

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In the Termination of the Parent-
Child Relationship of:

T.S. and R.S (Minor Children),
and F.S. (Father)

Appellant-Respondent,

v.

Indiana Department of Child
Services,

Appellee-Petitioner.

August 23, 2021

Court of Appeals Case No.
21A-JT-601

Appeal from the Lake Superior
Court

The Honorable Thomas P.
Stefaniak, Jr., Judge

Trial Court Cause No.
45D06-2009-JT-139
45D06-2009-JT-138

Bailey, Judge.

Case Summary

- [1] F.S. (“Father”) appeals the trial court’s judgment terminating his parental rights to his children T.S. and K.S. (collectively, “Children”). The only issue he raises on appeal is whether that judgment is clearly erroneous.
- [2] We affirm.

Facts and Procedural History

- [3] Father and J.M. (“Mother”)¹ are the parents of T.S., born March 22, 2010, and K.S., born September 14, 2011. Father has been incarcerated in an Illinois prison since 2012 for attempting to murder Mother on November 13, 2012. On that date, there was a protective order in effect prohibiting Father from contact with Mother and Children. Nevertheless, Father broke into Mother’s home in Illinois while Children were there and asleep. Father attacked Mother and attempted to strangle her, “as hard as [he] could, until [he] was tased by the [police].” Ex. v. I at 137. Father reported to the police that he had gone to Mother’s residence that day to kill Mother and then himself, stating “If I can’t live my life with my kids, she shouldn’t be able to live her life with them either.” Id. Father was convicted of attempted murder and sentenced to fifteen

¹ Both parents’ parental rights were terminated, but Mother does not participate in this appeal.

years in Illinois prison. Father's projected release date from prison is August of 2025, at which time he will be on parole for two years.

[4] Children were living with Mother in May of 2019 when the Indiana Department of Child Services (“DCS”) removed Children from Mother’s home and filed a petition alleging Children were Children in Need of Services (“CHINS”) due to “the deplorable conditions of the home, the alleged drug usage [in the home], lack of utilities, and the neglect of [Children].” Appealed Order at 1. Children were found to be CHINS and were placed in relative care with their maternal grandmother.

[5] On December 21, 2020, and January 7, 2021, respectively, DCS filed a motion and a supplemental motion requesting an order from the court that, pursuant to Indiana Code Section 31-34-21-5.6(b)(2)(B)(ii),² DCS was not required to make reasonable efforts to reunify Children with Father because Father had been convicted of the attempted murder of the mother of the children. The trial court granted that motion. Father requested visitation with Children, and DCS contacted both the court and the prison to inquire whether Father could have such visitation. The court denied the request as not being in Children’s best interests. The prison also stated that, given “the reason for [Father] being

² That subsection of the statute provides that reasonable efforts to reunify a child with the child’s parent are not required if the court finds that the parent had been convicted of attempting to murder the child’s other parent. Ind. Code § 31-34-21-5.6(b)(2)(B)(ii).

incarcerated,” it would not recommend that Father have visitation with Children. Tr. at 36.

[6] On September 15, 2020, DCS filed a petition to terminate Mother’s and Father’s parental rights to Children. Following a February 25, 2021, factfinding hearing, the trial court issued an order terminating the parental rights. That order stated, in relevant part:

... Father was incarcerated at the time of [Children’s] removal [from Mother’s home].

... No services were ordered for father until father’s release from incarceration.

Father is currently incarcerated and has been incarcerated for the past ten years. Father was convicted of attempted murder with the victim being the mother of these children. ...Father is set to be released in August of 2025.

Father has not had any contact with the children due to his incarceration. Father was incarcerated when the children were toddlers. The children are 9 and 10 years of age and do not have any significant relationship or bond with the father. Father is unable to care for these children and will be unable to care for these children for at least the next 4 ½ years. It would be unfair to the children to delay permanency.

The CHINS Court made a finding [that] no reasonable efforts [to reunify] were required for father due to father attempting to murder the mother. The safety of the children and the well-being of the children overrode any of father’s requests.

... Father is unable to care for the children due to his long incarceration. Father has been convicted of a violent crime against the mother. The children are thriving in relative placement.

Neither parent is providing any emotional or financial support for the child[ren].... Neither parent is in a position to properly parent these children. The children live in a relative placement and are bonded and thriving.

... The original allegations of neglect have not been remedied by the parents. Parents have not demonstrated an ability to independently parent the children and provide the necessary care, support, and supervision. There is no basis for assuming either parent will complete the necessary services and find themselves in a position to receive the children into the home....

The children continue to reside in stable relative placement which has indicated both a willingness and ability to adopt the children. It would be unfair to the children to delay such permanency on the very remote likelihood of the parents committing to and completing services.

There is a reasonable probability that the continuation of the parent-child relationship poses a threat to the well-being of the children in that: because of the reasons stated above. Additionally, the children deserve a loving, caring, safe[,] and stable home.

It is in the best interests of the children and [their] health, welfare[,] and future that the parent-child relationship between the children and parents be forever fully and absolutely terminated.

Appealed Order at 1-3.

- [7] The trial court entered its judgment terminating Father's parental rights to Children. Father now appeals.

Discussion and Decision

Standard of Review

- [8] Father maintains that the trial court's order terminating his parental rights was clearly erroneous. We begin our review of this issue by acknowledging that the traditional right of parents to establish a home and raise their children is protected by the Fourteenth Amendment of the United States Constitution. *See, e.g., In re C.G.*, 954 N.E.2d 910, 923 (Ind. 2011). However, a trial court must subordinate the interests of the parents to those of the child when evaluating the circumstances surrounding a termination. *In re K.S.*, 750 N.E.2d 832, 837 (Ind. Ct. App. 2001). 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.
- [9] Before an involuntary termination of parental rights can occur in Indiana, DCS is required to allege and prove, among other things:

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

* * *

(iii) The child has been removed from the parent and has been under the supervision of a local office or probation department for at least fifteen (15) months of the most recent twenty-two (22) months, beginning with the date the child is removed from the home as a result of the child being alleged to be a child in need of services or a delinquent child;

(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) [and] that termination is in the best interests of the child

I.C. § 31-35-2-4(b)(2). DCS need establish only one of the requirements of subsection (B) before the trial court may terminate parental rights. *Id.* DCS's "burden of proof in termination of parental rights cases is one of 'clear and

convincing evidence.’” *In re G.Y.*, 904 N.E.2d 1257, 1260-61 (Ind. 2009) (quoting I.C. § 31-37-14-2).

[10] When reviewing a termination of parental rights, we will not reweigh the evidence or judge the credibility of the 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 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*.

[11] Here, in terminating Father’s parental rights, the trial court entered specific findings of fact and conclusions thereon. When a trial court’s judgment contains special findings and conclusions, we apply a two-tiered standard of review. *Bester v. Lake Cnty. Off. of Fam. & Child.*, 839 N.E.2d 143, 147 (Ind. 2005). First, we determine whether the evidence supports the findings and, second, we determine 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). If the evidence and inferences support the trial court’s decision, we must affirm. *In re L.S.*, 717 N.E.2d at 208.

Conditions that Resulted in Children's Removal/Continued Placement

- [12] Father does not challenge any specific factual findings of the court. Rather, he maintains that the trial court erred in determining that there is a reasonable probability that the conditions that resulted in Children's removal and continued placement outside the home will not be remedied. We must determine whether the evidence most favorable to the judgment supports the trial court's determination. *In re D.D.*, 804 N.E.2d at 265; *Quillen*, 671 N.E.2d at 102. In doing so, we engage in 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 determine whether there is a reasonable probability that those conditions will not be remedied." *Id.* (quotations and citations omitted).
- [13] In the first step, we consider not only the initial reasons for removal, but also the reasons for continued placement outside the home. *In re N.Q.*, 996 N.E.2d 385, 392 (Ind. Ct. App. 2013). In the second step, the trial court must judge a parent's fitness to care for his or her children at the time of the termination hearing, taking into consideration evidence of changed conditions. *In re E.M.*, 4 N.E.3d at 643. The court must also "evaluate the parent's habitual patterns of conduct to determine the probability of future neglect or deprivation of the child." *Moore v. Jasper Cnty. Dep't of Child Servs.*, 894 N.E.2d 218, 226 (Ind. Ct. App. 2008) (quotations and citations omitted); *see also In re M.S.*, 898 N.E.2d 307, 311 (Ind. Ct. App. 2008) (noting the "trial court need not wait until a child is irreversibly harmed such that his physical, mental, and social development

are permanently impaired before terminating the parent-child relationship”). In evaluating the parent’s habitual patterns of conduct, the court may disregard efforts made shortly before the termination hearing and weigh the history of the parent’s prior conduct more heavily. *In re K.T.K.*, 989 N.E.2d 1225, 1234 (Ind. 2013). DCS is not required to rule out all possibilities of change; rather, it need establish only that there is a reasonable probability the parent’s behavior will not change. *Moore*, 894 N.E.2d at 226.

[14] Here, when Children were removed from Mother’s home, Father was not living with them due to his incarceration for his attempted murder of Mother. “Removal” from Father then occurred when DCS removed Children from Mother’s home and were unable to place them with Father due to his incarceration. *See In re A.G.*, 45 N.E.3d 471, 476-77 (Ind. Ct. App. 2015) (holding “constructive removal” from Father occurred when paternity was established and DCS was unable to place child with Father due to his incarceration) (citing *In re I.A.*, 934 N.E.2d 1127, 1134 (Ind. 2010)), *trans. denied*. At the time of the termination hearing, Father was still incarcerated, with at least four and a half years left until he could possibly be released from prison. Thus, at the time of the termination hearing, Father had not remedied the reason for Children’s constructive removal from him, i.e., his incarceration. *See Castro v. State Off. of Fam. & Child.*, 842 N.E.2d 367, 374 (Ind. Ct. App. 2006) (concluding that the trial court did not commit clear error in finding that conditions leading to the child’s removal from father would not be remedied where father, who had been incarcerated throughout the CHINS and

termination proceedings, was not expected to be released until after the termination hearing), *trans. denied*. In fact, that reason for constructive removal will not be remedied for at least the next four and a half years, which is the earliest possible time when Father will be release from prison. The trial court did not clearly err when it found that Father is not likely to remedy the reasons for Children’s removal.³

Children’s Best Interests

[15] In determining whether termination of parental rights is in the best interests of a child, the trial court is required to look at the totality of the evidence. *In re A.K.*, 924 N.E.2d 212, 224 (Ind. Ct. App. 2010). “A parent’s historical inability to provide adequate housing, stability and supervision coupled with a current inability to provide the same will support a finding that termination of the parent-child relationship is in the child’s best interests.” *Castro*, 842 N.E.2d at 374. “Additionally, a child’s need for permanency is an important consideration in determining the best interests of a child, and the testimony of the service providers may support a finding that termination is in the child’s best interests.” *In re A.K.*, 924 N.E.2d at 224. Such evidence, “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

³ Because DCS need only establish one of the requirements of subsection (b)(2)(B) of Indiana Code Section 31-35-2-4, we do not address Father’s argument that his relationship with Children would pose no threat to their well-being.

child's best interests." *In re A.D.S.*, 987 N.E.2d 1150, 1158-59 (Ind. Ct. App. 2013), *trans. denied*.

[16] Father has been in prison for most of Children's lives because he tried to kill their mother while they were asleep in the home. "[I]ndividuals who pursue criminal activity run the risk of being denied the opportunity to develop positive and meaningful relationships with their children." *Castro*, 842 N.E.2d at 374 (quotation and citation omitted). In *Castro*, we noted that, when a parent has been incarcerated for most of a child's life, the parent has a "historic inability to provide housing, stability and supervision" for the child. *Id.* Such is the case here. And Father's continued incarceration at the time of the termination hearing "is strong evidence of his current inability to provide the same." *Id.*

[17] Furthermore, the evidence established that (1) Father has not seen Children since his incarceration when they were toddlers, (2) Children currently need stability and permanency, (3) Children are doing well in their current placement with their maternal grandmother who is willing to adopt them, (4) there is no evidence that Father would be able to parent Children upon his release from prison, and, (4) in any case, Father cannot provide any care at all for Children for at least four and half more years, by which time Children will be teenagers. Thus, it is unsurprising that the DCS Family Case Manager testified that termination of parental rights is in Children's best interests. *See In re S.P.H.*, 806 N.E.2d 874, 883 (Ind. Ct. App. 2004) (holding that the needs of the children were too substantial to force them to wait while determining if their incarcerated father would be able to be a parent for them).

[18] The trial court did not clearly err in finding that termination was in Children's best interests.

Conclusion

[19] The trial court did not commit clear error when it terminated Father's parental rights to Children.

[20] Affirmed.

Crone, J., and Pyle, J., concur.