

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In the Matter of the Involuntary
Termination of the Parent-Child
Relationship of M.H., I.H., and
K.W. (Minor Children), and
J.H. (Father),
Appellant-Respondent,

v.

Indiana Department of Child
Services,
Appellee-Petitioner

December 15, 2021

Court of Appeals Case No.
21A-JT-1506

Appeal from the Johnson Circuit
Court

The Honorable Michael T. Bohn,
Magistrate

Trial Court Cause Nos.
41C01-2009-JT-42, - 43, - 44

Crone, Judge.

Case Summary

- [1] J.H. (Father) brings this appeal from the trial court's orders involuntarily terminating his parental rights to his minor children M.H., I.H., and K.W. We affirm.

Facts and Procedural History

- [2] M.H. was born in 2009, I.H. was born in 2012, and K.W. was born in 2018. K.W.'s mother is D.W. (Mother A). M.H.'s and I.H.'s mother is A.H. (Mother B). Father is Children's biological father.¹
- [3] The record indicates that Father has thirteen children. In November 2018, the Indiana Department of Child Services (DCS) filed a child in need of services (CHINS) petition regarding K.W. due to Mother A's drug use and mental health issues and because Father's whereabouts were unknown. At the time, Father was incarcerated in Michigan. K.W. was removed from both parents' care. In January 2019, Mother A admitted K.W. was a CHINS and agreed to participate in services. The trial court held a factfinding hearing for Father on March 11, 2019, but Father failed to appear despite having notice of the hearing. The trial court subsequently adjudicated K.W. a CHINS but declined to order services for Father until he appeared in court. Father failed to appear for review hearings in April and July 2019. Father finally appeared for his first review hearing in October 2019, and the trial court scheduled a dispositional

¹ Father was not married to Mother A, so although Father is K.W.'s biological father, her legal father is F.W. Father is M.H.'s and I.H.'s legal and biological father. Neither mother is a party to this appeal.

modification hearing for December 2019. Father failed to appear at the hearing despite his clear ability to do so due to his recent release from incarceration.

The trial court entered a dispositional decree as to Father on January 23, 2020, which, among other things, ordered Father to do the following: maintain contact with DCS, enroll in recommended programs, maintain safe and suitable housing, secure employment, refrain from drug use, obey the law, submit to random drug screens, comply with probation terms, and participate in certain services while incarcerated.

[4] Father complied with some of the trial court's decree, but "was mostly non-compliant with meeting his dispositional goals." Appealed Order A at 8.² In June 2020, the trial court held the first dispositional review hearing. Father failed to appear. The trial court found that Father was not in compliance with K.W.'s case plan, had stopped participating in services, failed to maintain contact with DCS upon his release from incarceration, tested positive for methamphetamine in February 2020, and had an outstanding warrant for his arrest for violating his probation. *Id.* The trial court changed K.W.'s permanency plan from reunification to adoption.

[5] In July 2019, DCS filed petitions alleging that M.H. and I.H. (Children) were CHINS due to Mother B's drug use and Father's incarceration in Michigan. Children were removed from both parents' care on July 16, 2019. Father failed

² As this is an appeal from multiple termination orders, for clarity we will refer to the trial court's termination order regarding K.W. as Appealed Order A. We will refer to the trial court's termination order regarding M.H and I.H. as Appealed Order B.

to appear at the initial hearing and again failed to appear at a continued initial hearing. The trial court determined that DCS had perfected service on Father and that his failure to appear resulted in a waiver of his right to an initial hearing. During a dispositional hearing held in November 2019, Mother B appeared in person and admitted that Children were CHINS and agreed to participate in services and to dispositional goals. Father appeared telephonically and also admitted that Children were CHINS and agreed to participate in services and to dispositional goals. Specifically, Father agreed to do the following: maintain suitable and stable housing, pay child support, refrain from drug use, visit with Children, obey the law, participate in home-based case management, submit to random drug screens, and contact DCS within seventy-two hours of being released from incarceration.

- [6] Father complied with some of the trial court's decree, but "was mostly non-compliant with meeting his dispositional goals." Appealed Order B at 6. The trial court held its first dispositional review hearing in February 2020, during which Father appeared telephonically. The trial court found that Father was not in compliance with Children's case plans, failed to contact DCS when he was released from incarceration in December 2019, and did not visit with Children after his release from incarceration. The trial court held a second review hearing in August 2020. Father did not appear at the hearing. At the time, Father had been reincarcerated in Michigan, and the trial court "was unable to reach him telephonically." *Id.* at 7. The trial court again found that Father was not in compliance with Children's case plans. Specifically, Father tested positive for

methamphetamine and was arrested for a parole violation, and, prior to his arrest, “Father did not engage in services and was inconsistent in his communication with DCS.” *Id.* Moreover, “Father did not participate in supervised visitations and did not request contact with [Children] upon his release from prison.” *Id.* Consequently, the trial court changed Children’s permanency plan from reunification to a concurrent plan of reunification and adoption.

[7] On September 15, 2020, DCS filed a petition to terminate Mother A’s and Father’s parental rights to K.W. On September 23, 2020, DCS filed a petition to terminate Mother B’s and Father’s parental rights to Children. Mother A signed a consent to adoption, and DCS dismissed her from the termination proceedings. Mother B signed a consent to the adoption and voluntarily agreed to the termination of her parental rights.

[8] A factfinding hearing was held regarding Father’s rights to Children on November 19, 2020, and March 15, 2021. Father appeared telephonically and with counsel from prison in Michigan. The evidence indicated that Father was in custody on a parole violation and did not have a projected release date. Father had previously served more than two years for various offenses committed in Michigan, and, during his brief period of release in March 2020, Father was arrested and charged in both Indiana and Michigan with numerous new offenses. During his period of release, Father did not visit with Children. The record further demonstrates that he never requested to visit virtually with Children from prison and has never asked DCS for updates or information

about Children. Father has not seen Children in approximately seven years, and, during the factfinding, Father was unable to give the birthdates for either child.

[9] A factfinding hearing was held regarding Father's rights to K.W. on December 14, 2020, and March 15 and 19, 2021. Father appeared telephonically and with counsel from prison in Michigan. The trial court reiterated Father's criminal history and current incarceration without a projected release date. The evidence indicated that Father has never met K.W. and is unaware of her birthdate. He has not provided child support for K.W., and, during his period of release from incarceration, Father did not visit with K.W. The record further demonstrates that Father has never requested to visit virtually with K.W. from prison and has never asked DCS for updates or information about K.W.

[10] On June 17 and 18, 2021, the trial court issued separate orders including extensive findings of fact and conclusions thereon determining that DCS had established the following by clear and convincing evidence: (1) there is a reasonable probability that the conditions that resulted in M.H., I.H., and K.W.'s removal and continued placement outside the home will not be remedied by Father; (2) there is a reasonable probability that continuation of the parent-child relationship between Father and each child poses a threat to each child's well-being; (3) termination of the parent-child relationship between Father and each child is in each child's best interests; and (4) DCS has a satisfactory plan for each child's care and treatment, which is adoption.

Accordingly, the trial court terminated Father's parental rights to M.H, I.H., and K.W. This appeal ensued.

Discussion and Decision

[11] Father does not challenge the sufficiency of the evidence to support the trial court's orders terminating his parental rights. Rather, his sole assertion on appeal is that his due process rights were violated "due to the many procedural irregularities in the CHINS proceedings which [led] to the termination of his parental rights to his three children." Appellant's Br. at 4. Father admits that he did not object to any of these alleged irregularities in the CHINS process during the CHINS proceedings, nor did he argue during the termination proceedings that those alleged irregularities amounted to a due process violation. Rather, Father raises this claim for the first time on appeal.

[12] It is well established that we may consider a party's constitutional claim waived when it is raised for the first time on appeal. *In re S.P.H.*, 806 N.E.2d 874, 877 (Ind. Ct. App. 2004); *McBride v. Monroe Cnty. Off. of Fam. & Child.*, 798 N.E.2d 185, 194 (Ind. Ct. App. 2003). "However, as the word 'may' implies, 'we have discretion to address such claims[.]'" *In re M.M.E.*, 146 N.E.3d 922, 924-25 (Ind. Ct. App. 2020) (quoting *In re D.H.*, 119 N.E.3d 578, 586 (Ind. Ct. App. 2019), *trans. denied*). We choose not to exercise that discretion in this case for two reasons.

[13] First, although we decline to delve into the minutiae of each of the alleged procedural irregularities at issue, we emphasize that our review of the record

presented reveals that many of Father's allegations were quite minor,³ and others appear justified as being precipitated by Father's continuing criminal behavior, repeated incarcerations out of state, and the difficulties faced by the trial court in locating him.⁴ Second, and more importantly, Father's only claim of a procedural deficiency that could be of significance simply cannot be substantiated on the limited record before us. Indeed, the crux of Father's appellate argument revolves around his assertion that he was never "advised of his rights" by the trial court at any time during the CHINS process as required by statute.⁵ Appellant's Br. at 14. However, Father has failed to provide us with any of the transcripts of the numerous CHINS hearings that occurred. Without a record of those proceedings, we will not speculate as to what the trial court did or did not do. It is the appellant's duty to ensure that an adequate record is presented to this Court for review of the issues he raises. *Mid-West Fed. Sav.*

³ For example, Father alleges that the boxes on an "Affidavit of Diligent Inquiry" form next to the address where service was attempted on Father "remained unchecked." Appellant's Br. at 9. However, Father makes no claim that he was not properly served or that he did not have actual notice of the CHINS proceedings.

⁴ Father alleges that initial CHINS hearings in both cases were not held within ten days of the filing of the CHINS petitions as required by Indiana Code Section 31-34-10-2. He further complains that neither of the CHINS factfinding hearings was held within sixty days after the CHINS petitions were filed as required by Indiana Code Section 31-34-11-1. Our review of the trial court's orders reveals that the procedural timelines, and extensions and waivers thereof, were due to Father's incarcerations and his repeated nonappearance for scheduled matters despite having notice and the opportunity to do so.

⁵ Indiana Code Section 31-34-4-6 provides that DCS "shall submit written information" advising a parent of a child who is alleged to be abused or neglected regarding the legal rights of the parent throughout the CHINS process. Indiana Code Section 31-34-10-4 provides that the juvenile court "shall advise" the parent of "[t]he nature of the allegations in the [CHINS] petition" and "[t]he dispositional alternatives available to the court if the child is adjudicated a child in need of services." Indiana Code Section 31-34-10-5 further provides that the juvenile court "shall inform" the parent that if the child is adjudicated a CHINS that "the parent, guardian, or custodian of the child may be required to participate in a program of care, treatment, or rehabilitation for the child" and "the parent or guardian may be held financially responsible for services provided for the parent, guardian, or child."

Bank v. Epperson, 579 N.E.2d 124, 125 (Ind. Ct. App. 1991). When an appellant fails to present an adequate record on appeal, “the appellant is deemed to have waived any alleged error based upon missing material.” *Adamson v. Norwest Bank, NA*, 609 N.E.2d 35, 37 (Ind. Ct. App. 1993). Indeed, although we have the discretion to address waived claims, especially when they involve constitutional rights, the violation of which would be fundamental error, *see D.H.*, 119 N.E.3d at 586, we will most certainly not do so when we are without an adequate record to determine if “a clearly blatant violation of basic and elementary principles” occurred and that the “harm or potential for harm” is substantial and appears clearly and prospectively. *In re S.M.*, 706 N.E.2d 596, 600 (Ind. Ct. App. 1999). Under the circumstances, we conclude that Father has waived appellate review of his due process claim, and we decline to exercise our discretion to address it.

[14] Affirmed.

Bradford, C.J., and Tavitas, J., concur.