MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

In Re: The Termination of the Parent-Child Relationship of S.B. and T.W. (Minor Children);

S.D. (Mother) and C.B. (Father),

Appellants-Respondents

v.

The Indiana Department of Child Services,

Appellee-Petitioner.

April 25, 2023

Court of Appeals Case No. 22A-JT-1603

Appeal from the Fulton Circuit Court

The Honorable A. Christopher Lee, Judge

Trial Court Cause Nos. 25C01-2106-JT-93
25C01-2106-JT-94

Memorandum Decision by Judge Pyle

Judges Bradford and Kenworthy concur.

Pyle, Judge.

Statement of the Case

[1] S.D. ("Mother") and C.B. ("Father") (collectively ("Parents")) each appeal the termination of the parent-child relationship with their daughter, S.B. ("S.B."). Mother also appeals the termination of the parent-child relationship with her son, T.W. ("T.W.").[1] Mother argues that the clear and convincing evidence standard in termination cases violates the Due Course of Law Clause in the Indiana Constitution. Father argues that there is insufficient evidence to support the termination of his parental relationship with S.B. Concluding that: (1) the clear and convincing evidence standard in termination cases does not violate the Due Course of Law Clause in the Indiana Constitution; and (2) there is sufficient evidence to support the termination of Father's parental relationship with S.B., we affirm the trial court's judgment.

[2] We affirm.

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[1] T.W.'s father is unknown.

Issues

1. Whether the clear and convincing evidence standard in termination cases violates the Due Course of Law Clause in the Indiana Constitution.

2. Whether there is sufficient evidence to support the termination of Father's parental relationship with S.B.

Facts[2]

[3] Mother and Father are the parents of S.B., who was born in October 2011. Mother is also the parent of T.W., who was born in March 2010. The Department of Child Services ("DCS") removed S.B. and T.W. ("the children") from Parents in March 2020. The reasons for the removal were Parents' methamphetamine use in the home and domestic violence. DCS initially placed the children with family members and then moved them together to a foster family. Also, in March 2020, DCS filed petitions alleging that the children were children in need of services ("CHINS"). Following the children's removal, Father moved to Kentucky. Father established paternity of S.B. in July 2020.

[4] In the summer of 2020, the children's foster mother discovered then eight-year-old S.B. masturbating. In August 2020, the foster mother discovered S.B. rubbing her nine-year-old foster brother's penis. S.B. subsequently revealed that

[2] Because Father is the only party to challenge the sufficiency of the evidence to support the termination of his parental rights, we limit our facts to those most favorable to the termination of Father's parental relationship with S.B.

she had previously engaged in a sexual relationship with her then ten-year-old brother, T.W., while they were living with Parents. S.B. had told Mother about her sexual relationship with T.W., but Mother had done nothing. In addition, S.B. revealed that she had engaged in a sexual relationship with her foster siblings because T.W. had told her to do so. DCS moved S.B. to a different foster home and placed T.W. in a residential treatment program for sexually maladaptive youth.

[5] In October 2020, Father admitted that S.B. was a CHINS. In January 2021, the trial court issued an amended dispositional order that required Father to: (1) participate in a substance abuse assessment and follow all recommendations; (2) participate in a parenting assessment and follow all recommendations; (3) participate in a mental health assessment to specifically address domestic violence and follow all recommendations; (4) refrain from the use of illegal substances; (5) submit to random drug screens; and (6) participate in supervised visits with S.B.

[6] Also, in January 2021, Father returned to Indiana, where he initially complied with the CHINS dispositional order by participating in parenting, substance abuse, and mental health assessments. However, Father failed to follow the recommendations of the parenting assessment, which included parenting education and home-based case management. Father also failed to follow the recommendations of the substance abuse assessment, which included participating in a substance abuse group. Because Father claimed that he had a work conflict with the substance abuse group, DCS allowed Father to

incorporate substance abuse issues into his individual therapy. Father consistently attended individual therapy for a couple of months until April 2021, when he attended only two of four scheduled sessions. Father attended one of four scheduled sessions in May 2021 and no sessions in June 2021.

[7] In June 2021, DCS filed petitions to terminate Parents' parental relationships with S.B. and Mother's parental relationship with T.W. Father tested positive for methamphetamine in July 2021. Father again tested positive for methamphetamine in November 2021. Three weeks later, Father was arrested and charged with possession of methamphetamine that was found in his vehicle.

[8] The trial court held a termination hearing in March 2022 and heard the evidence as set forth above. In addition, Father acknowledged that he had twice tested positive for methamphetamine after DCS had filed the petition to terminate his parental relationship with S.B. Father further testified that it was "irrelevant" that he had used methamphetamine during the pendency of the CHINS proceedings because he claimed that he was no longer using it at the time of the termination hearing. (Tr. Vol. 2 at 33).

[9] Dennis Dutcher ("Dutcher"), Father's therapist, testified that he had addressed substance abuse issues with Father. According to Dutcher, Father had only attended two sessions in the previous six months, one in September 2021 and another in December 2021. Dutcher further testified that Father had not told him that Father had tested positive for methamphetamine in November 2021.

[10] S.B.'s foster mother ("foster mother") testified that when S.B. arrived at her home in August 2020, S.B. was hateful and angry. If the foster mother told S.B. that she could not do something, S.B. would "tear up her room, and within seconds. And it took a lot of talking and holding and cuddling to calm . . . her down." (Tr. Vol. 2 at 162). Foster mother further testified that over the ensuing year and seven months, S.B. had made great progress and was "like a different child." (Tr. Vol. 2 at 162). According to foster mother, she could probably count on two hands the number of visits that Father had kept with S.B.

[11] S.B.'s psychologist, Dr. Robin Young ("Dr. Young"), testified that, during the previous year, she had treated S.B. with trauma-focused cognitive behavioral therapy. According to Dr. Young, when S.B. knew that she would be speaking about emotionally distressing events, S.B. asked her foster mother to attend therapy with her to support her. Dr. Young also testified that S.B. had progressed to the point of learning coping skills and understanding healthy boundaries. Dr. Young attributed S.B.'s progress to a collaboration among S.B., Dr. Young, S.B.'s foster family, and the DCS family case manager. Dr. Young further testified that S.B. would need continued therapy and that termination was in S.B.'s best interests.

[12] DCS family case manager Julie Storm ("FCM Storm") testified that Parents had shown an inability to "fully participate in services designed to alleviate [DCS'] reasons for involvement." (Tr. Vol. 2 at 194). FCM Storm further testified that termination was in S.B.'s best interests. In addition, CASA Sherry

Shepherd ("CASA Shepherd") testified that she was concerned that Parents had not been "dealing with their underlying issues[]" during the pendency of the CHINS proceedings. (Tr. Vol. 2 at 168). CASA Shepherd also testified that termination was in S.B.'s best interests.

[13] In June 2022, the trial court issued detailed fifteen-page orders terminating Mother's parental relationships with S.B. and T.W. and Father's parental relationship with S.B. Mother and Father each appeal.

Decision

[14] Mother argues that the clear and convincing evidence standard in termination cases violates the Due Course of Law Clause in the Indiana Constitution. Father argues that there is insufficient evidence to support the termination of his parental relationship with S.B. We address each of these contentions in turn.

1. Mother's Constitutional Argument

[15] Mother does not challenge the sufficiency of the evidence to support the termination of her parental relationships with S.B. and T.W. Rather, her sole argument is that the clear and convincing evidence standard in termination cases, as set forth in INDIANA CODE § 31-34-12-2, violates the Due Course of Law Clause in the Indiana Constitution.

[16] However, the law is well-established that a party on appeal may waive a constitutional claim. *McBride v. Monroe County Office of Family and Children*, 798 N.E.2d 185, 194 (Ind. Ct. App. 2003). For example, in *In re K.S.*, 750 N.E.2d 832, 834 n.1 (Ind. Ct. App. 2001), this Court determined that a mother had

waived her claim that the trial court had violated her due process rights because she had raised the constitutional claim for the first time on appeal. Here, Mother did not argue at the termination hearing that the clear and convincing evidence standard in termination cases violates the Due Course of Law Clause in the Indiana Constitution. Rather, Mother is now raising her constitutional claim for the first time on appeal. She has therefore waived appellate review of this issue. *See id*.

[17] Waiver notwithstanding, we find no error. Whether a statute is constitutional on its face is a question of law, which we review de novo. *Matter of S.G. v. Indiana Department of Child Services*, 67 N.E.3d 1138, 1144 (Ind. Ct. App. 2017). Statutes are "clothed in a presumption of constitutionality." *Id*. (cleaned up). An individual challenging the constitutionality of a statute bears the burden of rebutting this presumption. *Id*. "All reasonable doubts must be resolved in favor of an act's constitutionality. When a statute can be so construed to support its constitutionality, we must adopt such a construction." *Id*. (cleaned up).

[18] INDIANA CODE § 31-34-12-2 provides "a finding in a proceeding to terminate parental rights must be based upon clear and convincing evidence." *See In re E.M.*, 4 N.E.3d 636, 642 (Ind. 2014) ("[C]lear and convincing evidence . . . [is] a heightened burden of proof reflecting termination's serious social consequences") (cleaned up); *In re D.W.*, 969 N.E.2d 89, 94 (Ind. Ct. App. 2012) ("Clear and convincing evidence as a standard of proof requires the existence of a fact to be highly probable.") (cleaned up). Mother contends that

this statute is unconstitutional under Article 1, Section 12 of the Indiana Constitution, which provides that "every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law." Mother specifically argues that "Indiana's Constitution demands the highest level of protection for family integrity[]" and the proper standard is, therefore, beyond a reasonable doubt. (Mother's Br. 18).

[19] We recently discussed whether the clear and convincing evidence standard violates the Due Course of Law Clause of the Indiana Constitution and held that it does not. *See*, *In re P.B.*, 199 N.E.3d 790 (Ind. Ct. App. 2022), *trans. pending*. In reaching our decision in *P.B.*, we reviewed United States Supreme Court cases and noted that in *Santosky v. Kramer*, 455 U.S. 745, 769 (1982), the Supreme Court held that the Due Process Clause of the Fourteenth Amendment does not require a beyond a reasonable doubt standard in termination cases. *Id*. at 795. In the *Santosky* case, the United States Supreme Court specifically explained that "termination proceedings often require the factfinder to evaluate medical and psychiatric testimony, and to decide issues difficult to prove to a level of absolute certainty, such as lack of parental motive, absence of affection between parent and child, and failure of parental foresight and progress," all of which is evidence "rarely susceptible to proof beyond a reasonable doubt." *Santosky*, 455 U.S. at 769. However, the Supreme Court went on to state that state courts and legislatures could determine for themselves "the precise burden equal to or greater than [the clear and convincing evidence] standard." *Id*. at 769-70.

[20] Here, Mother, as did the mother in *P.B.*, acknowledges that *Santosky* "set the *minimum* burden of proof in termination cases at 'clear and convincing' evidence[.]" (Mother's Amended Br. 21) (emphasis in the original). However, as did the mother in *P.B.*, she encourages us to "accept the Supreme Court's invitation" to examine this issue under our state constitution and "hold that under Indiana's constitution the parent-child relationship should only be terminated upon the State proving its case 'beyond a reasonable doubt.'" (Mother's Amended Br. 19). Specifically, Mother points to the textual differences between the Federal Due Process Clause and the Indiana Due Course of Law Clause and emphasizes that the Indiana Clause, unlike the Federal Clause, protects from reputational injury. According to Mother, "[p]erhaps nothing is more essential to a parent's character and reputation than the parent's relationship with h[er] children." (Mother's Amended Br. 18).[3]

[21] However, as we noted in *P.B.*, "even when analyzing claims of reputational injury, we employ the same methodology to claims of denial of procedural due process in violation of Article 1, Section 12 as the U.S. Supreme Court uses to analyze claims of violation of the federal Due Process Clause." *P.D.*, 199 N.E.3d at 796. *See, Doe v. O'Connor*, 790 N.E.2d 985, 988 (Ind. 2003); *Matter of D.H.*, 119 N.E.3d 578, 586 n.16 (Ind. Ct. App. 2019) ("[T]he due process analysis under [the state and federal constitutions] is the same."), *trans. denied*.

[3] We note that the attorney who wrote Mother's brief in this case also wrote the mother's brief in *P.B.*, and the mothers' arguments in both cases are identical.

We further noted that "*Santosky* shows that procedural due process requires a standard that reflects the interests of both the state and parents in termination proceedings as well as the risk of error." *P.B.*, 199 N.E.3d at 796. In addition, we noted that where the U.S. Supreme Court had ultimately concluded that the clear and convincing evidence standard did this, we saw no reason to reach a different conclusion in *P.B. Id*. We also see no need to reach a different conclusion.

[22] Mother further argues, as did the Mother in *P.B.*, that injuries to reputation demand the highest level of proof under the Indiana Constitution. However, as we noted in *P.B.*, "given that this Court has found that the clear and convincing evidence standard is sufficient to protect a parent's liberty interest in their child, we see no reason why this standard would not sufficiently protect their reputation." *Id*. *See, Waltz v Daviess County Department of Public Welfare*, 579 N.E.2d 138, 140 (Ind. Ct. App. 1991)) (explaining that the clear and convincing evidence standard "follows from the fact that termination severs all of a parent's rights to the child, thereby extinguishing the constitutionally-protected right of the parent to make a home and raise the child, which has been recognized as one of the basic civil rights of man"), *trans. denied*. As we also noted in *P.B.*, "Mother's argument would have us hold that a higher burden is required in termination cases not based on a parent's rights over their child but based on the reputational harm of termination." *P.B.*, 199 N.E.3d at 796. "We do not believe there is support for such a holding." *See id*.

[23] In conclusion, although transfer is pending in *P.B.*, until our Indiana Supreme Court indicates that it is not good law, we follow *P.B*, adopt its analysis, and conclude that Mother has not shown that the clear and convincing evidence standard in termination cases violates the Due Course of Law Clause in the Indiana Constitution. *See P.B.*, 199 N.E.3d at 796. Accordingly, we affirm the trial court's termination of Mother's parental relationships with S.B. and T.W.

2. Father's Sufficiency of the Evidence Argument

[24] Father argues that there is insufficient evidence to support the termination of his parental relationship with S.B. The traditional right of parents to establish a home and raise their children is protected by the Fourteenth Amendment to the United States Constitution. *In re J.W., Jr.*, 27 N.E.3d 1185, 1187-88 (Ind. Ct. App. 2015), *trans. denied*. However, a trial court must subordinate the interests of the parents to those of the child when evaluating the circumstances surrounding a termination. *Id.* at 1188. Termination of the parent-child relationship is proper where a child's emotional and physical development is threatened. *Id.* Although the right to raise one's own child should not be terminated solely because there is a better home available for the child, parental rights may be terminated when a parent is unable or unwilling to meet his or her parental responsibilities. *Id.*

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

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

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

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

(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). DCS must prove the alleged circumstances by clear and convincing evidence. *K.T.K. v. Indiana Department of Child Services, Dearborn County Office*, 989 N.E.2d 1225, 1230 (Ind. 2013).

[26] When reviewing a termination of parental rights, this Court will not reweigh the evidence or judge the credibility of the witnesses. *In re Involuntary Termination of the Parent-Child Relationship of R.S.*, 56 N.E.3d 625, 628 (Ind. 2016). We consider only the evidence and any reasonable inferences to be drawn therefrom that support the judgment and give due regard to the trial court's opportunity to judge the credibility of the witnesses firsthand. *K.T.K.*, 989 N.E.2d at 1229.

[27] In addition, as a general rule, appellate courts grant latitude and deference to trial courts in family law matters. *Matter of D.P.*, 72 N.E.3d 976, 980 (Ind. Ct. App. 2017). "This deference recognizes a trial court's unique ability to see the

witnesses, observe their demeanor, and scrutinize their testimony, as opposed to this court[] only being able to review a cold transcript of the record." *Id.*

[28] Here, Father argues that there is insufficient evidence to support the termination of his parental rights. Specifically, he first contends that the evidence is insufficient to show both that there is a reasonable probability that the conditions that resulted in S.B.'s removal or the reasons for placement outside the parent's home will not be remedied and a continuation of the parent-child relationship poses a threat to S.B.'s well-being.

[29] However, we note that INDIANA CODE § 31-35-2-4(b)(2)(B) is written in the disjunctive. Therefore, DCS is required to establish by clear and convincing evidence only one of the three requirements of subsection (B). *In re A.K.,* 924 N.E.2d 212, 220 (Ind. Ct. App. 2010). We therefore discuss only whether there is a reasonable probability that the conditions that resulted in S.B.'s removal or the reasons for her placement outside Father's home will not be remedied.

[30] In determining whether the conditions that resulted in a child's removal or placement outside the home will not be remedied, we engage in a two-step analysis. *In re E.M.,* 4 N.E.3d at 642-43. We first identify the conditions that led to removal or placement outside the home and then determine whether there is a reasonable probability that those conditions will not be remedied. *Id.* at 643. The second step requires trial courts to judge a parent's fitness at the time of the termination proceeding, taking into consideration evidence of changed conditions and balancing any recent improvements against habitual

patterns of conduct to determine whether there is a substantial probability of future neglect or deprivation. *Id.* DCS need not rule out all possibilities of change. *In re Involuntary Termination of the Parent-Child Relationship of Kay. L.,* 867 N.E.2d 236, 242 (Ind. Ct. App. 2007). Rather, DCS need establish only that there is a reasonable probability that the parent's behavior will not change. *Id.*

[31] Here, our review of the evidence that supports the judgment reveals that DCS removed S.B. from Father because of Father's methamphetamine use and domestic violence. During the pendency of the proceedings, Father failed to successfully complete any of the court-ordered services. In addition, after DCS had filed the petition to terminate his parental relationship with S.B, Father twice tested positive for methamphetamine and was charged with possession of methamphetamine found in his vehicle. This evidence supports the trial court's conclusion that there was a reasonable probability that the conditions that resulted in S.B.'s removal would not be remedied.

[32] Father also argues that there is insufficient evidence that termination is in S.B.'s best interests. 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 Termination of the Parent-Child Relationship with D.D.*, 804 N.E.2d 258, 267 (Ind. Ct. App. 2004), *trans. denied*. In so doing, the court must subordinate the interests of the parents to those of the child involved. *Id.* Termination of the parent-child relationship is proper where the child's emotional and physical development is threatened. *In re R.S.*, 774 N.E.2d 927,

930 (Ind. Ct. App. 2002), *trans. denied*. Further, the testimony of the service providers may support a finding that termination is in the child's best interests. *McBride*, 798 N.E.2d at 203.

[33] Here, FCM Storm, CASA Shepherd, and Dr. Young all testified that termination was in S.B.'s best interests. The testimony of these service providers, as well as the other evidence previously discussed, supports the trial court's conclusion that termination was in S.B.'s best interests. There is sufficient evidence to support the termination of Father's parental relationship with S.B.

[34] Affirmed.

Bradford, J., and Kenworthy, J., concur.