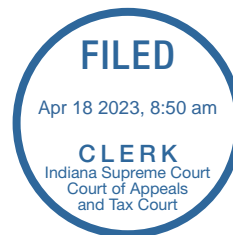


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



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IN THE COURT OF APPEALS OF INDIANA

In the Matter of the Termination
of the Parent-Child Relationship
of Ma.W. and Mo.W. (Minor
Children);

S.W. (Father),

Appellant-Respondent,

v.

Indiana Department of Child
Services,

Appellee-Petitioner.

April 18, 2023

Court of Appeals Case No.
22A-JT-2888

Appeal from the Putnam Circuit
Court

The Honorable Matthew L.
Headley, Judge

Trial Court Cause Nos.
67C01-2205-JT-4
67C01-2205-JT-5

Memorandum Decision by Judge Tavitas
Judges Vaidik and Foley concur.

Tavitas, Judge.

Case Summary

- [1] S.W. (“Father”) appeals the trial court’s order terminating his parental rights to Ma.W. and Mo.W. (“the Twins”). Father argues that the Department of Child Services (“DCS”) violated his due process rights by failing to make reasonable efforts to reunify the family and that the trial court clearly erred by determining that: 1) the conditions that resulted in the Twins’ removal or the reasons for placement outside Father’s home will not be remedied; and 2) termination of Father’s parental rights was in the Twins’ best interests. We find Father’s arguments without merit and, accordingly, affirm.

Issues

- [2] Father raises two issues on appeal, which we restate as:
- I. Whether DCS violated Father’s due process rights by failing to make reasonable efforts to reunify the family.
 - II. Whether the trial court clearly erred by terminating Father’s parental rights.

Facts

- [3] The Twins were born on April 25, 2017, to K.S. (“Mother”).¹ During Mother’s pregnancy, Mother and Father initially dated, but at some point, Mother and Father ended their relationship.
- [4] In May 2017, Father took a paternity test, which indicated that he was the Twins’ biological father. Father, however, did not immediately establish legal paternity. Father and Mother resumed dating when the Twins were approximately ages three months to one year, and Father occasionally cared for the Twins during this time. Father did not pay child support but occasionally gave money to Mother. Father’s involvement decreased around the time the Twins learned to walk.
- [5] Maternal Grandmother has been involved in the Twins’ lives since they were born. In late 2019, shortly before the Twins turned age two, Mother was in a relationship with D.C. Around this time, Mother permitted Maternal Grandmother to become the Twins’ primary caregiver.
- [6] On July 8, 2020, DCS filed a petition that alleged that the Twins were children in need of services (“CHINS”). DCS alleged that the Twins were victims of neglect by Mother and D.C., who, at the time, DCS believed to be the Twins’ biological father. Specifically, DCS alleged, inter alia, that: 1) Mother and D.C.

¹ On September 29, 2022, Mother consented to Maternal Grandmother’s adoption of the Twins. Mother does not participate in this appeal.

engaged in domestic violence in the Twins' presence; 2) Mother and D.C. used illegal substances on a daily basis; 3) Mother abandoned the Twins and left them with D.C.; and 4) the Twins were living with Maternal Grandmother. The trial court adjudicated the Twins as CHINS as to Mother and D.C. on September 9, 2020. In its October 20, 2020 dispositional order, the trial court ordered the Twins to remain placed with Maternal Grandmother under DCS's supervision.

[7] At the time DCS became involved with the Twins, Father was participating in a drug treatment program at Serenity House. In October 2020, DCS learned of Father's earlier paternity test, and DCS contacted Father the following month.

[8] While he was participating in the drug treatment program, Father began to visit the Twins, and he provided financial support to Maternal Grandmother on several occasions. Father, however, stopped providing financial support after several months despite Maternal Grandmother's request that Father help with childcare expenses. Father visited the Twins approximately ten times during the period in which he was participating in the drug treatment program.

[9] On December 3, 2020, DCS filed a motion for relief from judgment in which DCS alleged that, based on Father's paternity test, Father was the presumed biological father of the Twins, not D.C. DCS sought to add Father as a party to the CHINS proceedings. The trial court granted the motion.

[10] On January 22, 2021, DCS filed an amended CHINS petition in which it alleged that "due to [Father's] low level of involvement and failure to establish

paternity, he had been unable to protect the children from” Mother and D.C.’s neglect, as alleged in the July 2020 CHINS petition. Appellant’s. App. Vol. II p. 241. In a February 2, 2021 hearing, Father admitted the allegations and admitted that the Twins were CHINS. The trial court subsequently adjudicated the Twins as CHINS as to Father.

- [11] On February 19, 2021, the trial court issued a dispositional order that ordered the Twins to remain placed with Maternal Grandmother and required Father to, inter alia: 1) maintain contact with DCS; 2) participate in recommended services, including Fatherhood Engagement services; 3) work to establish paternity; and 4) attend all visitations with the Twins.
- [12] Father’s paternity was adjudicated in June 2021. Father completed the drug treatment program in July 2021. Father then moved to Danville for four months, where he cared for his mother. Father visited the Twins during this time period but could not estimate the number of times.
- [13] Father then moved to Bainbridge, where he continued to care for his mother. Father lived approximately eight or ten miles from Maternal Grandmother and frequently visited Mother, who lived “right around the corner” from Maternal Grandmother; however, Father only visited the Twins, he claimed, “semi-regularly.” Tr. Vol. II p. 33. Maternal Grandmother urged Father to become more involved as a parent, but Father’s visits did not increase. When he did visit the Twins, Father would “just sit there on the couch,” and he did not play with the Twins. *Id.* at 88.

[14] On October 26, 2021, Father attended his first and only Fatherhood Engagement class. The instructor’s conclusion was that Father “wanted to be a presence in [the Twins’] lives but not a custodial parent . . . Not care for them day in/day out.” *Id.* at 77. Father did not attend any additional Fatherhood Engagement classes and did not successfully complete that service.

[15] Also in October 2021, DCS offered Father unsupervised overnight visitation; however, Father did not engage in those visitations. Between Halloween and Christmas 2021, Father went approximately six weeks without contacting the Twins. After this six-week period, Father’s “phone calls picked up a little bit . . . , but [his] visits still stayed pretty low.” *Id.* at 59.

[16] In January 2022, DCS warned Father that it would not recommend reunification until Father completed Fatherhood Engagement; however, Father still did not participate any further in that service. In March 2022, Father was arrested for resisting law enforcement and several driving offenses, and he remained incarcerated during the termination proceedings.

[17] On May 23, 2022, DCS filed a petition for involuntary termination of Father’s parental rights to the Twins. DCS alleged that: 1) there was a reasonable probability that the conditions that resulted in removal or the reasons for placement outside Father’s home would not be remedied; and 2) termination of Father’s parental rights to the Twins was in the Twins’ best interests.

[18] The trial court held a hearing on the termination petition on September 29, 2022. Family Case Manager (“FCM”) Kelsey Reddick testified regarding

Father's limited involvement with the Twins, participation in services, and communication with DCS. FCM Reddick testified that, when Father learned about the July 2020 DCS case against Mother, Father "appeared very motivated" to take on a parenting role, "but his actions did not meet up with his words." Tr. Vol. II p. 57. She further testified that Father "did not engage in regular visits" and attended only one Fatherhood Engagement class. *Id.* at 55-56. She testified that DCS also offered Father additional services, including therapy, but Father was not interested in those services.

[19] FCM Reddick opined that DCS could not have done anything more to help Father "achieve the goals" outlined in his dispositional order because Father did not participate in services and was disinterested in regularly visiting with the Twins. *Id.* at 59. She further opined that termination of Father's parental rights was in the Twins' best interests because Maternal Grandmother was "the only one that's provided [the Twins] with stability for the last three years." *Id.* at 61. The court appointed special advocate ("CASA") recommended termination for the same reason.

[20] Maternal Grandmother testified regarding her role as the Twins' primary caretaker over the previous three years. She testified that the Twins "know that [Father] is their dad, but he's an occasional visitor." *Id.* at 90. She further testified that she plans to adopt the Twins.

[21] Father "accept[ed] full responsibility for not stepping up to the plate" but asked for another "opportunity to be a father." *Id.* at 102. Father testified that he last

saw the Twins approximately three weeks before he was taken to jail in March 2022. He could not recall the last time he provided financial support for the Twins.

[22] Father admitted that he has a twenty-year history of substance abuse, that he attended only one Fatherhood Engagement class, and that he knew he could visit the Twins. Father also testified that he had no “concrete plans” for having physical custody over the Twins. *Id.* at 39. In addition, Father testified that “DCS has done their job this entire time.” *Id.* at 35.

[23] On November 10, 2022, the trial court issued findings of fact and conclusions thereon. The trial court found:

[Father] . . . has demonstrated a lack of interest or initiative in the children’s everyday life and care. Because he failed to take advantage of overnight visits or participate in Fatherhood Engagement offered in the convenience and comfort of his own home, the Court finds by clear and convicting evidence that there is a reasonable probability that this condition will not be remedied. [Father] has been content to let others raise the children since they were born. At no point in the underlying CHINS case did [Father] seek placement, participate meaningfully in the one program required of him, or provide financially for the children. [Father] has been an inconsistent presence for the children. It is maternal grandmother—and not [Father]—who provides for their daily educational, financial, emotional, medical, housing, and other needs. It is not [Father’s] most recent incarceration that has led him to this point, but apparently his lack of interest in accepting the daily rigors of meaningful fatherhood. . . .

Appellant’s App. Vol. II pp. 109-110. The trial court, accordingly, ordered Father’s parental rights to the Twins terminated. Father now appeals.

Discussion and Decision

1. Due Process—Efforts to Reunify

[24] Father argues that his due process rights were violated by “DCS’s failure to provide Father with reasonable efforts to reunify him with [the Twins] while Father was incarcerated.” Appellant’s Br. p. 11. We disagree with Father’s characterization of DCS’s efforts, and we find that Father’s due process rights were not violated.

[25] “It is unequivocal that the termination of a parent-child relationship by the State constitutes the deprivation of an important interest warranting deference and protection, and therefore when the State seeks to terminate the parent-child relationship, it must do so in a manner that meets the requirements of due process.” *In re J.K.*, 30 N.E.3d 695, 699 (Ind. 2015). “The nature of the process due in any proceeding is governed by a balance of three factors: ‘the private interests affected by the proceeding; the risk of error created by the State’s chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure.’” *In re T.W.*, 135 N.E.3d 607, 613 (Ind. Ct. App. 2019) (quoting *In re D.H.*, 119 N.E.3d 578, 588 (Ind. Ct. App. 2019), *trans. denied*), *trans. denied*.

[26] When a parent faces the potential termination of his or her parental rights, under certain circumstances, DCS’s failure to make “reasonable efforts to

preserve and/or reunify the family in the CHINS case” might constitute a due process violation.² *Id.* We have explained that “[w]hat constitutes ‘reasonable efforts’ will vary by case, and . . . it does not necessarily always mean that services must be provided to the parents.” *Id.* Instead, the ultimate inquiry is whether DCS “behave[d] reasonably” under the circumstances. *Id.* We determine whether DCS behaved reasonably based on the risk of error created by DCS’s conduct. *See id.* (observing that “a parents’ interest in the care, custody, and control of his or her child” and “the State’s interest in protecting the welfare of a child” are both substantial and concluding that we, therefore, “focus on the risk of error created by DCS’s actions” (quoting *K.M. v. Ind. Dep’t of Child Servs.*, 997 N.E.2d 1114, 1120 (Ind. Ct. App. 2013))).

[27] The State urges, as a threshold matter, that Father has waived this argument on appeal by failing to raise it at the termination hearing. The State is correct that a party waives on appeal an issue that was not raised before the trial court. *See, e.g., Plank v. Cmty. Hosp. of Ind., Inc.*, 981 N.E.2d 49, 53 (Ind. 2013). We also note that Father testified at trial that “DCS has done their job this entire time” and that, “due to [his] lack of paying attention,” Father could not “say what [services DCS] did or did not offer,” which contradicts Father’s current position on DCS’s efforts. Tr. Vol. II pp. 35, 42. Nonetheless, we have discretion to address waived claims, “especially when they involve constitutional rights, the

² Our CHINS statutes do not require DCS to make reasonable efforts to preserve and reunify families under the circumstances enumerated in Indiana Code Section 31-34-21-5.6(b).

violation of which would be fundamental error.” *D.H.*, 119 N.E.3d at 586 (citing *Plank*, 981 N.E.2d at 53-54). Accordingly, we address Father’s due process arguments on the merits.

[28] Father argues that DCS should have provided him with services and visitation while he was in jail. Father ignores the fact that he repeatedly failed to take advantage of the services and, to a large extent, the visits that were offered to him prior to his incarceration. Indeed, DCS warned Father that it would not recommend reunification until Father completed Fatherhood Engagement, yet Father never progressed beyond the first class in that service. Father points to no authority to suggest that DCS was required to persuade him to engage in services.

[29] Father also does not argue that he requested additional services or visitation or that such services would be possible given the circumstances of his incarceration. *Prince v. Dep’t of Child Servs.*, 861 N.E.2d 1223, 1231 (Ind. Ct. App. 2007) (“[T]he responsibility to make positive changes will stay where it must, on the parent. If the parent feels the services ordered by the court are inadequate to facilitate the changes required for reunification, then the onus is on the parent to request additional assistance from the court or DCS.”); *In re H.L.*, 915 N.E.2d 145, 148 (Ind. Ct. App. 2009) (noting “the absence of services was due to Father’s incarceration” and that Father “does not point to any evidence that he specifically requested visitation or other services”).

[30] Ultimately, Father has not persuaded us that DCS acted unreasonably or that the absence of services or visitations while Father was incarcerated created any risk of error in the termination proceedings. Father was simply not interested in services or visitations, and it was not DCS’s job to coax Father into the role of being a parent. Accordingly, we find that Father’s due process rights were not violated.

II. Termination of Parental Rights³

[31] The Fourteenth Amendment to the United States Constitution protects the traditional rights of parents to establish a home and raise their children. *In re K.T.K. v. Ind. Dep’t of Child Services, Dearborn Cnty. Off.*, 989 N.E.2d 1225, 1230 (Ind. 2013). “[A] parent’s interest in the upbringing of [his or her] child is ‘perhaps the oldest of the fundamental liberty interests recognized by th[e] [c]ourt[s].’” *Id.* (quoting *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054 (2000)). We recognize that parental rights are not absolute and must be subordinated to the child’s best interests when determining the proper disposition of a petition to terminate parental rights. *Id.*; *see also Matter of Ma.H.*, 134 N.E.3d 41, 45 (Ind. 2019) (“Parents have a fundamental right to raise their children—but this right is not absolute.”), *cert. denied*, 140 S. Ct. 2835 (2020),

³ Father does not challenge any of the trial courts findings of fact, and, therefore, we need only consider whether the trial court’s findings support its conclusion. *In re S.S.*, 120 N.E.3d 605, 613 (Ind. Ct. App. 2019) (citing *Bester v. Lake Cnty. Off. of Family and Child.*, 839 N.E.2d 143, 147 (Ind. 2005)).

reh'g denied. “When parents are unwilling to meet their parental responsibilities, their parental rights may be terminated.” *Ma.H.*, 134 N.E.3d at 45-46.

[32] Pursuant to Indiana Code Section 31-35-2-8(c), “[t]he trial court shall enter findings of fact that support the entry of the conclusions required by subsections (a) and (b)” when granting a petition to terminate parental rights.⁴ Here, the trial court did enter findings of fact and conclusions thereon in granting DCS’s petition to terminate Father’s parental rights. We affirm a trial court’s termination of parental rights decision unless it is clearly erroneous. *Ma.H.*, 134 N.E.3d at 45. A termination of parental rights decision is clearly erroneous when the trial court’s findings of fact do not support its legal conclusions, or when the legal conclusions do not support the ultimate decision. *Id.* We do not reweigh the evidence or judge witness credibility, and we consider only the evidence and reasonable inferences that support the court’s judgment. *Id.*

[33] Indiana Code Section 31-35-2-8(a) provides that “if the court finds that the allegations in a petition described in [Indiana Code Section 31-35-2-4] are true,

⁴ Indiana Code Sections 31-35-2-8, governing termination of a parent-child relationship involving a delinquent child or CHINS, provides as follows:

- (a) Except as provided in section 4.5(d) of this chapter, if the court finds that the allegations in a petition described in section 4 of this chapter are true, the court shall terminate the parent-child relationship.
- (b) If the court does not find that the allegations in the petition are true, the court shall dismiss the petition.

the court shall terminate the parent-child relationship.” Indiana Code Section 31-35-2-4(b)(2) provides that a petition to terminate a parent-child relationship involving a child in need of services must allege, in part:

- (B) that one (1) of the following is true:
 - (i) There is a reasonable probability that the conditions that resulted in the child’s removal or the reasons for placement outside the home of the parents will not be remedied.
 - (ii) There is a reasonable probability that the continuation of the parent-child relationship poses a threat to the well-being of the child.
 - (iii) The child has, on two (2) separate occasions, been adjudicated a child in need of services;
- (C) that termination is in the best interests of the child;
and
- (D) that there is a satisfactory plan for the care and treatment of the child.

DCS must establish these allegations by clear and convincing evidence. *In re V.A.*, 51 N.E.3d 1140, 1144 (Ind. 2016).

A. Probability of Remedying Reasons for Placement

[34] Father challenges the trial court’s conclusion that there is “a reasonable probability that the conditions that resulted in the child’s removal or the reasons

for placement outside the home of the parents will not be remedied.” I.C. § 31-35-2-4(b)(2). “In determining whether ‘the conditions that resulted in the [Twins’ placement]. . . will not be remedied,’ we ‘engage in a two-step analysis.’” *In re E.M.*, 4 N.E.3d 636, 642-43 (Ind. 2014) (quoting *K.T.K.*, 989 N.E.2d at 1231). First, we identify the conditions that led to the placement; and second, we determine whether there is a reasonable probability that those conditions will not be remedied. *Id.* In analyzing this second step, the trial court judges the parent’s fitness “‘as of the time of the termination proceeding, taking into consideration evidence of changed conditions.’” *Id.* (quoting *Bester v. Lake Cnty. Off. of Family and Child.*, 839 N.E.2d 143, 152 (Ind. 2005)). “We entrust that delicate balance to the trial court, which has discretion to weigh a parent’s prior history more heavily than efforts made only shortly before termination.” *Id.* “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.” *Id.*

[35] Here, the Twins were placed with Maternal Grandmother because, although Father knew he was the Twins’ father, he was not involved in their lives. After DCS contacted Father, he began to visit the Twins, and he provided some support to Maternal Grandmother. The trial court found, however, that Father’s visits “fell off after a short time” even though Father lived nearby and often drove through the area. Appellant’s App. Vol. II p. 106. Father’s financial support also ceased, despite Maternal Grandmother’s request for support from Father.

[36] In addition, Father was ordered to participate in Fatherhood Engagement Fcto gain skills to parent the Twins. Despite DCS’s warning that it would not recommend reunification until Father completed that program, Father failed to do so. *See In re D.J.*, 755 N.E.2d 679, 684 (Ind. Ct. App. 2001) (“The trial court can [] reasonably consider the services offered to the parent . . . and the parent’s response to those services.”), *trans. denied*. Father also declined overnight visitations with the Twins and was, as the trial court found, “content with his role as an occasional presence in the children’s lives.” Appellant’s App. Vol. II p. 107; *see Lang v. Starke Cnty. Off. of Family and Child.*, 861 N.E.2d 366, 372 (Ind. Ct. App. 2007) (“[T]he failure to exercise the right to visit one’s children demonstrates a ‘lack of commitment to complete the actions necessary to preserve [the] parent-child relationship.’” (quoting *In re A.L.H.*, 774 N.E.2d 896, 900 (Ind. Ct. App. 2002))). Finally, at the time of the termination hearing, Father was incarcerated and had no plan for reuniting with the Twins.

[37] To summarize what the trial court found, the Twins were not placed with Father because he was uninvolved in their lives, and despite a year and a half of urging from DCS and Maternal Grandmother, Father made very little effort to change that. Under these facts and circumstances, we cannot say that the trial court clearly erred by determining that there was a reasonable probability that the reasons for the Twins’ placement would not be remedied.

B. Best Interests

[38] In determining what is in the best interests of a child, the trial court is required to look at the totality of the evidence. *Ma.H.*, 134 N.E.3d at 49. In doing so,

the trial court must subordinate the interests of the parents to those of the child involved. *Id.* Termination of a parent-child relationship is proper where the child's emotional and physical development is threatened. *K.T.K.*, 989 N.E.2d at 1235. A trial court need not wait until a child is irreversibly harmed such that his or her physical, mental, and social development is permanently impaired before terminating the parent-child relationship. *Id.* Additionally, a child's need for permanency is a "central consideration" in determining the best interests of a child. *Id.*

[39] Here, as described above, Father failed to make progress on services and only occasionally visited and provided support for the Twins. In other words, Father was only minimally involved in the Twins' lives and did not treat them as a priority. *See J.P.*, 713 N.E.2d 873, 876 (Ind. Ct. App. 1999) (finding that parent's brief and infrequent visits demonstrated that the parent failed to make "contact with [her child] a priority").

[40] In addition, at the time of the termination hearing, Father was incarcerated and had no plans for reunifying with the Twins. Father also has a twenty-year history of substance abuse and an extensive criminal history, which includes convictions for possession of methamphetamine, resisting law enforcement, and several driving offenses. *See, e.g., In re O.G.*, 159 N.E.3d 13, 20 (Ind. Ct. App. 2020) (considering, in part, father's criminal history in affirming termination of father's parental rights), *trans. denied*.

[41] Meanwhile, the Twins had spent the last three years of their lives living with Maternal Grandmother, who provided for all of their daily needs and who plans to adopt them. CASA and DCS both testified that terminating Father's parental rights was in the Twins' best interests because the Twins were happy, healthy, and bonded with Maternal Grandmother.

[42] In short, Father was simply not committed to being a parent; he was neither situated to provide the care, support, stability, and permanency that the Twins' needed nor on track to do so. Based on these facts and circumstances, we cannot say that the trial court clearly erred by determining that terminating Father's parental rights was in the Twins' best interests.

Conclusion

[43] DCS did not violate Father's due process rights, and the trial court did not clearly err by terminating Father's parental rights. Accordingly, we affirm.

[44] Affirmed.

Vaidik, J., and Foley, J., concur.