

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In the Matter of the Involuntary
Termination of the Parent-Child
Relationship of:

S.A.B. and W.B. (Minor
Children),
and
S.B. (Mother) and E.B. (Father)
Appellants-Respondents,

v.

February 8, 2023

Court of Appeals Case No.
22A-JT-1773

Appeal from the Tippecanoe
Superior Court

The Honorable Nancy Gettinger,
Senior Judge

Trial Court Cause No.
79D03-2204-JT-20
79D03-2204-JT-21

Indiana Department of Child
Services,
Appellee-Petitioner.

Memorandum Decision by Judge Bailey
Judges Brown and Weissmann concur.

Bailey, Judge.

Case Summary

[1] In this consolidated appeal, S.B. (“Mother”) and E.B. (“Father”) appeal the termination of their parental rights to S.A.B. (born in 2012) and W.B. (born in 2013) (“Children”) upon the petition of the Tippecanoe Department of Child Services (“DCS”). We affirm.

Issues

[2] Father presents two issues for review:

- I. Whether he was denied due process in the termination proceedings because he was not appointed counsel; and
- II. Whether the termination order is clearly erroneous because DCS failed to present sufficient evidence related

to remediation of conditions, threat from continuation of the parental relationship, or the best interests of Children.

Mother presents a single issue for review: whether the termination order is clearly erroneous because DCS failed to present sufficient evidence related to the best interests of Children.

Facts and Procedural History

- [3] On June 15, 2021, police found Mother unconscious in the front seat of her van. She had overdosed on heroin. Officers administered Narcan and transported Mother to a hospital. Children, who had been in the back seat of the van, reported that this was not the first such incident. At that time, Father was incarcerated. Mother and Children had no residence other than the van. Children had not attended school for at least nine months.
- [4] On June 21, DCS petitioned to have Children declared Children in Need of Services (“CHINS”). Mother and Father appeared in the CHINS proceedings, and each admitted that Children needed services. On September 10, the CHINS court entered a dispositional decree ordering that the parents, among other things: obtain suitable housing; cooperate with service providers; complete parenting, substance abuse, mental health, and domestic violence assessments; obtain a legal source of income; refrain from the use of alcohol or illegal substances; submit to drug screens; participate in visitation with Children; and follow all recommendations resulting from assessments or evaluations. Visits with Children were limited to virtual visits until Mother and

Father could present drug screens that were negative for the presence of methamphetamine and fentanyl.

[5] Mother was charged with and convicted of Neglect of a Dependent, related to her heroin overdose with Children present. Both she and Father were incarcerated at times during the pendency of the CHINS proceedings, and each participated in some virtual visits with Children during incarceration. Mother participated in some virtual visits after her release. Neither parent reported to DCS a source of income or stable housing. Neither parent completed assessments, and neither provided the requisite drug screen required for in-person visits with Children. On April 5, 2022, the CHINS court changed the permanency plan for Children from reunification to termination of parental rights and adoption.

[6] On April 6, DCS filed petitions for termination of parental rights. Attempted service upon Mother and Father failed and their whereabouts were unknown; thus, DCS sought and was granted permission to notify the parents by publication. On June 21, the trial court conducted a fact-finding hearing, at which Mother appeared in person and by counsel. Father did not appear and was not represented by counsel. On July 26, the trial court issued an order terminating Mother's and Father's parental rights to Children. This appeal ensued.

Discussion and Decision

Father's Due Process

- [7] Father makes a cursory assertion that he “was denied the right to counsel in contravention of I.C. 31-32-2-5.” Father’s Brief at 5. Father does not claim that he lacked notice of his right to counsel; nor does he develop an argument with respect to waiver. As best we can discern, Father’s contention is that he was deprived of due process because the trial court did not sua sponte appoint counsel.
- [8] Due process safeguards preclude “state action that deprives a person of life, liberty, or property without a fair proceeding.” *In re G.P.*, 4 N.E.3d 1158, 1165 (Ind. 2014) (quoting *In re C.G.*, 954 N.E.2d 910, 916 (Ind. 2011)). As our courts have previously noted, a parent has a fundamental liberty interest in the care and custody of her child. *Petition of McClure*, 549 N.E.2d 392, 395 (Ind. Ct. App. 1990). Thus, we have held it to be a violation of due process if a child is removed from “an indigent parent without affording that parent the right to assistance of court-appointed counsel.” *Id.*
- [9] Indiana’s law governing juvenile court procedures provides that “[a] parent is entitled to representation by counsel in proceedings to terminate the parent-child relationship.” Ind. Code § 31-32-2-5. Additionally, Indiana Code section 31-32-4-1(2) states that “[a] parent, in a proceeding to terminate the parent-child relationship” is “entitled to be represented by counsel.” If
- (1) a parent in proceedings to terminate the parent-child relationship does not have an attorney who may represent the parent without a conflict of interest; and

(2) the parent has not lawfully waived the parent’s right to counsel under [Indiana Code chapter 31-32-5];

the juvenile court shall appoint counsel for the parent at the initial hearing or at any earlier time.

I.C. § 31-32-4-3(a). The right to counsel in a termination proceeding may only be waived “if the parent does so knowingly and voluntarily.” I.C. § 31-32-5-5.

[10] As such, we examine the record to determine whether Father knowingly and voluntarily waived his right to counsel. With respect to Father’s knowledge, we observe that he was previously a party to proceedings in which his parental rights to three older children had been terminated. In this case, he was appointed counsel in the CHINS proceedings; Father expressed a desire to proceed pro se.¹ Finally, the Summons for Service by Publication included the following language:

You are entitled to representation by an attorney, provided by the State if applicable, throughout these proceedings to terminate the parent-child relationship.

(Exhibits, pg. 218.)

[11] DCS contends that, in some circumstances, a parent’s complete failure to act to preserve a known right can constitute waiver. DCS directs our attention to

¹ Father’s counsel filed a motion to withdraw, which was granted by the CHINS court. Father filed a separate motion to have his counsel removed; that motion was denied as moot.

Termination of Parent-Child Relationship of X.S. v. Indiana Dep't of Child Servs., 117 N.E.3d 601 (Ind. Ct. App. 2018). There, an incarcerated parent had been informed telephonically, by letter, and by summons of his right to legal representation in a termination of parental rights proceeding. Yet he made no request for counsel or transportation or any “other attempt to participate in the termination proceedings.” *Id.* at 604.

[12] Upon review of the parent’s claim of a deprivation of due process, we observed:

The Indiana Supreme Court has held “that the process due in a termination of parental rights action turns on balancing three *Mathews* [*v. Eldridge*, 424 U.S. 319 (1976)] factors: (1) the private interests affected by the proceeding; (2) the risk of error created by the State’s chosen procedure; and (3) the countervailing governmental interest supporting use of the challenged procedure.” *In re K.D.*, 962 N.E.2d 1249, 1257 (Ind. 2012). “The balancing of these factors recognizes that although due process is not dependent on the underlying facts of a particular case, it is nevertheless ‘flexible and calls for such procedural protections as the particular situation demands.’” *Thompson* [*v. Clark Cnty. Div. of Family & Children*], 791 N.E.2d at 795 (quoting *Mathews*, 424 U.S. at 334[.]

Id. at 606.

[13] Regarding the private interests, we noted “the value our society places on the parent-child relationship,” and acknowledged that, while the parent has a compelling interest in accuracy and justice, the child also has a compelling interest in “being raised in a safe, nurturing, and stable environment.” *Id.* at 606-07. As for risk of error from the chosen procedure, we observed “even if a

wrongful denial of counsel were to occur, the inherent nature of termination proceedings is such that the risk of erroneous disposition due to lack of representation is much lower than in most other legal proceedings.” *Id.* at 607. This is so because “the juvenile court is looking out for the parent’s interests in a termination proceeding even if an attorney is not.” *Id.* Finally, we “note[d] the State’s significant interest in the speedy, efficient, and cost-effective resolution of termination proceedings[.]” *Id.* at 607-08.

[14] Balancing the *Mathews* factors, the *X.S.* Court concluded:

[A] balancing of the *Mathews* factors does not require more process in termination proceedings than Father was given in this case. Father was informed on multiple occasions of the right to counsel, and if he wanted counsel, all he would have had to do was make a telephone call. We do not believe that this is too much to ask of a parent in a termination proceeding. Moreover, there is a greatly reduced risk of error in termination proceedings, even without counsel, which also weighs against a more burdensome procedure. Finally, the interests of Child and the State in a speedy resolution are well-served by the procedure used in this case. A more involved process would, in our view, not do much to advance Father’s interests while very possibly negatively affecting the interests of Child and the State through delay and unnecessary commitment of resources. In summary, we conclude that the procedure used in this case provided Father with “the opportunity to be heard at a meaningful time and in a meaningful manner.” *Thompson*, 791 N.E.2d at 795. Father has failed to establish that his due process rights were violated.

Id. at 608.

[15] Here, Father likewise made “no attempt to participate in the termination proceedings.” *See id.* at 604. We are persuaded that, in these circumstances, Father suffered no deprivation of his due process rights although the trial court did not sua sponte appoint counsel for Father.

Remediation of Conditions

[16] In conducting our review, we acknowledge that “[t]he traditional right of parents to establish a home and raise their children is protected by the Fourteenth Amendment of the United States Constitution.” *Bailey v. Tippecanoe Div. of Fam. & Child.*, 666 N.E.2d 73, 76 (Ind. Ct. App. 1996), *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. *Schultz v. Porter Cnty. Off. of Fam. & Child.*, 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.

[17] Before an involuntary termination of parental rights can occur in Indiana, 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.

* * *

(C) that termination is in the best interests of the child; and

(D) that there is a satisfactory plan for the care and treatment of the child.

I.C. § 31-35-2-4(b)(2) (2021). DCS's "burden of proof in termination of parental rights cases is one of 'clear and convincing evidence.'" *R.Y. v. Ind. Dep't of Child Servs.*, 904 N.E.2d 1257, 1260 (Ind. 2009) (quoting I.C. § 31-37-14-2).

[18] When reviewing a termination of parental rights, we will not reweigh the evidence or judge the credibility of the witnesses. *Peterson v. Marion Cnty. Off. of Fam. & Child.*, 804 N.E.2d 258, 265 (Ind. Ct. App. 2004), *trans. denied*. Instead, 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. *In re L.S.*, 717 N.E.2d 204, 208 (Ind. Ct. App. 1999), *trans. denied*.

[19] Father contends that DCS failed to present clear and convincing evidence to show a reasonable probability that the conditions leading to Children’s removal would not likely be remedied. This invokes a “two-step analysis.” *In re E.M.*, 4 N.E.3d 636, 643 (Ind. 2014). First, we must 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.* The trial court is entrusted with balancing a parent’s recent improvements against habitual patterns of conduct. *Id.* 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.*

[20] Habitual conduct may include parents’ prior 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 DCS and the parent’s response to those services as evidence of whether conditions will be remedied. *Id.*

[21] Children were initially removed from parental care because of Mother's overdose and the family’s homelessness. At that time, Father was incarcerated and had no ability to provide care for Children. The history of housing

instability and lack of stable income was not remedied. Apart from his periods of incarceration, Father did not maintain regular contact with DCS such that service referrals could be made. As of the time of the filing of the termination hearing, DCS had no valid address for either Father or Mother. Although Father points out “the court must balance recent improvements against habitual patterns of conduct,” Father’s Brief at 12, we observe that he made no claim of recent improvements. Father simply did nothing that he was court-ordered to do, with the exception of maintaining some sporadic contact with DCS and participating in some virtual visits. The trial court’s determination of a reasonable probability that the conditions leading to removal and continued placement outside the parental home are unlikely to be remedied is not clearly erroneous.

[22] Father also asserts that DCS failed to establish that there is a reasonable probability that continuation of the parent-child relationships poses a threat to Children. However, Indiana Code section 31-35-2-4(b)(2)(B) is written in the disjunctive, and therefore, the court is required to find that only one prong of subsection 2(B) has been established by clear and convincing evidence. *See L.S.*, 717 N.E.2d at 209. Having found that DCS presented sufficient evidence to establish, by clear and convincing evidence, a reasonable probability that conditions leading to removal would not be remedied, we need not address Father’s contention that he poses no threat to Children.

Best Interests

[23] Mother and Father each challenge the trial court's conclusion that termination of the parent-child relationship is in Children's best interests. Mother asserts: "Given Mother's recent efforts, the strong bond she and the children share, and the lack of a far better alternative, this court should reverse the termination of the parent-child relationship between Mother and her children." Mother's Brief at 18. Father asserts that "no historical evidence was presented about Father's bond with Children" and complains that "DCS did not refer any services for Father." Father's Brief at 14.

[24] In determining what is in a child's best interests, the court must look to the totality of the evidence. *A.D.S.*, 987 N.E.2d at 1158. Here, the most recent DCS involvement with this family began on June 15, 2021, when Mother overdosed on heroin in the presence of Children. At that time, Mother and Children were homeless and alternated sleeping in Mother's van and staying with friends.

[25] Mother was ordered to comply with services to address her substance abuse and obtain housing. However, she was non-compliant with services, partially attributable to three or four periods of incarceration during the pendency of the CHINS proceedings. Mother's criminal history consisted of convictions for prostitution, neglect of a dependent, indecent exposure, driving while suspended, and conversion. Her most recent arrest was for shoplifting. Father likewise failed to address his substance abuse or obtain housing. He too was incarcerated on multiple occasions. His criminal history consisted of

convictions for unlawful possession of a syringe, domestic battery, criminal trespass, possession of a synthetic drug, possession of paraphernalia, invasion of privacy, theft, unauthorized entry, public intoxication, public nudity, escape, resisting law enforcement, and failure to return to lawful detention.

[26] Father provided no drug screens to DCS. He did not participate in services other than virtual visitation, largely attributable to his periods of incarceration and unavailability for service referrals. Mother, who participated in some services, was uncooperative with her home-based caseworker's suggestions relative to employment and housing. Her caseworker testified: "we haven't really accomplished any of the goals that we've set out" and "it's hard because she doesn't want to get a job and that's really the main thing that you have to have in order to do a lot of the other things." (Tr. Vol. II, pg. 32.) Mother was historically non-compliant with drug screening. Specifically, DCS had obtained no drug screens from Mother. Mother had signed a release so that Valley Oaks, a private provider, could release results of two recent drug screens. But Mother testified that the first yielded no results because of suspicion of contamination and that she had not received results of a screen taken two weeks earlier. As of the termination hearing, Mother had no housing and no reported source of income.

[27] Meanwhile, Children were thriving in foster care. Children's Court Appointed Special Advocate recommended that Mother's and Father's parental rights be terminated. Children's family case manager testified that Children were "doing very well" in their pre-adoptive home and she opined that termination of

parental rights and adoption by the current foster parents was in Children's best interests. (*Id.* at 16.) The totality of the evidence is such that the trial court did not clearly err in finding termination of Mother's and Father's parental rights to be in Children's best interests.

Conclusion

[28] Father was not denied due process. The termination order is not clearly erroneous.

[29] Affirmed.

Brown, J., and Weissmann, J., concur.