

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:

B.D., Br. D., and I.D. (Minor
Children),

and

N.M. (Mother) and D.D.
(Father)

Appellants-Respondents,

v.

November 6, 2023

Court of Appeals Case No.
23A-JT-965

Appeal from the Pulaski Circuit
Court

The Honorable Mary C. Welker,
Judge

Trial Court Cause Nos.
66C01-2209-JT-8
66C01-2209-JT-9
66C01-2209-JT-10

Indiana Department of Child
Services,
Appellee-Petitioner.

Memorandum Decision by Judge Bailey
Judges May and Felix concur.

Bailey, Judge.

Case Summary

- [1] In this consolidated appeal, N.M. (“Mother”) and D.D. (“Father”), collectively (“Parents”), challenge the termination of their parental rights to Bryl.D. (born in 2013), Bryc.D. (born in 2015), and I.D. (born in 2016), collectively (“Children”), upon the petition of the Pulaski County Department of Child Services (“DCS”). Parents present the restated issue of whether the judgment is clearly erroneous because DCS failed to present clear and convincing evidence to establish the requisite statutory elements as to remediation of conditions and the best interests of Children.¹ We affirm.

¹ Parents also point out that, with reference to the statutory element setting forth the minimum term of removal from the parental home preceding a termination of parental rights, the trial court order over-states the length of time that Children had been removed. Despite the misstatement, however, the Parents concede

Facts and Procedural History

- [2] On September 13, 2021, DCS received a report that Children had been exposed to illicit drug use in the home of their custodial parent, Mother. At that time, Mother lived next door to her mother (“Maternal Grandmother”), who had exercised guardianship over Children for approximately three years while Mother had been incarcerated. DCS caseworkers offered drug screens to Mother and four other adults who were present, but all refused drug screening.
- [3] Eight days later, DCS received a second report of Children’s exposure to illicit drugs. Although Mother again refused a drug screen, she permitted Children to submit to hair follicle testing. The results indicated that each child had long term exposure to methamphetamines and fentanyl. One child had been exposed to THC and one to heroin.
- [4] On October 4, 2021, Children were removed from Mother’s home pursuant to an emergency order. Father was contacted by DCS, but he could not take custody of Children because he refused a drug screen. Father suggested placement with his cousins (“Foster Parents”) as an alternative, and this placement was made. Foster Parents obtained long-overdue medical and therapeutic services for Bryl.D., who has been diagnosed with Down’s

that DCS alleged and proved that Children had been removed under a dispositional decree for more than six months, satisfying the requirement of Indiana Code Section 31-35-2-4(b)(2)(A)(i). Neither parent develops an argument challenging the sufficiency of the evidence to establish the requisite time period to support a termination of parental rights.

Syndrome and autism. They also obtained multiple services for the benefit of Bryc.D., who has been diagnosed with muscular dystrophy.

[5] DCS alleged Children to be Children in Need of Services (“CHINS”) and, on December 19, Parents admitted that, because of their drug exposure, Children were CHINS. Parents were ordered to, among other things: maintain contact with DCS family case managers (“FCM”); enroll in recommend services; obtain suitable housing and employment; submit to drug screens; allow home-based counseling for Children; complete substance abuse assessments and follow recommendations; and visit with Children.

[6] Over the course of the CHINS proceedings, Mother was incarcerated on at least six occasions, three of which were for probation violations – related to a 2019 conviction for possession of methamphetamine. When she was not incarcerated, Mother was partially compliant with services, and she progressed to a trial home visit with Children. However, the trial home visit was terminated after Mother tested positive for methamphetamine. Also, during the course of the CHINS proceedings, Father was incarcerated for a significant portion of time – partially related to his sentence after pleading guilty to three theft charges and partially related to a probation violation sanction in a conversion case. Father did not successfully complete services recommended by DCS; he stopped visiting Children and was discharged unsuccessfully from an education program for fathers.

[7] On September 30, 2022, DCS filed a petition to terminate Parents' parental rights. Fact-finding hearings on the termination petition were held on December 19, 2022, and on February 10, February 28, and March 8, 2023. By that time, Mother had been recently released from incarceration, where she had participated in a program designed to prevent drug relapses. She was due to give birth to another child at the end of March. She was living in her boyfriend's house and had secured a promise of future employment in his family-owned auto repair business. Father – out on bond – had obtained employment to commence on March 9. He testified that he had been “clean since December 22,” having completed a thirty-day rehabilitation program called Recovery Works. (Tr. Vol. IV, pg. 2.) Father was living with his parents but anticipated that he could rent a trailer from them in the future, dependent upon his continued sobriety. Father had a pending charge in Porter County for possession of marijuana. In Pulaski County, he had a pending petition to revoke his probation in another case, exposing him to a two-year probation violation sanction.

[8] Mother requested that Children be placed back in her custody. In light of DCS's concern over her dependency upon her boyfriend for housing and employment, Mother testified that she could alternatively return to live with or near Maternal Grandmother. Father was admittedly not in a position to assume custody of Children; however, he opined that Mother and Maternal Grandmother could jointly meet Children's needs. Mother's boyfriend testified to his willingness to have Children in his home. He acknowledged that he had

been involved in a DCS case involving his own daughter, but he attributed it to “false reporting.” (Tr. Vol. III, pg. 141.) Children’s Court-Appointed Special Advocate (“CASA”) and Family Case Manager (“FCM”) recommended termination of Parents’ parental rights.

[9] On April 7, the trial court entered an order terminating Mother’s and Father’s parental rights. They now appeal.

Discussion and Decision

[10] In conducting our review, we acknowledge that “[t]he traditional right of parents to establish a home and raise their children is protected by the Fourteenth Amendment of the United States Constitution.” *Bailey v. Tippecanoe Div. of Fam. & Child.*, 666 N.E.2d 73, 76 (Ind. Ct. App. 1996), *trans. denied*.

However, a trial court must subordinate the interests of the parents to those of the child when evaluating the circumstances surrounding a termination. *Schultz v. Porter Cnty. Off. of Fam. & Child.*, 750 N.E.2d 832, 837 (Ind. Ct. App. 2001).

Termination of a parent-child relationship is proper where a child’s emotional and physical development is threatened. *Id.* Although the right to raise one’s own child should not be terminated solely because there is a better home available for the child, parental rights may be terminated when a parent is unable or unwilling to meet his or her parental responsibilities. *Id.* at 836.

[11] Before an involuntary termination of parental rights can occur in Indiana, DCS 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.

* * *

(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) (2021). DCS's "burden of proof in termination of parental rights cases is one of 'clear and convincing evidence.'" *R.Y. v. Ind. Dep't of Child Servs.*, 904 N.E.2d 1257, 1260 (Ind. 2009) (quoting I.C. § 31-37-14-2).

[12] When reviewing a termination of parental rights, we will not reweigh the evidence or judge the credibility of the witnesses. *Peterson v. Marion Cnty. Off. of Fam. & Child.*, 804 N.E.2d 258, 265 (Ind. Ct. App. 2004), *trans. denied*. 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 court's judgment terminating a

parent-child relationship only if it is clearly erroneous. *In re L.S.*, 717 N.E.2d 204, 208 (Ind. Ct. App. 1999), *trans. denied*.

[13] Where, as here, a trial court’s judgment contains special findings and conclusions, we apply a two-tiered standard of review. *Bester v. Lake Cnty. Off. of Fam. & Child.*, 839 N.E.2d 143, 147 (Ind. 2005). First, we determine whether the evidence supports the findings and, second, we determine whether the findings support the judgment. *Id.* “Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference.” *Quillen v. Quillen*, 671 N.E.2d 98, 102 (Ind. 1996). If the evidence and inferences support the trial court’s decision, we must affirm. *In re L.S.*, 717 N.E.2d at 208.

[14] Parents challenge the sufficiency of the evidence DCS presented to satisfy the elements of Indiana Code Section 31-35-2-4, inclusive of subsections (B) (remediation of conditions or posing of threat to children) and (C) (best interests of children). We address the contentions in turn.

[15] Remediation of Conditions. The trial court found that: Parents had been partially compliant with services; Father had not complied for any significant period of time; Father had never progressed beyond supervised visitation; Mother lacked independent income and was completely dependent upon another individual for her day-to-day needs; Mother had been “mostly compliant” with available services while incarcerated but non-compliant when not incarcerated; Mother had not progressed to unsupervised parenting time

after termination of the home trial visits on account of her methamphetamine use; Father had a pending criminal charge and was out on bond; Father was alleged to have violated probation and was facing a probation violation sanction of up to two years; Father independently and recently completed a rehabilitation program but was not in aftercare, apart from a Suboxone program; both parents had been incarcerated for “significant times” during the CHINS cases; and “neither Parent appears to appreciate the effect their incarcerations, use of illicit substances, and failure to provide or to assure appropriate medical care has had on [Children].” (Appealed Order at 10-12.)

- [16] Parents do not contend that the findings are unsupported. Rather, they point to evidence of changed conditions by the time of the termination hearing. According to Father, he “had maintained sobriety on his own for well over a month from his release date [from Recovery Works],” and “the record contains evidence that once he had addressed his drug addiction, Father immediately sought out the services necessary to work toward reunification.” Father’s Brief at 16-17. He points to his testimony that he had recently accepted a higher paying job and could have an opportunity to rent a trailer. And Mother asserts that her “response to the services offered by DCS are extensive and voluminous.” Mother’s Brief at 15. According to Mother, she failed only three drug screens “out of several dozen”; resolved all pending criminal matters; obtained housing and transportation; and benefitted from both service referrals from DCS and programs offered during her incarceration. *Id.* at 17.

[17] Addressing the reasonable probability of remediation of conditions 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.*

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

[19] Children were initially removed from Mother’s care due to their exposure to substance abuse in the home. Father expressed an interest in taking custody of Children but refused a drug screen, a prerequisite to his having custody. Once Children were placed in foster care and medically and psychologically

evaluated, it came to light that their needs were being grossly neglected. For example, Bryl.D. had congenital cataracts that were not timely removed, resulting in “significant vision impairment.” (Tr. Vol. II, pg. 164.) It had been recommended at a 2016 pediatric appointment that Bryl.D. be examined at least annually by a pediatric specialist; years passed without appropriate follow-up visits, and she had not been treated for hypothyroidism and needed tubes in her ears. In January of 2022, she was found to be “severely delayed,” even considering her diagnoses, and she “presented with severe behavioral problems” and “severe feeding difficulties.” (*Id.* at 171.) Bryl.D. was primarily bottle fed at age five.

[20] Bryl.D. is for the most part non-verbal, but she is receiving instruction in sign language and behavioral coping mechanisms. Bryl.D. and Bryc.D. require assistance in getting to school. Bryc.D. lacks muscle development sufficient to permit his climbing school bus steps; he is transported to school by his foster mother. Bryl.D. boards a specially equipped school bus and must be strapped into a car seat; her foster father accompanies her onto the bus each school day. Addressing their special needs requires numerous appointments with educational, mental health, and medical professionals.² For example, Bryl.D. has occupational therapy bi-weekly and feeding therapy bi-weekly. Bryc.D. has physical, occupational, mental health, and speech therapy. I.D. has been

² DCS estimated that, in one year, these obligations aggregated to eighty-four medical appointments, three surgeries, two sleep studies, and forty appointments with DCS and educational personnel.

referred for an attention deficit evaluation, but otherwise has typical childhood appointments. Mother had attended, by her estimate, less than five feeding therapy sessions, and she had been present for three medical appointments during the CHINS proceedings. Father had not participated to that level.

[21] Parents are to be commended for their participation in programs independent of DCS's referrals and for their efforts toward sobriety and stability. However, neither has demonstrated a lengthy period of sobriety outside of incarceration; neither has demonstrated an ability to address Children's extensive medical and educational needs; and the parents themselves are dependent upon others for the provision of necessities. During the CHINS proceedings, they have been unable to provide custodial care for Children apart from one trial in-home visit that ended upon a positive methamphetamine screen result. As of the termination hearing, Father remained involved in the criminal justice system. The trial court's determination of a reasonable probability that the conditions leading to removal and continued placement outside the parental home are unlikely to be remedied is not clearly erroneous.

[22] Indiana Code Section 31-35-2-4(b)(2)(B) is written in the disjunctive. Where, as here, DCS has met its burden as to remediation of conditions, pursuant to Indiana Code section 31-35-2-4(b)(2)(B)(i), "we need not address whether the State has proven its allegations under section 31-35-2-4(b)(2)(B)(ii)." *K.T.K. v. Ind. Dep't of Child Servs.*, 989 N.E.2d 1225, 1234 (Ind. 2013) (citing *In re W.B.*, 772 N.E.2d 522, 531 n.2 (Ind. Ct. App. 2002)). Accordingly, we do not address

Parents' contentions that they do not pose a threat to the well-being of Children.

[23] Best Interests of Children. Parents also challenge the trial court's conclusion that termination of the parent-child relationships is in Children's best interests. Mother asserts that termination is not the last resort available here, and she suggests that placing Children with Grandmother is preferable. According to Mother, "DCS did not even check the home of Maternal Grandmother" and "Maternal Grandmother has been an integral part of the Children's lives since they were infants." Mother's Brief at 21. Father echoes Mother's suggestion of placement, contending that Maternal Grandmother "has been an integral part of the Children's lives since they were infants" and "she has a strong bond with the Children." Father's Brief at 20.

[24] In determining what is in a child's best interests, the court must look to the totality of the evidence. *A.D.S.*, 987 N.E.2d at 1158. Here, both parents were in and out of jail during the CHINS proceedings. Mother eventually resolved the criminal matters pertaining to her, but her incarceration had impacted the provision of services and her ability to fully participate in addressing Children's needs. For example, Mother had missed most of Bryl.D.'s feeding therapy sessions.

[25] During the CHINS proceedings, Father was incarcerated in Pulaski, Porter, LaPorte, and Hamilton County jails. He had not resolved his criminal matters as of the termination hearing. He was in jeopardy of at least two years of

additional incarceration. Indeed, Father did not claim that he could provide custodial care for Children. Rather, he desired that the trial court make Maternal Grandmother the guardian of Children “while [he and Mother] get our life together.” (Tr. Vol. IV, pg. 3.)

[26] It is clear that both Mother and Father would have preferred that Children be placed in the guardianship of Maternal Grandmother for a second time. DCS opposed this plan for a number of reasons, including: Maternal Grandmother had several other children for whom she was providing supervision; her home had been the site of past drug use and one non-fatal overdose; she had experienced transportation difficulties; and she had been unable to comply with various medical recommendations pertaining to Children.

[27] Meanwhile, Children were thriving in foster care. Bryc.D. had significantly improved his grades and was exhibiting greater social skills. Dr. Marilyn Bull, a pediatric neurologist, testified that Bryl.D. had become “much more functional” in foster care. (Tr. Vol. II, pg. 172.) CASA recommended that Parents’ rights be terminated as to Children. Their FCM agreed that Children had thrived in their foster placement and also opined that termination of parental rights and adoption was in Children’s best interests.

[28] The totality of the evidence is such that the trial court did not clearly err in finding termination of parental rights to be in Children’s best interests.

Conclusion

[29] DCS presented sufficient evidence to establish the requisite statutory elements. Accordingly, the order terminating Parents' rights to Children is not clearly erroneous.

[30] Affirmed.

May, J., and Felix, J., concur.