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# IN THE COURT OF APPEALS OF INDIANA

In re the Termination of the Parent-Child Relationship of P.B. and B.B. (Minor Children) and A.B. (Mother) and L.L. (Father),

A.B. (Mother) and L.L. (Father),

*Appellants-Respondents,*

v.

Indiana Department of Child Services,

*Appellee-Petitioner*

November 22, 2022

Court of Appeals Case No. 22A-JT-1397

Appeal from the Fulton Circuit Court

The Honorable A. Christopher Lee, Judge

Trial Court Cause Nos. 25C01-2110-JT-147 25C01-2110-JT-148

**Vaidik, Judge.**

# Case Summary

[1] Indiana Code section 31-34-12-2 provides "a finding in a proceeding to terminate parental rights must be based upon clear and convincing evidence." The U.S. Supreme Court has held that the clear and convincing evidence burden of proof in termination cases satisfies the Due Process Clause of the Fourteenth Amendment, and that proof beyond a reasonable doubt is not required. Today, we hold the clear and convincing evidence standard also satisfies the Due Course of Law Clause of the Indiana Constitution.

# Facts and Procedural History

[2] A.B. ("Mother") is the biological mother of B.B., born in 2016, and P.B., born in 2020. L.L. ("Father") is the biological father of P.B. B.M. is the biological father of B.B., and his rights were also terminated, but he does not participate in this appeal.

[3] In early August 2020, the Department of Child Services (DCS) in Fulton County received a report of a young child wandering alone outside. Family Case Manager (FCM) Cynthia Rainey investigated and found three-year-old B.B. alone and naked two blocks from his home. FCM Rainey returned B.B. to the home, where he resided with Mother, six-month-old P.B., and another sibling. A safety plan was implemented, in which Mother agreed to drug tests. Both tests administered that month were positive for methamphetamine. On September 1, FCM Rainey returned to the home, but no one answered the

door. Through the window, she could see P.B. strapped to a car seat, apparently alone. With help from law enforcement, FCM Rainey entered the home and found P.B. had a urine-soaked diaper and B.B. was dirty, smelled, and had dried fecal matter on him. The children were removed from Mother's care due to ongoing concerns over her drug use, inability to properly supervise the children, and unsanitary home conditions. At this time, Father was incarcerated for violating his parole from a 2012 burglary conviction, and B.M. could not be located. The children were placed with their maternal aunt, where they have since remained.[1]

[4] The next day, DCS filed petitions alleging the children were in need of services (CHINS). In February 2021, Mother admitted both children were CHINS, and Father admitted as to P.B. The trial court found P.B. to be a CHINS that day. Due to difficulty locating B.M., B.B. was not found to be a CHINS until March.

[5] In the year and a half following her children's removal, Mother failed to comply with the case plan. She rarely attended visitation with the children—at one point going seven months without seeing them. Mother also refused to participate in drug screens, although she did participate in two during her initial substance-abuse assessment in early 2021. Both tests were positive for methamphetamine. Her participation in DCS services was mixed. She

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[1] The sibling was placed with her biological father, who assumed custody, and thus she was not part of the CHINS proceedings.

consistently attended individual therapy but refused to participate in home-based case management services to help her gain stable employment and housing, neither of which she achieved during the proceedings.

[6] Father only partially complied with the case plan. He was incarcerated from the time of P.B.'s removal until January 2021. Upon his release, he began weekly supervised visitation with P.B. Around this time, he "fell into a pattern of ongoing drug use." Appellants' App. Vol. II p. 212. He tested positive for methamphetamine, amphetamine, and THC in February and March, refused to test in April, and tested positive again in May. That same month, he was arrested for Level 6 felony possession of methamphetamine and later pled guilty. He was released in October, and soon after tested positive for methamphetamine. He thereafter refused to submit to DCS drug screens.

[7] Also in October 2021, DCS petitioned to terminate Mother's and Father's parental rights to P.B. and Mother's and B.M.'s parental rights to B.B. Father was arrested again in December but was released in January 2022 and began participating in some DCS services. While he continued to refuse any home-based case management services or to submit to any drug tests with DCS, he consistently attended therapy to address his substance abuse, began working with a recovery coach, and continued attending supervised visitation.

[8] The termination hearing occurred in March 2022. The State asked the trial court to take judicial notice of Father's pending criminal case, in which he was charged with Level 6 felony domestic battery and Level 6 felony strangulation.

Over Father's objection, the trial court stated it would "take judicial notice of the case." Tr. Vol. II p. 52. FCM Susann Field testified that Father stopped submitting to DCS drug tests in December 2021 and that DCS considered these missed tests to be positive for illegal substances. Father testified and acknowledged he had not been submitting to DCS drug testing but contended he had been participating in drug tests with his probation officer and had not used methamphetamine since December 2021. He also testified he had a pending domestic-violence case but that he had agreed to take domestic-violence classes in exchange for its dismissal. Father further testified he had been incarcerated multiple times during the CHINS proceedings and that this hurt P.B. because "she gets to know me, then I go away, then we have to start over again." *Id.* at 53.

[9] Sarah Chambers, Father's visitation supervisor, testified about the effects of Father's incarcerations on P.B. She testified that at the beginning of the case, Father and P.B. appeared to have no bond. She stated this improved with Father's consistent visitation, but then he was incarcerated in May 2021 and, upon his release in October, P.B. did not appear to recognize him, screamed and cried when he held her, and the two did not seem to have a bond due to the "lack of [Father's] presence in her life." *Id.* at 117. Both FCM Field and Sherry Shepard, the children's Court Appointed Special Advocate (CASA), testified they believed termination to be in the children's best interests. The children's aunt also testified that the children were not meeting developmental milestones

at the time of removal but had made progress in her care and that she planned to adopt P.B. and "possibly" B.B. *Id.* at 170.

[10] After the hearing, the trial court issued orders terminating Mother's and B.M.'s rights as to B.B. and Mother's and Father's rights as to P.B.

[11] Father and Mother now separately appeal.

# Discussion and Decision

## I. Mother's Appeal

[12] Mother's sole argument on appeal is that the "clear and convincing evidence" burden of proof in termination cases is unconstitutional.[2] Whether a statute is constitutional on its face is a question of law, which our court reviews de novo. *S.S. v. Ind. Dep't of Child Servs.*, 67 N.E.3d 1138, 1144 (Ind. Ct. App. 2017). Statutes are "clothed in a presumption of constitutionality." *Id.* (citation omitted). An individual challenging the constitutionality of a statute bears the burden of rebutting this presumption. *Id.* "All reasonable doubts must be resolved in favor of an act's constitutionality. When a statute can be so

[2] DCS alleges Mother waived this issue by failing to raise it in the trial court. While "the general rule is that failure to challenge the constitutionality of a statute in the court below results in waiver of review of the issue on appeal, appellate courts are not thereby prohibited from considering the constitutionality of a statute even though the issue has otherwise been waived." *Matter of K.Y.*, 145 N.E.3d 854, 861 (Ind. Ct. App. 2020), *trans. denied*. Given the important interests at stake here, we decline to decide this issue on waiver alone.

construed to support its constitutionality, we must adopt such a construction." *Id.* (internal citation omitted).

[13] Indiana Code section 31-34-12-2 provides "a finding in a proceeding to terminate parental rights must be based upon clear and convincing evidence." Mother contends this standard is unconstitutional under Article 1, Section 12 of the Indiana Constitution, which provides in part that "every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law." Mother asserts "Indiana's Constitution demands the highest level of proof for injuries to reputation" and thus the proper standard is beyond a reasonable doubt. Mother's Br. p. 17.

[14] The U.S. Supreme Court in *Santosky v. Kramer*, 455 U.S. 745 (1982), addressed this exact issue in the context of the Due Process Clause of the Fourteenth Amendment, which provides in part, "nor shall any State deprive any person of life, liberty, or property, without due process of law." In *Santosky*, the Court recognized that parents have a liberty interest in the care and upbringing of their children and that procedural due process requires a standard of proof that reflects this interest. To determine that standard, the Court considered the three factors set out in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976): the private interests affected by the proceeding, the risk of error created by the State's chosen procedure, and the countervailing governmental interest supporting use of the challenged procedure. The Court ultimately concluded that the clear and convincing evidence standard was constitutional, considering the strong private interests held by parents, the risk of error in implementing a lower standard,

and the important government interests in preserving and promoting child welfare.

[15] The Court also rejected the argument that a higher standard—specifically the beyond a reasonable doubt standard—is required, noting "termination proceedings often require the factfinder to evaluate medical and psychiatric testimony, and to decide issues difficult to prove to a level of absolute certainty, such as lack of parental motive, absence of affection between parent and child, and failure of parental foresight and progress," all of which is evidence "rarely susceptible to proof beyond a reasonable doubt." *Id.* at 769. However, the Court went on to say state courts and legislatures could determine for themselves "the precise burden equal to or greater than [the clear and convincing evidence] standard." *Id.* at 769-70.

[16] Mother acknowledges that *Santosk*y "sets the *minimum* burden of proof in termination cases at 'clear and convincing' evidence," but encourages us to "accept the Supreme Court's invitation" to examine this issue under our state constitution and "hold that under Indiana's constitution the parent-child relationship should only be terminated upon the State proving its case 'beyond a reasonable doubt.'" Mother's Br. pp. 11, 17-18. Specifically, Mother points to the textual differences between the two clauses, emphasizing that Indiana's Due Course of Law Clause, unlike the federal Due Process Clause, protects from reputational injury and asserts that "[p]erhaps nothing is more essential to a parent's character and reputation than the parent's relationship with his children." *Id.* at 17.

[17] But our Supreme Court has held that, even when analyzing claims of reputational injury, we employ the same methodology to claims of denial of procedural due process in violation of Article 1, Section 12 as the U.S. Supreme Court uses to analyze claims of violation of the federal Due Process Clause. *Doe v. O'Connor*, 790 N.E.2d 985, 988 (Ind. 2003); *Matter of D.H.*, 119 N.E.3d 578, 586 n.16 (Ind. Ct. App. 2019) ("[T]he due process analysis under [the state and the federal constitutions] is the same."). *Santosky* shows that procedural due process requires a standard that reflects the interests of both the state and parents in termination proceedings as well as the risk of error. The U.S. Supreme Court ultimately concluded that the clear and convincing evidence standard does this, and we see no reason to reach a different conclusion here.

[18] Mother argues injuries to reputation "demand . . . the highest level of proof" under the Indiana Constitution. Mother's Br. p. 17. But she gives no support for this assertion. And given that this Court has found that the clear and convincing evidence standard is sufficient to protect a parent's liberty interest in their child, we see no reason why this standard would not sufficiently protect their reputation. *See Waltz v. Daviess Cnty. Dep't of Pub. Welfare*, 579 N.E.2d 138, 140 (Ind. Ct. App. 1991) (the clear and convincing evidence standard "follows from the fact that termination severs all of a parent's rights to the child, thereby extinguishing the constitutionally-protected right of the parent to make a home and raise the child, which has been recognized as one of the basic civil rights of man"), *trans. denied*. Mother's argument would have us hold that a higher burden is required in termination cases not based on a parent's rights over their

child but based on the reputational harm of termination. We do not believe there is support for such a holding.

[19] Mother has not shown the clear and convincing evidence standard violates the Indiana Constitution.

# II. Father's Appeal

## A. Judicial Notice

[20] Father first argues the trial court abused its discretion by taking judicial notice of his pending criminal case. Indiana Evidence Rule 201 provides in part that a court may take judicial notice of "the existence of . . . records of a court of this state." "Even if court records may be judicially noticed, 'facts recited within the pleadings and filings that are not capable of ready and accurate determination are not suitable for judicial notice.'" *Matter of D.P.*, 72 N.E.3d 976, 983 (Ind. Ct. App. 2017) (quoting *Brown v. Jones*, 804 N.E.2d 1197, 1202 (Ind. Ct. App. 2004), *trans. denied*.).[3] "Unless principles of claim preclusion apply, judicial notice should be limited to the fact of the record's existence, rather than to any facts found or alleged within the record of another case." *Id.* (quotation omitted).

[3] As noted in *D.P.*, *Brown* was decided before Rule 201 was amended to allow judicial notice of state court records and addressed a court taking judicial notice of its own records. Nonetheless, we agree with the court in *D.P.* that "its general observations regarding the proper extent of judicial notice of a court record, when such notice is permitted, are still valid." *D.P.*, 72 N.E.3d at 983 n.3.

[21] Here, the trial court stated it was taking judicial notice of "the case," but in its findings of fact, the court stated: "Father's housing is also questionable because Father lives with his girlfriend who also happens to be the victim in his pending domestic violence case." Appellants' App. Vol. II p. 213. Father argues the court's finding that the victim was his girlfriend goes beyond taking judicial notice of the existence of the case itself. We don't find that the trial court went beyond what it may judicially notice. The trial court's finding merely accepts the fact that Father has been alleged to have committed domestic violence against his current live-in girlfriend and the permissible inference that allegations of this sort make his housing stability "questionable." *See D.P.*, 72 N.E.3d at 984 (trial court could take judicial notice of the fact that father had a pending charge of domestic battery against the mother). In any case, any issues with Father's housing were not what led to his termination. In fact, Father's housing situation was barely mentioned at the hearing—aside from his testimony that he lives with his girlfriend. As explained more fully below, the issues leading to termination predominantly involved Father's criminal behavior and drug use. As such, any error in this finding is "sufficiently minor so as not to affect the substantial rights" of Father. *See* Ind. Appellate Rule 66(A).

## B. Sufficiency of Evidence

[22] Father also argues the evidence presented at the termination hearing does not prove the statutory requirements for termination. When reviewing the termination of parental rights, we do not reweigh the evidence or judge witness

credibility. *In re K.T.K.*, 989 N.E.2d 1225, 1229 (Ind. 2013). Rather, we consider only the evidence and reasonable inferences most favorable to the judgment of the trial court. *Id.* When a trial court has entered findings of fact and conclusions of law, we will not set aside the trial court's findings or judgment unless clearly erroneous. *Id.* To determine whether a judgment terminating parental rights is clearly erroneous, we review whether the evidence supports the trial court's findings and whether the findings support the judgment. *In re V.A.*, 51 N.E.3d 1140, 1143 (Ind. 2016).

[23] A petition to terminate parental rights must allege, 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). DCS must prove the alleged circumstances by clear and convincing evidence. I.C. § 31-34-12-2. If the court finds the allegations in a petition are true, the court shall terminate the parent-child relationship. I.C. § 31-35-2-8(a).

### *1. Findings of Fact*

[24] Father first challenges two of the trial court's findings of fact. He challenges Findings 24 and 25, which provide:

> 24. Father made a point of stating at the permanency hearing on September 16, 2021, that from his incarceration in May to the hearing date marked the longest time in his adult life that he had been drug free. Upon his release in October 2021 Father had a short span of negative screens with the DCS, however, he tested positive for methamphetamine on November 12, 2021, has failed to screen for DCS since being reincarcerated in December 2021, and admitted to the FCM that he had been using again. Father's recovery coach discussed her employer performing drug screening of Father, with positive screens prior to January 2022 and none since. **No evidence of the screening process used, frequency, latest screen taken, or confirmed results have been offered by Father.**
>
> 25. Father also recognized that he was not relieved of his duty to participate in the DCS drug screen protocol, which DCS had moved to their Miami County office to accommodate Father. Father has acknowledged a long history of illegal drug use, confirmed that the period of incarceration in 2021 remained his longest period of sobriety, and **has presented no evidence to controvert the assumption that he is actively engaged in illegal drug use once again.**

Appellants' App. Vol. II pp. 212-13 (emphases added).

[25] Father does not argue these findings are erroneous. Instead, he takes issue with the fact that the trial court noted he had not provided evidence that the tests he was submitting elsewhere were negative. He argues this impermissibly places the burden on him to prove he is not using illegal substances, rather than on DCS to prove by clear and convincing evidence that he was. We disagree. Indisputably, Father did not submit drug tests to DCS after December 2021, despite knowing it was a required part of the case plan. DCS presented evidence that, per DCS's policy, these were considered positive screens. *See In re A.B.*, 924 N.E.2d 666, 671 (Ind. Ct. App. 2010) ("A parent whose drug use led to a child's removal cannot be permitted to refuse to submit to drug testing, then later claim the DCS has failed to prove that the drug use has continued."). In response, Father contended he did not submit to DCS drug screens because he was already providing drug tests to his probation officer. It is not impermissible burden-shifting for the court to note that Father did not bolster this argument with any evidence as to details or results of these tests.

### *2. Conditions Remedied Conclusion*

[26] Father challenges the trial court's conclusion there is a reasonable probability the conditions resulting in P.B.'s removal and continued placement outside the home will not be remedied. In determining whether the conditions resulting in a child's removal will not be remedied, the trial court engages in a two-step analysis. First, the trial court must ascertain what conditions led to the child's placement and retention outside the home. *In re K.T.K.*, 989 N.E.2d at 1231.

Second, the trial court must determine whether there is a reasonable probability those conditions will not be remedied. *Id.* The "trial court must consider a parent's habitual pattern of conduct to determine whether there is a substantial probability of future neglect or deprivation." *Id.* (quotation omitted).

[27] When P.B. was removed from Mother's care, Father was incarcerated. Father has been incarcerated for most of P.B.'s life and throughout the CHINS proceedings. He was arrested twice after P.B.'s removal and had pending criminal charges at the time of the termination hearing. Furthermore, Father's ongoing substance abuse and inconsistent participation in DCS services led to P.B.'s continued placement outside the home. Father consistently tested positive for methamphetamine throughout the CHINS proceedings and admitted to using methamphetamine as recently as a few months before the termination hearing.

[28] Father points to evidence given that his participation in DCS services—including substance-abuse counseling—improved in the two months leading up to termination. But it is within the court's discretion to "disregard the efforts [Father] made only shortly before termination and to weigh more heavily [his] history of conduct prior to those efforts." *Id.* at 1234.

[29] The trial court did not err when it concluded there is a reasonable probability the conditions leading to P.B.'s removal will not be remedied.

### *3. Best Interests Conclusion*

[30] Father also challenges the trial court's conclusion termination is in the best interests of the children. In determining the best interests of a child, the trial court must look at the totality of the evidence. *See In re A.B.*, 887 N.E.2d 158, 167-68 (Ind. Ct. App. 2008). The trial court must subordinate the interests of the parents to those of the child. *Id.* at 168. Termination of a parent-child relationship is proper where the child's emotional and physical development is threatened. *In re K.T.K.*, 989 N.E.2d at 1235. A trial court need not wait until a child is irreversibly harmed such that their physical, mental, or social development is permanently impaired before terminating the parent-child relationship. *Id.* Additionally, a child's need for permanency is a "central consideration" in determining the best interests of a child. *Id.* We have previously held that the recommendation by both the case manager and child advocate to terminate parental rights, in addition to evidence 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. *L.S. v. Ind. Dep't of Child Servs.*, 987 N.E.2d 1150, 1158 (Ind. Ct. App. 2013), *trans. denied*.

[31] Here, FCM Field and CASA Shepard support the termination of Father's parental rights, believing it to be in P.B.'s best interests. Moreover, as we noted above, Father's issues with substance abuse have not been remedied and pose a safety risk if P.B. were returned to his care. *See In re A.S.*, 17 N.E.3d 994, 1006 (Ind. Ct. App. 2014) (finding termination of parental rights in children's best interests where parents did not address their substance-abuse issues or complete

recommended services during the two-year case), *trans. denied*. While this evidence alone supports the trial court's conclusion, we again note that permanency is a central consideration in determining best interests. Father argues he attended supervised visitation with P.B. when not incarcerated and that these visits went well. While this is true, we note that of the fourteen months between P.B.'s removal and the termination hearing, Father was incarcerated for ten. The record shows that, due to his ongoing legal troubles, he has failed to have any consistent presence in P.B.'s life. Both Father and the visitation supervisor testified that Father's incarcerations had a negative effect on P.B. and her relationship with Father. In contrast, P.B. currently resides with her maternal aunt, who has raised her from the age of six months and wishes to adopt her.

[32] We conclude the totality of the evidence supports the trial court's determination that termination of Father's parental rights is in P.B.'s best interests.

[33] Affirmed.

Riley, J., and Bailey, J., concur.