

# Children's Law Center of Indiana



## Termination of the Parent-Child Relationship

3/7/14

In **In Re E.M.**, 4 N.E.3d 636 (Ind. 2014), the Supreme Court, considering only the evidence favorable to the judgment, respected the trial court's conclusion that Father's efforts were both too little in view of his violence and early pattern of hostility toward services, and too late in view of the children's urgent need for permanency. *Id.* at 640. The Court deferred to the trial court and affirmed its termination judgment. *Id.* In late 2008, Father's two children, who were barely one year old and in early infancy, were adjudicated CHINS based on reports of Father's repeated domestic violence against Mother. (The children's five older half-siblings, who are not Father's children, were also adjudicated CHINS, but are not involved in this appeal.) The children were initially allowed to remain in the home on the condition that Father stay away, but were removed a few months later after Father violated that condition. In addition to the order to stay away from the home, the CHINS dispositional order required Father to establish the paternity of his two children; to undergo a psychological evaluation and counseling for domestic violence, anger management, and parenting; and to have supervised visits with his children. Father's only efforts to comply with the dispositional order were to attend two domestic violence counseling sessions and a single visit with the children after their removal from home. Father was hostile and verbally abusive to service providers, and he denied that any domestic violence had occurred, even though police identified him as the aggressor in a March 2009 incident shortly after the children's removal, where he admittedly bit Mother's face and Mother stabbed him in the abdomen. Father failed to appear for all but the first two CHINS hearings, then dropped out of contact with DCS. DCS discontinued services to Father in mid-2009. Unbeknownst to DCS, Father was incarcerated in Illinois for a felony firearm conviction beginning in September 2009.

By mid-2010, Mother had fallen out of compliance with services and the children had been removed from the home for more than fifteen of the previous twenty-two months. DCS therefore petitioned to terminate Mother's and Father's parental rights, and adoption by relatives became an alternative permanency plan. By early spring 2011, the children and two of their half-siblings had been placed with their maternal grandmother, who planned to adopt them. Immediately after his release from prison in January 2012, Father contacted DCS, informed them of his incarceration, and asked to resume his visitation with the children. DCS did not permit any visits because the visitation order had been conditioned on Father's participation in court-ordered services, which he had abandoned. Father had completed parenting and anger-management classes while he was in prison. Father also resumed attendance at hearings. DCS continued to

pursue termination. Adoption by the children’s maternal grandmother had long since become the sole permanency plan.

At the termination trial, the witnesses for DCS and the Court Appointed Special Advocate unequivocally recommended terminating Father’s parental rights. Witnesses explained that: (1) the children’s older half-siblings had post-traumatic stress disorder (PTSD) and were afraid of Father due to the domestic violence they had witnessed; (2) there had never been any bonding between Father and his children; (3) the children had been removed from the home for nearly three and a half years and were thriving in their placement with the maternal grandmother; and (4) it would be unfair to the children “to wait around for [the] parents to get on board” with reunification. *Id.* at 641. The trial court found, inter alia, that Father’s violence towards Mother had also “abused” the children; that Father had “denied all services offered”; Father had not “completed any counseling or therapy”; and Father “continu[ed] to deny that he has issues with domestic violence.” *Id.* at 644. The trial court terminated Father’s rights, and he appealed. The Court of Appeals reversed the trial court’s order in an unpublished memorandum decision. The Supreme Court granted transfer, vacated the Court of Appeals opinion, and concluded that the Court of Appeals majority had contravened the standard of review by reweighing the evidence. *Id.* at 641.

**The Court opined that its review must “give ‘due regard’ to the trial court’s opportunity to judge the credibility of the witnesses first-hand,” and “not set aside [its] findings or judgment unless clearly erroneous.”** *Id.* at 642, quoting *K.T.K. v. Indiana Dept. of Child Servs.*, 989 N.E.2d 1225, 1229 (Ind. 2013). The Court explained that, when seeking to terminate parental rights, DCS must prove its case by “clear and convincing evidence,” a “heightened burden of proof” reflecting termination’s “serious social consequences.” *E.M.* at 642, quoting *In Re G.Y.*, 904 N.E.2d 1257, 1260-61 and n.1. (Ind. 2009). The Court observed that weighing the evidence under that heightened standard is the trial court’s prerogative in contrast to the Court’s well-settled highly deferential standard of review. *E.M.* at 642. The Court opined that reviewing whether the evidence “clearly and convincingly” supports the findings, or the findings “clearly and convincingly” support the judgment is not a license to reweigh the evidence. *Id.*

**The Court found that the evidence supported the trial court’s findings and the findings supported the trial court’s judgment that there was a reasonable probability that the conditions that resulted in the children’s removal would not be remedied.** *Id.* at 642-43. The Court explained that, in determining whether “the conditions that resulted in the child[ren]’s removal... will not be remedied,” the Court “engages in a two-step analysis” *E.M.* at 642-43, quoting *K.T.K. v. Indiana Dept. of Child Servs.*, 989 N.E.2d 1225, 1231 (Ind. 2013). The Court first identifies the conditions that led to removal; and second the Court “determine[s] whether there is a reasonable probability that those conditions will not be remedied.” *E.M.* at 643, quoting *K.T.K.* at 1231. The Court, quoting *Bester v. Lake Cty. Office of Family & Children*, 839 N.E.2d 143, 152 (Ind. 2005), observed that in the second step, the trial court must judge a parent’s fitness “as of the time of the termination proceeding, taking into consideration evidence of changed conditions.” *E.M.* at 643. The Court noted that requiring trial courts to give due regard to changed conditions does not preclude them from finding that parents’ past behavior is the best predictor of their future behavior. *E.M.* at 643.

The Court discussed whether the record sufficiently supported these four findings by the trial court: (1) Father's abuse of the children; (2) Father's denial of all services offered; (3) Father's continued denial of issues with domestic violence; and (4) Father's failure to complete any counseling or therapy. *Id.* at 644-46. The Court opined that, "based on the older half-siblings' PTSD diagnoses and the younger children's even greater vulnerability to psychological harm, the trial court was within its discretion to find that Father's violence against Mother had also abused the children." *Id.* at 645. The Court held that the trial court's finding that Father "denied all services offered" was also proper. *Id.* With regard to denial of services, the Court found it to be clear in context that the court was referring only to Father's *pre-incarceration* refusal of services, which Father did not substantially dispute (emphasis in opinion). *Id.* The Court opined that the trial court had ample record basis for Father's continued denial of his issues with domestic violence, noting that Father unequivocally testified that his problem was only anger, not violence. *Id.* The Court held that the trial court's finding that Father "has not completed any counseling or therapy" was technically correct, albeit of limited probative value. *Id.* at 646. The Court observed that the only evidence of Father "completing" anything like "counseling or therapy" was a "Certificate of Participation" in a "Parenting Education Program" about which Father presented no additional information, and Father's testimony that he had also completed anger management while incarcerated. *Id.* The Court held that, with no evidence about the substance of the parenting program, the trial court was not required to consider it a form of counseling or therapy; nor was it obligated to credit Father's testimony about anger management. *Id.*

**Concluding that the children's need for permanency was paramount, the Court found that it was not clearly erroneous for the trial court to conclude that, after three and half years, Father's efforts simply came too late.** *Id.* at 649. Quoting *K.T.K. v. Indiana Dept. of Child Servs.*, 989 N.E.2d 1225, 1235, the Court said that, simply stated, children cannot wait indefinitely for their parents to work toward preservation or reunification, and trial courts "need not wait until the child is irreversibly harmed such that the child's physical, mental, and social development is permanently impaired before terminating the parent-child relationship." *E.M.* at 648. The Court noted the following evidence in support of the trial court's decision that termination was in the children's best interests: (1) the children had been removed since the older child was barely a year old and the younger child was in early infancy; (2) the children had lived and bonded with their maternal grandmother for nearly a year and a half; (3) the children had never bonded with Father; (4) Father was still not ready to parent the children, and would likely need additional services in regard to parenting, domestic violence, and anger management. *Id.* The Court recognized that Father's incarceration played a substantial role in the lengthy delay and his failure to bond with the children, but opined that incarceration alone cannot justify "tolling" a child welfare case, as Father sought to do. *Id.* at 649. The Court found that Father had nearly a year before incarceration to engage in services and bond with his children but failed to do so. *Id.* The Court observed that, even after his apparent change of heart in prison, Father could have notified DCS of his imprisonment, requested services, sent progress reports from his prison programs, and made some effort to communicate with the children by sending cards, or short letters to them or telephoning them. *Id.*