

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In the Involuntary Termination
of the Parent-Child Relationship
of: J.W. (Minor Child), and M.S.
(Father)

Appellant-Respondent,

v.

Indiana Department of Child
Services,

Appellee-Petitioner.

July 8, 2022

Court of Appeals Case No.
22A-JT-252

Appeal from the Howard Circuit
Court

The Honorable Lynn Murray,
Judge

Trial Court Cause No.
34C01-2110-JT-435

Brown, Judge.

[1] M.S. (“Father”) appeals the involuntary termination of his parental rights to his child, J.W. We affirm.

Facts and Procedural History

[2] Father and C.W. (“Mother,” and together with Father, “Parents”) are the parents of J.W., who was born in April 2014. On October 26, 2020, the Department of Child Services (“DCS”) filed a petition alleging J.W. to be a child in need of services (“CHINS”). DCS alleged there were concerns regarding domestic violence occurring in the home with Mother and J.W. being the victims of physical abuse, Mother tested positive for methamphetamine on October 20, 2020, and Father’s address was unknown.¹ It also asserted that J.W. had been removed from Mother’s care.

[3] On December 21, 2020, the court held a hearing. On December 29, 2020, the court entered an Order on Fact Finding Hearing stating that arrangements were unable to be made for Father to appear telephonically for the hearing due to his incarceration in a federal facility in Ohio, finding that Mother admitted to the allegations in the petition, and taking the admission and adjudication under advisement pending further hearing for Father.

¹ The court’s order terminating Parents’ parental rights states that DCS received multiple reports in September and October 2020 “alleging child abuse or neglect that identified [J.W.] as an alleged victim, with [Mother] and her boyfriend listed as alleged perpetrators,” Father “was not listed in any reports of alleged abuse or neglect,” and Father “was later located at the Corrections Center of Northwest Ohio.” Appellant’s Appendix Volume II at 67.

- [4] On January 11, 2021, the court held a hearing. On January 14, 2021, it entered an Order on Fact Finding Hearing indicating that attempts were made to have Father available for the hearing from his facility in Ohio but the attempts were unsuccessful and finding J.W. to be a CHINS. That same day, the court entered a dispositional order.
- [5] In a July 22, 2021 Order on Periodic Case Review, the court observed that it had a video conference on July 19, 2021, and found that Father was incarcerated in Allen County on federal charges and his presence could not be accommodated through the federal or local inmate systems. It also stated that Father had not cooperated with DCS and had remained incarcerated throughout the review period and was unable to participate in proceedings or services.
- [6] On October 12, 2021, DCS filed a petition for the involuntary termination of the parent-child relationship between J.W. and Parents and on October 18, 2021, the court held a hearing. On January 10, 2022, it held a hearing at which Father failed to appear in person but appeared by appointed counsel. DCS's counsel indicated that Father had been served with the date and time of the hearing. Father's counsel stated that he had sent Father letters but had not spoken to him since he was in prison. The court heard testimony from multiple witnesses including DCS permanency worker Brianne Hensley and Court Appointed Special Advocate Annie Double ("CASA Double").

[7] On January 14, 2022, the court entered an order terminating Parents' parental rights. It found there was a reasonable probability that the conditions which resulted in J.W.'s removal from Parents' home and the reasons for his continued placement outside of Parents' care and custody would not be remedied. It also found that the continuation of the parent-child relationship posed a threat to J.W.'s well-being and termination of the parent-child relationship was in J.W.'s best interest.

Discussion

[8] The issue is whether the trial court erred in terminating Father's parental rights. Father argues that J.W. was removed from Mother's home due to her significant substance abuse problem, her failure to comply with DCS, and her inability to provide a sober caregiver for J.W. He asserts that no such allegations were made against him and that his failure to prioritize reunifying with J.W. and participate in reunification services were not the reasons J.W. was removed from Mother's home. He also contends that the trial court did not specifically find by clear and convincing evidence that the conditions for J.W.'s removal would not be remedied by him.

[9] In order to terminate a parent-child relationship, DCS is required to allege and prove, among other things:

(B) that one (1) of the following is true:

(i) There is a reasonable probability that the conditions that resulted in the child's removal or the reasons for

placement outside the home of the parents will not be remedied.

(ii) There is a reasonable probability that the continuation of the parent-child relationship poses a threat to the well-being of the child.

(iii) The child has, on two (2) separate occasions, been adjudicated a child in need of services;

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

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

Ind. Code § 31-35-2-4(b)(2). If the court finds that the allegations in a petition described in Ind. Code § 31-35-2-4 are true, the court shall terminate the parent-child relationship. Ind. Code § 31-35-2-8(a).

[10] A finding in a proceeding to terminate parental rights must be based upon clear and convincing evidence. Ind. Code § 31-37-14-2. We do not reweigh the evidence or determine the credibility of witnesses but consider only the evidence that supports the judgment and the reasonable inferences to be drawn from the evidence. *In re E.M.*, 4 N.E.3d 636, 642 (Ind. 2014). We 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. *Id.* We give due regard to the trial court's opportunity to judge the credibility of the witnesses firsthand. *Id.* "Because a case that seems close on a 'dry record' may have been much more clear-cut in person, we must be careful

not to substitute our judgment for the trial court when reviewing the sufficiency of the evidence.” *Id.* at 640.

[11] In determining whether the conditions that resulted in a child’s removal will not be remedied, we engage in a two-step analysis. *See E.M.*, 4 N.E.3d at 642-643. First, we identify the conditions that led to removal, and second, we determine whether there is a reasonable probability that those conditions will not be remedied. *Id.* at 643. In the second step, the trial court must judge a parent’s fitness as of the time of the termination proceeding, taking into consideration evidence of changed conditions, balancing a parent’s recent improvements against habitual patterns of conduct to determine whether there is a substantial probability of future neglect or deprivation. *Id.* We entrust that delicate balance to the trial court, which has discretion to weigh a parent’s prior history more heavily than efforts made only shortly before termination. *Id.* Requiring trial courts to give due regard to changed conditions does not preclude them from finding that a parent’s past behavior is the best predictor of future behavior. *Id.* The statute does not simply focus on the initial basis for a child’s removal for purposes of determining whether a parent’s rights should be terminated, but also those bases resulting in the continued placement outside the home. *In re N.Q.*, 996 N.E.2d 385, 392 (Ind. Ct. App. 2013). A court may consider evidence of a parent’s drug abuse, history of neglect, failure to provide support, lack of adequate housing and employment, and the services offered by DCS and the parent’s response to those services. *Id.* Where there are only temporary improvements and the pattern of conduct shows no overall progress,

the court might reasonably find that under the circumstances the problematic situation will not improve. *Id.*

[12] To the extent Father does not challenge the court's findings of fact, the unchallenged facts stand as proven. *See In re B.R.*, 875 N.E.2d 369, 373 (Ind. Ct. App. 2007) (failure to challenge findings by the trial court resulted in waiver of the argument that the findings were clearly erroneous), *trans. denied.*

[13] The trial court's order states:

11. . . . On October 23, 2020, [J.W.] was detained by [DCS], with the assistance of local law enforcement, and removed from Mother's care because no sober caregiver could be ensured. [J.W.] was placed in the care of his grandmother. [Father] was not listed in any reports of alleged abuse or neglect. [Father] was later located at the Corrections Center of Northwest Ohio, in Stryker, Ohio, where he was successfully served with the Summons and Notice of Rights, as well as the Verified Petition, on or around December 17, 2020.

12. . . . Father spent the majority of the CHINS case incarcerated. Throughout the case, FCM Hensley corresponded with [Father] via mailed letters in order to keep him [apprised] of the CHINs case. [Father] responded in same with FCM Hensley. FCM Hensley and [Father] kept in regular contact throughout his incarceration. However, once [Father] was released in August 2021, communication changed. [Father] was harder to contact, leading FCM Hensley to put in multiple investigative referrals to ascertain [Father's] whereabouts. [Father] was located, and some contact ensued between he and FCM Hensley. However, [Father] did not appear to prioritize reunifying with [J.W.]. [Father] did not request services or otherwise inquire about how to reunify with [J.W.]. FCM Hensley put in service referrals for random oral drug screens and

a mental health assessment. [Father] took one random oral drug screen in December 2021, nearly four months after his release from incarceration, and the result was negative. However, [Father] has since failed to comply with the drug screening service by failing to call and failing to submit to screens. [Father] has failed to comply with the mental health evaluation, even after multiple subsequent contacts by the service provider. It has become clear that [Father] has no intention of engaging in services or otherwise reunifying with [J.W.]. [Father's] failure to appear at the Fact Finding Hearing on the termination petition further validates this point.

13. The Court finds by clear and convincing evidence that there is a reasonable probability that the conditions that led to the removal and continued placement outside the home, namely illegal substance abuse and neglect of Child's needs, will not be remedied to the degree that [Mother] will be able to provide a nurturing, stable, and drug-free home for [J.W.]. . . .

At the same time, [Father] has failed to prioritize reunifying with [J.W.]. At the time of the Fact Finding Hearing, [Father] had been free from incarceration for approximately five months. During this time, [Father] showed no motivation or urgency in re-entering [J.W.'s] life. [Father] had not inquired about, let alone meaningfully participated in, any reunification services. [Father] has had no visitation with [J.W.]. [Father] is currently involved with federal probation, and has a criminal history that includes violent crimes.

Appellant's Appendix Volume II at 67-68.

[14] Hensley, the DCS permanency worker, testified that she had communicated with Father via letters and Zoom meetings while Father was incarcerated. She indicated Father was released from the Allen County Jail on August 18th. When asked if Father reached out to her to begin reunification services prior to

the October 18th permanency hearing, she answered in the negative. DCS's counsel referenced a three-month review period prior to the termination hearing and asked what communication was like with Father during that time. Hensley indicated that she did not have communication with Father until a phone call on October 27th. She indicated that Father participated in only one drug screen and had not complied with any other services. She testified that she placed referrals for services regarding a mental health assessment and court-ordered drug screens. She indicated Father did not take any initiative to contact her or DCS in order to work on reunification efforts and that she had to submit an investigative referral to find out where Father was living after he was released on August 18th. She also stated that Father did not contact her until she reached out to him. She asserted that Father had not taken any action to prove that reunifying with J.W. was a priority. She stated that Father had not requested that she do anything for him. When asked what concerns she would have if J.W. were to be placed in Father's care, she answered that it was a "huge concern," J.W. does not know Father, and J.W. last saw Father when he was two years old. Transcript Volume II at 22.

[15] CASA Double testified that she did not believe Father was capable of caring for J.W. or providing for his developmental and behavioral special needs. She indicated that she communicated with Father through Zoom meetings and child family team meetings but Father never contacted her on his own initiative to discuss J.W. and his case. She testified that Father had not made significant

progress in remedying the reasons for removal because he had not complied with services.

[16] In light of the unchallenged findings and the evidence set forth above and in the record, we cannot say the trial court clearly erred in finding a reasonable probability exists that the conditions resulting in the child's removal and the reasons for placement outside Father's care will not be remedied.

[17] To the extent Father challenges the trial court's finding that termination of the parent-child relationship is in the best interests of the child, we note that in determining the best interests of a child, the trial court is required to look to the totality of the evidence. *McBride v. Monroe Cnty. Office of Family & Children*, 798 N.E.2d 185, 203 (Ind. Ct. App. 2003). The court must subordinate the interests of the parent to those of the child. *Id.* The court need not wait until a child is irreversibly harmed before terminating the parent-child relationship. *Id.* The recommendation of a case manager and child advocate to terminate parental rights, in addition to evidence that the conditions resulting in removal will not be remedied, is sufficient to show by clear and convincing evidence that termination is in the child's best interests. *A.D.S. v. Ind. Dep't of Child Servs.*, 987 N.E.2d 1150, 1158-1159 (Ind. Ct. App. 2013), *trans. denied.*

[18] Hensley testified that it was her opinion that termination of the parent-child relationship was in J.W.'s best interests. CASA Double testified that she believed Father's parental rights should be terminated. Based on the totality of

the evidence, we conclude the trial court's determination that termination is in the child's best interests is supported by clear and convincing evidence.²

[19] For the foregoing reasons, we affirm the trial court.

[20] Affirmed.

Mathias, J., and Molter, J., concur.

² To the extent Father relies upon *In re G. Y.*, 904 N.E.2d 1257 (Ind. 2009), *reh'g denied*, we find that case distinguishable. In *In re G. Y.*, the mother was her child's sole caretaker for the first twenty months of his life. 904 N.E.2d at 1258. A year before the child's birth, Mother had delivered drugs to a police informant, she was arrested and incarcerated for the offense thirty-two months later when the child was twenty months old, and the trial court later terminated her parental rights. *Id.* at 1258-1259. The Court reversed and observed the mother's offense occurred before she became pregnant, there was no indication that she was anything but a fit parent during the first twenty months of the child's life, and she obtained post-release employment and suitable housing. *Id.* at 1262-1263. It also observed the mother maintained a consistent, positive relationship with her child while incarcerated, she had a lot of interaction with the child during their visits, and there was evidence of her commitment to reunification from the moment of her arrest including her attempt to arrange foster care with her sister and a friend. *Id.* at 1264-1265. Here, Father did not appear at the January 10, 2022 hearing despite being released from incarceration on August 18th and having been served with the date and time of the hearing. Father also did not comply with services. The record also reveals that Father was charged on August 26, 2016, more than two years after J.W.'s birth, with strangulation as a level 6 felony and battery resulting in bodily injury as a class A misdemeanor, and Father pled guilty to battery resulting in bodily injury as a class A misdemeanor.