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IN THE
COURT OF APPEALS OF INDIANA

IN RE THE MATTER OF THE INVOLUNTARY TERMINATION OF THE PARENT-CHILD REALTIONSHIP OF D.M., T.M., and W.M.:	)	
S.M.,	)	
Appellant-Respondent,	)	
vs.	)	No. 18A02-0906-JV-572
THE INDIANA DEPARTMENT OF CHILD SERVICES,	)	
Appellee-Petitioner.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Richard A. Dailey, Judge
The Honorable Brian M. Pierce, Master Commissioner
Cause No. 18C02-0703-JT-34
Cause No. 18C02-0703-JT-35
Cause No. 18C02-0703-JT-36

December 28, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

S.M. (Father) appeals the termination of his parental rights with respect to his children, D.M., T.M., and W.M. Father presents the following restated issues for review:

1. Did the Department of Child Services (DCS) prove by clear and convincing evidence that the conditions that led to the removal of the children from their parents' home would not be remedied?

2. Did the DCS prove by clear and convincing evidence that termination of Father's parental rights was in the children's best interests?

We affirm.

The facts favorable to the termination are that on December 27, 2005, the DCS filed a CHINS petition alleging D.M., T.M., and W.M. were in need of services because their mother was incarcerated and Father indicated he was unable to care for them because he lacked housing. When the DCS took custody of the children, they were filthy, treated for scabies, and exhibited behavioral problems. D.M. suffered from emotional neglect and reactive attachment disorder. Pursuant to Father's admission, the children were adjudicated CHINS on February 6, 2006. The court entered a disposition and parenting participation order on May 22, 2006. The court conducted a series of periodic reviews and permanency review hearings to monitor the parents' progress in meeting their parental obligations. The orders issued in conjunction with those hearings reflect that Father did not improve his ability to fulfill his parental obligations. On March 19, 2007, the DCS filed a petition to terminate the parent-child relationship with respect to both parents. In August 2007, the court found that Father failed to consistently attend his scheduled counseling sessions, had not succeeded in securing appropriate housing for the children, and had not completed the required drug and

alcohol assessment.

On October 20 and November 6, 2008, the juvenile court conducted fact-finding hearings, after which, on December 10, 2008, it entered an order terminating the mother's parental rights with respect to all three children, but taking the termination of Father's rights under advisement so that he could be provided an opportunity to execute a consent to adoption of the three children. Father failed to execute the consent and, on or about May 27, 2009, the court entered findings and conclusions in support of an order terminating Father's parental rights. Those findings, in turn, incorporated by reference the December 10 findings entered in support of the termination of the mother's parental rights and taking Father's rights under advisement. We reproduce below the relevant findings from both orders, beginning with the May 27 order terminating Father's rights.[1]

> 1. That this court entered "Findings of Fact, Conclusions of Law and Order Terminating the Parent/Child Relationship of a Child in Need of Services" on December 10, 2008.
>
> 2. That all of the findings and conclusions previously entered by this court are hereby incorporated.
>
> 3. That the findings and conclusions previously entered by this court, ". . . ordered that the parent/child relationship between [Father], the natural father, and the child be taken under advisement and that he [Father] be provided the opportunity to execute a 'consent to adoption'".
>
> 4. That [Father] has, to date, failed to execute the consent to adoption, despite testifying that it was his intention to consent to the adoption of the child should this court terminate the parental rights of the natural mother.

[1] We note that both the December 10, 2008 and May 27, 2009 findings refer more often than not to "the child" and not "the children". We presume this is either an oversight or merely a matter of form, as the parties appear to concede that both parents' rights were terminated as to all three children.

> 5. That this court terminated the parental rights of the natural mother on December 10, 2008 and [Father] was made aware of the court's decision to terminate the parental rights of the child's natural mother.
>
> 6. That the Court Appointed Special Advocate (CASA) agrees that it is in the child's best interest to now terminate the parental rights of the child's natural father, [Father].
>
> 7. That based on the foregoing and the previous findings of this court, there is a reasonable probability that the conditions that resulted in the child's removal will not be remedied.
>
> 8. That based on the foregoing and the previous findings of this court, there is a reasonable probability that the continuation of the parent/child relationship herein poses a threat to the well being of the child.
>
> 9. Termination of the parent/child relationship is in the best interest of the child.
>
> 10. The Indiana DCS has a satisfactory plan for the care and treatment of the child, which includes adoptive placement.
>
> 11. The Indiana DCS has proven their petition herein by clear and convincing evidence.

Appellant's Appendix at 356-57. The earlier findings that were incorporated by reference include the following:

> 3. That the child was adjudicated to be a Child in Need of Services (CHINS) on February 6, 2006 and has been under the supervision of a county office of family and children (DCS) for at least fifteen (15) months of the most recent twenty-two (22) months.
>
> 4. That the child was originally adjudicated CHINS because [mother] was incarcerated in Wayne County and could not care for the child; that the child was filthy and suffered from scabies; and that … [Father] refused to care for the child because he did not have appropriate housing for himself or the child.

* * * * *

6. That [Father] has been provided ample opportunity to complete reunification services. While [Father] has demonstrated some progress toward applying the parenting techniques taught to him, he has not demonstrated the economic stability, employment stability or housing stability necessary for reunification.

7. That Dr. Paul Spengler conducted psychological evaluations of [mother] and [Father] to help assess their fitness for parenting, to clarify diagnostic issues and for additional treatment recommendations.

* * * * *

10. That the psychological evaluation of [Father] illustrated that he likely suffers from chronic depression, exhibits lower self-esteem and is likely to easily give up when things go wrong in his life. These symptoms are generally difficult to treat and prognosis with regard to treatment is only fair.

11. That [Father] was dropped from drug treatment in 2006 because failed [sic] to attend counseling. [Father] re-entered drug treatment in 2008, refused to submit to a drug screen, and once again was dropped for non-participation.

* * * * *

13. That [D.M.] was in therapy with John Anderson, being treated for reactive attachment disorder. Both [Father] and [mother] were to actively participate in her treatment program. [mother] failed to keep the counseling appointments and was eventually dropped from the counseling sessions. [Father] attended the counseling sessions and appeared to apply the parenting techniques demonstrated and discussed.

14. That while the parents were together and visitation was supervised by SAFY (Safe Alternatives for Families and Youth), the visits with the children were very chaotic. [Father] and [mother] would pick fights with each other and not appropriately address the children. However, once the parents had separate visitation times, [Father] always appeared at the visits and was appropriate with the children. However, [mother] (when she appeared) was unduly harsh with the children, did not have age-appropriate expectations of the children, and failed to demonstrate a loving bond with the children.

15. That [Father] was presented with the opportunity to obtain housing in the Shepherd Center, a transitional housing program for families where children

can reside with their parent or parents and where the staff will work with the parents to obtain appropriate and permanent housing. [Father] was explained that this program offered his best and quickest opportunity to be reunited with his children. [Father] was in the Shepherd Center program for only three days before he was kicked out of the program for failing to follow the rules.

* * * * *

18. That [Father] has demonstrated an attachment to the children during supervised visitation periods and has been consistent in his attendance. He appears to have actively applied the parenting techniques demonstrated and taught to him.

19. That neither [mother] nor [Father] have maintained stable housing or employment during large periods of time when DCS has been involved with this case.

20. That since the child has been placed in foster care, the child has shown systematic and consistent improvement in her education and social development.

* * * * *

22. That [Father] has demonstrated a genuine attachment and love for the child. All parties see his involvement in the child's life as positive. However, even [Father] admits that he lacks the financial stability and housing stability to adequately care for the child. [Father] recognizes that it is in the best interest of the child that the child stay in the current foster care placement and indicates that he intends to consent to an adoption should [mother's] parental rights be terminated.

* * * * *

24. That based on the foregoing, there is a reasonable probability that the conditions that resulted in the child's removal will not be remedied.

25. That based on the foregoing, there is a reasonable probability that the continuation of the parent/child relationship herein poses a threat to the well-being of the child.

* * * * *

> 27. The Indiana DCS has a satisfactory plan for the care and treatment of the child, which includes adoption placement.
>
> IT IS FURTHER ORDERED that that [sic] the parent/child relationship between [Father], the natural father, and the child be taken under advisement and that he be provided with the opportunity to execute a "consent to adoption".

Id. at 86-90. Father appeals the order terminating his parental rights.

1.

The traditional right of parents to "'establish a home and raise their children is protected by the Fourteenth Amendment of the United States Constitution.'" *R.W., Sr. v. Marion County Dep't of Child Servs.,* 892 N.E.2d 239, 245 (Ind. Ct. App. 2008) (quoting *In re M.B.*, 666 N.E.2d 73, 76 (Ind. Ct. App. 1996), *trans. denied*). The juvenile court, however, must subordinate the interests of the parents to those of the child when evaluating the circumstances surrounding the termination. *R.W., Sr. v. Marion County Dep't of Child Servs.,* 892 N.E.2d 239. Parental rights may be terminated when the parents are unable or unwilling to meet their parental responsibilities. *Id*.

We have long applied a "highly deferential" standard of review in cases involving the termination of parental rights. *In re L.B.,* 889 N.E.2d 326, 336 (Ind. Ct. App. 2008). In conducting such a review, we will not reweigh evidence or re-assess the credibility of the witnesses. *In re L.B.,* 889 N.E.2d 326. Rather, we consider only the evidence and reasonable inferences most favorable to the judgment. *Id*. "Moreover, in deference to the juvenile court's unique position to assess the evidence, we will set aside the court's judgment

terminating a parent-child relationship only if it is clearly erroneous." *Id*. at 336. We will affirm if the evidence and inferences support the juvenile court's decision. *In re L.B.*, 889 N.E.2d 326.

The juvenile court here entered specific findings and conclusions in terminating Father's parental rights. We apply a two-tiered standard of review where the court does so. *Id*. We first determine whether the evidence supports the findings, and second whether the findings support the judgment. *Id*. "Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference." *Quillen v. Quillen*, 671 N.E.2d 98, 102 (Ind. 1996).

Relevant to the issues presented in this appeal, in order to terminate a parent-child relationship, the State must allege that:

> (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;
>
> * * * * *
>
> (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 Ann. § 31-35-2-4(b)(2) (West, PREMISE through 2009 1st Regular Sess.). The State must establish each of these allegations by clear and convincing evidence. *Egly v. Blackford County Dep't of Pub. Welfare*, 592 N.E.2d 1232 (Ind. 1992).

Father does not contest the fact that the children have been removed from his care, pursuant to a dispositional decree, for at least six months. He asserts, however, that the DCS failed to establish by clear and convincing evidence that the conditions resulting in their removal would not be remedied. Father claims that the reasons cited by the juvenile court as justifying termination were not sufficiently established. Specifically, he notes that the court found that he had failed to successfully complete a drug and alcohol assessment program, yet claims that he has not had a positive drug screen for more than two and one-half years. He notes also that at the time of the final hearing, he produced a lease showing that he currently had a place of residence. He claims this negated the court's finding that he had not demonstrated housing stability. According to Father, these were the only two issues about which the DCS had concerns. On the positive side, Father

> would point to all of the positive testimony regarding his appropriate visitation with his children and the bonding they share. More than one witness told the trial court that [Father] was consistent in visiting his children and that he used appropriate parenting techniques. The State's own evidence was that there is definitely a bond between Respondent and his children.

Appellant's Brief at 15.

When determining whether a reasonable probability exists that the conditions justifying a child's removal and continued placement outside the home will not be remedied, the juvenile court must judge a parent's fitness to care for his or her children at the time of

the termination hearing, taking into consideration evidence of changed conditions. *R.W., Sr. v. Marion County Dep't of Child Servs.,* 892 N.E.2d 239. "The court must also evaluate the parent's habitual patterns of conduct to determine whether there is a substantial probability of future neglect or deprivation of the children." *Id.* at 246.

Father asserts that "it was the mother's actions that led to the removal of the children." *Appellant's Brief* at 14. While perhaps technically true, this conveys the false impression that if Father had physical custody at the time, a different result would have obtained. In point of fact, at the time the children were removed, Father was homeless. Moreover, after the children were removed from the home, Father was ordered to participate in various services, including completing a psycho-social assessment, obtaining and completing classes in parenting education, budgeting instruction, household organization, and medical care safety of the children. He did not entirely succeed. Father was permitted to live with the children in a facility designed to hasten reunification, but was expelled from the program only a few days after it commenced. He was also ordered to actively participate in a drug assessment program and pursue treatment if it was recommended "to facilitate a long-term drug-free lifestyle." *Exhibits Volume* at 37. He failed to complete this program as well.

By all counts, Father loves and has a bond with his children and his parenting skills are not so bad as to warrant termination on that basis alone. Stability appears to be the issue. In the three years following the commencement of the CHINS proceedings, he failed to obtain suitable housing until the eleventh hour, which was *after* the court had essentially determined that his rights should be terminated, as inferred in the December 10, 2008 order

that permitted him time to execute a consent to the children's adoption. Even then, Father had not secured employment, so it is unclear how long he could have maintained the home he had leased at the time of the May 2009 termination hearing. In the final analysis, we are not confined to considering only the fact that he had leased a place to live at the time of the final hearing. Rather, we must evaluate his habitual patterns of conduct and determine whether there is a substantial probability of future neglect or deprivation. *See R.W., Sr. v. Marion County Dep't of Child Servs.,* 892 N.E.2d 239.

Unfortunately, the attainment of leased premises for housing as of the time of the termination hearing stands out as an anomaly in what is otherwise a habitual pattern of failure to maintain a stable and secure lifestyle. Moreover, Father failed to avail himself of the many services offered by the DCS to address his deficiencies. In determining whether historical deficiencies will be remedied, a juvenile court may properly consider the services offered by the DCS, as well as the parent's response to those services. *In re L.B.,* 889 N.E.2d 326. "'A pattern of unwillingness to deal with parenting problems and to cooperate with those providing social services, in conjunction with unchanged conditions, support a finding that there exists no reasonable probability that the conditions will change.'" *Id*. at 339 (quoting *Lang v. Starke County Office of Family & Children*, 861 N.E.2d 366, 372 (Ind. Ct. App. 2007), *trans. denied*). We note also that Father expressed doubt at the November 6, 2008 termination hearing that he would be able to provide a stable home environment for the children in the future. For this reason, among others, he agreed that adoption was in the children's best interests, with Father to retain the right to maintain a relationship with his

children through visitation. Father thereafter refused to execute the consent to adopt, however, thus leaving the juvenile court to decide whether reunification was a realistic goal, or whether instead termination was appropriate. After reviewing the record, we conclude there is sufficient evidence of a clear and convincing nature that Father's identified parenting deficiencies will not be remedied.

We note finally Father's argument that the DCS failed to prove by clear and convincing evidence that continuation of the parent-child relationship poses a threat to D.M., T.M., and S.M. I.C. § 31-35-2-4(b)(2)(B) provides that in order to support termination, the State must establish there is a reasonable probability that the conditions that resulted in the child's removal will not be remedied *or* that the continuation of the parent-child relationship poses a threat to the well-being of the child. Because it is written in the disjunctive, a juvenile court need find by clear and convincing evidence that only one of the two requirements of subsection (B) have been met. Here, the juvenile court found that both requirements of subsection (B) were met. Having affirmed the finding with respect to I.C. § 31-35-2-4(b)(2)(B)(i), we need not address the alternate basis under I.C. § 31-35-2-4(b)(2)(B)(ii). *See R.W., Sr. v. Marion County Dep't of Child Servs.,* 892 N.E.2d 239.

2.

Father contends the DCS did not establish that termination was in the children's best interests. As indicated above, in order to terminate a parent-child relationship, the State is required under I.C. § 31-35-2-4(b)(2) to prove that termination is in the best interests of the child. As with the other elements, the State must establish this allegation by clear and

convincing evidence. *Egly v. Blackford County Dep't of Pub. Welfare*, 592 N.E.2d 1232. In a termination proceeding, the juvenile court is required to consider the totality of the evidence in determining what is in a child's best interests. *In re L.B.*, 889 N.E.2d 326. Terminating parental rights is not done in order to punish the parent, but rather to protect the child or children involved. *Id*. Thus, the juvenile court must focus its attention on the interests of the children and not the parents. In so doing, it need not wait until a child is irreversibly harmed before terminating the parent-child relationship. *Id*.

In addition to the factors set out above in our discussion of Issue 1, we note that the children have been in their foster home now for nearly four years. The evidence demonstrates that at least one of the children has special needs, and that child is doing well in the foster home, as indeed are the other two children. We are also mindful that the permanency plan for the children includes adoption by the foster parents. In view of the children's progress in their current placement, and the continuing uncertainty after almost four years of failed services as to whether Father will ever be able to provide a secure, stable home for the children, we conclude the DCS presented clear and convincing evidence that termination of Father's parental rights is in the children's best interests.

Judgment affirmed.

NAJAM, J., and BRADFORD, J., concur.