

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In Re the Termination of the
Parent-Child Relationship of:
J.S. (Minor Child),

and

W.S. (Father),

Appellant-Respondent,

v.

Indiana Department of
Child Services,

Appellee-Petitioner.

September 8, 2021

Court of Appeals Case No.
21A-JT-509

Appeal from the Tippecanoe
Superior Court

The Honorable Kurtis G. Fouts,
Special Judge

Trial Court Cause No.
79D03-1907-JT-111

Weissmann, Judge.

[1] W.S. (Father) appeals the termination of his parental rights as to his son J.S. (Child), arguing that the termination was solely based on his incarceration. Finding that Father's incarceration was but one of the reasons for termination, and that termination was not clearly erroneous, we affirm the trial court's termination order.

Facts

- [2] Child was first removed from Mother in 2017. Mother was homeless and left Child with several different people unable to properly care for him. Child was removed a second time in January 2018, following a physical altercation between two men at Mother's home. DCS filed a Child in Need of Services (CHINS) petition the day of Child's second removal. Child was one month shy of his 3rd birthday.
- [3] Father's whereabouts were initially unknown. He did not attend the January detention hearing or the continued hearing in the CHINS case. When he finally appeared for a hearing in April 2018, he was in the custody of the Tippecanoe County Sheriff. The record contains no context for why Father was in custody that day or how long he remained in custody, and Father provides none. Father then failed to appear at the factfinding hearing that May, after which Child was declared a CHINS. Among other things, the juvenile court ordered Father to attend all hearings, conferences, visitations, and appointments; contact DCS at least twice per month; refrain from consuming or possessing illegal drugs; and obey the law. Ex. Vol. II, pp. 157-60.

[4] Father did not comply with the order. In 2019, he pleaded guilty to dealing in methamphetamine, a Level 4 felony, and admitted to being an habitual offender. He also continued to skip hearings related to the CHINS case until July 8, 2019. App. Vol. II, p. 30. Father was taken into custody on the meth charge immediately following that hearing. *Id.*; Ex. Vol. I, p. 190. During his incarceration, Father spoke with DCS once. His interactions with Child were also infrequent. Father's earliest possible release date is October 2024, when Child will be 9 years old.

[5] In April 2020, the juvenile court terminated Father's parental rights as to Child, finding that Father's criminal activity puts Child at serious risk of harm; Father cannot take custody of Child while incarcerated; and Father is an absentee father who places Child at substantial risk for physical, mental, and emotional abuse. App. Vol. II, p. 32. Father now appeals, arguing that the evidence was insufficient to support the termination.

Standard of Review

[6] Parents have a constitutionally protected interest in the care, custody, and control of their children, but that interest is not absolute. *In re I.A.*, 934 N.E.2d 1127, 1132 (Ind. 2010) (citing *Troxel v. Granville*, 530 U.S. 57, 65 (2000)). The State may terminate parental rights when parents are unable or unwilling to meet their parental responsibilities. *In re R.H.*, 892 N.E.2d 144, 149 (Ind. Ct. App. 2008).

[7] A petition to terminate parental rights must allege, in relevant part:

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

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

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

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

(C) that termination is in the best interests of the child; and

(D) that there is a satisfactory plan for the care and treatment of the child.

Ind. Code § 31-35-2-4(b)(2). If the trial court finds these allegations are true by clear and convincing evidence, it shall terminate the parent-child relationship. Ind. Code § 31-35-2-8; Ind. Code § 31-37-14-2.

[8] We apply a two-tiered standard of review to a trial court's termination of parental rights: first, we determine whether the evidence supports the findings and second, whether the findings support the judgment. *In re R.S.*, 56 N.E.3d 625, 628 (Ind. 2016) (citing *In re I.A.*, 934 N.E.2d at 1132). In reviewing the termination of parental rights, we do not reweigh evidence or judge witness credibility. *Id.* The judgment will be set aside only if it is clearly erroneous. *Id.*

Discussion & Decision

[9] Father argues that his incarceration alone is insufficient to establish by clear and convincing evidence that: (1) there is a reasonable probability that the conditions resulting in removal will not be remedied; (2) a continued relationship with Father poses a threat to Child’s wellbeing; and (3) termination is in Child’s best interest. Father must prevail on both of his first two arguments *or* his third argument for us to set aside the judgment. *See* Ind. Code § 31-35-2-4(b)(2). Because Father does not challenge any of the juvenile court’s factual findings, we accept them as true. *In re S.S.*, 120 N.E.3d 605, 610 (Ind. Ct. App. 2019). Holding that the trial court’s unchallenged findings support the judgment, we affirm.

I. Remediating of Conditions & Threat to Child

[10] Father challenges the trial court’s finding that there is not a reasonable probability that the conditions leading to removal of Child would be remedied on two grounds. First, he argues that removal was based on Mother’s behavior, not his; second, he argues that termination is based on his incarceration alone, which is not a sufficient basis for termination.

[11] We engage in a two-step analysis to determine whether conditions leading to removal will be remedied. *K.E. v. Ind. Dep’t of Child Servs.*, 39 N.E.3d 641, 647 (Ind. 2015) (citing *In Re E.M.*, 4 N.E.3d 636, 642-43 (Ind. 2014)). We first identify which conditions led to removal; then we determine whether, based on the parent’s fitness at the time of the termination hearing, there is reasonable

probability those conditions will not be remedied. *Id.* In evaluating the second step, the trial court uses its discretion to balance habitual patterns, including criminal history, neglect, and failure to provide support, against changed conditions. *In re E.M.*, 4 N.E.3d at 643.

[12] As a preliminary matter, we stress that Father does not allege dates of incarceration that would make participation in the CHINS case impossible. He does not allege dates of incarceration at all. The record indicates that he was in custody on the date of the initial hearing on April 2, 2018, and that he was in custody for his appearance in July 2019. The record also indicates that he committed the dealing in methamphetamine offense on April 23, 2018, that he was not charged until March 13, 2019, and he was taken into custody on July 8, 2019. App. Vol. II, pp. 28-29. Again, because Father does not challenge the trial court's findings, including its findings related to his dates of incarceration, we accept them as true. *In re S.S.*, 120 N.E.3d at 610. This means that for at least a year of the underlying CHINS case, we have no reason to believe that incarceration kept Father from participating.

[13] Neither of Father's arguments accurately describes the trial court's findings. Father's behavior contributed to Child's removal. When Child was removed from Mother, Father was nowhere to be found. Ex. Vol. III, p. 88. According to Father's criminal record, he was free for a little over a year of the underlying CHINS case, from at least April 2018 until July 2019. Ex. Vol. I, pp. 170; 176; 190. But even during that time, Father failed to participate as ordered. *See* App. Vol. II, p. 30. In fact, the trial court found that, "[t]hroughout this case,

[Father]’s participation was nearly nonexistent” and as of the April 2020 termination hearing, Father “has not been in [Child]’s life throughout the last two (2) years.” *Id.* at 30, 31.

[14] It is clear that Father’s imprisonment is not the sole reason for termination, as Father’s absenteeism predated his incarceration. *Id.* Father’s imprisonment until 2024 suggests that his absenteeism will not be remedied. Father’s lack of involvement in the underlying CHINS case, his limited contact with Child, and his failure to either engage with DCS or complete other programming to improve his performance as a father¹ add to this bleak calculus.

[15] Father next argues that the trial court relied on his incarceration alone to establish him as a threat to Child. Again, the trial court’s order contradicts this view. It cites both Father’s chronic absences and continued criminal activity as threats, concluding, “[Father] is an absentee father to [Child] and placing him with [Father] places him at substantial risk for physical, mental and emotional abuse.” App. Vol. II, p. 32.

[16] Even if Father’s argument had some basis in the record, he uses the wrong legal standard to support it. Father argues that “termination should only occur where being in the custody of their parents is wholly inadequate for their very

¹ Father testified, “I am doing everything I possibly can. Uh, like just doing my GED schooling, parenting class, drug and alcohol, I wanna do my part for my son.” Tr. Vol. II, p. 59. On appeal, however, Father does not challenge the trial court’s findings regarding his nonparticipation or cite this testimony at all, though it is relevant to this Court’s analysis pursuant to *K.E.*, 39 N.E. at 648-49 (restoring Father’s parental rights based at least in part on Father’s commitment to self-improvement programs while incarcerated).

survival.” Appellant’s Br., p. 15 (citing *Waltz v. Daviess Cnty. Dep’t of Pub. Welfare*, 579 N.E.2d 138, 139 (Ind. Ct. App. 1991), *trans. denied*). But our Supreme Court has explicitly disowned this standard: “Clear and convincing evidence need not reveal that ‘the continued custody of the parents is wholly inadequate for the child’s very survival.’” See *Bester v. Lake Cnty. Office of Fam. & Child.*, 839 N.E.2d 143, 148 (Ind. 2005) (citing *Egley v. Blackford Cnty. Dep’t of Pub. Welfare*, 592 N.E.2d 1232, 1233 (Ind. 1992)). Instead, DCS need only show by clear and convincing evidence that the child’s emotional and physical development is threatened. *Id.* The trial court correctly determined DCS met that burden.

II. Best Interests of the Child

[17] Lastly, Father argues that the transcript is devoid of evidence to support a finding that termination was in Child’s best interests. A determination of best interests should be based on the totality of circumstances. *Lang v. Starke Cnty. Off. of Fam. & Child.*, 861 N.E.2d 366, 373 (Ind. Ct. App. 2007). A parent’s past and current inability to provide a suitable environment for their children supports a finding that termination is in the children’s best interests. *Id.* Permanency is an important consideration in this determination. *K.T.K. v. Ind. Dep’t of Child Servs.*, 989 N.E.2d 1225, 1235 (Ind. 2013).

[18] The trial court found that Father had not been in Child’s life for 2 years and likely would be absent for another 4 years after the 2020 termination hearing

due to his incarceration, or until Child is 9 years old.² App. Vol. II, p. 31. Placing Child with Father upon Father's release would be akin to waiting 4 years to place Child with a stranger. *Id.* at 31. Based on this evidence, and the evidence discussed in Part I, *supra*, we cannot say that the trial court's conclusion that termination was in Child's best interests was clearly erroneous.

[19] We affirm the trial court's termination of Father's parental rights.

Mathias, J., and Tavitas, J., concur.

² Father also challenged this fact during the termination hearing, testifying that he would be released in 2022, not 2024. Tr. Vol. II, p. 59. However, Father fails to challenge this factual finding on appeal.