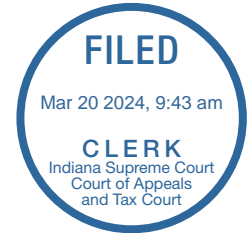


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



IN THE
Court of Appeals of Indiana

In Re: The Termination of the Parent-Child Relationship of:

A.W. (Minor Child),

and

A.A. (Father),

Appellant-Respondent,

v.

Indiana Department of Child Services,

Appellee-Petitioner

March 20, 2024

Court of Appeals Case No.
23A-JT-2638

Appeal from the Allen Superior Court

The Honorable Beth A. Webber, Judge Pro Tempore

Trial Court Cause No.
02D08-2211-JT-270

Memorandum Decision by Judge Riley
Judges Brown and Foley concur.

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Respondent, A.A. (Father), appeals the trial court's Order, granting the petition of Appellee-Petitioner, Indiana Department of Child Services (DCS), seeking to terminate his parental rights to the minor child, A.W. (Child).

[2] We affirm.

ISSUE

[3] Father presents this court with one issue, which we restate as: Whether the trial court's Order terminating his parental rights is clearly erroneous.

FACTS AND PROCEDURAL HISTORY

[4] In 2009, Father was convicted of Class B felony neglect of a dependent and Class B felony aggravated battery. Father was sentenced to sixteen years, with two years suspended to probation. Father was released to probation in 2015 but was convicted of false informing in 2016 and resisting law enforcement in 2018. In April 2019, Father was charged with two Counts of Level 3 felony armed robbery.

- [5] On September 23, 2019, D.W. (Mother)¹ gave birth to Child. On September 26, 2019, DCS removed Child from Mother's care due to Mother's non-compliance with her treatment for multiple mental health diagnoses which rendered her unable to care for Child. At the time of Child's removal, Father was identified as Child's putative father. Father, who was in custody on the armed robbery charges, was unable to provide care for Child. On September 30, 2019, the trial court authorized DCS to file a petition seeking to have Child declared a child in need of services (CHINS). Child was placed in foster care.
- [6] On November 5, 2019, Father pleaded guilty to two Counts of Level 5 felony armed robbery and was sentenced to three years to be executed on home detention, followed by three years of probation. Father was released to home detention. On November 21, 2019, Mother and Father admitted the allegations of the CHINS petition, and the trial court adjudicated Child to be a CHINS. That same day, the trial court ordered Father to engage in reunification services, including a diagnostic assessment, home-based case management, and supervised visitation. In addition, Father was to maintain suitable housing and to refrain from engaging in any criminal activity.
- [7] On December 6, 2019, the State filed a notice of violation of Father's home detention, alleging that Father cut off his ankle monitoring device. Between his release on home detention on November 5, 2019, and being taken into custody

¹ Mother consented to Child's adoption and does not participate in this appeal.

for removing his ankle monitoring device, Father did not visit with Child or engage in any DCS services. On December 27, 2019, the State filed an Information, charging Father with Level 6 felony escape. Father was subsequently found to have violated his home detention in the armed robbery case, and he pleaded guilty to escape. On May 7, 2020, the trial court sentenced Father to 183 days for his escape conviction and to six years for violating the terms of his home detention, to be served consecutively.

[8] As the CHINS case was ongoing and Father proceeded through the criminal justice system, Child was in the care of his foster family.² Child is nonverbal-autistic and has significant behavioral issues. Child can be physically aggressive and has tantrums involving screaming and crying. Child can engage in self-injury, and he must be monitored so that he does not put inedible objects in his mouth or walk away from his caregivers. Child has difficulty communicating effectively and will cry and point to show what he wants. Child wears braces on his legs to assist in walking. Child will continue to have special needs as he grows older.

[9] On January 24, 2023, DCS filed its petition seeking to terminate Father's parental rights to Child. On July 11, 2023, the trial court held a hearing on DCS's petition. Father had been denied time cuts to his executed sentence due to repeated conduct violations. Father's earliest certain release date was

² On November 3, 2021, a petition seeking to have Father's paternity established was filed. On February 8, 2022, Father was adjudicated as Child's father.

December 3, 2024. By the time of the fact-finding hearing, Child was almost four years old. Child was engaging in ABA therapy, the primary intervention modality for autistic children, multiple times per week, as well as engaging in weekly occupation and speech therapy and monthly physical therapy. Rebekah Leemreis (Leemreis), a certified behavior analyst who assessed Child, testified that caring for Child requires an abundance of patience and that providing Child with consistency and routine is paramount for his well-being. According to Leemreis, a new caregiver would have to learn how to communicate with Child and what triggers Child's negative behaviors. Child was then in the process of learning a new electronic communication system, which a new caregiver would also have to learn. It was Leemreis's opinion that it was very important for a caregiver to be involved with Child's ABA therapy, as it was essential for the therapy techniques to be mirrored at home, and she affirmed that anyone starting to visit Child in eighteen months' time "would be way behind the 8-ball[.]" (Transcript p. 31). Foster Parents had been participating in Child's ABA therapy. Foster Mother testified that she and Foster Father "do everything for [Child] now" and that Child becomes aggressive if his routine is varied. (Tr. p. 33). Foster Parents, who had been caring for Child since September 26, 2019, planned to adopt Child.

[10] DCS's Family Case Manager (FCM) reported that there had been no contact between Father and Child. Regarding visits with Child while Father was incarcerated, FCM testified that "[w]e've attempted to make them occur however, [Father had] a few issues with getting in trouble throughout the last

few years while in the facility.” (Tr. p. 46). Father had completed one parenting program while incarcerated. Father had begun a substance abuse program, but he had not completed it. FCM opined that Father’s incarceration had negatively affected his ability to parent Child because Child had a very specific way of communicating that Father had not learned. FCM testified that Father had made a poor life choice in removing his ankle monitor, resulting in his return to prison and being unable to provide for Child. Father had not taken any steps to learn how to care for Child. FCM felt that Father was unlikely to remedy the conditions that required Child’s continued removal because, due to his incarceration and repeated conduct violations, Father did not have the ability to provide for Child’s needs. Child’s court appointed special advocate (CASA) was also concerned about Father’s ability to care for Child, as Child has special needs that must be addressed on a daily basis and Father had no experience with Child’s care.

[11] Father acknowledged at the termination hearing that he had no contact with Child and that he had not been eligible for some time cuts because he had incurred violations while incarcerated. Father hoped to receive some time credits that were then pending. Father maintained that he had “changed [his] whole life” after being released from prison in 2015. (Tr. p. 64). Father felt that Child had been removed solely because of Mother’s actions and that “[a]ll of this is [Mother’s] fault.” (Tr. p. 65). Father explained that he had committed the escape offense because Mother had not paid the rent or electric bill and “[he] was ready to get locked up[.]” (Tr. p. 65). Father felt that he took care of

his daughter, so he had the ability to care for Child. Father had no specific plan for where he would live or for employment after his release from prison. Father expressed his desire to have Child placed with Father's Grandmother (Great Grandmother) pending his release from prison and during the time he would need to complete services and to learn how to care for Child. On rebuttal, FCM testified that Great Grandmother had decided that, due to Child's significant needs and her own health issues, she could not be a placement or adoptive relative for Child.

[12] On October 6, 2023, the trial court issued its Order, terminating Father's parental rights to Child. In support of its Order, the trial court entered detailed findings of fact and conclusions thereon, including the following:

By the clear and convincing evidence, the [c]ourt determines that there is a reasonable probability that [the] reasons that brought about [C]hild's placement outside the home will not be remedied and that continuation of the parent-child relationship poses a threat to the well-being of [C]hild.

* * * *

The [c]ourt concludes that the reason for [C]hild's placement outside [the home was] initially due to Mother's inability to care for the child, but had Father been involved and refrained from criminal behavior he may have been in position to serve as caregiver for his son. However, [Father] cut off his ankle monitor, ended up incarcerated and while incarcerated he engaged in behavior that has ruled [out] an early release. At all times he has remained unable and unavailable to provide for the care of [Child]. The [c]ourt also concludes that even if Father had been released early, his historical patterns of conduct reveal he is not suited to provide for the care and supervision of this

child. The [c]ourt concludes from Father’s testimony that he lacks insight into his own circumstances, let alone the needs of his son. For this [c]ourt to force this child to continue and languish without permanency is contrary to the best interests of [Child].

(Appellant’s App. Vol. II, p. 10).

[13] Father now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Standard of Review

[14] Father challenges the evidence supporting the trial court’s Order terminating his parental rights to Child. Due to the unique position of the trial court to assess the evidence, Indiana courts apply a deferential standard of review to such claims. *In re A.K.*, 924 N.E.2d 212, 219 (Ind. Ct. App. 2010), *trans. dismissed*. Under this deferential standard, we neither reweigh the evidence nor determine the credibility of witnesses. *In re P.B.*, 199 N.E.3d 790, 797 (Ind. Ct. App. 2022), *trans. denied*. We consider only the evidence that supports the judgment and the reasonable inferences to be drawn from that evidence. *Id.*

[15] In addition, where the trial court has entered special findings of fact and conclusions thereon in support of its determination, “[w]e 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.” *In re E.M.*, 4 N.E.3d 636, 642 (Ind. 2014). We do not set aside the trial court’s findings or judgment unless it is clearly erroneous. *Id.* For purposes of our

review, we take any uncontested factual findings as true. *Matter of C.C.*, 170 N.E.3d 669, 675 (Ind. Ct. App. 2021).

II. *Termination of Parental Rights*

[16] As the United States Supreme Court and the Indiana Supreme Court have acknowledged, a parent’s right to raise his or her children is “perhaps the oldest of the fundamental liberty interests.” *Matter of Bi.B.*, 69 N.E.3d 464, 466-67 (Ind. 2017) (quoting *Bester v. Lake Cnty. Office of Family & Children*, 839 N.E.2d 143, 147 (Ind. 2005), in turn quoting *Troxel v. Granville*, 120 S.Ct. 2054, 2060 (2000)). However, the traditional right of a parent to raise his or her children, although cherished and protected, is not absolute, and that right may be terminated when parents are unable or unwilling to meet their parental responsibilities. *In re N.G.*, 51 N.E.3d 1167, 1169 (Ind. 2016). Termination of parental rights is an extreme sanction that is intended as a measure of last resort and is available only when all other reasonable efforts have failed. *C.A. v. Ind. Dep’t of Child Servs.*, 15 N.E.3d 85, 91 (Ind. Ct. App. 2014). As such, before a trial court grants a DCS petition to terminate parental rights, our legislature has required DCS to allege and prove certain facts by clear and convincing evidence, including that one 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 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.

Ind. Code § 31-35-2-4(b)(2)(B)(i-ii). Father challenges the evidence supporting the trial court's conclusions on both statutory factors. Father does not specifically challenge any of the trial court's factual findings, and, therefore, we take the trial court's factual findings as true. *See Matter of C.C.*, 170 N.E.3d at 675.

[17] Our review of a trial court's determination that there is a reasonable probability that the conditions that resulted in a child's removal or the reasons for continued placement outside the home will not be remedied entails a two-step analysis. *Matter of J.S.*, 133 N.E.3d 707, 715 (Ind. Ct. App. 2019). First, we must identify the conditions that led to removal; second, we determine whether the evidence supports the trial court's conclusion that there is a reasonable probability that those conditions will not be remedied. *Id.* When making a determination on the 'conditions for removal' element, a trial court must judge a parent's fitness as of the time of the termination hearings, taking into account 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.* Requiring a trial court to give due regard to changed conditions does not preclude it from finding that a parent's past behavior is the best predictor of his or her future behavior. *Id.* When assessing whether a parent will remediate the conditions that resulted in removal, a trial court may properly consider the parent's prior criminal history, drug and alcohol abuse, and history of neglect, among other factors. *In re N.Q.*, 996 N.E.2d 385, 392 (Ind. Ct. App. 2013).

[18] Here, the reason for Child’s initial and continued removal from Father’s care was Father’s inability to provide for Child’s basic needs due to his incarceration. Father has a criminal record consisting of convictions for neglect of a dependent, aggravated battery, false informing, resisting law enforcement, robbery, and escape. Father was in custody when Child was removed. However, after Child’s removal, Father was on home detention for approximately one month before he removed his ankle monitor. During this period when he was on home detention, Father never attempted to visit with Child or to engage in any reunification services. Thereafter, Father was back in custody on the escape and home detention violation charges and was eventually sent to the Department of Correction (DOC).

[19] While we acknowledge that not all the services ordered as part of the CHINS dispositional order were available to Father in prison, Father’s own actions prevented him from fulfilling at least one of those services—exercising his supervised visitation with Child. Contrary to Father’s assertion on appeal that the DOC could not accommodate any visits with Child, FCM testified that she had tried to arrange visitation for Child with Father but that it was Father’s multiple conduct violations which precluded him from exercising visitation with Child. Those violations also prevented Father from obtaining an earlier release. Although [Father](#) hoped to obtain time cuts, as of the date of the termination hearing, Father’s earliest certain release date was approximately one and one-half years away. Father had been transferred to the DOC in July 2020, and in the three years he had been in the DOC, Father had completed

one parenting class and had enrolled in a substance abuse program. It was unclear from the record whether Father had failed to complete the substance abuse program or whether he was still participating in it. Child, who is non-verbal autistic, has significant caretaking needs that require specialized training and a deep understanding of Child's behavior to meet. Father has no experience caring for Child, and he has not demonstrated any real interest in learning to care for Child, even when he was not incarcerated. Father was not scheduled for release for another year and a half, a period of time which would put him at a significant disadvantage in learning how to communicate with and care for Child. Father has no plan for housing or employment upon release from prison, and his idea to have Child live with Great Grandmother while he got on his feet and learned to care for Child after his release was not viable.

[20] Like the trial court, we also conclude that Father's future ability to address Child's needs was inhibited by his lack of "insight into his own circumstances, let alone the needs of his son." (Appellant's App. Vol. II, p. 10). At the fact-finding hearing, Father took no responsibility for the fact that Child was in foster care; instead, he blamed Mother alone. In addition, despite being informed of Child's significant care needs, Father reasoned that because he had provided care for his daughter in the past, he would be able to care for Child. However, there is no evidence in the record that Father's daughter is a special needs child, so Father's assessment demonstrated a lack of true understanding of Child's situation and the gravity of the commitment required to meet Child's needs. In short, we conclude that the trial court's conclusion that there was a

reasonable likelihood that Father's inability to meet Child's basic needs would not be remedied was supported by clear and convincing evidence. *See C.A. v. Ind. Dep't of Child Servs.*, 15 N.E.3d 85, 95-96 (Ind. Ct. App. 2014) (affirming the trial court's 'conditions' determination, where the father's release date was pushed back by his own bad conduct while in prison, his early release was uncertain, his children had not visited with him since his arrest, Father had missed a significant portion of his children's developmental years, and there was no guarantee that, even upon his release, he would be capable of caring for his children due to his criminal record).

[21] Father contends that the mere fact that he is incarcerated does not support the trial court's termination order. Father is correct that incarceration alone "is an insufficient basis for terminating parental rights." *K.E. v. Ind. Dep't of Child Servs.*, 39 N.E.3d 641, 643 (Ind. 2015). However, Father mischaracterizes the trial court's findings and conclusions. Contrary to Father's implication, the trial court's 'conditions' determination did not rest solely upon the fact that he was incarcerated, as the trial court concluded that based on Father's historical patterns of conduct, even if Father was not incarcerated, he is not suited to care for Child.

[22] Relying on *In re G. Y.*, 904 N.E.2d 1257 (Ind. 2009), Father argues that the amount of time it would likely take him to comply with the conditions of the CHINS dispositional decree is not a sufficiently strong reason to terminate his parental rights. In *G. Y.*, the trial court had terminated the parental rights of a mother who had a little over two years remaining of eight years of executed

time she had been ordered to serve for a drug offense. *Id.* at 1259. Part of the trial court’s reasoning that termination was in G.Y.’s best interests was that “[t]o provide Mother additional time to be released from jail and try to remedy conditions would only necessitate [G.Y.] being put on a shelf instead of providing paramount permanency.” *Id.* at 1262-63. In reversing the termination order, our supreme court held that this finding was unsupported by the evidence, where Mother had made a good-faith effort to complete the required services available to her in prison, she had secured a full-time job and a home for herself and her child to live in after her release from prison, and Mother had taken steps to provide additional permanency for her child upon release by working toward an associate degree and planning to complete additional substance abuse treatment and vocational training. *Id.* at 1263-64. In light of those circumstances, the *G.Y.* court did not find that “the amount of time that it will likely take Mother to comply with the conditions of the court’s Participation Decree to be a sufficiently strong reason . . . to warrant a conclusion by clear and convincing evidence that termination of Mother’s parental rights is in G.Y.’s best interests.” *Id.* at 1264.

[23] Here, we consider the evidence supporting the trial court’s conclusion regarding the likelihood of the remedy of the conditions for removal or continued placement, not the ‘best interests’ determination at issue in *G.Y.* *See id.* In addition, unlike G.Y.’s mother, Father did not make a good-faith effort to comply with the services available to him in prison: his own misconduct kept him from exercising supervised visitation with Child under the CHINS

dispositional decree. *G.Y.* is further distinguishable from the instant case in that *G.Y.* was not a child with significant special needs, Father has not procured housing or employment, and Father has no viable plan for Child's care after his release. Therefore, we do not reverse the trial court's termination order based on *G.Y.*

[24] Father's reliance on *K.E.* is also unavailing. *K.E.*'s incarcerated father had a plan for employment and a place to live for himself and *K.E.* after his release from prison, *K.E.*'s father had completed twelve programs while incarcerated to target parenting, life skills, and his substance abuse, and *K.E.*'s father had a bond with *K.E.* due to exercising visits every other week and making nightly phone calls. *K.E.*, 39 N.E.3d at 648-49. Based on this evidence, the *K.E.* court concluded that the trial court's 'conditions' determination was unsupported by the evidence. *Id.* at 649. Here, Father's viable plans regarding housing and employment are non-existent, Father had only completed one DOC program in three years, and Father had no contact with Child, who has significant special needs. Accordingly, Father has failed to demonstrate that the trial court's conclusion that there was a reasonable probability that the conditions for removal and/or Child's continued placement outside the home would not be remedied was clearly erroneous.³ See *In re E.M.*, 4 N.E.3d at 642.

³ Given our holding and the fact that section 31-35-2-4(b)(2)(B) is written in the disjunctive, we do not address the evidence supporting the trial court's determination that Father's continued relationship with Child posed a threat to Child's well-being. See *Bester*, 839 N.E.2d at 153 n.5 (noting that DCS is not required to prove both of the factors listed in section 31-35-2-4(b)(2)(B)).

CONCLUSION

[25] Based on the foregoing, we hold that the trial court's Order terminating Father's parental rights to Child was not clearly erroneous.

[26] Affirmed.

Brown, J. and Foley, J. concur

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