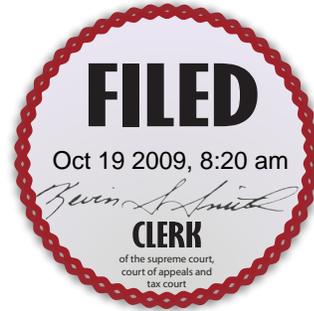


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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IN RE: THE TERMINATION OF THE )  
PARENT-CHILD RELATIONSHIP OF: )  
W.W., Minor Child, )  
 )  
And, )  
 )  
J.B.W., Father, )  
 )  
Appellant-Respondent, )  
 )  
vs. )  
 )  
INDIANA DEPARTMENT OF CHILD )  
SERVICES, )  
 )  
Appellee-Petitioner. )

No. 63A01-0904-JV-200

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APPEAL FROM THE PIKE CIRCUIT COURT  
The Honorable Jeffrey L. Biesterveld, Judge  
The Honorable Joseph L. Verkamp, Referee/Judge  
Cause No. 63C01-0810-JT-127

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October 19, 2009

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARNES, Judge**

**Case Summary**

J.W. (“Father”) appeals the termination of his parental rights to W.W. We affirm.

**Issue**

Father raises one issue, which we restate as whether there is sufficient evidence to support the termination of his parental rights.

**Facts**

Father has five children. The oldest child is twenty-two and incarcerated. In 2004, Father voluntarily relinquished his parental rights to his three middle children. Father did not complete services offered to him by the Department of Child Services (“DCS”) prior to the voluntary relinquishment of his parental rights. Father’s youngest child, W.W., was born on April 26, 2004.

Father and the younger children’s mother (“Mother”) were involved in a violent relationship. For example, Mother accused father of shocking her with a cattle prod repeatedly and beating her with a shot gun. Some of Father’s children were present during these incidents.

From November 9, 2004, until January 9, 2009, Father was incarcerated on methamphetamine-related convictions. Father had been manufacturing

methamphetamine at his parents' farm and had involved his oldest son in the operation. While Father was incarcerated, he was not offered services by the DCS. Father did attend some parenting classes and completed a substance abuse program, but he had no contact with W.W. After his incarceration, Father resumed living at his parents' house and worked on his parents' farm. Father did not participate in any drug treatment programs during the three weeks between his release from prison and the start of the termination hearings.

On January 24, 2008, while Father was still incarcerated, the DCS alleged that W.W. was a child in need of services ("CHINS"). On October 6, 2008, the DCS filed a petition to terminate Father's parental rights to W.W. On January 30, 2009, February 6, 2009, and February 10, 2009, soon after Father's January 9, 2009 release from prison, the trial court held evidentiary hearings on the petition to terminate his parental rights. On March 10, 2009, the trial court issued an order terminating Father's parental rights.<sup>1</sup> Father now appeals.

### **Analysis**

Father argues there is insufficient evidence to support the termination of his parental rights. "When reviewing the termination of parental rights, we do not reweigh the evidence or judge witness credibility." Bester v. Lake County Office of Family & Children, 839 N.E.2d 143, 147 (Ind. 2005). "We consider only the evidence and reasonable inferences that are most favorable to the judgment." Id. Where a trial court enters findings and conclusions granting a petition to terminate parental rights, we apply

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<sup>1</sup> Mother's voluntarily relinquished her parental rights to W.W.

a two-tiered standard of review. Id. First, we determine whether the evidence supports the findings. Id. Then we determine whether the findings support the judgment. Id. We will set aside a judgment that is clearly erroneous. Id. A judgment is clearly erroneous when the findings do not support the trial court's conclusions or the conclusions do not support the judgment. Id.

A petition to terminate the parent-child relationship must allege:

(A) one (1) of the following exists:

(i) the child has been removed from the parent for at least six (6) months under a dispositional decree;

(ii) a court has entered a finding under IC 31-34-21-5.6 that reasonable efforts for family preservation or reunification are not required, including a description of the court's finding, the date of the finding, and the manner in which the finding was made; or

(iii) after July 1, 1999, the child has been removed from the parent and has been under the supervision of a county office of family and children for at least fifteen (15) months of the most recent twenty-two (22) months;

(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) (2008).<sup>2</sup>

The DCS had the burden of proving these allegations by clear and convincing evidence. See Bester, 839 N.E.2d at 148. Clear and convincing evidence need not show that the continued custody of the parent is wholly inadequate for the child's very survival. Id. Instead, it is sufficient to show by clear and convincing evidence that the child's emotional and physical development is threatened by the parent's custody. Id.

Father argues there is insufficient evidence that the conditions resulting in W.W.'s removal from his parents' home would not be remedied and that the continuation of the parent-child relationship poses a threat to the well-being of the child. Because the statute is written in the disjunctive, however, the DCS was not required to prove both. Id. at 148 n.5. As such, we only address the trial court's finding that the continuation of the parent-child relationship poses a threat to W.W.

Father claims that the termination is based exclusively on his past conduct and that any evidence of potential harm from the continuation of the parent-child relationship is speculative. Father directs us to his testimony that he is drug free, that he wants to get a job with the Ironworker's Union, and that he has accepted responsibility for his problems and wants to change his life. Father also acknowledges that "he did not think much" of the parenting classes offered in prison and that he had missed AA meetings since his release because of bad weather, the limited availability of meetings, and his lack of a driver's license. Appellant's Br. p. 11.

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<sup>2</sup> Effective July 1, 2009, subsection (b)(2)(A)(iii) of this statute was reworded slightly. See P.L. 131-2009 § 65. We quote the version of the statute in effect at the time of the proceedings in this case.

To the extent this argument is not a request to reweigh the evidence, it is well-settled that “the the trial court must consider a parent’s habitual pattern of conduct to determine whether there is a substantial probability of future neglect or deprivation.” Bester, 839 N.E.2d at 152. “At the same time, however, a trial court should judge a parent’s fitness to care for his child as of the time of the termination proceeding, taking into consideration evidence of changed conditions.” Id. Thus, a parent’s habitual pattern of conduct as well as his or her fitness at the time of the termination proceeding are relevant to a trial court’s consideration

The evidence shows that prior to his incarceration, Father physically abused Mother in the presence of the children. Father manufactured methamphetamine at his parents’ house and involved his oldest son in making the drug. Father also voluntarily relinquished his parental rights to three of his children. During his four-year-long incarceration, Father never attempted to contact W.W. and completed one substance abuse program. The fact that the DCS did not offer him additional services did not prevent him from attempting to seek such services, which he did not do. After his release, Father was living with his parents on the farm where he had previously manufactured methamphetamine, was working on the farm with no concrete plans for outside employment, and had not participated in any substance abuse programs.

At the termination hearing, Father testified that while he was incarcerated he realized he was responsible for losing his family and that he could change his life. Despite these claims, in August 2008, Father wrote in a letter to the DCS, “[Mother] hasn’t sent me any pictures or anything telling me how he is. I’m sorry to see that she

hasn't changed her ways." App. p. 163. In September 2008, Father again wrote the DCS and stated, "I don't know why [Mother] has chosen the path she is on. But I have changed and I am the father of [W.W.]" Id. at 164. Thus, contrary to his claims of accepting responsibility, as late as the fall of 2008, Father still blamed Mother for her actions and focused on her behavior.

In addition to this evidence concerning Father, the DCS presented evidence regarding W.W. The DCS case manager testified that Father would need to maintain his sobriety and participate in parenting classes and anger management counseling for six to twelve months before he could be considered as a custodian for W.W. The case manager also testified that the continuation of the parent-child relationship posed a threat to W.W. because W.W. "is bonded with his grandparents, he has lived with them since an infant, . . . and the disruption of that would be harmful to his emotional well being." Tr. p. 214. An in-home therapist testified that, based on W.W.'s strained affection toward Mother, W.W. would "have an even harder time" being with Father. Id. at 271-72. She, too, testified that the continuation of the parent-child relationship posed a threat to W.W.'s well-being.

To the extent that Father argues the DCS presented no actual evidence of negative effects on W.W. as result of the continuation of the parent-child relationship, we note that Father had no contact with W.W. after he was incarcerated in 2004, when W.W. was approximately six months old. Although the three weeks from when he was released from prison to the termination hearing is a small window of time, we are not convinced that this short amount of time prohibited the trial court from terminating Father's parental

rights. We acknowledge that our supreme court has recently held in two decisions that the involuntary termination of parental rights of incarcerated parents was not warranted. However, the court stated that the close timing of the decisions was a coincidence “and not a reflection of any presumption as to the outcome of such cases.” In re J.M., 908 N.E.2d 191, 191 (Ind. 2009). Given the evidence, we conclude that the DCS presented clear and convincing evidence that the continuation of the parent-child relationship threatened W.W.’s well-being.

Father also argues that there is insufficient evidence to show that the termination of the parent-child relationship is in W.W.’s best interest. Father relies on Rowlett v. Vanderburg County Office of Family & Children, 841 N.E.2d 615 (Ind. Ct. App. 2006), trans. denied. In that case an incarcerated father, Rowlett, moved to continue the final hearing on a petition to terminate his parental rights until after his release from prison. The trial court denied his request, held the final hearing six weeks prior to his release, and terminated Rowlett’s parental rights.

We first addressed whether the trial court properly denied Rowlett’s motion for continuance. We observed that continuing the hearing would have had little immediate effect upon the children because they had been under the care and custody of their maternal grandmother since they were determined to be CHINS and the OFC planned for the grandmother to adopt them. Rowlett, 841 N.E.2d at 619-20. We concluded that the trial court should have granted Rowlett’s motion for continuance and given him a sufficient period following his release to demonstrate his willingness and ability to assume parental duties. Id. at 620.

Because the appeal before us involves the sufficiency of the evidence, not the ruling on a motion to continue, this portion of Rowlett is not immediately relevant to today's question. Even if it were, Father has not made the same "good-faith effort to better himself as a person and as a parent" as Rowlett had. Id. at 622. Like Father, Rowlett was not offered services by the OFC while he was incarcerated. Nevertheless, Rowlett was placed in a Therapeutic Community, participated in nearly 1,100 hours of individual and group services, and had earned twelve hours of college credit during his incarceration. Although still incarcerated at the time of the final hearing, Rowlett had secured employment and housing for after his release, had been accepted to college, and had planned to continue counseling and other services to help him maintain his sobriety. Rowlett had also maintained a relationship with his children during his incarceration by sending them letters and talking to them on the phone. Because of the significant difference between the efforts made by Rowlett and Father, our analysis in Rowlett is not applicable here.

As for the facts before us today, W.W. has been in the custody of his maternal grandparents since he was approximately six months old, and they plan to adopt him. The case worker testified that termination is in W.W.'s best interests because he has been living with his grandparents "all of his life, that's all he knows, he feels safe, uh, and disrupting that relationship would be very harmful to him . . . ." Tr. pp. 217-18. The guardian ad litem testified that W.W. is very well adjusted, extremely intelligent, and very happy. She testified that the termination of Father's parental rights is W.W.'s his

best interests. There is clear and convincing evidence that the termination of Father's parental rights is in W.W.'s best interests.

### **Conclusion**

The DCS presented clear and convincing evidence to support the termination of Father's parental rights. We affirm.

Affirmed.

NAJAM, J., and KIRSCH, J., concur.