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IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF THE TERMINATION OF THE PARENT-CHILD RELATIONSHIP OF: J.H. AND A.H., Minor Children,	)	
Jo.H., Father,	)	
Appellant-Respondent,	)	
vs.	)	No. 89A04-1011-JT-706
INDIANA DEPARTMENT OF CHILD SEVICES,	)	
Appellee-Petitioner.	)	

APPEAL FROM THE WAYNE SUPERIOR COURT
The Honorable Darrin M. Dolehanty, Judge
Cause Nos. 89D03-1007-JT-7, 89D03-1007-JT-8

June 23, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Jo.H. ("Father") appeals the involuntary termination of his parental rights to his children, J.H. and A.H. Concluding that there is sufficient evidence to support the trial court's judgment, we affirm.

Facts and Procedural History

Father is the biological father of J.H., born in May 2007, and A.H., born in May 2008.[1] The evidence most favorable to the trial court's judgment reveals that in June 2009, the Indiana Department of Child Services, local office in Wayne County ("WCDCS"), removed then thirteen-month-old A.H., who suffers with cystic fibrosis, from Mother's home. A.H. was determined to be a child in need of services ("CHINS"), following a hearing during which both parents admitted to the allegations of the CHINS petition.[2] In August 2009, J.H. was removed from Mother's home and was likewise adjudicated a CHINS, following the admissions of both parents, in November 2009. At the time of the children's respective removals, Father, who had been convicted in April 2009 of dealing in cocaine as a Class B felony and theft as a Class D felony was incarcerated and serving a ten-year sentence.

Pursuant to the CHINS dispositional orders, Father was directed to cooperate with WCDCS, participate in any services provided while incarcerated (including parenting and

[1] The children's biological mother, B.M., signed a Voluntary Relinquishment of Parental Rights form in June 2010. The trial court thereafter issued an order terminating Mother's parental rights to J.H. and A.H. in September 2010. Mother does not participate in this appeal. Consequently, we limit our recitation of the facts to those pertinent solely to Father's appeal.

[2] Although Father included a document titled, "Joint Stipulations of the Parties" in the Record on appeal, we observe that, for reasons unknown, Father failed to include in the Record copies of several pertinent documents in the underlying proceedings, including the CHINS petitions and dispositional orders, the parent participation plans, and other relevant orders, thereby frustrating our efficient review of this matter. *See* Ind. App. Rule 50(A)(2)(f)-(h).

educational programs), and promptly inform WCDCS of any changes in his incarceration status. WCDCS was unable, however, to provide Father with any reunification services due to Father's ongoing incarceration. In July 2010, WCDCS filed petitions, under separate cause numbers, seeking the involuntary termination of both parents' parental rights to J.H. and A.H. Following an initial hearing in the matter, Mother voluntarily relinquished her parental rights to J.H. and A.H.

A consolidated evidentiary hearing on the termination petitions as to Father was held in November 2010. During the termination hearing, WCDCS presented evidence that Father had remained incarcerated throughout the duration of the underlying CHINS and termination proceedings, and that his earliest possible release date, according to the Indiana Department of Correction website, was in September 2013. WCDCS presented additional evidence indicating that although Father had obtained his G.E.D. and participated in several classes while incarcerated, including domestic violence classes, substance abuse classes, and parenting classes, Father would still need to successfully complete court-ordered reunification services following his release from incarceration in 2013, which would take at least six additional months before reunification could occur, if at all. In addition, evidence presented during the termination hearing indicated: (1) Father had not seen the children since May 2009; (2) Father had attempted to contact the children by telephone once and by mail only three or four times during the preceeding year; and (3) the children, who had been placed together in a pre-adoptive foster home for over one year, were thriving and extremely bonded to their foster parents.

At the conclusion of the termination hearing, the trial court took the matter under advisement. On November 5, 2010, the court entered its judgment terminating Father's parental rights to the children. Father now appeals.

Discussion and Decision

Initially, we note our standard of review. 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.

In the instant case, the trial court made specific findings and conclusions in its termination order. When a trial court enters specific findings of fact and conclusions thereon, we apply a two-tiered standard of review. First, we determine whether the evidence supports the findings, and second, we determine whether the findings support the judgment. Bester v. Lake Cnty. Office of Family & Children, 839 N.E.2d 143, 147 (Ind. 2005). 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; see also Bester, 839 N.E.2d at 147.

"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. Although parental rights are of a

constitutional dimension, the law provides for the termination of these rights when parents are unable or unwilling to meet their parental responsibilities. In re R.H., 892 N.E.2d 144, 149 (Ind. Ct. App. 2008). In Indiana, before parental rights may be involuntarily terminated, the State is required to allege and prove, among other things:

> (B) that one (1) of the following is true:
>
> (i) There is a reasonable probability that the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied.
>
> (ii) There is a reasonable probability that the continuation of the parent-child relationship poses a threat to the well-being of the child.
>
> (iii) The child has, on two (2) separate occasions, been adjudicated a child in need of services;
>
> (C) that termination is in the best interests of the child . . . .

Ind. Code § 31-35-2-4(b)(2). The State's burden of proof for establishing these allegations in termination cases "is one of 'clear and convincing evidence.'" In re G.Y., 904 N.E.2d 1257, 1260-1261 (Ind. 2009) (quoting Ind. Code § 31-37-14-2 (2008)). "[I]f the State fails to prove any one of these statutory elements, then it is not entitled to a judgment terminating parental rights." Id. at 1261. Father challenges the sufficiency of the evidence supporting the trial court's findings as to subsection (b)(2)(B) & (C) of the termination statute cited above. See Ind. Code § 31-35-2-4(b)(2)(B).

Conditions Remedied/Threat to Well-being

At the outset, we pause to observe that Ind. Code § 31-35-2-4(b)(2)(B) is written in the disjunctive. Thus, WCDCS was required to establish, by clear and convincing evidence, only one of the three requirements of subsection (b)(2)(B). See id.; see also

L.S., 717 N.E.2d at 209. The trial court found prongs (b)(2)(B)(i) and (ii) of this subsection were satisfied. Because we find it to be dispositive, however, we limit our review to Father's allegations of error pertaining to subsection (b)(2)(B)(ii) of Indiana's termination statute. See Ind. Code § 31-35-2-4.

A parent's interest in the care, custody, and control of his or her children is arguably one of the oldest of our society's fundamental liberty interests. Bester, 839 N.E.2d at 147. Hence, the traditional right of parents to establish a home and raise their children is sheltered by the Fourteenth Amendment of the United States Constitution "against the State's unwarranted usurpation, disregard, or disrespect." M.L.B. v. S.L.J., 519 U.S. 102, 116, 117 S. Ct. 555, 564 (1996). A case involving the State's authority to permanently sever a parent-child bond therefore demands the close consideration the Supreme Court has long required when a family association so undeniably important is at stake. Id. at 116-117, 117 S. Ct. at 564.

The purpose of terminating parental rights is not to punish the parent but to protect the children involved. K.S., 750 N.E.2d at 832. Moreover, an involuntary termination of parental rights is the most extreme sanction a court can impose on a parent because termination severs all rights of a parent to his or her children. R.H., 892 N.E.2d at 149. Termination of parental rights is therefore intended as a last resort, available only when all other reasonable efforts have failed. Id. Nevertheless, although parental rights have a constitutional dimension, "the law allows for their termination when parties are unable or unwilling to meet their responsibility as parents." In re S.P.H., 806 N.E.2d 874, 880 (Ind. Ct. App. 2004).

Here, in terminating Father's parental rights to the children, the trial court cited to many facts in support of its conclusion that continuation of the parent-child relationships with J.H. and A.H. pose a threat to the children's well-being. Specifically, the court found: (1) A.H. was eleven months old and J.H. was one year and eleven months old as of the date of Father's sentencing; (2) at the time of Father's earliest possible release date in September 2013, A.H. will be five years old, and J.H. will be seven; and (3) once Father is eventually released from incarceration, the children "could not reasonably be immediately placed into his care, and it would be at least an additional six (6) months before placement could occur." Appellant's Appendix at 37. The court also pointed out in its findings that the children "were both living with [Father] . . . on the date that [Father] was arrested for his criminal activity." Id. In addition, the court noted that although Father "hopes" to get further time cuts to his sentence, "thinks" his parents will assist him with housing when he is released, and "wants" to establish a bond and "make amends" with the children, all of which are "commendable goals," none of these matters "have been established as fact." Id.

Based on these and other findings, the trial court made the following conclusions:

> These children have been away from their father for 18 months as of the time of this Order. They have "seen" [Father] one time during that period, while on a jail visit. Given the children's ages, the Court cannot conclude that the jail visit was meaningful enough to have had any impression upon these children, let alone for them to have established even the most tangential of bonds with [Father]. Concurrently, the children have been in a stable foster home for one year, have bonded with the foster parents, have continual, meaningful contact with the foster parents, and have thrived in that home. The foster parents have bonded with the children, and as testified to by the foster mother, "would love to adopt the children if given the chance."

> Right now, the children are safe, loved, and protected. Their "well-being" is established. To wait another three years or longer and then remove the children from their home and the people they have come to know as parents, would certainly threaten that well-being. To continue the children in foster care, with no real permanency for another three-plus years, and then to completely change the landscape of their lives, cannot be seen as anything other than a threat to that same well-being.

Id. at 38. A thorough review of the record reveals that clear and convincing evidence supports the trial court's findings and conclusions set forth above. These findings and conclusions, in turn, support the court's ultimate decision to terminate Father's parental rights to J.H. and A.H.

During the termination hearing, WCDCS case supervisor Kelly Broyles ("Broyles") recommended termination of Father's parental rights. In so doing, Broyles informed the court that it would take "at a minimum" six months of participation in reunification services before the children could be placed with Father. Transcript at 9. Broyles also confirmed that Father's parents, the ones whom Father plans to live with upon his release from incarceration, were deemed an inappropriate placement for the children during the CHINS case after testing positive on "a couple of drug screens." Id. at 7.

Similarly, Karen Bowen ("Bowen"), Director of the Wayne/Union County Court-Appointed Special Advocate (CASA) Program, also recommended termination of Father's parental rights, citing the "significant" amount of time until Father's projected release date, given the age of these "two very small children." Id. at 15. Bowen also informed the trial court that by the time any reunification could occur with Father in 2013 or later, the children will have already found "security, they'll have that bond which they

have already established, even in the past year of their li[ves]. . . . I think that it's kind of cruel to ask them to put their li[ves] on hold and just wait on a parent to get out of prison." Id.

A trial court need not wait until a child is irreversibly harmed, such that his physical, mental, and social development is permanently impaired before terminating the parent-child relationship. McBride v. Monroe Cnty. Office of Family & Children, 798 N.E.2d 185, 199 (Ind. Ct. App. 2003). Father's continued incarceration at the time of the termination hearing, coupled with his earliest possible release date of September 2013 and his lack of meaningful contact with the children for a majority of the children's lives, is strong evidence of Father's current and future inability to remedy the conditions that resulted in the children's removal and/or continued placement outside his care, as well as his inability to provide the children with the safe and stable home environment they need within a meaningful time frame. See Castro v. State Office of Family & Children, 842 N.E.2d 367, 374 (Ind. Ct. App. 2006), trans. denied. The trial court's findings and conclusions set forth above are supported by the evidence. Father's arguments to the contrary amount to an invitation to reweigh the evidence, which we may not do. Considering the evidence most favorable to the trial court's decision, we find no clear error on this issue.

Best Interests

Next, we consider Father's contention that the WCDCS failed to present clear and convincing evidence that termination of his parental rights is in the children's best interests. We are mindful that, in determining what is in the best interests of a child, the

trial court is required to look beyond the factors identified by the Department of Child Services and look to the totality of the evidence. McBride, 798 N.E.2d at 203. 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 both the case manager and child 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 addition to the findings previously cited, the trial court also found that A.H. "suffers from cystic fibrosis[] and requires ongoing medical attention," relative placement with the children's great-grandmother was unsuccessful because of her "inability to meet [A.H.'s] special needs," and "no family members have sought guardianship for either child during[] the period the children have been removed from the home." Appellant's Appendix at 36. The court further noted that the children are "doing well in the foster home, and appear to be thriving." Id. In addition, the court noted that when first placed with the current foster family, A.H. was "very sick[] and recovering from pneumonia," but was "currently on track, developmentally, gets breathing treatments twice a day, and his medical caregivers are 'thrilled' with his current medical condition." Id. The court then concluded as follows:

> These children have very clearly bonded with the foster parents, and are thriving in the foster home. [A.H.] has made amazing progress while in the foster home. By all accounts, the children are happy, comfortable, well cared for, and loved.

> While incarcerated, [Father] has availed himself of many programs offered by the DOC. . . . [Father] appears to have made good use of his time at the DOC, and has been rewarded with time cuts. At the same time, in matters of such grave importance and longstanding consequence, the Court must "subordinate the interests of the parents to those of the child when evaluating the circumstances surrounding the termination." In this particular matter, the very best interests of these children are served by termination of the parent-child relationship at issue here. The biological mother has voluntarily surrendered her parental rights, leaving these children with the biological father as their only parent. While [sic] the father has a biological relationship with these children, it is almost certain that neither child recognizes the biological father as a relative, let alone as their sole parent. The children have no bond with this person, and know him, if at all, through intermittent and sporadic letters or phone calls. Even if [Father] is released from prison on the earliest possible release date, there is virtually no chance that either child will understand that this person is their father. By that point, the only parents and the only family that these children will know are the foster parents. For those reasons, the Court very easily concludes that termination is in the very best interest of both children. As stipulated by the parties, [WCDCS] and the CASA concur with this conclusion.

Id. at 38-39 (citation omitted). These findings and conclusions, too, are supported by the evidence.

WCDCS supervisor Broyles and CASA Bowen both recommended termination of Father's parental rights as in the children's best interests. In so doing, Broyles informed the trial court that WCDCS believed it was in the children's best interests to "have permanency in a timely manner," and that due to Father's incarceration, limited contact with the children, and earliest possible release date not until the "fall of 2013," WCDCS recommended the court "go ahead and terminate parental rights. . . ." Transcript at 9. Similarly, in recommending termination, Bowen testified that the children were "happy and comfortable, well[-]loved, [and] well cared for." Id. at 15.

Based on the totality of the evidence, including Father's current and projected period of incarceration, inability to provide the children with a safe and stable home environment until September 2013, at the earliest, if at all, and the recommendations of Bowen and Broyles, we conclude that there is sufficient evidence to support the trial court's determination that termination of Father's parental rights is in the children's best interests. "A parent's historical inability to provide adequate housing, stability and supervision coupled with a current inability to do the same will support a finding that termination of the parent-child relationship is in the child's best interests." Castro, 842 N.E.2d at 374. Although Father may now have a sincere desire to be reunited with J.H. and A.H., he has been unable to do so for the majority of the children's lives due to his conscious decision to participate in criminal activity *after* the children were born and while they were living under his care, resulting in his prolonged incarceration and absence from their lives. Contrary to Father's assertions on appeal, his decision to engage in illegal conduct after the birth of his children, his failure to maintain a strong bond with the children while incarcerated, and his lack of any definitive plan regarding how he will obtain stable employment and provide the children with a safe and stable home environment following his release from incarceration are significant and distinguishing factors from those found in G.Y. See G.Y., 904 N.E.2d 1257 (concluding that termination of Mother's parental rights was not in child's best interests where Mother's illegal activity occurred before she became pregnant, she had provided a safe and stable home for the child from birth until her incarceration, she maintained a strong

relationship with her child despite being incarcerated, and she secured a full-time job as well as made arrangements for post-release housing).

Keeping in mind that the purpose of terminating parental rights is not to punish parents but to protect children, several other factors weigh in favor of the trial court's conclusion that termination of Father's parental rights is in the children's best interests in this case, including: (1) the children are of a tender age and need stability and permanency now, especially in light of A.H.'s significant and chronic medical issues; (2) J.H. and A.H. are living together and thriving in a pre-adoptive foster home and are extremely bonded to their foster parents, whom they view as "momma" and "dad;" (3) there is no guarantee that Father will be a suitable parent once he is released from incarceration, or that he would even obtain custody. Transcript at 18. This Court has previously recognized that "[i]ndividuals who pursue criminal activity run the risk of being denied the opportunity to develop positive and meaningful relationships with their children." Castro, 842 N.E.2d at 374. Even assuming Father will eventually develop into a suitable parent, A.H. and J.H., who were less than one and less than two years old, respectively, when Father became incarcerated and they were removed from the family home, should not have to continue to wait to enjoy the permanency that is essential to their development and overall well-being. We therefore conclude that the trial court's determination that termination of Father's parental rights to both children is in their best interests is supported by clear and convincing evidence and is therefore not clearly erroneous.

Conclusion

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 Cnty. Dep't of Public Welfare, 592 N.E.2d 1232, 1235 (Ind. 1992)). We find no such error here.

Affirmed.

FRIEDLANDER, J., and BAILEY, J., concur.