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**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF THE TERMINATION)
OF THE PARENT-CHILD RELATIONSHIP OF:)

D.Y. (Minor Child),)

AND)

D.H. (Father),)

Appellant-Respondent,)

vs.)

No. 49A04-1102-JT-107

THE INDIANA DEPARTMENT OF)
CHILD SERVICES,)

Appellee-Petitioner,)

AND)

CHILD ADVOCATES, INC.,)

Guardian Ad Litem.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Gary Chavers, Judge Pro Tempore
The Honorable Larry Bradley, Magistrate
Cause No. 49D09-1003-JT-12760

October 14, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Respondent, D.H. (Father), appeals the trial court's termination of his parental rights to his minor child, D.Y.¹

We affirm.

ISSUE

Father raises one issue on appeal, which we restate as follows: Whether the State presented sufficient evidence to support the termination of D.H.'s rights to his minor child, D.Y.

FACTS AND PROCEDURAL HISTORY

D.Y. was born on December 11, 2007 to L.Y. (Mother) and D.H., D.Y.'s alleged father. Mother and Father lived together for a short time after D.Y.'s birth. However, Father was incarcerated for dealing cocaine and possession of a controlled substance when D.Y. was four or five months old and has not seen D.Y. since. Father also has never submitted to a

¹ The trial court also terminated Mother's parental rights, but she is not a party to this appeal.

paternity test to verify his paternity of D.Y.

When D.Y. was one year old, he came to the attention of the Indiana Department of Child Services (DCS) because a report was filed stating that D.Y. was extremely underweight and not doing things that normal one year olds do. The report also alleged that Mother had a long history of drug abuse, continued to abuse drugs, and sometimes left D.Y. in the care of the people that provided her with drugs. Accordingly, on February 19, 2009, DCS filed a petition alleging that D.Y. was a child in need of services (CHINS). In the petition, DCS noted that Father was incarcerated and had an anticipated release date of 2012, although it was possible that he would be released at the end of 2009.

Also on February 19, 2009, Mother admitted to an amended petition, and the trial court made a finding that D.Y. was a CHINS. Father, however, requested a factfinding hearing as to the allegations pertaining to him, which was consequently held on May 29, 2009. At the hearing, the parties stipulated that D.H. was D.Y.'s father and that D.H. did not anticipate being released until 2012, or 2009 at the earliest. Based on the stipulations, the trial court found that "because of [Father's] incarceration, [the child] continues to be a CHINS because [Father] cannot provide for his health, welfare, care, custody control, shelter education needs or basic necessities." (Petitioner's Exh. 7).

Subsequently, on March 22, 2010, DCS filed a petition for the termination of Mother and Father's parent-child relationship with D.Y. On November 17, 2010 and January 28, 2011, the trial court held a hearing on the petition. At the hearing, DCS Family Case Manager Rebecca Barker (Barker) testified that she had only had one conversation with

Father since DCS had filed the termination petition. Father never responded to Barker when she sent a letter to him in prison and never established his paternity of D.Y. In contrast, Father testified that he had completed parenting classes and a substance abuse program while in prison, but he did not offer any proof of those services.

On January 28, 2011, the second day of the trial court's hearing, Father was still incarcerated but on work release. Father stated that he would be transferred from work release to house arrest if he were able to find employment, but he did not provide verification of that possibility and was not employed at the time. At the conclusion of the evidence, the trial court took the matter under advisement. Then, on January 31, 2011, the trial court entered findings of fact and conclusions of law terminating Father's parental rights to D.Y.

Father now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

On appeal, Father argues that the evidence was insufficient to support the termination of his parental rights to D.Y. His argument has two components: first, he contends that there was insufficient evidence that the conditions that led to D.Y.'s removal from the home would not be remedied, and second, he argues that DCS did not present sufficient evidence that termination was in D.Y.'s best interests. We will address these two arguments separately.

We recognize that the Fourteenth Amendment to the United States Constitution protects the traditional right of parents to establish a home and raise their children. *In re J.S.O.*, 938 N.E.2d 271, 274 (Ind. Ct. App. 2010). A parent's interest in the care, custody, and control of his or her children is arguably one of the oldest of our fundamental liberty

interests. *Id.* However, the trial court must subordinate the interests of the parents to those of the children when evaluating the circumstances surrounding a termination of a parent-child relationship. *In re J.H.*, 911 N.E.2d 69, 73 (Ind. Ct. App. 2009), *trans. denied*. Parental rights may therefore be terminated when the parents are unable or unwilling to meet their parental responsibilities. *Id.*

In reviewing termination proceedings on appeal, this court must not reweigh the evidence nor assess the credibility of the witnesses. *Id.* We consider only the evidence that supports the trial court's decision and the reasonable inferences drawn therefrom. *Id.* Where, as here, the trial court has entered findings of fact and conclusions of law, we apply a two-tiered standard of review. *Id.* First, we determine whether the evidence supports the findings, and second, whether the findings support the conclusions of law. *Id.* In deference to the trial court's position to assess the evidence, we set aside the trial court's findings and judgment terminating the parent-child relationship only if they are clearly erroneous. *Id.*

In the instant case, Father challenges the trial court's conclusions of law terminating his parental rights.² In order to terminate Father's parental rights, DCS was required to prove by clear and convincing evidence:

(B) that one of the following [was] true:

(i) There [was] a reasonable probability that the conditions that

² Father also briefly disputes the trial court's findings of fact by arguing that there is no evidence DCS ever attempted to contact him. In support of this argument, he points to his testimony that he never received any correspondence from DCS regarding services that he might be able to participate in while incarcerated. We will not address this argument because we are not allowed to reweigh the evidence on appeal, and his statement conflicts with DCS' testimony that it did contact him. *In re J.H.*, 911 N.E.2d at 73. Moreover, we note that issues regarding services are "a matter separate and distinct from the operation of the parental rights termination statute." *In re E.E.*, 736 N.E.2d 791, 796 (Ind. Ct. App. 2000). Thus, "even a complete failure to provide services would not serve to negate a necessary element of the termination statute and require reversal." *Id.*

resulted in the child's removal or the reasons for placement outside the home of the parents [would] not be remedied.

(ii) There [was] a reasonable probability that the continuation of the parent-child relationship [posed] a threat to the well-being of the child.

(iii) The child [had], on two (2) separate occasions, been adjudicated a child in need of services[.]

(C) that termination [was] in the best interests of the child.

Ind. Code § 31-35-2-4(b)(2)(B), -(C); *Bester v. Lake Cnty. Office of Family and Children*, 839 N.E.2d 143, 148 (Ind. 2005). Clear and convincing evidence as a standard of proof requires the existence of a fact to “be highly probable.” *Hardy v. Hardy*, 910 N.E.2d 851, 859 (Ind. Ct. App. 2009). It need not reveal that “the continued custody of the parents is wholly inadequate for the child’s very survival.” *Bester*, 839 N.E.2d at 148 (quoting *Egly v. Blackford Cnty. Dep’t of Pub. Welfare*, 592 N.E.2d 1232, 1233 (Ind. 1992)). Rather, it is sufficient to show that the child’s emotional and physical development are threatened by the parent’s custody. *Id.*

I. *Remedy of Conditions*

According to Father, DCS did not present clear and convincing evidence that the conditions that resulted in D.Y. being removed from his home would not be remedied or that Father poses a threat to D.Y.’s well-being.³ When determining whether there is a reasonable probability that a parent will not remedy the conditions justifying a child’s removal from the home, the trial court must judge a parent’s fitness to care for his or her child at the time of the termination hearing. *Rowlett v. Vanderburgh Cnty. Office of Family and Children*, 841

³ Because we find that there was clear and convincing evidence that Father would not remedy the conditions that led to D.Y.’s removal, we will not address the issue of whether Father was a threat to D.Y.’s well-being.

N.E.2d 615, 621 (Ind. Ct. App. 2006). The trial court must evaluate the parent's habitual patterns of conduct to determine whether there is a substantial probability of future neglect or deprivation of the child. *C.T. v. Marion Cnty. Dept. of Child Services*, 896 N.E.2d 571, 578 (Ind. Ct. App. 2008), *trans. denied*. DCS is not required to 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." *Id.* (quoting *In re Kay L.*, 867 N.E.2d 236, 242 (Ind. Ct. App. 2007)). Moreover, the trial court may properly consider a parent's criminal history, drug and alcohol abuse, historical failure to provide support, and lack of adequate housing and employment. *Matter of D.G.*, 702 N.E.2d 777, 779 (Ind. Ct. App. 1998).

Here, the trial court found that:

There is a reasonable probability that the conditions that resulted in [D.Y.'s] removal and continued placement outside the home will not be remedied by his alleged father. [Father] remains incarcerated and unable to parent. He has testified that he has participated in certain parenting and substance abuse classes, but has tendered no proof. He failed to respond to correspondence from [DCS] and has spoken with the family case manager one time. He cannot provide housing at this time, being on work release until May 2011, and is unemployed. His failure to establish paternity and his minimal contact with [DCS] evidences an unwillingness to make the effort to parent. Upon his release, he would still have to participate in services and obtain housing and legal income to remedy conditions.

(Appellant's App. p. 11). In other words, the primary facts supporting the trial court's judgment were Father's incarceration, his failure to establish paternity, his failure to obtain housing and employment, and his failure to respond to communications he received from DCS concerning D.Y.

In response to the trial court's finding, Father asserts that the condition that placed

D.Y. outside of his custody was his incarceration, which will be remedied when he is released from prison in the foreseeable future. In support of his argument, Father directs us to our Opinions in *Rowlett* and *H.T.*, where we addressed the issue of termination of an incarcerated parent's parental rights. *Rowlett*, 841 N.E.2d at 618; *In re H.T.*, 901 N.E.2d 1118, 1119 (Ind. Ct. App. 2009). In *Rowlett*, the Vanderburgh County Office of Family and Children (OFC) filed a petition alleging that Rowlett's two minor children were CHINS. *Rowlett*, 841 N.E.2d at 618. Shortly thereafter, Rowlett was arrested and sentenced to three years for dealing in methamphetamine and possession of precursors with intent to manufacture methamphetamine respectively, with the two sentences to run consecutively. *Id.* The following year, the OFC filed petitions to terminate Rowlett's parental rights to his two children. *Id.* At the hearing on the petitions, the OFC presented evidence that resulted in the termination of Rowlett's rights, including: Rowlett's "habitual patterns of conduct prior to his most recent incarceration, [] long history of substance abuse, criminal and drug-related activity, [] transient lifestyle, [] lack of employment history, [and] past neglect and parenting." *Id.* at 621.

On appeal, Rowlett challenged the sufficiency of the evidence, and we reversed the trial court's termination. *Id.* at 622. We held that "the OFC's evidence, while evincing a habitual pattern of conduct by Father prior to his latest incarceration, does not accurately reflect [Rowlett's] status and ability to care for his children as of the time of the termination hearing." *Id.* at 621. Instead, we found that at the time of termination, Rowlett was set to be released from incarceration within six weeks, had participated in almost 1,100 hours of

individual and group services while in prison—including services in encounters, anger management, impulse control, parenting skills, domestic violence, self-esteem, self-help, and substance abuse—had earned twelve hours of college credit through Ball State University, and was enrolled in eighteen additional credit hours. *Id.* at 622. Rowlett had also obtained employment, been accepted as a student at the University of Evansville, and made plans to live with his aunt upon release. *Id.*

Similarly, in *H.T.*, H.T.’s father, A.C., was incarcerated for most of H.T.’s life prior to the termination proceedings. *In re H.T.*, 901 N.E.2d at 1119. A.C. started serving his sentence four months before H.T. was born, and DCS filed a petition that H.T. was a CHINS before A.C. had served his entire sentence. *Id.* A.C. was released from prison one month before the trial court held a subsequent termination hearing, but the trial court terminated his parental rights. *Id.* at 1120.

On appeal, A.C. argued that DCS had not presented sufficient evidence to support a termination of his parental rights. *See id.* We agreed with his argument, noting that he had taken significant steps to show his willingness to become H.T.’s custodial parent. *Id.* at 1122. While incarcerated, he had called her approximately once per week and had participated in certain programs to obtain an early release. *Id.* at 1119. Those programs included classes at Ball State University, for which he received a Bachelor of Arts degree while in prison, as well as substance abuse programs and parenting classes. *Id.* In addition, H.T. was placed with her half-sibling’s grandmother after the CHINS hearing, and A.C. sent letters to the grandmother in an attempt to get to know her and her husband and to thank her

for caring for H.T. *Id.* A.C. also sent letters to H.T., which the grandmother withheld. *Id.* As a result of these factors, we determined that the trial court had erred in finding that H.T.'s well-being was threatened by her father's involvement in her life. *Id.* at 1122.

In the instant case, we do not see Father's circumstances as analogous to *Rowlett* or *H.T.* It is true that, like *Rowlett* and A.C., Father was due to be released from prison within a short time frame at the point when the trial court terminated his parental rights. However, *Rowlett* and A.C. indicated a willingness to become custodial parents that mitigated the obstacle of their incarcerations, whereas Father has not made such indications. Unlike *Rowlett* and A.C., Father did not have contact with D.Y. during his incarceration. DCS presented evidence that it tried to contact Father, and he never responded. Also, Father alleged that he had participated in services in prison but there was no evidence in the record to support that allegation. Finally, Father did not have employment or housing lined up for his release and had not established his paternity of D.Y. In light of these circumstances, we cannot find that the trial court erred in holding that there was a reasonable probability that Father would not remedy the conditions justifying D.Y.'s removal from the home.

II. *Best Interests of D.Y.*

Next, we will address the issue of whether termination of Father's parental rights was in D.Y.'s best interests. In determining what is in a child's best interests, the trial court is required to look beyond the factors identified by DCS to the totality of the evidence. *In re T.F.*, 743 N.E.2d 766, 776 (Ind. Ct. App. 2001). In doing so, the trial court must subordinate the interests of the parent to those of the child involved. *Id.* In analyzing a child's best

interests, we recognize that permanency is a central consideration. *In re G.Y.*, 904 N.E.2d at 1265. The trial court need not wait until a child is irreversibly influenced such that his or her physical, mental, and social growth is permanently impaired before terminating the parent-child relationship. *In re T.F.*, 743 N.E.2d at 776.

Based on these standards, we find that termination of Father's parental rights is in D.Y.'s best interests. As we stated above, permanency is a central consideration, and the trial court found that D.Y. was thriving in his pre-adoptive home, where he had lived for two-thirds of his life. *See In re G.Y.*, 904 N.E.2d at 1265. In addition, D.Y. has special needs that require consideration. Although Father's release from prison is imminent, Father still has not verified paternity or gained suitable employment or housing in order to provide permanency for D.Y. It is possible that Father might eventually create a safe, stable environment to meet D.Y.'s needs, but we find that he had not done so at the time of the termination hearing. Additionally, there was no evidence that Father had participated in classes while incarcerated, had found employment, or had found stable housing to provide for D.Y. Therefore, we conclude that the trial court did not err in determining that the termination of Father's parental rights was in D.Y.'s best interests.

CONCLUSION

Based on the foregoing, we conclude that the DCS provided sufficient evidence to support the termination of Father's parental rights to his minor child, D.Y.

Affirmed.

NAJAM, J. and MAY, J. concur