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**IN THE  
COURT OF APPEALS OF INDIANA**

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IN THE MATTER OF THE INVOLUNTARY )  
TERMINATION OF THE PARENT-CHILD )  
RELATIONSHIP OF C.K., J.K., M.K., S.K., and )  
L.K., MINOR CHILDREN, AND THEIR )  
MOTHER, LATASHA KIRKSEY AND THE )  
ALLEGED FATHER OF J.K., MICHAEL )  
BRASHER, AND THE ALLEGED FATHER OF )  
L.K., ANTHONY McNARY )

ANTHONY McNARY and LATASHA McNARY, )  
f/k/a LATASHA KIRKSEY )  
Appellants-Respondents, )

vs. )

MARION COUNTY DEPARTMENT OF )  
CHILD SERVICES, )  
Appellee, )

CHILD ADVOCATES, INC., )  
Appellee (Guardian ad Litem). )

No. 49A02-0605-JV-376

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APPEAL FROM THE MARION SUPERIOR COURT  
PROBATE DIVISION  
The Honorable Deborah Shook, Commissioner  
The Honorable Cale J. Bradford, Special Judge  
Cause No. 49D09-0502-JT-4886

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**April 4, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**SULLIVAN, Judge**

In this consolidated appeal, Appellant LaTasha McNary, formerly known as LaTasha Kirksey (“Mother”), challenges the trial court’s decision to terminate her parental rights to her children C.K., J.K., M.K., S.K, and L.K, and Appellant Anthony McNary (“McNary”) challenges the trial court’s decision to terminate his parental rights to his child L.K. Upon appeal, Mother presents one issue for our review, which we restate as whether the evidence was sufficient to support the trial court’s decision.

McNary presents four issues for our review, which we restate as:

- (1) whether McNary was denied due process of law when the trial court based, in part, its decision to terminate McNary’s parental rights upon McNary’s failure to establish paternity over L.K., but McNary did establish paternity after the termination hearing but before the termination order;
- (2) whether the termination of McNary’s parental rights constituted cruel and unusual punishment;
- (3) whether the trial court erred in its “characterization” of the facts and in failing to recognize evidence favorable to McNary; and
- (4) whether the trial court’s decision was supported by sufficient evidence.

We affirm.

The record reveals that C.K. was born on May 29, 1994, J.K. was born on May 2, 1998, M.K. was born on March 28, 2000, S.K. was born on March 8, 2002, and L.K. was born on May 10, 2004. McNary was alleged to be the father of L.K.<sup>1</sup> (Exh. p. 18). On January 9, 2004, the Marion County Office of Family and Children (“OFC”)<sup>2</sup> filed a petition alleging that C.K., J.K., M.K., and S.K. were children in need of services (“CHINS”). The OFC alleged that for eight years, C.K. had not been in Mother’s care but instead had been in the care of an individual who did not have legal responsibility for C.K. Indeed, the evidence revealed that C.K. had been left in the care of his great aunt, a friend of Mother. The petition further alleged that J.K., M.K., and S.K. had been left in the care of their great-grandmother, who was mentally ill, and that Mother was frequently absent, left no contact information, and did not ensure that the children had the necessary food, diapers, or medical care while she was away. Indeed, while in the care of the great-grandmother, M.K. swallowed a whole bottle of his anti-seizure medication and had to be rushed to the hospital.

On January 28, 2004, the trial court entered an order noting that Mother had admitted to the allegations in the CHINS petition, finding C.K., J.K., M.K., and S.K. to be CHINS, and ultimately ordering the children to be removed from Mother’s care.

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<sup>1</sup> Michael Brasher was the alleged father of J.K. and M.K. and an alleged father of S.K., Gregory Hayes was also an alleged father of S.K., and Albert Hall was C.K.’s alleged father. Mr. Brasher appeared before the trial court, but he and the other alleged fathers have not made an appearance in this court.

<sup>2</sup> The Marion County Office of Family and Children has since been re-dubbed the Marion County Department of Child Services (“MCDCS”).

On May 10, 2004, Mother gave birth to L.K. Mother used cocaine while she was pregnant with L.K., and the newborn tested positive for cocaine at birth. Mother tested positive for both opiates and cocaine at the time of L.K.'s birth. Based upon this, on May 13, 2004, the OFC filed a petition alleging that L.K. was a CHINS. The petition alleged that McNary was the father of L.K. and that paternity of the child had not yet been established. After an initial hearing held on the day the petition was filed, both Mother and McNary admitted to the allegations, and the trial court determined L.K. to be a CHINS. The trial court also scheduled a dispositional hearing to be held on June 15, 2004. At the dispositional hearing held on June 15, both Mother and McNary failed to appear, and the trial court ordered their supervised visitation suspended until they appeared in court. Still, the permanency plan for L.K. at this time was reunification with the parents.

Both Mother and McNary were ordered to complete services to help remedy the reasons for the children's removal. They completed a parenting assessment and a drug and alcohol assessment. Although both parents completed some sort of drug treatment as well, Mother tested positive for cocaine after completion of the drug program and was required to go through another treatment program.

Mother and McNary had an "on again off again" relationship. In November of 2003, Mother was arrested for battery against McNary and was ultimately convicted. As a result of her conviction, a no-contact protective order was issued against Mother to keep her away from McNary. When Mother and McNary married in July of 2005, Mother was in violation of this order. In July of 2005, Mother was convicted of Welfare

Fraud as a Class C felony and sentenced to a four-year suspended sentence. While on probation, Mother tested positive for cocaine, which was a violation of the terms of her home detention. At that time, Mother and McNary were living together. As of the last termination hearing date, Mother was incarcerated.

McNary attended a drug treatment program in August 2005. After a full assessment, McNary was diagnosed with alcohol and cannabis abuse, in remission, and was placed in a twelve-week outpatient program. McNary attended the first six sessions, but missed the next five. McNary ultimately did complete the outpatient program shortly before the final hearing date, but was “sporadic” with his urine screens. McNary was also ordered to establish paternity over L.K., but as of the last day of trial had not yet done so despite being repeatedly informed by his case manager how to establish paternity. It is important to the OFC that an alleged father establish paternity because, until this is done, there is no legal relationship and a child cannot be placed with the alleged father.

Neither Mother nor McNary completed a home-based counseling program because such programs are offered to a parent only after all other services have been completed, and McNary, as of the last hearing date, had not established paternity as required, and Mother had relapsed into cocaine use and thus had to complete another drug treatment program.

With regard to the children, C.K., the oldest, had been living in a foster home since he was approximately five months old. S.K. had only stayed with Mother on weekends. S.K., J.K., and L.K. were all placed in the same foster home. M.K. was at

“Daymar,”<sup>3</sup> apparently an institutional setting, and doing well enough to be transitioned into a pre-adoptive foster home.

On February 9, 2005, the OFC filed a petition requesting that Mother and McNary’s parental rights to their respective children be terminated. The trial court held hearings upon the petition on November 10, 2005 and February 17, 2006. On March 23, 2006, the trial court entered findings of fact and conclusions of law with respect to Mother and McNary, terminating their parental rights. On the same day that the trial court entered its findings and conclusions, McNary submitted a “notice” to the trial court informing it that McNary had established paternity of L.K. on February 21, 2006 in an action in Marion County Circuit Court under cause number 49C01-0406-JP-1688, with an attached copy of the paternity order. McNary filed a notice of appeal on April 6, 2006, and Mother filed a notice of appeal on April 19, 2006.

Upon appeal, both Mother and McNary challenge the termination of their parental rights. According to Indiana Code § 31-35-2-4(b)(2) (Burns Code Ed. Repl. 2003), to involuntarily terminate a parent-child relationship, the OFC must establish the following elements:

“(A) . . .

- (i) the child has been removed from the parent for at least six (6) months under a dispositional decree;
- (ii) a court has entered a finding under IC 31-34-21-5.6 that reasonable efforts for family preservation or reunification are not required, including a description of the court’s finding, the

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<sup>3</sup> This is apparently a reference to Damar Services Inc., “Indiana’s oldest private not-for-profit provider of residential services to children with developmental disabilities . . . .” <<http://www.damar.org/category/about>> (last visited March 19, 2007).

- date of the finding, and the manner in which the finding was made; or
- (iii) after July 1, 1999, the child has been removed from the parent and has been under the supervision of a county office of family and children for at least fifteen (15) months of the most recent twenty-two (22) months;
- (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 interests of the child; and
- (D) there is a satisfactory plan for the care and treatment of the child.”

These elements must be proved by clear and convincing evidence. Ind. Code § 31-34-12-2 (Burns Code Ed. Repl. 2003). Furthermore, as we noted in Rowlett v. Vanderburgh County Office of Family and Children, 841 N.E.2d 615, 620 (Ind. Ct. App. 2006), trans. denied:

“This court has long had a highly deferential standard of review in cases concerning termination of parental rights. Parental rights are of a constitutional dimension, but the law provides for the termination of those rights when the parents are unable or unwilling to meet their parental responsibilities. We will not set aside the trial court's judgment terminating parental rights unless it is clearly erroneous. We neither reweigh evidence nor judge witness credibility, and we consider only the evidence most favorable to the judgment along with reasonable inferences to be drawn therefrom.” (citations omitted).

Here, neither Mother nor McNary make any claim with regard to subsection 4(b)(2)(A). Instead, they focus their arguments upon the OFC's burden to prove the elements contained in subsections (B), (C), and (D) of Section 4(b)(2).

## Mother

Mother claims that her parental rights should not have been terminated on the grounds that she had not completed home-based counseling because the OFC has an “undisclosed” policy of not offering home-based counseling until a parent has completed all of the other required services. Mother claims that she was compliant in the rest of the required services and therefore should have been offered home-based counseling. Mother claims that the reason she was not offered home-based counseling was that McNary had not completed his required services and that she cannot be held responsible for McNary’s failings.

We first observe that the statutes concerning termination of parental rights do not require the State to offer services at all. In re B.D.J., 728 N.E.2d 195, 201 (Ind. Ct. App. 2000). Rather, while a participation plan serves as a useful tool in assisting parents in meeting their obligations, and services are typically offered to assist parents in regaining custody of their children, termination of parental rights may occur independently of them, so long as the elements of Section 4 are proved by clear and convincing evidence. Id.

Here, although Mother may have complied with some of the services offered, the drug treatment she received was obviously unsuccessful, as Mother tested positive for cocaine use while on probation and was incarcerated as a result. Despite Mother’s claims to the contrary, we do not think that it stretches the imagination to state that a Mother who used cocaine while she was pregnant and gave birth to a child who also tested positive for cocaine, and who continued to use cocaine after her children have been removed under a CHINS dispositional decree, is not a fit parent. The trial court could

reasonably conclude that, given Mother's cocaine use, the continuation of the parent-child relationship between her and her children posed a danger to the well-being of the children.

Further, Mother had never been an active part of the children's lives, leaving them in the care of others, including her mentally ill grandmother, without providing for their care. This resulted in M.K. overdosing on his seizure medication. Mother was also violent towards McNary, resulting in her conviction for battery against him. Given Mother's behavior, the trial court could conclude that either the conditions which resulted in the children's removal from her care would not be remedied or that the continuation of the parent-child relationship posed a threat to the well-being of the children. See I.C. § 31-35-2-4(b)(2)(B). The court's conclusion that termination of Mother's parental rights was in the best interests of the children is also supported by this evidence. See I.C. § 31-35-2-4(b)(2)(C).

Mother does not challenge that there was a satisfactory plan for the care and treatment of the children, but the record indicates that there was indeed a satisfactory plan. Such a plan need not be detailed, so long as it offers a general sense of the direction in which the child will be going after the parent-child relationship is terminated. In re Termination of Parent-Child Relationship of D.D., 804 N.E.2d 258, 268 (Ind. Ct. App. 2004), trans. denied. Specifically, C.K. has lived in his current foster home since he was approximately five months old and viewed one of his caretakers as his mother, calling her "mom." S.K. had lived with Mother only on weekends, staying with relatives at most other times. She, J.K., and L.K. were all eventually placed in the same foster home,

where they were “thriving.” M.K., who had mental disabilities and a seizure disorder, was at “Daymar,” where he was doing well. M.K. was ready to be transitioned into pre-adoptive foster care. Thus, the trial court was within its discretion to conclude there was a satisfactory plan for the care and treatment of the children. See In re D.D., 804 N.E.2d at 268 (finding a satisfactory plan for the care and treatment of child after termination of parental rights where plan was for child to be adopted, either by his current foster family, which was interested in adoption but not yet ready to make a final decision, or with another family). In short, we can say that the trial court did not err in terminating Mother’s parental rights.

### McNary

McNary’s claims, although worded slightly more elaborately, are effectively a multi-faceted attack on the sufficiency of the evidence supporting the trial court’s decision to terminate his parental rights to L.K. Nevertheless, we address each of McNary’s arguments in turn.

### I

#### Establishing Paternity

McNary claims that his rights to due process and equal protection were violated when the trial court based its decision to terminate McNary’s parental rights, in part, on the fact that he had failed to establish paternity of L.K. when there is evidence that McNary did eventually establish paternity, albeit after the date of the final termination hearing but before the termination order was entered. The OFC admits that McNary did eventually establish paternity, but claims that McNary cannot refer to this upon appeal

because McNary did not present any evidence of paternity at the evidentiary hearing. Citing In re A.M., 596 N.E.2d 236 (Ind. Ct. App. 1992), trans. denied, the OFC claims that evidence submitted after the date of the evidentiary hearing should be ignored. However, the court in In re A.M. did not say that the trial court could not consider the evidence submitted after the termination hearing; it simply held that the failure to consider such evidence was not reversible error given the circumstances of that case. See id. at 239.

Here, McNary did submit, albeit after the evidentiary hearing, a certified copy of the judgment establishing McNary's paternity over L.K. Further, the cause number of the paternity action, 49C01-0406-JP-1688, does indicate that the paternity action was filed in June of 2004. Nevertheless, McNary did not bring the existence of this pending action to the attention of the trial court during the termination hearings. He also waited until the date that the trial court entered its termination order before bringing this to the attention of the trial court. McNary may not successfully claim that the trial court failed to discover matters which he himself failed to bring to the court's attention. Furthermore, McNary was ordered to establish paternity in June of 2004, yet paternity was not actually established until February 21, 2006—over a year and a half later. Yet McNary offers no reason for this delay.<sup>4</sup> We certainly cannot fault the trial court for failing to consider evidence which McNary did not present at the hearing.<sup>5</sup> Even if the trial court should

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<sup>4</sup> Without further explanation, McNary merely claims that his delay in establishing paternity was “procedural in nature.” McNary's Br. at 26.

<sup>5</sup> In arguing that the OFC, or even the guardian ad litem, should for some reason have sought to establish McNary's paternity over L.K., McNary acknowledges the relative simplicity with which

have considered the evidence which McNary did not submit until the day the termination order was entered, McNary's unexplained delay in establishing paternity, combined with the remaining evidence, support the trial court's decision to terminate McNary's parental rights.

To the extent that McNary claims that it was somehow a violation of his rights to equal protection<sup>6</sup> to require him to establish paternity, we find such claim to be without merit. First, as McNary recognizes, he made no objection at the trial court level based upon a violation of his constitutional rights. To avoid the usual consequence of this, i.e. forfeiture of the issue, McNary claims the trial court committed fundamental error.<sup>7</sup>

McNary claims that the State, via the OFC and the trial court's actions, treated him, as an alleged father, differently than it treats those not alleged to be the father. McNary claims that his parental rights were terminated because he had not, at the time of the hearing, established paternity.<sup>8</sup> Specifically, McNary claims that because he had not yet established paternity, the OFC denied him the opportunity to participate in home-

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paternity can be established. Pursuant to Indiana Code § 31-14-2-1 (Burns Code Ed. Repl. 2003), a man's paternity can be established by only two means: (1) a paternity action brought under Title 31, Article 14, which is the method pursued by McNary in the present case, or (2) by executing a paternity affidavit pursuant to Indiana Code § 16-37-2-2.1. McNary's claim that the OFC could have somehow easily forced or facilitated his establishment of paternity underscores the unexplained delay in McNary himself establishing paternity over L.K. Indeed, McNary points to no authority at all in his claim that the OFC should have, for some reason, done what he did not do until the very last second before his parental rights were terminated.

<sup>6</sup> Although McNary briefly mentions Article 1, Section 14 of the Indiana Constitution, he provides no separate argument as to how this section is implicated. We therefore do not address the argument involving the Indiana Constitution. Even if we did, as explained, *infra*, the State's treatment of McNary, to the extent that it was different than the treatment afforded to others, is wholly justifiable.

<sup>7</sup> The fundamental error doctrine is applicable in termination cases. S.M. v. Elkhart County Office of Family and Children, 706 N.E.2d 596, 599 n.3 (Ind. Ct. App. 1999).

<sup>8</sup> The irony is not lost on us that, in a sense, McNary had no parental rights to terminate before he established paternity.

based counseling, and that because he did not complete home-based counseling, he did not complete all the required services and his parental rights were therefore terminated. Thus, McNary claims that if he had not been required to establish paternity, he could have participated in home-based counseling, been more compliant with the services offered by the OFC, and his parental rights would therefore not have been terminated.

We see no error in the OFC requiring that McNary establish paternity before it offered further services. Establishing paternity is a basic step toward showing a desire to maintain a relationship with L.K. See In re Involuntary Termination of Parent-Child Relationship of S.M., 840 N.E.2d 865, 870 (Ind. Ct. App. 2006) (considering alleged father's failure to establish paternity as supporting trial court's decision to terminate parental rights). Additionally, the only service not offered to McNary was home-based counseling. As noted earlier, the State is not required by law to offer services to the parent to correct the deficiencies in childcare. In re B.D.J., 728 N.E.2d at 201. Although services are typically offered to assist parents in regaining custody of their children, termination of parental rights may occur independently of them, so long as the elements of Section 4 are proved by clear and convincing evidence. Id. Here, even without having established paternity, McNary was offered numerous services other than home-based counseling, including a parenting assessment, visitation, parenting classes, drug treatment, and urine screening. The OFC did not violate McNary's constitutional rights when it failed to offer home-based counseling to him because he had not yet established paternity over L.K. Nor did the trial court err in considering McNary's failure to

establish paternity at the time of the termination hearing or even his failure to do so until after the hearing.

McNary further claims that other relatives of a child, and even strangers, could seek custody of a child in need of services, and that by requiring him to establish paternity, the trial court required more of him than it did of others in violation of equal protection. McNary notes that the Indiana Code sections dealing with CHINS favor placement of the child with a relative. See Ind. Code § 31-34-6-2 (Burns Code Ed. Repl. 2003) (“A court shall consider placing a child alleged to be a child in need of services with an appropriate family member of the child before considering any other placement for the child.”). McNary also refers to Indiana Code § 31-9-2-44.5 (Burns Code Ed. Supp. 2006), which broadly defines the term “family member.” McNary claims that the CHINS statutes do not require him to establish paternity, but that, by requiring him to do so, the trial court and the OFC have applied the statutes to him in such a manner as to violate his constitutional rights.

McNary’s claims are misguided. Pursuant to Indiana law, the sole custody of a child born out of wedlock belongs to the mother, unless a trial court orders otherwise. Ind. Code § 31-14-13-1 (Burns Code Ed. Repl. 2003). Further, pursuant to Indiana Code § 31-14-2-1 (Burns Code Ed. Repl. 2003), a man may establish paternity only by means of a paternity action or by executing a paternity affidavit in accordance with Indiana Code § 16-37-2-2.1 (Burns Code Ed. Supp. 2006). Thus, unless and until McNary established paternity, he had no legal rights vis-à-vis L.K. In other words, the trial court

could not “return” L.K. to the custody of McNary unless and until McNary established that he was legally L.K.’s father.

McNary’s argument regarding relatives and strangers not being subject to such requirements is without merit. When a trial court places a CHINS with a relative or other foster parent, such custody is not intended to be permanent. Overlooking that a foster parent would have to meet certain requirements before even becoming a foster parent, in order for such an individual to have permanent custody over a child, that individual would have to adopt a child—a process also requiring judicial action. See Ind. Code 31-19. McNary’s argument that a relative or stranger could have obtained custody over L.K. without having to jump through the same or similar hoops that he was required to go through overlooks an enormous difference between him and any such individual—he was the alleged, and admitted, father of L.K. Requiring him to establish paternity was entirely reasonable, logical, and necessary for him to have any permanent, legal relationship with L.K. The State, via the OFC or the trial court, did not violate McNary’s rights when it required him to establish paternity and when it gave negative consideration to his failure and/or delay in doing so.<sup>9</sup> In short, we can discern no violation of McNary’s constitutional rights by the trial court ordering him to establish paternity.

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<sup>9</sup> McNary’s reliance on Stanley v. Illinois, 405 U.S. 645 (1972), is unavailing. In that case, the United States Supreme Court held that a father who lived with, but was unwed to, his children’s mother could not be presumed to be unfit. See id. at 657. The Court held that the unwed father was entitled to a hearing on his fitness as a parent before his children were taken from him and that, “by denying him a hearing and extending it to all other parents whose custody of their children is challenged, the State denied Stanley the equal protection of the laws guaranteed by the Fourteenth Amendment.” Id. at 649. Here, McNary was not presumed to be unfit because he and Mother were unwed. Instead, the trial court simply required him to establish paternity over L.K. and the OFC did not offer McNary home-based

## II

### Cruel and Unusual Punishment

McNary next claims that terminating his parental rights because he admittedly used drugs in the past and lived with Mother, who obviously had an ongoing substance abuse problem, constitutes cruel and usual punishment in violation of his constitutional rights.<sup>10</sup> The trial court's judgment terminating McNary's parental rights states in relevant part:

“19. [McNary] is married to [Mother] who is continuing to use illegal drugs.

20. [McNary] has a history of drug abuse and is currently in recovery. Living with an addict would add difficulty for [McNary] as a person in recovery.” McNary's App. at 9.

It is apparent from the trial court's order and the record that McNary was not being “punished” for his past drug abuse by the termination of his parental rights. Indeed, this court has noted before that the purpose of terminating parental rights is not to punish parents but to protect children. See Castro v. State Office of Family and Children, 842 N.E.2d 367, 373 (Ind. Ct. App. 2006), trans. denied. As explained in more detail below, there was sufficient evidence to support the trial court's decision to terminate McNary's parental rights.

McNary cites to Robinson v. California, 370 U.S. 660 (1962). In Robinson, the Court held unconstitutional a state statute which made it a crime to “be addicted to the  

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counseling because he had not yet done so, and the trial court considered McNary's failure and/or delay in doing so in deciding whether to terminate his parental rights.

<sup>10</sup> We presume McNary is referring to the Eighth Amendment to the United States Constitution because he makes no reference to Article 1, Section 16 of the Indiana Constitution, which similarly prohibits “cruel and unusual punishments . . . .”

use of narcotics.” Id. at 662, 667. Here, McNary is not being punished at all, and to the extent that it could be argued that he has been punished by the termination of his parental rights, it is not due simply to his status of being a recovering addict, but because of his demonstrated behavior as a detrimental environment for the child.

### III

#### Mischaracterization of Facts

McNary next claims that the trial court erred “by its characterization of facts at issue and [in] its failure to recognize mitigating evidence in favor of [McNary] maintaining his relationship with his son.” McNary’s Appellant’s Br. at 21. McNary claims that the trial court’s findings of fact are misleading and incomplete. In reviewing this claim, we are mindful that as an appellate tribunal, we neither reweigh evidence nor judge witness credibility, and we consider only the evidence most favorable to the judgment along with reasonable inferences to be drawn therefrom. Rowlett, 841 N.E.2d at 620. McNary’s claims in this regard are simply a request that we look at evidence unfavorable to the trial court’s decision, reweigh this evidence, and come to a different conclusion than did the trial court. We will not do so. See id.

### IV

#### Sufficiency of the Evidence

Lastly, McNary claims that the evidence was insufficient to support the trial court’s determination to terminate his parental rights to L.K. In doing so, McNary attacks several specific findings by the trial court in its termination order, which reads in relevant part:

- “1. [Mother] is the mother of [L.K.] whose date of birth is May 10, 2004.
2. [McNary] is the alleged father of [L.K.]
3. [L.K.] was found to be a child in need of services under cause number 49D09-0405-JC-808.
4. On or about May 13, 2004, a CHINS petition was filed in the Marion County Superior Court, Juvenile Division, by the MCDCS as to [L.K.] because [Mother] used cocaine while pregnant and [L.K.] tested positive for cocaine at birth. Also, [Mother]’s four other children were wards at the time of [L.K.]’s birth. [McNary] was named the alleged father and he had not established paternity.
5. A Disposition Order was entered by the court as to [McNary] on June 15, 2004, which ordered [L.K.] removed from his care and custody.
6. [L.K.] has been in relative care or foster care continuously for the duration of the case. He has not been returned to the care and custody of [McNary]; therefore, he has been removed from the care of [McNary] under the terms of a dispositional decree for more than six (6) months.<sup>111</sup>
7. There is a reasonable probability that the conditions which resulted in the removal of the child and the reasons for his continued placement outside of his alleged father’s care will not be remedied, and that the continuation of the parent-child relationship poses a threat to the child’s well-being.
8. [Mother] and [McNary] have a history of domestic violence as evidenced by [Mother’s] arrest and conviction for battery against [McNary] in November 2003. A No Contact Order was put into place due to this conviction. Both [Mother] and [McNary] violated this order by getting married while it was still in effect.
9. [Mother] stated that her most recent probation violation was due to testing positive for cocaine and leaving the home in which she was staying. [Mother] stated that she left the home because of an ‘altercation with [McNary].’
10. [Mother] and [McNary] have a history of separating and reuniting throughout their relationship.

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<sup>11</sup> The trial court’s order misstates the duration period for which the child must have been removed from the care and custody of the parent. The applicable period in this case is for fifteen of the last twenty-two months.

11. Despite [McNary]'s claim that he wishes to file a dissolution of marriage action as to [Mother], their previous conduct of repeatedly separating and reuniting casts much doubt upon whether they will truly stay apart.
12. [McNary] was disruptive in court on February 17, 2006. He yelled and stormed out of the court room because he was upset with a statement made by a witness. The trial was delayed for approximately twenty to thirty minutes until [McNary] was calm enough to re-enter the court room.
13. [McNary] was ordered to establish paternity on June 15, 2004.
14. DCS filed its petition to involuntarily terminate [McNary]'s relationship with [L.K.] on February 9, 2005. [McNary] had not established paternity.
15. On October 7, 2005, the first day of trial, [McNary] testified that his case manager told him how to establish paternity and that he was planning to do it, but he had not yet done it.
16. On February 17, 2006, the last day of trial, [McNary] still had not established paternity.
17. MCDCS provided [McNary] with the information he needed to take steps toward becoming a parent to his child and he declined to make use of this information. [McNary]'s failure to follow through with establishing paternity speaks volumes as to his desire to have his child returned to his care.
18. Where [McNary] failed to take any steps toward establishing paternity and where he has been aware of the steps he must take to do so for over one year, there is a reasonable probability that the conditions resulting in [L.K.]'s removal will not be remedied.
19. [McNary] is married to [Mother] who is continuing to use illegal drugs.
20. [McNary] has a history of drug abuse and is currently in recovery. Living with an addict would add difficulty for [McNary], as a person in recovery.
21. [J.K.], the daughter of [Mother], made allegations against [McNary] during the CHINS case, stating that he had molested her.
22. [McNary]'s testimony was not credible. Not only does he have a felony conviction for a crime involving dishonesty, but his testimony was inconsistent.

23. The children need permanence and stability so that their mental, physical and emotional needs will be met by a consistent, permanent caretaker throughout their childhood.
24. [L.K.] has been in foster care his entire life. He is placed with two sisters in foster care and this placement would like to adopt all three children.
25. The Marion County Department of Child Service's plan for permanency for [L.K.] is adoption.
26. This plan for the care and treatment of [L.K.] is satisfactory.
27. Given the child's need for permanency and a stable, loving home and his alleged father's lack of demonstrated ability to provide for those needs, it is in the child's best interest to terminate the parent-child relationship.
28. The Guardian ad Litem for [L.K.] believes that termination of the parent child relationship is in [L.K.'s] best interest." McNary's App. at 7-10.

As stated above, we have a highly deferential standard of review in cases concerning termination of parental rights, and we will not set aside the trial court's judgment terminating parental rights unless it is clearly erroneous. Rowlett, 841 N.E.2d at 620. We will neither reweigh evidence nor judge witness credibility, and we consider only the evidence most favorable to the judgment along with reasonable inferences to be drawn therefrom. Id.

In attacking the sufficiency of the evidence, McNary again complains that the trial court relied upon his failure to establish paternity, at least as of the date of the termination hearing. However, as we concluded above, we cannot say that the trial court erred in considering the fact that, as of the date of the hearing, McNary had not indicated that he had done so, or at least had taken formal steps to do so, despite being informed how to do

so and having over one year in which to do so. We cannot fault the trial court for considering this in its decision to terminate McNary's parental rights.

McNary also claims that the trial court erred in considering the history of domestic violence in the relationship, in which he claims that he was simply the victim. Although it was Mother who was convicted of battery against McNary, there was testimony that McNary had also been physically violent with Mother and that the couple "argued constantly." Tr. at 191. While we might agree with McNary that simply being the victim of domestic violence would not be sufficient by itself to terminate his parental rights, we cannot fault the trial court for taking into consideration evidence that McNary too had been violent and, given his habit of reuniting with Mother, the violent nature of the couple's relationship.

McNary next claims that the trial court erred in considering evidence that J.K., Mother's daughter from another man, had made allegations that McNary had molested her. Pointing to evidence that could indicate that the OFC did not take this allegation seriously, McNary suggests that it was error for the trial court to have credited this accusation and considered it in its determination. McNary, however, never denies that Sarah Wilken, a family case manager, testified that J.K. had made allegations that McNary had molested her. This testimony was not objected to, and other than attacking the credibility of the allegation, does not otherwise suggest that such evidence was improper. Essentially, McNary asks us to reweigh this evidence, which we will not do.

McNary also complains that the trial court "condemned" him for reuniting with and ultimately marrying Mother, suggesting that the trial court interfered with his

fundamental right to marriage. This wholly mischaracterizes what the trial court did. As mentioned, the termination of parental rights is not to punish the parent, but to protect the child. Castro, 842 N.E.2d at 373. The trial court did not “punish” McNary for marrying Mother or otherwise interfere with his right to do so, but instead looked to his choice to remain with Mother, with whom McNary had a stormy relationship. Given Mother’s drug abuse problems and inability to parent her other children, we cannot fault the trial court for considering McNary’s history of leaving then reuniting with Mother, and his decision to marry her,<sup>12</sup> as evidence of his poor decision-making abilities which could endanger L.K.

McNary further argues that the trial court erred in considering his history of substance abuse. McNary claimed he had been sober during the pendency of this cause, a claim the trial court apparently believed in that it described McNary as a recovering drug abuser. Contrary to McNary’s claims, the trial court did not terminate McNary’s parental rights because he was sober; it simply noted that McNary was a recovering drug abuser who had a history of reuniting with Mother, who was still a drug abuser. Surely the trial court did not err in considering that McNary’s recovery might be endangered by his relationship with a known substance abuser.

McNary also argues that the trial court erred in determining that McNary’s testimony was not believable, claiming that it was largely unchallenged. This is beside

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<sup>12</sup> To the extent that McNary suggests that his marrying Mother was simply a misguided attempt to establish paternity over L.K. as ordered, this is again simply an invitation to view the evidence in a different manner than did the trial court. McNary was told how to establish paternity, but failed to do so until after the termination hearing.

the point. The trial court, as the trier of fact, could believe or disbelieve McNary whether his testimony was challenged or not.

Outside of these specific challenges to the trial court's findings of fact, McNary also generally claims that the evidence was insufficient to establish the statutorily required elements to terminate his parental rights. McNary does not deny that L.K. had been removed from his care for at least fifteen of the last twenty-two months under a dispositional decree. See I.C. § 31-35-2-4(b)(2)(A)(iii). He instead focuses his arguments upon the requirements of Section 4(b)(2)(B) and (C).

McNary first claims that there was no evidence that the conditions which resulted in L.K.'s removal or the reason for his placement outside the home of the parents would not be remedied. See I.C. § 31-35-2-4(b)(2)(B)(i). In determining whether the conditions that resulted in the child's removal will be remedied, the trial court must look to the parent's fitness at the time of the termination proceeding, but must also look at the patterns of conduct in which the parent has engaged to determine if future changes are likely to occur. In re S.M., 840 N.E.2d at 869. The OFC responds that one of the conditions which led to L.K.'s removal—the fact that McNary had not yet established paternity—still remained at the time of the termination hearing. An alleged father's failure to establish paternity may properly be considered by a trial court in determining whether there is a reasonable probability that the conditions resulting in removal of the child from the alleged father will be remedied. In re S.M., 840 N.E.2d at 870. Here, although McNary did ultimately establish his paternity, his actions could have been considered by the trial court to be “too little, too late.”

Further, the OFC could establish either that the conditions which resulted in the child's removal would not be remedied or that the continuation of the parent-child relationship posed a threat to the well-being of the child. See I.C. § 31-35-2-4(b)(2)(B). Here, there was evidence that McNary was a recovering substance abuser yet continued to associate with Mother, who was an active substance abuser, that their relationship was at least occasionally violent, and that McNary delayed in his establishing paternity over L.K. Further, despite McNary's reports of sobriety, he still failed to attend six of his substance abuse treatment sessions. From this evidence, the trial court could reasonably conclude that there was a reasonable probability that the termination of the parent-child relationship posed a threat to the well-being of L.K. Highlighting this is McNary's testimony regarding Mother's ability to parent L.K. despite her ongoing drug abuse:

“Q: Do you think it's safe to have [L.K.] around [Mother] if she still has a [drug abuse] problem?

A: Of course. She won't harm a child. I mean she's just hurting herself really.” Tr. at 226.

McNary's inability to appreciate the danger that Mother, who used cocaine and narcotics while pregnant with L.K., might pose to his child, who was born with cocaine in his system, aptly demonstrates the danger that McNary poses to L.K.'s well-being. From this evidence, the trial court could also reasonably conclude that termination of the parent-child relationship between McNary and L.K. was in L.K.'s best interests. See I.C. § 31-35-2-4(b)(2)(C).

With regard to McNary's brief argument that there was not a satisfactory plan for the care and treatment of L.K., see I.C. § 31-35-2-4(b)(2)(D), we note that L.K. had been

in foster care since shortly after his birth and that his current foster parents wished to adopt him. These foster parents were also fostering two of L.K.'s sisters and wished to adopt them as well. The trial court did not err in concluding that adoption by the foster parents was a satisfactory plan for the care and treatment of L.K. See In re D.D., 804 N.E.2d at 268. In summary, the trial court did not err in terminating McNary's parental rights to L.K.

The judgment of the trial court is affirmed.

SHARPNACK, J., and CRONE, J., concur.