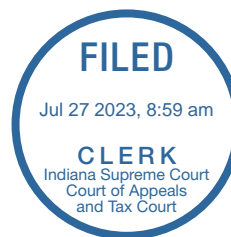


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



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IN THE COURT OF APPEALS OF INDIANA

In the Termination of the Parent-
Child Relationship of:

F.S. (Minor Child),

and

S.S. (Father) and A.D. (Mother),

Appellants-Respondents,

v.

Indiana Department of Child
Services,

Appellee-Petitioner.

July 27, 2023

Court of Appeals Case No.
23A-JT-302

Appeal from the St. Joseph Probate
Court

The Honorable Jason Cichowicz,
Judge

The Honorable Graham C.
Polando, Magistrate

Trial Court Cause No.
71J01-2106-JT-86

Memorandum Decision by Chief Judge Altice
Judges May and Foley concur.

Altice, Chief Judge.

Case Summary

[1] In this consolidated appeal, S.S. (Father) and A.D. (Mother) (collectively, Parents) appeal the termination of their parental rights as to their minor child, F.S., born August 20, 2018. Mother contends that the Indiana Department of Child Services (DCS) failed to present sufficient evidence to support the termination order, and Father claims that his due process rights were violated because the efforts of DCS personnel in implementing the reunification services ordered by the Child in Need of Services (CHINS) order were not reasonable.

[2] We affirm.

Facts and Procedural History

[3] Shortly after F.S.'s birth, DCS received a "hotline" telephone call, indicating that F.S. had been "born positive for" amphetamine, opiates, and other drugs. *Appellant's Appendix Vol. 3* at 59. During an investigation, Mother also tested positive for those substances, so DCS filed a petition alleging that F.S. was a CHINS. F.S. was removed from Mother's care, and it was determined that she could be safely placed with Father. As a result, the CHINS petition was dismissed.

- [4] DCS filed a subsequent CHINS petition on March 5, 2020, following Parents' arrest—in F.S.'s presence—for possession of methamphetamine and drug paraphernalia. F.S. was removed from Parents' care and placed in a foster home. At the time of removal, DCS personnel observed that F.S. was “pretty dirty,” and it appeared that she had not had a bath “in a while.” *Id.* at 133. F.S. also had a “bleeding diaper rash” that took several months to clear. *Id.* An evaluation showed that F.S. was developmentally delayed in communication and fine motor skills.
- [5] Following a hearing in September 2020, the trial court adjudicated F.S. a CHINS and entered a dispositional decree. The decree ordered Parents to, among other things, maintain safe and suitable housing and a stable source of income, refrain from illegal drug and alcohol use, submit to random drug screens, participate in counseling, and attend fully supervised visits with F.S. on a regular and consistent basis.
- [6] Mother was arrested in September 2020 for theft and possession of a fraudulent sales document. She also had two prior arrests in March 2020 for conversion and unlawful possession of a syringe. Father was arrested and charged with possession of methamphetamine and a needle in December 2020. By late December 2020, it was established that Parents had not complied with court-ordered services including substance abuse assessments, drug screens, counseling, or staying connected with their DCS family case manager (FCM). Although Parents occasionally visited with F.S., they routinely missed visits or cancelled them.

- [7] Parents continued their noncompliance with most of the court-ordered services, including the failure to remain in contact with the FCM. As a result, in March 2021, the trial court suspended Parents' visits with F.S. The court also approved DCS's permanency plan of adoption for F.S. with her foster parents.
- [8] On July 20, 2021, DCS filed an amended petition¹ to terminate Parents' parental rights as to F.S., alleging that there is a reasonable probability that the conditions that resulted in F.S.'s removal will not be remedied or that there is a reasonable probability that the continuation of the parent-child relationship poses a threat to F.S.'s well-being. DCS further alleged that termination is in F.S.'s best interest, and that adoption is a satisfactory plan for F.S.
- [9] On December 14, 2021, the trial court held a hearing to determine whether Parents' visitation should be reinstated. At that time, Mother was incarcerated, and Father admitted that he had missed many of the court-ordered drug screens. In fact, Parents failed to submit to any drug screens in November and December 2021. The evidence also showed that before the visits with F.S. had been suspended, on at least one occasion, F.S. screamed, "no, no, no" to her foster mother because she did not want to visit Parents. *Exhibit* 126-27, 199-200. F.S.'s foster Mother testified that before many of the scheduled visits, F.S. would become hysterical and "bite and hit herself" because she did not want to see Parents. *Id.* at 213-15.

¹ DCS filed its original petition to terminate parental rights on June 7, 2021.

[10] Robert Middlebrook—F.S.’s court appointed special advocate (CASA)—testified that Parents’ visits should not be reinstated because F.S.’s personality changes after she spends time with them. Middlebrook opined that restarting the visits would be traumatic and detrimental to F.S. Middlebrook also testified that Parents had failed to comply with most of the court-ordered services and programs that were offered to them by DCS. After hearing the evidence, the trial court refused to reinstate the visits.

[11] As of February 2022, Mother had only partially complied with court-ordered drug screens, she failed to undergo a substance abuse assessment, and she was not participating in DCS services. Father had not submitted to drug screens, did not participate in individual therapy, and failed to stay in contact with the FCM and other DCS personnel.

[12] Nearly two years after the CHINS case commenced, Father underwent a court-ordered substance abuse assessment in January 2022. During the interview, Father falsely claimed that he had only used marijuana and alcohol at some point during his life. He denied using heroin, crack cocaine, or methamphetamine, and he did not reveal his 2020 arrest for possession of methamphetamine to the counselor. Based on that interview, the counselor concluded that Father had no substance abuse issues and no drug treatment was recommended.

[13] At some point, the FCM offered to provide the additional information about Father’s substance abuse and drug-related arrests to the drug counselor so she

could supplement Father's assessment. The counselor declined the offer because she opined that supplementing the report would be unfair to Father since he had already been evaluated and there was no recommendation of drug services or counseling.

[14] Parents failed to appear at a March 28, 2022 permanency hearing. The evidence showed that three-year-old F.S. continued to thrive in foster care, that the plan for F.S. was adoption, and that DCS personnel believed that adoption was in F.S.'s best interest. It was also revealed that Father had not been truthful about his drug use during the assessment, and Mother never completed a drug assessment. The trial court ordered Parents' visits with F.S. to remain suspended.

[15] When the termination hearing commenced on September 29, 2022, Parents had not visited with F.S. for "nearly two years." *Appellant's Appendix Vol. 3* at 135. The evidence established that Parents had largely failed to comply with the dispositional orders, in that they did not stay in contact with DCS personnel and case managers, they moved frequently, and both had repeated drug-related arrests throughout the course of the CHINS proceedings. Parents "flatly refused" to comply with court-ordered drug screens, and they repeatedly missed visits with F.S. before the visits were suspended. *Id.* at 132-33. DCS personnel determined that Parents' repeated evasion of court-ordered drug testing was indicative of their ongoing drug use that presented a danger to F.S.

[16] Middlebrook testified that he did not believe there was a reasonable probability that Parents would remedy the reasons for F.S.'s removal. Father told Middlebrook that he would not participate in DCS services because he had done nothing wrong. Middlebrook believed that Parents ignored the trial court's orders and did only what *they* considered "right." *Id.* at 135.

[17] The FCM testified that Parents were unlikely to remain sober because they had not participated in any substance abuse programs. Thus, the FCM believed that the reasons for DCS's involvement and F.S.'s removal from Parents' care would not be remedied and that continuing the parent-child relationship posed a threat to F.S.'s wellbeing.

[18] Evidence at the termination hearing also established that F.S. was in a stable and loving home with her foster parents. DCS's permanency plan for F.S. was adoption by her current foster parents, and the FCM testified that adoption was in F.S.'s best interest. Middlebrook testified that F.S.'s foster parents were "the best [he had] ever seen," any thoughts of removing F.S. from her foster parents was "horrific," and it would be "devastating" for F.S. not to be adopted by her foster family. *Id.* at 69-71, 179.

[19] Following the termination hearing that concluded on October 31, 2022, the trial court terminated Parents' rights as to F.S. The termination order provided in relevant part as follows:

**Reasonable probability that the Conditions that Resulted in the
Child's Removal or the Reasons for placement outside the
home of the Home of the Parents Will not be Remedied.**

On March 3, 2020, police officers arrested parents for Possession of Methamphetamine and Possession of Paraphernalia. The Child, then approximately eighteen months old, was with her parents in the vehicle. The Parents were found with illegal drugs in their possession, as well as multiple syringes in the vehicle. Parents were first taken to a local hospital as they appeared to [law enforcement] to be lethargic and slow to respond. They were then taken into custody at the St Joseph County Jail.

[T]he Department initially removed the Child from her Parents' care both because of an acute need—for a caregiver given her Parents' arrest—but also a more inchoate one: the entirely reasonable inference that Parents were abusing serious drugs and, therefore, could not safely care for the Child.

. . .

The Court finds this to be of utmost significance. At the evidentiary hearing on the termination petition, Parents focused much of their evidence and argument on their contention that they did not have a drug issue, and therefore did not pose a threat to the Child's well-being. But the time to contest the Department's allegations—more precisely, to hold the Department to its burden of proof—was at the factfinding and dispositional hearings of which they were aware, and from which they voluntarily absented themselves.

Indeed, for the next two-plus years, Parents essentially “dug in their heels,” refusing to go along with what the Court ordered them to do in that dispositional decree . . .

. . .

The Court finds that, as of the date of the hearing on the Department's Petition, Parents had largely failed to comply with this dispositional decree. Mother . . . never obtained the [drug] assessment as ordered. Similarly, Father refused to sign a release of information as ordered, doing so only after the Court specifically ordered him to do so. Parents failed to comply with the Order to keep the Department apprised of their current address significant, given their apparently frequent moves.

Most significantly, and for an extraordinarily lengthy period: from the entry of the dispositional decree on September 28, 2020 to October 6, 2021, Parents failed to comply with the requirement for drug testing.

Parents largely attempted to circumvent the Court's Order by failing to call in daily, defeating the "random" nature of the tests.

Indeed, Parents' attempts to evade truly "random" testing suggest more than noncompliance with the dispositional decree, rather, it suggests knowing continued drug use. This conclusion is buttressed by other evidence in this cause:

- Parents' repeated arrests for drug-related charges at the beginning (and during the pendency) of the CHINS proceedings;
- their frequent absence from visits, to the extent that only 60% of those scheduled visits actually occurred with both parents;
- their noteworthy fatigue during the visits they did attend, to the point where each of them dropped food items;
- Father's wearing of weather-inappropriate clothing, with an explanation, when questioned, that he had "tennis elbow";

- Mother’s repeated trips to her vehicle, and lengthy trips to the bathroom, during those visits. (Given that at least Father expressed a need to the Child to see “what’s going on with Mommy,” during such a lengthy bathroom break, and, while acknowledging the natural embarrassment associated with such a condition, Mother’s failure to disclose her explanation of irritable bowel syndrome until late in the case, the Court does not find that explanation credible.)

To be sure, none of these factors, taken in isolation, establish Parents’ persistent drug use. But taken together, the Court finds that they do.

The Court therefore finds that the Department has proved, by clear and convincing evidence, that the reasons for the Child’s removal (and the reasons for continued placement outside the home) will not be remedied.

Threat to the Child’s Well-Being

The Court . . . finds that Parents pose a threat to the Child’s well-being. At the time the Department removed the Child from Parents’ care, the Child was, in the credible terms of her Foster Mother, “pretty dirty,” as she “hadn’t had a bath in a while.” She was wearing only socks, no shoes, and had a bleeding diaper rash which took two months to clear. At a First Steps evaluation, the Child was developmentally delayed, specifically in the area of communication and fine motor skills.

[F]or lengthy periods, these Parents simply ignored the Orders they didn’t like. And the Court agrees with the Department that Parents’, particularly Father’s, apparent paranoia raises serious concerns about his parenting abilities.

Appellant's Appendix Vol. 3 at 61-63.

[20] As for DCS's handling of this case, including the FCM's offer to supplement Father's drug assessment report after the evaluation had already been completed, the trial court's order provided that

Sadly, the [DCS's] behavior in this case gave Parents cause for skepticism. Parents' treatment by [the FCM] was quite high-handed. The most recent Progress Report [that the FCM] prepared (right before the termination petition was heard, in September of 2022) could only with charity be called "cursory."

The Department attempted to influence Father's substance abuse assessment after they believed its outcome was inaccurate; the assessor . . . commendably resisted those efforts. (Notably, the Department may well have been correct that Father was not truthful in answering the questions constituting that assessment, indeed, the court appeared to make such a finding at the hearing of of March 28, 2022. But there is a fine line between simply arguing that the Court should disregard the rosy picture presented by the assessment, which would have been perfectly reasonable, and attempting to . . . color the results post hoc). And some of the Department's paperwork was sloppy, including the termination petition itself, as the Court had to acknowledge despite denying a Motion to Dismiss from Father's counsel on that basis.

And so the Court has a measure of sympathy for Parents. It is possible that a Family Case Manager with a less adversarial stance could have encouraged compliance with services, especially those geared toward sobriety. But the termination statute does not measure the Department's compliance with anything more than—potentially—reasonable efforts at reunification.

The Court agrees with the CASA's bewilderment at Parents' response to the Court's Orders: Parents chose being "right," as

they saw it, even if it meant not seeing their Child, over simply complying with simple, reasonable orders.

...

Conclusion

It is unfortunate that the Department's Family Case Manager, when faced with mistrustful parents, doubled down on imperious behavior.

But the Court finds that the Department has met the elements of the termination petition by clear and convincing evidence. The Court must therefore GRANT the Petition to Terminate the Parent-Child Relationship.

Id. at 64 (emphases added).

[21] Parents now appeal.

Discussion and Decision

I. Standard of Review

[22] The Fourteenth Amendment to the United States Constitution protects a parent's right to raise his or her children. *In re D.D.*, 804 N.E.2d 258, 264 (Ind. Ct. App. 2004), *trans. denied*. Although “[a] parent’s interest in the care, custody, and control of his or her children is ‘perhaps the oldest of the fundamental liberty interests[,]’” parental interests are not absolute and “must be subordinated to the child’s interests in determining the proper disposition of a petition to terminate parental rights.” *Bester v. Lake Cty. OFC*, 839 N.E.2d 143, 147 (Ind. 2005) (quoting *Troxel v. Granville*, 530 U.S. 57, 65 (2000)). Thus, the

parent-child relationship may be terminated when a parent is unable or unwilling to meet their parental obligations. *Id.* We are cognizant that involuntary termination of parental rights is the most severe sanction a court can impose because it severs all rights of a parent to his or her child. *Matter of D.G.*, 702 N.E.2d 777, 780-81 (Ind. Ct. App. 1998). Therefore, termination is considered a last resort, “available only when all other reasonable efforts have failed.” *Id.* at 781.

[23] When reviewing the termination of parental rights, we will not reweigh the evidence or judge the credibility of the witnesses. *In re G.F.*, 135 N.E.3d 654, 660 (Ind. Ct. App. 2019). Rather, we consider only the evidence and reasonable inferences most favorable to the judgment. *Id.* In deference to the trial court’s unique position to assess the evidence, we will set aside its judgment terminating a parent-child relationship only if it is clearly erroneous. *In re L.S.*, 717 N.E.2d 204, 208 (Ind. Ct. App. 1999), *trans. denied*. In light of the applicable clear and convincing evidence standard, we review to determine whether the evidence clearly and convincingly supports the findings and whether the findings clearly and convincingly support the judgment. *In re G.F.*, 135 N.E.3d at 660. Also, when—as here—a parent does not specifically challenge any of the trial court’s findings of fact, the unchallenged findings are accepted as true on review. *Madlem v. Arko*, 592 N.E.2d 686, 687 (Ind. 1992). Thus, we need only determine whether the unchallenged findings and the reasonable inferences support the termination judgment. *See In re S.S.*, 120 N.E.3d 605, 610 (Ind. Ct. App. 2019).

[24] Before an involuntary termination of parental rights may occur in Indiana, Ind. Code § 31-35-2-4 provides that the petition filed by DCS must allege in relevant part:

(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;

[25] If the juvenile court finds that the allegations in the termination petition are true, it “shall” terminate the parent-child relationship and enter findings supporting its conclusions. I.C. § 31-35-2-8. Finally, we note that because I.C. § 31-35-2-4 (b)(2)(B) is written in the disjunctive, we need only conclude that DCS has met its burden as to one of the three elements. *See In re L.S.*, 717 N.E.2d at 209.

II. Mother’s Contentions

[26] Mother argues that the evidence is insufficient to support the termination of her parental rights because DCS failed to show that the conditions that led to F.S.’s removal from her care would not be remedied and that the evidence failed to show that termination of her parental rights was necessary to prevent a threat to F.S.’s well-being.

In determining whether the evidence supports the court’s conclusion that the reasons for the child’s removal will not be remedied, we engage in a two-step process: first we determine those conditions that led to the child’s placement and retention in foster care. *K.T.K. v. Indiana Dep’t of Child Serv.*, 989 N.E.2d 1225, 1231 (Ind. 2013). We then determine whether there is a reasonable probability that those conditions will not be remedied. *Id.* In other words, we look to the “bases resulting in [the child’s] continued placement outside the home.” *In re N.Q.*, 996 N.E.2d 385, 392 (Ind. Ct. App. 2013). 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. *See K.T.K.*, 989 N.E.2d at 1234. A trial court is not precluded from finding that a parent’s “past behavior is the best predictor of their future behavior.” *In re E.M.*, 4 N.E.3d 636, 643 (Ind. 2014).

[27] In this case, the evidence established that F.S. was removed from Parents in March 2020 because of their arrests on drug charges while F.S. was in their care, along with their admission to heroin use. Following the dispositional hearing, Parents were ordered to engage in substance abuse assessments and to follow all recommendations, submit to random drug screens, engage in individual therapy, remain in contact with their FCM, obey the law, and visit F.S. as scheduled. The evidence established that Parents consistently refused to comply with those directives throughout the pendency of the proceedings.

[28] As of February 4, 2022, Mother had not undergone a substance abuse assessment, and she was only partially compliant with drug screens. The

evidence established that Parents “flatly refused” to participate in screens for over a year. *Appellant’s Appendix Vol. 3* at 132. Mother also did not participate in therapy and other court-ordered programs, did not visit with F.S. on a regular basis, and did not remain in contact with DCS personnel. She was also arrested on several drug-related charges throughout the pendency of the proceedings.

[29] Because of Parents’ failure to abide by court orders, the trial court suspended their visits with F.S. for nearly two years prior to the termination hearing. The evidence showed that while Parents were disobeying the trial court’s orders, F.S. was bonding with her foster parents. In light of Parents’ consistent refusal to comply with the trial court’s orders, the CASA and FCM opined that there was not a reasonable probability that Parents would remedy the reasons for F.S.’s removal.

[30] The evidence presented at the termination hearing establishing Parents’ pattern of unwillingness or lack of commitment to address their parenting problems and to cooperate with services and rehabilitation efforts, and otherwise failing to follow the dispositional orders, demonstrates the requisite reasonable probability that Parents would not remedy the reasons for F.S.’s removal and her retention in foster care. *See Lang v. Starke Cnty. OFC*, 861 N.E.2d 366, 372 (Ind. Ct. App. 2007), *trans denied*. Moreover, Parents’ failure to take reasonable steps to visit F.S. demonstrates a lack of commitment to preserve the parent-child relationship. *Id.*

[31] In sum, the evidence was sufficient to support the trial court’s conclusion that the conditions resulting in F.S.’s removal would not be remedied. Thus, we decline to set aside the trial court’s judgment terminating Mother’s parental rights.²

III. Father’s Claims

[32] Father argues that because the trial court was critical of his substance abuse assessment and the FCM’s handling of the matter, it is apparent that DCS failed to make reasonable and sufficient efforts to reunify him with F.S. pursuant to Ind. Code § 31-34-21-5.5(b).³ Thus, Father maintains that his due process rights were violated, and the termination order must be set aside.

[33] We initially observe that 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

² As an aside, while I.C § 31-35-2-4 is written in the disjunctive and DCS was only required to prove that there is a reasonable probability that the conditions resulting in F.S.’s removal will not be remedied *or* that continuing the parent-child relationship poses a threat to F.S.’s well-being, we note that DCS proved both elements of the termination statute in this case. Indeed, the evidence demonstrating that the conditions were not likely to be remedied similarly established that the continuation of the parent-child relationship threatened F.S.’s well-being. *See, e.g., In re A.K.*, 924 N.E.2d 212, 221 (Ind. Ct. App. 2020) (holding that the same evidence used to support one element of the termination statute can support another), *trans. dismissed*. In other words, Mother’s failure to address her long-term substance abuse problem, avoiding drug screens, the refusal to participate in court-ordered services, and the testimony of the FCM and CASA that F.S.’s exposure to an environment of illegal drug use endangered F.S.’s physical and/or mental conditions, support a conclusion that a continuation of the parent-child relationship poses a threat to F.S.’s well-being.

³ This statute provides in relevant part that “(b) The [DCS] shall make reasonable efforts to preserve and reunify families as follows: (2) If a child has been removed from the child’s home, to make it possible for the child to return safely to the child’s home as soon as possible.”

termination proceedings are afforded due process protections. *Id.* Thus, when the State seeks to terminate the parent-child relationship, it must do so in a manner that satisfies the requirements of due process. *In re J.K.*, 30 N.E.3d 695, 699 (Ind. 2015).

[34] We have discretion to address such due process claims even where the issue is not raised below. *In re T.W.*, 135 N.E.3d at 612. 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 (1976)). To that end, our Supreme Court has held that “the process due in a termination of parental rights action turns on balancing three factors set forth in *Mathews*: (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.* In balancing the three-prong *Mathews* test, “the private interest affected by the proceeding is substantial—a parent’s interest in the care, custody, and control of [his or her] child.” *In re C.G.*, 954 N.E.2d 910, 917 (Ind. 2011). Additionally, we “note the countervailing *Mathews* factor, that the State’s *parens patriae* interest in protecting the welfare of a child is also substantial.” *Id.*

[35] Because the provision of family services is not a requisite element of our parental rights termination statute, this court has held that even a complete failure to provide services would not serve to negate a necessary element of the termination statute and require reversal. *In re E.E.*, 736 N.E.2d 791, 796 (Ind.

Ct. App. 2000). Also, where, as here, a parent sits idly and does not assert a need or desire for services, he cannot successfully maintain that DCS denied him parenting services. *See In re B.D.J.*, 728 N.E.2d 195, 201 (Ind. Ct. App. 2000).

[36] In this case, nothing in the record demonstrates that Father requested services from DCS that he did not receive. Even more compelling, Father “flatly refused” to comply with the drug screens and the related services that DCS offered to him. *Appellant’s Appendix Vol. 3* at 132. And it was not until almost two years after the commencement of the CHINS case that Father finally underwent the court-ordered substance abuse assessment. During that assessment, Father was not truthful about his drug use. While the trial court expressed concern about the FCM’s offer to provide collateral information to the assessor without Father’s participation, the evidence showed—and the trial court found—that “Parents refus[ed] to go along with what the Court ordered them to do in th[e] dispositional decree.” *Id.* at 130. Indeed, Father failed to make the effort and take the steps necessary to reunify with F.S. Thus, we reject Father’s claim that his due process rights were violated and conclude from the evidence presented that his parental rights as to F.S. were properly terminated.

[37] Judgment affirmed.

May, J. and Foley, J., concur.