

# MEMORANDUM DECISION

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# IN THE COURT OF APPEALS OF INDIANA

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In the Matter of the Termination  
of the Parent-Child Relationship  
of M.L., Father, and K.M.,  
Minor Child,

M.L.,

*Appellant-Respondent,*

v.

Indiana Department of Child  
Services,

*Appellee-Petitioner.*

February 3, 2022

Court of Appeals Case No.  
21A-JT-1618

Appeal from the  
Delaware Circuit Court

The Honorable  
Kimberly S. Dowling, Judge  
Amanda L. Yonally, Magistrate

Trial Court Cause No.  
18C02-2011-JT-101

**Molter, Judge.**

[1] K.M. (“Child”) was born on September 13, 2016, to M.L. (“Father”) and B.M.<sup>1</sup> (“Mother”). In October 2019, Child was living with Mother and was removed from her home because Mother was arrested for illegal drug use. At the time of Child’s removal, Father was incarcerated in the Indiana Department of Correction. The Indiana Department of Child Services (“DCS”) petitioned to have Child adjudicated as a child in need of services, and the juvenile court did so. Since 2018, Father has been incarcerated and has had limited contact with Child. He has never visited with Child in person since his incarceration, and he has spoken with her on the telephone only a few times. Also, due to his incarceration, he was not eligible to participate in any services.

[2] In November 2020, DCS filed its petition to terminate Father’s parental rights to Child. A hearing was held in April 2021, and Father testified that he was incarcerated for most of Child’s life and never acted as Child’s primary caregiver. The DCS family case manager and Child’s court appointed special advocate both testified that termination was in Child’s best interests and that DCS’s permanency plan was for adoption of Child by her maternal grandparents. On June 28, 2021, the juvenile court ordered termination of Father’s parental rights to Child. Father contends the juvenile court erred in terminating his parental rights because DCS failed to prove by clear and

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<sup>1</sup> Mother does not participate in this appeal. She consented to Child’s adoption and was dismissed from the termination proceedings in March 2021. Appellant’s App. at 116.

convincing evidence the required elements for termination. Because we disagree, we affirm.

### **Facts and Procedural History**

- [3] Child was born to Father and Mother on September 13, 2016 and is five years old. When Child was about seven months old and in Mother’s care, DCS removed Child from Mother and initiated a child in need of services (“CHINS”) case due to Mother’s abuse of illegal drugs. At the time, Father was incarcerated in the Indiana Department of Correction (“IDOC”) after being convicted of Level 6 felony obstruction of justice. Although he visited with Child prior to his incarceration, Father had not yet established paternity of Child. He also did not provide for Child’s basic needs of shelter, food, clothing, and education, and he had never paid any child support. Eventually, Child was returned to Mother’s care, and the initial CHINS case was closed in 2018.
- [4] When Child was three years old, DCS again removed Child from Mother’s care and placed Child with her maternal grandparents (“Grandparents”) after Mother was arrested for abusing illegal drugs. DCS initiated another CHINS case in October 2019. Because Father’s earliest possible release date was in April 2022, DCS based its CHINS petition, in part, on Father’s incarceration. Father admitted to the allegations in the CHINS petition in October 2019, and the juvenile court adjudicated Child to be a CHINS.
- [5] On December 13, 2019, the juvenile court entered its dispositional order, with a plan of reunification. Father was still incarcerated, and Child was ordered to

remain with Grandparents. The order required Father to contact DCS weekly; notify DCS of any changes in address, household composition, employment, and telephone number; notify DCS of any new arrests or criminal charges; allow DCS and service providers to make announced or unannounced visits to the home; not use, consume, manufacture, trade, distribute, or sell any illegal controlled substances; not permit the possession, use, or consumption of any illegal controlled substances in the home or in the presence of Child; obey the law; complete substance abuse assessment and treatment; and submit to random drug screens.

[6] Since October 2019, Grandparents have primarily raised Child and provided her basic needs. Child never visited Father during his incarceration, and she spoke to him on the telephone only a few times. Consequently, in June 2020, the juvenile court found that Father had not enhanced his ability to fulfill his parental obligations. It entered a permanency order several months later, finding that Father did not comply with Child's case plan because he was ineligible to participate in any programs or gain employment in the IDOC. The juvenile court subsequently approved adoption as Child's permanency plan.

[7] On November 12, 2020, DCS filed a petition to terminate Father's parental rights. Several months later, on April 15, 2021, the juvenile court held an evidentiary hearing on the termination petition, and Father was still incarcerated.

[8] Family Case Manager (“FCM”) Kaitlyn Ihrle, who had worked with the family for at least four years, testified that she believed Child deserved immediate permanency, rather than waiting for Father’s release from the IDOC. She explained that Grandparents acted as Child’s parental figures, cared for Child for most of her life, and provided her basic needs. FCM Ihrle further testified that Father was incarcerated for most of the underlying CHINS case and communicated with Child only a couple of times since its beginning. She also stated that Father did not have income to support Child, and his only source of housing was at the IDOC. Similarly, Child’s court appointed special advocate (“CASA”), Miles Hill, testified that she believed termination and adoption were in Child’s best interests. CASA Hill also stated that Grandparents provided Child with permanency and a happy and healthy home.

[9] Further, at the hearing, DCS presented evidence regarding Father’s history of criminal offenses. In 2016, he was convicted of obstruction of justice. Then, while on probation in 2017, Father harbored an individual who had committed murder and was charged with assisting a criminal. He committed another offense in 2018 and pleaded guilty to resisting law enforcement. As a result of this conviction, Father was sentenced to eighteen months suspended to probation and ordered to serve this time consecutively with the sentence imposed under his charges for assisting a criminal, which was five years executed at the IDOC. These were the offenses that Father was incarcerated for during the underlying CHINS case and termination proceeding.

[10] On June 28, 2021, the juvenile court entered its decree terminating Father's parental rights. The juvenile court concluded, among other things, that: there was a reasonable probability that the conditions which resulted in Child's placement outside the home will not be remedied; there was a reasonable probability that the continuation of the parent-child relationship between Father and Child threatens Child's well-being; Child has been adjudicated a CHINS on two separate occasions; termination of parental rights was in Child's best interests; and Child's adoption was the satisfactory plan that DCS had for the care and treatment of Child. Father now appeals.

## **Discussion and Decision**

### **I. Standard of Review**

[11] When reviewing a termination of parental rights, we will not reweigh the evidence or judge the credibility of witnesses. *In re H.L.*, 915 N.E.2d 145, 149 (Ind. Ct. App. 2009). 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 juvenile court's judgment terminating a parent-child relationship only if it is clearly erroneous. *Id.* at 148–49.

[12] Where, as here, the juvenile court entered specific findings and conclusions, we apply a two-tiered standard of review. *In re B.J.*, 879 N.E.2d 7, 14 (Ind. Ct. App. 2008), *trans. denied*. First, we must determine whether the evidence

supports the findings,<sup>2</sup> and second, we determine whether the findings support the judgment. *Id.* A finding is clearly erroneous only when the record contains no facts or inferences drawn therefrom that support it. *Id.* If the evidence and inferences support the trial court’s decision, we must affirm. *A.D.S. v. Ind. Dep’t of Child Servs.*, 987 N.E.2d 1150, 1156 (Ind. Ct. App. 2013), *trans. denied.*

[13] As our Supreme Court has observed, “[d]ecisions to terminate parental rights are among the most difficult our trial courts are called upon to make. They are also among the most fact-sensitive—so we review them with great deference to the trial courts . . . .” *E.M. v. Ind. Dep’t of Child Servs.*, 4 N.E.3d 636, 640 (Ind. 2014). While the Fourteenth Amendment to the United States Constitution protects the traditional right of a parent to establish a home and raise their child, the law allows for the termination of those rights when a parent is unable or unwilling to meet their responsibility as a parent. *Bester v. Lake Cnty. Off. of Fam. & Child.*, 839 N.E.2d 143, 145 (Ind. 2005); *In re D.P.*, 994 N.E.2d 1228, 1231 (Ind. Ct. App. 2013).

[14] Parental rights are not absolute and must be subordinated to the child’s interests in determining the appropriate disposition of a petition to terminate the parent-child relationship. *In re J.C.*, 994 N.E.2d 278, 283 (Ind. Ct. App. 2013). The purpose for terminating parental rights is not to punish the parent but to protect

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<sup>2</sup> Father does not challenge the juvenile court’s findings of fact. So, he has waived any arguments relating to the unchallenged findings. *See In re S.S.*, 120 N.E.3d 605, 610 (Ind. Ct. App. 2019) (noting this court accepts unchallenged trial court findings as true).

the child. *In re D.P.*, 994 N.E.2d at 1231. Termination of parental rights is proper where the child's emotional and physical development is threatened. *Id.* The juvenile court need not wait until the child is irreversibly harmed such that their physical, mental, and social development is permanently impaired before terminating the parent-child relationship. *Id.*

## II. Sufficiency of the Evidence

[15] Before an involuntary termination of parental rights may occur, the State 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 [CHINS];

(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 State’s burden of proof for establishing these allegations in termination cases is one of clear and convincing evidence. *In re H.L.*, 915 N.E.2d at 149. Moreover, “if the court finds that the allegations in a petition described in section 4 of this chapter are true, the court *shall* terminate the parent-child relationship.” Ind. Code § 31-35-2-8(a) (emphasis added). On appeal, Father challenges only the juvenile court’s conclusions with respect to subparts (B) and (C).

***A. Subpart (B)***

[16] The juvenile court found that DCS proved, by clear and convincing evidence, that there was a reasonable probability that: (1) the conditions that resulted in Child’s removal or the reasons for placement outside the home of the parents will not be remedied, (2) the continuation of the parent-child relationship poses a threat to the well-being of Child, and (3) Child was adjudicated as a CHINS on two separate occasions. *See* Ind. Code § 31-35-2-4(b)(2)(B).

[17] On appeal, Father only alleges error from the juvenile court’s conclusions regarding subsections (i) and (ii) of Indiana Code section 31-35-2-4(b)(2)(B). But because Indiana Code section 31-35-2-4(b)(2)(B) is written in the disjunctive and requires the juvenile court to find only one of the three requirements of subsection (b)(2)(B) by clear and convincing evidence, the juvenile court’s conclusion that Child had, on two separate occasions, been adjudicated a CHINS satisfied the requirement listed in subsection (b)(2)(B). *A.D.S.*, 987 N.E.2d at 1157 n.6.

[18] Even if Child had not been adjudicated a CHINS on two separate occasions, we also find no error in the trial court’s conclusion that there was a reasonable probability that the conditions resulting in the removal of Child were unlikely to be remedied. In determining whether there is a reasonable probability that the conditions that led to a child’s removal and continued placement outside the home will not be remedied, we engage in a two-step analysis. *K.T.K. v. Ind. Dep’t of Child Servs.*, 989 N.E.2d 1225, 1231 (Ind. 2013). First, we must ascertain what conditions led to the child’s placement and retention in foster care, and second, we determine whether there is a reasonable probability that those conditions will not be remedied. *Id.*

[19] In the second step, the trial court must judge a parent’s fitness at the time of the termination proceeding, taking into consideration evidence of changed conditions and balancing a parent’s recent improvements against “‘habitual pattern[s] of conduct to determine whether there is a substantial probability of future neglect or deprivation.’” *E.M.*, 4 N.E.3d at 643 (quoting *K.T.K.*, 989 N.E.2d at 1231). Pursuant to this rule, “trial courts have properly considered evidence of a parent’s prior criminal history, drug and alcohol abuse, history of neglect, failure to provide support, and lack of adequate housing and employment.” *In re D.B.*, 942 N.E.2d 867, 873 (Ind. Ct. App. 2011). In addition, DCS need not provide evidence ruling out all possibilities of change; rather, it must establish only that there is a reasonable probability the parent’s behavior will not change. *In re Involuntary Termination of Parent-Child Relationship of Kay L.*, 867 N.E.2d 236, 242 (Ind. Ct. App. 2007). “We entrust

the 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." *E.M.*, 3 N.E.3d at 643. When determining whether the conditions for the removal would be remedied, the juvenile court may consider the parent's response to the offers of help. *D.B.*, 942 N.E.2d at 873.

[20] Here, Child was initially removed from the home due to Mother's arrest for abusing illegal drugs. At the time of removal, Father was incarcerated and unable to provide Child with housing or necessary care. Further, at the time of the termination hearing, the record reveals that virtually nothing had changed. Father was still incarcerated, as he has been for most of Child's life.

[21] As the juvenile court stated, Father's criminal history is significant and includes multiple felony convictions. First, shortly after Child's birth in 2016, Father was convicted of obstruction of justice and sentenced to thirty months with six months executed and twenty-four months suspended to probation. Then, while on probation the following year, he was charged with assisting a criminal when he provided assistance to someone who had committed murder. He was sentenced to five years executed in the IDOC. Then, Father committed another offense in 2018 and pleaded guilty to resisting law enforcement. He was sentenced to eighteen months suspended to probation and ordered to serve this time consecutively with the sentence imposed under his charges for assisting a criminal. Due to Father's latter two offenses, he has been incarcerated since September 2018. He also admitted to being incarcerated for at least three years

of Child's life, and Child was only four years old at the time of the termination hearing. Tr. at 9–13.

[22] The record further reveals that Father has not visited with Child since 2018, and they have had minimal contact. For example, in the six months leading to the termination hearing, Father spoke to Child “[m]aybe three times” on the telephone. *Id.* at 50. He also admitted to never paying child support. *Id.* at 16. Father has never been Child's primary caregiver or provided for her basic needs, and Grandparents have predominantly cared for her since at least 2019.

[23] Although Father points to evidence that demonstrates he loves Child and has tried to maintain his parental relationship despite his incarceration, Father's choices to repeatedly engage in criminal activity demonstrate that he cannot regulate his behavior enough to provide for Child's needs. Our courts have long recognized that “[i]n individuals who pursue criminal activity run the risk of being denied the opportunity to develop positive and meaningful relationships with their children.” *K.T.K.*, 989 N.E.2d at 1235–36.

[24] We also find Father's reliance on the decisions in *In re G.Y.*, 904 N.E.2d 1257 (Ind. 2009) and *In re J.M.*, 908 N.E.2d 191 (Ind. 2008) misplaced, as they are both easily distinguished. In *G.Y.*, the mother committed a crime before her child was born. 904 N.E.2d at 1258. Several years later, after her child's birth, she was arrested and sentenced. *Id.* at 1258–59. Upon the mother's arrest, she tried to arrange for childcare. *Id.* at 1259. When her efforts failed, DCS took custody of the child. *Id.* On transfer, the Indiana Supreme Court held that

there was insufficient evidence to establish that termination was in the child's best interests. *Id.* at 1264. The Court noted that mother had taken steps to better herself while incarcerated—including completing college courses, making housing and employment arrangements upon her release, completing a drug rehabilitation program, and completing a parenting class. *Id.* at 1262. The mother also maintained a consistent and positive relationship with the child, and there was no evidence that a pattern of criminal activity was likely to continue upon her release from prison. *Id.* at 1262–63 (describing how mother visited with her child once a month for a couple of hours and sent the child cards, pictures, and letters to connect with him). The Court additionally noted that the mother was to be released soon after the hearing. *Id.*

[25] The facts here contrast with those in *G.Y.* Father's criminal conduct arose shortly after Child's birth and continued throughout most of Child's life. Between 2016 and 2018, Father committed three felonies. Additionally, he has never been Child's primary caregiver or provided for her basic needs. Since 2018, Father has only communicated with Child through infrequent telephone calls and has never visited with her in person. In the six months leading to the termination hearing, Father spoke to Child on the telephone "[m]aybe three times." Tr. at 50. The facts of this case are clearly different from those in *G.Y.*

[26] Father also contends that his case is analogous to *J.M.* In *J.M.*, the juvenile court denied DCS's petition to terminate parental rights based, in part, upon evidence that the parents were being released from prison early and had completed programs during their incarcerations—meaning that the child's

permanency was not prejudiced by waiting upon the parents' release and to further judge their fitness. 908 N.E.2d at 194–96. After this court reversed the juvenile court's denial of the petition, the parents sought transfer. *Id.*

[27] The Indiana Supreme Court granted transfer and found that the record supported the juvenile court's decision that the parents' "ability to establish a stable and appropriate life upon release can be observed and determined within a relatively quick period. Thus, the child's need of permanency is not severely prejudiced." *Id.* at 196. The Court held that the juvenile court's order was not clearly erroneous and affirmed the juvenile court. *Id.* *J.M.* focused on the standard of appellate review in these cases, which is very deferential, and by which "[a]n appellate court may not substitute its own judgment for that of the trial court if any evidence or legitimate inferences support the trial court's judgment." *Best v. Best*, 941 N.E.2d 499, 502 (Ind. 2011). Because *J.M.* addressed how the juvenile court's findings should not be disturbed if supported by the evidence, *J.M.* is not applicable in this case.

[28] In short, DCS satisfied Subpart (B) because Child had twice before been adjudicated CHINS. Even if that had not been the case, clear and convincing evidence supports the trial court's conclusion that there is a reasonable

probability that the conditions that led to Child’s removal and continued placement outside Father’s care will not be remedied.<sup>3</sup>

***B. Subpart (C)***

[29] Father also challenges the juvenile court’s conclusion that termination of the parent-child relationship is in the best interests of Child. We note that in determining the best interests of a child, the trial court is required to look beyond the factors identified by DCS and to the totality of the evidence. *Z.B. v. Ind. Dep’t of Child Servs.*, 108 N.E.3d 895, 903 (Ind. Ct. App. 2018), *trans. denied*. The court must subordinate the interests of the parent to those of the child, and the court need not wait until a child is irreversibly harmed before terminating the parent-child relationship. *Id.* Moreover, the recommendations of both the case manager and the 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 child’s best interests. *A.D.S.*, 987 N.E.2d at 1158–59.

[30] A juvenile court “need not wait until the child is irreversibly harmed such that [their] physical, mental, and social development is permanently impaired before terminating the parent-child relationship.” *In re A.K.*, 924 N.E.2d 212, 224 (Ind. Ct. App. 2010). Additionally, a child’s need for permanency is an

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<sup>3</sup> Due to the disjunctive nature of Indiana Code section 31-35-2-4(b)(2)(B) and the sufficient evidence supporting the juvenile court’s conclusion under subsection (i), we will not address Father’s argument that DCS failed to present clear and convincing evidence that the continuation of the parent-child relationship poses a threat to Child’s well-being. *See* Ind. Code § 31-35-2-4(b)(2)(B)(ii).

important consideration in determining the best interests of a child. *Id.* At the time of the termination hearing, Child had been living with Grandparents for more than one year, and Father had failed to make the changes in his life necessary to provide Child with a safe and healthy environment. As discussed above, DCS presented sufficient evidence that there was a reasonable probability that Father would not remedy the reasons for Child's removal from his care.

[31] FCM Ihrle also opined that termination of Father's parental rights was in the best interests of Child. She testified that she had no reason to believe she could place Child in Father's care because, at the time, he had government housing at the IDOC and no income to support Child. She also stated that, due to Father's conduct, he was not eligible to participate in any services. Tr. at 41. She testified that Grandparents have been Child's parental figures and provided her basic needs for most of her life. FCM Ihrle further stated that Child is happy in her current placement and deserves permanency now, especially since Grandparents are the family that she has known.

[32] Similarly, CASA Hill stated that she believed that termination of Father's parental rights was in the best interests of Child. She testified that Grandparents provide child with a happy and healthy home, and that Grandparents take care of Child's needs. CASA Hill further stated that Child deserves permanency now to continue with her life. She also testified that adoption by Grandparents was in Child's best interests moving forward.



[33] The juvenile court made findings sufficient to terminate Father's parental rights, and those findings, which are supported by evidence, are unchallenged. Father has thus failed to establish error in this regard. Accordingly, we affirm the juvenile court's order terminating Father's parental rights.

[34] Affirmed.

Robb, J., and Riley, J., concur.