

MEMORANDUM DECISION

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IN THE
Court of Appeals of Indiana

In Re: The Involuntary Termination of the Parent-Child
Relationship of W.K. (Minor Child);

W.K. (Father),

Appellant-Respondent

v.

The Indiana Department of Child Services,

Appellee-Petitioner.

April 30, 2024

Court of Appeals Case No.

23A-JT-2612

Appeal from the Madison Circuit Court

The Honorable Stephen J. Koester, Judge

The Honorable T. Grey Chandler, Magistrate

Trial Court Cause No.

48C02-2304-JT-108

Memorandum Decision by Judge Pyle
Judges Bailey and Crone concur.

Pyle, Judge.

Statement of the Case

[1] W.K., Jr., (“Father”) appeals the termination of the parent-child relationship with his son, W.K., III, (“W.K.”). Father argues that there is insufficient evidence to support the termination. Concluding that there is sufficient evidence to support the termination of Father’s parent-child relationship with W.K., we affirm the trial court’s judgment.¹

[2] We affirm.

Issue

Whether there is sufficient evidence to support the termination of Father’s parent-child relationship with W.K.

Facts

[3] The facts most favorable to the termination reveal that Father and Mother married in 2011. W.K., who has been diagnosed with high functioning autism, was born in October 2011. Father began using methamphetamine every day in

¹ W.K.’s mother (“Mother”) is not participating in this appeal.

2015. Father and Mother separated in 2016, and Father left W.K. in Mother's care. DCS apparently placed W.K. in foster care from November 2017 through January 2018.² Mother filed a petition to dissolve her marriage to Father in May 2018. The trial court's August 2018 dissolution decree awarded Mother custody of W.K. The dissolution decree also provided that the matter had been set for a further hearing on the issues of parenting time and child support; however, it does not appear that the trial court held such a hearing. DCS apparently placed W.K. in foster care from August 2019 through December 2020.

[4] In June 2020, the State charged Father with Level 6 felony possession of methamphetamine and two counts of Class A misdemeanor possession of a controlled substance. In November 2021, the State charged Father with an unrelated case of Level 6 felony possession of methamphetamine. Based on the pending charges, Father was apparently incarcerated from November 2021

² The petition alleging that W.K. was a child in need of services ("CHINS") in this case set forth the dates that W.K. had previously been in foster care. The trial court's termination order further reveals that W.K. was involved in two prior CHINS cases. According to the trial court's order, one of those cases did not result in W.K.'s removal from Mother's home and was dismissed. The other case resulted in W.K.'s removal from Mother's home and a CHINS adjudication.

Father argues that the trial court erred by including this information about the prior CHINS cases in the termination order because the information was not included in an exhibit or judicially noticed by the trial court. However, any error in the trial court's inclusion of this information in the termination order is harmless where the CHINS petition in this case set forth the dates that W.K. had previously been in foster care and the trial court did not rely on the previous CHINS cases in terminating Father's parental relationship with W.K.

through February 1, 2022. It is unclear from the record where Father lived following his release from incarceration in February 2022.

[5] Also, in February 2022, someone at W.K.'s school contacted DCS to report that W.K. had accumulated eighteen unexcused absences. In addition, although W.K. had previously had A's and B's in his classes, by February 2022, W.K. was failing all of his classes. The person who contacted DCS further reported that no one at the school had been able to reach Mother. After Mother failed to cooperate with DCS when it investigated the case, DCS filed a petition alleging that W.K. was a CHINS because Mother had "failed to ensure that his educational needs [had been] met." (Ex. at 11). The petition further alleged that Father had "not demonstrated the ability and willingness to appropriately parent his child and ensure that the child's educational needs [had been] met." (Ex. at 12). DCS did not remove W.K. from Mother's home.

[6] In March 2022, the State charged Father with Level 4 felony burglary and Level 6 felony residential entry, and Father was incarcerated on the pending charges. In April 2022, a DCS case manager went to Mother's home to interview W.K. in the pending CHINS case. During the interview, the case manager became concerned about Mother's mental health. Ten-year-old W.K. told the case manager that he did not feel safe in Mother's home because Mother was "violent and because she [was] always fighting demons." (Ex. at 22). W.K. asked the case manager if he could return to foster care. The DCS case manager removed W.K. from Mother's home and placed him with a foster

family. W.K. could not be placed with Father because Father was incarcerated at that time.

[7] Following W.K.'s removal from Mother's home, DCS filed an amended CHINS petition, which included Mother's mental health issues. The amended petition provided that Father had "not demonstrated the ability to and willingness to appropriately parent his child and ensure that the child's educational needs [had been] met." (Ex. at 22). Also, following W.K.'s removal from Mother's home, DCS family case manager Timothy Johnson ("FCM Johnson") attempted to schedule several telephone calls with Father at the DOC. However, FCM Johnson was unable to reach Father.

[8] Father waived his right to a CHINS factfinding hearing, and the trial court adjudicated W.K. to be a CHINS in June 2022. Also, in June 2022, Father pled guilty to Level 4 felony burglary in the March 2022 case. The trial court sentenced Father to four years to be executed at the DOC. The trial court's sentencing order provided that if Father successfully completed a DOC therapeutic program, the trial court would consider modifying Father's sentence.

[9] Also, in June 2022, W.K.'s foster parent placement failed because "the foster mom was a lot more on board with having [W.K.] than [foster] dad was and so [W.K.] was there a couple of months before [the foster parents] asked to have [W.K.] moved." (Tr. at 74). Thereafter, DCS placed W.K. in an emergency shelter.

- [10] In August 2022, Father pleaded guilty to the June 2020 charges of Level 6 felony possession of methamphetamine and Class A misdemeanor possession of controlled substances. At the same time, Father pleaded guilty to the November 2021 charge of Level 6 felony possession of methamphetamine. Pursuant to the terms of the plea agreements in each case, the trial court sentenced Father to a two-year executed sentence, which included all the convictions, in the DOC.
- [11] One month later, in September 2022, the trial court entered a CHINS dispositional order as to Father. In relevant part, the order required Father to: (1) contact weekly, either in person, by letter, by email, or by telephone, W.K.'s DCS family case manager; (2) assist in the formulation and implementation of a child protection plan; (3) cooperate with the DOC's expectations; and (4) participate in the Fatherhood Engagement program if the DOC offered it.
- [12] At some point in the fall of 2022, DCS placed W.K. with a single foster mother. During that placement, W.K. told a school official that he had a gun in his backpack, which he did not, but school officers expelled W.K. from school. Shortly thereafter, the foster mother's father, who was an elderly man with white hair, was visiting the foster mother's home when W.K. stated that he had always wanted to kill someone with white hair just to see what it would feel like to kill someone. The foster mother asked to have W.K. removed from her home, and DCS placed W.K. back in the emergency shelter.

- [13] In December 2022, DCS referred W.K. to Damar Services (“Damar”) for a residential evaluation to determine “how to best put services in place to help [W.K.]” (Tr. at 74). Following the evaluation, Damar determined that W.K. did not need residential treatment and recommended placing W.K. in a Damar-licensed foster home.
- [14] In April 2023, while W.K. was still at Damar, DCS filed a petition to terminate Parents’ parental rights. In May 2023, W.K. was placed with a Damar-licensed foster family. Although it was near the end of the academic school year, the foster family enrolled W.K. in school. At that time, W.K. tested at or above grade level for every subject even though he had not had “any formal schooling for about a year.” (Tr. at 56).
- [15] The trial court held a two-day termination hearing in June and July 2023. FCM Johnson testified that he had not offered services to Father during the pendency of the CHINS proceedings. According to FCM Johnson, in the past, he had not been successful in referring an outside service provider into the DOC because the DOC has its own service providers. FCM Johnson also testified that he had not received any documentation from Father regarding programs that he had participated in while incarcerated. FCM Johnson further testified that termination was in W.K.’s best interests and that the plan for W.K. was foster parent adoption. During cross-examination, Father’s counsel pointed out that W.K. had only been living with the foster family for two months and that DCS has a policy that the agency generally waits six months before validating

an adoptive home. FCM Johnson responded that although that was the general policy, his supervisor had told him that there could be exceptions to the policy.

[16] CASA Felicity Storm (“CASA Storm”) testified that W.K. was “thriving” in his foster home. (Tr. at 92). According to CASA Storm, W.K. was a “wonderful bright child” who smiled and got excited when discussing permanent placement with his foster family. (Tr. at 96). CASA Storm also testified that W.K.’s foster parents “treat[ed] [W.K.] like he’s their son. . . . [I]t’s very much a . . . [W.K.] focused family.” (Tr. at 98). CASA Storm further testified that termination was in W.K.’s best interests. CASA Storm specifically opined that the conditions that had resulted in W.K.’s removal would not be remedied and that based on Father’s history, W.K. “would end up back in the system repeatedly.” (Tr. at 94). According to CASA Storm, W.K. “shouldn’t sit in the DCS system indefinitely waiting for [Father] to resolve [his] criminal matters.” (Tr. at 97).

[17] Forty-three-year-old Father testified that his earliest release date from the DOC was in January 2026. However, Father stated that he had completed the Purposeful Incarceration Program, he was waiting for a sentence modification, and he was “trying to get out on probation.”³ (Tr. at 154). Father further testified that he had tried to participate in other programs at the DOC but that he “k[ept] getting pulled out for court.” (Tr. at 151). Father also testified that he had not had contact with W.K. during the pendency of the CHINS

³ Father’s current earliest possible release date is August 26, 2025.

proceedings because he had not known “how to go about doing that.” (Tr. at 158). However, Father testified that he had visited W.K. “a couple of times a week” before he had been arrested and while W.K. was living with Mother. (Tr. at 156). Father did not specify to which arrest he was referring. According to Father, he and W.K. had watched movies, played games, gone to the park and to the library, and ridden bicycles. Father also acknowledged that he had used methamphetamine daily from 2015 until his November 2021 arrest. In addition, Father testified that when released from the DOC, he had a job at a concrete company where his brother’s fiancée worked. He acknowledged that he had never done concrete work before and did not know what his job duties would entail. Father further testified that he would be living with his brother when he was released from the DOC. Father also testified that he had never lived with his brother.

[18] Following the hearing, in October 2023, the trial court issued an order terminating Parents’ parental rights. The trial court’s order provides, in relevant part, as follows:

38. While Father’s incarceration impedes his ability to comply with some of those dispositional orders, it did not impede him, if he were to have expressed interest, in assisting in the formulation of a protection plan for his son, who has been out of Father’s daily care for almost seven (7) years.
39. It further did not impede his ability to maintain a relationship with his son, by either written or electronic communication, should he have been so inclined.

40. Father did not make any effort to maintain a relationship with the child during his incarceration and the pendency of the CHINS case. There is no evidence he attempted contact with the child by way of written or electronic communication, resulting in no contact or visits between Father and the child while Father was incarcerated.
41. Father has not been incarcerated for the child's entire life. He has been incarcerated since 2021 (except for February 2022 to March 2022), almost a decade after his son's birth. Father disengaged from parenting his son well before his most recent incarceration and commencement of the most recent CHINS case.
42. Father asserts he saw his son a couple times a week before incarceration. Presumably this is the time period 2016 to 2021. Though this Court lends little creditability to his testimony, even if it were true, he claims to have hung out with [W.K.], going to the park, on bike rides, or to the library. There is no evidence that Father financially supported [W.K.], assisted in providing basic needs such as food, clothing, or medical care, provided discipline or correction, or aided in the boy's educational studies or extracurricular pursuits.
43. Father has a methamphetamine addiction, having started using in 2015, and was using daily until his last use in November 20[21].

* * * * *

59. To allow [W.K.] to continue to languish in the child welfare system on the hope that . . . Father will involve [himself] in [his] son's rearing and be able to meet the even greater than average needs brought on by [W.K.]'s autism upon [Father's] ultimate release from prison is unrealistic and not in [W.K.]'s best interest.

* * * * *

63. Father's lack of involvement in [W.K.]'s life, before and after incarceration, and plan to obtain work he hasn't done before and bring [W.K.] to a home he never lived in, without resources to care for a then teenage autistic child, all of which will occur at some point in a year or two, or more, in the future, shows that [F]ather has been unwilling and will be unable to provide [W.K.] with a safe and stable home now or in the immediate future.
64. It is, therefore, in [W.K.]'s best interest that . . . [Father]'s parental rights be terminated so that [W.K.] is free to be adopted.
65. While [W.K.]'s pre-adoptive foster care placement is relatively recent after he stepped down from his residential placement, the Court finds DCS' plan of adoption for him to be satisfactory under the circumstances.

(App. Vol. 2 at 24-26).

[19] Father now appeals.

Decision

[20] Father argues that there is insufficient evidence to support the termination of his parent-child relationship with W.K. The traditional right of parents to establish a home and raise their children is protected by the Fourteenth Amendment to the United States Constitution. *In re J.W., Jr.*, 27 N.E.3d 1185, 1187-88 (Ind. Ct. App. 2015), *trans. denied*. However, a trial court must subordinate the interests of the parents to those of the child when evaluating the circumstances surrounding a termination. *Id.* at 1188. Termination of the parent-child relationship is proper where a child's emotional and physical development is threatened. *Id.* 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 parental responsibilities. *Id.*

[21] The termination statute in effect at the time DCS filed the termination petition in April 2023 provided that, before an involuntary termination of parental rights may occur, 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) (2023)⁴. DCS must prove the alleged circumstances by clear and convincing evidence. *K.T.K. v. Indiana Department of Child Services, Dearborn County Office*, 989 N.E.2d 1225, 1230 (Ind. 2013).

[22] When reviewing a termination of parental rights, this Court will not reweigh the evidence or judge the credibility of the witnesses. *In re Involuntary Termination of Parent-Child Relationship of R.S.*, 56 N.E.3d 625, 628 (Ind. 2016). We consider only the evidence and any reasonable inferences to be drawn therefrom that support the judgment and give due regard to the trial court's opportunity to judge the credibility of the witnesses firsthand. *K.T.K.*, 989 N.E.2d at 1229.

[23] In addition, as a general rule, appellate courts grant latitude and deference to trial courts in family law matters. *Matter of D.P.*, 72 N.E.3d 976, 980 (Ind. Ct. App. 2017). "This deference recognizes a trial court's unique ability to see the witnesses, observe their demeanor, and scrutinize their testimony, as opposed to this court[] only being able to review a cold transcript of the record." *Id.*

[24] Further, where, as here, a judgment contains specific findings of fact and conclusions thereon, we apply a two-tiered standard of review. *In re A.S.*, 905 N.E.2d 47, 49 (Ind. Ct. App. 2009). First, we determine whether the evidence supports the findings, and then we determine whether the findings support the

⁴ We note that the legislature amended INDIANA CODE § 31-35-2-4 during the 2024 legislative session, and the amendment became effective March 11, 2024.

judgment. *Id.* We will set aside a judgment only when it is clearly erroneous. *Id.* A judgment is clearly erroneous when the findings do not support the trial court's conclusions or the conclusions do not support the judgment. *Id.*

[25] Here, Father first contends that the evidence is insufficient to show that there is a reasonable probability that: (1) the conditions that resulted in the W.K.'s removal or the reasons for his placement outside the parent's home will not be remedied; and (2) a continuation of the parent-child relationship poses a threat to W.K.'s well-being.

[26] At the outset, we note that INDIANA CODE § 31-35-2-4(b)(2)(B) is written in the disjunctive. Therefore, DCS is required to establish by clear and convincing evidence only one of the three requirements of subsection (B). *In re A.K.*, 924 N.E.2d 212, 220 (Ind. Ct. App. 2010). We therefore discuss only whether there is a reasonable probability that the conditions that resulted in W.K.'s removal or the reasons for his placement outside the home will not be remedied.

[27] In determining whether the conditions that resulted in a child's removal or placement outside the home will not be remedied, we engage in a two-step analysis. *In re E.M.*, 4 N.E.3d 636, 642-43 (Ind. 2014). We first identify the conditions that led to removal or placement outside the home and then determine whether there is a reasonable probability that those conditions will not be remedied. *Id.* at 643. The second step requires trial courts to judge a parent's fitness at the time of the termination proceeding, taking into

consideration evidence of changed conditions and balancing any recent improvements against habitual patterns of conduct to determine whether there is a substantial probability of future neglect or deprivation. *Id.* Pursuant to this two-step analysis, trial “courts have properly considered evidence of a parent’s prior criminal history, drug and alcohol abuse, history of neglect, failure to provide support, and lack of housing and employment.” *In re D.B.*, 942 N.E.2d 867, 873 (Ind. Ct. App. 2011).

[28] We further note that DCS need not rule out all possibilities of change. *In re Involuntary Termination of the Parent-Child Relationship of Kay. L.*, 867 N.E.2d 236, 242 (Ind. Ct. App. 2007). Rather, DCS need establish only that there is a reasonable probability that a parent’s behavior will not change. *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.” *E.M.*, 4 N.E.3d at 643.

[29] Here, DCS removed W.K. from Mother while Father was incarcerated. Thus, the primary condition for W.K.’s removal as to Father was Father’s inability to provide care and supervision for W.K. due to his incarceration. In support of his argument that the trial court’s findings fail to support its conclusion that there is a reasonable probability that the conditions that resulted in the W.K.’s removal or the reasons for his placement outside the parent’s home will not be remedied, Father directs us to *K.E. v. Indiana Department of Child Services*, 39 N.E.3d 641 (Ind. 2015).

[30] In the *K.E.* case, the father was incarcerated before K.E. was born. The father's incarceration was one of the reasons that the trial court had adjudicated K.E. to be a CHINS, and the father was incarcerated during the entirety of the CHINS proceedings. The father had been unable to receive services from DCS because he was incarcerated. Nonetheless, the father voluntarily completed twelve programs related to self-improvement, parenting, and drug and alcohol abuse while he was incarcerated. In addition, K.E.'s placement took the child to visit the father for two to three hours at a time, and the father participated in nightly telephone calls with the child. Moreover, upon his release, the father planned on living with his dad, who had a job ready for the father. At the termination factfinding hearing, although the father's earliest release date was two years away, the CASA in the case recommended that the decision regarding the termination of the father's parental rights be delayed until it was determined whether the father's sentence would be modified. The CASA testified that she had made this recommendation because the father had a bond with the child and DCS had not offered him the same services that it had offered the mother because he was incarcerated. Despite the CASA's recommendation, the trial court granted DCS's petition to terminate the father's parental relationship with the child.

[31] The father appealed and argued, in part, that the trial court's findings did not support its conclusion that the conditions under which the child had been removed from his care would not be remedied. Our Indiana Supreme Court considered the father's efforts while incarcerated, his bond with the child, and

his plans following his release from incarceration. *Id.* at 648-49. Because of the father's individual efforts to obtain reunification with his child, the supreme court determined that the trial court's termination of the father's parental rights had been based only the father's incarceration and held, in part, that "incarceration is an insufficient basis for terminating parental rights." *Id.* at 643.

[32] However, the facts in this case are distinguishable from those in *K.E.* First, Father completed only one program while incarcerated. Although he had the opportunity to complete other programs, he claimed that he was unable to do so because he had to go to court. Further, Father has had no contact with W.K. since his March 2022 incarceration. We also note that the trial court questioned Father's credibility when Father testified that he had had regular contact with W.K. before he was incarcerated. In addition, at the time of the termination hearing, Father's earliest release date was more than two years away, and CASA Storm did not recommend delaying the termination of Father's parental rights until it was determined whether his sentence would be modified. Rather, CASA Storm testified that conditions that had resulted in W.K.'s removal would not be remedied and that based on Father's history, W.K. "would end up back in the system repeatedly." (Tr. at 94). CASA Storm further testified that termination was in W.K.'s best interests.

[33] We further note that our review of the evidence reveals that Father's historical lifestyle includes a six-year history of daily methamphetamine use and two felony convictions for possession of methamphetamine. In addition, when

Father was released from incarceration in February 2022, he could have visited W.K. However, Father chose to commit another felony and was incarcerated shortly thereafter. These facts demonstrated the requisite probability that the conditions that resulted in W.K.'s removal will not change.

[34] Father also argues that there is insufficient evidence that the termination was in W.K.'s best interests. In determining whether termination of parental rights is in a child's best interests, the trial court is required to look at the totality of the evidence. *In re Termination of the Parent-Child Relationship of D.D.*, 804 N.E.2d 258, 267 (Ind. Ct. App. 2004), *trans. denied*. In so doing, the court must subordinate the interests of the parent to those of the child involved. *Id.* In addition, a child's need for permanency is a central consideration in determining that child's best interests. *In re G.Y.*, 904 N.E.2d 1257, 1265 (Ind. 2009). Further, the testimony of the service providers may support a finding that termination is in the child's best interests. *McBride v. Monroe County Office of Family and Children*, 798 N.E.2d 185, 203 (Ind. Ct. App. 2003).

[35] Here, our review of the evidence reveals that at the time of the termination hearing, Father had not had any contact with W.K. in more than a year, and W.K. was thriving in foster care. In addition, FCM Johnson and CASA Storm both testified that termination was W.K.'s best interests. The testimony of these service providers, as well as the other evidence previously discussed, supports the trial court's conclusion that termination was in W.K.'s best interests.

[36] Lastly, Father argues that DCS failed to prove by clear and convincing evidence that it had a satisfactory plan for W.K.'s care and treatment. This Court has previously explained that the plan for the care and treatment of a child need not be detailed, so long as it offers a general sense of the direction in which the child will be going after the parent-child relationship is terminated. *In re. A.S.*, 17 N.E.3d 994, 1007 (Ind. Ct. App. 2014), *trans. denied*. Here, FCM Johnson testified that the plan for W.K.'s care and treatment was foster parent adoption. This is a satisfactory plan. *See In re A.N.J.*, 690 N.E.2d 716, 722 (Ind. Ct. App. 1997).

[37] Nevertheless, Father argues that adoption is not a satisfactory plan in this case because, pursuant to a DCS policy, the foster family would not be able to adopt W.K. until four months after the trial court terminated Father's parental rights. However, FCM Johnson testified that although DCS had a general policy of waiting for six months before validating an adoptive home, his supervisor had told him that there could be exceptions to the policy. DCS proved by clear and convincing evidence that it had a satisfactory plan for W.K.'s care and treatment.⁵

⁵ We note that Father has challenged nearly all of the trial court's findings and conclusions regarding himself. However, we have thoroughly reviewed the record of the proceedings and determined that the evidence supports the trial court's findings, the findings support the conclusions, and there is sufficient evidence to support the termination of Father's parental relationship with W.K. We do not address each of Father's specific challenges.

[38] Affirmed.

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

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