

MEMORANDUM DECISION

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ATTORNEY FOR APPELLANT

Michael D. Ghilardi
Law Office of Michael D. Ghilardi
Fort Wayne, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Robert J. Henke
Assistant Section Chief, Civil Appeals

David E. Corey
Supervising Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

In the Matter of R.M. and A.M.
(Children), Children in Need of
Services,

A.M. (Mother),
Appellant,

v.

Indiana Department of Child
Services,
Appellee.

April 29, 2022

Court of Appeals Case No.
21A-JC-2394

Appeal from the Allen Superior
Court

The Honorable Lori K. Morgan,
Judge

The Honorable Sherry A. Hartzler,
Magistrate

Trial Court Cause Nos.
02D08-1707-DC-981
02D08-2001-JC-43
02D08-2001-JC-44

Brown, Judge.

- [1] A.M. (“Mother”) appeals the trial court’s order modifying custody. Mother claims that she was denied due process and the court abused its discretion in modifying custody. We affirm.

Facts and Procedural History

- [2] Mother and R.M.M. (“Father”) are the parents of R.M., who was born in January 2012, and Ad.M., who was born in July 2013 (R.M. and Ad.M., together, “Children”). On July 19, 2018, the trial court issued a Decree of Dissolution of Marriage under cause number 02D08-1707-DC-981 (“Cause No. 981”) which dissolved Mother and Father’s marriage, found it was in Children’s best interests that Mother retain custody, and awarded her legal custody. In a previous memorandum decision, this Court stated:

Children were removed from Mother’s care and found to be CHINS in January of 2017 due to Mother’s drug use. Ultimately, those CHINS cases were closed and Children were returned to Mother’s custody.

In late 2019 to early 2020, the Indiana Department of Child Services (“DCS”) received three additional reports of Mother’s alleged abuse or neglect of Children. The first such report—in November 2019—pertained to Children’s appearance and Mother’s alleged erratic behavior. DCS opened an investigation and, in January 2020, received a second report of alleged neglect or abuse. The second report alleged that Mother’s untreated mental health issues, possible substance abuse, and exposure of Children to excessive cold temperatures in her home were harming Children. In February of 2020, DCS received a third report which repeated the concerns stated in the January 2020 report, and added concerns that Mother had

delusions of smelling formaldehyde or natural gas in her home and repeatedly called the police regarding the same.

In February of 2020, DCS filed a CHINS petition as to Children and initially placed Children with Mother. On August 6, 2020, DCS removed Children from Mother's home due to concerns about Mother's possible untreated mental health issues as demonstrated by her erratic and paranoid behaviors, inappropriate housing, and potential homelessness. Regarding Mother's behavior, she articulated beliefs—in Children's presence—to DCS family case manager Dwila Lewis-Hess ("FCM Lewis-Hess") that someone was trying to poison her, that her "ex-husband was spying on her through the television," and that toothpaste manufacturers "were putting something in the toothpaste" to cause cavities. Mother texted FCM Lewis-Hess as many as sixty times in one day to report her paranoid beliefs, including her belief that FCM Lewis-Hess had caused her to be evicted from her apartment. Regarding Mother's housing, FCM Lewis-Hess observed that the residence was "in disarray" with piles of clothing blocking the entrance, dirty dishes, broken items, and no furniture.

DCS referred Mother to obtain a psychological assessment, home-based services, and random drug screenings. Mother refused to obtain the psychological evaluation. Mother initially participated in home-based services designed to help her find housing and employment and provide her with parenting education; however, Mother stopped participating in the services before they were completed. DCS referred Mother to therapeutic visitation with Children, but Mother refused to participate in such visitation.

On August 27, 2020, the court heard evidence on the CHINS petition and, on September 2, the court issued its order on the fact-finding hearing. The court found that Mother was to be evicted from her apartment on August 29, 2020, for violations of her lease. Those violations included complaints that Children were disturbing other residents and were observed on a security camera damaging property in the common area of a building in the apartment complex during the hours of 1:00 a.m. to 3:00 a.m. while unsupervised. The court also found that Mother displayed erratic and paranoid behavior, including

an incident in November of 2019 in which Mother opened all the windows and doors of her apartment because she believed “people were dumping chemicals in the apartment,” and police found Children “huddled in a hallway covered with blankets” because the interior apartment temperature was 30 degrees.

* * * * *

On October 1, 2020, the court held a dispositional hearing at which it heard further evidence. In an order dated October 20, the court accepted DCS’s recommendations for services to be provided to Mother in the best interests of Children. The court ordered Mother to comply with a parent participation plan that included maintaining safe and appropriate housing, enrolling in home-based services, obtaining a psychological evaluation and following any resulting recommendations, submitting to random drug testing, and obtaining a drug and alcohol assessment and following any resulting recommendations. The court also ordered Mother to have therapeutic, supervised visitation with Children.^[1]

Matter of R.M., No. 20A-JC-2194, slip op. 1-2 (Ind. Ct. App. May 14, 2021) (citations omitted). Mother appealed, and this Court held that, because there was sufficient evidence Children were seriously endangered by her actions and inactions at the time of removal, Children’s needs for safety were unmet, and she was unlikely to meet their needs for safety without court intervention, the CHINS adjudication was not clearly erroneous. *Id.* at 4.

¹ The court also ordered that Children’s placement in the home of the non-custodial parent, Father, be continued.

[3] On February 22, 2021, the court issued a Permanency Plan Order stating Children were placed with Father, they were progressing well, and Father was participating in the services required in the dispositional decree. The court further found that Mother had failed to enroll or satisfactorily participate in the services required in the dispositional decree. The court ordered that Children remain in the home of Father and authorized Father to file custody pleadings. On May 7, 2021, a Motion for Permanency was filed and a hearing was scheduled for September 7, 2021.

[4] On September 7, 2021, the court held the scheduled hearing. At the hearing, the court noted Mother was not present, and Mother's counsel stated that she spoke to Mother an hour and a half earlier and Mother had said she would like to request new counsel. The court stated that "given that she has court-appointed counsel in this matter, [] the Court doesn't have the ability to remove you as counsel and then put another PD in in your place if that's essentially what she's asking," and Mother's counsel stated: "I'm not entirely sure. She said she didn't want me on there and she wanted her own counsel. . . . She disconnected the phone call at that point" Transcript Volume II at 4-5. The court stated it was inclined to deny the request and asked Mother's counsel if she was comfortable going forward, and Mother's counsel stated "I'm court-appointed so I think that is sufficient and we can move forward." *Id.* at 5.

[5] Dr. David Lombard, a clinical psychologist, testified regarding his evaluations of Mother as requested by DCS and began to summarize the results of the assessments. Counsel for DCS then indicated that he was informed that

Mother had contacted FCM Lewis-Hess and requested to participate by phone, and the court called Mother and explained who was in the courtroom and that it had denied her motion to have new counsel appointed. Mother then asked “[w]ho works for CASA,” and the court stated “CASA by Chris Hamilton and Nicole Fischer.” *Id.* at 9. Mother indicated that she was standing in front of the courthouse, and the court asked her to enter the courtroom. Dr. Lombard continued to testify regarding his assessments and recommendations. Mother’s counsel cross-examined Dr. Lombard and asked him about the recommended therapy, Mother’s ability to function day-to-day without the therapy, and whether Mother had shown any mistrust toward Children.

[6] Julie Ann Harter testified that she was a clinician therapist with SCAN and that she received a referral to serve as the supervised therapeutic clinician but was never able to complete an intake. When asked about an attempt to conduct an intake in May, she testified Mother “became agitated and began to question the verbiage” in certain documents and “basically stated it’s her belief that we at SCAN had an intent to kill her and I attempted then to bring in another clinician to potentially reframe the paperwork,” and “unfortunately at that point she still was claiming that SCAN has the intent to kill her and she took the paperwork and x’d it out and then took it with her [and] left the building.” *Id.* at 17. Mother’s counsel cross-examined Harter and asked about the efforts to follow up with Mother.

[7] FCM Lewis-Hess testified as to the reasons DCS became involved with Mother, the CHINS adjudications, and the removal of Children due to Mother’s

behavior and the condition of her apartment. She testified that Mother “kept saying that somebody was breaking into her apartment and stealing odd things,” Mother interjected “[w]ho’d I say that too [sic] because it wasn’t you,” the court told Mother that she could not interrupt during the testimony and asked if she understood, and Mother stated “[b]ut you can’t have somebody lying under oath either.” *Id.* at 21. FCM Lewis-Hess continued to testify regarding the dispositional order and Mother’s compliance with ordered services. She testified that Mother “accused the home-based worker of poisoning her with a pen and accused her of stealing her phone to the point that the home-based worker called the police for assistance. [Mother] also called 9-1-1 . . . ,” Mother then interjected “[n]o, I actually called the police . . . on her . . . [s]o get the reports correct,” and the court stated “[m]a’am, I’m going to have you leave if you keep interrupting.” *Id.* at 22. Mother replied “[o]kay. Well, I don’t care. I called the police on her,” the court stated “[m]a’am, listen. I’m going to have you leave if you don’t stop interrupting. Do you understand,” and Mother stated “[b]ecause she’s getting it all backwards.” *Id.* at 22-23. FCM Lewis-Hess testified that the police arrived and Mother “was adamant [sic] that the worker had stolen her phone and the police had asked [Mother] to look in her car and the phone was actually . . . ,” and Mother interjected “I called the police on her because she threatened me. That’s why I called the police on her.” *Id.* at 23.

[8] FCM Lewis-Hess testified regarding Mother’s compliance with the recommendations from the psychological evaluations. She indicated Mother

initially submitted to drug screens which were negative but “then she demanded the screens be changed from swab to urine because she said the swabs gave her gingivitis.” *Id.* at 24. She testified regarding Mother’s compliance with visitation, her visits were sporadic, and her last visit was in February 2021. When asked if Mother provided a reason that she had not seen Children, FCM Lewis-Hess replied Mother “was demanding that I send the referral to SCAN” and “I tried to go over with her that it did not say she was giving permission for a funeral director to embalm her,” and Mother interjected “[t]hat’s what the paperwork said. I got (sic) the paperwork to – and I had . . . to bring the supervisor in there and they was (sic) talking about some craziness . . . so I left. And I have proof of that paperwork to turn into the Court.” *Id.* at 24-25.

[9] The court asked Mother’s counsel if it would be beneficial to go off the record for her to have a moment with her client, Mother’s counsel replied affirmatively, and the court took a six-minute recess. Upon reconvening, Mother stated “I got that paperwork from SCAN by the way,” “I had to go get a supervisor and nobody’s doing anything about it,” “[c]an you reschedule so I can get a different attorney – to hire an attorney because I’m not going to sit and keep on taking this. I’m not. I’ve got all the paperwork to back it up,” and “I can give it to you today and have it stamped in the Court. I was told to get a restraining order put on the [] girl too by the police. I got (sic) all my drug screens. They’re all negative.” *Id.* at 25. The court stated “[Mother], you were talking to us on the phone a little bit ago,” Mother stated “[y]eah, I’d rather get a phone hearing too,” and the court asked “[w]hy don’t you do this? If you’d

rather have a phone hearing go ahead and leave, go back to your car wherever it is. Make sure we've got the number and we'll call you okay?" *Id.* at 26. Mother stated "[s]o to turn in all the paperwork from SCAN . . . they tried getting me to sign fifty (50) packets of paperwork" and "I have them, copies of everything," the court said "[l]isten. Listen," Mother said "I have all my drug screens" and "[a]ll my visitation," Mother's counsel stated "[Mother], listen to the Judge," and the court said "[y]ou can leave. Call us – get to your car where you have your phone and we'll call you. Go ahead." *Id.* Mother stated "so what I'm going to do is call my friend. Have her come pick me up. I'm going to get all the paperwork," "I'm going to turn it into that window back there, all the police reports," "all the paperwork from SCAN, all the paperwork from Armani, all the drug screen negative results that I have," and "I'm going to have them stamp it that I turned it in," and the court said "listen time to leave." *Id.* at 27. Mother said "[y]ou can't have people lying and committing perjury" and "I'm not going to put up with this." *Id.* at 27-28.

[10] The court stated "I'm going [] off the record. I think it'll take her ten (10) minutes to get to her car and then we'll continue." *Id.* at 28. The transcript indicates the court took a ten-minute recess and then called Mother. Mother stated "I'm walking in there right now with my drug screens. You guys want to see proof," the court said "I'm going to have you participate by phone so just stay where you're at," Mother stated "[n]o, I'm walking back in there now. You want to see all the drug screens that are negative," and the court told Mother she could participate by phone. *Id.* Mother kept speaking, and the

court stated “[a]ll right. I’m turning it down. She has an opportunity to hear. Go ahead.” *Id.* at 28.

[11] FCM Lewis-Hess continued to testify regarding visitation and stated that, with respect to one referral, Mother “made a comment that she was going to kill all these bitches.” *Id.* at 30. She testified Mother was paranoid that somebody was poisoning her and “she alleged that I’m related to [Father] somehow, that I’m a part of his family,” “[s]he said . . . I was breaking into her car and stealing the court paperwork before she got it,” “[s]he said I was stealing her mail,” and “then at one point she said I was having an affair with [Father].” *Id.* at 31-32. She also testified regarding the condition of Father’s home and how Children were progressing since being placed with Father. Mother’s counsel cross-examined FCM Lewis-Hess, asked about visitation services, and elicited testimony that Mother never had a positive drug screen.

[12] Father testified regarding how Children were doing in school and their health. Mother’s counsel cross-examined Father and asked about his compliance with ordered services. The transcript shows that Mother stated “I heard [Father’s mother] placed with the kids or something. If you go back in the record she recently had got arrested for marijuana. Not in my kids’ best interest. I got a drug screen,” the court stated “[m]a’am listen, you’re going to have to leave on your own . . . or I’m going to have the Sheriff come and have you removed.” *Id.* at 42-43. Mother continued to speak. Mother’s counsel stated “[t]he Sheriff is going to come up and get you,” and Mother said “[s]o dad thinks that the best place for the kids is with somebody that just got arrested for marijuana.”

Id. at 43. Mother’s counsel told Mother “I’d advise you not to say anything else.” *Id.* Mother continued speaking. The transcript indicates that Mother exited the courtroom.

[13] Court Appointed Special Advocate Nichole Fischer (“CASA Fischer”) testified that she recommended that custody be modified to Father, Mother exhibited frightening behaviors, and she recommended that Mother’s visitation be therapeutically supervised.

[14] On September 29, 2021, the court issued an Order Modifying Custody which included the following findings:

10. Mother submitted to multiple psychological assessments by Dr. David Lombard in May 2017, September 2020, and October 2020.

11. On September 2020, Dr. Lombard completed testing and a clinical interview and noted possible diagnoses of post-traumatic stress disorder (PTSD), personality disorder and intermittent explosive disorder. Ultimately, Lombard recommended that Mother participate in weekly cognitive behavioral therapy (CBT) with a provider skilled in working with victims of domestic violence. He further recommended that Mother return for further testing.

12. In October 2020, Lombard completed additional testing and evaluation of Mother and ultimately diagnosed her with generalized anxiety disorder, and a personality disorder with avoidant and schizophrenic traits. Lombard recommended that Mother be further evaluated for her paranoid symptoms and recommended dialectal behavioral therapy (DBT) to address the personality disorder.

* * * * *

14. The Court further finds through Lombard, that Mother’s paranoia and anxiety can interfere with her ability to parent and follow

through on treatment and education. At worst, parents suffering from these conditions may not trust their children, which in turn could negatively impact development and be emotionally damaging. These conditions can also cause volatility in major relationships and disengagement with children.

15. Mother was referred to homebased services that ultimately terminated when mother accused the agency of poisoning her. Mother was also referred to DBT therapy, but she refused services. The Department attempted to drug screen Mother[;] however, she contended the drug screens gave her gingivitis and she stopped participating for six (6) months.

16. The Department referred Mother to SCAN for visitations; however, when she was asked to sign documents concerning her visitations, she contended she was signing a consent to be embalmed. Additional referrals were made to Dockside for visitations; however, Mother never attended. Ultimately, Mother has not visited with the children since February 10, 2021.

17. During the underlying juvenile proceedings, the Department supervised the children in the care of Father . . . and found the household appropriate and the children well-cared-for. Both children are doing well in school and Father provides medical insurance. During the CHINS proceedings, Father participated in Fatherhood Engagement Services, attended twelve-step meetings, worked with a sponsor, and completed a mental health evaluation.

18. The Department of Child Services and the children's Court Appointed Special Advocate recommend[] that Father . . . be granted sole legal and physical custody of the minor children . . . , contending same is in their best interests.

19. The Court notes that Mother . . . initially appeared for these proceedings telephonically, and then minutes later in person. The Court observed her to be disruptive and refusing any redirection. She was offered the ability to appear telephonically for which she agreed, and left the courthouse. However, as she was appearing telephonically,

she remained disruptive and continued to refuse redirection. Although[] it was difficult to follow Mother's contentions, the Court concludes that her behavior in open court was consistent with the testimony of Dr. David Lombard, SCAN, and [DCS]. The Court does not find it credible that SCAN was attempting to kill Mother or that [DCS] was trying to poison her and steal her paperwork.

20. Ultimately, the Court concludes that Mother is, unfortunately, very ill. Efforts were made to engage her in services to rehabilitate her and reunify her with her children; however, Mother either did not avail herself of services or when she did participate, she exhibited combative and paranoid symptoms. The Court finds through the testimony of Mother's case manager, that [Mother] does indeed love her children; however, her current mental state and refusal to effectively participate in services make her unfit to continue to exercise physical and legal custody of her children.

21. The Court finds that there has been a change of circumstances so substantial and continuing as to make the terms of the custody, support and parenting time orders entered by the Allen Superior Court in [Cause No. 981] unreasonable. The Court finds that there has been a substantial change in one or more of the factors which the Court may consider under I.C. 31-17-2-8 for purposes of modifying custody and considering all factors.

22. The best interests of the children are served by granting [Father] sole legal custody.

Appellant's Appendix Volume II at 89-92. The court granted Mother therapeutic supervised parenting time.

Discussion

[15] Mother asserts that she was denied due process when the trial court denied her motion for a continuance to obtain private counsel, had her leave the courtroom to participate by telephone, and ultimately had her removed from

the proceeding without making available the opportunity for her to speak with counsel. She also argues the court abused its discretion in modifying custody. The State argues Mother waived her due process argument and the court did not abuse its discretion in modifying custody.

[16] “As a general rule, a party may not present an argument or issue to an appellate court unless the party raised that argument or issue to the trial court.” *GKC Indiana Theatres, Inc. v. Elk Retail Invs., LLC*, 764 N.E.2d 647, 651 (Ind. Ct. App. 2002). Further, the Indiana Supreme Court has held that “a party on appeal may waive a constitutional claim, including a claimed violation of due process rights, by raising it for the first time on appeal.” *In re N.G.*, 51 N.E.3d 1167, 1173 (Ind. 2016). Here, Mother did not assert to the trial court that she was denied due process, and the issue on appeal is waived. *See id.* (finding the mother waived her due process claim).

[17] Waiver notwithstanding, reversal is not warranted. Due process requires the opportunity to be heard at a meaningful time and in a meaningful manner. *In re K.D.*, 962 N.E.2d 1249, 1257 (Ind. 2012) (citing *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893 (1976)). We have stated the nature of process due, in the context of a termination of parental rights proceeding, turns on the balancing 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. *Lawson v. Marion Cty. Off. of Fam. & Child.*, 835 N.E.2d 577, 580 (Ind. Ct. App. 2005). The balancing of these factors recognizes that although due process is not

dependent on the underlying facts of the particular case, it is nevertheless flexible and calls for such procedural protections as the particular situation demands. *Id.* We generally review a decision to deny a continuance for an abuse of discretion, and no abuse of discretion will be found when the moving party has not demonstrated that he or she was prejudiced by the denial. *See In re K.W.*, 12 N.E.3d 241, 243-244 (Ind. 2014). Further, we afford trial judges ample latitude to run the courtroom and maintain discipline and control of the proceedings. *See In re J.K.*, 30 N.E.3d 695, 698 (Ind. 2015). *See also Pitman v. State*, 436 N.E.2d 74, 78 (Ind. 1982) (noting the trial court has the responsibility to manage and control the proceedings and is given wide latitude of discretion in carrying out its duties).

[18] The trial court found that it “observed [Mother] to be disruptive and refusing any redirection,” “[s]he was offered the ability to appear telephonically for which she agreed, and left the courthouse,” and “as she was appearing telephonically, she remained disruptive and continued to refuse redirection.” Appellant’s Appendix Volume II at 91. The record supports these findings. Throughout the hearing, Mother interrupted the witnesses and the court, spoke out of turn, was nonresponsive in her answers, and disregarded the trial court’s instructions. The record further reveals that, despite Mother’s conduct, the court took steps to provide her and her counsel, who represented Mother throughout the hearing, with the opportunity to introduce evidence and cross-examine the witnesses, and Mother’s counsel questioned the witnesses. Mother has not shown that she was prejudiced by the denial of a continuance. Our

review of the record reveals that Mother was not denied the opportunity to be heard and to present argument and evidence. Under the circumstances, we conclude Mother was not denied due process.

[19] Ind. Code § 31-17-2-21 provides a court may not modify a child custody order unless modification is in the child’s best interests and there is a substantial change in one or more of the factors the court may consider under Ind. Code § 31-17-2-8. We review custody modifications for abuse of discretion, with a preference for granting latitude and deference to trial judges in family law matters. *Kirk v. Kirk*, 770 N.E.2d 304, 307 (Ind. 2002). We set aside judgments only when they are clearly erroneous and will not substitute our own judgment if any evidence or legitimate inferences support the trial court’s judgment. *Id.* “[W]e are in a poor position to look at a cold transcript of the record, and conclude that the trial judge, who saw the witnesses, observed their demeanor, and scrutinized their testimony as it came from the witness stand, did not properly understand the significance of the evidence” *Id.* (citation omitted). To the extent Mother does not challenge the trial court’s findings of fact, the unchallenged facts stand as proven. See *In re B.R.*, 875 N.E.2d 369, 373 (Ind. Ct. App. 2007), *trans. denied*.

[20] The trial court entered findings regarding the assessments performed by Dr. Lombard, the evidence regarding Mother’s mental health, the efforts to engage her in services to reunify her with Children, the extent and nature of Mother’s participation in the services, and her ability to exercise physical and legal custody of Children. The record reveals that testimony and evidence was

presented which supports the court's findings. The court heard testimony from Dr. Lombard, Harter, FCM Lewis-Hess, Father, and CASA Fischer and was able to consider Mother's health and conduct over time and the Children's best interests. We cannot say the court abused its discretion or that its judgment is clearly erroneous.

[21] For the foregoing reasons, we affirm the trial court's order.

[22] Affirmed.

Mathias, J., and Molter, J., concur.