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**IN THE  
COURT OF APPEALS OF INDIANA**

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In the Matter of the Termination of the Parent-Child )  
Relationship of D.M., minor child, and S.L., mother, )  
and E.M., father: )

E.M., )  
)  
Appellant-Respondent, )

vs. )

No. 46A03-1012-JT-676

INDIANA DEPARTMENT OF CHILD SERVICES, )  
LA PORTE COUNTY OFFICE, )

Appellee-Petitioner. )

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APPEAL FROM THE LA PORTE CIRCUIT COURT  
The Honorable Thomas Alevizos, Judge  
The Honorable Nancy Gettinger, Magistrate  
Cause No. 46C01-1007-JT-68

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June 21, 2011

**MEMORANDUM DECISION - NOT FOR PUBLICATION**  
**KIRSCH, J.**

E.M. (“Father”) appeals the involuntary termination of his parental rights to his child, D.M. In so doing, Father challenge the sufficiency of the evidence supporting the trial court’s judgment. Father also asserts that he was denied due process of law, and that the trial court committed reversible error in admitting certain drug screen test results over his objection during the termination hearing.

We affirm.

### **FACTS AND PROCEDURAL HISTORY**

Father is the biological father of D.M., born in December 2006.<sup>1</sup> In November 2009, the Indiana Department of Child Services, LaPorte County (“LCDCS”), received a report that, while attempting to serve a warrant on Father for residential entry, local law enforcement personnel observed Father through a window using heroin in the presence of D.M. Father was subsequently arrested and later pleaded guilty to neglect of a dependent and Class D felony possession of a controlled substance.

Meanwhile, LCDCS took D.M. into emergency protective custody and filed a petition with the trial court alleging D.M. was a child in need of services (“CHINS”). Father later admitted to the allegations contained in the CHINS petition during a hearing on the matter in December 2009. The trial court thereafter adjudicated D.M. a CHINS and proceeded to disposition the same day.

Following the dispositional hearing, the trial court issued an order formally removing D.M. from Father’s care and custody. The court’s order further directed Father

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<sup>1</sup> The parental rights of D.M.’s biological mother, S.L., were involuntarily terminated by the trial court in its November 2010 termination order. S.L. does not participate in this appeal. Consequently, we limit our recitation of the facts to those pertinent solely to Father’s appeal.

to participate in a variety of services designed to enhance his parenting abilities and facilitate reunification with D.M. Specifically, Father was ordered to, among other things: (1) obtain and maintain a safe, stable, and nurturing home; (2) complete a drug and/or alcohol assessment and follow any resulting recommendations; (3) submit to random drug screens; (4) maintain regular contact with LCDCS and inform his caseworker of any change in address, phone number, and employment status; (5) participate in home-based services; and (6) exercise regular supervised visitation with D.M. so long as Father produced negative drug screens.

Father's participation in court-ordered services was sporadic and ultimately unsuccessful. Although Father completed the substance abuse assessment in late January 2010 and participated in the recommended intensive out-patient drug rehabilitation program ("IOP") at the Swanson Center, he continued to regularly test positive for heroin. In addition, Father failed to maintain consistent contact with LCDCS and rarely visited with D.M., due in large part to Father's recurrent and on-going positive drug screens.

Following a review hearing in March 2010, the trial court ordered Father to participate in an in-patient drug rehabilitation program in an attempt to help Father overcome his addiction to heroin. Father acknowledged his need to participate in such a program and was transported to Life Treatment Center in South Bend. Despite repeated assurances from LCDCS family case manager Pat Daisy ("Daisy") that LCDCS would pay the initial fee and help Father obtain grant money from Life Treatment Center for the subsequent per diem charges, Father refused to stay and was immediately transported

back to LaPorte County. Father also refused subsequent offers of referrals to participate in a second IOP program through the Swanson Center and/or a different in-patient program through South Suburban Drug Program, located in Illinois.

In July 2010, Father was arrested and incarcerated in Porter County on a new possession of heroin charge. Father pleaded guilty to the new heroin charge, and was later released from the Porter County Jail in October 2010. Father remained in custody, however, and was immediately transferred to the LaPorte County Jail to face probation revocation charges in that county.

A two-day evidentiary hearing on the termination petition was held in November 2010. During the termination hearing, LCDCS presented evidence showing Father remained incarcerated in the LaPorte County Jail and was facing an additional one-and-one-half years of incarceration on his pending probation revocation charges. LCDCS also provided evidence that Father had failed to successfully complete a majority of the trial court's dispositional goals, had failed to successfully complete a drug rehabilitation program, and had only visited with D.M. approximately four to five times since the child's removal from Father's care in November 2009.

Also during the termination hearing, LCDCS attempted to introduce into evidence Petitioner's Exhibit 4, which was comprised of twenty-four reports regarding the results of various drug screens administered to Father during the underlying CHINS and termination proceedings. Counsel for Father objected, stating that his "only objection" was that LCDCS had failed to lay a proper foundation for admitting all twenty-four reports in a single exhibit. Specifically, counsel argued that the only evidence relating to

the drug screens that had been presented to the trial court came from LCDCS family case manager Franklin Williams (“Williams”), who admitted he had “only been involved in one drug screen.” *Tr.* at 46. Counsel further confirmed that his objection was “not with the certification and authentication of [the] business records.” *Id.* at 47.

As a result of counsel’s objection, the trial court admitted Petitioner’s Exhibit 4A, which contained only the results of the single drug screen that was administered while Williams was the acting family case manager. The remaining proffered drug screen reports, however, were eventually admitted into evidence, in piecemeal fashion, following the testimony of several additional family case managers who had also been assigned to D.M.’s case.

At the conclusion of the termination hearing, the trial court took the matter under advisement. The trial court entered its judgment terminating Father’s parental rights to D.M. on November 24, 2010. Father now appeals.

### **DISCUSSION AND DECISION**

We begin our review by acknowledging that 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 a termination of parental rights case, we will not reweigh the evidence or judge the credibility of the witnesses. *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 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*.

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.* In addition, 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. *K.S.*, 750 N.E.2d at 836.

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; [and]

(C) that termination is in the best interests of the child . . . .

Ind. Code § 31-35-2-4(b)(2)(B) & (C) . 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 (2008)).

Father challenges the sufficiency of the evidence supporting the trial court's findings as to subsection (B) and (C) of the termination statute cited above. *See* Ind. Code § 31-35-2-4(b)(2). Father also asserts he was denied due process of law, and that the trial court committed reversible error in admitting the drug screen reports over his objection. We shall consider each argument in turn.

## **I. Sufficiency of the Evidence**

### **A. Remedy of Conditions/Threat to Well-being**

Initially, we observe that LCDCS was required to establish only one of the requirements of Indiana Code section 31-35-2-4-(b)(2)(B) by clear and convincing evidence. *See L.S.*, 717 N.E.2d at 209. Because we find the issue to be dispositive, we need only consider whether sufficient evidence supports the trial court's determination

that there is a reasonable probability that the conditions resulting in D.M.'s removal and/or continued placement outside Father's care will not be remedied.

In determining whether conditions causing a child's removal or continued placement outside the care of a parent will 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 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*. 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 the parent's behavior will not change. *In re Kay L.*, 867 N.E.2d 236, 242 (Ind. Ct. App. 2007).

In its judgment terminating Father's parental rights to D.M., the trial court acknowledged that it was "undisputed that Father completed the IOP program." *Appellant's App.* at 7. The court further found, however, that "despite [Father's] participation in the IOP, he continued to test positive for heroin." *Id.* In addition, the trial court also noted that despite being court-ordered to participate in an in-patient drug

treatment program in March 2010, Father refused to do so and continued to test positive on eight of nine drug screens from “June 1, 2010 through the present time.” *Id.* at 8.

As for Father’s recent criminal history, the trial court noted Father’s convictions for neglect of a dependent and two possession of heroin convictions, all of which occurred during the pendency of the underlying proceedings. The trial court also recognized that Father remained incarcerated at the time of the termination hearing and was “possibly facing serving his suspended sentence of 365 days[,] in addition to the 180 days of an executed sentence.” *Id.* at 9. The court thereafter made several additional pertinent findings as follows:

24. In this case, [the parents] have been in and out of jail and have continued to use drugs. Father did not take advantage of the services offered to him in that although he appeared and participated in an IOP, he was not able to stay clean and he failed to participate in an in-patient program. . . .
25. [N]either parent is currently able to care for [D.M.] and conditions have not changed. Although both parents are not using drugs since their incarceration, neither parent has completed treatment and stayed clean after or even during treatment. Parents admit they need in-patient treatment.
26. The Indiana Supreme Court has acknowledged that permanency is a central consideration in determining the best interests of a child. *In re G.Y.*, 904 N.E.2d 1257 (Ind. 2009). However, in *G.Y.*[,] [the] court found that the termination of parental rights for a child whose parent was incarcerated was not appropriate. In that case, the parent had not committed any criminal offense during the child’s lifetime, the parent, while incarcerated, had taken steps to participate in individualized drug counseling, had undertaken steps to secure housing and employment upon her release, had taken parenting classes, was pursuing an associate’s degree, and had maintained a positive relationship with the child while incarcerated by visiting with the child, and sending cards, pictures, and letters. *Id.* at 1263. There is no evidence that in this case that [Father] has taken any

initiative or any steps during the pendency of the CHINS case to successfully participate in any services while incarcerated or not, that would enhance [his] ability to care for [D.M.]. In fact, [he] committed new crimes[,]. . . failed to visit or at least to visit [D.M.] more than minimally, failed to maintain regular contact with [LCDCS][,] and did not participate in in-patient services that may have helped [him] to stay clean.

*Id.* at 12-13. Our review of the record before us reveals that there is ample evidence to support the trial court's findings cited above, which in turn support the court's ultimate decision to terminate Father's parental rights to D.M.

Testimony from caseworkers and service providers during the termination hearing makes clear that despite a wealth of services available to Father during the underlying proceedings, his circumstances remained largely unchanged. In recommending termination of Father's parental rights, LCDCS case managers Williams, Daisy, and Sherry Gulstrom ("Gulstrom") described Father's participation in services as "sporadic," "inconsistent," and "non-compliant." *Tr.* at 53, 55, 75, 108. They also confirmed that Father remained unemployed throughout the duration of the underlying CHINS and termination proceedings, failed to maintain regular contact with LCDCS, and had only visited with D.M. a handful of times since the child's removal from Father's care largely due to the fact Father "continued to test positive [for illegal substances] and we never did get the three consecutive negative drug screens that [were] required." *Id.* at 77.

Although Father completed a substance abuse evaluation and IOP with the Swanson Center pursuant to the trial court's dispositional order, Williams, Daisy, and Gulstrom testified that Father continued to test positive for heroin throughout the underlying proceedings, even while participating in the IOP, and that he refused to enroll

in any in-patient drug-rehabilitation program, despite the trial court's order to do so and Daisy's referral to the Life Treatment Center in-patient program. When asked whether she believed there was a "reasonable probability of improvement in the conditions that caused [D.M.'s] removal," Gulstrom answered in the negative and further explained that Father had not "complied with services," did not have a "stable li[fe] to care for [D.M.]," had been unable to "stay off heroin even after completing IOP at Swanson Center," and had been unable to produce "clean drug screens in order to have visitation with [D.M.]" *Id.* at 108.

Father's own testimony lends further support to the trial court's findings. When asked during the termination hearing if he uses drugs, Father answered, "Yes, I have a problem." *Id.* at 149. Father further testified that he had refused to participate in an in-patient drug rehabilitation program in violation of the trial court's order to do so, that he was currently incarcerated, and that he was facing charges that could result in approximately one-and-a-half years of additional time in jail. When asked, "At this time, are you able to take care of [D.M.]," Father replied, "No, ma'am, I'm not." *Id.* at 172.

Based on the foregoing, we conclude that LCDCS presented clear and convincing evidence to support the trial court's findings and ultimate determination that there is a reasonable probability that the conditions resulting in D.M.'s removal and continued placement outside the family home will not be remedied. Father's arguments to the contrary, emphasizing his self-serving statements regarding his recent sobriety while incarcerated and prior history of employment and caring for D.M., rather than the

evidence relied upon by the trial court, amount to an invitation to reweigh the evidence, which we may not do. *D.D.*, 804 N.E.2d at 264.

### **B. Best Interests**

We next consider Father's assertion that LCDCS failed to present sufficient evidence to support the trial court's determination that termination of his parental rights is in D.M.'s best interests. In determining what is in the best interests of a child, the trial court is required to look beyond the factors identified by the Indiana Department of Child Services and look to the totality of the evidence. *McBride v. Monroe Cnty. 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.*

In recommending termination of parental rights as in D.M.'s best interests, family case manager Daisy testified that after D.M. was placed in foster care, she began seeing improvements in D.M.'s overall "behaviors and some of the limitations that he had exhibited prior to that," including his "limited speech" and "attention." *Id.* at 72-73. She further described D.M. as doing "really well[,] actually" following his removal from Father. *Id.* at 72. When asked why she believed termination of Father's parental rights was in D.M.'s best interests, Daisy explained:

D.M. deserves a stable, safe home and his parents cannot provide this. I believe that D.M. would be harmed if he were placed back in [Father's] care because [D.M.'s] basic needs would not be met. And his parents have allowed him to be around heroin and needles. And they're in and out of jail. And they can't insure that [D.M.] would have a safe home.

*Id.* at 108-09. Court Appointed Special Advocate Jessica Nowka (“Nowka”) likewise informed the court that she believed termination of Father’s parental rights was in D.M.’s best interests. In so doing, Nowka testified that she did not believe Father could “remain clean” or provide a “stable home” for D.M., and that returning D.M. to Father would be “harmful” for the child. *Id.* at 118.

Based on the totality of the evidence, including Father’s failure to complete a majority of the trial court’s dispositional orders, his unresolved addiction issues, and current inability to provide D.M. with a safe and stable home environment, coupled with the testimony from Daisy and Nowka, we conclude that clear and convincing evidence supports the trial court’s determination that termination of Father’s parental rights is in D.M.’s best interests.

## **II. Due Process**

Father attempts to avoid termination of his parental rights by asserting LCDCS violated his constitutionally protected right to due process when it failed to “fulfill its obligations to report the results of his drug screens to the Swanson Center.” *Appellant’s Br.* at 1. In making this argument, Father claims that his “efforts to become clean would likely have been successful more quickly had Father’s [LCDCS] case worker not failed in her responsibility to tender his drug screen results to the Swanson Center,” and that this “substantial procedural irregularity” constitutes a “due process violation meriting reversal.” *Id.* at 7.

The Due Process Clause of the United States Constitution “prohibits state action that deprives a person of life, liberty, or property without a fair proceeding.” *In re B.J.*, 879 N.E.2d 7, 16 (Ind. Ct. App. 2008), *trans. denied*. To be sure, the right to raise one’s child is an “essential, basic right that is more precious than property rights.” *In re C.C.*, 788 N.E.2d 847, 852 (Ind. Ct. App. 2003), *trans. denied*. Thus, when the State seeks to terminate a parent-child relationship, it must do so in a manner that meets the constitutional requirements of the Due Process Clause. *Hite v. Vanderburgh Cnty. Office of Family & Children*, 845 N.E.2d 175, 181 (Ind. Ct. App. 2006). Although due process has never been precisely defined, the phrase embodies a requirement of “fundamental fairness.” *In re J.T.*, 740 N.E.2d 1261, 1264 (Ind. Ct. App. 2000), *trans. denied*.

We have previously explained, however, that the “provision of family services is not a requisite element of our parental rights termination statute, and thus, even a complete failure to provide services would not serve to negate a necessary element of the termination statute and require reversal.” *In re E.E.*, 736 N.E. 2d 791, 796 (Ind. Ct. App. 2000). We further clarified a parent’s responsibility in seeking appropriate services as follows:

[T]he [Indiana Department of Child Services (“DCS”)] and trial court have no way to know whether addictions treatment is failing because the treatment is not the most appropriate for the parent or because the parent simply does not care enough about reunification to maintain sobriety under any form of treatment. Accordingly, we will not place a burden on either the DCS or the trial court to monitor treatment and to continually modify the requirements for drug and alcohol treatment until a parent achieves sobriety. Rather, the responsibility to make positive changes will stay where it must, on the parent. If the parent feels the services ordered by the court are inadequate to facilitate the changes needed for reunification, then

the onus is on the parent to request additional assistance from the court of DCS.

*Prince v. Dep't of Child Servs.*, 861 N.E.2d 1223, 1231 (Ind. Ct. App. 2007). Here, it is undisputed, and the trial court acknowledges in its findings, that LCDCS failed to provide the Swanson Center with Father's drug screen results until shortly after his completion of the IOP. Nevertheless, testimony from LCDCS family case manager Daisy reveals that as soon as she became aware of this fact, she initiated discussions with both Father and the Swanson Center concerning various additional treatment options, including re-enrolling Father in a second IOP program and/or referring Father to an in-patient drug rehabilitation program. Notwithstanding Father's admission that he continued to struggle with his addiction and needed help, he refused to participate in any of the recommended treatment programs, even after the trial court's March 2010 order specifically directing Father to complete an in-patient program and LCDCS's subsequent referral to Life Treatment Center. Father also refused to maintain consistent contact with LCDCS, failed to cooperate with home-based services providers, and ultimately was re-arrested on new drug-related charges in July 2010.

Under these circumstances, we cannot conclude that Father's procedural due process rights were significantly compromised, or that he was denied fundamental fairness during the underlying CHINS case simply because LCDCS failed to provide the results of Father's positive drug screens to the Swanson Center while Father was participating in the IOP program. *See e.g. In re B.J.D.*, 728 N.E.2d 195, 201 (Ind. Ct. App. 2000) (holding that a parent may not sit idly by without asserting a need or desire

for services and then successfully argue that he or she was denied services to assist with his or her parenting); *see also In re T.F.*, 743 N.E.2d 766, 772 (Ind. Ct. App. 2001) (explaining that one procedural irregularity, in and of itself, without a multitude of other clear and substantial procedural irregularities, is not enough to deprive a parent of his due process rights such that reversal of a termination decision is required), *trans. denied*.

### **III. Abuse of Discretion**

Finally, we consider Father's assertion that the trial court abused its discretion by admitting the results of the drug screens administered to Father during the underlying CHINS and termination proceedings. The admission of evidence is entrusted to the sound discretion of the trial court. *In re A.J.*, 877 N.E.2d 805, 813 (Ind. Ct. App. 2007), *trans. denied*. We will find an abuse of discretion only where the trial court's decision is against the logic and effect of the facts and circumstances before the court. *Id.* If a trial court abuses its discretion by admitting the challenged evidence, we will only reverse for that error if the error is inconsistent with substantial justice or if a substantial right of the party is affected. *In re S.W.*, 920 N.E.2d 783, 788 (Ind. Ct. App. 2010). Moreover, any error caused by the admission of evidence is harmless error, for which we will not reverse, if the erroneously admitted evidence was cumulative of other evidence properly admitted. *Id.*

During the termination hearing, Father repeatedly and unequivocally admitted that he had used heroin not only while participating in the Swanson Center IOP program, but also throughout the duration of the underlying CHINS and termination proceedings until the commencement of his current incarceration. Thus, even assuming without deciding

that the challenged drug screen reports were improperly admitted into evidence, such evidence was merely cumulative of Father's own, properly admitted testimony.

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.” *Matter of A.N.J.*, 690 N.E.2d 716, 722 (Ind. Ct. App. 1997) (quoting *Egley v. Blackford Cnty. Dep't of Pub. Welfare*, 592 N.E.2d 1232, 1235 (Ind. 1992)). We find no such error here.

Affirmed.

VAIDIK, J., and MATHIAS, J., concur.