MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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IN THE
COURT OF APPEALS OF INDIANA

In the Termination of the Parent-Child Relationship of K.S. & A.S. (Minor Children),

and

R.S. (Father) & E.K. (Mother)

Appellant-Respondents,

v.

May 11, 2022

Court of Appeals Case No. 21A-JT-2093

Appeal from the Clark Circuit Court

The Honorable Vicki L. Carmichael, Judge

The Honorable Joni Grayson, Magistrate

Trial Court Cause Nos. 10C04-2104-JT-11

Indiana Department of Child Services, *Appellee-Petitioner*	10C04-2104-JT-12

May, Judge.

[1] R.S. ("Father") and E.K. ("Mother") (collectively, "Parents") appeal the involuntary termination of their parental rights to K.S. and A.S. (collectively, "Children"). Father argues three of the trial court's findings are not supported by the evidence presented at the fact-finding hearing and the trial court erroneously concluded the conditions that resulted in the Children's removal would not be remedied. Mother presents a legal argument regarding the standard by which courts should judge the best interests of children, and Mother also argues the trial court's findings do not support its conclusions that the conditions that led to Children's removal will not be remedied and that termination of the Mother-Children relationship is in Children's best interest. We affirm.

Facts and Procedural History

[2] K.S. and A.S. were born to Parents on April 13, 2017, and September 24, 2019, respectively. On September 25, 2019, the Department of Child Services ("DCS") received a report that A.S. was born drug-exposed and tested positive for opiates and fentanyl. The report also indicated Parents were parenting K.S. while under the influence of illegal drugs. On October 22, 2019, the trial court

granted DCS permission to file petitions alleging Children were Children in Need of Services ("CHINS") based on Parents' illegal drug use. Mother appeared for the initial hearing, but Father did not. That same day, Children were removed from Parents' home and placed with paternal aunt.

[3] On November 14, 2019, Mother and Father both appeared for a hearing, and the court ordered supervised visits for Parents. On December 12, 2019, the court held the CHINS fact-finding hearing. Mother appeared with counsel. Father did not appear, but his counsel was present. Mother admitted Children were CHINS. Other testimony was given. The court found Children were CHINS and their best interest would be served by them remaining out of Parents' home.

[4] On December 19, 2019, Parents failed to appear at the dispositional hearing, but their counsel were present. In the dispositional order, the trial court required Parents, among other things, to maintain weekly contact with the Family Case Manager ("FCM"); notify the FCM of changes to contact information or legal status; enroll in recommended programs within thirty days and keep all appointments; secure and maintain a stable, legal source of income; obtain suitable and stable housing; allow the FCM to make announced and unannounced home visits; sign all releases required for the FCM to monitor progress; refrain from the use of illegal substances; successfully complete substance abuse assessment and all treatment recommendations; submit to random drug screens; and attend all scheduled supervised visits with

Children. The court also ordered Mother to complete a parenting assessment and follow all recommendations.

[5] On January 27, 2020, DCS filed notices of Parents' non-compliance, with supporting affidavits. On February 20, 2020, the court held a review hearing, at which Parents failed to appear. The court found Parents had not complied with Children's case plan because they had not participated in services, did not enhance their ability to fulfill their parental obligations, did not visit Children, and did not cooperate with DCS. The court set a rule-to-show-cause hearing for March 19, 2020, but that hearing had to be reset multiple times due to the Covid pandemic. On July 2, 2020, Parents appeared remotely with counsel. The court found Parents in contempt for failing to follow the court's orders and took DCS's proposed petition to terminate parental rights under advisement.

[6] On October 9, 2020, the Court Appointed Special Advocate ("CASA") filed a report. On November 19, 2020, the court held a permanency hearing and found Children had been out of Parents' home and living with paternal aunt for twelve months and Children were progressing well with paternal aunt. The court also found Parents remained noncompliant with services. Parents had failed to submit to any random drug screens, did not consistently communicate with the FCM or allow the FCM to access their place of residence, and refused to cooperate with court-ordered services. As a result, the court changed the permanency plan to termination of parental rights and adoption.

[7] On December 16, 2020, Mother tested positive for opiates, morphine, and fentanyl. On December 18, 2020, Mother tested positive for fentanyl, and Father tested positive for opiates. On February 24, 2021, both Mother and Father tested positive for fentanyl and tramadol. On April 16, 2021, DCS filed a petition to terminate Mother and Father's parental rights.

[8] The court held a factfinding hearing on the matter on July 13, 2021. Parents appeared at the hearing and testified. When DCS asked the FCM whether Children could be returned safely to Parents as of the date of the hearing, the FCM testified as follows:

> No. [Parents], as of today [Parents] are homeless. They have not drug screened for me in quite some time. So I have no reason to believe that they are sober right now. They are not in communication very often with me at all. They are, as far as I know, [Father] has been unemployed this whole case. I don't believe [Mother] is employed anymore. She has not been to work in months and she had excuses for that and I know that she had received unemployment checks recently and so that leads me to believe she's not working. So, for them to not have a stable or a reliable source of income or enough money to provide for [Children]. Not any way to prove they are sober. That's why.

(Tr. Vol. 2 at 75.) According to the FCM, Parents had not completed any service or treatment during the CHINS or termination proceedings. In addition, visits between Parents and Children never progressed past supervised visitation because Parents routinely failed to bring required supplies and because Parents needed additional parenting instruction to effectively parent

Children. On August 25, 2021, the court issued its order terminating Parents' parental rights to Children.[1]

Discussion and Decision

[9] We review termination of parental rights with great deference. *In re K.S.*, 750 N.E.2d 832, 836 (Ind. Ct. App. 2001). We will not reweigh evidence or judge credibility of 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 most favorable to the judgment. *Id.* In deference to the juvenile court's unique position to assess the evidence, we will set aside a judgment terminating a parent's rights only if it is clearly erroneous. *In re L.S.*, 717 N.E.2d 204, 208 (Ind. Ct. App. 1999), *reh'g denied, trans. denied, cert. denied,* 534 U.S. 1161 (2002).

[10] "The traditional right of parents to establish a home and raise their children is protected by the Fourteenth Amendment of the United States Constitution." *In re M.B.*, 666 N.E.2d 73, 76 (Ind. Ct. App. 1996), *trans. denied*. A trial court must subordinate the interests of the parents to those of the children when evaluating the circumstances surrounding a termination. *In re K.S.*, 750 N.E.2d at 837. The right to raise one's own children should not be terminated solely because there is a better home available for the children, *id.,* but parental rights may be

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[1] The trial court entered a single order that disposed of both termination petitions.

terminated when a parent is unable or unwilling to meet parental responsibilities. *Id.* at 836.

[11] To terminate a parent-child relationship, the State must allege and prove:

> (B) that one (1) of the following is true:
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> > (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 wellbeing of the child.
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> > (iii) The child has, on two (2) separate occasions, been adjudicated a child in need of services;
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> (C) that termination is in the best interests of the child; and
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> (D) that there is a satisfactory plan for the care and treatment of the child.

Ind. Code § 31-35-2-4(b)(2). The State must provide clear and convincing proof of these allegations. *In re G.Y.*, 904 N.E.2d 1257, 1260-61 (Ind. 2009), *reh'g denied*. If the court finds the allegations in the petition are true, it must terminate the parent-child relationship. Ind. Code § 31-35-2-8.

[12] When, as here, a judgment contains specific findings of fact and conclusions thereon, we apply a two-tiered standard of review. *Bester v. Lake Cnty. Office of Family & Children*, 839 N.E.2d 143, 147 (Ind. 2005). We determine whether the evidence supports the findings and whether the findings support the judgment. *Id.* "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). Unchallenged findings are accepted as correct. *Madlem v. Arko*, 592 N.E.2d 686, 687 (Ind. 1992) ("Because Madlem does not challenge the findings of the trial court, they must be accepted as correct."). If the evidence and inferences support the juvenile court's decision, we must affirm. *In re L.S.*, 717 N.E.2d at 208.

I. Father's Arguments

A. Findings of Fact

[13] Father first challenges Finding 27: "[Father] had only completed a substance abuse assessment but failed to complete all other court-ordered services --- including drug treatment." (App. Vol. II at 174.) Father argues this is erroneous because he attempted drug rehabilitation and "he in fact had visited regularly and consistently with [Children]." (Father's Br. at 6.) While Father entered drug treatment, he did not *complete* that requirement, which supports the trial court's finding. Father was offered drug treatment services, homebased services, and parenting services, yet he refused to attend or participate, which resulted in the suspension of some services. The fact that Father continued to

attend some[2] visits with Children does not invalidate the trial court's finding when the court's order required Parents to attend "all scheduled visitations." (Ex. Vol. at 52.) The record contains clear and convincing evidence supporting the trial court's finding.

[14] Next, Father argues Finding 29 – that he "refused to cooperate" with the FCM, "often refusing to respond to her efforts at communication" (App. Vol. 2 at 175) – is erroneous because "he talked to his caseworker, met with her in three separate Child Family Team Meetings ('CFTM'), and provided a release of medical information to her." (Father's Br. at 6.) However, FCM Margaret Aguilar testified about attempting to get Parents involved in the case. For example, FCM Aguilar mailed several letters and resource packets, drove to the home, and called, texted, and emailed throughout the life of the case, yet "[t]hey weren't cooperative at all with DCS, with me, not responding to me. They were not participating in services. They were not visiting [Children]. They were not asking how [Children] were doing." (Tr. Vol. 2 at 62-63.) Thus, while Father may have talked with the FCM on a few occasions, the evidence nonetheless supports the trial court's finding that the communication was inadequate due to Father's refusal to cooperate.

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[2] Father asserts he "attended substantially all of his visits with children," (Father's Br. at 9), but he also acknowledges he attended only nine of the fourteen scheduled visits in June 2021. We decline to adopt Father's characterization of the record.

[15] Finally, Father challenges the trial court's finding that "[his] drug use remains untreated without any meaningful effort by Father to participate in drug treatment." (App. Vol. II at 175.) Father argues this finding is erroneous because "he attended inpatient drug rehabilitation treatment on more than one occasion during the pendency of this action and had gone to intensive outpatient therapy." (Father's Br. at 7.) However, Tammy Lee Jones, director of nursing and patient admission at Sunrise Recovery testified Father left against medical advice after being in treatment only seven days and "at some point he went to intensive outpatient therapy, but he did not complete that either." (Tr. Vol. 2 at 50-51.) While at Sunrise Recovery, Father refused to participate in therapy groups, was uncooperative, and refused to take his blood pressure medication, which resulted in three trips to a local hospital. Even if Father would describe his effort as meaningful, the fact remains that he never completed treatment. Father had, by his own admission, been sober only sixteen days at the time of the termination hearing. The evidence clearly and convincingly supports the trial court's finding.

B. Conclusion Conditions would not be Remedied

[16] Father next challenges the trial court's conclusion that the conditions resulting in Children being removed from Parents would not be remedied.[3] He claims that conclusion is not supported because he "made substantial efforts towards

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[3] Father also argues the findings did not support a conclusion that the continuation of the parent-children relationship is a threat to the Children's well-being. However, as the trial court's order did not include that conclusion, we need not address this argument.

resolving his drug addiction." (Father's Br. at 11.) Evidence of a parent's pattern of unwillingness or lack of commitment to address parenting issues and to cooperate with services "demonstrates the requisite reasonable probability" that conditions will not change. *Lang v. Starke Cnty. Off. of Fam. & Child.*, 861 N.E.2d 366, 372 (Ind. Ct. App. 2007), *trans. denied.*

[17] In support of this conclusion, the trial court found:

> 8. On October 22, 2019 the court ordered that [Children] be removed from the home environment; remaining in the home would be contrary to the health and welfare of [Children]. [A.S.] was born drug-exposed; his cord drug screen was positive for opiates and fentanyl. Regarding [K.S.], [Mother] and [Father] admitted they were parenting [K.S.] while drug impaired. Based upon the evidence of drug use and the impact on [Children], [A.S.] and [K.S.] were detained and placed outside the home of [Parents].
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> * * * * *
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> 27. At the time of the termination hearing [Parents] had only completed a substance abuse assessment, but failed to complete all other court-ordered services – including drug treatment. [Parents] admitted they were homeless and lacked stable housing. [Father] admitted that he was not ready "right this second" to be reunited with [Children].
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> 28. [Parents] testified they have been sober since June 26, 2021 – just sixteen (16) days prior to the termination hearing. Even if this statement is true, the court finds sixteen days of sobriety to be an insufficient amount of time to demonstrate the sobriety will be permanent.

29. [Parents'] habitual patterns of conduct included the following:

> a. [Father] and [Mother] refused to cooperate with their Family Case Manager throughout the life of the CHINS case – often refusing to respond to her efforts at communication and refusing to give her entry into their home;
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> b. [Father] and [Mother] did not take advantage of the services offered to assist them in making improvements in their parenting;
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> c. It was necessary for the court to find [Father] and [Mother] in contempt of court for their failure to cooperate and participate in services.

30. [Children] remained outside the home due to [Parents'] refusal to participate in a meaningful way in services and their continued drug use.

31. [Parents'] drug use remains untreated. [Parents] admitted to a long history of drug use, yet neither [Father] nor [Mother] participated, in any meaningful way, in drug treatment. On the day that [Father] showed for his substance abuse assessment, he tested positive for fentanyl. Neither [Father] nor [Mother] sought inpatient treatment until after the permanency plan was changed to adoption. In December 2020, [Father] was admitted to Sunrise Recovery and stayed for about seven (7) days. He left against medical advice. [Mother] was admitted to Sunrise Recovery in June 2021 and stayed for about eight days. She left against medical advice. For three of those eight days [Mother] was detoxing from opioids. [Father] did attempt intensive outpatient treatment at Sunrise later in December 2020 – he stayed in that program for about 15 days. The court finds that

> neither parent has made a real effort to get sober and retain sobriety.
>
> 32. [Parents] have continued to neglect [Children] during the course of the CHINS. Neither parent has provided [Children] with support. Neither [Father] nor [Mother] participated in the efforts to rehabilitate [Children]. [Children] struggled medically – and both were under the care of physicians, yet [Father] and [Mother] did not participate in medical appointments. [Children] struggled with developmental challenges and needed therapies to help correct those deficiencies, yet [Father] and [Mother] did not participate in the therapies. Further, [A.S.] needed surgery, yet [Parents] were not present in the hospital during the surgery, nor did they visit [A.S.] in the hospital.
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> 33. [Parents] were offered drug treatment services, homebased services, and parenting services, as well as the services of the Family Case Manager. During the CHINS case, [Parents] refused to maintain contact with FCM Aguilar, they ignored her efforts to get them engaged in services, [Parents] failed to take advantage of the homebased and parenting services that were available to them. [Parents] were also suspended from some services due to their non-attendance or non-participation.
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> 34. As a result of the [Parent's] historical refusal to engage in services, there has been no overall progress despite reasonable efforts to preserve this family.

(App. Vol. II at 170-176.) Contrary to Father's argument, the court's findings clearly and convincingly support its conclusion that the conditions that resulted in Children being removed from Parents' custody would not be remedied. *See In re K.T.K.*, 989 N.E.2d 1225, 1234 (Ind. 2013) (mother's recent sobriety outweighed by her history of substance abuse and neglect of her children). *See*

also In re G.M., 71 N.E.3d 898, 908 (Ind. Ct. App. 2017) (affirming the trial court's conclusion that the conditions under which child was removed from mother's care would not be remedied based on mother's continued drug use and noncompliance with services).

II. Mother's Arguments

A. Conclusion Termination is in Children's Best Interests

[18] Mother argues "the trial court's findings, which rely on the recommendations of the FCM and CASA do not clearly and convincingly establish that the termination of the Mother-Children relationship is in the best interest of the children." (Mother's Br. at 9.) Mother makes two separate arguments in this regard – a legal argument and an as-applied argument. We deal first with Mother's legal argument.

[19] As Mother notes, our standard for reviewing a trial court's conclusion that termination is in the best interests of the relevant child or children often includes some version of the following language:

> In determining what is in the best interest of a child, the trial court is required to look beyond the factors identified by the DCS and consider the totality of the evidence. In so doing, the trial court must subordinate the interests of the parent to those of the child. The court need not wait until a child is harmed irreversibly before terminating the parent-child relationship. **Recommendations of the case manager and court-appointed advocate, in addition to evidence the conditions resulting in removal will not be remedied, are sufficient to show by clear and convincing evidence that termination is in the child's best interests**.

In re J.C., 994 N.E.2d 278, 289-90 (Ind. Ct. App. 2013) (internal citations omitted) (emphasis added), *reh'g denied*.

[20] Mother alleges the last sentence of that standard is erroneous because it contradicts our Indiana Supreme Court's precedent, which states: "When determining what is in children's best interests, trial courts may consider a **variety** of factors." *Matter of M.I.*, 127 N.E.3d 1168, 1171 (Ind. 2019) (emphasis in original). *See also In re K.T.K.*, 989 N.E.2d 1225, 1235 (Ind. 2013) ("When assessing the child's physical, emotional and mental well-being, the trial court may consider a **myriad** of factors.") (emphasis added). Mother notes our Indiana Supreme Court has never adopted that Court of Appeals language, which Mother refers to as a "short cut" that reflects a "'check the box' approach that allows the court to terminate parental rights simply because that's what the 'experts' recommend." (Mother's Br. at 19.)

[21] First, we whole-heartedly concur in Mother's assertion that an analysis of whether parents should be denied the fundamental right to parent their children ought never be reduced to a simplistic "check the box" approach that fails to take into account the specific circumstances of each case. *See*, *e.g.*, *In re Adoption of C.B.M.*, 992 N.E.2d 687, 692 (Ind. 2013) ("the interest of a parent in the companionship, care, custody, and management of his or her children comes to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements") (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)). We also agree with Mother that the weight given to expert opinions must necessarily vary based on

the individual facts of each case, such as the amount of time and the circumstances under which an expert was able to interact with parents and/or children. *See*, *e.g.*, *Sears Roebuck & Co. v. Manuilov*, 742 N.E.2d 453, 461 (Ind. 2001) (noting, under Indiana Evidence Rule 702, that after a court is satisfied the expert's testimony will assist the trier of fact, "then the accuracy, consistency, and credibility of the expert's opinions may properly be left to vigorous cross-examination, presentation of contrary evidence, argument of counsel, and resolution by the trier of fact").

[22] However, we remind Mother that we are an appellate court, not the trial court. Our standard of review does not permit us de novo review of a trial court's decision that termination of parental rights is proper. *See Bester*, 839 N.E.2d at 147. Nor does that standard permit us to reweigh evidence or judge credibility of witnesses, as those determinations belong to the trial court. *See Quillen*, 671 N.E.2d at 102 (stating appellate court reverses findings as clearly erroneous "only when the record contains no facts to support them either directly or by inference"). If a party on appeal wishes to challenge the veracity of a trial court's finding regarding an expert's opinion based on the specific facts and circumstances in the record regarding that expert's interaction with the family, that argument must be raised by the party, or we presume the trial court's finding is correct. *See Madlem*, 592 N.E.2d at 687. In the appellate context, unchallenged findings that experts recommended termination and that the circumstances that led to removal are unlikely to be remedied by a parent *are sufficient* for us to affirm a trial court's determination that termination is in

children's best interest. Moreover, our appellate standard in no way conflicts with our Indiana Supreme Court's statement that "trial courts may consider a **variety** of factors." *Matter of M.I.*, 127 N.E.3d at 1171 (emphasis in original). Indeed, in order to honor parents' fundamental rights to their children, trial courts ought to consider as many different forms of evidence, as provided by the parties, when determining children's best interests.

[23] Now, turning to Mother's as-applied argument, the trial court entered the following findings under a heading for "BEST INTERESTS" (App. Vol. II at 176):

> 36. . . . . Here, [K.S.] and [A.S.] were removed from [Parents] approximately twenty-one (21) months ago. During this 21-month period of time, [Parents] have completely failed to make the necessary adjustments that would ensure [Children] could be safely returned home.
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> 37. In addition to the [Parents'] unwillingness to deal with their drug addiction, the court finds [Parents] have demonstrated, by their actions and inactions, an ambivalence toward improving their parenting and providing a safe home environment for [Children]. In support, the court adopts the testimony of FCM Aguilar and homebased case worker Lois Nugent. FCM Aguilar described her work with Parents] in this way: "it was like pulling teeth." Ms. Nugent described [Father] as resisting any type of curriculum or program that would improve his parenting skills. Ms. Nugent told [Parents] they had to be drug free to reunite with the children, and she asked them "what are you doing to get clean?" Yet, [Parents] demonstrated an inability to nurture [Children]. [Mother] was reserved during visits – often waiting for [Children] to come to her. [Father] would speak to [K.S.] in a non-age-appropriate manner. [K.S.] at times seemed confused

> and fearful. Visits never progressed beyond fully supervised, indicating a lack of progress toward reunification.
>
> 38. [Children] have responded well to the care they have received in their aunt's home. She has been attentive to their needs and guaranteed that they receive medical care and treatment, and therapies. [Children] have made improvements in the area of speech and their development has been enhanced. There is a bond between the aunt and [Children].
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> 39. Family Case Manager Maggie Aguilar recommended termination and adoption as the best means of getting permanency for [Children].
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> 40. Nissa Jacobi, the Court Appointed Special Advocate, recommended termination of parental rights.

(*Id*. at 177-78.) Contrary to Mother's argument, the trial court did not rely simply on its finding that circumstances were unlikely to change and the testimony of the FCM and CASA. The court also found that, in twenty-one months, Parents had "completely failed" to make improvements and showed "ambivalence toward improving" as parents. (*Id*. at 177.) Moreover, the court noted Children's improvements while in aunt's care and the bond between aunt and Children. (*Id*. at 178.) In the next section of findings, the court also found DCS's plan for Children was adoption by aunt, who is willing to adopt them. (*Id*. at 179.) These findings are certainly sufficient to clearly and convincingly support the trial court's determination that termination is in Children's best interests. *See*, *e.g.*, *Matter of Ma.H.*, 134 N.E.3d 41, 50 (Ind. 2019) ("the totality of the evidence above supports the trial court's findings, which in turn support

the court's best-interests conclusion"), *cert. denied*, 140 S. Ct. 2835 (2020), *reh'g denied*, 141 S. Ct. 205 (2020).

B. Conclusion Conditions Would Not be Remedied

[24] Mother argues "the juvenile court's findings do not clearly and convincingly support the conclusion that the conditions that led to removal would not be remedied." (Mother's Br. at 26.) Mother claims her "baby steps toward sobriety are enough to survive the reasonable probability analysis because the juvenile court's findings do not support the existence of the sort of 'habitual patterns of conduct' that have traditionally been recognized in this sort of case." (*Id*. at 28.) We strongly disagree.

[25] Parents' involvement with DCS began because A.S. "was born drug-exposed." (App. Vol. II at 170.) Parents admitted they had been parenting K.S. "while drug impaired." (*Id*. at 170-71.) Accordingly, contrary to Mother's argument, Parents' drug issues pre-dated involvement with DCS, and these findings along with Parents' continued inability to remain sober during the twenty-one months of these proceedings clearly support an inference that Mother's drug use was "habitual." Mother testified she had been sober for sixteen days prior to the termination hearing, but the trial court found sixteen days of sobriety to be an insufficient amount of time to demonstrate sobriety will be permanent, and we find no error therein. The trial court's findings clearly and convincingly support its conclusion that the conditions under which Children were removed from Parents' care would not be remedied. *See In re G.M.*, 71 N.E.3d at 908 (affirming the trial court's conclusion that the conditions under which child was

removed from mother's care would not be remedied based on mother's continued drug use and noncompliance with services).

Conclusion

[26] The evidence in the record supports the three findings challenged by Father. The trial court's findings support its conclusions that the conditions under which Children were removed from Parents' care would not be remedied and that termination of Parents' parental rights was in Children's best interests. Accordingly, we affirm the judgment of the trial court.

[27] Affirmed.

Brown, J., and Pyle, J., concur.