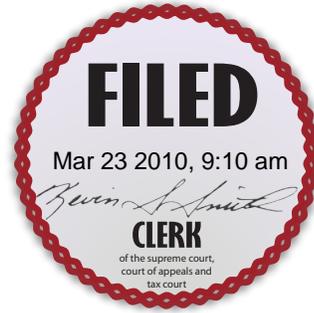


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**IN THE
COURT OF APPEALS OF INDIANA**

TERMINATION OF PARENT-CHILD)
RELATIONSHIP OF E.D., A.D.;)
minor children,)
)
D.L.D., Father,)
)
Appellant-Respondent,)
)
vs.)
)
INDIANA DEPARTMENT OF CHILD)
SERVICES,)
)
Appellee-Petitioner.)
)

No. 71A04-0908-JV-469

APPEAL FROM THE ST. JOSEPH PROBATE COURT
The Honorable Peter J. Nemeth, Judge
Cause Nos. 71J01-0810-JT-220 & 71J01-0810-JT-221

March 23, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

D.L.D. (“Father”) appeals the involuntary termination of his parental rights to his children, A.D. and E.D. Concluding that the Indiana Department of Child Services, St. Joseph County (“DCS”), presented clear and convincing evidence to support the trial court’s judgment, we affirm.

Facts and Procedural History

Father is the father of A.D., born on September 3, 2001, and E.D., born on November 5, 2004.¹ The evidence most favorable to the trial court’s judgment reveals that in late February 2008, DCS received a report alleging Father and Mother, who were addicted to crack cocaine, openly exposed the children to their drug use and offered alcohol to then six-year-old A.D. The referral also alleged there was no food in the family home. DCS initiated an investigation and substantiated the allegations of the report.

The children were taken into emergency protective custody on February 28, 2008, and later placed in relative foster care with their maternal Great Aunt and Great Uncle. DCS thereafter filed petitions under separate cause numbers alleging A.D. and E.D. were children in need of services (“CHINS”). An initial hearing on the CHINS petitions was held in March 2008. During the hearing, Father admitted to the material allegations of the petitions, and the children were adjudicated CHINS.

¹ For clarification purposes we note that, at the time the children were removed, Father and the children’s biological mother, D.S. (“Mother”), were living together but were not married. Paternity of A.D. had been previously established in Father, following DNA testing, by default judgment in May 2003. Paternity of E.D., however, was never formally established. In addition, Mother’s parental rights were involuntarily terminated by default judgment in December 2008. Mother does not participate in this appeal. Consequently, we limit our recitation of the facts to those pertinent solely to Father’s appeal.

A dispositional hearing was held in April 2008. Father did not appear. It was later discovered that Father had been recently arrested and incarcerated on several charges, including felony robbery. The trial court proceeded with the hearing in Father's absence and, later the same day, issued an order formally removing the children from Father's care. The court's dispositional order also directed Father to participate in a variety of services in order to achieve reunification with the children. Specifically, Father was ordered to, among other things, visit with the children on a regular basis, cooperate with home-based service providers, complete a drug rehabilitation program and follow all after-care recommendations, submit to random drug screens, undergo a parenting assessment and follow all resulting recommendations, secure stable housing and employment, and maintain consistent contact with DCS.

DCS filed petitions seeking the involuntary termination of Father's parental rights to A.D. and E.D. in October 2008. A fact-finding hearing on the termination petitions was held in August 2009. During the hearing, DCS presented evidence showing Father, who remained incarcerated, had failed to successfully complete all court-ordered services. The evidence further indicated Father was thousands of dollars in arrears in court-ordered child support for A.D. and had failed to establish paternity for E.D. Father also had neglected to maintain any relationship with the children since their removal from the family home, having never telephoned them or sent birthday cards or letters to the children despite knowing how to contact the children's relative foster parents. Additional evidence also indicated both children continued to suffer from post traumatic stress

disorder (“PTSD”) as a result of having been severely traumatized before their removal from the family home.

At the conclusion of the termination hearing, the trial court took the matter under advisement. On August 13, 2009, the trial court issued its judgments terminating Father’s parental rights to A.D. and E.D. This consolidated appeal ensued.

Discussion and Decision

This Court has long had a highly deferential standard of review in cases concerning the termination of parental rights. *In re K.S.*, 750 N.E.2d 832, 836 (Ind. Ct. App. 2001). When reviewing the termination of parental rights, we will not reweigh the evidence or judge the credibility of the witnesses. *In re D.D.*, 804 N.E.2d 258, 264 (Ind. Ct. App. 2004), *trans. denied*. Instead, we consider only the evidence and reasonable inferences that are most favorable to the judgment. *Id.* Moreover, in deference to the trial 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. *In re L.S.*, 717 N.E.2d 204, 208 (Ind. Ct. App. 1999), *trans. denied*. If the evidence and inferences support the trial court’s decision, we must affirm. *Id.*

“The traditional right of parents to establish a home and raise their children is protected by the Fourteenth Amendment of the United States Constitution.” *In re M.B.*, 666 N.E.2d 73, 76 (Ind. Ct. App. 1996), *trans. denied*. A trial court must subordinate the interests of the parent to those of the child, however, when evaluating the circumstances surrounding a termination. *K.S.*, 750 N.E.2d at 837. 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.* at 836.

“The State’s burden of proof in termination of parental rights cases is one of ‘clear and convincing evidence.’” *In re G.Y.*, 904 N.E.2d 1257, 1260-61 (Ind. 2009) (quoting 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. *Id.* at 1261. Rather, 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.*

When seeking an involuntary termination of parental rights, the State is required to allege and prove, among other things, that:

- (A) one 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; [and]
- (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). If the court finds that the allegations in a petition described in section 4 of this chapter are true, the court *shall* terminate the parent-child relationship.

See Ind. Code § 31-35-2-8.

In challenging the sufficiency of the evidence supporting the trial court's general judgments, Father makes no specific allegation of error. Nor does he provide us with cogent argument or citation to authority concerning the alleged insufficiency of the evidence. Rather, Father simply states that although he will continue to be unavailable to care for the children until he is released from prison in 2013 at the earliest, he "want[s] the opportunity to show the trial [c]ourt he [can] provide for the [children] once released." Appellant's Br. p. 7. Father further states that he "tried to enroll in prison programs to make himself a better parent" and therefore "[b]ecause he has not given up on [the case plan requirements concerning housing and income while in prison], [he] should be given the opportunity to raise his children once [released]." *Id.* In failing to assert a single cogent argument on appeal, Father has waived appellate review. *See Davis v. State*, 835 N.E.2d 1102, 1113 (Ind. Ct. App. 2005) (concluding that failure to present a cogent argument or citation to authority constitutes waiver of issue for appellate review), *trans. denied*. Nevertheless, given our preference for resolving a case on its merits, we will review the sufficiency of the evidence supporting the trial court's judgment terminating Father's parental rights to A.D. and E.D.

I. Removal from Parent

The record makes clear both A.D. and E.D. were removed from Father's care for at least six months, pursuant to a dispositional decree, as required by Indiana Code section 31-35-2-4(b)(2)(A)(i). The trial court's dispositional orders, issued on April 2, 2008, formally removed the children from Father's care, made both children wards of DCS, and directed that the children remain in relative foster care with their maternal great

aunt and great uncle. DCS thereafter filed petitions seeking the involuntary termination of Father's parental rights to A.D. and E.D. on October 28, 2008, more than six months following the court's dispositional order. At the time of the termination hearing in August 2009, both children remained wards of DCS and were still living with their great aunt and great uncle. Thus, the trial court's determination that the children had been removed from Father's care for at least six months pursuant to a dispositional order is supported by clear and convincing evidence.

II. Remedy of Conditions/Threat to Child's Well-Being

We next consider whether clear and convincing evidence supports the trial court's determination concerning subsection 2(B) of the termination statute. Initially, we observe that Section 31-35-2-4(b)(2)(B) is written in the disjunctive. The trial court therefore had to find only one of the two requirements of subsection 2(B) had been met before issuing an order to terminate Father's parental rights. *See In re L.V.N.*, 799 N.E.2d 63, 69 (Ind. Ct. App. 2003). Nevertheless, the trial court found sufficient evidence had been presented to satisfy the evidentiary requirements as to both prongs of subsection 2(B). Because we find it to be dispositive, we shall only consider whether clear and convincing evidence supports the trial court's finding as to subsection 2(B)(i) of Indiana's termination statute.

In determining whether there is a reasonable probability that the conditions resulting in a child's removal or continued placement outside the family home will not be remedied, a trial court must judge a parent's fitness to care for his or her child at the time of the termination hearing, taking into consideration evidence of changed conditions. *In*

re J.T., 742 N.E.2d 509, 512 (Ind. Ct. App. 2001), *trans. denied*. The court must also “evaluate the parent’s habitual patterns of conduct to determine the probability of future neglect or deprivation of the child.” *Id.* Pursuant to this rule, courts have properly considered 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. *A.F. v. Marion County Office of Family & Children*, 762 N.E.2d 1244, 1251 (Ind. Ct. App. 2002), *trans. denied*. A trial court may also properly consider the services offered to the parent by a county department of child services and the parent’s response to those services as evidence of whether conditions will be remedied. *Id.* Finally, we point out that a county department of child services is not required to provide evidence ruling out all possibilities of change; rather, it need establish only that there is a reasonable probability a parent’s behavior will not change. *In re Kay L.*, 867 N.E.2d 236, 242 (Ind. Ct. App. 2007).

A thorough review of the record leaves us convinced that clear and convincing evidence supports the trial court’s determination that there is a reasonable probability the conditions resulting in A.D.’s and E.D.’s removal will not be remedied, which in turn supports the court’s ultimate decision to terminate Father’s parental rights to the children. The children were initially removed from Father’s care due to his addiction to crack cocaine and inability to provide the children with the basic necessities of life, including food and a safe, drug-free, stable home environment. The children’s continued placement outside of Father’s care was a direct result of Father’s continuing incarceration

and failure to successfully complete any court-ordered services. At the time of the termination hearing, these conditions remained unchanged.

During the termination hearings, Linda Cioch, Executive Director of the local DCS office, recommended termination of Father's parental rights. In so doing, Cioch informed the court that Father had failed to successfully complete even a single court-ordered service "due to the fact that he has been incarcerated primarily the entire time that the children have been in [foster] care." Tr. p. 23. Cioch further testified that Father had received multiple "infractions" during his current incarceration "which would indicate that he is still . . . causing problems" and testified that she didn't "believe any of the initial [conditions causing the children's removal] have been addressed." *Id.*

Father's own testimony further supports the trial court's judgment. Father admitted during the termination hearing that he "never participated in or completed" any court-ordered services since the children's removal from his care. *Id.* at 48. When asked how many times he attempted to call his children since their removal, Father answered, "I don't use the phone. . . . None." *Id.* at 47. Father also acknowledged that he had never sent the children Christmas or birthday cards and/or presents, and that he had only sent one letter to the children's foster parents. Father's failure to maintain any sort of relationship with A.D. and E.D. throughout the duration of the underlying proceedings suggests a lack of commitment on Father's part to complete the actions necessary to preserve his parental relationship with the children. *See, e.g., Lang v. Starke County Office of Family & Children*, 861 N.E.2d 366, 372 (Ind. Ct. App. 2007) (stating that

failure to visit one's child "demonstrates a lack of commitment to complete the actions necessary to preserve [the] parent-child relationship"), *trans. denied*.

When asked to describe his history of criminal activity and incarcerations since the birth of his children, Father informed the court that he pled guilty to Class C felony robbery in 2001 and was incarcerated until June 2005. In December 2005 Father was arrested for felony theft, pled guilty, served approximately eighteen months of incarceration, and was released in June 2007. Shortly thereafter, Father was convicted of residential entry and was re-incarcerated until January 2008. In March 2008, following A.D.'s and E.D.'s removal from the family home but before the dispositional hearing in the underlying proceedings, Father was again arrested and incarcerated on multiple charges, including felony robbery. At the time of the termination hearing, Father remained incarcerated, and his earliest possible release date was not until 2013.

"Individuals who pursue criminal activity run the risk of being denied the opportunity to develop positive and meaningful relationships with their children." *Castro v. State Office of Family & Children*, 842 N.E.2d 367, 374 (Ind. Ct. App. 2006), *trans. denied*. Moreover, as previously explained, a trial court must judge a parent's fitness to care for his or her children *at the time of the termination hearing*, taking into consideration the parent's *habitual patterns of conduct* to determine the probability of future neglect or deprivation of the children. *D.D.*, 804 N.E.2d at 266. Here, due in large part to his continuous engagement in criminal activity and repeated incarcerations, Father has been unable to demonstrate an ability or willingness to provide A.D. and E.D. with a consistently safe and stable home environment. Also significant, at the time of the

termination hearing Father was unavailable to parent the children, and his earliest possible release date from incarceration was not for at least four more years.

Based on the foregoing, we conclude that ample evidence supports the trial court's determination that there is a reasonable probability the conditions resulting in A.D.'s and E.D.'s removal will not be remedied. In so doing, we decline Father's invitation to maintain the parent-child relationship until he is released from custody and can show the ability to provide for his children, as there is no indication from the record that such a time will, in fact, ever come. Where a parent's "pattern of conduct shows no overall progress, the court might reasonably find that under the circumstances, the problematic situation will not improve." *In re A.H.*, 832 N.E.2d 563, 570 (Ind. Ct. App. 2005).

III. Best Interests of the Children

In determining what is in the best interests of a child, a trial court is required to look beyond the factors identified by the Indiana Department of Child Services and to look to the totality of the evidence. *McBride v. Monroe County Office of Family & Children*, 798 N.E.2d 185, 203 (Ind. Ct. App. 2003). In so doing, the trial court must subordinate the interests of the parent to those of the child. *Id.* The court need not wait until a child is irreversibly harmed before terminating the parent-child relationship. *Id.* Moreover, we have previously held that the recommendations of the case manager and court-appointed advocate to terminate parental rights, in addition to evidence that the conditions resulting in removal will not be remedied, is sufficient to show by clear and convincing evidence that termination is in the child's best interests. *In re M.M.*, 733 N.E.2d 6, 13 (Ind. Ct. App. 2000).

In the present case, the record reveals that local DCS director Cioch and the court-appointed special advocate (“CASA”), Carol Tremor, both recommended termination of Father’s parental rights to both children. In her written report to the court, Tremor stated that the children “desperately need a loving, stable, permanent living arrangement where their needs can be met.” Appellee’s App. p. 55. Tremor further indicated that she believed the children needed this permanency and stability “sooner than [Father’s] possible release in 2013.” *Id.*

The children’s respective therapists likewise recommended termination of Father’s parental rights. In so doing, A.D.’s therapist, Guy Tatay, informed the trial court that when A.D. was initially removed from Father’s care, he “had a lot of behavioral problems,” would “go through crying fits,” and “had a lot of aggressive behaviors.” Tr. p. 71. Tatay also testified that A.D. continues to suffer from PTSD, and that it appears that A.D. has “suffer[ed] through a lot of trauma in his life.” *Id.* at 73. In addition, Tatay stated A.D. had confided during therapy that “in his old [Father’s] home” he was “hit with a broom” and worried about “not having enough food.” *Id.* When asked whether A.D. had ever mentioned Father during therapy sessions, Tatay replied, “No. . . . Not without my prompting. . . .” *Id.* at 75. Tatay went on to explain that “[n]ormally, when a kid doesn’t mention a parent it means that there is no bond formed with that parent.” *Id.*

Similarly, in recommending termination of Father’s parental rights to E.D., therapist Cynthia Biskner informed the trial court that she knew “right away” upon meeting E.D. that she was “dealing with a child [who had been] traumatized.” *Id.* at 58. Biskner also testified that E.D., who was also diagnosed with PTSD, would throw

“temper tantrums that would go on for hours,” had “terrific nightmares,” and would be “terrified” if her bedroom door was closed at night. *Id.* at 59. As a result of the trauma E.D. has suffered, Biskner informed the court that it was “critical” E.D.’s future caregivers provide her with “good sound parenting, nurturing parenting, consistent structure,” and that no corporal punishment ever be used, otherwise E.D. would likely have “horrific” issues in the future. *Id.* at 61-62.

When asked whether she believed E.D. had any bond with Father, Biskner answered that she did not “think that [E.D.] really knows [Father] at all” because in “almost a year in therapy” E.D. “doesn’t talk about him at all.” *Id.* at 65. When asked, “[W]hat would be the consequence to [E.D.] if she were to return to . . . the environment from which she came,” Biskner replied, “I think it would be a terrific regression[,] and I don’t think we would get the child back to any kind of normalcy.” *Id.* at 68.

Based on the totality of the evidence, including Father’s failure to successfully complete any of the trial court’s dispositional goals and current inability to provide the children with a safe, stable, and drug-free home, coupled with the unwavering testimony of Cioch, Tremor, Biskner, and Tatay, all recommending termination of Father’s parental rights, we conclude there is clear and convincing evidence supporting the trial court’s determination that termination of Father’s parental rights is in A.D.’s and E.D.’s best interests. *See, e.g., In re A.I.*, 825 N.E.2d 798, 811 (Ind. Ct. App. 2005) (concluding that testimony of the court-appointed special advocate and family case manager, coupled with evidence that conditions resulting in continued placement outside the home will not be

remedied, is sufficient to prove by clear and convincing evidence termination is in child's best interests), *trans. denied*.

IV. Satisfactory Plan of Care

Finally, we consider whether sufficient evidence supports the trial court's determination that DCS has a satisfactory plan for the future care and treatment of A.D. and E.D. Indiana Code section 31-35-2-4(b)(2)(D) provides that before a trial court may terminate a parent-child relationship, it must find there is a satisfactory plan for the future care and treatment of the child. *D.D.*, 804 N.E.2d at 268. It is well-established, however, that this plan need not be detailed, so long as it offers a general sense of the direction in which the child will be going after the parent-child relationship is terminated. *Id.* Notably, this Court has previously held that the fact there is no specific family in place to adopt the child does not make the plan unsatisfactory. *See In re B.D.J.*, 728 N.E.2d 195, 204 (Ind. Ct. App. 2000) (concluding that plan for adoption of special needs children was sufficient even if not adopted by current foster parents because if that avenue did not work other adoption options could be pursued). "Attempting to find suitable parents to adopt [a child] is clearly a satisfactory plan." *Lang*, 861 N.E.2d at 375.

In the present case, Cioch testified that DCS's future plan for A.D. and E.D. is for the children to remain in the care of their great aunt and great uncle until the children can be adopted by a suitable family. This plan provides the trial court with a general sense of the direction of the children's future care and treatment. We therefore conclude that the trial court's determination that DCS's plan for adoption is "a satisfactory plan for the care and treatment of the child[ren]" is not clearly erroneous. Appellants' Br. p. 12, 14.

A thorough review of the record reveals that the trial court’s judgment terminating Father’s parental rights to A.D. and E.D. is supported by clear and convincing evidence. This Court will reverse a termination of parental rights “only upon a showing of ‘clear error’– that which leaves us with a definite and firm conviction that a mistake has been made.” *In re A.N.J.*, 690 N.E.2d 716, 722 (Ind. Ct. App. 1997) (quoting *Egly v. Blackford County Dep’t of Public Welfare*, 592 N.E.2d 1232, 1235 (Ind. 1992)). We find no such error here.

Affirmed.

RILEY, J., and CRONE, J., concur.