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**IN THE  
COURT OF APPEALS OF INDIANA**

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ANTHONY DAVIS, )

Appellant-Respondent, )

vs. )

No. 49A02-0604-JV-299

MARION COUNTY OFFICE OF )  
FAMILY AND CHILDREN, )

Appellee-Petitioner, )

CHILD ADVOCATES, INC., )

Appellee-Guardian ad Litem. )

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Marilyn Moores, Judge  
Cause No. 49D09-0505-JT-16797

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**November 9, 2006**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**DARDEN, Judge**

## STATEMENT OF THE CASE

Anthony Davis appeals the termination of his parental rights as to his minor child, K.B.

We affirm.

### ISSUE

Whether there was clear and convincing evidence to support the termination of Davis's parental rights.

### FACTS

K.B. was born on December 5, 2002 to Rosie Brown. Davis is the putative father. Davis, Brown and K.B. resided together until Davis was incarcerated on or about December 1, 2003, after being convicted of burglary. Davis had a previous conviction for burglary, as a class C felony, and receiving stolen property, as a class D felony, in 1994 and a conviction for burglary, as a class C felony, in 1993.

On June 16, 2004, the Marion County Office of Family and Children (the "OFC") filed a petition, alleging K.B. and Brown's three other children living with her<sup>1</sup> to be children in need of services ("CHINS") pursuant to Indiana Code section 31-34-1-1<sup>2</sup>

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<sup>1</sup> Brown also had three children not in her care.

<sup>2</sup> Indiana Code section 31-34-1-1 provides as follows:

A child is a child in need of services if before the child becomes eighteen (18) years of age:

(1) the child's physical or mental condition is seriously impaired or seriously endangered as a result of the inability, refusal, or neglect of the child's parent, guardian, or custodian to supply the child with necessary food, clothing, shelter, medical care, education, or supervision; and

(2) the child needs care, treatment, or rehabilitation that:

(A) the child is not receiving; and

(B) is unlikely to be provided or accepted without the coercive intervention of the court.

because Brown had left the children unsupervised, and as to K.B., because Davis was incarcerated. The trial court determined K.B. to be a CHINS. Following a disposition hearing on October 1, 2004, the trial court ordered that K.B. be made a ward of the State and remain in foster care. The trial court's order also included a plan for reunification, which provided in relevant part:

B. That Anthony Davis shall secure and maintain safe, sanitary and stable housing . . . .

C. That Anthony Davis shall secure and maintain a legal and stable source of income adequate to support himself and his child.

D. That Anthony Davis shall participate in and successfully complete age appropriate parenting classes . . . .

E. That Anthony Davis shall visit his child on a regular basis.

\* \* \*

K. That Anthony Davis shall notify the case manager of any change in address, telephone number, employment or household composition within 48 hours of the change.

L. That Anthony Davis shall cooperate with the Prosecutor's Office in establishing paternity . . . .

(Exhibits Vol. 8-9).

On May 2, 2005, the OFC filed a petition to terminate the parental rights of Brown, Davis and the other three children's fathers. The trial court held hearings on the petition on August 31, 2005, November 8, 2005, December 6, 2005, and January 10, 2006. On March 24, 2006, the trial court entered its findings of fact and conclusions of law. As to Davis, the trial court found the following:

5. As of the final trial date, paternity had not been established . . . . Davis completed [a] paternity affidavit[] agreed to by Ms. Brown on the day before the final trial day. No evidence was submitted that th[is] affidavit[] w[as] filed through the local department of health as required by IC 16-37-2-2.1.

\* \* \*

7. The Children were found to be CHINS upon admission by the parents that the children were neglected when Ms. Brown had failed to properly supervise them by leaving them alone late in the evening without adult supervision and had done this previously. None of the fathers were around or available to provide the children with proper care or supervision . . . . Mr. Davis was incarcerated.

\* \* \*

9. On October 1, 2004, the Juvenile Court held a Disposition Hearing as to Rosie Brown . . . [and] Anthony Davis . . . and ordered that the children be removed from his or her care and placed in relative care or foster care under the supervision of the [OFC]. Therein, the court ordered parental participation in services for each parent and adopted the predisposition reports prepared by [the OFC] and made such predisposition reports findings of the court.

\* \* \*

28. Mr. Davis . . . w[as] incarcerated when the CHINS case was initiated in June 2004 and w[as] not offered services by [the OFC] during [his] incarceration.

\* \* \*

41. Mr. Davis was present at the birth of [K.B.], believed he signed paperwork at the hospital but never filed a formal paternity action throughout either the CHINS or termination action.

42. No services were offered to Mr. Davis while he was in prison. This is not indicative of any wrongdoing by [the OFC] merely that Mr. Davis engaged in a lifestyle that mandated his removal from society for periods of time.

43. Mr. Davis was released from prison on November 25, 2005, and did not immediately inform the case manager for [the OFC].

44. On or about December 10<sup>th</sup>, [the OFC] referred Mr. Davis for a parenting assessment and supervised visitation.

45. Mr. Davis' contact with [K.B.] has been severely limited and in no way a substantial relationship a child of tender years requires.

46. Mr. Davis has a record of criminal convictions starting in 1991. His convictions include felony burglary in 1994 and his 2003 felony conviction for burglary and theft; receiving stolen property that resulted in his incarceration from December 2003 to November 2005.

47. Mr. Davis was employed in South Bend through Work Release prior to his release.

48. Mr. Davis returned to Indianapolis after his release and enrolled in parenting classes.

49. Mr. Davis works now and stated he has several health conditions that make working difficult. His statements about work were inconsistent and showed lack of stability between his August 2005 testimony and his later testimony. He stated he works occasionally painting houses.

50. When in prison Mr. Davis claimed he participated in a program entitled Thinking for a Change and did not complete a drug program he started because he went into Work Release.

\* \* \*

52. Mr. Davis said he does not know where Ms. Brown lives, but Ms. Brown stated she and Mr. Davis were buying a home together.

53. Mr. Davis said he was buying a house at 3212 East 20<sup>th</sup> Street, but in January 2006 the purchase plan had fallen through over finances and he was living with his mother. This is the same address as the house Ms. Brown said she and Mr. Davis were buying together.

54. The chance for Mr. Davis . . . to prove [him]self [a] fit parent[] was everyday from the date of removal in the underlying CHINS until the final termination hearing and [he] ha[s] not done that.

\* \* \*

58. Mr. Davis has been in prison the entirety of the CHINS case and until eight weeks before the final trial date of a termination matter and is unlikely to remedy the conditions necessitating his child's removal without significant services and time. The law requires, and his child needs permanency; placement in a safe stable house with no further Court involvement required. This Court has considered the evidence, testimony and Mr. Davis' demeanor in Court and finds that he cannot in the foreseeable future provide that stability. He has three serious felony convictions on his record and he will have difficulty establishing a stable life for himself, let alone his alleged child. His testimony reflected a lack of stability of environment which this Court can and does consider. This child needs permanency that he cannot in the foreseeable future provide.

\* \* \*

61. The reasons for removal from the care and supervision of . . . Mr. Davis have not been remedied.

62. The services ordered and offered to [Davis] were necessary to provide an opportunity to demonstrate that [he] had the ability and interest in providing appropriate and safe parenting for [K.B.] The services were unsuccessful.

63. Mr. Davis . . . ha[s] failed to demonstrate an ability to provide for the mental, physical and emotional needs of [K.B.]

64. [K.B.] need[s] a permanent and a stable loving home free from further neglect. Due to the parent's lack of ability to provide for those needs, it is in [K.B.]'s best interest to terminate the parent-child relationship.

65. The guardian ad litem has seen [K.B.] and [she is] doing well in [her] placement. The GAL agrees with the plan of adoption and believe adoption would be in [K.B.]'s best interest.

(App. 28-32). Concluding that the conditions resulting in K.B.'s removal would not be remedied, a parent-child relationship between Davis and K.B. posed a threat to K.B. and that it would be in K.B.'s best interests to terminate the parent-child relationship, the trial court ordered that Davis's parental rights be terminated.

Additional facts will be provided as necessary.

### DECISION

Although parental rights are of a constitutional dimension, the law allows for termination of these rights when parties are unable or unwilling to meet their responsibility. *In re A.N.J.*, 690 N.E.2d 716, 720 (Ind. Ct. App. 1997). The purpose of termination of parental rights is not to punish parents but to protect children. *In re L.S.*, 717 N.E.2d 204, 208 (Ind. Ct. App. 1999), *trans. denied, cert. denied*, 534 U.S. 1161 (2002).

When a county office of family and children seeks to terminate parental rights, the office must plead and prove in relevant part 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). These allegations must be established by clear and convincing evidence. *Bester v. Lake County Office of Family and Children*, 839 N.E.2d 143, 148 (Ind. 2005). "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." *Id.* (quoting *Egly v. Blackford County Dep't of Pub. Welfare*, 592 N.E.2d 1232, 1233 (Ind. 1992)).

In reviewing the termination of parental rights, we will neither reweigh the evidence nor judge the credibility of witnesses. *Id.* at 147. We consider only the

evidence most favorable to the judgment. *Id.* Where, as here, the trial court has entered findings of fact and conclusions of law, we apply a two-tiered standard of review. *Id.* We must determine whether the evidence supports the findings and then whether the findings support the judgment. *Id.* We will set aside a judgment terminating a parent-child relationship only if it is clearly erroneous. *Id.* A judgment is clearly erroneous if the findings do not support the conclusions or the conclusions do not support the judgment. *Id.*

Davis first challenges the finding that the conditions resulting in the removal of K.B. would not be remedied. Davis argues that the “facts demonstrate that at the time of the final termination hearing, [his] circumstances had changed,” and therefore, “[t]he trial court committed clear error in finding otherwise.” Davis’s Br. 11.

To determine whether the conditions are likely to be remedied, the trial court must examine the parent’s fitness to care for the child “as of the time of the termination hearing and take into account any evidence of changed conditions.” *In re S.P.H.*, 806 N.E.2d 874, 881 (Ind. Ct. App. 2004). The trial court, however, also must determine whether there is a substantial probability of future neglect or deprivation. *Id.* “A court may properly consider evidence of a parent’s prior criminal history, drug and alcohol abuse, history of neglect, failure to provide support, and lack of adequate housing and employment.” *McBride v. Monroe County Office of Family and Children*, 798 N.E.2d 185, 199 (Ind. Ct. App. 2003).

In this case, Davis had prior felony-convictions in 1993 and 1994. Davis again was convicted of a felony in 2003. In June of 2004, the OFC removed K.B. because

Davis was incarcerated and Brown had left K.B. without adult supervision. While incarcerated, Davis participated in two programs: a ten-hour substance abuse program and a class called “Thinking for Change.” (Tr. 32). Davis, however, did not participate in any parenting classes while in prison. Davis remained incarcerated until November 25, 2005. During the December 6, 2005 hearing, Laquita Thomas-Trabue, a case manager for the OFC, testified that Davis failed to contact her upon his release and had not established paternity of K.B. as ordered by the trial court.

During the hearing on December 6, 2005, Davis testified that he believed it would take “[p]robably two months” to complete a parenting class and be ready for home-based counseling. (Tr. 213). By January 10, 2006, the last day of the termination hearing, Davis had enrolled in a parenting course and taken one class. Davis also had visited with K.B. on two occasions in late December of 2005.

During the hearing on August 31, 2005, Davis testified that he was working for a company in South Bend as part of a work-release program and expected to be hired by the company upon his release. Davis further testified that upon his release from prison, he would “get [an] apartment,” provided by the “[w]ork release center.” (Tr. 38). Davis, however, admitted that he did not know where he would live upon his release and that he may move back to Indianapolis.

During the hearing on December 6, 2005, Davis testified that he had been employed until he “moved back [to Indianapolis] from South Bend.” (Tr. 203). Davis, however, testified that he was going to start a job with a carpet cleaning company “in a

couple of days” once he completed training. (Tr. 204). Davis further testified that he was residing with his mother but planned on purchasing a house.

During the hearing on January 10, 2006, Davis testified that he had been working as a house painter for Gray’s Construction since December 2, 2005 but working was difficult because he had a ruptured patella tendon and osteoarthritis. Davis testified that he was living with his cousin and her two daughters in Indianapolis and planned on living there “long enough . . . to establish [him]self.” (Tr. 298). Davis, however, did not know how many bedrooms the house had but thought it had “about four.” (Tr. 299). Although Davis testified that he was living with his cousin, he subsequently testified that he had left his mother’s residence because his “sister . . . asked [him] to come and stay with her.” (Tr. 304).

In this case, there is ample evidence that the conditions resulting in K.B.’s removal will not be remedied. Most notably, the evidence shows that Davis failed to secure and maintain a stable source of income and suitable residence upon his release from prison. The evidence also shows that Davis did not participate in any parenting classes or a parenting assessment until after the third day of the termination hearing and did not seek visitation with K.B. until December of 2005. Additionally, the evidence discloses that Davis has a pattern of criminal behavior. Accordingly, the trial court’s finding that the conditions were not likely to be remedied is not clearly erroneous.

Davis also challenges the finding that a continuation of his parent-child relationship with K.B. poses a threat to her well-being. The trial court must find the reasonable probability that the conditions, which resulted in the removal of the child,

would not be remedied, *or* that the continuation of the parent-child relationship posed a threat to the well-being of the child. I.C. § 31-35-2-4(b)(2)(B) (emphasis added). Because we have found that the evidence supports the trial court’s findings as to the former, we need not address Davis’s contention that the OFC failed to prove the latter. *A.N.J.*, 690 N.E.2d at 721 n.2.

Davis next challenges the trial court’s finding and determination that termination is in K.B.’s best interest. Specifically, Davis cites to the trial court’s finding that he “acted as a parent for [K.B.]” prior to his incarceration. (App. 31).

For the “best interest of the child” statutory element, the trial court is required to consider the totality of the evidence and determine whether the custody by the parent is wholly inadequate for the child’s future physical, mental, and social growth. *In re J.K.C.*, 470 N.E.2d 88, 91 (Ind. Ct. App. 1984). In making this determination, the trial court must subordinate the interest of the parent to that of the child involved. *Id.* “[T]he testimony of a child’s guardian ad litem regarding the child’s need for permanency supports a finding that termination is in the child’s best interests.” *In re A.I.*, 825 N.E.2d 798, 811 (Ind. Ct. App. 2005), *trans. denied*.

K.B. lived with Davis during her first year until he was incarcerated. Approximately six months after Davis’s incarceration, the OFC removed K.B. from her home. Stacy Reifis, the guardian ad litem assigned to Brown’s children, testified that K.B. and her half-brother, Q.B., were placed in a pre-adoptive home in June of 2005, and K.B. was bonding with her foster mother. Reifis testified that K.B. and Q.B. were “together and . . . in a loving family with somebody who wants to adopt them.” (Tr. 84).

Reifis further testified that giving K.B.'s parents additional time to attempt to complete services was not in K.B.'s best interest because she was "moving forward in [her] development," was "happy in [her] placement[]," and "it would be fairly disruptive at this point, to take [her] back to something that . . . was less stable . . . ." (Tr. 84).

Trabue also testified that adoption was in K.B.'s best interest because she had been "out of the home for nearly a year and a half . . . ." (Tr. 226). Trabue also expressed concern regarding Davis's ability to parent K.B. because Davis had been incarcerated, had failed to seek parenting services while in prison, had not contacted her upon his release, and had not established paternity despite being ordered to do so by the trial court.

The trial court's conclusion that termination of Davis's parental rights is in K.B.'s best interests is supported by clear and convincing evidence, and therefore, is not clearly erroneous. Thus, the elements necessary to sustain the termination of Davis's parental relationship with K.B. were established by clear and convincing evidence.

Affirmed.

NAJAM, J., and FRIEDLANDER, J., concur.