

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In the Termination of the Parent-Child Relationship of:

Za.S., Zac.S., and Je.S. (Minor Children),

and

J.S. (Father),

Appellant-Respondent,

v.

Indiana Department of Child Services,

Appellee-Petitioner.

October 17, 2022

Court of Appeals Case No.
22A-JT-983

Appeal from the Madison Circuit Court

The Honorable Stephen J. Koester,
Judge

Trial Court Cause Nos.
48C02-2111-JT-191, 48C02-2111-JT-192, 48C02-2111-JT-193

Altice, Judge.

Case Summary

[1] J.S. (Father) appeals the involuntary termination of his parental rights to three of his minor children, Za.S. (born October 2005), Zac.S. (born June 2007), and Je.S. (born January 2017) (collectively, Children).¹ Father challenges the sufficiency of the evidence supporting the termination.

[2] We affirm.

Facts & Procedural History

[3] Father and Jen.S. (Mother) were married in May 2005, and Children were born during their marriage. Thereafter, Mother and Father separated in early 2019, and Mother filed a motion for emergency custody on March 20, 2019, which was denied on May 3, 2019. Father then filed a petition for dissolution of marriage on May 8, 2019.

[4] In the meantime, on or about April 21, 2019, the Indiana Department of Child Services (DCS) received a report that Children were victims of neglect. The report occurred after Mother and her boyfriend were arrested in Mother's car, while Je.S. was also in the vehicle under Mother's care. Mother was arrested for possession of marijuana and possession of paraphernalia.

¹ Father has other children – half-siblings to Children – who are not involved in this termination case.

[5] On April 23, 2019, DCS Family Case Manager (FCM) Robert Barnes spoke with Mother over the phone. Mother expressed concerns that Father was using drugs, addicted to methamphetamine, and regularly smoking marijuana. Two days later, FCM Barnes met with Father at Father's residence. Prior to this meeting, Father had submitted to drug screens on April 21 and April 24, both of which "came back positive for illicit substances." *Exhibits* at 5. Father, however, denied using illicit substances and refused FCM Barnes's request to take another drug screen. FCM Barnes also spoke with then thirteen-year-old Za.S., who reported that he had seen Mother and Father smoke marijuana, that Father had driven under the influence, and that he found a "baggie with white powder with a small pink straw" in Father's dresser. *Id.* at 6. Father was the sole caregiver in the home at the time, and FCM Barnes could not establish that Father was a sober caregiver.

[6] On May 3, 2019, DCS filed a petition alleging Children to be children in need of services (CHINS). Children had not been removed from Father's home at the time. Based on the facts set out above, DCS alleged, in part, under Ind. Code § 31-34-1-1, that Children's physical or mental conditions were seriously impaired or seriously endangered as a result of the inability, refusal, or neglect of Mother and Father to supply Children with necessary food, clothing, shelter, medical care, education, or supervision.

[7] On May 6, 2019, following a detention hearing, the trial court granted DCS's request to detain Children and place them with their paternal grandmother.

Over DCS's objection, the court allowed Father to live in the same home "as long as he is always supervised with the children." *Exhibits* at 19.

- [8] DCS filed an amended CHINS petition on June 7, 2019, which included additional allegations based on a May 19 report of physical abuse involving Father and Za.S. The allegations involved Father forcefully pushing Za.S. onto the ground, resulting in bruising to Za.S. As a result, DCS had removed Children from their grandmother's residence and placed them with their paternal aunt (Aunt). Thereafter, on June 10, 2019, the trial court granted Father supervised visits with Children.
- [9] At the factfinding hearing on July 15, 2019, Father admitted that Children were CHINS, acknowledging that he lacked appropriate housing and agreeing to submit to a substance abuse evaluation. Mother also admitted that housing was an issue and that services would be beneficial. The trial court adjudicated Children CHINS and ordered their continued removal.
- [10] At the dispositional hearing on August 7, 2019, the trial court ordered Father to, among other things, visit with Children on a regular basis, cooperate with home-based services, complete a drug/alcohol assessment and follow recommendations, submit to random drug screens, abstain from use of illegal drugs, complete parenting classes, complete a "psycho-parenting evaluation" and follow recommendations, participate in a batterer's intervention program, and obtain and maintain adequate housing. *Id.* at 51. Father did not attend this hearing, though he was represented by counsel.

[11] A periodic review hearing was held on November 20, 2019, which Father did not attend. He had been living out of state and had not participated in any of the court-ordered services that had been put into place by DCS. Additionally, Father had been discharged by his first visitation provider for failing to confirm visits within the mandated time, and telephonic communication between Father and Children had been stopped because Father was “having inappropriate communication with children’s placement.” *Id.* at 54.

[12] On April 22, 2020, the court held a permanency hearing. Father had returned to Indiana in late January after having lived in Ohio for most of the time the case had been open. Within days of his return, DCS made service referrals for Father, including for supervised visits, a substance abuse assessment, and random drug screens. Father was in the process of arranging supervised visits at the time of the hearing, but he had not otherwise complied with the case plan. In addition to reunification with Mother, the court adopted a concurrent permanency plan of appointment of a legal guardian.

[13] At the review hearing on September 2, 2020, the trial court determined that Father had “complied generally” with the case plan but had yet to complete services to alleviate the cause of Children’s out-of-home placement. *Id.* at 66. Specifically, Father had completed a drug abuse assessment for which follow-up therapy had been recommended, he had completed a parenting assessment with no follow-up recommendations, and he was frequently visiting Children. Father, however, remained noncompliant with random drug screens.

- [14] A permanency hearing was held on March 3, 2021, at which the trial court found Father to be in partial compliance. As noted at the prior hearing, Father had completed a drug abuse assessment and a parenting assessment. He remained consistent with supervised visits. Father had not been consistent with the individual and group therapy recommended following his drug abuse assessment, had not completed the court-ordered batterer's intervention program, and had not complied with random drug screens.
- [15] The trial court held another permanency hearing on September 8, 2021, and Father did not appear in person. At the time, Father had not completed domestic violence counseling, home-based casework, or therapeutic visits. Each of those service referrals had been closed out due to noncompliance. Further, Father had not attended the family team meeting with DCS in July. The court approved concurrent permanency plans of reunification and adoption/guardianship.
- [16] Thereafter, on November 3, 2021, DCS filed the instant petitions for the involuntary termination of parental rights. The factfinding hearing commenced on January 25, 2022, with Mother consenting to Children's adoption. Mother was excused from the remainder of the hearing.
- [17] Regarding Father, DCS presented evidence that he had been evicted from his home on October 9, 2021, and he had since lived in a camper, a motel, and, most recently, a car. He was arrested and charged, in November 2021, with Level 6 felony possession of methamphetamine, which charges were still

pending at the time. Father has mental health conditions (PTSD, schizophrenia, and substance use disorder) and physical issues (cataplexy narcolepsy and a prior spinal fusion). He has been unable to work for approximately twenty years and receives SSI of \$891 per month. He has substantial child support arrears with respect to his two oldest children, who are not involved in this case. At the time of the hearing, Father had a sixth child on the way.

[18] Father denied ever using methamphetamine or any illicit drug other than marijuana. However, Aunt, his sister, testified to the contrary. She testified that substance abuse had been a problem for Father for many years and that he had told her that “he would use any substance he got his hands on.” *Transcript* at 80. This included methamphetamine. Aunt testified that she loved Father but that he was not currently welcome at her house “[b]ecause he’s not sober.” *Id.* at 77. Though she had not spoken with him for a long time, Aunt indicated that she knew he was not sober based on his social media posts and videos. Aunt explained, “I can hear his voice. I know when my brothers [sic] high.” *Id.* at 78.

[19] Za.S., who was sixteen at the time, testified that his parents had been “going downhill with like drugs” and that Father had been unable to provide for Children for about four years. *Id.* at 83. Za.S. noted that the family did not even have hot water at the time of removal. Za.S. testified that he began refusing visits with Father about five months before the hearing due to Father’s behavior. Za.S. indicated that he knew Father was “still currently using” and

explained that during visits, “he would be paranoid he would be looking everywhere saying people were following us. That’s like a really big sign when he’s high. And like he would talk fast.” *Id.* at 86, 85. Za.S. indicated that “before all this happened like when [Father] was more sober, he [] never acted like that.” *Id.* at 86. Za.S. expressed a clear desire for permanency and to be adopted by Aunt.

[20] Aunt testified that she intended to adopt Children following termination of Father’s rights and that she would welcome his involvement in Children’s lives once he is healthy and sober. Aunt opined that it was not fair to Children to continue to make them “play a waiting game with their future” and that they had waited long enough for permanency. *Id.* at 75. When asked if she thought Father could currently provide Children with stability, Aunt responded, “Absolutely positively not.” *Id.* at 80.

[21] The current FCM, Marlena Wolfe, testified that Father had completed some services – a parenting assessment and two substance abuse assessments – and was engaged in individual therapy and medication management as recommended two weeks prior by the recent substance abuse assessment.² Despite multiple referrals, however, Father had not attended a single session of a domestic violence program, not complied with home-based services, and not attended Fatherhood Engagement. Under the current referral for random drug

² Individual therapy had also been recommended after the first substance abuse assessment, but Father did not successfully complete that referral.

screens, Father had not complied with any of the thirty-six screens. FCM Wolfe was not permitted to testify regarding the specific results of screens taken earlier in the CHINS proceedings, but she did testify, without objection, that she had personally reviewed results that “would follow in the same line as what other witnesses ha[d] testified ... about [Father’s] drug use.” *Id.* at 93. FCM Wolfe also testified that she had spoken with Father the day before the hearing and that Father indicated during the call that he and his pregnant girlfriend were living in their car and needed help with housing. In sum, FCM Wolfe recommended termination of Father’s parental rights due to his noncompliance with services and lack of any movement toward permanency for Children.

[22] Similarly, CASA Natalie Bogan opined that termination of parental rights was in the best interests of Children. CASA Bogan explained that her recommendation was based on Father’s lack of engagement in necessary services, her concerns that he is not sober, and Children’s expressed lack of interest in reconciliation with Father. She indicated that Children need permanency and to “not feel afraid.” *Id.* at 65.

[23] At the conclusion of the evidence, the trial court observed that this case “isn’t a particularly close call.” *Id.* at 112. Children had been out of Father’s home for nearly three years and, the court noted, lack of appropriate housing and illegal drug use continued to be an issue throughout the life of the case. By Father’s own testimony, the court observed, he was living out of a car the day before the hearing. The court indicated that it did not find Father’s testimony “credible whatsoever” about his drug use. *Id.* at 113. Instead, the court believed Aunt

and Za.S.’s testimony regarding Father’s recent drug use, noting that they are the “people that know him best.” *Id.* The court also noted Father’s “complete lack of compliance with [drug] screening” and his “well documented long history of noncompliance with services.” *Id.* at 114. In determining that termination of parental rights was in Children’s best interests, the court recognized Father’s long history of mental illness, drug use, housing instability, and – though through no fault of his own – lack of income. The court also determined that DCS had a satisfactory plan in place for Children – adoption by Aunt. Accordingly, the trial court ordered the termination of Father’s parental rights and directed DCS to submit a written order.

[24] On April 20, 2022, the trial court issued its written termination order, which included findings and conclusions. Father now appeals. Additional information will be provided below as needed.

Discussion & Decision

[25] When reviewing the termination of parental rights, we will not reweigh the evidence or judge the credibility of the witnesses. *In re R.S.*, 56 N.E.3d 625, 628 (Ind. 2016). Instead, we consider only the evidence and reasonable inferences most favorable to the judgment. *In re S.K.*, 124 N.E.3d 1225, 1230-31 (Ind. Ct. App. 2019), *trans. denied*. In deference to the trial court’s unique position to assess the evidence, we will set aside its judgment terminating a parent-child relationship only if it is clearly erroneous. *Id.* at 1231. Moreover, in light of the applicable clear and convincing evidence standard, we review to determine

whether the evidence clearly and convincingly supports the findings and whether the findings clearly and convincingly support the judgment. *In re R.S.*, 56 N.E.3d at 628.

[26] We recognize 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.” *In re J.W., Jr.*, 27 N.E.3d 1185, 1187-88 (Ind. Ct. App. 2015), *trans. denied*. Although parental rights are of constitutional dimension, the law provides for the termination of these rights when parents are unable or unwilling to meet their parental responsibilities. *In re R.H.*, 892 N.E.2d 144, 149 (Ind. Ct. App. 2008). In addition, a court must subordinate the interests of the parents to those of the child when evaluating the circumstances surrounding the termination. *In re J.W., Jr.*, 27 N.E.3d at 1188.

[27] Before an involuntary termination of parental rights may occur in Indiana, DCS is required to allege and prove by clear and convincing evidence, among other things, that one 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[.]

Ind. Code § 31-35-2-4(b)(2)(B); Ind. Code § 31-37-14-2. DCS must also prove by clear and convincing evidence that termination is in the best interests of the child and that there is a satisfactory plan for the care and treatment of the child. I.C. § 31-35-2-4(b)(2)(C), (D); I.C. § 31-37-14-2.

[28] On appeal, Father challenges the trial court's conclusions that there is a reasonable probability that the conditions that resulted in Children's removal or placement outside Father's home will not be remedied, that there is a reasonable probability that the continuation of the parent-child relationship poses a threat to the Children's well-being, and that termination is in Children's best interests. We will address each in turn as needed, after first addressing Father's challenge to one of the trial court's findings of fact.

Finding 20

[29] Father challenges only one of the trial court's specific findings of fact, Finding 20, as clearly erroneous. That finding provides:

Notwithstanding his self-service [sic] testimony, the Court finds that Father has failed to engage in or complete a number of ordered services, including domestic violence therapy, Fatherhood Engagement, and Home-Based Case Work. Father has failed to engage in all thirty six (36) random screens offered to him through Cordant testing services. On the few random tests in which Father has engaged, he has on multiple occasions tested positive for substances he was not prescribed.

Appendix at 19.

- [30] In challenging this finding, Father notes his “positive accomplishments.” *Appellant’s Brief* at 9. He directs us to the September 2020 review order, which indicated that he had completed a parenting assessment that resulted in no recommendations, cooperated with DCS, and generally complied with the case plan. Father, however, ignores the parts of the order indicating that Father had yet to complete services to alleviate the cause of Children’s out-of-home placement and that he remained noncompliant with random drug screens. Further, in the dispositional order, Father had been ordered to complete both parenting classes and a parenting assessment. While he took the assessment, he never participated in Fatherhood Engagement as referred by DCS.
- [31] Father also observes that he completed two substance abuse assessments (in mid-2020 and January 2022), the last of which was only two weeks before the termination hearing. Though this is true, the record establishes that he had yet to successfully complete individual therapy, which had been recommended after each assessment, and recently had been attending individual therapy for only about a week before the hearing.
- [32] The evidence supports the trial court’s finding that Father had failed to engage in or complete a number of ordered services, including domestic violence therapy, Fatherhood Engagement (i.e., parenting classes), and home-based casework. The finding in this regard was not clearly erroneous. *See D.C. v. J.A.C.*, 977 N.E.2d 951, 953 (Ind. 2012) (“Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference.”).

[33] Father also challenges Finding 20 as it relates to positive drug screens. As he correctly observes, the trial court sustained a hearsay objection to FCM Wolfe's testimony that over the life of the case, Father had taken twenty-six screens, seventeen of which were positive. Because this testimony was excluded by the trial court, the evidence does not support the trial court's finding that Father tested positive on multiple occasions. That portion of the finding, therefore, is clearly erroneous and will not be considered below in determining whether the trial court's findings support its judgment.³

Conditions Unlikely to be Remedied

[34] Father challenges the trial court's conclusion that there is a reasonable probability that the conditions that resulted in Children's removal or continued placement outside his home would not be remedied. In making a determination regarding the probability that conditions will change,

the court must judge a parent's fitness to care for his or her child at the time of the termination hearing, taking into consideration evidence of changed conditions. Due to the permanent effect of termination, the trial court also must evaluate the parent's habitual patterns of conduct to determine the probability of future neglect or deprivation of the child. 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 A.I.*, 825 N.E.2d 798, 806 (Ind. Ct. App. 2005),

³ Father did not object to FCM Wolfe's testimony that Father had failed to comply with all thirty-six random screens offered under the most-recent referral.

trans. denied. A court may properly consider 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. Moreover, a trial court "can reasonably consider the services offered by the [DCS] to the parent and the parent's response to those services." [*McBride v. Monroe Cty. Office of Family & Children*, 798 N.E.2d 185, 199 (Ind. Ct. App. 2003)].

In re N.Q., 996 N.E.2d 385, 392 (Ind. Ct. App. 2013) (some citations omitted).

[35] Here, the evidence and findings establish that Children were removed from and remained out of Father's care throughout the pendency of the CHINS case due to his housing instability and drug use, among other things. During the four months leading up to the termination hearing, Father had been evicted and was without a permanent residence, living in a camper, a hotel, a friend's home, and in his vehicle. There is no question that Father lacked appropriate housing for Children at the time of the hearing.

[36] Further, his drug use continued to be an issue. Father had not taken any of the thirty-six random drug screens most recently offered him. 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."). While DCS failed to present drug screen results for screens taken by Father, DCS offered some indirect evidence that Father did in fact test positive for illicit drugs earlier in the case. That is, FCM Wolfe testified, without objection, that she personally reviewed test results that were in line with other witnesses' testimony

about Father’s drug use. Aunt and Za.S. testified that based on their observations of Father’s behavior, they believed that he was still abusing drugs. Moreover, Father had been arrested for possession of methamphetamine, with charges pending at the time of the hearing.

[37] All this evidence, along with Father’s failure to complete individual therapy as recommended after both drug assessments and his noncompliance with other services, including home-based case work and Fatherhood Engagement,⁴ clearly and convincingly supports the trial court’s conclusion that there is a reasonable probability that the conditions that resulted in Children’s removal from and continued placement outside Father’s home will not be remedied. As a result, we need not review the alternative basis found by the trial court, that there is a reasonable probability that that continuation of the parent-child relationship poses a threat to Children’s well-being. *See Matter of D.C.*, 149 N.E.3d 1222, 1229 (Ind. Ct. App. 2020) (choosing not to address alternative bases for termination, because I.C. § 31-35-2-4(b)(2)(B) is written in the disjunctive), *trans. denied*.

Best Interests

[38] Finally, we address Father’s brief argument related to Children’s best interests. Father acknowledges that his “financial condition is strained” and that he lacks

⁴ Father’s bald suggestion that his parental rights were terminated based on his failure to comply with “unnecessary and or impossible to meet conditions” is without merit. *Appellant’s Brief* at 13.

appropriate housing, but he argues that his parental rights cannot be terminated solely because there is a better place for Children to live. *Appellant's Brief* at 16. He contends that Children should have been permitted to stay with Aunt, without termination of his rights, to give him time to obtain suitable housing.

[39] We agree with the general principle that “a parent’s constitutional right to raise his or her own child may not be terminated solely because there may be a better home available for that child.” *In re R.A.*, 19 N.E.3d 313, 321 (Ind. Ct. App. 2014), *trans. denied*. In this case, however, Father’s rights were not terminated on this basis alone. Rather, the trial court considered the totality of the circumstances, including that Father had been “mostly non-compliant with services” and had made “no significant progress toward gaining reunification with [Children].” *Appendix* at 41. The court also considered Za.S.’s express desire for permanency with Aunt, Aunt and Za.S.’s persuasive testimony regarding Father’s current and historical use of illegal drugs, and the recommendations of CASA Brogan and FCM Wolfe. *See Matter of Ma.H.*, 134 N.E.3d 41, 49 (Ind. 2019) (holding that trial courts must look to the totality of the evidence in making this determination and subordinate the parents’ interests to those of the children, with the children’s need for permanency being a central consideration).

[40] Za.S., then sixteen years old, testified that Father had not been able to provide for him and his younger siblings for about four years after “going downhill” using drugs. *Transcript* at 83. Za.S. indicated that he had elected to stop visits with Father months before the hearing due to Father’s continued drug use and

related behavior. Further, Aunt opined that Father could “[a]bsolutely positively not” currently provide Children with stability, but she testified that if he became sober and healthy, she would allow him to engage with Children after termination. *Id.* at 80.

[41] After nearly three years of waiting, Children needed and deserved stability and consistency, which Father was still unable to provide at the time of the hearing. *Matter of Ma.H.*, 134 N.E.3d at 49 (“Indeed, children cannot wait indefinitely for their parents to work toward preservation or reunification.”) (internal quotation marks omitted). The trial court’s conclusion that termination of Father’s parental rights was in Children’s best interests is not clearly erroneous.

[42] Judgment affirmed.

Brown, J. and Tavitas, J., concur.