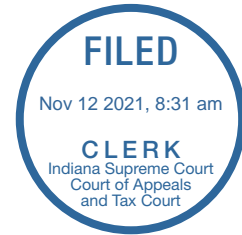


## MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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## IN THE COURT OF APPEALS OF INDIANA

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In the Termination of the Parent-Child Relationship of:

G.K., N.K., and L.K. (Minor Children), and

L.A.K., Jr. (Father)

*Appellant-Respondent,*

v.

Indiana Department of Child Services,

*Appellee-Petitioner.*

November 12, 2021

Court of Appeals Case No.  
21A-JT-1128

Appeal from the Vanderburgh Superior Court

The Honorable Brett J. Niemeier,  
Judge

Trial Court Cause No.  
82D04-2002-JT-396  
82D04-2002-JT-397  
82D04-2002-JT-398

**Bailey, Judge.**

## Case Summary

- [1] L.A.K. (“Father”) appeals the trial court’s judgment terminating his parental rights to his children. The restated issue he raises on appeal is whether the trial court clearly erred when it terminated his parental rights.
- [2] We affirm.

## Facts and Procedural History

- [3] Father and C.W. (“Mother”)<sup>1</sup> are the parents of G.K., born November 24, 2014, N.K., born July 3, 2013, and L.K., born November 23, 2015 (collectively, “Children”). On May 13, 2018, the Indiana Department of Child Services (“DCS”) received a report that Father had taken Children from Mother’s care in Florida, brought Children to Indiana, and refused to return the Children to Mother. The report also alleged Father was using methamphetamine and synthetic marijuana. On June 4, 2018, DCS received a report that Father was slumped over and had signs of intoxication while in a vehicle in which Children were passengers. There were not sufficient car seats for Children in the vehicle.
- [4] Upon subsequent investigation, DCS observed that the home in which Father and Children were living had only one bed that Father and Children were sharing. The home was rented by Father’s cousin. Father and Children were

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<sup>1</sup> Mother’s parental rights regarding Children were also terminated, but Mother does not actively participate in this appeal.

not on the lease of the home and could have been evicted from the home if the landlord discovered they resided there. On June 6, 2018, Father submitted to a drug screen and tested positive for methamphetamine, cocaine, and benzodiazepines.

[5] On June 6, Children were removed from Father's care and placed in foster care. On June 7, DCS filed a petition alleging Children were Children in Need of Services ("CHINS") due to a lack of appropriate, stable housing and Father's use of illegal substances. Due to lengthy delays in attempting to transfer the CHINS case to Florida as requested by the parents and in obtaining general anesthesia and operative procedures for Children due to their severe dental decay, DCS dismissed the original CHINS petition and filed a new petition on January 23, 2019. The latter petition alleged Children were CHINS due to a lack of appropriate, stable housing and Father's use of illegal substances.

[6] At initial and dispositional hearings on February 6, 2019, Father denied Children were CHINS, waived his right to a full trial, and stipulated to the evidence contained in the CHINS case files. Father also agreed to participate in "random drug screens, substance abuse treatment, parent aide [services], and supervised visitation." Ex. v. I at 129. The trial court found Children to be CHINS and ordered Father to engage in reunification services. The ordered services included: participating in programs recommended by DCS; maintaining suitable, safe, and stable housing; securing and maintaining an income; refraining from use and/or possession of illegal controlled substances; completing a substance abuse assessment and all recommended substance abuse

treatments; submitting to random drug screens; attending all scheduled visitations with Children; maintaining contact with DCS regarding information relevant to the CHINS actions; and providing Children with a safe, secure, and nurturing environment that is free from abuse and neglect.

[7] At a May 29, 2019, show cause hearing, the trial court found that Father willfully failed to comply with its orders. Specifically, the court found that Father failed to complete a substance abuse evaluation and he failed to submit to random drug screens except on March 26, 2019, at which time he tested positive for amphetamine and methamphetamine. At a June 26, 2019, show cause hearing, the court found that Father’s continued failure to comply with Children’s case plans was “willful,” and it again ordered him to obtain a substance abuse evaluation, follow the recommendations of the evaluation, and submit to random drug screens. Ex. v. II at 6.<sup>2</sup>

[8] On November 13, 2019, the court held a permanency hearing and found that Father had partially complied with Children’s case plans, in that he had participated in some supervised visits and parent aide sessions. However, the court also found that Father had missed many visits with Children “even after instituting a two hour call ahead,” and had tested positive for methamphetamine. Ex. v. I at 216. The trial court approved a permanency plan of reunification with a concurrent plan of adoption and granted DCS’s

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<sup>2</sup> Throughout this decision, we only cite to the exhibit documents regarding one of the children because the CHINS exhibits and other termination documents are the same for each child in all relevant respects.

request that visitation and parent aide services be stopped due to Father's failure to participate and/or comply. At a February 19, 2020, show cause hearing, the court again found that Father's continued failure to comply with Children's case plans was "willful," and it again ordered him to follow all orders of the court. *Id.* at 4.

[9] On February 25, 2020, DCS filed termination of parental rights ("TPR") petitions as to Father, Mother, and Children. At an October 27, 2020, permanency hearing in the CHINS cases, the court changed Children's permanency plans to solely adoption after finding that Father had failed to comply with Children's case plans. Specifically, the court found that a recommended substance abuse program had closed Father's file due to his noncompliance, and Father had failed drug screens on nine occasions since July of 2020.

[10] The court held a fact-finding hearing on the TPR petitions on April 14, 2021. While Father claimed that he lived at his cousin's home for the entirety of the CHINS case, service provider records stated that individuals living at that address denied that Father lived there. Father testified that, although he currently still lived at his cousin's home, he had located a two-bedroom house to rent and was "getting it ready." *Tr.* at 41. He testified that he did not have a lease to rent the new house but was going to sign one that day. Father also testified he had been off illegal drugs for "quite a while" and he believed he would pass a drug screen if tested that day. *Id.* at 43. Father stated that he was "in the process" of getting a job but could not do so until he had an Indiana

driver's license. *Id.* at 36. He stated he was waiting for his Florida driver's license to arrive so that he could use that to get an Indiana license.

[11] Family case manager Brittney Robertson ("FCM Robertson"), who had worked on Children's cases since April 2019, testified that the conditions resulting in Children's removal would not be remedied because Children had been out of Father's care "for nearly three years and there has been no reasonable progress." *Id.* at 84. FCM Robertson testified that Father failed to submit to nearly 100 scheduled drug screens over the course of the CHINS and termination cases, and that he tested positive for illegal drugs on the occasions when he did submit to drug screens. Father tested positive for amphetamine and methamphetamine at the last drug screen he took, which was on March 8, 2021.

[12] FCM Robertson opined that the continuation of Father's parental relationship posed a threat to Children's well-being because Father would not be able to provide Children with a safe, stable, and drug-free environment. FCM Robertson also believed that termination of Father's parental rights was in Children's best interest because Father had not made any significant progress to maintain the stability Children need.

[13] Brooke Hagler ("Hagler") was a family consultant who worked for Lifeline Youth and Family Services. Hagler supervised Father's visitations with Children and provided parent aide services to Father. Hagler testified that she had tried to find more consistent employment for Father but Father did not

apply for any employment. Hagler tried to help Father find sufficient housing, including providing Father with an application for housing; however, Father did not follow up on obtaining housing. Hagler attempted to assist Father with his parenting skills but did not believe that Father had made any progress in his parenting by the time parent aide was discontinued by the court for Father's noncompliance.

[14] Hagler also had concerns about Father's visits with Children. Father's visits remained supervised at all times. Several times Father had to be reminded of one child's dietary restrictions, and Father fed Children fast food and candy despite conversations with Hagler regarding Children's dental problems, their need for healthier food, and the fact that Children were becoming sick after visitations from the unhealthy food. Hagler did not believe Children's health needs would have been met during visits if she had not been there to supervise. Father failed to consistently attend scheduled visitations, despite Hagler's availability to provide him transportation to visits, and Children were upset when Father missed visits. Eventually, Father's supervised visitation was discontinued by the court due to his failure to comply with the visitation order. Father's last visit with Children was on November 14, 2019.

[15] Jenny Waggoner ("Waggoner"), a foster care case manager at Open Arms, worked with Children from March 2019 until the beginning of August 2020. Waggoner opined that changing Children's permanency plan to adoption was in Children's best interest because they were "seeing less and less of" Father and were "moving on[,] ... thriving[,] and ... growing." *Id.* at 52. She believed

adoption was in Children's best interests also because Father had made "no improvements[,]” was still abusing drugs, and was still “surfing from home to home.” *Id.*

[16] Court Appointed Special Advocate (“CASA”) Deborah Gamache (“CASA Gamache”) had been Children's CASA since August 2020. CASA Gamache testified that termination was in Children's best interest because Father had “not been able to rectify any of the situations to be able to reunify[,]” he does not have the necessary parenting skills, and Children have “bloomed” and “come such a long way” since they have been in foster care. *Id.* at 93.

[17] On May 26, 2021, the trial court granted the TPR petitions as to Children. In addition to the above facts and testimony, the court found that, throughout the CHINS and termination proceedings, Father failed to comply with the court orders. Specifically, Father: failed to maintain contact with DCS regarding his criminal charges, employment, and housing; was charged with multiple crimes while the CHINS case was pending; failed to secure and maintain employment; failed to secure and maintain safe and secure housing adequate for Children; failed to participate in many random drug screens; tested positive for illegal drugs on the few occasions when he did submit to drug screens; failed to obtain a substance abuse evaluation until thirteen months after being ordered to do so; failed to complete a recommended substance abuse treatment program; failed to participate in scheduled visitations with Children, “despite the visit worker being able to transport [F]ather to and from visits[,]” Appealed Order at 12; and failed to participate in parent aide services as he had agreed.



[18] The trial court further stated:

- n. F[amily case manager] testified that [F]ather missed nearly one hundred drug screens throughout the life of the case. Father has stated that he would not have screened when he thought he was going to have a positive test result.

\* \* \*

- y. Father completely failed to comply with the dispositional orders. Father refused drug screening, failed to complete any form of substance abuse treatment, was unwilling to work with parent aide to obtain appropriate housing[,] and eventually stopped participating in visitations with [C]hildren altogether. Father has not visited with [C]hildren in over year.
- z. Because he failed to engage in reunification services, [F]ather has clearly failed to remedy the situation that brought about the removal of Child[ren]. Father has continued to use methamphetamine and has not addressed his housing instability. Father understood he was ordered to do services that would have resulted in reunification and did not do them. Father has not visited with [C]hildren in over year. The Court has little doubt that the [F]ather, based upon his behavior in the underlying CHINS, will never be able to adequately protect [C]hildren from his substance abuse, or provide [C]hildren with appropriate housing and stability. Father has been provided ample opportunity to remedy the issues resulting in each child being CHINS and has not taken advantage of those reunification opportunities. Based upon his behavior in the underlying CHINS matter, the Court finds there is no reasonable probability that [F]ather will adequately remedy the reasons for [C]hildren's removal.

- aa. While [F]ather has refused services, continued to abuse methamphetamine, and refused to visit [C]hildren, [C]hildren have remained out of the home. [C]hildren are currently placed in a pre-adoptive foster home.

Appealed Order at 13-14. The trial court further found that the continuation of Father's relationship with Children posed a threat to Children, and that termination of Father's parental rights was in Children's best interests. The court ordered that Father's parental rights to Children be terminated, and this appeal ensued.

## Discussion and Decision

### Standard of Review

[19] Father maintains that the trial court's order terminating his parental rights was clearly erroneous. We begin our review of this issue by acknowledging that the traditional right of a parent to establish a home and raise his or her children is protected by the Fourteenth Amendment of the United States Constitution. *See, e.g., In re C.G.*, 954 N.E.2d 910, 923 (Ind. 2011). However, a trial court must subordinate the interests of the parent to those of the child when evaluating the circumstances surrounding a termination. *In re K.S.*, 750 N.E.2d 832, 837 (Ind. Ct. App. 2001). 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.

[20] Before an involuntary termination of parental rights can occur in Indiana, DCS is required to allege and prove, among other things:

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

\* \* \*

(iii) The child has been removed from the parent and has been under the supervision of a local office or probation department for at least fifteen (15) months of the most recent twenty-two (22) months, beginning with the date the child is removed from the home as a result of the child being alleged to be a child in need of services or a delinquent child;

(B) that one (1) of the following is true:

(i) There is a reasonable probability that the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied.

(ii) There is a reasonable probability that the continuation of the parent-child relationship poses a threat to the well-being of the child.

(iii) The child has, on two (2) separate occasions, been adjudicated a child in need of services.

\* \* \*

(C) [and] that termination is in the best interests of the child . . . .

Ind. Code § 31-35-2-4(b)(2). DCS need establish only one of the requirements of subsection (b)(2)(B) before the trial court may terminate parental rights. *Id.* DCS’s “burden of proof in termination of parental rights cases is one of ‘clear and convincing evidence.’” *In re G.Y.*, 904 N.E.2d 1257, 1260-61 (Ind. 2009) (quoting I.C. § 31-37-14-2).

[21] When reviewing a termination of parental rights, we will not reweigh the evidence or judge the credibility of the witnesses. *In re D.D.*, 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*.

[22] Here, in terminating Father’s parental rights, the trial court entered specific findings of fact and conclusions thereon. When 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.

## Challenge to Trial Court's Factual Findings

[23] Father challenges the sufficiency of the evidence to support some of the court's factual findings, as follows.

### *Father's Unemployment*

[24] Father purports to challenge trial court finding (C)(f) regarding the lack of proof of his employment. However, regarding providing proof of employment to FCM Robertson, Father admits that "he did not maintain contact with the FCM as he felt she was working against him and did not treat him well." Father's Br. at 16. Moreover, Father himself testified at the termination hearing that "[y]ou could say I'm not employed, but I'm waiting for my Florida license to get back here because that's the only way I can get my Indiana license." Tr. at 36. There is sufficient evidence to support finding (C)(f).

### *Father's Housing*

[25] Father challenges the following portion of finding (C)(g): "FCM was not made aware of a new residence for father until the day of trial, however father no [sic] lease supporting this claim." Appealed Order at 9. However, again, that finding was supported by Father's own testimony. Father testified that he did not let his case manager know that he had a home other than the one from which the Children were originally removed, i.e., his cousin's home. He stated that he did not contact the case manager about that "because [he] and her [sic] does [sic] not get along." Tr. at 47. Furthermore, Father testified that he was currently still living at his cousin's home; he testified that he did not have a

lease for his alleged new home but was “going to sign a lease today[,]” i.e., the date of the termination hearing. *Id.* at 47-48. There is sufficient evidence to support finding (C)(g).

#### *Father’s Substance Abuse*

[26] Father challenges court findings (C)(k), (l), and (n), which all relate to his abuse of illegal substances as shown by his repeated failure to take nearly 100 scheduled drug screens and his positive tests for every drug screen that he did take. Those findings were supported by caseworker testimony and the drug screen test results contained in State’s Exhibit 1. In challenging these findings, Father cites only his own self-serving testimony that the drug test results were untrustworthy and that he had not used illegal drugs for some time by the date of the termination hearing. This is merely a request that we judge witness credibility and reweigh the evidence, which we cannot do. *See In re D.D.*, 804 N.E.2d at 265. There is sufficient evidence to support findings (C)(k), (l), and (n).

#### *Substance Abuse Services*

[27] Father challenges findings (C)(o) through (r), all of which relate to his failure to timely obtain a substance abuse evaluation and complete any recommended substance abuse treatment as ordered. Those findings are supported by the testimonial and documentary evidence that: (1) on February 6, 2019, the court ordered Father to complete a substance abuse assessment and any recommended substance abuse treatment; (2) Father did not obtain a substance

abuse assessment until March 17, 2020, over thirteen months after being ordered to do so; (3) thereafter, Father enrolled in the recommended substance abuse treatment program but, by that time, the treatment could only be done virtually and by telephone due to the COVID-19 pandemic; and (4) Father did not complete the recommended substance abuse treatment. Father points to his testimony that he started the recommended drug treatment program but could not complete it because he could not afford reliable internet access. Not only is this a request that we judge witness credibility and reweigh the evidence, which we cannot do, *see id.*, but it also fails to explain why Father did not obtain a substance abuse evaluation and treatment at an earlier time before COVID-19 restrictions on in-person treatment were put in place. There is sufficient evidence to support findings (C)(o) through (r).

#### *Visitation*

[28] Father challenges findings (C)(s) through (v) which relate to his failure to visit with Children as ordered. Those findings state that Father had not visited Children since November of 2019 due to his non-compliance with the visitation order; Father ended his last visit with Children early; Father's visitation supervisor had concerns about his parenting during visitations; and visitations never progressed beyond being supervised. All of those findings are supported by the testimony of Hagler, the visitation supervisor. Father points to Hagler's testimony that Father engaged with Children during visitation, but this is merely a request that we reweigh the evidence, which we cannot do. *See In re D.D.*, 804 N.E.2d at 265.

### *Parent Aide Services*

[29] Father challenges findings (C)(w) and (x) which discuss Father's failure to progress and engage in services provided by a parent aide, including obtaining employment and housing. However, those findings are supported by the testimony of Hagler, who provided parent aide services to Father. In challenging these findings, Father states that he was not court-ordered to engage in parent aide services. However, the record shows that Father was court ordered to obtain employment and housing, and Father informed the court at the initial hearing that he agreed to participate in the parent aide program that provides housing and employment services. Father also argues that Hagler was not "proactive" enough in that she did not "push, encourage, or remind Father" about housing and employment opportunities. Appellant Br. at 19. But, again, this is a request that we reweigh the evidence, which we will not do. *See In re D.D.*, 804 N.E.2d at 265. There was sufficient evidence to support findings (C)(w) and (x).

### *Conclusion Regarding Findings*

[30] The evidence supports the trial court's challenged findings. Father's contentions boil down to requests that we reweigh the evidence and/or judge witness credibility, which we cannot do. *See id.*



## Conditions that Resulted in Children's Removal/Continued Placement Outside the Home

[31] Father maintains that the trial court erred in finding a reasonable probability that the conditions that resulted in Children's removal and continued placement outside the home will not be remedied.<sup>3</sup> In support, he points to his own testimony regarding his alleged recent partial compliance with some of the court's requirements, such as allegedly ceasing to use illegal drugs and trying to obtain employment and housing.

[32] However, again, Father's arguments on appeal are simply requests that we reweigh the evidence, which we cannot do. *See In re D.D.*, 804 N.E.2d at 265. Instead, we must determine whether the evidence most favorable to the judgment supports the trial court's conclusion. *Id.*; *Quillen*, 671 N.E.2d at 102. In doing so, we engage in a two-step analysis. *In re E.M.*, 4 N.E.3d 636, 643 (Ind. 2014). "First, we identify the conditions that led to removal; and second, we determine whether there is a reasonable probability that those conditions will not be remedied." *Id.* (quotations and citations omitted). In the first step, the court considers not only the initial reasons for removal, but also the reasons for continued placement outside the home. *In re N.Q.*, 996 N.E.2d 385, 392 (Ind. Ct. App. 2013). In the second step, the trial court must judge a parent's fitness to care for his or her children at the time of the termination hearing,

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<sup>3</sup> Because Indiana Code Section 31-35-2-4(b)(2)(B) is written in the disjunctive, we need not address Father's other challenges under this subsection.

taking into consideration evidence of changed conditions. *In re E.M.*, 4 N.E.3d at 643. However, the court must also “evaluate the parent’s habitual patterns of conduct to determine the probability of future neglect or deprivation of the child.” *Moore v. Jasper Cnty. Dep’t of Child. Servs.*, 894 N.E.2d 218, 226 (Ind. Ct. App. 2008) (quotations and citations omitted); *see also In re M.S.*, 898 N.E.2d 307, 311 (Ind. Ct. App. 2008) (noting the “trial court need not wait until a child is irreversibly harmed such that his physical, mental, and social development are permanently impaired before terminating the parent-child relationship”). In evaluating the parent’s habitual patterns of conduct, the court may disregard efforts made shortly before the termination hearing and weigh the history of the parent’s prior conduct more heavily. *In re K.T.K.*, 989 N.E.2d 1225, 1234 (Ind. 2013). And DCS is not required to rule out all possibilities of change; rather, it need establish only that there is a reasonable probability the parent’s behavior will not change. *Moore*, 894 N.E.2d at 226.

[33] Here, Children were originally removed because of Father’s use of illegal drugs and failure to provide Children with adequate housing. There was ample testimonial and documentary evidence at the termination hearing that, over the course of the CHINS and termination proceedings: Father refused to take nearly 100 drugs screens; Father continued to test positive for illegal drugs on the occasions when he did submit to drug screens; and Father did not have an appropriate home for Children that included beds for them and was safe from illegal drug use. Thus, DCS proved by clear and convincing evidence that Father had not remedied the reasons for Children’s removal.

[34] In the face of that overwhelming evidence, Father merely points to his own testimony that he had ceased illegal drug use before the termination hearing and was in the process of obtaining employment and adequate housing. The trial court acted within its discretion by disregarding efforts allegedly made shortly before the termination hearing and weighing the history of Father’s prior, consistent conduct more heavily. *See In re K. T.K.*, 989 N.E.2d at 1234. Given the evidence of Father’s habitual patterns of drug use and failing to maintain employment and adequate, safe housing—along with evidence of his illegal drug use as recently as six weeks before the hearing and his current unemployment and lack of adequate housing—the trial court did not clearly err in concluding that Father has not remedied, and is not likely to remedy, the conditions that led to Children’s removal and continued placement outside the home.

## Best Interests

[35] In determining whether termination of parental rights is in the best interests of a child, the trial court is required to look at the totality of the evidence. *In re A.K.*, 924 N.E.2d 212, 224 (Ind. Ct. App. 2010). “A parent’s historical inability to provide adequate housing, stability and supervision coupled with a current inability to provide the same will support a finding that termination of the parent-child relationship is in the child’s best interests.” *Castro v. State Off. of Fam. & Child.*, 842 N.E.2d 367, 374 (Ind. Ct. App. 2006), *trans. denied*. “Additionally, a child’s need for permanency is an important consideration in determining the best interests of a child, and the testimony of the service

providers may support a finding that termination is in the child's best interests." *In re A.K.*, 924 N.E.2d at 224. Such evidence, "in addition to evidence that the conditions resulting in removal will not be remedied, is sufficient to show by clear and convincing evidence that termination is in the child's best interests." *In re A.D.S.*, 987 N.E.2d 1150, 1158-59 (Ind. Ct. App. 2013), *trans. denied*.

[36] Again, Father's contentions on this issue amount to requests that we reweigh the evidence and judge witness credibility, which we will not do. *See In re D.D.*, 804 N.E.2d at 265. The evidence most favorable to the judgment shows that, throughout the CHINS and TPR proceedings, Father: either refused drug screens or tested positive for illegal drugs; failed to obtain employment or other stable income; and failed to obtain adequate, safe housing. Moreover, the DCS workers and service providers testified that termination of Father's parental rights is in Children's best interests due to Father's ongoing failure to obtain employment and housing and his consistent illegal drug use. Given that testimony, in addition to evidence that Children need permanency and stability that Father cannot provide and that the reasons for Children's removal from Father will not likely be remedied, we hold that the totality of the evidence supports the trial court's determination that termination is in Children's best interests. *In re A.D.S.*, 987 N.E.2d at 1158-59.

## Conclusion

[37] The evidence in the record supports the trial court's findings of fact, and those findings support the trial court's judgment terminating Father's parental rights. The trial court did not clearly err.

[38] Affirmed.

Crone, J., and Pyle, J., concur.