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IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF THE TERMINATION OF THE PARENT-CHILD RELATIONSHIP OF:	)	
J.M. and K.M., Minor Children,	)	
and	)	
M.L.M., Father,	)	
Appellant-Respondent,	)	
vs.	)	No. 71A05-1010-JT-638
INDIANA DEPARTMENT OF CHILD SERVICES,	)	
Appellee-Petitioner.	)	

APPEAL FROM THE ST. JOSEPH PROBATE COURT
The Honorable J. Eric Smithburn, Senior Judge
Cause Nos. 71J01-1001-JT-8 and 71J01-1001-JT-20

May 26, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

M.L.M. ("Father") appeals the probate court's order involuntarily terminating his parental rights to his children, J.M. and K.M. Father contends that his Fourteenth Amendment rights were violated because his parental rights were terminated without good cause, and he also contends that the termination order is not supported by sufficient evidence. We believe that Father's due process argument is part and parcel of his sufficiency challenge, in which we find no merit. Therefore, we affirm.

Facts and Procedural History

The probate court's termination order contains the following uncontested findings of fact:

> 2. [K.R.D.] (Mother) gave birth to [J.M.] [February 17, 2001] and [K.M.] [January 22, 2006] out of wedlock.
>
> 3. Father's paternity of [J.M.] and [K.M.] was adjudicated by this Court's Orders Establishing Paternity of 9-28-06 ([K.M.]) and 9-28-09 ([J.M.]).
>
> 4. On 8-19-10, Mother voluntarily relinquished her parental rights as to [S.C., a third child unrelated to Father] and [K.M.] and on said date this Court entered its Order on Voluntary Termination of Parental Rights.
>
> 5. On 8-19-10, Mother executed a Consent to Adoption of [J.M.].
>
> 6. In 9-08, Mother, [J.M.], [K.M.], and [S.C.] were living at the Center for the Homeless (CH) in South Bend, Indiana.
>
> 7. On or about 9-13-08, Mother departed the CH without providing a new address and left [J.M.], [K.M.] and [S.C.] with the children's Maternal Grandmother … (Grandmother). Mother, without permission, took Grandmother's car and disappeared for approximately two weeks.
>
> 8. On or about 9-13-08, Mother abandoned [J.M.] and [K.M.], leaving the children with Grandmother.

> 9. On or about 9-29-08, Grandmother reported to DCS [Department of Child Services] that Mother was missing.
>
> 10. On 9-29-08, DCS removed the children from Mother's care (Grandmother's home), placing [K.M.] and [S.C.] in foster care and [J.M.] in his Grandmother's home.
>
> 11. [K.M.] had previously (1-22-06) been removed by DCS from Mother's care because [K.M.] was a cocaine-exposed infant.
>
> 12. Father knew that [K.M.] was born with cocaine in her system.
>
> 13. On 10-1-08, this Court entered its Detention Orders … confirming the DCS placements of 9-29-08.
>
> 14. In 9-08, Mother was living with [J.M.] and [K.M.] and Mother was using cocaine.
>
> 15. In 9-08, Father was not living with Mother, [J.M.] and [K.M.].
>
> 16. In 9-08, Father knew that Mother was addicted to cocaine, and Father did nothing to provide the children with a safe and stable home.
>
> 17. On 10-6-08, this Court entered its Orders Authorizing Filing of CHINS [Child in Need of Services] Petitions, and Orders Setting Initial Hearings for [J.M.] and [K.M.].
>
> 18. On 10-8-08, at the CHINS Initial Hearing for [J.M.] and [K.M.], Father and Mother admitted the allegations of the CHINS Petitions and the Court adjudicated [J.M.] and [K.M.] as CHINS.[1]

Appellant's App. at 26.

On January 14, 2010, DCS filed petitions for the involuntary termination of Father's parental rights to J.M. and K.M. Senior Judge J. Eric Smithburn presided at the final hearing,

[1] The CHINS petitions alleged in pertinent part that "Father has been uninvolved with the children and is unable to care for them at this time." DCS Ex. F and G.

which was held on August 27, 2010.[2] Father, who was incarcerated, appeared at the hearing and was represented by counsel. Senior Judge Smithburn took the matter under advisement and issued an order granting the petitions on September 17, 2010.[3] In addition to the foregoing findings of fact, the order contains the following findings and conclusions thereon:

> 19. At the time of the DCS removal of [J.M.] and [K.M.] from Mother's care and custody (Grandmother's home), Father was not involved in the lives of the children and Father did not have the financial means to provide [J.M.] and [K.M.] with a stable home in which to live and Father refused or was unable to support [J.M.] and [K.M.].
>
> 20. At the time of the DCS removal of [J.M.] and [K.M.] from Mother's care and custody (Grandmother's home), none of Father's relatives offered to provide care and custody of [J.M.] and [K.M.].
>
> 21. On 11-12-08, pursuant to the Court's CHINS Dispositional Order, Father was Ordered to visit with the children (parenting time) on a regular basis and maintain consistent contact with DCS.
>
> 22. Father attended only 3 of 11 scheduled supervised visits with [J.M.] and [K.M.] at Families First.
>
> 23. The only contact [K.M.] had with Father was during visits.
>
> 24. [K.M.] doesn't know Father and she has lived most of her life in foster care.
>
> 25. Father never made any effort to provide [J.M.] and [K.M.] with a stable home.

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[2] The cover page of the transcript of this hearing erroneously indicates that it is a transcript of proceedings conducted on January 11, 2010, by Judge Peter J. Nemeth. No hearing was held on that date. A hearing on the termination petitions was conducted on March 3, 2010, apparently by Judge Nemeth, at which Father did not appear. An order terminating Father's parental rights was issued that same day. On March 13, 2010, Father, who was incarcerated, wrote a letter to Judge Nemeth stating that he had not been given an opportunity to appear at the hearing in person or by conference call. The termination order was vacated and the final hearing ultimately was reset for August 27, 2010.

[3] We note that neither his name nor his signature appears on the copies of the order in the record before us.

26. Father refused or was unable to support the children and provide a stable home environment for [J.M.] and [K.M.].

27. In 3-09, Father was convicted of Driving With Lifetime Suspension, a Class C Felony, and he was incarcerated.

28. Father made no effort to have parenting time with [J.M.] and [K.M.] while Father was in prison.

29. Father has had no parenting time with [J.M.] or [K.M.] from March of 2009 to 8-27-10.

30. In 5-10, while on work release from Westville Correctional Center, Father committed a work release violation and was returned to prison (Westville).

31. Father's scheduled release date from prison is March of 2011.

32. Father has no plan for providing [J.M.] and [K.M.] with a stable home environment.

33. Father failed to comply with the Court's CHINS Dispositional Order to have parenting time with [J.M.] and [K.M.] on a regular basis and maintain consistent contact with DCS.

34. The conditions that resulted in DCS not placing [J.M.] and [K.M.] with their Father will not be remedied.

35. The conclusion in the CASA [Court-Appointed Special Advocate] Report – that it is in the best interests of [J.M.] and [K.M.] that their Father's parental rights be terminated – is credible.

36. It is in the best interests of [J.M.] and [K.M.] that Father's parental rights be terminated.

37. There is a plan for the care and treatment of [J.M.] and [K.M.], which is adoption.

38. The allegations of the DCS Petition [for involuntary termination of Father's parental rights, filed January 14, 2010] are true.

The Court, by clear and convincing evidence, CONCLUDES as follows:

> ….
>
> 3. There is a reasonable probability that the conditions that resulted in the removal of the children or the reasons for placement of [J.M.] and [K.M.] outside the home of Mother or Father will not be remedied.
>
> 4. Termination of the parental rights of [Father] is in the best interests of [J.M.] and [K.M.].
>
> 5. There is a satisfactory plan for the care and treatment of [J.M.] and [K.M.], which is adoption.
>
> ….
>
> 7. The DCS Petitions for Involuntary Termination of the Parent-Child Relationship between [J.M.] and [K.M.] and [Father] should be granted.

Id. at 26-28. Father now appeals.

Discussion and Decision

"The Fourteenth Amendment to the United States Constitution protects the traditional right of parents to establish a home and raise their children." *Bester v. Lake Cnty. Office of Family & Children*, 839 N.E.2d 143, 147 (Ind. 2005). A parent's interest in the care, custody, and control of his child is perhaps the oldest fundamental liberty interest. *Id*. Parental interests are not absolute, however, and must be subordinated to the child's interests when determining the proper disposition of a petition to terminate parental rights. *Id*. Therefore, parental rights may be terminated when the parent is unable or unwilling to meet his parental responsibilities. *Id*.

To involuntarily terminate a parent-child relationship, DCS must allege and prove that

(B) there is a reasonable probability that:

(i) the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied; or

(ii) the continuation of the parent-child relationship poses a threat to the well-being of the child;

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

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

Ind. Code § 31-35-2-4(b)(2) (inapplicable provisions omitted).[4] DCS must prove these elements by clear and convincing evidence. Ind. Code § 31-37-14-2. "Clear and convincing evidence need not reveal that the continued custody of the parents is wholly inadequate for the child's very survival. Rather, it is sufficient to show by clear and convincing evidence that the child's emotional and physical development are threatened by the respondent parent's custody." *Bester*, 839 N.E.2d at 148 (citations and quotation marks omitted).

Father first argues that his Fourteenth Amendment rights[5] were violated by the involuntary termination of his parental rights

> based upon the minimal foundation of [his] imprisonment as a habitual traffic violator, a number of missed visitations that resulted from these legal problems, and the fact that [he] had too much faith in the mother of the children; in that he allowed himself to be optimistic about her efforts to get clean and raise the children, when 20/20 hindsight has shown that he should

[4] Indiana Code Section 31-35-2-4 was revised effective March 12, 2010. We refer to the version of the statute that was in effect when the termination petitions were filed in January 2010.

[5] Father also invokes the Indiana Constitution's due course of law provision but fails to develop a separate argument on this point. Therefore, the issue is waived. *See Lewis v. State*, 911 N.E.2d 76, 83 n.6 (Ind. Ct. App. 2009) (declining to address state constitutional argument where appellants "provide[d] no separate analysis on that basis"), *trans. denied*.

> have been less trusting and investigated alternate caregivers in case the mother turned out to be unable to care for them.

Appellant's Br. at 9. We agree with DCS that Father's constitutional argument is "essentially nothing more" than a challenge to the sufficiency of the evidence supporting the probate court's decision. Appellee's Br. at 23. Accordingly, we address Father's argument in that context.

In reviewing termination proceedings on appeal, we will neither reweigh the evidence nor assess the credibility of the witnesses. *In re J.H.*, 911 N.E.2d 69, 73 (Ind. Ct. App. 2009), *trans. denied*. We consider only the evidence that supports the probate court's decision and the reasonable inferences drawn therefrom. *Id*. Typically, where the probate court enters findings of fact and conclusions thereon, our standard of review is two-tiered: first, we determine whether the evidence supports the findings, and second, whether the findings support the conclusions. *Id*. In deference to the probate court's unique position to assess the evidence, we set aside its findings and judgment terminating a parent-child relationship only if they are clearly erroneous. *Id*. "A finding of fact is clearly erroneous when there are no facts or inferences drawn therefrom to support it." *Id*. A judgment is clearly erroneous only if the legal conclusions drawn by the probate court are not supported by its findings of fact or the conclusions do not support the judgment. *Id*.

Because Father does not contest the accuracy of the probate court's factual findings, we need only determine whether the findings support the conclusions. Father challenges only two: (1) that there is a reasonable probability that the conditions that resulted in the

placement of the children outside his home will not be remedied; and (2) that the termination of his parental rights is in the children's best interests.

To determine whether the conditions that led to the placement of the children outside a parent's home are likely to be remedied, the probate court must first determine what conditions led to DCS placing the children in foster care rather than placing them with the parent. *In re B.D.J.*, 728 N.E.2d 195, 201 (Ind. Ct. App. 2000). Second, the court should determine whether there is a reasonable probability that those conditions will be remedied. *Id*. When assessing a parent's fitness to care for children, the court should view the parent as of the time of the termination hearing and take into account any evidence of changed conditions. *Id*. The court must also "consider the parent's habitual patterns of conduct as a means of determining the probability of future detrimental behavior." *Id*. The court "need not wait until the child is irreversibly harmed so long as clear and convincing evidence exists that the shortfalls of the parent's ability are not likely to be remedied." *Id*.

Father asserts that although he was incarcerated at the time of the termination hearing, "a change of this condition is imminent, with his scheduled release date fast approaching in early 2011." Appellant's Br. at 12. He further asserts that although his

> history as a habitual traffic violator is certainly nothing to applaud, his criminal activity has been of a mild to moderate nature, and suggests little about his capability to function as a father to [K.M.] and [J.M.]. [Father] has never been accused of neglecting or depriving his children, other than missing scheduled visitations while he was incarcerated, and possibly being overly optimistic that the mother of the children would clean up her act.

Id.

Father's argument disregards the undisputed fact that he knew that Mother was addicted to cocaine, that he was not involved in the children's lives when she abandoned them in September 2008, and that he did nothing to provide them with a safe and stable home. At that time, he was living with his sixteen-year-old son from another relationship in a one-bedroom apartment that he "had to" sublease from a tenant because of his criminal record. Tr. at 72. As of September 2008, Father had accumulated one class D felony conviction for driving while suspended (which resulted in the lifetime suspension of his driving privileges) and one class C felony conviction for driving while suspended as a habitual traffic violator. In March 2009, he was arrested yet again for driving while suspended and accumulated a second class C felony conviction. Two months after he was out on work release, Father committed a rules violation and was sent back to prison. While in prison, Father made no effort to have parenting time with the children, and he had no plan for providing them with a stable home environment upon his release. Based on the foregoing, we cannot say that the first challenged conclusion is clearly erroneous.

As for the second, Father makes the following argument:

> DCS failed to prove by clear and convincing evidence that termination was in [the children's] best interests. With the exception of [his] incarceration as a habitual traffic offender and its resulting impacts, there has been no evidence presented that would suggest [he] is unable to be a father to his children.

Appellant's Br. at 13. We disagree.

A determination of the best interests of the children should be based on the totality of the circumstances. *Lang v. Starke Cnty. Office of Family & Children*, 861 N.E.2d 366, 373 (Ind. Ct. App. 2007). In making this determination, the probate court must subordinate the

interests of the parent to those of the children involved. *In re A.K.*, 924 N.E.2d 212, 224 (Ind. Ct. App. 2010), *trans. dismissed*. "A parent's historical inability to provide a suitable environment along with the parent's current inability to do the same supports a finding that termination of parental rights is in the best interests of the children." *Lang*, 861 N.E.2d at 373. "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." *A.K.*, 924 N.E.2d at 224.

As indicated above, Father was uninvolved with and unable to provide a suitable environment for the children before he was incarcerated and made no plans to do so following his release from prison. K.M. does not know Father and has spent most of her life in foster care. Additionally, the CASA opined that termination of Father's parental rights was in the children's best interests. For all these reasons, we cannot say that the probate court's conclusion in this regard is clearly erroneous. Therefore, we affirm.

Affirmed.

NAJAM, J., and ROBB, C.J., concur.