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**IN THE
COURT OF APPEALS OF INDIANA**

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

G.H., T.H. & B.H. (Minor Children),)

AND)

I.H. (Father),)

Appellant-Respondent,)

vs.)

No. 66A01-1102-JT-40

INDIANA DEPARTMENT OF)
CHILD SERVICES,)

Appellee-Petitioner.)

APPEAL FROM THE PULASKI CIRCUIT COURT
The Honorable Michael A. Shurn, Judge
Cause Nos. 66C01-1010-JT-2; 66C01-1010-JT-3; & 66C01-1010-JT-4

October 11, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Respondent, I.H. (Father), appeals the trial court's termination of his parental rights to his minor children, G.H., T.H., and B.H.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 Father's rights to his minor children, G.H., T.H., and B.H.

FACTS AND PROCEDURAL HISTORY

Father and S.C. (Mother) are the parents of three minor children, G.H., born March 9, 2004; T.H., born June 30, 2005; and B.H., born September 26, 2007. Father, Mother, and all three children lived together until early 2009, when Father was convicted of burglary and incarcerated. At the time, Father also had additional prior convictions for burglary, dealing in a controlled substance and theft, as well as a federal conviction for being a felon in possession of a firearm.

The Department of Child Services (DCS) became involved with the children on June 20, 2009, when police officers found B.H. wandering the streets with a bump on his head and a bruise on his face. At that time, the children were staying with their paternal grandparents

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

in Indianapolis because Father was incarcerated and Mother did not have stable housing. Mother also tested positive for methamphetamines at the detention center.

After finding B.H. wandering the streets, DCS determined that the paternal grandparents were not properly providing for the children's care and supervision and removed all three minor children from their home. On June 20, 2009, DCS filed petitions alleging that each child was a child in need of services (CHINS). Father entered an admission to the CHINS allegations, and on November 2, 2009, the trial court conducted an initial hearing on the petitions. At the conclusion of the hearing, the trial court adjudicated the children to be CHINS.

Subsequently, on November 23, 2009, the trial court entered its Dispositional Order whereby it continued the children's placement in foster care. The trial court did not order Father to participate in any services offered by DCS due to Father's incarceration; DCS, did, though, allow Father the opportunity to communicate with his children through letters and cards. At the time of the subsequent termination hearing, which took place almost one year later, Father had only sent his children two sets of cards.

On October 8, 2010, DCS filed verified petitions for the termination of Father's parent-child relationship with each of his three children. On October 26, 2010, the trial court conducted an initial hearing on the termination petitions. Then, on November 12, 2010, the trial court entered Orders approving permanency plans for all three children. The plans stated that "[Father] is not in compliance with the plan as follows: [h]e has been incarcerated and will be incarcerated for at least the next several years and unable to participate in

services or to care for the children.” (Appellant’s App. pp. 43, 45, and 47).

On January 24, 2011, the trial court conducted a fact finding hearing on the petitions for involuntary termination of the parent-child relationship, and on February 3, 2011, the trial court entered its Order terminating Father’s parental rights. In its Order, the trial court found that “[t]here is no evidence in this case that [Father] has taken any initiative or any steps while this case has been pending to successfully participate in any services while incarcerated that would enhance his ability to care for the children. Additionally, he has failed to maintain contact with the children on a regular basis.” (Appellant’s App. p. 26).

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

DISCUSSION AND DECISION

On appeal, Father argues that DCS did not present sufficient evidence to terminate his parental rights towards his children. Specifically, he asserts that DCS offered almost no evidence regarding his parenting abilities, except evidence of the fact that he is currently incarcerated and is likely to remain incarcerated for several years in the future. He also maintains that DCS never ordered him to complete any services in order to improve his parenting skills.

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 child 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 unique 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 both the trial court's findings of fact and its conclusions of law, so we will address each of those issues separately.

I. *Findings of Fact*

With respect to the trial court's findings of fact, Father argues that there was insufficient evidence to support the trial court's findings that he would remain incarcerated for another five years, did not communicate with his children, and failed to participate in services. Finding of fact number 8 addresses two of these issues. It states:

Father testified that he would be incarcerated for at least another 36 months, and [Family Case Manager (FCM)] Salyers testified that he would be serving 5

years on a federal weapons charge. Although [F]ather had some contact with the children while they were placed with paternal grandfather, he has not had consistent contact with them in over a year.

(Appellant's App. p. 22). Father notes that FCM Salyers testified she "believe[d]" Father had five years to serve in federal prison; according to Father, this testimony does not support the trial court's finding that he still has five years to serve because DCS did not offer any evidence of his actual release dates or sentencing order. Also, Father alleges he did maintain contact with his children. He points to FCM Salyer's testimony that he sent two sets of cards to his children while in prison in Westville, that he saw his children while in the Pulaski County Jail, and that he had made a couple of phone calls to see how his children were doing.

Father's third argument relates to the trial court's finding that he did not participate in services. Father contends that the trial court should not have found that he did not participate in any services because the trial court did not order him to do so and did not determine whether any services were available to him in prison.

As stated above, we will only reverse a trial court's findings if they are clearly erroneous. *In re J.H.*, 911 N.E.2d at 73. We cannot conclude that these findings are clearly erroneous because they are supported by sufficient evidence in the record. FCM Salyers stated that she believed Father had five years to serve in federal prison, and Father did not introduce any evidence to contradict that testimony. With respect to Father's communication, Father, in effect, asks us to revise the weight the trial court gave to his two sets of cards and two phone calls, which we cannot do on appeal. *Id.* In regards to Father's lack of participation in services, we characterize his contention as a challenge to the appropriateness

of the finding rather than its validity. Our mandate on appeal is to determine whether evidence supports the findings, not whether the findings are appropriate. *Id.* Since Father does not dispute the factual validity of his lack of participation in services, we find his argument to be without merit.

II. *Conclusions of Law*

Next, Father challenges the trial court's conclusions of law terminating his parental rights. 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 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. . . .²

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

² This is not an exhaustive list of the evidentiary requirements necessary to terminate a parent's parental rights, but these are the provisions at issue in the instant case.

sufficient to show that the child's emotional and physical development are threatened by the parent's custody. *Id.*

According to Father, DCS did not present clear and convincing evidence that the conditions that resulted in the children being removed from his home will not be remedied or that he poses a threat to the children's well-being. Also, Father mentions that the termination of his parental rights is not in the children's best interests, but he does not develop that argument in the argument section of his brief. We find that the trial court did not err in concluding that the conditions that resulted in the children being removed from the home would not be remedied, so we will not address the issue of whether Father poses a threat to the children's well-being. We will, however, address the issue of the best interests of the children, because even though Father does not develop his arguments in that respect, we recognize the importance of the issue.

A. *Remedy of Conditions*

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 N.E.2d 615, 621 (Ind. Ct. App. 2006). The 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 court based its decision to terminate Father’s parental rights on Father’s past, current and future incarceration; his failure to have consistent and regular contact with the children; his failure to participate in any programs or services while incarcerated; his inability to care for the children at the time of the termination evidentiary hearing; and his criminal history. Based on these factors, we conclude that the trial court had sufficient evidence to find that the current conditions would not be remedied.

It is true that Father will likely be released from incarceration in five years, and the current conditions might be remedied at that point, but we recognize that the trial court was required to examine Father’s conduct at the time of the termination hearing. *See Rowlett*, 841 N.E.2d at 621. At the time of the hearing, Father still had a substantial period of incarceration ahead of him. In a similar case, *Castro*, we held that a parent could not remedy the conditions leading to his child’s removal within a “meaningful” timeframe if that parent had six years of incarceration still to serve. *Castro v. State Office of Family and Children*, 842 N.E.2d 367, 374 (Ind. Ct. App. 2006).

Instead of *Castro*, Father points to *G.Y.*, in which our supreme court held that it was not proper to terminate a mother’s parental rights when she had made reasonable efforts to

improve herself during her imprisonment and was going to be released in a reasonable amount of time. *In re G.Y.*, 904 N.E.2d 1257 (Ind. 2009). However, we note several distinguishing factors between *G.Y.* and the instant case. There, the parent's release from incarceration was "imminent." *Id.* at 1265. Also, the parent had gotten her college degree while in prison, had maintained regular visitation with G.Y., and had created a post-incarceration housing and employment plan. *Id.* Here, Father's release is not imminent, he did not participate in any services while incarcerated, and there is no evidence that his children's current condition will be remedied upon his release from prison.

Instead, Father has multiple prior convictions. We have noted in other cases that "[i]ndividuals who pursue criminal activit[ies] run the risk of being denied the opportunity to develop positive and meaningful relationships with their children." *Castro*, 842 N.E.2d at 374. The trial court also found that Father had not maintained consistent contact with his children. We have previously held that the failure to exercise the right to visit the children demonstrates a lack of commitment to complete the actions necessary to preserve the parent-child relationship. *See In re G.H.*, 906 N.E.2d 248, 253 (Ind. Ct. App. 2009). Based on these factors, we conclude that the trial court did not err in concluding that there was a reasonable possibility that Father would not remedy the children's current condition.

B. *Best Interests of the Children*

Finally, we will address the issue of whether termination of Father's parental rights is in the best interests of the children. In determining what is in the best interests of the children, 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 parents to those of the children 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 the children are irreversibly influenced such that their 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 requiring the children to wait an additional five years for their father to be released from incarceration would deprive them of a stable, permanent home for a meaningful time period. FCM Salyers testified at trial that the children are benefiting from structure in their foster home and need such stability and permanence to thrive. At the time of their detention, G.H. and T.H. each had speech problems but have made significant improvements in their speech since moving to a foster home. As a result, we decide that the trial court did not err in concluding that the termination of Father's parental rights was in the children's best interests.

CONCLUSION

Based on the foregoing, we conclude that the DCS provided sufficient evidence for the termination of Father's parental rights to his minor children, G.H., T.H., and B.H.

Affirmed.

NAJAM, J. and BAILEY, J. concur