

MEMORANDUM DECISION

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ATTORNEY FOR APPELLANT

Jon J. Olinger
Fort Wayne, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Marjorie Lawyer-Smith
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

In the Matter of the Termination
of the Parental Rights of:

D.B., (Minor Child)

and

E.B. (Mother),

Appellant-Respondent,

v.

Indiana Department of Child
Services,

Appellee-Petitioner.

June 22, 2023

Court of Appeals Case No.
22A-JT-3010

Appeal from the Allen Superior
Court

The Honorable Lori K. Morgan,
Judge

The Honorable Beth A. Webber,
Magistrate

Trial Court Cause No.
02D08-2203-JT-80

Memorandum Decision by Senior Judge Robb
Judges Crone and Kenworthy concur.

Robb, Senior Judge.

Case Summary and Issue

[1] E.S.B. (“Mother”) is the biological mother of D.J.B., born in November 2020 (“Child”). Child was removed from Mother’s care in December 2020 and adjudicated a child in need of services (“CHINS”) in January 2021. In March 2022, the Indiana Department of Child Services (“DCS”) filed a petition to terminate Mother’s parental rights to Child. Following a factfinding hearing, the juvenile court issued its order finding DCS had proven by clear and convincing evidence that Mother’s parental rights should be terminated.¹ Mother now appeals, raising one issue for our review that we restate as whether the juvenile court’s termination decision is supported by clear and convincing evidence. Concluding the juvenile court’s judgment is supported by the unchallenged findings of fact and is not clearly erroneous, we affirm.

Facts and Procedural History

¹ Although paternity of Child was not established, D.R. is the alleged biological father of Child. D.R.’s parental rights were also terminated, but he does not participate in this appeal. The facts will generally be limited to those pertinent to Mother.

- [2] Mother has been involved with DCS, at least, since 2019, when her two older children were adjudicated CHINS (“Older Children”). In those cases, which were active at the time the termination hearing occurred in the instant case, Mother was ordered to participate in a psychiatric evaluation, substance abuse treatment, family counseling, and homebased services. Mother was referred for services that included substance abuse treatment in April and May of 2019. And, while Mother participated in a few of the services and completed the psychiatric evaluation, she was largely unsuccessful with participation in and completion of the services. Mother was also ordered to participate in family recovery court to assist her with her substance abuse issues. However, Mother was discharged from family recovery court in September 2019, for failure to participate in substance abuse treatment. The permanency plan for the Older Children was termination of Mother’s parental rights with adoption.
- [3] Child was born on November 26, 2020. On November 27, Mother submitted to a drug screen and tested positive for cocaine and oxycodone. That same day, DCS received a report alleging that Child was underweight and exhibited signs of withdrawal from illegal substances. Due to his poor health, Child was placed in the NICU.
- [4] Mother admitted to using marijuana while pregnant with Child. She later admitted to using cocaine during her pregnancy, disclosing that she last used the substance two weeks prior to Child’s birth. The results from Child’s December 2, 2020, umbilical cord test revealed a positive result for cocaine and benzodiazepines.

- [5] On December 3, 2020, DCS removed Child from Mother’s care and placed Child with his maternal aunt (“Maternal Aunt”) and filed a preliminary inquiry report with the juvenile court. On December 7, DCS filed a petition alleging Child was a CHINS based on Child being born with illegal substances in his system. That same day, the juvenile court conducted an immediate initial hearing and issued a preliminary inquiry order, finding probable cause existed to believe Child was a CHINS. In its initial hearing order, issued on January 7, 2021, the juvenile court appointed Michael Harmeyer as Child’s guardian ad litem (“GAL”).
- [6] On January 12, 2021, the juvenile court held an additional initial hearing and a dispositional hearing. Mother did not appear for the hearings. Following the additional initial hearing, the juvenile court accepted Mother’s previous admissions that she had used marijuana during her pregnancy with Child, she had active CHINS cases for the Older Children, she had a positive drug screen for cocaine and oxycodone, she was unable to provide a safe and stable home for Child that was free of illegal substance use, and Child was in need and would benefit from services he is unlikely to receive or accept without the coercive intervention of the juvenile court. The juvenile court adjudicated Child a CHINS. Dwila Lewis was assigned as the family case manager (“FCM”).
- [7] At the conclusion of the dispositional hearing, the court entered a dispositional order, including a parent participation plan that required Mother to, among other things, refrain from criminal activity; cooperate and maintain contact

with the caseworkers and the GAL; submit to a diagnostic assessment, obtain a drug and alcohol assessment, and follow all recommendations of the assessments; enroll in homebased services, participate in all sessions, and successfully complete the program; submit to random drug screens; refrain from using illegal drugs; attend visits with Child; and follow the CHINS orders issued in the cases involving the Older Children. The court continued Child's placement with Maternal Aunt.

[8] On May 3, 2021, the juvenile court held a review hearing, which Mother did attend. The review report that DCS filed with the juvenile court indicated that Mother was mostly compliant with the requirements of the parent participation plan. Mother had maintained contact and cooperated with DCS, her caseworkers, and GAL Harmeyer; she had scheduled a substance abuse assessment; she had consistently visited with Child and the Older Children; she completed her diagnostic assessment; she was in compliance with the CHINS orders issued in the cases involving the Older Children; and she had consistently submitted to random drug screens and had tested negative for all illegal substances in her last six screens. However, Mother had tested positive for hydrocodone in February. In its order issued on May 3, the juvenile court found that Mother had failed to participate in therapy and had tested positive for illegal substances.

[9] On October 15, DCS filed a progress/permanency report with the juvenile court. The report noted that Mother had begun to comply with the services ordered in her parent participation plan. The report indicated Mother had

increased her contact with DCS; completed additional diagnostic and substance abuse assessments; consistently visited with Child; and was compliant with the CHINS orders issued in the cases involving the Older Children. However, the report also noted that Mother had not cooperated with her caseworkers and GAL Harmeyer regarding team meetings and drug screens; had not consistently participated in and had made minimal progress with her individual and substance abuse counseling; had not consistently participated in homebased services; and, since July 2, 2021, had not submitted to drug screens and had no-showed for twelve requested screens. The October report also included information on Child's general health, noting Child had a small hole in his heart, Child's ventricles were enlarged, and Child was attending ongoing medical appointments.

[10] On October 18, the juvenile court held a permanency hearing, which Mother did not attend. At the conclusion of the hearing, the juvenile court issued its order, finding Mother had failed to maintain contact with DCS, had “no[-] showed to her individual therapy and group therapy[,]” and had not consistently participated in her drug screens. Exhibit Binder, Volume I at 32. The juvenile court modified Child's permanency plan to termination of Mother's parental rights and adoption.

- [11] On March 23, 2022, DCS filed a petition for the involuntary termination of Mother’s parental rights to Child. Following a review hearing held on April 4,² the juvenile found that Mother had failed to maintain contact with DCS, participate in therapy, and submit to drug screens. The juvenile court reaffirmed the permanency plan of termination of parental rights and adoption.
- [12] On July 22, Mother was charged in Allen County with two drug offenses, possession of paraphernalia and possession of cocaine or narcotic drug. On August 16, Mother was charged in a separate Allen County case with additional drug-related offenses, including possession of cocaine or narcotic drug, possession of a controlled substance, and possession of paraphernalia. In the second case, Mother was also charged with operating while suspended. Warrants had been issued in both cases for Mother’s arrest.
- [13] A factfinding hearing was held on September 6, 2022. DCS presented testimony from FCM Lewis; GAL Harmeyer; and Maternal Aunt. Mother did not appear at the hearing and did not present any witnesses. FCM Lewis testified to Mother’s compliance with the requirements of the parental participation plan, telling the juvenile court, Mother was “not real cooperative” with her caseworkers. Transcript, Volume 2 at 59. The FCM told the court she had been unsuccessful in trying to schedule phone calls and meetings, including family team meetings, with Mother and that Mother had “no-showed” for

² Mother attended the April 4, 2022, review hearing.

twelve drug screens. *Id.* at 68. FCM Lewis told the court that DCS had, subsequently, referred Mother to Cordant Health for her drug screens. The FCM stated that Mother was required to call the facility each day, but Mother had not called in 248 days, and Mother no-showed for twenty-eight drug screens.

[14] FCM Lewis testified that she would “go . . . long periods of time where [she did not] hear from [Mother].” *Id.* at 59. The FCM told the juvenile court she had not spoken with Mother in-person or by telephone since June or July 2022. FCM Lewis further testified that Mother had failed to complete substance abuse group and individual therapy, a psychiatric evaluation, and individual therapy addressing her mental health. Regarding homebased services, the FCM told the court that the services had been discontinued due to Mother’s lack of participation and inability to successfully complete the program.

[15] FCM Lewis testified that Mother was never able to obtain employment. The FCM told the juvenile court that Mother attended approximately thirty supervised visits with Child but had eleven no-shows. FCM Lewis further testified that Mother had not attended any supervised visits with Child in 2022.

[16] When asked on direct examination why DCS filed the termination petition, FCM Lewis testified,

Mother has an ongoing substance abuse issue that she has not addressed or remedied at this point. She has not engaged in her court-ordered services to remedy the reasons for involvement nor has she consistently visited with [Child]. . . . There’s a lot of

safety concerns around [M]other. There's a lot of reports [DCS] received that would be cause for concern had [Child] been placed in her care. And [M]other has not attended any of [Child's] medical appointments so she really doesn't know how to care for him.

Id. at 80.

[17] GAL Harmeyer testified that termination of Mother's parental rights was in Child's best interest. GAL Harmeyer told the juvenile court:

[T]hroughout this case, . . . I believe that [Mother] has not demonstrated any meaningful progress in her recovery. In my estimation her primary challenge is associated with her continuing use of illegal, destructive substances. And again, I think she's been given opportunities through this case and through the referrals ordered in this case – given opportunities to begin on her path towards recovery and I've not seen any kind of progress along that line. Likewise, I'm not sure that she has actively engaged in the most critical services that have been ordered through this court whether it be substance abuse services, counseling, or even for that matter submitting to random drug screens on a regular basis as ordered. And again, not having participated actively, I conclude that she had not benefited from any such services. The same issues that existed at the beginning of the case, sad to say, continue on at this time.

Id. at 92. The GAL answered in the affirmative when asked on direct examination whether the GAL was concerned that Mother had no “meaningful” supervised visits with Child since December 2021. *Id.*

[18] Regarding Mother's two pending felony cases and the warrants for her arrest, GAL Harmeyer told the court, “[This] just adds to what I see as a continuing

pattern of instability in [Mother's] life. Again, if I was looking at a couple of active warrants for a parent's arrest[,] that alone wouldn't justify termination of parental rights. But when added to the mix I think it adds to the critical mass that has evolved over time here." *Id.* at 93.

[19] Maternal Aunt testified to Child's medical issues. She told the juvenile court Child has been diagnosed with dwarfism and autism. His dwarfism diagnosis necessitates that Child receive daily growth hormone shots. Maternal Aunt further testified that Child attends yearly medical appointments with his cardiologist and has monthly appointments with a neurologist and a nutritionist. Every six months, Child sees his pediatrician and also sees an endocrinologist at Riley Hospital for Children. Maternal Aunt told the court that she transports Child to all of his medical appointments.

[20] Maternal Aunt also testified that Child has a soft spot on his head that had not closed. She told the juvenile court that if the spot did not close by the time Child reached the age of two, Child might need to have a metal plate inserted. Maternal Aunt testified that Child has an abnormally large belly and exhibits aggression toward food. She testified that "a normal plate of food that'll feed you . . . won't fill Child up. So when you cut him off [from eating,] he gets really angry and he'll bang his head on the floor or the walls." *Id.* at 45-46. Maternal Aunt further testified that while Child's enlarged ventricles had returned to a normal size, Child still has a hole in his heart. Maternal Aunt told the court Child would soon attend therapy. Maternal Aunt also told the court Child has been in her care continuously since December 2020, and she

understands that there may be no cure for some of Child’s medical issues.

Maternal Aunt testified that she is willing to adopt Child.

[21] On December 1, 2022, the juvenile court issued its order terminating Mother’s parental rights to Child. Relevant to this appeal, the juvenile court concluded DCS had proven under Indiana Code section 31-35-2-4(b)(2)(B) there is a reasonable probability that the conditions that resulted in Child’s removal from and continued placement outside of Mother’s home will not be remedied.³ The juvenile court also concluded under Indiana Code section 31-35-2-4(b)(2)(C) that termination was in Child’s best interest because Child is doing well in his current placement, “even with all of his special needs and medical issues,” Mother has not addressed her substance abuse issues, and Mother had not visited with Child since December 2021. Appealed Order at 11, ¶ 73. Mother now appeals.

Discussion and Decision

I. Standard of Review

[22] The Fourteenth Amendment to the United States Constitution protects the traditional right of parents to establish a home and raise their children. *Bester v.*

³ The juvenile court also concluded DCS proved under the alternative provision of Indiana Code section 31-35-2-4(b)(2)(B) that continuation of the parent-child relationship posed a threat to Child’s well-being because, among other things, Child has significant medical needs that neither parent knows how to address, Child has not visited with Mother for any length of time since December 2021, and Mother has failed to complete substance abuse treatment. *See* Appealed Order at 10, ¶ 72.

Lake Cnty. Off. of Fam. & Child., 839 N.E.2d 143, 147 (Ind. 2005). Although parental rights are of a constitutional dimension, the law allows for the termination of those rights when parents are unable or unwilling to meet their parental responsibilities. *In re T.F.*, 743 N.E.2d 766, 773 (Ind. Ct. App. 2001), *trans. denied*. Parental rights, therefore, are not absolute and must be subordinated to the best interests of the child. *Id.* 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 the child’s physical, mental, and social development is permanently impaired before terminating the parent-child relationship. *Id.*

[23] In reviewing termination proceedings on appeal, this court will neither reweigh evidence nor assess witness credibility. *C.A. v. Indiana Dep’t of Child Servs.*, 15 N.E.3d 85, 92 (Ind. Ct. App. 2014). We consider only the evidence and reasonable inferences favorable to the juvenile court’s judgment. *Id.* Where, as here, the juvenile court enters findings of fact and conclusions of law, we apply a two-tiered standard of review: we first determine whether the evidence supports the findings and then determine whether the findings support the judgment. *Id.*

[24] In deference to the juvenile court’s unique position to assess the evidence, we will not set aside its judgment terminating a parent-child relationship unless clearly erroneous. *In re E.M.*, 4 N.E.3d 636, 642 (Ind. 2014). Findings are clearly erroneous when the record contains no facts or inferences to support them. *In re S.L.H.S.*, 885 N.E.2d 603, 615-16 (Ind. Ct. App. 2008). And when,

as here, findings are unchallenged, we consider them to be true. *In re Br.B.*, 139 N.E.3d 1066, 1073 (Ind. Ct. App. 2019), *trans. denied*. If the evidence clearly and convincingly supports the findings and the findings clearly and convincingly support the judgment, the judgment is not clearly erroneous. *In re R.S.*, 56 N.E.3d 625, 628 (Ind. 2016).

II. Statutory Requirements

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

(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);⁴ Ind. Code § 31-37-14-2 (stating burden of proof in termination proceedings). If the juvenile court concludes the allegations of the petition for involuntary termination are true, “the court shall terminate the parent-child relationship.” Ind. Code § 31-35-2-8(a).

III. Remedy of Conditions

[26] Mother challenges the juvenile court’s conclusion that there is a reasonable probability the conditions that resulted in Child’s removal from and continued placement outside of Mother’s home will not be remedied. *See* Ind. Code § 31-35-2-4(b)(2)(B)(i). We note that Mother has not challenged any of the juvenile court’s findings of fact, and we therefore take them as true and need only determine whether the unchallenged findings clearly and convincingly support the judgment. *See In re S.S.*, 120 N.E.3d 605, 610 (Ind. Ct. App. 2019).

[27] We also note that Mother’s statement of the issues purportedly challenges both of the juvenile court’s conclusions under Indiana Code section 31-35-2-4(b)(2)(B) (“Subsection B”). *See* Brief of the Appellant at 4. Subsection B is written in the disjunctive such that, to support termination, DCS need only prove *either* that conditions leading to removal will not be remedied *or*

⁴ There are four elements in total. *See* Ind. Code § 31-35-2-4(b)(2)(A)-(D). Mother only specifically challenges the element listed in subsection (B)(i). As Mother did not specifically challenge the “threat to the well-being of the child” sub-element and the “best interests” element, and she did not challenge proof of the remaining two elements (the period of removal from the home/efforts at reunification and the plan for the care and treatment of the child), we consider any argument regarding them waived. *See* Ind. Appellate Rule 46(A)(8)(a).

continuation of the relationship poses a threat to the child's well-being. *See In re S.S.*, 120 N.E.3d at 610. Here, the juvenile court found DCS proved both sub-elements of Subsection B by clear and convincing evidence. Thus, Mother must show on appeal the court clearly erred as to both. But Mother's argument is directed solely at the juvenile court's remedy-of-conditions conclusion. *See Br. of the Appellant* at 14. Even if Mother is correct and the juvenile court's conclusion that conditions will not be remedied is set aside as clearly erroneous, the juvenile court's termination order is still supported by the unchallenged conclusion that DCS proved continuation of the relationship threatens Child's well-being.

[28] That said, we recognize the constitutional dimension of the right at issue. Therefore, we will address whether the findings support the juvenile court's remedy-of-conditions conclusion under Subsection B.

[29] There is a two-step analysis for addressing whether the conditions that resulted in a child's removal will not be remedied: first, identifying the conditions that led to removal, and second, determining whether there is a reasonable probability those conditions will be remedied. *See E.M.*, 4 N.E.3d at 642-43. In the second step, the juvenile court must judge a parent's fitness as of the time of the termination proceeding, taking into consideration evidence of changed conditions; in other words, the court must balance a parent's recent improvements against habitual patterns of conduct to determine whether there is a substantial probability of future neglect or deprivation. *Id.* at 643. We entrust that "delicate balance" to the juvenile court, which has discretion to

weigh a parent's prior history more heavily than efforts made only shortly before termination. *Id.*

[30] Mother claims that “[w]hile [she] did not complete many of the services ordered after [her] assessments, she did make . . . efforts to obtain the assessments and start the process.” Br. of the Appellant at 14. Mother maintains that an argument could be made that “given more time, [she] would [have] complete[d] and benefit[ted] from services.” *Id.* Mother also argues the juvenile court held her to “a different standard” because the court “judged [her] based on errant [progress/permanency] reports” that contained information from the CHINS proceedings for the Older Children. *Id.* We disagree.

[31] Here, the juvenile court made the following findings supporting its conclusion that there is a reasonable probability the conditions resulting in Child's removal from Mother's care would not be remedied:

- DCS initially became involved with Child due to Mother's substance abuse issues, *see* Appealed Order at 5 ¶ 17;
- Child has been in relative placement with Maternal Aunt since December 3, 2020, the day Child was released from the hospital, and Child has never returned to Mother's care, *see* Appealed Order at 5, ¶ 19; 7, ¶ 40;
- Mother has pending CHINS cases for the Older Children, where she was originally participating in family recovery court to assist her with substance abuse issues, but Mother was discharged from family recovery court for noncompliance and failure to participate in substance abuse treatment; under the

CHINS cases for the Older Children, Mother was referred for services beginning in April and May 2019 and referred for substance abuse treatment beginning in 2019, *see* Appealed Order at 6 ¶ 34;

- Mother has not refrained from criminal activity, as she had new, pending charges from June and August 2022, that involve substance abuse issues, and at the time of the termination hearing, Mother had active warrants for her arrest, *see* Appealed Order at 6 ¶¶ 35, 36;

- Mother completed several assessments, but she never participated consistently in the substantive services that were recommended based upon the assessments – including drug and alcohol counseling and drug screens, twelve step meetings, and individual counseling, *see* Appealed Order at 7 ¶ 44;

- Mother never completed substance abuse treatment, *see* Appealed Order at 7 ¶ 46;

- Mother did not participate in drug screens requested by FCM Lewis, and Mother failed to participate in any drug screens provided by the appointed drug-testing facility; between July 2021, and the date the termination hearing took place, Mother failed to call the drug-testing facility 248 times and no-showed for drug screens twenty-eight times, *see* Appealed Order at 8 ¶ 50.

[32] We conclude the juvenile court’s unchallenged findings clearly and convincingly support its conclusion that DCS proved by clear and convincing evidence that there is a reasonable probability the conditions that resulted in Child’s removal from Mother’s care will not be remedied. Therefore, the juvenile court’s decision to terminate Mother’s parental rights was not clearly

erroneous, and the juvenile court did not err in terminating Mother's parental rights to Child.

[33] As to Mother's argument that the juvenile court held her to a different standard by taking into consideration information from the CHINS proceedings for the Older Children, we conclude the court was well within its discretion to do so. Mother's parent participation plan specifically required Mother to, among other things, follow the CHINS orders issued in the cases involving the Older Children.

Conclusion

[34] The juvenile court did not err in concluding DCS had sufficiently proven the elements required for termination. The juvenile court's order terminating Mother's parental rights to Child is therefore affirmed.

[35] Affirmed.

Crone, J., and Kenworthy, J., concur.