MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

IN RE: The Termination of the Parent-Child Relationship of K.M. (Minor Child), A.H. (Mother), and M.M., Sr. (Father),

Appellant-Respondents,

v.

Indiana Department of Child Services,

Appellee-Petitioner

Bailey, Judge.

June 25, 2021

Court of Appeals Case No. 20A-JT-2351

Appeal from the Allen Superior Court

The Honorable Charles F. Pratt, Judge
The Honorable Sherry A. Hartzler, Magistrate

Trial Court Cause No. 02D08-1903-JT-102

Case Summary

[1] In this consolidated appeal, A.H. ("Mother) and M.M. ("Father") challenge the termination of their parental rights to K.M. ("Child"), upon the request of the Allen County Department of Child Services ("the DCS"). They present the issue of whether the order of termination is clearly erroneous because the DCS failed to establish, by clear and convincing evidence, the requisite statutory elements to support the termination decision. We affirm.

Facts and Procedural History

[2] Child was born on July 26, 2014; her postnatal examination revealed the presence of THC. At that time, Mother and Father were residing in a hotel. On September 3, 2014, the DCS filed a petition alleging that Child was a Child in Need of Services ("CHINS"). On September 29, 2014, the DCS filed an amended petition alleging that Father had failed to provide support for Child.

[3] Mother admitted to the CHINS court that she had used marijuana during her pregnancy, that she had difficulty maintaining stable housing, that she had prior involvement with the DCS, that she had not completed reunification services, and that she failed to provide Child with a drug-free environment. Father admitted that he had a criminal history including two domestic batteries, he had been incarcerated for violating probation by using cocaine, and he was unemployed due to a layoff. On October 1, 2014, Child was adjudicated a CHINS but remained in parental care.

[4] On October 7, 2014, the trial court entered a combined dispositional and parental participation order. Mother and Father were ordered to, among other things: refrain from criminal activity; maintain appropriate housing; notify the DCS of pertinent household changes; cooperate with service providers; attend case conferences; execute consents for release of information; accept home visits by caseworkers; provide appropriate child clothing; cooperate with rules of child placement; submit to a diagnostic assessment and follow recommendations; obtain a drug and alcohol assessment and follow recommendations; ensure attendance of Child at medical appointments; formally establish paternity;[1] obtain and maintain suitable employment; enroll in home-based services; and submit to drug screens.

[5] On June 16, 2015, Child was placed in foster care, with parents to have supervised visitation. Father provided several drug screens that were positive for THC; also, one was positive for cocaine, and one was positive for a synthetic cannabinoid. In August of 2015, Child was placed back with her parents, but she was removed one month later. Beginning in 2016 and throughout most of 2017, Child was with her parents six days per week, at their residence. This unsupervised arrangement ended after both parents tested

[1] Father had signed a paternity affidavit at Child's birth and was presumed to be Child's biological father. However, Mother was legally married to another man and the DCS requested the formal establishment of paternity.

positive for marijuana. In 2018, Mother gave birth to another child who had been exposed to marijuana in utero.

[6] On June 5, 2018, the plan for Child was changed to one for termination of parental rights. On March 21, 2019, the DCS filed a petition to terminate Mother's and Father's parental rights as to Child. An evidentiary hearing was conducted on August 27, 2019, September 3, 2019, January 23 and 28, 2020, March 3, 2020, and August 25, 2020. On November 23, 2020, the trial court issued its findings, conclusions, and order terminating Mother's and Father's parental rights. This appeal ensued.

Discussion and Decision

[7] At the outset, we acknowledge that "[t]he Fourteenth Amendment to the United States Constitution protects the traditional right of parents to establish a home and raise their children." *In re Adoption of O.R.,* 16 N.E.3d 965, 972 (Ind. 2014). However, a trial court must subordinate the interests of the parents to those of the child when evaluating the circumstances surrounding a termination. *Schultz v. Porter Cnty. Ofc. of Family & Children* (*In re K.S.*), 750 N.E.2d 832, 837 (Ind. Ct. App. 2001). Termination of a 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 or her parental responsibilities. *Id.* at 836.

[8] Before an involuntary termination of parental rights can occur in Indiana, the DCS is required to allege and prove, in relevant part:

> (A) that one (1) of the following is true:
>
> (i) The child has been removed from the parent for at least six (6) months under a dispositional decree.
>
> * * *
>
> (B) that one (1) of the following is true:
>
> (i) There is a reasonable probability that the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied.
>
> (ii) There is a reasonable probability that the continuation of the parent-child relationship poses a threat to the well-being of the child.
>
> (iii) The child has, on two (2) separate occasions, been adjudicated a child in need of services.
>
> (C) 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). The statute employs disjunctive language and thus the DCS need establish only one of the requirements of subsection (b)(2)(B) before the trial court may terminate parental rights. The DCS is

required to prove that termination is appropriate by a showing of clear and convincing evidence, a higher burden than establishing a mere preponderance. *In re. V.A.*, 51 N.E.3d 1140, 1144 (Ind. 2016).

[9] When reviewing a termination of parental rights, we will not reweigh the evidence or judge the credibility of the witnesses. *Id.* at 1143. Rather, we consider only the evidence and reasonable inferences that are most favorable to the judgment. *Id.* Moreover, in deference to the trial court's unique position to assess the evidence, we will set aside the court's judgment terminating a parent-child relationship only if it is clearly erroneous. *K.T.K. v. Ind. Dep't of Child Servs*, 989 N.E.22d 1225, 1229 (Ind. 2013). In order to determine whether a judgment terminating parental rights is clearly erroneous, we review the trial court's judgment to determine whether the evidence clearly and convincingly supports the findings and the findings clearly and convincing support the judgment. *In re I.A.*, 934 N.E.2d 1127, 1132 (Ind. 2010). "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).

[10] Mother and Father focus upon whether there is clear and convincing evidence of a reasonable probability that they would fail to remedy the conditions that led to Child's removal. Without dispute, Mother and Father obtained stable housing; they have lived for five years in a federally subsidized apartment. As for the propensity for illegal drug use, Mother argues that her last drug screen, six months before the termination decision, is stale and not indicative of

continued drug use, and Father argues that the DCS showed no nexus between marijuana use and ability to parent.

[11] A focus upon whether conditions are likely to be remedied invokes a "two-step analysis." *In re E.M.*, 4 N.E.3d 636, 643 (Ind. 2014). First, we identify the conditions that led to removal; and second, we must determine whether there is a reasonable probability that those conditions will not be remedied. *Id.* In the second step, the trial court must judge parental fitness as of the time of the termination hearing, taking into consideration the evidence of changed conditions. *Id.* "[I]t is not just the basis for the initial removal of the child that may be considered for purposes of determining whether a parent's rights should be terminated, but also those bases resulting in the continued placement outside of the home." *In re A.I.*, 825 N.E.2d 798, 806 (Ind. Ct. App. 2005).

[12] The trial court is entrusted with balancing a parent's recent improvements against habitual patterns of conduct. *In re E.M.*, 4 N.E.3d at 643. The trial court has discretion to weigh a parent's prior history more heavily than efforts made only shortly before termination. *Id.* "Requiring trial courts to give due regard to changed conditions does not preclude them from finding that parents' past behavior is the best predictor of their future behavior." *Id.* Habitual conduct may include parents' criminal history, drug and alcohol abuse, history of neglect, failure to provide support, and a lack of adequate housing and employment. *A.D.S. v. Ind. Dep't of Child.Servs.*, 987 N.E.2d 1150, 1157 (Ind. Ct. App. 2013), *trans. denied*. The trial court may also consider the services offered to the parent by the DCS and the parent's response to those services as

evidence of whether conditions will be remedied. *Id.* The DCS need not present evidence to rule out every possibility of change; rather, it must establish that there is a reasonable probability that parental behavior will not change. *Id.*

[13] Mother and Father do not challenge the trial court's factual findings as being clearly erroneous, with the exception of the finding that the parents stopped utilizing services by February of 2019. This finding of fact is erroneous. Although there were some interruptions in services, Mother and Father were still participating in home-based services as of the time of the termination hearing. We will disregard the erroneous finding and determine whether the unchallenged findings, independent of the erroneous finding, are sufficient to support the judgment. *In re A.M.*, 121 N.E.3d 556, 562 (Ind. Ct. App. 2019), *trans. denied*.

[14] The unchallenged findings, which detail a six-year history of DCS involvement, include the following:

> [T]he Department of Child Services initially became involved due to [Child] being born marijuana exposed. Although the child was ordered continued in the care of her parents after the preliminary inquiry hearing, on June 16, 2015 she was removed as a result of the continued drug use of Mother and Father. Intervening between the preliminary inquiry hearing and the removal, the Court finds that both parents were offered services that included diagnostic assessments, drug and alcohol assessments, home based service[s] and drug screens.
>
> The Court finds that unsupervised visitation was permitted with both parents during the initial stages of the underlying proceeding

starting in November 2016 until approximately December 2017 when visitations were ordered supervised by SCAN. … The Court takes judicial notice of the Order Terminating the Parent-Child Relationship of [Mother and Father] in cause number 02D08-1912-JT-557 and 02D08-1912-JT-558 entered on October 13, 2020 with respect to two (2) children born to [Mother and Father]. …

The Court finds from the time period of March 2018 until January 28, 2020, Mother and Father did not consistently participate in their supervised visitation. In 2018 through August 2019, Mother attended only one-half of her visitations and Father attended only five visits. In January 2020, Mother's attendance had improved, however, she consistently cited illness and travel as barriers to her attendance. . . .

The Court finds that although ordered in 2014, Mother and Father did not complete their drug and alcohol assessments until 2016. As a result of Mother's assessment, she was recommended to complete twenty (20) hours of group counseling and twenty-one (21) hours of individual counseling; however, she never followed through with the recommended services.

The Court finds that by March 2017, Mother started to attend services at Park Center but never followed through and she was discharged.

In March 2019, Mother was again referred to Bowen Center for her diagnostic assessment which recommended individual and group therapy, but she never followed through with services.

With respect to Father, although he was ordered to complete his diagnostic assessment and drug and alcohol assessment in 2014, he did not submit to his diagnostic assessment until September

2017 which recommended substance abuse services. Father never followed through with services.

Ultimately neither parent disputes that they did not complete any of their services. Mother also admits that she similarly did not complete services in the prior proceedings involving two children for whom she voluntarily relinquished her parental rights.

During the course of the termination proceedings, the parties stipulated to the admission of both positive and negative drug screen results for Mother and Father. In summary, Mother and Father achieved a period of sobriety in 2016 until approximately July 2017 in which they both started to test positive for THC and cocaine. By February 2019, Mother and Father were testing positive for THC and cocaine (which prompted the removal of the other children subject to [the termination order]). After this period of time, compliance with drug screens was sporadic for both Mother and Father.

The court finds through the testimony of case manager, Faith Benson that although she would request that Mother and Father submit to drug screens, both parents often refused or failed to appear. Other times, Mother and Father would appear on a different day than Benson requested which caused the screen not to be random as required by this Court's Orders.

Mother testified that she did not believe that marijuana was a harsh drug and that she probably tested positive for cocaine because her drug dealer did not clean the scales used to weigh her marijuana. When questioned as to why she used marijuana, Mother testified that it calms her down and makes her "not think about things."

Mother also testified that she when [sic] to Parkview Behavioral Health in October and December of 2019 because she was

> depressed. However, the Court finds that she also did not sign a release for this information for the Department of Child Services to verify as she has been Court ordered because she "went on her own." The Court also finds that Mother requested counseling services in 2018 to which the Department referred Mother but she never followed through. …
>
> Of particular concern to the Guardian Ad Litem is the failure to appear at visitation which causes a child distress. Further, it is imperative that this child receive safe and stable permanency. Unfortunately, Mother and Father never got past their denial of their issues and participated in services.

(Appealed Order at 8-11.) The court observed that Mother's use of marijuana purportedly to "not think about things" was inconsistent with ability to provide appropriate child supervision and then summarized: "The Court concludes that the instability demonstrated by Mother and Father are symptomatic of their consistent intoxication." (*Id.* at 12.)

[15] The findings have evidentiary support. Historically, the parents have been unable or unwilling to maintain a safe, drug-free, and stable home for their children. Mother had two older children who were the focus of a CHINS proceeding in 2010; Mother voluntarily relinquished her parental rights to her older children. After Child's birth, Mother and Father had two other children. The parental rights to these children were terminated in January of 2020. A panel of this Court affirmed the termination decision. *In re M.M., Jr., et al.*, 2021 WL 1803673 (Ind. Ct. App. May 5, 2021).

[16] Over the years, Mother and Father have each been registered with a temporary employment agency but neither has reported employment other than short-term, temporary employment. They have participated in services to varying degrees. While visitation was once sporadic, attendance had recently improved. But Mother and Father failed to complete referrals to address substance abuse issues, refused multiple drug screens, and continued to test positive for THC. At times, they tested positive for cocaine. Mother was once positive for an amphetamine and Father was once positive for a synthetic form of marijuana known as spice.

[17] With respect to any drug other than marijuana, Mother testified and simply denied usage. With respect to marijuana use, the parents minimized the import of persistent positive screens and did not acknowledge any effect upon their employability or parenting skills. They argue on appeal that the results of marijuana screens lack significance; that is, some test results were remote and some detected levels were small. But these are invitations to reweigh the evidence, which we decline. *In re V.A.*, 51 N.E.3d at 1143. We also reject Father's contention that the evidentiary record disclosed no nexus between marijuana use and ability to parent. As the trial court observed, Mother testified that she smoked marijuana to change the focus of her thoughts. It was within the province of the trial court to consider any adverse effect upon Mother's ability to supervise Child. In sum, the DCS presented sufficient evidence of a reasonable probability that conditions leading to Child's removal – lack of stability and drug use – would not be changed.

[18] Father also argues that termination of his parental rights is not in Child's best interests. He acknowledges the guidance of our Indiana Supreme Court in *In re G.Y.*, 904 N.E.2d 1265, 1257 (Ind. 2009): "Permanency is a central consideration in determining the best interests of a child." He then argues that "a child's need for immediate permanency is not reason enough to terminate parental rights where the parent has established a relationship with his child and has taken positive steps in accordance with a Parent Participation Plan." (Father's Brief at 20.)

[19] In determining what is in a child's best interests, the trial court is required to look beyond the factors identified by the DCS and look to the totality of the evidence. *McBride v. Monroe Cnty. Off. of Family & Children*, 798 N.E.2d 185, 203 (Ind. Ct. App. 2003). In doing so, the trial court must subordinate the parent's interests to those of the child. *Id*. The trial court need not wait until the child is irreversibly harmed before terminating parental rights. *Id.* "The historic inability to provide adequate housing, stability, and supervision, coupled with the current inability to provide the same, will support a finding that continuation of the parent-child relationship is contrary to the child's best interests." *In re. A.H.*, 832 N.E.2d 563, 570 (Ind. Ct. App. 2005).

[20] The evidence of record supports Father's claim that he and Child were bonded. Also, parental participation in visitation increased to 75% and both parents were said to have been cooperative with the latest home-based case manager; these recent parental efforts are commendable. But, significantly, the services provided to Mother and Father have spanned six years. Child's guardian ad litem and

family case manager opined that, while the parents were sometimes cooperative, they did not benefit from services sufficiently over the years to maintain regular employment or provide a drug-free, stable home. The DCS presented sufficient evidence to establish that termination of parental rights is in Child's best interests.

[21] Finally, Father acknowledges the existence of a future plan for Child but suggests that it is statutorily inadequate, arguing "words have some meaning," and "while the State has a 'plan' for the care and treatment of this child, i.e., her placement for adoption, there has been no showing that this plan is satisfactory by clear and convincing evidence." (Father's Brief at 21-22.) We have explained before 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*. "A DCS plan is satisfactory if the plan is to attempt to find suitable parents to adopt the children." *Id.* That is, "there need not be a guarantee that a suitable adoption will take place, only that DCS will attempt to find a suitable adoptive parent." *Id.* Here, Child had been placed in a pre-adoptive home with other siblings. The trial court found that the plan for the care and treatment of Child is adoption, which is a satisfactory plan. *See id.*

Conclusion

[22] The DCS established by clear and convincing evidence the requisite elements to support the termination of parental rights.

[23] Affirmed.

May, J., and Robb, J., concur.