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IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF THE INVOLUNTARY TERMINATION OF PARENT-CHILD RELATIONSHIP OF D.H ., Minor Child, and	)	
B.M., Father,	)	
Appellant-Respondent,	)	
vs.	)	No. 49A04-0812-JV-749
MARION COUNTY DEPARTMENT OF CHILD SERVICES,	)	
Appellee-Petitioner,	)	
and	)	
CHILD ADVOCATES, INC.,	)	
Appellee-Guardian ad Litem.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Marilyn A. Moores, Judge
The Honorable Larry Bradley, Magistrate
Cause No. 49D09-0807-JT-39280

June 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

B.M. ("Father") appeals a juvenile court order terminating his parental rights. We affirm.

Issues

We restate the issues as follows:

I. Does sufficient evidence exist to support the juvenile court's order terminating Father's parental rights?

II. Was Father denied due process based on DCS's alleged failure to afford him reasonable opportunities for reunification while incarcerated?

Facts and Procedural History

On May 30, 2007, D.H. was born. That day, Father visited him in the hospital.[1] The following day, both D.H. and his mother tested positive for cocaine. As a result, the Marion County Department of Child Services ("DCS") placed him in foster care. On June 4, 2007, DCS filed a petition alleging that D.H. was a child in need of services ("CHINS"). On July 31, 2007, the juvenile court held an initial hearing on the petition. At the hearing, Father saw D.H. for the first time since his initial visit in the hospital. Father entered an admission to the

[1] At that time, Father's paternity had not yet been established. Subsequent genetic tests established his paternity of D.H.

CHINS petition. The certified court order from the hearing also indicated that Father "reported to the court his desire to give the child up for adoption." Tr. at 17. The juvenile court found D.H. to be a CHINS as to Father. Father was granted supervised visitation but did not visit D.H. after the July 31 hearing.

On August 11, 2007, Father was arrested for operating a motor vehicle while intoxicated ("OWI") and operating while suspended as a habitual traffic violator.[2] On August 28, 2007, the juvenile court held a disposition hearing, at which time D.H. was formally removed from Father's care. Father was not present at the hearing due to incarceration.

On July 29, 2008, the DCS filed a petition for involuntary termination of Father's parental rights. The juvenile court held a hearing on October 29, 2008. On November 12, 2008, the juvenile court entered a judgment terminating the parent-child relationship between D.H. and Father. This appeal ensued.[3] Additional facts will be provided as necessary.

Discussion and Decision

I. Sufficiency of Evidence

On appeal, Father challenges the sufficiency of evidence supporting the termination of his parental rights. When reviewing a juvenile court's order terminating a parent-child relationship, we will not set it aside unless it is clearly erroneous. *Castro v. State Office of Family & Children*, 842 N.E.2d 367, 372 (Ind. Ct. App. 2006), *trans. denied*. We will

[2] On October 10, 2007, Father was convicted via plea agreement of class D felony OWI, class D felony resisting law enforcement, and class C felony operating a vehicle after license forfeited for life.

[3] D.H.'s mother consented to adoption and is not a party to this appeal.

neither reweigh evidence nor judge witness credibility. *In re A.I.*, 825 N.E.2d 798, 805 (Ind. Ct. App. 2004), *trans. denied*. Rather, we will consider only the evidence and inferences most favorable to the judgment. *Id*.

In *Bester v. Lake County Office of Family & Children*, 839 N.E.2d 143 (Ind. 2005), our supreme court stated,

> The Fourteenth Amendment to the United States Constitution protects the traditional right of parents to establish a home and raise their children. A parent's interest in the care, custody, and control of his or her children is perhaps the oldest of the fundamental liberty interests. Indeed the parent-child relationship is one of the most valued relationships in our culture. We recognize of course that parental interests are not absolute and must be subordinated to the child's interests in determining the proper disposition of a petition to terminate parental rights. Thus, parental rights may be terminated when the parents are unable or unwilling to meet their parental responsibilities.

Id. at 147 (citations, quotation marks, and alteration omitted). In recognition of the seriousness with which we address parental termination cases, Indiana has adopted a clear and convincing evidence standard. *Castro*, 842 N.E.2d at 377.[4]

To obtain a termination of the parent-child relationship, DCS must establish 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;
>
> (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;

[4] To the extent DCS argues that Indiana's juvenile law derives from federal law, we disagree and decline to address its lengthy argument on the subject.

(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) (emphasis added).

Father challenges the sufficiency of evidence to support the juvenile court's conclusion that a reasonable probability exists that conditions leading to D.H.'s removal will not be remedied.[5] The juvenile court's findings and conclusions include the following:

FINDINGS OF FACT

….

6. Given his extensive criminal history, and alcohol and substance abuse problem, there is a reasonable probability that [Father] will not remedy conditions that resulted in [D.H.'s] removal and continued placement outside the home without intensely addressing alcohol and substance abuse problems outside of incarceration, and having a complete change of behavioral patterns. Although no verification was presented, [Father] stated he has completed two levels of substance abuse education while in prison, a controlled atmosphere. In the past, he has relapsed twice after completing substance abuse programs. In November 2007, [Father] was sentenced to prison on convictions of Resisting Arrest, Operating a Vehicle While Intoxicated with a Prior Offense, and Operating a Vehicle After License Forfeited for Life. He was just off Parole when last arrested, leading to his latest convictions. The arrest was also during [D.H.'s] CHINS proceeding. This leaves a great concern of [Father's] ability or willingness to remedy the unstable conditions of alcohol abuse and failure to abide by the law which has led him to be unavailable to parent.

7. The continuation of the parent-child relationship poses a threat to the well-being of [D.H.]. [Father's] current out-date from prison is June 25, 2009.

[5] Father also alleges error regarding the finding that his relationship poses a threat to D.H.; however, we need not address this allegation because Indiana Code Section 31-35-2-4(b)(2)(B) is written in the disjunctive.

> Prior to reunification, [Father] would have to be out of prison, complete services, and maintain a stable lifestyle. In the meantime, [D.H.] would be held in limbo between the only family he has known and [Father] who is a stranger. It is in [D.H.'s] best interests that [Father's] parental rights be terminated to provide the opportunity for adoption into a permanent and stable environment in which he can thrive. [D.H.] is bonded with his pre-adoptive foster parents and is doing extremely well.
>
> CONCLUSIONS
>
> ….
>
> 2. DCS has proved by clear and convincing evidence that there is a reasonable probability that conditions that resulted in [D.H.'s] removal and continued placement outside the home will not be remedied by [Father].

Appellant's App. at 8-10.

When assessing whether there is a reasonable probability that conditions that led to the child's removal will not be remedied, we must consider not only the initial basis for the child's removal, but also the bases for continued placement outside the home. *In re A.I.*, 825 N.E.2d at 806. Moreover, "the trial court should judge a parent's fitness to care for his children 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*. "Due to the permanent effect of termination, the trial court also must evaluate the parent's habitual patterns of conduct to determine the probability of future neglect or deprivation of the child." *Id*. For example, the court may properly consider evidence of a parent's criminal history, substance abuse, lack of employment or adequate housing, history of neglect, and failure to provide support. *McBride v. Monroe County Office of Family & Children*, 798 N.E.2d 185, 199 (Ind. Ct. App. 2003). In making its case, the "DCS need not rule out all possibilities of

change; rather, [it] need establish only that there is a reasonable probability that the parent's behavior will not change." *In re Kay.L.*, 867 N.E.2d 236, 242 (Ind. Ct. App. 2007).

Here, we look not merely at the initial basis for D.H.'s removal—the positive cocaine test result for both D.H. and his mother—but also at the reasons for his continued placement away from his parents. The record indicates that Father has a decade-long history of alcohol and drug abuse that has resulted in numerous misdemeanor and felony convictions, including the loss of his driving privileges for life. He has continued his pattern of substance abuse despite becoming the father not only of D.H. but also of another child—an eight-year-old son. In fact, the arrest resulting in his current incarceration stems from acts he committed after D.H. was born and during D.H.'s CHINS proceeding. Moreover, he has a history of relapse despite his participation in substance abuse programs, and the record does not contain any verification that he completed the programs in which he participated while in prison.

In sum, Father has demonstrated an inability to curtail his drug and alcohol usage and has demonstrated a pattern of further endangering himself and others by operating a vehicle while under the influence. "[A] trial court need not wait until a child is irreversibly influenced by a deficient lifestyle such that his or her physical, mental, and social growth is permanently impaired before terminating the parent-child relationship." *Castro*, 842 N.E.2d at 372. Thus, the juvenile court's conclusion regarding the improbability of remedied conditions is not clearly erroneous.

Father also challenges the sufficiency of evidence to support the juvenile court's finding that termination is in D.H.'s best interests. In determining whether termination is in

the best interests of the child, the juvenile court must look beyond the factors identified by DCS to the totality of the evidence. *C.T. v. Marion County Dep't of Child Servs.*, 896 N.E.2d 571, 585 (Ind. Ct. App. 2008). In so doing, the court must subordinate the interests of the parent to those of the child. *Id*. The recommendations of the caseworker and court-appointed special advocate ("CASA") that Father's parental rights be terminated support a finding that termination is in the child's best interests. *McBride*, 798 N.E.2d at 203. A child's need for stability and permanency is paramount. *Id*. at 192-193.

Our supreme court recently addressed the issue of reunification versus adoption in termination cases involving an incarcerated parent. *In re G.Y.*, 904 N.E.2d 1257 (Ind. 2009). In *G.Y.*, the incarcerated mother challenged the juvenile court's finding that termination was in the child's best interests based on his need for the consistency and permanency provided by the pre-adoptive foster home in which he had resided for two years. *Id*. at 1261. In reversing the juvenile court's termination order, the court considered the child's general need for permanency and stability and concluded that, where the mother's release from prison was imminent and she had made remarkable efforts toward reunification, the evidence was insufficient to show that the child would be harmed by remaining a foster care ward until he could be reunited with his mother. *Id*. at 1265.

Here, we note that Father's scheduled June 2009 release is imminent. However, *G.Y.* is distinguishable in many respects. First, unlike Father, the mother in *G.Y.* committed her crimes before G.Y. was even conceived, and her arrest did not occur until she had parented G.Y. for twenty months. Moreover, G.Y.'s incarcerated mother maintained contact with her

child, participating in regular visits and sending him cards, letters, and pictures. *Id*. at 1264-65. She also went to great lengths to try to arrange G.Y.'s placement with family or friends during her incarceration. *Id*. at 1265. Finally, in *G.Y.*, the mother made remarkable self-improvement efforts while incarcerated. Not only did she complete all rehab and parenting requirements available to her while in prison, but she also earned her associate's degree, secured housing and a full-time job, and made plans to further her education upon release. *Id*. at 1262-63. Thus, it is not surprising that she received positive evaluations from the DCS caseworker and the guardian ad litem. *Id*. at 1264.

No such efforts or positive evaluations are present in this case. Here, both the caseworker and the CASA recommended that Father's parental rights be terminated based on the child's interest in permanency. Moreover, the totality of evidence indicates that Father has an ongoing struggle with substance abuse and with breaking various laws related to that abuse. Becoming a father has seemingly provided him little, if any, incentive to better himself. He lives a transient lifestyle and has been unwilling, or at least unable, to maintain steady employment. As such, the juvenile court's finding that termination of Father's parental rights is in D.H.'s best interests is not clearly erroneous.

II. Due Process

Father argues that he was denied due process based on DCS's alleged failure to afford him reasonable opportunities for reunification while incarcerated. Indiana Code Section 31-34-21-5.5(b), which governs CHINS proceedings, provides that the DCS "shall make

reasonable efforts to preserve and reunify families." However, the termination statute does not require proof of reasonable efforts to reunify. In termination proceedings,

> [t]he trial court can reasonably consider the services offered by the [DCS] to the parent and the parent's response to those services. However, the law concerning termination of parental rights does not require the [DCS] to offer services to the parent to correct the deficiencies in childcare …. Rather, while a participation plan serves as a useful tool in assisting parents in meeting their obligations, and while county departments of public welfare routinely offer services to assist parents in regaining custody of their children, termination of parental rights may occur independently of them, as long as the elements of Ind. Code § 31-35-2-4 are proven by clear and convincing evidence. Therefore, a parent may not sit idly by without asserting a need or desire for services and then successfully argue that he was denied services to assist him with his parenting.

In re B.D.J., 728 N.E.2d 195, 201 (Ind. Ct. App. 2000).

Here, the parent participation decree issued at the initial CHINS hearing included a permanency plan for reunification.[6] Father could have challenged DCS's efforts at reunification during the CHINS proceeding. Instead, during that time, he chose to engage in conduct that led to the incarceration that he now claims is a hindrance to his ability to take steps toward reunification. As such, his due process challenge is not well taken. Accordingly, we affirm.

Affirmed.

BRADFORD, J., and BROWN, J., concur.

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[6] The reunification plan ordered Father to (1) maintain weekly contact with the family case manager; (2) secure and maintain a legal and stable source of income adequate to support household members and the child; (3) obtain and maintain suitable housing; (4) complete a home-based counseling program with the child and complete all counselor recommendations; (5) participate in and successfully complete a drug and alcohol assessment and successfully complete all recommended substance abuse treatment; (6) submit to random drug testing and establish paternity of the child; (7) exercise supervised visitation; and (8) complete all prison sentences. Tr. at 22; Pet. Ex. 6.