center. DCS also made referrals to the Bowen Center for medication evaluation, individual counseling, family counseling, group counseling for substance-abuse issues, and supervised visitation. Father completed the inpatient program in April but tested positive for fentanyl thereafter. After leaving Park Center, Father moved to a

community-corrections residential facility. Father participated in an intake with the Bowen Center on May 2 and scheduled an individual counseling appointment for May 17, but he didn't attend. On May 19, Father cut off his ankle monitor and left the community-corrections facility without permission. He was subsequently arrested and charged with Level 6 felony escape and Level 6 felony failure to return to lawful detention.¹ A second petition to revoke probation was filed in the prior felony case, and a warrant was issued for Father's arrest.

[9] A termination hearing was held in June. Father did not appear, and his whereabouts were unknown. Family Case Manager (FCM) Jeffrey Borland testified that Father had been noncompliant throughout the CHINS and termination proceedings because he'd "either been incarcerated or on the run for 21 out of the 24 months." Tr. p. 57. He did monthly visits with Father while he was incarcerated, but Father didn't contact him during the periods he wasn't in jail. He said Father hadn't seen Child at visitation for close to twenty-three months, and he'd never provided proof of employment or independent housing. FCM Borland explained DCS was seeking termination of Father's parental rights due to his noncompliance and "not being in the picture." *Id.* at 62.

[10] Stephen Griebel, Child's guardian ad litem (GAL), testified that termination was in Child's best interests because Father hasn't demonstrated an ability or

¹ In November 2023, Father pled guilty to Level 6 felony escape and was sentenced to 183 days in the Department of Correction.

willingness to take care of Child and because of Father’s criminal conduct, substance abuse, and lack of income or stable housing. Child’s maternal grandmother testified that since Child had been placed with her, Father hadn’t visited Child or provided any clothing or financial support for him.

[11] In September, the trial court issued an order terminating Father’s parental rights.

[12] Father now appeals.

Discussion and Decision

I. Father’s due-process rights were not violated

[13] Father contends “he was not provided all reasonable services to reunify him with Child and that such failure violated his due process rights.”² Appellant’s Br. p. 19. DCS argues Father waived this argument by failing to raise it in the trial court. Generally, an argument cannot be presented for the first time on appeal. *In re D.H.*, 119 N.E.3d 578, 586 (Ind. Ct. App. 2019), *aff’d as modified on reh’g*, 122 N.E.3d 832 (Ind. Ct. App. 2019), *trans. denied*. However, we have

² Father also claims DCS violated his due-process rights by “failing to case plan” and “not follow[ing] its policies or the statute with respect to incarcerated persons.” Appellant’s Br. pp. 19, 20-21. He cites Indiana Code section 31-34-15-4(7), which outlines the requirements for a case plan when a parent is incarcerated. But Father merely quotes the statute and stops there; he doesn’t discuss the contents of the case plan or how the plan fell short of the statutory requirements. Because Father fails to develop a cogent argument as to the case plan, he has waived this claim. *See* Ind. Appellate Rule 46(A)(8)(a) (“The argument must contain the contentions of the appellant on the issues presented, supported by cogent reasoning.”).

discretion to address such claims because they involve a parent's constitutional rights, *id.*, and we exercise that discretion here.

[14] To protect a parent's due-process rights in a termination case, DCS must generally make reasonable efforts to preserve or reunify the family during the CHINS proceedings. *In re T.W.*, 135 N.E.3d 607, 615 (Ind. Ct. App. 2019), *trans. denied*; Ind. Code § 31-34-21-5.5. What constitutes "reasonable" varies by case and does not always mean services must be provided to the parent. *T.W.*, 135 N.E.3d at 615.

[15] DCS made reasonable efforts here. The same month of the CHINS adjudication, DCS referred Father for a substance-use assessment. Father attended the assessment but didn't complete the recommended services. He also stopped attending visitation after the first month. While Father was in the Adams and Allen county jails, FCM Borland visited him monthly, but Father didn't contact FCM Borland during the periods he wasn't incarcerated. DCS referred Father for services in June 2022 after he was released from jail, but all Father did was complete an intake. When Child was placed with his maternal grandmother following Mother's death, the trial court ordered Father to participate in supervised visitation and DCS submitted a referral, but Father never attended. He had another opportunity to participate in services during the termination proceedings when DCS resubmitted his referrals in March, but again, he didn't follow through. Father's failure to engage in the referred services does not render DCS's efforts unreasonable.

[16] Despite his noncompliance with services while he was out of jail, Father emphasizes that DCS didn't provide him with services or inquire about the possibility of visitation while he was incarcerated. But the inability to provide services to an incarcerated parent doesn't amount to a denial of due process. *See In re H.L.*, 915 N.E.2d 145, 148 (Ind. Ct. App. 2009) (finding no due-process violation where "the absence of services was due to Father's incarceration and he does not point to any evidence that he specifically requested visitation or other services"). And Father wasn't incarcerated for the entirety of the CHINS case. DCS put in service referrals after Father got out of jail in 2022, but instead of participating, he violated his probation by overdosing on fentanyl and went "on the run" for several months.

[17] The evidence shows that DCS made reasonable efforts to reunify Father and Child. Father has not demonstrated that his due-process rights were violated.

II. The trial court did not err in terminating Father's parental rights

[18] Father also argues there is insufficient evidence to meet the statutory requirements for termination. When reviewing the termination of parental rights, we do not reweigh the evidence or judge witness credibility. *In re K.T.K.*, 989 N.E.2d 1225, 1229 (Ind. 2013). Rather, we consider only the evidence and reasonable inferences that are most favorable to the judgment of the trial court. *Id.* When a trial court has entered findings of fact and conclusions of law, we will not set aside the trial court's findings or judgment unless clearly erroneous. *Id.* To determine whether a judgment terminating parental rights is clearly

erroneous, we review whether the evidence supports the trial court's findings and whether the findings support the judgment. *In re V.A.*, 51 N.E.3d 1140, 1143 (Ind. 2016).

[19] A petition to terminate parental rights must allege, 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.

I.C. § 31-35-2-4(b)(2). DCS must prove the alleged circumstances by clear and convincing evidence. *K.T.K.*, 989 N.E.2d at 1231. If the trial court finds the allegations are true, the court "shall terminate the parent-child relationship."

I.C. § 31-35-2-8(a).

A. Conditions Remedied

[20] Father challenges the trial court's determination that there is a reasonable probability the conditions resulting in Child's removal and continued placement outside the home will not be remedied. In making such a determination, the trial court engages in a two-step analysis. First, the court must ascertain what conditions led to the child's placement and retention outside the home. *K.T.K.*, 989 N.E.2d at 1231. Second, the court must determine whether there is a reasonable probability those conditions will not be remedied. *Id.* The "trial court must consider a parent's habitual pattern of conduct to determine whether there is a substantial probability of future neglect or deprivation." *Id.* (quotation omitted).

[21] Child was removed after Mother and Father overdosed on fentanyl while he was in their care. Father was charged with two Level 6 felonies in connection with the overdose, was already on probation at the time, and picked up two more criminal charges over the course of the proceedings. He tested positive for illegal drugs multiple times and even overdosed on fentanyl again while Child was present, which was the last time he saw Child. While he completed a substance-use assessment and an intake for individual counseling, he didn't follow the recommendations from the assessment or attend any counseling sessions. He failed to participate in any other services DCS referred. Father notes his completion of an inpatient substance-abuse program in April 2023, but he tested positive for fentanyl shortly thereafter. Even worse, when he moved from the program to the community-corrections facility, he cut off his ankle

monitor and left without permission. As the trial court noted, Father “has a pattern of not making good choices” and “has not shown any stability.” Appellant’s App. Vol. II p. 94. The evidence supports the court’s conclusion that there is reasonable probability Father will not remedy the conditions that resulted in Child’s removal and continued placement outside the home.³

B. Best Interests

[22] Father also challenges the trial court’s conclusion that termination is in Child’s best interests. In determining whether termination is in the best interests of a child, the trial court must look to the totality of the evidence. *In re Ma.H.*, 134 N.E.3d 41, 49 (Ind. 2019), *reh’g denied*. The court must subordinate the interests of the parents to those of the child. *K.T.K.*, 989 N.E.2d at 1230. Termination of a parent-child relationship is proper where the child’s emotional and physical development is threatened. *Id.* at 1235. Additionally, a child’s need for permanency is a “central consideration” in determining the best interests of a child. *Id.* “Indeed, children cannot wait indefinitely for their parents to work toward preservation or reunification.” *Ma.H.*, 134 N.E.3d at 49 (quotation omitted). We have previously held that the recommendation by both the case manager and child advocate to terminate parental rights, in addition to

³ Father also challenges the trial court’s conclusion that there is a reasonable probability that continuation of the parent-child relationship poses a threat to Child’s well-being. But because we affirm the trial court’s conclusion that there is a reasonable probability that the conditions resulting in Child’s removal will not be remedied, we need not address this alternate conclusion. See *In re A.G.*, 45 N.E.3d 471, 478 (Ind. Ct. App. 2015) (explaining Indiana Code section 31-35-2-4(b)(2)(B) is written in the disjunctive and requires trial courts to find only one of the three provisions of subsection (B) has been established by clear and convincing evidence), *trans. denied*.

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 1150, 1158 (Ind. Ct. App. 2013), *trans. denied*.

[23] Here, both FCM Borland and GAL Griebel recommended that Father's parental rights be terminated. And as discussed above, Father's issues with substance abuse have not been remedied and pose a safety risk to Child if he were returned to Father's care, especially given that Father has twice overdosed in Child's presence. *See In re A.S.*, 17 N.E.3d 994, 1006 (Ind. Ct. App. 2014) (finding termination of parental rights in children's best interests where parents did not address their substance-abuse issues or complete recommended services during the two-year case), *trans. denied*. While this evidence alone is sufficient to support the trial court's conclusion, permanency is a central consideration in determining Child's best interests. Child, now three, has been removed from Father's care for two-and-a-half years, and Father has not seen Child since July 2022. In contrast, Child is doing well in the care of his maternal grandmother, who wishes to adopt him.

[24] Father relies on *In re G. Y.*, 904 N.E.2d 1257 (Ind. 2009), *reh'g denied*, and *In re J.M.*, 908 N.E.2d 191 (Ind. 2009), but these cases are easily distinguishable. In *G. Y.*, an incarcerated mother committed a crime before her child was born, did not commit any other crimes, and took many positive steps while incarcerated to better herself as a person and parent. In *J.M.*, the incarcerated parents were

being released early, had completed programs while incarcerated, and had taken steps to provide permanency for their child upon release.

[25] As already explained, Father committed crimes and was in and out of jail throughout the CHINS and termination proceedings. He claims his “criminal matters w[ill] be behind him” within two years, Appellant’s Br. p. 16, but that’s assuming he doesn’t violate any conditions of his sentences or commit additional crimes. And Father hasn’t seen Child since July 2022, when he and Mother overdosed in Child’s presence. Father has taken few, if any, steps to improve himself as a person and parent, and he has not shown an ability to provide a safe and stable environment for Child. The trial court was not required to wait on Father any longer. *See Ma.H.*, 134 N.E.3d at 49. The evidence supports the court’s conclusion that termination is in Child’s best interests.

[26] Affirmed.

May, J., and Kenworthy, J., concur.

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