

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:

N.H. (Minor Child),

and

D.H. (Father)

Appellants-Respondents,

v.

September 18, 2023

Court of Appeals Case No.
23A-JT-649

Appeal from the Fountain Circuit
Court

The Honorable Stephanie S.
Campbell, Judge

Trial Court Cause No.
23C01-2209-JT-66

Indiana Department of Child
Services,
Appellee-Petitioner.

Memorandum Decision by Judge Bailey
Judges Tavitas and Kenworthy concur.

Bailey, Judge.

Case Summary

[1] D.H. (“Father”) appeals the trial court’s judgment terminating his parental rights to his son, N.H. (“Child”), born January 4, 2018.¹ He raises one issue on appeal, which we restate as whether the trial court’s denial of his motion for a continuance or bifurcation of the final termination of parental rights (TPR) hearing due to his absence violated his constitutional right to due process of law.

[2] We affirm.

Facts and Procedural History

¹ H.M. (“Mother”) voluntarily relinquished her parental rights to N.H. and does not participate in this appeal.

[3] In 2021, the Indiana Department of Child Services (“DCS”) received multiple reports about drug use in the home of Mother, Father (collectively, “Parents”), and Child, and it conducted five assessments. On or about August 5, 2021, DCS assessed a report alleging that Mother was using methamphetamine while supervising Child, that Child had access to the drug, that Mother allowed individuals with drug-related convictions to live with her and Child, and that Father was unable to protect Child. Mother admitted to a DCS Family Case Manager (“FCM”) that she had relapsed on methamphetamine and marijuana. The FCM was unable to speak with Father, who recently had sustained serious injuries in a train accident and was hospitalized. The FCM had previously spoken to Father in June 2021, and Father had told her at that time that he had a prior history with methamphetamine and marijuana use.

[4] Father has lengthy substance abuse and criminal histories. Father began to abuse substances at the age of seventeen, and by the time of the termination factfinding hearing, he had a forty-one-year history of substance abuse, which was only interrupted when Father was incarcerated, hospitalized, or in the nursing home. Father’s criminal history began in the 1980s, and his convictions include violent offenses and drug-related offenses. Among other things, Father has been convicted of dealing in methamphetamine from Mother’s home.

[5] On August 18, DCS filed a petition alleging that Child was a Child in Need of Services (“CHINS”) due to Mother’s methamphetamine use in Child’s presence, Mother allowing individuals with drug-related convictions to live with her and Child, Father having used methamphetamine in the past, Mother

neglecting Child's medical needs, and Father being at the hospital in critical condition due to an accident. DCS removed Child from Mother's care on September 24, 2021, and placed him in relative care with the maternal grandparents. On November 9, 2021, upon Mother's admission, the trial court adjudicated Child a CHINS. On December 7, DCS placed Child with the maternal aunt, Mother's twin sister ("Aunt").

[6] Also on December 7, Father admitted that Child was a CHINS, and the same day, the court entered a dispositional decree and a parental participation decree in which it ordered Parents to participate in reunification services. In relevant part, Father was ordered to keep in touch with DCS, notify DCS of new addresses as well as new arrests and criminal charges, participate in recommended programs, sign releases, maintain a safe and stable home, not consume any alcohol, obey the law, complete a substance abuse assessment, and submit to random drug screens.

[7] After Father was released from the hospital, he was in a nursing home until March of 2022. While at the hospital and the nursing home, Father was in fragile health but was not cognitively impaired. Father communicated with DCS but was unable to participate in services other than some Facetime and telephone visits with Child and drug screens that were negative for unprescribed drugs. Upon release from the nursing home, Father moved into his mother's house where he lived with his mother and sister. Following his release, Father had "some ongoing health issues," but he did not have any mental or physical

limitations that would have prevented him from engaging in reunification services as ordered. Tr. at 99.

[8] After his release from the nursing home, Father's communication with DCS was sporadic. On March 3, 2022, Father tested positive for marijuana.² On March 17, Father completed a substance abuse assessment which resulted in a recommendation that he participate in intensive outpatient treatment (IOP), attend narcotics anonymous (NA) meetings, identify a sponsor, and have clean drug screens. Father did not complete the IOP, did not attend NA meetings, did not identify a sponsor, and he only completed eight random drug screens during an approximately one-year period. On May 3, 2022, Father tested positive for methamphetamine. Father last submitted a drug screen on July 6, 2022, and that screen was also positive.³

[9] DCS referred Father for a mental health assessment, but, at Father's request, the assessment was "put on hold while he was dealing with his medical issues." Tr. at 85. DCS referred Father to therapy, but Father did not participate. Father briefly participated in home-based case management, but he did not complete it, and the provider discharged him in May of 2022 for lack of engagement.

² At that time Father also tested positive for Oxycodone, but that had been prescribed to him.

³ The record does not disclose the identity of the drug for which Father tested positive on July 6.

- [10] After Father was released from the nursing home, DCS also referred him for supervised visitation, and Father initially engaged in visits with Child. The visits first took place in Father's home, but because Father did not supervise Child properly, DCS moved the visits to its offices. By April, Father "started to disengage from services," and his last in-person visit took place in approximately May of 2022. Tr. at 88. DCS "attempted to continue to offer" Father visits through Facetime and phone calls, but Father eventually disengaged from the telephonic visits as well. *Id.*
- [11] Father was subsequently discharged from services, including visitation, "due to not attending and/or noncompliance." App. at 46. Father had approximately eight months in which to comply with services after his release from the nursing home, but he failed to complete any service. Father also refused a request from DCS that he complete a drug screen on December 6, 2022.
- [12] On September 26, 2022, DCS filed a petition to terminate Parents' parental rights as to Child. On November 15, the court conducted an initial hearing for which Father had received service of process but at which Father failed to appear. On December 6, the trial court conducted a pretrial hearing at which Mother voluntarily relinquished her parental rights to Child. Father appeared in person at the December 6 pretrial hearing but without counsel. Father had appointed counsel, Jonathan Holley, during the CHINS case but, at some point, the court had dismissed Holley as Father's counsel because Father had failed to communicate with Holley.

[13] At the December 6 pretrial hearing, Father testified that he did not wish to voluntarily relinquish his parental rights. The trial court verified that Father had been properly served and advised Father of his rights, including his right to have an attorney represent him. Father stated that he wanted an attorney but could not afford one. The trial court advised Father that the termination factfinding hearing was set for December 12 and would proceed on that date even if Father did not appear. The trial court appointed an attorney present in the courtroom as standby counsel for the pretrial hearing so that Father could ask him questions, but the court made it clear to Father that the standby attorney would not be the one representing him at the factfinding hearing. Father consulted with the standby attorney and said afterwards that he did not wish to voluntarily relinquish his parental rights. The trial court said that it would ask Taylor Powell, Mother's attorney, if he could represent Father without a conflict.

[14] The trial court again informed Father that the final TPR hearing was set for December 12 and had been set for "quite some time." Tr. at 37. The court again informed Father that, if he failed to appear at the December 12 hearing, it would nevertheless be held that day in his absence. Father stated that he understood and would have transportation to the December 12 hearing. The court again reminded Father that, if he did not appear, the December 12 hearing would proceed without him, to which Father stated, "I know. I will be here. I promise. I will be here.... One way or another I will -- I will be here." *Id.* at 42.

- [15] On December 7, Father was involved in an altercation with his sister, and he was arrested, jailed, and charged with domestic battery as a result. Father did not inform DCS of his arrest or that he was in jail. Father was released from jail on Friday, December 9, but he did not inform DCS of his new address following his release from jail.
- [16] In between the December 6 pretrial hearing and the December 12 final TPR hearing, the court was informed that attorney Powell could not represent Father, and the court instead appointed attorney Holley to represent Father. The record does not disclose that Father was informed of the appointment of Holley as his counsel.
- [17] Father failed to appear at the December 12 hearing, but Holley appeared on Father's behalf. Holley informed the court that he believed Father had been released from jail on December 9 and then "dropped off" at a homeless shelter. Tr. at 46. However, Holley had been unable to get in contact with Father. Therefore, Holley moved for a continuance of the hearing or, in the alternative, a bifurcation of the hearing so that Father would be able to appear and present evidence on his own behalf. The trial court confirmed that neither its own staff nor DCS nor the Court Appointed Special Advocate ("CASA") had been contacted by Father since the December 6 hearing. The trial court denied Holley's requests and conducted the TPR hearing in Father's absence.
- [18] At the December 12 hearing, DCS presented evidence, including exhibits and witness testimony. The FCM, CASA, and Aunt testified that Child had been in

the latter's care since December 7, 2021, and was "thriving" in her care. App. at 48. Child was bonded with Aunt, and she was willing to adopt Child. Both the FCM and CASA testified that termination of Father's parental rights and adoption by Aunt were in Child's best interests. Holley cross-examined DCS's witnesses and made arguments on Father's behalf. However, Holley did not assert that the trial court's denial of the motion to continue or bifurcate the hearing was a violation of Father's due process rights. In an order dated February 26, 2023, the trial court ordered the involuntary termination of Father's parental rights. This appeal ensued.

Discussion and Decision

[19] Father maintains that the order terminating his parental rights violated his constitutional due process rights. Specifically, he contends that conducting the termination factfinding hearing in his absence denied him due process of law. Although Father did not raise a due process argument in the trial court, we exercise our discretion to review that issue on appeal. *See Matter of D.H.*, 119 N.E.3d 578, 586 (Ind. Ct. App. 2019) (noting "we have discretion to address claims [not raised in the trial court], especially when they involve constitutional rights, the violation of which would be fundamental error"), *aff'd in relevant part on reh'g*, 122 N.E.3d 832 (Ind. Ct. App. 2019), *trans. denied*. We review constitutional challenges to a TPR order de novo. *E.g., D.C. v. Ind. Dep't of Child Serv.*, 201 N.E.3d 660, 664 (Ind. Ct. App. 2022).

[20] When the State seeks to terminate parental rights, “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) (quotations and citations omitted). The nature of the process due in proceedings to terminate parental rights is governed by a balancing of the “three distinct factors” specified in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976): 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 A.P.*, 734 N.E.2d 1107, 1112 (Ind. Ct. App. 2000), *trans. denied*.

The private interest affected by the proceeding is substantial—a parent’s interest in the care, custody, and control of his or her child. And the State’s interest in protecting the welfare of a child is also substantial. Because the State and the parent have substantial interests affected by the proceeding, we focus on the risk of error created by DCS’s actions and the trial court’s actions.

In re S.L., 997 N.E.2d 1114, 1120 (Ind. Ct. App. 2013) (citing *In re C.G.*, 954 N.E.2d 910, 917 (Ind. 2011)).

[21] In addition, we “must keep in mind the general principle that[,] if the State imparts a due process right, then it must give that right.” *In re C.G.*, 954 N.E.2d at 917 (quotation and citation omitted). A parent in a proceeding to terminate the parent-child relationship is statutorily entitled to (1) cross-examine witnesses, (2) obtain witnesses or tangible evidence by compulsory process, and (3) introduce evidence on behalf of the parent. Ind. Code § 31-32-2-3(b). While

we have held that due process does not require a parent’s physical presence at a TPR hearing, it does require that the parent be given the opportunity “to be heard at a meaningful time and in a meaningful manner.” *In re K.W.*, 12 N.E.3d 241, 249 (Ind. 2014) (quotations and citation omitted). However, “[a] juvenile court may presume a parent knowingly and voluntarily has waived his or her right to be present during the termination hearing upon a showing that the parent was properly notified of the scheduled trial date but failed to appear.” *In re A.B.*, 922 N.E.2d 740, 745 (Ind. Ct. App. 2010); *see also* I.C. § 31-32-5-7 (“The right of a parent, guardian, or custodian to be present at any hearing concerning the person’s child is waived by the person’s failure to appear after lawful notice.”).

[22] Here, Father contends that the trial court denied him an opportunity to be heard in a meaningful manner when it conducted the TPR hearing in his absence. However, Father not only clearly had lawful and actual notice of the TPR hearing, but the trial court repeatedly informed him in person at the December 6 hearing that the TPR hearing would proceed without him if he failed to appear, and Father repeatedly acknowledged the same. Under such circumstances, we may presume that Father waived his right to be present at the hearing. *See* I.C. § 31-32-5-7; *A.B.*, 922 N.E.2d at 745.

[23] Moreover, Father’s own failure to keep others—such as DCS—advised of his whereabouts likely contributed to his absence from the TPR hearing and certainly made it impossible to contact him at the time of the hearing. Nevertheless, Father was represented by counsel at the TPR hearing, and his

counsel was provided with the opportunity to cross examine the State's witnesses, introduce evidence (other than Father's testimony) and make arguments on Father's behalf. Furthermore, Father has failed to allege any specific prejudice that resulted from his absence from the termination hearing. Therefore, as we have repeatedly held in similar cases, the risk of error caused by the trial court's denial of the motion to continue the TPR hearing was minimal. *See, e.g., In re B.J.*, 879 N.E.2d 7, 16-17 (Ind. Ct. App. 2008) (finding no due process violation where father was represented by counsel and failed to allege any specific prejudice from father's absence from the TPR hearing), *trans. denied; Q.B. v. Marion Cnty. Dep't of Child Serv.*, 873 N.E.2d 1063, 1068 (Ind. Ct. App. 2007) (finding no due process violation where father had adequate notice of the pending proceedings, father's absence was "caused by [his] own failure to keep others apprised of his whereabouts," and father was represented by counsel at the TPR hearing).

[24] The trial court did not violate Father's due process rights by conducting the final TPR hearing in his absence.⁴

[25] Affirmed.

Tavitas, J. and Kenworthy, J., concur.

⁴ Because Father does not challenge the trial court's findings and conclusions terminating his parental rights, we need not and do not address the State's argument that he has waived such a challenge.