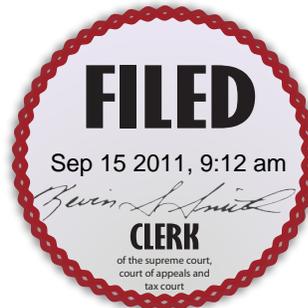


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

MARK S. LENYO
South Bend, Indiana

ATTORNEYS FOR APPELLEE:

JUSTINE J. STAUBLIN
DCS, St. Joseph County Office
South Bend, Indiana

ROBERT J. HENKE
DCS Central Administration
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF THE TERMINATION)
OF THE PARENT-CHILD RELATIONSHIP OF)
K.T. (Child),)

AND)

K.K.T. (Father),)

Appellant-Respondent,)

vs.)

THE INDIANA DEPARTMENT OF)
CHILD SERVICES,)

Appellee-Petitioner.)

No. 71A02-1103-JT-313

APPEAL FROM THE ST. JOSEPH PROBATE COURT
The Honorable Peter J. Nemeth, Judge
Cause No. 71J01-1005-JT-121

September 15, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

K.K.T. (“Father”) appeals the involuntary termination of his parental rights to his child, K.T. Concluding that the Indiana Department of Child Services, local office in St. Joseph County (“SJCDCS”), presented clear and convincing evidence to support the trial court’s judgment, we affirm.

Facts and Procedural History

Father is the biological father of K.T., born in July 1996.¹ The facts most favorable to the trial court’s judgment reveal that in January 2009, K.T. was taken into emergency protective custody after SJCDCS received and substantiated a report that Mother had engaged in a physical altercation with one of K.T.’s older half-siblings in K.T.’s presence, leaving visible bruise marks and cuts on the child. Father was never married to Mother, did not live in the family home, and his whereabouts were unknown to SJCDCS at the time of K.T.’s removal. During SJCDCS’s investigation of the matter, however, the assessment case manager conducted a records search and discovered that Father had prior SJCDCS substantiations for abuse and child neglect. The neglect substantiation was related to an incident where Father failed to properly buckle a child

¹ K.T.’s biological mother, A.M., voluntarily relinquished her parental rights to K.T. in July 2009. Because A.M. does not participate in this appeal, we limit our recitation of the facts to those pertinent solely to Father’s appeal.

into a car seat. The abuse substantiation involved a report that Father had sexually molested his thirteen-year-old step daughter in 2002.

SJCDCS filed a petition alleging K.T. was a child in need of services (“CHINS”), and K.T. was adjudicated as such following a hearing in March 2009. Father did not appear for this hearing. In April 2009, Father appeared for a dispositional hearing, after which the trial court issued an order directing Father to successfully complete a variety of tasks and services designed to facilitate reunification with K.T. Specifically, Father was ordered to maintain consistent contact with SJCDCS, immediately notify SJCDCS of any changes in his address or telephone number, and have no contact with K.T. until approved of by K.T.’s therapist, as K.T. had repeatedly told her therapist and case workers that Father “scared and terrified” her. Tr. p. 50. A subsequent modification of the dispositional decree also directed Father to submit to random drug screens.

In May 2009, SJCDCS case manager Kari Williams made three referrals for Father to participate in the Batterer Intervention Program, a drug rehabilitation program, and a psychosexual assessment through the Family and Children Center (“FCC”). Williams made these referrals based, in part, on Father’s admissions to her that he had recently used marijuana and that he and Mother had become physically violent toward each other on many occasions in the past. Father agreed to participate in all three referrals.

Although Father attended appointments at FCC to participate in a psychosexual evaluation on two separate occasions, he refused to submit to the required polygraph portion of the assessment thereby preventing the evaluation from being performed. In

addition, Father never participated in the Batterers Intervention Program or the recommended substance abuse program. Eventually, in May 2010, SJDCS filed a petition seeking the involuntary termination of Father's parental rights to K.T.

An evidentiary hearing on SJDCS's involuntary termination petition was held in January 2011. During the termination hearing, SJDCS presented evidence detailing Father's refusal to participate in court-ordered reunification services, including the recommended Batterer Intervention Program and psychosexual assessment. Although SJDCS acknowledged Father had begun participating in a residential drug treatment program through Life Treatment Center following its filing of the involuntary termination petition, the evidence showed Father remained in the program at the time of the termination hearing. In addition, SJDCS presented evidence of Father's history of criminal behavior, lack of independent housing, failure to pay court-ordered child support for K.T. for approximately three years, and current inability to provide K.T. with a safe and stable home environment. SJDCS also introduced evidence establishing K.T. was terrified of Father, had not seen Father since she was approximately seven years old, and was living and thriving in pre-adoptive relative foster care with her aunt and uncle.

At the conclusion of the termination hearing, the trial court took the matter under advisement. The court thereafter issued its judgment terminating Father's parental rights to K.T. Father now appeals.

Discussion and Decision

When reviewing the termination of parental rights, we will neither reweigh the evidence nor judge witness credibility. *In re D.D.*, 804 N.E.2d 258, 265 (Ind. Ct. App.

2004), *trans. denied*. Instead, we consider only the evidence and reasonable inferences most favorable to the judgment. *Id.* Moreover, in deference to the trial court's unique position to assess the evidence, we will set aside a 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*.

Here, in terminating Father's parental rights, the trial court entered specific findings and conclusions. When a trial court's judgment contains specific findings of fact and conclusions thereon, we apply a two-tiered standard of review. *Bester v. Lake Cnty. Office of Family & Children*, 839 N.E.2d 143, 147 (Ind. 2005). First, we determine whether the evidence supports the findings, and second, we determine 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). If the evidence and inferences support the trial court's decision, we must affirm. *L.S.*, 717 N.E.2d at 208.

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*. These parental interests, however, are not absolute and must be subordinated to the child's interests when determining the proper disposition of a petition to terminate parental rights. *Id.* 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. *In re K.S.*, 750 N.E.2d 832, 836 (Ind. Ct. App. 2001).

Before an involuntary termination of parental rights may occur in Indiana, 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

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, 1260-61 (Ind. 2009) (quoting Ind. Code § 31-37-14-2). If the trial 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. Ind. Code § 31-35-2-8. Father’s sole allegation on appeal is that there is insufficient evidence to support the trial court’s findings as to subsection (b)(2)(B) of Indiana’s termination statute. *See id.* § 31-35-2-4.

At the outset, we point out that Indiana Code section 31-35-2-4(b)(2)(B) provides that SJCDCS need establish only one of the three requirements of this subsection by clear and convincing evidence before the trial court may terminate parental rights. Here, the trial court found SJCDCS presented sufficient evidence to satisfy subsection (b)(2)(B)(i)

and (ii) of the termination statute. Because we find it to be dispositive in the instant case, we shall consider only whether sufficient evidence supports the trial court's determination that there is a reasonable probability that the conditions resulting in K.T.'s removal and continued placement outside of Father's care will not be remedied.

In challenging this conclusion, Father does not dispute any of the trial court's specific findings as unsupported by the evidence. Rather, Father simply asserts that the trial court's judgment is not supported by the evidence and directs our attention to his self-serving testimony that he voluntarily entered a residential substance abuse treatment program, was employed on a regular basis in the past, and "played absolutely no role in the reason for removal of the child from the biological mother's home." Appellant's Br. p. 8.

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 trial 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 Cnty. Office of Family & Children*, 762 N.E.2d 1244, 1251 (Ind. Ct. App. 2002), *trans. denied*. Moreover, a county department of child services is not required to provide evidence ruling out all possibilities of change; rather, it need only establish that there is a reasonable probability the parent's behavior will not change. *In re Kay L.*, 867

N.E.2d 236, 242 (Ind. Ct. App. 2007). Finally, we have previously explained that Indiana's termination statute makes clear that "it is not just the basis for the initial removal of the child that may be considered for purposes of determining whether a parent's rights should be terminated, but also those bases resulting in the continued placement outside of the home." *In re A.I.*, 825 N.E.2d 798, 806 (Ind. Ct. App. 2005), *trans. denied*.

In determining there is a reasonable probability that the conditions leading to K.T.'s removal and/or continued placement outside of Father's care will not be remedied, the trial court made several findings regarding Father's past and present inability to provide K.T. with a safe and stable home environment. In so doing, the trial court took note of Father's criminal activities, specifically finding Father "had a child molestation charge substantiated by [SJCDCS] in 2000" and that a "criminal charge was filed but dismissed before trial." Appellant's App. p. A-10. The court also found Father has "been in prison for burglary, battery by bodily waste on a police officer, driving under the influence of intoxicants and domestic violence against his first wife." *Id.* In addition, the court found Father "has not seen [K.T.] since 2004-2005," is "currently in residential placement at the Life Treatment Center for drug/alcohol treatment, owes "\$9,600.00 in back child support, and "did not follow through on the referrals made by [the SJCDCS] [c]ase [m]anger." *Id.* Finally, the court found K.T. is "terrified of her father." *Id.* These findings are supported by the evidence.

The record makes clear that although Father was afforded multiple opportunities to participate in counseling and other programs designed to facilitate his unification with

K.T., Father refused to take advantage of these programs and was never able to demonstrate any significant progress in his ability to safely parent K.T. During the termination hearing, case managers Monica Oliver and Williams, as well as court-appointed special advocate Judith Rogers, confirmed SCDCS had substantiated at least one prior incident of sexual abuse involving Father and his stepdaughter and that several additional allegations of sexual misconduct with minors involving Father had been made in previous years. Nevertheless, Father refused to submit to a polygraph and psychosexual evaluation and/or treatment. Father also declined to participate in the recommended Batterer Intervention Program. SJDCS's progress report further confirms that no additional services were referred for Father "due to [Father's] refusal to complete [the] polygraph without his stipulations which made the polygraph unsuccessful. Father's refusal has made unifying with his daughter difficult as [Father] has substantiations and allegations from other counties and the three female children in this case state he has molested them in the past." Exhibits, Three Month Progress Report p. 3.²

Although Father denied ever engaging in any sexual misconduct with his stepdaughter, he confirmed he was "in and out of jail a lot" until he was about twenty-five years old, and that he had convictions for battery by bodily waste, operating a vehicle while intoxicated, and domestic battery. Tr. p. 22. Father also admitted that he had not paid any court-ordered child support for K.T. in three years and owed approximately \$9,600.00 in back child support. As for his struggle with drugs and

² Unfortunately, we are unable to provide a more precise citation to this document as the Exhibit Volume submitted on appeal does not contain any page numbers.

alcohol, Father testified he had been an alcoholic “[m]ost of [his] life,” had been living at the Life Treatment Center for the last seven months, and was “currently two-weeks behind on [paying] them.” *Id.* at 24, 32.

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. *See D.D.*, 804 N.E.2d at 266. Moreover, “a pattern of unwillingness to deal with parenting problems and to cooperate with those providing social services, in conjunction with unchanged conditions, supports a finding that there exists no reasonable probability that the conditions will change.” *Lang v. Starke Cnty. Office of Family & Children*, 861 N.E.2d 366, 372 (Ind. Ct. App. 2007), *trans. denied*. Based on the foregoing, we conclude that SJCDCS presented clear and convincing evidence to support the trial court’s findings cited above as well as its ultimate determination that there is a reasonable probability that the conditions resulting in K.T.’s continued placement outside Father’s care will not be remedied. Father’s arguments to the contrary amount to an invitation to reweigh the evidence, which we may not do. *See D.D.*, 804 N.E.2d at 264.

Affirmed.

FRIEDLANDER, J., and DARDEN, J., concur.