MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In re the Termination of the Parent-Child Relationship of:

Lay. C., Lan. C., Li.C. (Minor Children), and

R.C. (Father) and C.W. (Mother),

Appellants-Respondents,

v.

Indiana Department of Child Services,
Appellee-Petitioner.

February 25, 2022

Court of Appeals Case No. 21A-JT-1257

Appeal from the Rush County Superior Court

The Honorable Brian D. Hill, Judge

Trial Court Cause No.
70D01-2012-JT-84
70D01-2012-JT-85
70D01-2012-JT-86

Bailey, Judge.

Case Summary

[1] C.W. ("Mother") and R.C. ("Father") appeal the termination of their parental rights to Lay.C., Lan.C., and Li.C. ("Children") upon the petition of the Rush County Department of Child Services ("DCS"). We affirm.

Issues

[2] Mother presents for review the issue of whether she was denied substantive due process because DCS thwarted reunification efforts.

[3] Father presents two issues for review:

I. Whether the trial court abused its discretion by admitting into evidence two recorded forensic interview statements made by Lay.C.; and

II. Whether Father was denied procedural due process because he did not receive court-appointed counsel.

Facts and Procedural History

[4] Mother gave birth to Lay.C. in 2014, to Lan.C. in 2016, and to Li.C. in 2017. Mother and Father were living together in July of 2018, when DCS caseworkers found Children lice-infested and living in squalor. One child had been restrained for long periods of time in a feces-covered highchair. DCS entered into an informal adjustment with Mother and Father and provided a referral for

home-based services from Intensive Home Builders. A home-based caseworker provided some short-term services to Mother, but withdrew from the referral, reporting that her assistance could not ensure that Children were in a safe environment. On August 16, 2018, DCS removed Children and filed a petition alleging that Children were Children in Need of Services ("CHINS").

[5] On September 10, 2018, Children were adjudicated CHINS, based upon parental admissions. Mother and Father admitted that they were overwhelmed and struggled with parenting skills, that Children at times lacked necessary food, hygienic care, and medical services, and that Children were substantially endangered. Mother and Father were ordered to participate in reunification services. Father, who was sometimes incarcerated, did not participate in court-ordered services. Mother participated in services, but service providers were convinced that Mother was not making significant progress in improving her parenting skills and providing a safe environment for Children. Children were placed with Mother for a ninety-day trial home visit but the placement ended early upon allegations that Mother's boyfriend, M.K., had behaved aggressively toward Children and perpetrated domestic violence.

[6] Two years after Children were adjudicated CHINS, on September 15, 2020, the CHINS court changed the permanency plan to include adoption. Thereafter, DCS petitioned to terminate Mother's and Father's parental rights to Children. The juvenile court conducted an initial hearing at which Mother appeared telephonically on January 5, 2021. Father did not appear despite having been provided with notice. DCS discovered that Father was incarcerated, and the

juvenile court conducted a second initial hearing with Father appearing telephonically on March 5, 2021. At that hearing, the court offered Father court-appointed counsel but Father stated that he was hiring private counsel. However, he did not do so.

[7] On May 11, 2021, the juvenile court conducted a hearing upon a DCS request to admit into evidence forensic interviews with Lay.C. that had been recorded on February 19 and May 6, 2020. Mother stipulated to the admissibility of the statements but did not stipulate to the veracity of the representations therein. Father neither stipulated to admission nor objected to admission.

[8] On May 14, 2021, the fact-finding hearing commenced, with Mother present. Father did not attend the first day, but appeared on the second day, without counsel. On May 27, 2021, the fact-finding hearing was concluded and the juvenile court orally pronounced Mother's and Father's parental rights terminated. Mother and Father initiated an appeal of the order, and DCS requested remand for the entry of findings of fact and conclusions thereon. On October 29, 2021, the juvenile court entered an amended written order terminating Mother's and Father's parental rights. Mother and Father now appeal.

Discussion and Decision

[9] Before an involuntary termination of parental rights may occur, the State is required to allege and prove, among other things:

(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 [CHINS];

(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.

[10] Ind. Code § 31-35-2-4(b)(2).

[11] The State's burden of proof for establishing these allegations in termination cases is one of clear and convincing evidence. I.C. 31-34-12-2; *In re G.Y.*, 904 N.E.2d 1257, 1260 (Ind. 2009). "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." I.C. § 31-35-2-8(a). Here, neither Mother nor Father challenge the sufficiency of the evidence to support the juvenile court's findings of fact nor do they challenge any of the court's conclusions thereon.

Rather, the parents present a challenge to the admission of evidence and allege deprivations of substantive and procedural due process.

Mother's Allegation of Denial of Substantive Due Process

[12] Mother contends that she was denied her substantive due process right to raise Children "when DCS failed to make reasonable efforts to reunify her with her children." Appellant's Brief at 17. According to Mother, "from the beginning to its sad end, DCS mishandled this [CHINS] case." *Id.* at 21.

[13] "Due process protections at all stages of CHINS proceedings are vital because every CHINS proceeding has the potential to interfere with the rights of parents in the upbringing of their children." *In re G.P.*, 4 N.E.3d 1158, 1165 (Ind. 2014) (quotations and citations omitted). CHINS proceedings and termination proceedings are intertwined, and parents facing termination of parental rights are also afforded due process protections. *In re T.W.*, 135 N.E.3d 607, 612 (Ind. Ct. App. 2019), *trans. denied*. 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." *Id.* at 613 (citing *In re D.H.*, 119 N.E.3d 578, 588 (Ind. Ct. App. 2019), *aff'd in relevant part on reh'g*, 122 N.E.3d 832 (Ind. Ct. App. 2019), *trans. denied*). Here, Mother's interest in the care, custody, and control of Children is substantial, and the State's interest in protecting the welfare of Children is also

substantial. Thus, our focus is placed upon the risk of error created by DCS's actions.

[14] The provision of family services is not a requisite element of our parental rights termination statute. I.C. 31-35-2-4. However, Indiana Code Section 31-34-21-5.5 provides that DCS "shall make reasonable efforts to preserve and reunify families." Indiana Code Section 31-35-2-4.5 permits a parent to file to dismiss a termination petition when DCS has not provided services in accordance with a current and valid case plan.[1] If DCS has acted so unreasonably in its provision or withholding of services as to constitute a deprivation of due process, a termination order may be reversed. *See Matter of C.M.S.T.*, 111 N.E.3d 207, 212-13 (Ind. Ct. App. 2018) (reversing a termination order where DCS employees had engaged in "egregious behavior" and the entire handling of the CHINS case was so "chaotic and unprofessional" as to violate the parents' due process rights).

[15] Mother concedes that DCS made numerous service referrals but claims that she was nevertheless thwarted in her reunification efforts because of the manner in which services were provided. In particular, Mother points out that Children had more than one dozen foster home placements in two years.[2] In most

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[1] Indiana Code Section 31-34-21-5.6 sets forth some exceptions to the requirement of providing reunification services.

[2] Lan.C and Li.C. had been in fourteen placements and Lay.C. had been in thirteen placements. Ultimately, Lay.C. was placed with a paternal relative in pre-adoptive placement, and the younger siblings were in a foster home with a DCS plan of adoption by those foster parents.

instances, foster parents had requested that placements end; Mother opines that frequent placement changes exacerbated Children's behavioral problems. Mother observes that one such placement required that she travel three hours to participate in supervised visitation. Too, Mother apparently believes that Lay.C. did not receive therapy that was sufficiently tailored to her diagnosis of reactive attachment disorder. Mother insists that DCS should have warned her against having M.K. in her home, rather than penalize her by removing Children from their trial home visit.

[16] Finally, Mother faults DCS for its handling of a housing plan. With the hope that Mother and Children could reside with Mother's sister ("Aunt") and Aunt's fiancé, DCS provided an apartment deposit. But DCS did not approve of Mother moving into the apartment immediately although Mother reportedly contributed to the rent. Maintaining the apartment became a financial hardship to Aunt and her fiancé, Aunt became overwhelmed and depressed; ultimately, she asked that Lay.C. be removed from the residence.

[17] "[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." *Prince v. Dep't of Child Servs.*, 861 N.E.2d 1223, 1231 (Ind. Ct. App. 2007). Here, DCS made available to Mother the following resources: individual counseling, family counseling, medical evaluations, a psychological evaluation, trauma assistance, domestic violence education, economic assistance (in the form of a rental deposit, rental

payment, and cleaning supplies), home-based case work, home-based therapy, homemaker services, parental education, therapeutic supervised visitation, and home-based supervised visitation. Sadly, Children's extreme behaviors prompted numerous placements, and some of the placements were geographically remote from Mother. But Mother did not fully participate in the services offered or request additional services. The response of DCS to less than ideal circumstances was not outside the realm of reasonable action. In sum, DCS provided reasonable services but those services failed to achieve reunification. Mother did not suffer a deprivation of her substantive due process rights in this instance.

Admission of Recorded Forensic Statements

[18] Father contends that the juvenile court abused its discretion by admitting into evidence two recorded forensic statements made by Lay.C. The admission of evidence is within a trial court's sound discretion and an abuse of discretion occurs only when the decision is clearly against the logic and effect of the facts and circumstances before the court or if the court has misinterpreted the law. *In re G.G.B.W. v. S.W.*, 80 N.E.3d 264, 272 (Ind. Ct. App. 2017), *trans. denied*. According to Father, the juvenile court failed to comply with a child hearsay statute, Indiana Code Section 31-35-4-3, which provides:

> A statement or videotape described in section 2 of this chapter is admissible in evidence in an action to determine whether the parent-child relationship should be terminated if, after notice to the parties of a hearing and of their right to be present:

> (1) the court finds that the time, content, and circumstances of the statement or videotape and any other evidence provide sufficient indications of reliability; and
>
> (2) the child:
>
> > (A) testifies at the proceeding to determine whether the parent-child relationship should be terminated;
> >
> > (B) was available for face-to-face cross-examination when the statement or videotape was made; or
> >
> > (C) is found by the court to be unavailable as a witness because:
> >
> > > (i) a psychiatrist, physician, or psychologist has certified that the child's participation in the proceeding creates a substantial likelihood of emotional or mental harm to the child;
> > >
> > > (ii) a physician has certified that the child cannot participate in the proceeding for medical reasons; or
> > >
> > > (iii) the court has determined that the child is incapable of understanding the nature and obligation of an oath.

[19] DCS notified the court of its intention to introduce child hearsay evidence on April 16, 2021. At a child hearsay hearing on May 11, 2021, Mother appeared by counsel and Father failed to appear. By counsel, Mother stipulated to the admission of Lay.C.'s recorded statements:

> So, the stipulation would be that the Department can use the February 19th, 2020 forensic interview and the May 6th, 2020 forensic interview, basically, in lieu of the child's in-person testimony. My client has had a chance to review the child hearsay evaluation formed [sic] by Dr. Linda McIntire and agrees that she doesn't want any harm to come to the child, by virtue of having a child of that age testify. And so, we would agree that those can be offered by the Department as evidence and otherwise would not be able to come in because they would be hearsay. We are not, however, your Honor, stipulating that [sic] the truth or voracity [sic] of any [of] the statements that are contained therein. Merely that they are, you know, statements made by the child in a forensic interview and it would be harmful for her to testify.

(Tr. Vol. II, pgs. 25-26.) Mother was then placed under oath and confirmed that it was her intention to stipulate to the admissibility of Lay.C.'s recorded statements.

[20] Father now points out that he did not likewise stipulate to the admission of the statements. True, but Father also did not appear at the hearing or lodge an objection regarding any alleged deficiency in the foundation for admissibility. He has therefore waived the issue for appellate review. *See e.g., Taylor v. State*, 841 N.E.2d 631, 637 (Ind. Ct. App. 2006), *trans. denied*. Moreover, in the context of admission of child hearsay in other juvenile proceedings, i.e., delinquency, this Court has said, "the ramification of the requirements of the child hearsay statute not being met is that the hearsay should not be admitted at trial. Reversal would not necessarily be required if other evidence is sufficient to support the adjudication." *L.H. v. State*, 878 N.E.2d 425, 429 (Ind. Ct. App.

2007). Here, there is no indication in the juvenile court's amended written order that it relied upon any statement made by Lay.C. in her forensic interviews. And the findings of fact and conclusions of law – unchallenged by either parent here – support the termination decision absent reliance upon child hearsay.

Father's Allegation of Denial of Procedural Due Process

[21] Father was not provided with court-appointed counsel for the termination proceedings, and he maintains that this constitutes a deprivation of his due process rights. Father directs our attention to Indiana Code Section 31-32-2-5, which provides: "A parent is entitled to representation by counsel in proceedings to terminate the parent-child relationship." DCS directs our attention to Indiana Code Section 31-32-5-5, which provides: "A parent who is entitled to representation by counsel may waive that right if the parent does so knowingly and voluntarily."

[22] Indiana Code Section 31-32-4-3(a) provides:

> If:
>
> (1) a parent in proceedings to terminate the parent-child relationship does not have an attorney who may represent the parent without a conflict of interest; and
>
> (2) the parent has not lawfully waived the parent's right to counsel under IC 31-32-5 (or IC 31-6-7-3 before its repeal);

> the juvenile court shall appoint counsel for the parent at the initial hearing or at any earlier time.

[23] Accordingly, the salient inquiry here is whether Father waived his right to counsel. At the hearing conducted on March 5, 2021, two months before the fact-finding hearing commenced, the juvenile court advised Father: "if you do not have the money or means to hire an attorney, the Court will appoint an attorney to represent you at no cost." (Tr. Vol. II, pg. 19.) The following colloquy ensued:

> Court: Would you like to have an attorney to represent you in this matter?
>
> Father: I've been talking to one.
>
> Court: You want to talk with one?
>
> Father: I've been talking to one that, my family found for me. … My brother found me one that I've been talking to.
>
> Court: So, are you gonna hire counsel?
>
> Father: Yeah.

(*Id.*) The juvenile court proceeded with the advisement of rights and then clarified:

> Now, the fact that you're gonna hire your own counsel, when I set this out, and I don't know what date that, we'll work out a date, here, in a little bit. But when I set this for a fact-finding

> hearing date and you show up and if you don't have counsel, I'm not gonna then appoint counsel and proceed. So, are you sure that you're gonna be hiring your own private counsel.

(*Id.* at 21.) Father responded "yes" and the juvenile court again offered to "appoint one today," to which Father responded: "Yes, I'll have one." (*Id.*)

[24] Upon this record, we conclude that Father knowingly and voluntarily waived his right to court-appointed counsel for the termination proceedings.

Conclusion

[25] Father has not demonstrated that the juvenile court abused its discretion in the admission of evidence. Mother has not shown a deprivation of her due process rights; Father has not shown a deprivation of his due process rights.

[26] Affirmed.

Mathias, J., and Altice, J., concur.