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IN THE COURT OF APPEALS OF INDIANA

IN THE MATTER OF THE TERMINATION OF THE PARENT-CHILD RELATIONSHIP OF K.T.N., JR., and P.D.N, children,	)	
KYLE TIMOTHY NANCE, SR.,	)	
Appellant-Respondent,	)	
vs.	)	No. 71A03-0704-JV-195
ST. JOSEPH COUNTY DEPARTMENT OF CHILD SERVICES,	)	
Appellee-Petitioner.	)	

APPEAL FROM THE ST. JOSEPH PROBATE COURT
The Honorable Peter J. Nemeth, Judge
Cause No. 71J01-0502-JT-22
Cause No. 71J01-0502-JT-23

August 23, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Kyle Timothy Nance Sr. appeals the trial court's order terminating his parental rights. Nance raises the sole issue of whether sufficient evidence exists to support the trial court's judgment. Concluding that sufficient evidence exists, we affirm.

Facts and Procedural History

On April 4, 2003, Nance called the Department of Child Services ("DCS") to inform them that the children of Diane Smith[1] were not attending school or doctor's appointments, that Smith was "low functioning and cannot read or write," and that she was living with her brother, who was a drug dealer and who was taking Smith's food stamps and welfare check. Transcript at 10. Nance and Smith were, and continued to be, in an "on and off relationship." Id. at 7. At the time, Nance's son, K.N., was in the care of Smith, and Smith was pregnant with another of Nance's children, P.N. As a result of this report and the DCS's subsequent investigation, the DCS put home-based services in Smith and Nance's home.[2] The DCS provided services for a few weeks, but then Nance "became very upset with the homebased worker and no longer wanted her in his home." Id. at 11. DCS attempted to resume services, but Nance "threatened the CPS worker, refused to allow her to see the children." Id. The DCS then filed a petition alleging that K.N. and P.N. were children in need of services ("CHINS"). On October 15, 2003, a hearing on the CHINS petition was held. As a result of this hearing, K.N. and P.N. were sent home with Nance, and Smith was ordered to have

[1] Smith and Nance eventually married, and Smith changed her name to Diana Nance. We will refer to her as "Smith" throughout the opinion for consistency and clarity.

[2] Although the record is not exactly clear, it appears that soon after Nance called the DCS, he and Smith reunited and moved in together.

supervised visitation only.[3] On December 3, 2003, the trial court issued a disposition order, requiring Nance to

> participate in individual counseling; participate in family counseling; cooperate with homebased services; submit to random drug screens upon request of OFC;[4] complete parenting classes; complete a parenting assessment and follow all recommendations; complete a psychological evaluation and follow all recommendations; maintain stable employment; maintain stable housing; remain drug free; maintain consistent contact with the Office of Family and Children and anger management.

Id. at 13. It appears that Nance generally complied with the majority of these requirements. He has maintained stable employment and housing throughout the proceedings, and the DCS has not alleged that he failed to complete any of his classes or evaluations. In fact, his counselor wrote a letter to the DCS just prior to the termination hearing indicating that Nance "has regularly attended counseling over the last two years and he has made significant progress." Appellant's App. at 18.

One part of the dispositional order in which Nance was not in complete compliance relates to his drug use. Nance tested positive for marijuana on March 3, 2005, and April 11, 2005, and his DCS case manager testified that "[t]here were several times [she] called Mr. Nance and he did not go and take the drug screen." Tr. at 16. Nance passed drug screens given on December 5, 2005, February 14, 2006, March 24, 2006, and August 15, 2006.

Also, along with the dispositional order, the DCS established a safety plan under which Nance agreed that Smith would never be left alone in care of K.N. or P.N. However,

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[3] The record does not clearly indicate whether Nance and Smith were living together at this time.

[4] The OFC, or Office of Family and Children, later became the DCS.

at some point, Smith called DCS and indicated that she was at home alone with the children and did not know Nance's whereabouts.[5] Apparently, Nance had left K.N. and P.N. with a babysitter while he attended a court hearing related to his custody over K.N. and P.N. The hearing took longer than expected, and the babysitter left the children with Smith. As a result of this incident, DCS filed a Motion for Modification of Dispositional Decree.[6] On April 14, 2004, the trial court held a hearing on this motion and ordered that K.N. and P.N. be placed in foster care.

While the children were in foster care, Nance consistently attended visitation, which went well according to Nance's DCS case manager. However, visitation was halted in February 2005 when the DCS filed its petition for termination of parental rights. The DCS filed this petition shortly after learning that on November 22, 2004, Nance and Smith had married. Nance did not relate this marriage to his case worker, who learned about it through the newspaper. In fact, Nance told his case worker that he and Smith "were no longer together. That he wanted to be reunified with his daughter and his son and that [Smith] and himself no longer had a relationship." Tr. at 21.

On December 15, 2006, the trial court held a hearing on the DCS's petition, and on December 27, 2006, issued its order terminating the parent-child relationship between Nance and K.N. and P.N. Nance now appeals the trial court's order.[7]

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[5] The record is not clear on what date this event occurred.

[6] The record is not clear on what date the DCS filed this motion.

[7] It appears that Smith's parental rights with respect to K.N. and P.N. were terminated at some point prior to Nance's hearing. The record is not entirely clear on when this termination occurred.

Discussion and Decision

I. Standard of Review

When reviewing a termination of parental rights, we neither reweigh evidence nor judge witness credibility; instead we consider only the evidence most favorable to the judgment and the reasonable inferences that can be drawn from the evidence. In re J.W., 779 N.E.2d 954, 959 (Ind. Ct. App. 2002), trans. denied. When, as in this case, the trial court enters findings along with its judgment sua sponte,[8] the findings control only the issues covered, and we use a general judgment standard for issues for which the court did not make findings. McBride v. Monroe County Office of Family and Children, 798 N.E.2d 185, 198 (Ind. Ct. App. 2003). A finding will not be set aside unless we find it clearly erroneous. Id. We will affirm the general judgment on any legal theory the evidence supports. Id. A finding is clearly erroneous when no facts or inferences support it. In re J.W., 779 N.E.2d at 959. We will reverse a judgment as clearly erroneous if we review the record and have "a firm conviction that a mistake has been made." Id.

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[8] The trial court in this case entered "findings" only in the loosest sense of the word. The trial court stated:

> This matter having come before the Court upon the Petition for Involuntary Termination of Parental Rights filed herein and the Court having heard the evidence, and having taken this matter under advisement, now finds by clear and convincing evidence that:
> Witnesses sworn, evidence taken and concluded.
> The allegations of the petition are true in that: the child have [sic] been removed from the parent for at least six (6) months under a dispositional decree of this Court dated December 3, 2003, Cause Number 71J010306JC000195.
> There is a reasonable probability that the conditions resulting in the removal of the child from their [sic] parents' home will not be remedied.
> There is a reasonable probability that a continuation of the parent-child relationship will pose a threat to the well-being of the Child.
> It is in the best interest of the child that the parent-child relationship be terminated.
> The St. Joseph County Department of Child Services has a satisfactory plan for the care and treatment of the child which is Adoption.

II. Termination of Parental Rights

A parent has a constitutional right to raise his or her children, but this right is "not absolute and must be subordinated to the children's interests when the children's emotional and physical development is threatened." A.F. v. Marion County Office of Family and Children, 762 N.E.2d 1244, 1249 (Ind. Ct. App. 2002), trans. denied. Although parental rights are afforded constitutional protections, these rights may be terminated when parents are unable or unwilling to meet their parental responsibilities. In re R.S., 774 N.E.2d 927, 930 (Ind. Ct. App. 2002), trans. denied. We do not terminate these rights to punish a parent, but to protect a child. Id.

The elements that must be proved by clear and convincing evidence in order to terminate a parent-child relationship are set out in Indiana Code section 31-35-2-4(b)(2):

> (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;
> ***
> (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 interest of the child; and
> (D) there is a satisfactory plan for the care and treatment of the child.

Although Nance states in his brief that the State failed to introduce sufficient evidence to satisfy each of these statutory elements, Nance has neither argued nor presented facts that raise an issue with regard to subsections A or D.[9] He does present argument that goes to

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Appellant's App. at 12-13.

[9] The record clearly indicates that the children have been removed from Nance's care for at least six

whether sufficient evidence exists to support the trial court's findings that the conditions that resulted in his children's removal will not be remedied, that the continuation of the parent-child relationship poses a threat to his children, and that termination is in the children's best interest.

A. Whether There Is a Reasonable Probability that the Conditions that Led to the Children's Removal Will Not Be Remedied [10]

When making this determination, trial courts should judge a parent's fitness at the time of the termination hearing, considering any change in conditions since the removal. In re D.J., 755 N.E.2d 679, 684 (Ind. Ct. App. 2001), trans. denied. Here, the trial court did not make specific factual findings, so we do not know what evidence introduced at the hearing provided the basis for the trial court's finding that this reasonable probability exists. Nance's DCS caseworker testified that the conditions will not be remedied because Nance "continues to still have a relationship with [Smith] who is not an appropriate caregiver for these kids. He [h]as, also, refused to do the drug treatment and aftercare, and has tested positive on several of his drug screens." Tr. at 24. The DCS also introduced evidence regarding Nance's issues with anger management.

We acknowledge that Nance has tested positive for marijuana on two occasions and failed to show up for some drug tests. In determining a parent's current fitness, a trial court

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months and that there is a family in place to adopt the children.

[10] Because subsection (B), is written in the disjunctive, we will affirm if clear and convincing evidence supports either condition. Castro v. State Office of Family and Children, 842 N.E.2d 367, 373 (Ind. Ct. App. 2006), trans. denied. Therefore, we do not discuss whether evidence supports the trial court's conclusion that a reasonable probability exists that the continuation of the parent-child relationship poses a threat to the children's well-being because we conclude that clear and convincing evidence supports the trial court's conclusion that a reasonable probability exists that the conditions that led to the children's removal will not be remedied.

may consider previous patterns of conduct. McBride, 798 N.E.2d at 199. However, at the time of the hearing, Nance had not failed a drug test in over twenty months. "When assessing the parent's fitness to care for children, the trial court should view the parent as of the time of the termination hearing and take into account any evidence of changed conditions." In re B.D.J., 728 N.E.2d 195, 201 (Ind. Ct. App. 2000). Although we recognize that a parent's persistent use of drugs may certainly demonstrate a reasonable probability that the relationship with that parent may be harmful to a child, the record neither indicates that Nance's drug use posed a threat to K.N. or P.N. at the time of the hearing nor discloses such a pattern of habitual use that could support such a finding. Although we by no means wish to condone Nance's prior and admitted use of marijuana, his two positive tests, and the caseworker's indication that he had not shown up for several tests,[11] when compared to his more recent negative tests, establishes an insufficient basis, on its own, to support a finding that ultimately results in the termination or his parental rights. However, his past use certainly constitutes a factor that the trial court could consider in making its determination.

In regard to Nance's anger management issues, the DCS introduced evidence of a 2001 conviction for robbery, a Class C felony. Nance's criminal history is relevant to a determination of whether the conditions resulting in K.N. and P.N.'s removal will not be remedied, as it is a part of Nance's pattern of conduct. See In re J.W., 779 N.E.2d at 961. The DCS also introduced testimony of the caseworker and the CASA that Nance had been less than cooperative at times. The CASA testified that "there were a couple of times that I

[11] At a different point, the caseworker testified that "there were seven times [she] called [Nance] and he did not take the drug screen." Tr. at 118. However, she did not explain whether she actually reached

feared for [the caseworker] because [Nance] became very irate with her and I was afraid that we would have a situation where he would hit her." Tr. at 45-46. Also, Smith informed the DCS that Nance had abused her physically and that at one point she had moved out of the house because of this treatment. Smith testified at the hearing that sometime during 2005 Nance had pushed her, but that although Nance used to have a problem with his anger, "it got good, real good. You know what I'm saying, he changed a lot." Tr. at 74. Also, Nance's therapist, with whom he had been meeting since before the commencement of the termination proceedings, submitted a letter to the caseworker just prior to the termination hearing indicating:

> [Nance] has regularly attended counseling over the last two years and he has made significant progress. He has been very cooperative and has embraced both my assessments of his situation and suggestions for change. . . . I think that [Nance] is a very different person now as compared to a year or even six months ago. I believe that he is stable and responsible enough that he could be considered for reunification with his children.

Appellant's App. at 18. The CASA testified that she had read this report, but "what I have seen in life, similar therapy sessions in dealing with some of his anger management is different than facing real life situations." Tr. at 46. The evidence introduced regarding Nance's anger management problems does not overwhelm us, as it consists of a conviction, which is serious but also five years old, some vague instances of verbal altercations with DCS workers, and what appears to be an isolated incident with Smith. Importantly, the evidence of Nance's more recent conduct indicates that he has made serious attempts to confront his anger issues and has made significant progress.

Nance, whether he took a drug screen at a later date, or why Nance did not take these screens.

On the other hand, the DCS introduced substantial evidence regarding the danger posed to K.N. and P.N. by Nance's relationship with Smith. The DCS caseworker testified that she repeatedly discussed with Nance the danger Smith posed to the children, and that he could never leave the children alone with Smith. At the hearing, the DCS indicated that its "main reason . . . for termination is that the relation of [Smith] and . . . that [Smith] is an unfit person to take care of these children. [Nance] works ten hours a day and the children are in Diane Smith's care, that's the problem." Tr. at 41.

The danger Smith poses to the children appears to be twofold. First, she is apparently unable to care for children without the assistance of others. Evidence indicated that Smith is unable to tell time, cannot tell when children need to be fed or changed, and is unable to protect children from others. The DCS caseworker testified that "[t]hree of her four older kids were sexually abused by her brother and she was not aware that this type of touch or fondling was inappropriate for kids of that age." Tr. at 20. Additionally, and perhaps more importantly, is Smith's "lack of discretion of who she allowed into the home and the danger they caused to her children. . . . [Smith] would allow people into the home and she doesn't understand the danger they pose." Tr. at 44. The DCS introduced evidence relating to Smith's choice in partners, several of whom are currently in jail for sexual or violent offenses.

Although the DCS may not have introduced sufficient evidence to demonstrate that Nance, on his own, was not a fit parent,[12] a trial court can properly consider the character and

[12] We recognize that the DCS introduced evidence regarding Nance's marijuana use and his anger management issues. However, the DCS admitted that the primary reason they were seeking to terminate Nance's parental rights was the danger his relationship with Smith posed to the children.

behavior of others who will be a substantial part of the children's life if the parent-child relationship continues. See McBride, 798 N.E.2d at 202 (considering evidence that mother maintained contact with an abusive partner after child services recommended that she cease contact); In re D.G., 702 N.E.2d 777, 781 (Ind. Ct. App. 1998) (noting that the trial court considered the parent's choice of partners as a reason for termination and examining the danger posed to the child by the parent's current partner).

Nance testified that he understands the danger Smith poses to his children, and claims to have made arrangements to ensure that they will not be left alone with her. However, the trial court also had before it evidence that Nance has habitually lied about or minimized his relationship with Smith to the DCS. The CASA testified that Nance

> told us again and again that he has separated from her. He was getting his own place that they weren't together and this was even after the marriage. He told us that they weren't married for a long time and then he told us they were and [he was] getting a divorce. He kept telling us things that weren't true. He kept saying he wasn't going to be in her life and that she wasn't going to be in his life. That he wanted his children more than he wanted Diane. He didn't understand that she's a danger to children. She cannot be around children. She cannot be a part of his life and have the children.

Tr. at 45. Additionally, the DCS introduced Nance's psychological examination, which indicated that Nance's "siblings know about his plan to raise all six[13] children and they are supportive. [Nance] says 'they all want to help, but they don't want [Smith] around. If she's around they're not gonna want to help.'" Appellant's App. at 23. It was within the trial court's province to disbelieve Nance's claim that he would be able to ensure that K.N. and P.N. were not left alone in Smith's care. We conclude that Nance's relationship with Smith,

[13] Nance has four children that were not part of the instant proceedings.

along with the evidence regarding Nance's marijuana use and anger management issues, constitutes a sufficient factual basis from which the trial court could infer that a reasonable probability exists that the conditions that led to the children's removal will not be remedied.

B. Best Interests of the Children

When determining whether termination is in children's best interests, a trial court should look to the totality of the evidence. In re J.W., 779 N.E.2d at 962. In making this determination, the trial court should subordinate parents' interests to those of the children. Id. "[T]he trial court need not wait until the child is irreversibly influenced such that his or her physical, mental and social growth is permanently impaired before terminating the parent-child relationship." Id.

Again, because of the lack of specific findings or elaboration in the trial court's order, we do not know upon what evidence the trial court relied when reaching its conclusion that termination was in the children's best interests. However, evidence was introduced that K.N. and P.N. had formed a strong and positive relationship with their foster parents, and that these parents planned to adopt them. See In re Involuntary Termination of Parent Child Relationship of A.H., 832 N.E.2d 563, 571 (Ind. Ct. App. 2005); M.H.C. v. Hill, 750 N.E.2d 872, 878-79 (Ind. Ct. App. 2001) (identifying trial court's finding that children had been in another's care and had developed a relationship with that person's children as support for trial court's finding that termination was in child's best interests). Also, the CASA and the DCS caseworker both indicated that termination would be in the children's best interests. Cf. In re R.J., 829 N.E.2d 1032, 1038-39 (Ind. Ct. App. 2005) (noting that recommendations of DCS caseworkers are not alone a basis for termination of parental rights, but that such

recommendations are factors for the trial court to consider). As discussed above, Nance continues to have a relationship with Smith, whom Nance admits poses a danger to his children. We conclude that sufficient evidence supports the trial court's finding that termination is in the children's best interests.

The result of this case is somewhat troubling, as substantial evidence was introduced indicating that Nance attempted to be a good parent, and that he had made significant progress in dealing with his anger management issues. Also, Nance has consistently maintained employment and adequate housing, and clearly has a genuine desire to maintain his relationship with K.N. and P.N. Although the record demonstrates past problems with anger and marijuana use, we emphasize that a parent's fitness is to be judged at the time of the hearing, and that changes in a parent's behavior should be taken into consideration. Also troubling is the manner in which the DCS stopped Nance's visitation upon the filing of the petition for termination, even though the caseworker testified that visitation was going well and was unsupervised at the time it was ended. We remind the DCS that it "shall make reasonable efforts to preserve and reunify families[,] [i]f a child has been removed from the child's home, to make it possible for the child to return safely to the child's home as soon as possible."[14] Ind. Code § 31-34-21-5.5. We find it somewhat counterintuitive that visitation that was admittedly going well should be terminated. However, we also recognize the concerns the DCS had with Nance's relationship with Smith, and the danger it posed to the children. Apparently, there came a point at which the DCS became convinced that Nance was not going to end his relationship with her, or ensure that she be supervised when with the children, and that thus reunification would not be a viable option.

This is indeed a close case, and were we making an original determination, we might

[14] We recognize that the DCS's compliance with this statutory provision is not an element of the termination of parental rights statute, and that a termination order may be affirmed even when the DCS completely fails to offer services. Cf. In re E.E., 736 N.E.2d 791, 796 (Ind. Ct. App. 2000) ("[T]he 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

very well find that the requisite elements for termination were not met. However, we are not making such a determination, and must decide only if the trial court's judgment is clearly erroneous and unsupported by any evidence or inferences therein. Without reweighing the evidence, the combination of Nance's drug use, albeit it far from the most serious case we have seen, pattern of issues with anger management, albeit a pattern that Nance has admirably attempted to reverse, and relationship with Smith, about which he repeatedly lied to the DCS, makes it impossible for us to say the trial court's decision was clearly erroneous. Therefore, we must affirm the trial court's termination of Nance's parental rights.

Conclusion

We conclude that sufficient evidence supports the trial court's findings that a reasonable probability exists that the conditions that led to the children's removal will not be remedied and that termination of the parent child relationship is in the children's best interests. These findings, along with the findings that the children have been removed from Nance's care for over six months and that the DCS has a satisfactory plan in place for the children supports the trial court's judgment terminating Nance's parental rights.

Affirmed.

VAIDIK, J., concurs.

SULLIVAN, SR. J., dissents.

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and require reversal.").