

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In the Matter of the Termination
of the Parent-Child Relationship
of R.S., Mother, O.D.J., Father,
and O.J. and H.J., Minor
Children,

R.S. and O.D.J.,
Appellants-Respondents,

v.

Indiana Department of Child
Services,
Appellee-Petitioner.

March 19, 2021

Court of Appeals Case No.
20A-JT-1855

Appeal from the
Wayne Superior Court

The Honorable
Barbara Arnold Harcourt, Senior
Judge

Trial Court Cause Nos.
89D03-2005-JT-9
89D03-2005-JT-10

Kirsch, Judge.

- [1] R.S. (“Mother”) and O.D.J. (“Father”) (collectively, “Parents”) appeal the juvenile court’s order terminating their parental rights to their minor children, O.J. and H.J. (“Children”). Parents raise the following restated issue on appeal: whether the juvenile court’s judgment terminating their parental rights was supported by clear and convincing evidence.
- [2] We affirm.

Facts and Procedural History

- [3] Mother and Father are the biological parents of O.J. (born, October 13, 2006) and H.J. (born March 13, 2009). *Ex. Vol. I* at 61, 66. In March of 2015, the Indiana Department of Child Services (“DCS”) first became involved with the family after a call was placed to DCS’s child abuse hotline. *Id.* at 162. DCS family case manager Beth Wagers (“FCM Wagers”) went to the family’s home and found that the home’s sole power source was an extension cord that was running from another apartment, that the apartment was cold, and that there was not much food or furniture in the apartment. *Id.* Mother admitted to FCM Wagers that she had been using marijuana and oxycodone. *Id.* Father appeared “jittery and had difficulty keeping his eyes opened.” *Id.* Mother and Father both refused to take drug tests. *Id.* FCM Wagers observed Children both at school and at the apartment and observed them to be appropriately dressed and did not offer Parents any services or remove Children from the home at that time. *Id.* About one month later, FCM Wagers returned to

Parents' apartment. *Id.* It still lacked utility service, and both Mother and Father refused to take drug tests; however, Parents entered into a program of informal adjustment ("IA") with DCS that was approved by the juvenile court on May 29, 2015. *Id.* at 162, 177, 179.

[4] In June 2015, Father was referred to Rodney Barbee ("Barbee") with the Children's Bureau for case management services, which included assisting Father with understanding the legal process, monitoring Father's progress in services, and helping Father find employment and suitable housing. *Id.* at 172. Father did not maintain consistent contact with Barbee, and in June 2016, his services with Barbee were stopped. *Id.*

[5] On July 15, 2015, DCS filed petitions alleging that Children were Children in Need of Services ("CHINS") after Parents did not participate in services during the IA, and both Parents tested positive for drugs.¹ *Id.* at 9, 36, 61-70. On July 22, 2015, the juvenile court held the initial hearing on the CHINS petition, at which Parents denied the allegations, and Children remained in Parents' care. *Id.* at 9, 36, 71-72. FCM Jennifer Morgan ("FCM Morgan") was assigned to the case in August of 2015. *Id.* at 163; *Tr. Vol. 2* at 202. On August 7, 2015, Father tested positive for morphine, and on August 21, 2015, Father tested positive for marijuana and oxycodone. *Ex. Vol. II* at 22, 26.

¹ In July 2015, at the outset of the CHINS case, DCS paid Parents' electric, water, and heating bills to restore utility service to the residence, but for several months after DCS paid for Parents' utility service, Parents "never had utilities turned on in their home." *Tr. Vol. II* at 194.

[6] Following the August 26, 2015 fact-finding hearing as to Mother, the juvenile court adjudicated Children as CHINS.² *Ex. Vol. I* at 10, 37, 73-77. After the juvenile court held the dispositional hearing, it entered the dispositional decree on September 4, 2015, which ordered Parents to participate in services. *Id.* at 10-11, 37-38, 78-83, 104-09. Parents were also ordered to maintain a suitable home, refrain from drug use, participate in home-based counseling, complete a substance abuse assessment and follow all recommendations of the substance abuse assessment, and submit to random drug screens. *Id.* at 78-83, 104-09. The juvenile court also ordered Father to participate in Fatherhood Engagement services. *Id.* On September 8, 2015, Father tested positive for marijuana, and on September 16, 2015, he tested positive for cocaine, morphine, and oxycodone. *Ex. Vol. II* at 17, 20. Children were removed from Parents' care on October 21, 2015. *Tr. Vol. 2* at 203.

[7] In November 2015, DCS referred Parents to PEACE Community Services ("PEACE") for a substance abuse assessment. *Id.* at 18. Parents completed the assessment, and Robin Cruz ("Cruz") with PEACE provided them substance abuse treatment that included both individual counseling and joint sessions. *Id.* On November 4, 2015, Mother tested positive for marijuana and morphine, and Father tested positive for morphine. *Ex. Vol. I* at 224; *Ex. Vol. II* at 14. On November 9, 2015, Mother again tested positive for marijuana, and Father

² Father admitted to the allegations contained in the CHINS petitions. *Ex. Vol. I* at 10, 37, 73-77.

tested positive for morphine. *Ex. Vol. I* at 222; *Ex. Vol. II* at 11. On December 3, 2015, Mother and Father both tested positive for cocaine and morphine. *Ex. Vol. I* at 220; *Ex. Vol. II* at 7. Cruz recommended that Parents participate in drug detoxification services, but Parents did not participate in those services because it was “not something that they wanted to do at the time.” *Tr. Vol. 2* at 119. Parents stopped attending services in December 2015, were discharged from PEACE in January 2016, and did not complete substance abuse services. *Id.* at 119, 122. On January 27, 2016, Mother and Father both tested positive for marijuana and cocaine. *Ex. Vol. I* at 217; *Ex. Vol. II* at 4.

[8] By April of 2016, Parents moved to a new apartment in Richmond, Indiana, which was clean and had working utilities, and FCM Stephanie McCutcheon (“FCM McCutcheon”) was assigned to their case. *Tr. Vol. II.* at 205; *Ex. Vol. I* at 166, 172-73. At some point in 2016 or 2017, DCS referred Mother for a substance abuse assessment at Reid Healthcare Pavilion with Thomas Pennington (“Pennington”). *Tr. Vol. II* at 125. Mother completed the assessment, and Pennington recommended that Mother participate in substance abuse treatment. *Id.* at 125-26. Pennington testified that Mother “came for one (1) session, and then I don’t believe she ever came back” and was discharged without completing the services. *Id.* at 127, 129.

[9] On January 9, 2017, DCS filed petitions to terminate Parents’ parental rights, and after a fact-finding hearing on April 25 and 28, 2017, the juvenile court denied the petitions because it found the evidence was not clear and convincing that Parents would be unable to overcome their substance abuse or addiction

issues and because Parents had resolved their housing issues. *Ex. Vol. I* at 161-70. Children were not returned to Parents' care, and DCS continued to offer Parents services. *Id.* at 128-29.

[10] On August 22, 2017, the State charged Father with Level 6 felony possession of a narcotic drug and Class A misdemeanor resisting law enforcement under Cause Number 89D01-1708-F6-440 ("Cause No. 440"). *Ex. Vol. I* at 184-85. On October 17, 2017, through an agreement with the prosecutor, Father was placed in a drug diversion program, which entailed "intense supervision" of participants along with requirements to successfully complete counseling, maintain stable employment, and have an accountability partner. *Id.* at 185; *Tr. Vol. II* at 64-65. If the participant completed the program, the court would dismiss their case, but Father failed to complete the drug diversion program and was removed from the program by the court on May 17, 2018. *Ex. Vol. I* at 186, 188; *Tr. Vol. II* at 65-66. After his removal from the drug diversion program, Father pleaded guilty as charged in Cause No. 440. *Ex. Vol. I* at 186-87, 190-92.

[11] In October of 2017, Father was referred to Centerstone Mental Health for substance abuse treatment, which included "group therapy, individual recovery coaching, life skills, and case management." *Tr. Vol. II* at 94. Father did not successfully complete the substance abuse services and was discharged from the program in May of 2018 due to nonparticipation. *Id.* at 93-94. In April of 2018, Mother applied for housing with the Richmond Housing Authority, but the housing authority informed her, as it did for all applicants, that it needed more information, including "a birth certificate, social security cards for all

members of the household, current police report on each adult member of the household, current income verification for each member of the household, and a complete name and address of past and present landlords” to process her application. *Id.* at 154-55. The housing authority never received the requested information, and her application was closed in January 2019. *Id.*

[12] In June of 2018, Father began Fatherhood Engagement with Jeff Day (“Day”) at the Children’s Bureau. *Id.* at 181. At the time, Father was incarcerated under Cause No. 440, and Day first met with Father twice while he was in jail. *Id.* When Father was released from jail, Day attempted to help Father find employment, and when Father found employment, he thanked Day for his help. *Id.* Day testified that he explained to Father that Father’s services were not yet completed but did not hear from Father again and stopped providing services to Father in August of 2018 due to Father’s noncompliance. *Id.* at 181-82.

[13] FCM Supervisor Leslie Hamilton-Williams (“FCM Supervisor Hamilton-Williams”) began supervising Parents’ case in December of 2018. *Id.* at 45-47. On February 19, 2019, DCS filed petitions to terminate Parents’ parental rights, and after a May 16, 2019 fact-finding hearing, the juvenile court denied the petitions to terminate parental rights. *Ex. Vol. I* at 171-76. At the end of June 2019, FCM Megan Studebaker (“FCM Studebaker”) was assigned to Parents’ case. *Tr. Vol. II* at 206. On July 8, 2019, Mother met with FCM Supervisor Hamilton-Williams and FCM Studebaker at the local DCS office and told them that she was still using methamphetamine and marijuana and that she used

methamphetamine to stay awake at work, and the results of a drug test administered that day showed that she was positive for amphetamine, methamphetamine, and marijuana. *Id.* at 48-49, 215-16; *Ex. Vol. I* at 213. Mother also reported issues with her home to FCM Supervisor Hamilton-Williams and FCM Studebaker, and they asked Mother to sign a release so that they could work with Mother's landlord to help improve her housing. *Tr. Vol. II* at 49, 216. Mother admitted that she had not paid rent to her landlord since November 2018, stated she did not want "drag [her landlord] into" the DCS case, and did not allow FCM Supervisor Hamilton-Williams or FCM Studebaker to observe the residence, stating "she didn't care" even though she could be held in contempt of the dispositional decree for not allowing DCS access to the home because she "wasn't afraid of jail." *Id.* at 49-50, 216.

[14] On that same day, FCM Supervisor Hamilton-Williams and FCM Studebaker also met with Father to schedule Father's substance abuse assessment with Centerstone. *Id.* at 52-53, 217. Father submitted a drug screen that day, which returned positive for amphetamine, methamphetamine, and fentanyl. *Id.* at 54; *Ex. Vol. I* at 233. Father never completed the scheduled substance abuse assessment. *Tr. Vol. II* at 53-54. Father also admitted to prior heroin use and that he and Mother used drugs together. *Id.* at 55, 217.

[15] In August of 2019, Mother admitted to FCM Studebaker that she used methamphetamine, Lortabs, and marijuana. *Id.* at 218. Mother completed a substance abuse assessment with Brandon Waterbury ("Waterbury") at Meridian Health Services in October of 2019. *Id.* at 99-100, 208-09. Based on

Mother's substance abuse assessment and her admission that she had used methamphetamine approximately two or three weeks before the assessment, Waterbury diagnosed Mother with substance use disorder. *Id.* at 104-05.

Waterbury recommended that Mother "complete intensive outpatient addiction treatment [along with] individual case management" and attend NA and AA meetings, but Mother did not complete those recommended services. *Id.* at 104, 106. As to substance abuse services, Mother told FCM Studebaker that "she did not anticipate engaging in [substance abuse services] whatsoever." *Id.* at 231.

[16] In August of 2019, FCM Studebaker was able to visit Mother's residence and observed that the residence lacked electricity and hot water and that there were "parts of the ceiling that were coming down. . . ." *Id.* at 219. She also observed that the residence was sparsely furnished and that there were no appropriate beds for Children. *Id.* FCM Studebaker testified that she discussed with Mother how DCS could help assist with her utilities, but Mother "stated she did not need any help." *Id.*

[17] On October 29, 2019, the juvenile court held Parents in contempt for failure to participate in services, continued use of illegal drugs, and for not allowing FCM Studebaker into the home, which was stayed on the condition that Parents abide by the dispositional decree. *Ex. Vol. I* at 181-83. On November 4, 2019,

Mother met with Johanna Epp (“Epp”) of Meridian Health Services.³ *Tr. Vol. II* at 134. Epp testified that she and Mother “met face-to-face on one (1) occasion” to assist Mother with addiction services, housing, locating a primary care physician, working on parenting skills, and mental health issues. *Id.* at 136-37. Epp observed that Mother was “a little bit resistant” to participating in Meridian’s services and stated that Mother told her “she pretty much could have everything under control independently.” *Id.* at 137. After the first meeting on November 4, 2019, Mother did not reach out to Epp with the exception of a February 21, 2020 text message to Epp in which Mother indicated she needed assistance with “housing and other things.” *Id.* at 138. Epp scheduled a meeting with Mother for March 2, 2020, but Mother missed the meeting and missed the two rescheduled appointments. *Id.* After Mother missed the rescheduled March 16, 2020 meeting, Meridian discharged Mother from services due to her failure to participate. *Id.* at 138-39.

[18] In the latter part of 2019 and early 2020, Day with the Children’s Bureau was again going to start working with Father for Fatherhood Engagement Services but was unable to contact Father to begin working on those services. *Id.* at 181-82. On January 6, 2020, Mother tested positive for marijuana. *Ex. Vol. I* at 209.

³ In approximately November or December 2019, Mother also began case management services with Brandy Clark (“Clark”) at Meridian Health Services for “skill building, coping, moving from using substances, to learning new ways to deal with life.” *Tr. Vol. II* at 186, 188. As with Epp, Mother met with Clark on one occasion and told Clark that she “felt justified in her [substance] use.” *Id.* at 189. Despite Clark’s attempts to engage Mother, Mother did not respond, and in December, Clark closed Mother’s services due to noncompliance. *Id.* 188-90.

On February 17, 2020, Mother refused a drug screen following a supervised visit with Children at the DCS office but admitted to FCM Supervisor Hamilton-Williams that she used marijuana and was “still using meth because she suffers from insomnia” while nevertheless claiming that “she didn’t need substance abuse treatment.” *Tr. Vol. II* at 56. Mother also told FCM Supervisor Hamilton-Williams that she believed Father’s “ongoing use of heroin has caused [Father] brain damage.” *Id.* at 57. As to housing, Mother was still living in a home that lacked electricity and hot water but was on the waiting list at the local housing authority and had been offered housing with only one bedroom because Mother lacked custody of Children. *Id.*

[19] On February 21, 2020, the juvenile court modified the dispositional decree and ordered Parents to participate in parenting time, substance abuse therapy, case management services to obtain stable housing with working utilities, stable income, and transportation, and it ordered Father to complete a psychiatric evaluation. *Ex. Vol. I* at 159-60. On March 3, 2020, the juvenile court found Mother in contempt for her failure to participate in services and ordered that she serve five days in jail. *Id.* at 149-50.

[20] Parents exercised parenting time during the underlying CHINS cases; Mother’s visitation was consistent while Father’s visitation was not. *Id.* at 169, 175. Children’s foster mother testified that during a visit with Father in approximately 2018, Father made comments to Children that scared them, so Children requested foster mother to stay with them at the visits. *Tr. Vol. II* at 33. The last time Children saw Father was in March 2019. *Id.* at 29, 221.

FCM Studebaker testified that Father told her in July and October 2019 that he did not want to visit with Children unless Mother was also present. *Id.* at 222.

FCM Studebaker also stated that Father told her in June of 2020 that he did not want to see Children without Mother present because he “is family oriented, and would prefer to do things as a family only, and that [Children] were tough enough to handle it.” *Id.*

[21] FCM Studebaker stated that between January and March 2020, Mother had missed six visits with Children. *Id.* at 222. On one of the six missed visits, Mother cancelled the visit because she had slept in, on another Mother cancelled because she was sick, and on the remaining visits Mother did not contact FCM Studebaker before the visit to cancel, and FCM Studebaker “would not hear anything [from Mother] until well after the visit would have ended.” *Id.*⁴ Mother also missed two additional visits for a funeral. *Id.* at 222-23. On March 23, 2020, Mother decided to do virtual visits with Children because of COVID-19, and FCM Studebaker also told Mother that she could call Children more frequently and offered Mother the option of video visits but Mother declined, preferring to use the phone instead. *Id.* at 30, 224. Between March 13 and June 12, 2020, Mother called Children only four times, and on June 12, 2020, face-to-face visitation began again. *Id.* Children’s foster mother stated that Children typically appeared happy after seeing Mother at visits, but

⁴ FCM Studebaker stated there was another visit in which Mother “may have let me know she was sick, but it would have been after the visit had started.” *Tr. Vol. 2* at 223.

when O.J. returned home from a July 13, 2020 visit with Mother, “[h]e was yelling and crying.” *Id.* at 32-33. Mother continued to have visitation with Children at the time of the termination hearing. *Id.* at 228.

[22] On April 22, 2020, Father was arrested, and the following day the State charged Father with Level 6 felony possession of methamphetamine and Class A misdemeanor resisting law enforcement. *Id.* at 131-32; *Ex. Vol. I* at 193-94, 196. On April 24, 2020, FCM Kyle Thomas (“FCM Thomas”) met with Father in the Wayne County jail where he spoke with Father about the underlying CHINS cases. *Tr. Vol. II* at 36-39. FCM Thomas testified that Father told him, “he was essentially done with participating in the case, and that he would see [DCS] in court.” *Id.* at 39. FCM Thomas also administered a drug screen to Father on that day, which returned positive for amphetamine and methamphetamine. *Id.* at 37; *Ex. Vol. I* at 229. At the time of the termination hearing in July 2020, Father remained incarcerated but testified that he signed a plea agreement and expected to be released from incarceration on August 19, 2020. *Tr. Vol. II* at 221; *Tr. Vol. III* at 3-5.

[23] FCM Studebaker was last in Mother’s home in May of 2020, but the week before the termination hearing, FCM Studebaker attempted to visit Mother’s home and observed that “there was an extension cord running from the bottom floor of the apartment building, up to the third floor in which her apartment is, and through that door.” *Tr. Vol. II* at 220. FCM Studebaker testified that Mother had told her that “she does not need electricity and that it is not important to her.” *Id.* at 230-31. Mother’s landlord testified that she has not

paid rent for her apartment in “more than two (2) years,” and Mother, who is unemployed, admitted that the home is not suitable for Children but that she was trying to find a different residence for Children. *Id.* at 234, 246-48.

[24] Since Children’s removal on October 21, 2015, they have been living in the same foster home and are doing well in their placement. *Id.* at 29, 195, 224. The foster parents have made sure that Children participate in sports and other activities, and they have improved academically. *Id.* at 147. Court Appointed Special Advocate (“CASA”) Karen Bowen (“CASA Bowen”) opined that termination of parental rights was in the best interests of Children. *Id.* at 148, 152. CASA Bowen testified that she had many concerns about Parents, stating that their lack of participation in services, continued positive drug screens and substance abuse issues, her inability to access the inside of Parents’ home, and observation of extension cords running from the hallway into their apartment were all concerning to her. *Id.* at 149. DCS’s plan for the care and treatment of Children upon termination was adoption, and foster mother testified that she and her husband would like to adopt Children. *Id.* at 31, 148, 225.

[25] On May 1, 2020, DCS filed verified petitions to terminate Parents’ parental rights. *Appellants’ App. Vol. II* at 3, 12, 20-23, 30-33. On July 15, 21, and 28, 2020, the juvenile court held a fact-finding hearing. *Id.* at 8-9, 17-18. On September 8, 2020, the juvenile court entered its order terminating Parents’ parental rights. *Id.* at 9, 18; *Appellants’ App. Vol. V* at 120-36. The juvenile court concluded that DCS had proven by clear and convincing evidence that Children had been removed from the home in accordance with Indiana Code section 31-

35-2-4(b)(2)(A), that there was a reasonable probability that the conditions resulting in removal or reasons for placement outside the home had not been remedied, that there was a reasonable probability that continuation of the parent-child relationship posed a threat to the well-being of Children, that termination was in the best interests of Children, and that DCS had a satisfactory plan for care and treatment of Children. *Appellants' App. Vol. V* at 130-33, 134-35. Parents now appeal.

Discussion and Decision

[26] As our Supreme Court has observed, “Decisions to terminate parental rights are among the most difficult our trial courts are called upon to make. They are also among the most fact-sensitive -- so we review them with great deference to the trial courts[.]” *E.M. v. Ind. Dep’t of Child Servs.*, 4 N.E.3d 636, 640 (Ind. 2014). While the Fourteenth Amendment to the United States Constitution protects the traditional right of a parent to establish a home and raise his child and parental rights are of a constitutional dimension, the law allows for the termination of those rights when a parent is unable or unwilling to meet his responsibility as a parent. *Bester v. Lake Cnty. Office of Family & Children*, 839 N.E.2d 143, 145 (Ind. 2005). Parental rights are not absolute and must be subordinated to the child’s interests in determining the appropriate disposition of a petition to terminate the parent-child relationship. *In re J.C.*, 994 N.E.2d 278, 283 (Ind. Ct. App. 2013). The purpose of terminating parental rights is not to punish the parent but to protect the child. *In re D.P.*, 994 N.E.2d 1228, 1231 (Ind. Ct. App. 2013). 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 his physical, mental, and social development is permanently impaired before terminating the parent-child relationship. *Id.*

[27] When reviewing a termination of parental rights case, we will not reweigh the evidence or judge the credibility of the witnesses. *In re H.L.*, 915 N.E.2d 145, 149 (Ind. Ct. App. 2009). Instead, we consider only the evidence and reasonable inferences that are most favorable to the judgment. *Id.* Moreover, in deference to the juvenile court's unique position to assess the evidence, we will set aside the juvenile court's judgment terminating a parent-child relationship only if it is clearly erroneous. *Id.* at 148-49. A judgment is clearly erroneous only if the legal conclusions made by the juvenile court are not supported by its findings of fact, or the conclusions do not support the judgment. *In re S.P.H.*, 806 N.E.2d 874, 879 (Ind. Ct. App. 2004).

[28] Where, as here, a juvenile court enters specific findings and conclusions, we apply a two-tiered standard of review. *In re B.J.*, 879 N.E.2d 7, 14 (Ind. Ct. App. 2008), *trans. denied*. First, we determine whether the evidence supports the findings, and second, we determine whether the findings support the judgment. *Id.* A finding is clearly erroneous only when the record contains no facts or inferences drawn therefrom that support it. *Id.* If the evidence and inferences support the juvenile court's decision, we must affirm. *A.D.S. v. Ind. Dep't of Child Servs.*, 987 N.E.2d 1150, 1156 (Ind. Ct. App. 2013), *trans. denied*.

[29] Before an involuntary termination of parental rights may occur, among other requirements, DCS is required to allege and prove:

(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[.]

Ind. Code § 31-35-2-4(b)(2)(B)-(C). DCS's burden of proof for establishing these allegations in termination cases is one of clear and convincing evidence. *In re H.L.*, 915 N.E.2d at 149. Moreover, "if the court finds that the allegations in a petition described in section 4 of this chapter are true, the court *shall* terminate the parent-child relationship." Ind. Code § 31-35-2-8(a) (emphasis added).

[30] Parents do not challenge the juvenile court's conclusions under Indiana Code section 31-35-2-4(b)(2)(A) and (D) regarding the removal of Children from the home or that there was a satisfactory plan for the "care and treatment" of Children. Parents have therefore waived any challenge to the juvenile court's

legal conclusions as to these elements for failure to make a cogent argument. *In re B.R.*, 875 N.E.2d 369, 373 (Ind. Ct. App. 2007) (citing Ind. Appellate Rule 46(A)(8)(a)), *trans. denied*. Parents do, however, maintain that DCS failed to prove by clear and convincing evidence that there was a reasonable probability that the conditions resulting in the removal of Children or the reasons for placement outside the home of the parents will not be remedied⁵ or that termination was in the best interests of Children.

Findings of Fact

[31] Of the juvenile court's sixty-three⁶ findings of fact, Parents contend that findings ten through twenty-two, forty, and forty-nine were clearly erroneous. As to the remaining unchallenged findings, we "must accept these findings as true." *In re S.S.*, 120 N.E.3d 605, 610 (Ind. Ct. App. 2019); *see also Madlem v. Arko*, 592 N.E.2d 686, 687 (Ind. 1992) (Unchallenged findings "must be accepted as correct."). We must determine whether the findings are adequate to support the juvenile court's decision, and we must disregard findings that are not proper or

⁵ While the juvenile court concluded that there was a reasonable probability that the continuation of the parent-child relationship posed a threat to the well-being of Children, Parents have waived any argument as to this conclusion for failure to make a cogent argument. *In re B.R.*, 875 N.E.2d 369, 373 (Ind. Ct. App. 2007) (citing Ind. Appellate Rule 46(A)(8)(a)), *trans. denied*. We also note that because Indiana Code section 31-35-2-4 (b)(2)(B) is written in the disjunctive, we may affirm the termination of parental rights if DCS proved by clear and convincing evidence any one of the elements of Indiana Code section 31-35-2-4(b)(2)(B). *See K.E. v. Ind. Dep't of Child Servs.*, 39 N.E.3d 641, 646 n.4 (Ind. 2015).

⁶ Of the juvenile court's sixty-three paragraphs designated as findings of fact, six of those paragraphs are citations to case law regarding termination of parental rights and one paragraph provides that any matter designated as a finding of fact that is found to be a conclusion of law is deemed a conclusion of law. *Appellants' App. Vol. V* at 133-34.

competent. *In re B.J.*, 879 N.E.2d at 19. We may reverse a juvenile court’s judgment only if its findings amount to prejudicial error, but we cannot reverse because of an erroneous finding unless the findings were the “‘sole support for any conclusion of law necessary to sustain the judgment of the court.’” *Id.* (quoting *Riehle v. Moore*, 601 N.E.2d 365, 369 (Ind. Ct. App. 1992), *trans. denied*).

[32] Parents challenge findings ten through twenty-two, in which the juvenile summarized records from the underlying CHINS proceedings, because they contend the juvenile court adopted findings from the CHINS orders that were not made in accordance with the clear and convincing standard applicable to termination proceedings. Parents contend that the inclusion of findings ten through twenty-two in the termination order was clearly erroneous because: (1) finding sixty-one found, in part, “[e]ach of the above paragraphs is expressly adopted as the [juvenile court’s] own finding of fact” that the conditions leading to removal would not be remedied or that continuation of the parent-child relationship posed a threat to the well-being of Children; and (2) finding sixty-two found that “[e]ach paragraph above also demonstrates [the juvenile court’s] finding that termination of the parent-child relationship is in the best interests of [] Children, and is expressly adopted as [the juvenile court’s] own finding of fact.” *Appellants’ App. Vol. V* at 134.

[33] Here, the juvenile court took judicial notice of the records of the underlying CHINS proceedings and acknowledged that it would not specifically adopt the findings from those proceedings but instead would rely on them to establish

that, at the time of the review or permanency hearing, they were a part of the juvenile court's findings. *Tr. Vol. II* at 27. Indiana Evidence Rule 201(b)(5) provides that a court may take judicial notice of the records of a court of this state. *See In re D.K.*, 968 N.E.2d 792, 796 (Ind. Ct. App. 2012) (upholding the juvenile court's judicial notice of the records of a related CHINS proceeding at the outset of a hearing to terminate parental rights). The juvenile court was within its province to take judicial notice of the records of the CHINS proceedings. Parents' argument correctly notes that there are differing evidentiary burdens applicable to findings made in CHINS proceedings and termination proceedings, but they do not specifically argue that the contents of findings ten through twenty-two are inaccurate or otherwise unsupported. Findings ten through twenty-two were not a wholesale adoption and incorporation of the findings from the orders in the underlying CHINS proceedings; rather they showed a timeline of what had happened up to the instant termination proceeding through the juvenile court's summary of the contents of portions of the orders from the CHINS proceedings.. *Appellants' App. Vol V* at 123-28. Parents do not argue that the juvenile court's summary of portions of the contents of the CHINS orders lacks evidentiary support. Findings ten through twenty-two, which were supported by the evidence and testimony presented at the termination hearing, briefly addressed Parents' continued drug use, lack of utilities in the residence, noncompletion of substance abuse programs and other services, findings of contempt, failure to cooperate with DCS at various points, and that Children remained in their out-of-home placement. *Id.* In addition, these findings were not the sole support

for any necessary conclusion of law applicable to termination. The juvenile court made numerous other unchallenged findings of fact about Mother and Father's ability to parent Children that were relevant to the required conclusions of law applicable to termination and were based on the testimony and evidence presented at the termination hearing. *Id.* at 129-33. We cannot say that findings ten through twenty-two were clearly erroneous, but, even assuming there was any error in the inclusion of findings ten through twenty-two and disregarding those findings as erroneous, the remaining unchallenged findings support the juvenile court's legal conclusions as to termination. *See In re B.J.*, 879 N.E.2d at 19. Parents' arguments to the contrary are an invitation to reweigh the evidence, which we cannot do. *See In re H.L.*, 915 N.E.2d at 149.

[34] Parents also challenge finding forty as unsupported by the evidence. Finding forty addressed Mother's visitation with Children and provided as follows:

Mother has had pleasant visits with the children. However, her visitation pattern has been erratic. Specifically, she missed three visits during January-March 2020 with no call to cancel. Mother was offered visits by phone and video at any time she chose and she did not avail herself of the additional time. She had four visits from March to June 2020.

Appellants' App. Vol. 2 at 132. Mother directs us to the records from the underlying CHINS case and a finding of fact from the 2019 order denying termination which showed that historically she participated in visits with Children. *See Ex. Vol. I* at 95, 125, 129, 134, 137, 141, 145, 155-56, 175. At the termination hearing, FCM Studebaker testified that, from January 2020 until

March 2020, Mother missed six visits with Children. *Tr. Vol. II* at 222-23. In March 2020, Mother decided to visit with Children virtually due to COVID-19 when FCM Studebaker offered her this option, and Mother was also told that she could contact Children through the foster mother anytime that she wanted. *Id.* at 30, 224. Mother opted against visiting Children by video and instead chose to contact Children by phone, but between March 13 and June 12, 2020, Mother called Children only four times on the telephone. *Id.* The juvenile court had before it both the underlying CHINS orders and 2019 termination order which addressed Mother's visitation with Children and heard FCM Studebaker's testimony from which it could base this finding. We cannot say that the juvenile court's finding is unsupported by the evidence, and Parents' argument is a request for us to reweigh the evidence in violation of our standard of review. *See In re H.L.*, 915 N.E.2d at 149.

- [35] Parents also challenge finding forty-nine, which found as follows: "Mother and Father have not provided substantial financial support for [] Children. The last items that [] Mother provide[d] were baseball pants and cleats in 2018." *Appellants' App. Vol. V* at 133. Parents contend that this finding was erroneous because they were never ordered to provide financial support and should not have been criticized for failure to do so. In support of their argument, they cite *Bester v. Lake County Office of Family & Children*, 839 N.E.2d 143, 149 (Ind. 2005), in which the Indiana Supreme Court stated that, as to a finding that the father in a termination of parental rights case had not provided financial support to his child, "[a]bsent some indication that Father was directed to provide financial

support to Child, he cannot now be criticized for not doing that which he was never asked to do.” Here, DCS agrees that Parents were never ordered to financially support Children once they were removed from their home. *Ex. Vol. I* at 78-82, 104-09. At the same time, the juvenile court’s observation that Parents failed to provide financial support outside of providing baseball pants and cleats in 2018 is accurate. *Tr. Vol. II* at 30-31, 250. Parents should not have been penalized for failure to provide financial support when they were not ordered to do so. *See Bester*, 839 N.E.2d at 149. Unlike in *Bester*, where DCS failed to meet its burden to terminate the father’s parental rights, the juvenile court’s erroneous reliance on Parents’ failure to provide financial support is harmless in light of the juvenile court’s remaining unchallenged findings that support termination of Parents’ parental rights. *See In re B.J.*, 879 N.E.2d at 19.

Remedy of Conditions

[36] In determining whether there is a reasonable probability that the conditions that led to a child’s removal and continued placement outside the home will not be remedied, we engage in a two-step analysis. *K.T.K. v. Ind. Dep’t of Child Servs.*, 989 N.E.2d 1225, 1231 (Ind. 2013). First, we must ascertain what conditions led to the child’s placement and retention in foster care, and, second, we determine whether there is a reasonable probability that those conditions will not be remedied. *Id.* In the second step, the juvenile court must judge a parent’s fitness at the time of the termination proceeding, taking into consideration evidence of changed conditions and balancing a parent’s recent improvements against “ ‘habitual pattern[s] of conduct to determine whether

there is a substantial probability of future neglect or deprivation.” *E.M.*, 4 N.E.3d at 643 (quoting *K.T.K.*, 989 N.E.2d at 1231). Pursuant to this rule, “trial courts have properly considered evidence of a parent's prior criminal history, drug and alcohol abuse, history of neglect, failure to provide support, and lack of adequate housing and employment.” *In re D.B.*, 942 N.E.2d 867, 873 (Ind. Ct. App. 2011). In addition, DCS need not provide evidence ruling out all possibilities of change; rather, it need establish only that there is a reasonable probability the parent's behavior will not change. *In re Kay L.*, 867 N.E.2d 236, 242 (Ind. Ct. App. 2007). “We entrust that delicate balance to the trial court, which has discretion to weigh a parent’s prior history more heavily than efforts made only shortly before termination.” *E.M.*, 4 N.E.3d at 643.

[37] When determining whether there is a reasonable probability that the conditions for the removal will not be remedied, the juvenile court may consider the parent’s response to the offers of help, including services offered by DCS and the parents’ response to those services. *D.B.*, 942 N.E.2d at 873. “A pattern of unwillingness to deal with parenting problems and to cooperate with those providing social services, in conjunction with unchanged conditions, support a finding that there exists no reasonable probability that the conditions will change.” *Lang v. Starke Cnty. Office of Family & Children*, 861 N.E.2d 366, 372 (Ind. Ct. App. 2007), *trans. denied*.

[38] Here, DCS’s involvement began in March 2015 due to poor living conditions in the home and concerns about drug use. *Ex. Vol. I* at 162. After Parents’ unsuccessful participation in an IA, the juvenile court adjudicated Children as

CHINS due to the home's unsuitability and Parents' drug use and failure to participate in services during the IA. *Id.* at 73-76, 171. DCS removed Children from Parents' home in October 2015 due to the home's unsuitability and Parents' drug use. *Id.* at 84-86, 110-12, 162-63, 171. Children have been in foster care for nearly five years while the case has been ongoing. *Tr. Vol. II* at 29, 195.

- [39] Parents have consistently failed to participate in services over the course of the underlying CHINS cases. Mother's noncompliance with services included failing to participate in substance abuse treatment at PEACE with discharge for noncompliance in January 2016, failing to participate in substance abuse treatment through Reid Healthcare Pavilion and being discharged from those services, completing a substance abuse assessment at Meridian in October 2019 but failing to follow through with treatment for substance abuse, failing to participate in case management in late 2019 into early 2020 and being unsuccessfully discharged, and failing to consistently submit to random drug screens. *Id.* at 99, 101, 106, 119, 122, 125-27, 137-39, 144, 169-70, 173-74, 188-90. In like manner, Father was discharged from case management services at the Children's Bureau in June 2016 for noncompliance, failed to complete substance abuse treatment at PEACE and was discharged for noncompliance in January 2016, failed to participate in substance abuse treatment through Centerstone and was discharged for noncompliance in April or May of 2018 due to noncompliance, failed to participate in Fatherhood Engagement services with the Children's Bureau and was discharged for noncompliance in August

2018, and failed to consistently submit to drug screens. *Id.* at 93-94, 119, 122, 169-70, 173-74, 181-83; *Ex. Vol. I* at 172.

[40] Parents contend that of the positive drug screens admitted into evidence, only two for Mother and one for Father were from 2020. The juvenile court found as follows with respect to Parents' drug screens:

31. The dates and results of Mother's drug screens are listed below:

- a. Collected on or about November 4, 2015: positive for THC and opiates.
- b. Collected on or about November 9, 2015: positive for THC.
- c. Collected on or about December 3, 2015: positive for cocaine and opiates.
- d. Collected on or about January 27, 2016: positive for THC and cocaine
- e. Collected on or about July 8, 2019: positive for amphetamine, methamphetamine, and THC.
- f. Collected on or about January 6, 2020: positive for THC.
- g. Collected on or about July 6, 2020: positive for amphetamine, methamphetamine, and fentanyl.

. . . .

41. The dates and results of Father's drug screens are listed below:

- a. Collected on or about August 7, 2015: positive for morphine.
- b. Collected on or about August 21, 2015: positive for THC and oxycodone.
- c. Collected on or about September 8, 2015: positive for THC.
- d. Collected on or about September 16, 2015: positive for

- cocaine, opiates, and oxycodone.
- e. Collected on or about November 4, 2015: positive for opiates.
 - f. Collected on or about November 9, 2015: positive for morphine.
 - g. Collected on or about December 3, 2015: positive for cocaine and opiates.
 - h. Collected on or about January 27, 2016: positive for THC and cocaine.
 - i. Collected on or about July 8, 2019: positive for amphetamine, fentanyl and methamphetamine.
 - j. Collected on or about April 24, 2020: positive for amphetamine and methamphetamine.

Appellants' App. Vol. V at 131-32. Parents do not challenge the juvenile court's findings with respect to their drug screens; thus, the juvenile court's findings on this issue stand as proven. *See In re S.S.*, 120 N.E.3d at 610. In addition, the evidence showed that Parents' drug use persisted throughout the case. *Ex. Vol. I* at 163-65, 166-68, 205-34; *Ex. Vol. II* at 2-28; *Tr. Vol. 2* at 48-49, 55-56, 215-17. The record also shows that Father has been incarcerated since his last positive drug screen, and Parents had a pattern of failing to submit to drug screens throughout the pendency of the action. *Tr. Vol. II* at 169-70, 173-74, 221; *Tr. Vol. III* at 3-4. Mother often attempted to minimize or justify her drug use by stating that she was using drugs to stay awake at work or to manage her pain through self-medication. *Tr. Vol. II* at 48-49, 56, 188-89. Parents have not successfully addressed their substance abuse issues and have not remedied this condition.

[41] When Children were first removed, Parents lacked suitable housing. *Ex. Vol. I* at 84-86, 110-12, 164, 171; *Tr. Vol. II* at 195. For a time, Parents obtained

appropriate housing, but it did not last. *Tr. Vol. II* at 205; *Ex. Vol. I* at 172-73. At the time of the terminating hearing, Parents' apartment, which was once suitable, had lacked electricity since 2018 and Mother had not paid rent in more than two years. *Tr. Vol. II* at 108-09, 234-37. FCM Studebaker was last in Mother's home in May of 2020, but the week before the termination hearing, FCM Studebaker attempted to visit Mother's home and observed that "there was still an extension cord running from the bottom floor of the apartment building, up to the third floor in which her apartment is, and through that door." *Id.* at 220. FCM Studebaker testified that Mother has told her that "she does not need electricity and that it is not important to her." *Id.* at 230-31. Mother, who is unemployed, admitted that the home is not suitable for Children but that she was trying to find a different residence for Children. *Id.* at 246-48. Father had been incarcerated since April 2020 with an expected release date of August 19, 2020. *Id.* at 221, *Tr. Vol. III* at 3-4. Parents have been unable to maintain suitable housing and have not remedied this condition.

[42] Parents exercised parenting time during the underlying CHINS cases. *Ex. Vol. I* at 169, 175. However, the last time Children saw Father was in March 2019. *Id.* at 29, 221. FCM Studebaker testified that Father told her in July and October 2019 that he did not want to visit with Children unless Mother was also present. *Id.* at 222. FCM Studebaker also stated that Father told her in June of 2020 that he did not want to see Children without Mother present because he "is family oriented, and would prefer to do things as a family only, and that [Children] were tough enough to handle it." *Id.* Father has been

incarcerated since April 2020, which, in addition to his desire not to see Children without Mother present, has hindered his ability to develop a meaningful relationship with Children. Those “who pursue criminal activity run the risk of being denied the opportunity to develop positive and meaningful relationships with their children.” *Castro v. State Office of Family & Children*, 842 N.E.2d 367, 374 (Ind. Ct. App. 2006) *trans. denied*. While Children’s foster mother stated that Children typically appeared happy after seeing Mother at visits, Mother had missed six visits with Children between January and March of 2020 and did not always cancel the visits ahead of time. *Tr. Vol. II* at 32-33, 222-24. When Mother decided to do virtual visits and was told she could call Children more frequently, Mother called Children only four times between March 13 and the resumption of in-person visits June 12, 2020. *Id.* at 30, 224, 228.

[43] Parents also argue that their situation is analogous to that of *K.E. v. Indiana Department of Child Services*, 39 N.E.3d 641, 643 (Ind. 2015), which held, among other things, that incarceration, standing alone, is an insufficient basis for terminating parental rights. *Id.* The father in *K.E.* was incarcerated when the CHINS case began, and, because of the father’s incarceration, DCS provided services only to the mother. *Id.* In finding there was a reasonable probability that the reasons for removal would not be remedied, the juvenile court found, in part: 1) the father was unable to receive services from DCS because he was incarcerated; 2) the father had a long criminal history; 3) the father’s release date was more than two years after the date of the fact-finding hearing; and 4)

the father had a history of drug and alcohol use. *Id.* at 647. The Indiana Supreme Court, however, reversed the termination of parental rights, stating, in part:

Although at the time of the termination hearing [the father's] possible release was still over two years away[,] that alone is insufficient to demonstrate that the conditions for removal will not be remedied. Indiana courts have upheld parental rights of incarcerated parents who still had a year or more to serve before possible release, and we have not established a bright-line rule for when release must occur to maintain parental rights.

Id. at 648. *K.E.* is distinguishable. Here, unlike the incarcerated father in *K.E.* who was unable to participate in services due to his incarceration, Parents have had numerous opportunities to participate in a wide-range of services but have failed to engage in the services provided to them by DCS. *Tr. Vol. II* at 93-94, 99, 101, 106, 119, 122, 125-27, 137-39, 144, 169-70, 173-74, 181-83, 188-90; *Ex. Vol. I* at 172. Like the father in *K.E.*, Father was incarcerated at the time of the termination hearing and was expected to be released on August 19, 2020. Unlike *K.E.*, this was not a situation in which parental rights were terminated solely due to a parent's incarceration as DCS provided Parents ample opportunities to participate in services over the course of the case but they did not do so successfully or consistently. In addition, Parents had continued to engage in drug use and have been unable to maintain suitable housing for Children. *Ex. Vol. I* at 163-65, 166-68, 205-34; *Ex. Vol. II* at 2-28. *K.E.* does not compel reversal.

[44] We cannot say that the juvenile court’s conclusion that there was a reasonable probability that the conditions resulting in the removal of Children or the reasons for their placement outside of Parents’ home will not be remedied was clearly erroneous. Parents’ arguments to the contrary are a request to reweigh the evidence, which we cannot do. *See In re H.L.*, 915 N.E.2d at 149.

Best Interests

[45] Parents finally contend that termination is not in Children’s best interests, and in particular, they maintain that because there is a “strong bond” between Children and Mother that DCS failed to meet its burden on this element. *Appellants’ Br.* at 10. However, Parents do not further develop this argument by making a cogent argument or citing to relevant legal authority and have, therefore, waived any contention regarding whether sufficient evidence supports the juvenile court’s conclusion that termination is in Children’s best interests. *In re B.R.*, 875 N.E.2d at 373 (citing Ind. Appellate Rule 46(A)(8)(a)). Nevertheless, we conclude that there was sufficient evidence to support the juvenile court’s conclusion.

[46] When determining whether termination of parental rights is in a child’s best interests, courts look to “the totality of the evidence.” *In re Ma.H.*, 134 N.E.3d 41, 49 (Ind. 2019), *cert. denied*. 140 S. Ct. 2835 (2020). This includes a child’s need for permanency because “children cannot wait indefinitely for their parents to work toward preservation or reunification.” *Id.* In doing so, the juvenile court must subordinate the interests of the parents to those of the child.

A.D.S., 987 N.E.2d at 1158. The juvenile court need not wait until a child is irreversibly harmed before terminating the parent-child relationship. *Id.*; *see also In re G.Y.*, 904 N.E.2d 1257, 1265 (Ind. 2009). When determining a child's best interests, it is appropriate for this court to rely on the recommendations of DCS, a child's advocate, and service providers. *See K.T.K.*, 989 N.E.2d at 1235-36.

[47] As discussed above, the evidence established that Parents were unlikely to remedy the conditions that led to Children's removal, given their lack of stable and suitable housing, unresolved long-term substance abuse issues, lack of stability, and their failure to consistently participate and benefit from DCS services. At the time of the termination hearing, Mother acknowledged that her home was unsuitable for Children, and, in addition to the home's condition, Parents had not addressed their issues with substance abuse. *Tr. Vol. II* at 246-48; *Ex. Vol. I* at 205-34; *Ex. Vol. II* at 2-28. Father was incarcerated at the time of the termination hearing but was expected to be released on August 19, 2020. *Tr. Vol. II* at 221; *Tr. Vol. III* at 3-5. At the time of the termination hearing, Children had been removed from the home since October 21, 2015, and DCS had been involved with the family for nearly five years. Children were in a stable home where they had been placed since their removal and were doing well. *Tr. Vol. II* at 29, 195, 224. CASA Bowen testified that she had numerous concerns about Parents' ability to care for Children. *Id.* at 148-49. CASA Bowen also testified at the termination hearing that termination of parental rights was in Children's best interests because Parents had failed to participate in services throughout the case and continued to test positive for drugs, and

their apartment continued to lack electricity as extension cords were still running from the hallway into the apartment indicating the lack of electricity. *Id.* at 148-52. The evidence that the conditions leading to removal would not be remedied coupled with the recommendations of DCS and CASA is sufficient to show by clear and convincing evidence that termination is the best interests of Children. *See In re A.S.*, 17 N.E.3d 994, 1006 (Ind. Ct. App. 2014) (citing *In re J.C.*, 994 N.E.2d 278, 290 (Ind. Ct. App. 2013)), *trans. denied*. As our Indiana Supreme Court has stated, “children cannot wait indefinitely for their parents to work toward preservation or reunification -- and courts ‘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.’” *In re E.M.*, 4 N.E.3d. at 647 (quoting *K.T.K.*, 989 N.E.2d at 1235). Based on the totality of the evidence, we conclude that sufficient evidence supported the juvenile court’s determination that termination of Parents’ parental rights was in the best interests of Children.

[48] Based on the record before us, we cannot say that the juvenile court’s termination of Parents’ parental rights to Children was clearly erroneous. We affirm the juvenile court’s judgment.

[49] Affirmed

Bradford, C.J., and May, J., concur.