MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In the Matter of the Termination of the Parent Child Relationship X.C. (Minor Child),

A.C. (Father),

Appellant-Respondent,

v.

Indiana Department of Child Services,

Appellee,

and

Child Advocates, Inc.,

Appellee-Petitioner.

July 22, 2021

Court of Appeals Case No. 20A-JT-2249

Appeal from the Marion Superior Court

The Honorable Marilyn A. Moores, Judge

The Honorable Scott B. Stowers, Magistrate

Trial Court Cause No. 49D09-1910-JT-854

Brown, Judge.

[1] A.C. ("Father") appeals the involuntary termination of his parental rights to his child X.C. We affirm.

Facts and Procedural History

[2] In December 2015, X.C. was born to K.W. ("Mother") and Father. In February 2016, the Indiana Department of Child Services ("DCS") filed a petition alleging X.C. was a child in need of services ("CHINS") and that Mother failed to provide him with a safe stable living environment with proper supervision free from illegal drug use. DCS also alleged Father had recently

tested positive for marijuana and was unable or unwilling to protect X.C. while he was in Mother's care and was unable to appropriately parent X.C.

[3] On February 9, 2016, the court entered an order authorizing placement of X.C. in relative care and foster care. It also ordered unsupervised parenting time and authorized Father to reside in the relative caregiver's home conditioned upon his participation in random drug screens. That same day, the court appointed Child Advocates, Inc., as guardian ad litem for X.C.

[4] On May 23, 2016, the court entered an order finding that Father, by counsel, admitted that X.C. was a CHINS due to the fact that he was not the child's custodial parent and could not protect the child from Mother's actions. The court accepted Father's admission and adjudicated X.C. to be a CHINS. The court's order stated that Father's counsel requested authorization for Father to transport the child to daycare and to reside in the home of the relative caregiver and that DCS objected and alleged Father continued to test positive for illicit substances. The court denied Father's request.

[5] On June 6, 2016, the court entered a dispositional order referring to a parental participation order which required Father to submit to random drug/alcohol screens and successfully complete a Father Engagement Program.

[6] On October 1, 2018, the guardian ad litem filed a Petition for Involuntary Termination of the Parent-Child Relationship under cause number 49D09-

1810-JT-1167.[1] At the time of the hearings on the guardian ad litem's petition, DCS did not support termination of Father's parental rights. In its June 24, 2019 order denying the petition, the court found that Father acknowledged he had smoked marijuana. It also found that Father had several pending charges and remained incarcerated but was due to be released in September 2019.

[7] On October 4, 2019, the guardian ad litem filed a petition for involuntary termination of the parent-child relationship between Father and Mother and X.C. In January 2020, Mother signed a consent for X.C.'s foster mother to adopt him.

[8] On September 23 and 30, 2020, and October 14, 2020, the court held hearings at which X.C.'s foster mother, Permanency Family Case Manager Kamamee Fatormah ("FCM Fatormah"), and Guardian ad Litem John Hart ("GAL Hart") testified.[2] Father testified that he did his best to maintain his bond with X.C. throughout the CHINS case, he made a mistake by using marijuana despite knowing that doing so would delay reunification with X.C., he would be willing and able to abstain from all illegal drug use, and he loved X.C. very much. Father also agreed there were some periods of time during the CHINS

[1] The record does not contain a copy of this petition.

[2] The record does not include a transcription of the October 14, 2020 hearing and the caption page of the transcript states: "October 14, 2020 (audio not recovered)." Transcript Volume II at 2. On March 11, 2021, Father filed a Verified Statement of the Evidence Presented at the Final Day of the Termination Trial. On March 30, 2021, the court entered an order certifying Father's verified statement.

case that he did not participate in services or parenting time because he was not ready to turn himself in on an open warrant.

[9] On November 16, 2020, the court terminated Father's parental rights. It found that X.C. had been a ward and an adjudicated CHINS for over four years, there was a reasonable probability the conditions resulting in his removal would not be remedied, the continuation of the parent-child relationship between Father and X.C. posed a threat to X.C.'s well-being, and termination of the relationship was in X.C.'s best interests.

Discussion

[10] Father asserts that DCS went through extensive efforts to reunite X.C. with Mother but made no such effort to include him in the reunification process. He acknowledges that he has a criminal history and was incarcerated at the time of the termination hearings, but asserts that incarcerated parents do not forfeit the right to be reunified with their children. He states that he was set to be released on November 16, 2020, and there was no reason to rush into terminating his parental rights.[3]

[11] To the extent Father asserts on appeal that DCS did not afford him due process, we note Father acknowledges that he did not raise the argument before the trial

[3] To the extent Father contends that the court's order that he complete the Father Engagement Program and provide drug screens was not based on evidence in the CHINS case as he did not enter an admission to drug use or misconduct, Father did not object to or appeal the dispositional order in the CHINS case. Further, Father does not point to the record, other than the court's November 16, 2020 termination order, for his assertion that he did not enter an admission to drug use or misconduct.

court. Accordingly, his argument is waived. *See In re S.P.H.*, 806 N.E.2d 874, 877-878 (Ind. Ct. App. 2004) (father who appealed termination of parental rights waived claims concerning DCS's alleged failures to comply with CHINS statutory requirements when he raised them for the first time on appeal). Waiver notwithstanding, reversal is not warranted.

[12] It has been established that, as a matter of statutory elements, DCS is not required to provide parents with services prior to seeking termination of the parent-child relationship. *In re T.W.*, 135 N.E.3d 607, 612 (Ind. Ct. App. 2019), *trans. denied*. However, parents facing termination proceedings are afforded due process protections. *Id.* We have discretion to address such due process claims even where the issue is not raised below. *Id.* CHINS and termination of parental rights proceedings "are deeply and obviously intertwined to the extent that an error in the former may flow into and infect the latter," and procedural irregularities in a CHINS proceeding may deprive a parent of due process with respect to the termination of his or her parental rights. *Id.* (citing *Matter of D.H.*, 119 N.E.3d 578, 588 (Ind. Ct. App. 2019), *aff'd in relevant part on reh'g*, *trans. denied*). *See also In re J.K.*, 30 N.E.3d 695, 699 (Ind. 2015) (holding "when the State seeks to terminate the parent-child relationship, it must do so in a manner that meets the requirements of due process") (quoting *In re G.P.*, 4 N.E.3d 1158, 1165 (Ind. 2014) (alteration and internal quotation marks omitted)).

[13] "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) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893 (1976)). The Indiana

Supreme Court has held that "the process due in a termination of parental rights action turns on balancing three *Mathews* factors: (1) the private interests affected by the proceeding; (2) the risk of error created by the State's chosen procedure; and (3) the countervailing governmental interest supporting use of the challenged procedure." *Id.* (citing *In re C.G.*, 954 N.E.2d 910, 917 (Ind. 2011)). "In balancing the three-prong *Mathews* test, we first note that the private interest affected by the proceeding is substantial – a parent's interest in the care, custody, and control of her child." *In re C.G.*, 954 N.E.2d at 917. "We also note the countervailing *Mathews* factor, that the State's *parens patriae* interest in protecting the welfare of a child is also substantial." *Id.* Thus, we turn to the risk of error created by DCS's actions and the trial court's actions. *See id.*

[14] We note that DCS filed a petition alleging X.C. to be a CHINS in February 2016. That same month, Father appeared at a hearing and the trial court appointed counsel to represent him. In its May 23, 2016 order, the court found that Father, by counsel, admitted that X.C. was a CHINS.

[15] With respect to DCS's provision of services, its policy manual provides directions regarding the provision of services and states DCS "will provide family services to all children and families with an open case," "will make appropriate service referrals," and "will reassess the strengths and needs of the child and family throughout the life of the case and will adjust services, if necessary, to meet identified needs." *Matter of D.H.*, 119 N.E.3d at 589 (citing

Indiana Department of Child Services Child Welfare Policy Manual, Ch. 5, Sec. 10).[4]

[16] The court found that Father had been in and out of incarceration for the duration of the CHINS case and, "[w]hen he was not incarcerated, he made no attempt to reach out to the FCM." Appellant's Appendix Volume II at 27. It found that, "[a]t the time that FCM Fatormah received the case in August 2019, referrals for Father Engagement and Random Drug Screens were open and in place." *Id.* It found that FCM Fatormah granted Father's request that his drug screens occur in his home, but he failed to participate. It further found that, "[b]y his own admission, [Father] did not comply with the Court's order of submitting to random drug screens, attributing his non-compliance to scheduling conflicts and being 'lazy.'" *Id.* at 28. To the extent Father does not challenge the 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) (failure to challenge findings by the trial court resulted in waiver of the argument that the findings were clearly erroneous), *trans. denied*.

[17] The record reveals that, when asked if she had ever been able to "make a lot of effort towards reunifying" X.C. with Father, FCM Fatormah answered affirmatively. Transcript Volume II at 75. She testified that all court ordered

[4] The Indiana Department of Child Services Child Welfare Policy Manual is now found at https://www.in.gov/dcs/files/Child_Welfare_Policy_Manual.pdf [https://perma.cc/M849-7RFV] (last visited July 2, 2021).

services were in place when she received the case in August 2019 which included the Father Engagement Program and random drug screens. She testified that Father participated in a child and family team meeting in the first several months she was assigned to the case and that, at that meeting, she addressed the Father Engagement Program and drug screens. She stated that she introduced herself to Father and he knew how to reach her. On cross-examination, Father's counsel mentioned that "there was a referral open but there is not a provider working with" Father and asked FCM Fatormah for her understanding of why that service was not being offered to him. *Id.* at 89. FCM Fatormah answered: "My understanding was [Father] was not willing to participate in any services, at that point." *Id.* When asked who told her that, she answered: "This is based on the previous FCM and then I made attempts to . . . provide those services to him, as well." *Id.*

[18] FCM Fatormah stated she "did re-refer him to another agency to provide Father's Engagement for him." *Id.* at 91. When asked why there was not an open referral and why she had to make another referral, she answered: "It was open in the system, but [Father] was not working with the provider. He was not meeting with the provider consistently so[] the provider was not willing to work with him." *Id.* at 92. She confirmed that she made a referral to another agency after the child and family team meeting and there was an individual in place at that agency to provide Father Engagement Services. She testified that she set up random drug screens such that the screener was able to visit Father's home, Father was supposed to be participating in in-home drug screens while

he was on work release, and he refused to participate. When asked why she said Father refused to participate, she answered: "Because we have several – several . . . when we get our weekly reports of compliance for Court, it states that – when a screen is missed – when an in-home screen is missed, it will mention; missed, client refused so, that was the case." *Id.* at 96-97.

[19] FCM Fatormah also testified Father did not inform her that he was incarcerated at the Marion County Jail, she learned of his incarceration and sent him a parent incarceration letter in early 2020 asking him if he was participating in services in jail or if he would like to participate in services through DCS, and she did not receive any response. She also testified she was always the one to initiate contact with Father and he did not initiate contact with her during his incarceration or while she had been the family case manager.

[20] Under these circumstances, we cannot say that Father's due process rights were violated or that he was excluded from the CHINS process. *See In re B.D.J.*, 728 N.E.2d 195, 201 (Ind. Ct. App. 2000) ("[A] parent may not sit idly by without asserting a need or desire for services and then successfully argue that he was denied services to assist him with his parenting").

[21] In order to terminate a parent-child relationship, DCS 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 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.

Ind. Code § 31-35-2-4(b)(2). If the court finds that the allegations in a petition described in Ind. Code § 31-35-2-4 are true, the court shall terminate the parent-child relationship. Ind. Code § 31-35-2-8(a).

[22] A finding in a proceeding to terminate parental rights must be based upon clear and convincing evidence. Ind. Code § 31-37-14-2. We do not reweigh the evidence or determine the credibility of witnesses but consider only the evidence that supports the judgment and the reasonable inferences to be drawn from the evidence. *In re E.M.*, 4 N.E.3d 636, 642 (Ind. 2014). We confine our review to two steps: whether the evidence clearly and convincingly supports the findings, and then whether the findings clearly and convincingly support the judgment. *Id*. We give due regard to the trial court's opportunity to judge the credibility of the witnesses firsthand. *Id*. "Because a case that seems close on a 'dry record' may have been much more clear-cut in person, we must be careful not to substitute our judgment for the trial court when reviewing the sufficiency

of the evidence." *Id*. at 640. The involuntary termination statute is written in the disjunctive and requires proof of only one of the circumstances listed in Ind. Code § 31-35-2-4(b)(2)(B).

[23] In determining whether the conditions that resulted in a child's removal will not be remedied, we engage in a two-step analysis. *See E.M.*, 4 N.E.3d at 642-643. First, we identify the conditions that led to removal, and second, we determine whether there is a reasonable probability that those conditions will not be remedied. *Id.* at 643. In the second step, the trial court must judge a parent's fitness as of the time of the termination proceeding, taking into consideration evidence of changed conditions, balancing a parent's recent improvements against habitual patterns of conduct to determine whether there is a substantial probability of future neglect or deprivation. *Id.* 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 a parent's past behavior is the best predictor of future behavior. *Id.* The statute does not simply focus on the initial basis for a child's removal for purposes of determining whether a parent's rights should be terminated, but also those bases resulting in the continued placement outside the home. *In re N.Q.*, 996 N.E.2d 385, 392 (Ind. Ct. App. 2013). A court may consider evidence of a parent's drug abuse, history of neglect, failure to provide support, lack of adequate housing and employment, and the services offered by DCS and the parent's response to those services. *Id.* Where there are only

temporary improvements and the pattern of conduct shows no overall progress, the court might reasonably find that under the circumstances the problematic situation will not improve. *Id.*

[24] While incarceration alone cannot serve as a basis for termination of parental rights, it is well-settled that a trial court may evaluate the parent's habitual patterns of conduct to assess the likelihood that the child could experience future neglect or deprivation; and give considerable weight to the parent's history of incarceration and the effects upon the child. *See A.D.S. v. Ind. Dep't of Child Servs.*, 987 N.E.2d 1150, 1157 (Ind. Ct. App. 2013) (holding that the parent's habitual patterns of conduct should be evaluated to determine the probability of future neglect or deprivation of the child, that DCS is not required to prove a parent has no possibility of changing, and that DCS need only establish a reasonable probability that no change will occur), *trans. denied*.

[25] The court found Father had no parenting time with X.C. since December 2018, he had a lengthy criminal history,[5] he was released from incarceration in September 2019 and placed on work release, and he absconded in December 2019, which resulted in a conviction for failure to return to lawful detention as a

[5] Specifically, the court found Father had convictions for two counts of theft as class D felonies in 2001; attempted theft as a class D felony in 2004; theft as a class D felony, domestic battery as a class A misdemeanor, and criminal mischief as a class B misdemeanor in 2006; burglary as a class C felony and theft and possession of marijuana as class D felonies in 2008; battery against a public safety official and resisting law enforcement as class A misdemeanors in 2015; theft as a level 6 felony in 2018; and battery against a public safety official as a level 6 felony and operating a vehicle while intoxicated endangering a person as a class A misdemeanor in 2020.

level 6 felony. The court found that Father was ultimately arrested on a warrant. It found that Father had been in and out of incarceration for the duration of the CHINS case and "[w]hen he was not incarcerated, he made no attempt to reach out to the FCM." Appellant's Appendix Volume II at 27. It found Father had made no progress towards court ordered services and Father attributed his non-compliance with random drug screens to "scheduling conflicts and being 'lazy.'" *Id.* at 28. It found that Father had been "either incarcerated or evading arrest warrants for the majority of the child's life." *Id.* The court concluded that Father had over four years to provide a safe and stable environment but had not done so, he had "demonstrated a consistent pattern of conduct which render him unavailable to parent the child," "[e]ven after the Court afforded [Father] additional time to demonstrate stability in denying the 2018 TPR Petition, Father, upon his September 2018 [sic] release from incarceration, promptly absconded from Work Release,"[6] and Father "continues to absence himself from the child's life by his negative choices and decisions." *Id.*

[26] The record reveals that X.C.'s foster mother testified that X.C. had been in her care since July 2017, and Father visited X.C. no more than ten times. FCM Fatormah testified that she had been X.C.'s case manager since August 2019 and X.C. had not been with Father since that time. She testified that X.C.'s

[6] The trial court found: "After his release from incarceration in September 2019, [Father] was placed on work release and on or about December 6, 2019, he absconded." Appellant's Appendix Volume II at 27.

case was filed in February 2016 and to her knowledge X.C. had never been placed with Father during the CHINS case. In explaining why she recommended the termination of Father's parental rights, she answered in part "mainly because he has been in and out of jail since I have been on the case and the little time that he was out, he did not actually reach out to DCS to participate in any progress . . . ." Transcript Volume II at 81.

[27] After X.C.'s birth in December 2015 and after Father admitted that X.C. was a CHINS in 2016, he committed theft as a level 6 felony in July 2017 and battery against a public safety official as a level 6 felony and operating a vehicle while intoxicated endangering a person as a class A misdemeanor in December 2017. Further, after the guardian ad litem filed the petition to terminate his parental rights in October 2019, Father absconded from work release in December 2019, which resulted in a conviction for failure to return to lawful detention as a level 6 felony.

[28] In light of the unchallenged findings, the length of Father's absence, and evidence set forth above and in the record, we cannot say the trial court clearly erred in finding a reasonable probability exists that the conditions resulting in X.C.'s removal and the reasons for placement outside Father's care will not be remedied.

[29] While Father does not specifically challenge the trial court's finding that termination of the parent-child relationship is in the best interests of X.C., we note that in determining the best interests of a child, the trial court is required to

look beyond the factors identified by DCS and to the totality of the evidence. *McBride v. Monroe Cty. Office of Family & Children*, 798 N.E.2d 185, 203 (Ind. Ct. App. 2003). The court must subordinate the interests of the parent to those of the child. *Id.* The court need not wait until a child is irreversibly harmed before terminating the parent-child relationship. *Id.* Moreover, the recommendations by both the case manager and child advocate to terminate parental rights, in addition to evidence that the conditions resulting in removal will not be remedied, is sufficient to show by clear and convincing evidence that termination is in a child's best interests. *A.D.S. v. Ind. Dep't of Child Servs.*, 987 N.E.2d 1150, 1158-1159 (Ind. Ct. App. 2013), *trans. denied*.

[30] FCM Fatormah testified that DCS was in support of terminating Father's rights and adoption was in X.C.'s best interest, and GAL Hart stated that he believed that termination of Father's parental rights was in X.C.'s best interest. Based on the testimony, as well as the totality of the evidence as set forth in the record and termination order, we conclude that clear and convincing evidence supports the trial court's determination that termination is in X.C.'s best interests.

[31] For the foregoing reasons, we affirm the trial court.

[32] Affirmed.

Bradford, C.J., and Vaidik, J., concur.