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.C. (Minor Child)

and

U.C. (Father),

Appellant-Respondent,

v.

Indiana Department of Child Services,

Appellee-Petitioner.

April 9, 2021

Court of Appeals Case No. 20A-JT-1826

Appeal from the Warrick Superior Court

The Honorable J. Zach Winsett, Judge

Trial Court Cause No. 87D01-2001-JT-1

Bailey, Judge.

Case Summary

[1] U.C. ("Father") appeals the termination of his parental rights to S.C. ("Child"), upon the petition of the Warrick County Department of Child Services ("the DCS"). We affirm.

Issues

[2] Father presents two consolidated and restated issues for review:

I. Whether the trial court abused its discretion in denying Father's request for a continuance; and

II. Whether the DCS established, by clear and convincing evidence, the requisite statutory elements to support the termination decision.

Facts and Procedural History

[3] On March 18, 2018, the DCS received a report that Father had physically abused Child's older half-sibling. Father and A.W. ("Mother")[1] submitted to drug screens and both tested positive for THC. Father was court-ordered to leave the hotel where the family had been temporarily residing, and Mother initially retained custody of Child and Child's half-sibling. However, on June 8, 2018, Mother contacted the DCS and reported that she could not care for the

[1] Mother consented to Child's adoption and is not an active party to this appeal.

children. Child was placed in the care of Tiffany Beck ("Beck"), a maternal family friend.[2]

[4] On June 28, 2018, Child was adjudicated a Child in Need of Services ("CHINS"). Father was ordered to participate in services, to include drug screens, child visitation and home-based therapy. He was to maintain contact with the DCS, obtain stable employment and housing, and complete a parental assessment, a psychological evaluation, and a substance abuse evaluation. For the majority of the CHINS proceedings, Father was incarcerated. When he was not incarcerated, Father's participation in services was sporadic. His participation was hampered by lack of housing, lack of transportation, and a methamphetamine use relapse. On December 31, 2019, the DCS petitioned to terminate Father's parental rights.

[5] On March 10, 2020 and July 29, 2020, the trial court conducted a factfinding hearing. On September 3, 2020, the trial court entered its findings, conclusions, and order terminating Father's parental rights to Child. Father now appeals.

[2] Child's half-sibling was placed with a relative and is not a part of this termination proceeding.

Discussion and Decision

Motion for Continuance

[6] Father was appointed counsel on January 31, 2020 and an evidentiary hearing was set for March 10, 2020. On March 6, 2020, Father's counsel filed a written motion for a continuance, which was apparently not ruled upon. When the parties convened for an evidentiary hearing on March 10, Father orally moved for a continuance. Counsel represented to the trial court that only one brief telephonic conference had been conducted due to Father's incarceration. Counsel suggested that Father's anticipated move to a community transition facility would better facilitate communication. The trial court denied the continuance, stating that there had been adequate time for preparation. The hearing commenced but the presentation of evidence did not conclude, and the hearing was scheduled to reconvene on May 8, 2020. This hearing date was rescheduled due to pandemic restrictions and the hearing was ultimately reconvened on July 29, 2020. Father contends that his due process rights were violated when the trial court denied his motion for continuance of the evidentiary hearing.

[7] The decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court. *Rowlett v. Vanderburgh Cnty. Off. of Family and Children*, 841 N.E.2d 615, 619 (Ind. Ct. App. 2006). We will reverse the trial court only for an abuse of that discretion. *Id.* An abuse of discretion may be found in the denial of a motion for a continuance when the moving party has

shown good cause for granting the motion. *Id.* However, no abuse of discretion will be found when the moving party has not demonstrated that he or she was prejudiced by the denial. *Id.*

[8] Father claims that he, like the appellant in *Rowlett*, has been afforded inadequate time to avail himself of services to preserve his parental rights. In *Rowlett*, the father was incarcerated two months after his minor children were taken into protective custody and before he was ordered to perform any services. *Id*. at 618. He was still incarcerated at the time his parental rights were terminated, not providing him with the chance to participate in services. *Id.* At the scheduling conference, four months prior to the termination hearing, the father objected to the date set because he was to be released six weeks after the scheduled date of the hearing. *Id.* Then, a month later, still three months before the hearing, the father filed a motion to continue, which was denied by the trial court. *Id*. On appeal, we found that the father had made positive strides in turning his life around while in prison, including not using drugs, participating in a Therapeutic Community, participating in nearly 1,100 hours of individual and group services, and earning twelve hours of college credit. *Id*. at 619–20. Based on his improvement and because continuing the hearing until sometime after the father was released would have little immediate effect on the children as the plan was adoption by the maternal grandmother, we concluded that the trial court should have granted the father a continuance. *Id*. at 620.

[9] We find that the instant facts are distinguishable from those in *Rowlett*. Here, Father requested a continuance a scant four days before the hearing. Counsel

anticipated that attorney-client communication would be easier when Father moved to a community transition program. However, as the trial court observed, counsel had been appointed several weeks earlier and had preparation time. And, unlike the parent in *Rowlett*, Father had not been incarcerated before being offered services. Here, Father was intermittently incarcerated and released, but he did not consistently avail himself of services.

[10] Finally, the record does not indicate that Father was prejudiced. Ultimately, the evidentiary hearing was continued to July 29, 2020, four and one-half months after the request for a continuance. Father testified at that hearing and he does not contend that additional favorable evidence could have been developed with additional time. Father has demonstrated no abuse of the trial court's discretion.[3]

Standard of Review – Sufficiency of the Evidence

[11] When we review whether the termination of parental rights is appropriate, we will not reweigh the evidence or judge witness credibility. *In re V.A.*, 51 N.E.3d 1140, 1143 (Ind. 2016). We will consider only the evidence and reasonable inferences that are most favorable to the judgment. *Id.* In so doing, we give "due regard" to the trial court's unique opportunity to judge the credibility of the witnesses. *In re I.A.,* 934 N.E.2d 1127, 1132 (Ind. 2010) (citing Indiana

[3] Although Father frames his issue in terms of denial of due process, he acknowledges that a decision to grant or deny a continuance is within the discretion of the trial court, and he has developed no additional argument with respect to the denial of procedural due process.

Trial Rule 52(A)). We will set aside the trial court's judgment only if it is clearly erroneous. *K.T.K. v. Ind. Dep't of Child Servs.*, 989 N.E.2d 1225, 1229 (Ind. 2013). In order to determine whether a judgment terminating parental rights is clearly erroneous, we review the trial court's judgment to determine whether the evidence clearly and convincingly supports the findings and the findings clearly and convincingly support the judgment. *I.A.*, 934 N.E.2d at 1132.

Requirements for Involuntary Termination of Parental Rights

[12] "The Fourteenth Amendment to the United States Constitution protects the traditional right of parents to establish a home and raise their children." *In re Adoption of O.R.*, 16 N.E.3d 965, 972 (Ind. 2014). Although parental rights are of a constitutional dimension, the law provides for the termination of those rights when the parents are unable or unwilling to meet their parental responsibilities. *Bester v. Lake Cnty. Off. of Family & Children*, 839 N.E.2d 143, 147 (Ind. 2005). The State is required to prove that termination is appropriate by a showing of clear and convincing evidence, a higher burden than establishing a mere preponderance. *In re V.A.*, 51 N.E.3d at 1144.

[13] Indiana Code section 31-35-2-4(b)(2) sets out the elements that the DCS must allege and prove by clear and convincing evidence to terminate a parent-child relationship:

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

(i) The child has been removed from the parent for at least six (6) months under a dispositional decree.

(ii) A court has entered a finding under IC 31-34-21-5.6 that reasonable efforts for family preservation or reunification are not required, including a description of the court's finding, the date of the finding, and the manner in which the finding was made.

(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) 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.

Because subsection (b)(2)(B) is written in the disjunctive, we need only to find that one of the three requirements of this subsection was established by clear

and convincing evidence. *See In re L.S.*, 717 N.E.2d 204, 209 (Ind. Ct. App. 1999).

Analysis

[14] Father contends that insufficient evidence supports the termination decision. Specifically, he claims that the trial court ignored evidence of his progress since he moved to work release. According to Father, he has obtained employment and participates in therapy and drug screens. As such, he focuses upon whether there is clear and convincing evidence of a reasonable probability that he would fail to remedy the conditions that led to Child's removal.

[15] 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*. (citing *Bester*, 839 N.E.2d at 152). 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*.

[16] 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 the DCS and the parent's response to those services as evidence of whether conditions will be remedied. *Id.*

[17] The trial court found that Child had been removed from parental care due to Father's physical abuse of Child's half-sibling, substance abuse, and homelessness. The trial court reviewed Father's criminal history and response to services during the two years after removal. Father had been ordered to complete a substance abuse evaluation and psychological evaluation; these remained uncompleted. He had, after some lapse of time, completed a parent assessment while incarcerated. Father had participated in visits with Child, amounting to approximately 42% of scheduled visits. He had met with a home-based counselor approximately half-time, but had been unable to procure stable employment, housing, or transportation prior to his incarceration. Father had provided only three drug samples to the DCS.

[18] Father was arrested on September 14, 2018, for possession of methamphetamine. He pled guilty on June 12, 2019 and was released on bond. His bond was revoked when he was charged with an additional possession of methamphetamine offense. From February 2019 to June 2020, Father was incarcerated for the majority of the time. He was eventually placed in work release and his anticipated release date from the Department of Correction was

December 2020. Father had pled guilty to battery, arising from conduct against a prior girlfriend. He had been placed on probation but violated the terms. Father also pled guilty to battery upon Mother and Child's older half-sibling. Again, Father violated the terms of his probation. The DCS referred Father to a domestic violence program, which he had refused on grounds that he had completed the same programming in the past and lacked funds for additional classes.

[19] The trial court concluded that Father had been unable to remedy conditions because of his incarceration and lack of response to services. The trial court deemed continuation of the parent-child relationship a threat to Child because of Father's "complete inability to meet [Child]'s basic needs" and Father's history of physical abuse to family members. Appealed Order at 5.

[20] The record is replete with testimonial support for the trial court's findings of fact. Visitation supervisor Martha Reising ("Reising") testified that Father was bonded with Child, but he was inconsistent with visitation, his visits were decreased from twice weekly to once weekly, and he ultimately attended only 42% of the sessions. The visits never progressed beyond in-office visits. According to Reising, this was because housing was a "major issue" and Father lived in a hotel when he was not completely homeless. (Tr. Vol. II, pg. 29.) Reising testified that Father never secured appropriate housing for a child.

[21] Home based caseworker Zachary Sciaccotta ("Sciaccotta") testified that he met with Father approximately 50% of the scheduled sessions. Sciaccotta believed

that Father made some progress before suffering with an abscessed tooth and losing his employment and his room at a hotel. Sciaccotta testified that Father missed probationary drug screens and had his probation revoked.

[22] Social worker Olivia Golike ("Golike") attempted to administer a parent stress index test to Father, but she considered any potential results invalid due to Father's perceived "defensive responding." (*Id.* at 51.) Father had provided a mental health history indicating that he had been diagnosed with bipolar disorder, schizophrenia, and intermittent explosive disorder. However, he reported that he was not taking any prescription medication for those conditions. Golike recommended that Father have individual therapy and substance abuse and psychological evaluations. Father did not follow through with those recommendations.

[23] Family case manager Alyssade Talente ("Talente") testified that the DCS had requested that Father provide fifty-six drug screen samples; Father had provided three. He had attended two of sixteen team meetings. Talente considered it difficult to maintain contact with Father; he had been in work release two weeks before he contacted the DCS. Talente also testified that Father had prior contacts with the DCS, arising from reports of battery, and that he had been charged with drug possession offenses and had been alleged to be a habitual substance offender.

[24] Father argues that the trial court wholly disregarded evidence of his recent improvements. According to Father, he secured full-time employment within

days of his move to work release. Also, he testified that he was participating in therapy sessions and drug screens. Father's efforts are commendable; however, they are relatively recent and made under the supervision of a Department of Correction release program. The trial court did not discard Father's testimony as lacking in credibility; rather, the trial court balanced the recent efforts against Father's historical patterns. This the trial court was entitled to do. *A.D.S.*, 987 N.E.2d at 1157. The DCS presented clear and convincing evidence from which the trial court could conclude that conditions leading to Child's removal were unlikely to be remedied.[4]

[25] Father also contends that the DCS did not present clear and convincing evidence that termination is in Child's best interests. In determining what is in a child's best interests, the court must look to the totality of the evidence. *Id.* at 1158. Beck, a day care provider and mother of four other children, testified that she took custody of Child in June of 2018, when Child was three years old. Beck described Child at that time as developmentally delayed, hyperactive, and angry. Beck obtained speech and occupational therapy for Child, and he had recently been prescribed medication for hyperactivity. Beck opined that Child had become a happy and loving member of the family, and she expressed a desire to adopt him.

[4] Because the relevant statutory provision is written in the disjunctive, we do not separately discuss evidence supporting a determination that continuation of the parent-child relationship poses a threat to Child.

[26] Tacarra Craig of Southwest Behavioral Health Care testified that she had conducted sixty skills development sessions with Child, and he had made significant improvements. Child's therapist, Wendi Simpson ("Simpson"), testified that she saw Child weekly. Child had been diagnosed with Disruptive Mood Dysregulation Disorder, a condition in which he lacked ability to control his emotions. However, Child had improved such that Simpson described him as calm and able to "self-regulate." (Tr. Vol. II, pg. 64.)

[27] Child's Court Appointed Special Advocate ("CASA") described Child as having been "distressed" and "delayed" when he was removed from his parents. (*Id.* at 101.) For example, then three-year-old Child had not been potty trained, he ate with his hands, and he did not communicate verbally at his age level. With therapy, Child's head-banging and self-destructive behaviors had noticeably decreased. The CASA described Child as "excellent in [his] placement." (*Id.* at 103.) She recommended that Father's parental rights be terminated. Child's family case manager agreed that Child had thrived in his placement and she also opined that termination of parental rights and adoption was in Child's best interests. The totality of the evidence is such that the trial court did not clearly err in finding termination of Father's rights to be in Child's best interests.

Conclusion

[28] The trial court did not abuse its discretion in denying Father's motion for a continuance. The DCS established by clear and convincing evidence the requisite elements to support the termination of parental rights.

[29] Affirmed.

May, J., and Robb, J., concur.