MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In the Involuntary Termination of Parent-Child Relationship of:

L.S., C.R., and D.R. (Minor Children),

and

B.S. (Mother) and L.A.S. (Father),

Appellants-Respondents,

v.

Indiana Department of Child Services,

June 15, 2021

Court of Appeals Case No. 20A-JT-1902

Appeal from the Perry Circuit Court

The Honorable M. Lucy Goffinet, Judge

Trial Court Cause No. 62C01-2002-JT-55, 62C01-2002-JT-56, 62C01-2002-JT-58

Appellee-Petitioner.

Altice, Judge.

Case Summary

[1] In this consolidated appeal, B.S. (Mother) and L.A.S. (Father) (collectively, Parents) appeal the involuntary termination of their parental rights as to their respective minor children, L.S., C.R., and D.R. (collectively, Children). Father contends that his due process rights were violated because the trial court did not provide him with proper notice of the hearing and proceeded with the termination proceedings as to his and B.S.'s biological child, L.S., in Father's absence. Mother argues that her due process rights were violated because the trial court conducted factfinding hearings in her absence as to her biological children, C.R. and D.R.

[2] We affirm.

Facts and Procedural History

[3] On December 4, 2018, the Indiana Department of Child Services (DCS) received reports that Children, who were living with Parents at a residence in Perry County, were physically abused by Parents, that Parents were using methamphetamine, that the living conditions were unsanitary, and that the residence had no utilities. Children were immediately removed from Parents' care and placed with relatives. DCS then filed petitions pursuant to Indiana Code § 31-34-1-1 and -2, alleging that Children were In Need of Services (CHINS). The trial court appointed separate legal counsel for Parents and entered denials to the CHINS allegations.

[4] Thereafter, in March 2019, the court adjudicated Children CHINS. Following a dispositional hearing on April 16, 2019, the trial court ordered Parents to, among other things, obtain and maintain stable housing, engage in substance abuse counseling, submit to drug screens, and visit Children. Parents did not engage in DCS services or visit Children from November 2019 through August 2020.

[5] On February 10, 2020, DCS filed petitions to involuntarily terminate Parents' parental rights as to Children. DCS also filed a petition to terminate the parental rights of T.R., the biological father of C.R. and D.R., but he has not participated in these proceedings.

[6] The trial court held an initial hearing by telephone with Parents on May 7, 2020, at which time separate counsel was appointed for each. The trial court set the matter for a factfinding hearing on July 21 and then excused Parents from the proceedings. The trial court then permitted DCS to present evidence regarding the termination of T.R.'s parental rights. DCS established that T.R. had been served by publication for that hearing and failed to appear. DCS then entered several exhibits that pertained to T.R., including CHINS orders, a portion of his criminal history, and proof of service of various hearings by publication.

[7] The July 21, 2020, hearing was continued because Mother was reportedly ill. The trial court then reset the factfinding hearing for "September 1 . . . (half a day), September 10th . . . (half a day), and September 11th (all day)." *Appendix Vol. 3* at 71. The record shows that on August 3, 2020, DCS sent the required statutory notices to Parents at their last known addresses and to their respective legal counsel, advising them of all September hearings. Although the trial court held a hearing on September 1, the hearing was recessed until September 11. Mother appeared at the September 1 hearing and was specifically advised of the September 11 date. Father did not appear.

[8] Neither Parent appeared for the September 11 hearing, yet counsel for both were present. At the hearing, counsel for DCS advised the trial court that Parents were "clearly given the date" for all hearings, that they had missed "many hearings," and that it was in Children's "best interests for the factfinding hearing to proceed." *Transcript* at 18. Father's counsel objected, stating that

there had been no contact with Father since June 30 and she was "not able to confirm that he [knew] of the hearing date." *Id.* at 17. Father's counsel also advised the trial court that she had "reached out to him . . . via text, letter, and telephone" with no response. *Id.* at 18.

[9] Mother's counsel advised the trial court that he had not heard from Mother since "last Thursday" and had not been able to contact her. *Id.* Counsel, however, acknowledged that Mother had been specifically informed of the September 11 hearing.

[10] Over Parents' objection, the trial court permitted the case to proceed in absentia. DCS presented testimony and exhibits with no objection from Parents. The exhibits included the CHINS orders and showed that DCS had sent notices of the hearing to Parents, as well as T.R. Following the hearing, the trial court terminated Parents' rights as to Children and entered the following findings of fact and conclusions of law:

> It was established by clear and convincing evidence that the allegations of the petition are true in that:
>
> The child has been removed from their parent(s) for at least six (6) months under a disposition decree . . . .
>
> The child has been removed from their parent(s) and has been under the supervision of the Indiana Department of Child Services or the county probation department for fifteen . . . of the last twenty-two . . . months.

> There is a reasonable probability that the conditions that resulted in the child's removal or the reasons for the placement outside the parent's home will not be remedied in that: Father was served by publication and fails to appear for the Fact Finding. Mother fails to appear and to participate in the proceeding. The children have been removed for twenty-two . . . months. Mother still does not have stable housing. Parents have made no progress in services. Mother has only submitted to five . . . drug screens, one of which Mother knew the date and time. Mother's visitation has been sporadic, and between November 2019 and August 2020, there was no visitation between Mother and the children. Father has not visited with the children. Father has not participated in services.
>
> There is a reasonable probability that continuation of the parent-child relationship poses a threat to the well-being of the child in that: The children have witnessed inappropriate behavior when visiting with Mother, including Mother's husband throwing a phone at Mother.
>
> Termination is in the . . . best interests of the child in that: The children are in a stable environment, and Mother and Father can offer no stability to the children. The Department of Child Services has a satisfactory plan for the care and treatment of the child, which is: adoption.

Appellants' Appendix Vol. II at 151-52.[1] Parents now appeal.

Discussion and Decision

[1] Although the above-quoted termination order refers to a "child," the two termination orders that the trial court entered are virtually identical and include all three Children. *See Appendix Vol. 3* at 84-86.

I. Standard of Review

[11] 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. Office of Family & Children,* 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 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.

II. Unchallenged Findings

[12] As an initial matter, we note that Parents do not challenge the trial court's findings of fact and conclusions thereon as clearly erroneous. Parents have, therefore, waived any arguments relating to these unchallenged findings. *See In re S.S.,* 120 N.E.3d 605, 614 n.2 (Ind. Ct. App. 2019) (explaining that this court will accept unchallenged trial court findings as true). Inasmuch as Parents

have not challenged the trial court's conclusions, they have conceded that DCS proved, by clear and convincing evidence, the allegations in the petition to terminate their parental rights. *See id.* Thus, we proceed to address Parents' sole claim of error that conducting the termination proceedings in their absence constituted a violation of their right to due process.

III. Parents' Due Process Claims

[13] The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits action that deprives a person of life, liberty, or property without a fair proceeding. *D.T. v. Ind. Dep't of Child Servs.,* 981 N.E.2d 1221, 1225 (Ind. Ct. App. 2013). When the State seeks to terminate the parent-child relationship, it must do so in a manner that satisfies due process requirements. *C.G. v. Marion Cty Dep't of Child Servs.*, 954 N.E.2d 910, 917 (Ind. 2011). The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Thompson v. Clark Cty. Div. of Family & Children*, 791 N.E.2d 792, 795 (Ind. Ct. App. 2003), *trans. denied*.

[14] The nature of the process due in a termination of parental rights proceeding turns on the balancing of three 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. *Matthews v. Eldridge,* 424 U.S. 319, 333 (1976); *see also In re K.D.,* 962 N.E.2d 1249, 1257 (Ind. 2012). When confronted with a due process challenge

in a termination of parental rights proceeding, this court often focuses on the risk of error created by the State's actions in the case. *C.G.,* 954 N.E.2d at 918.

[15] Parents acknowledge that they did not raise a due process argument at the trial court level. Thus, the issue is waived. *See In re N.G.,* 51 N.E.3d 1167, 1173 (Ind. 2016) (holding that a constitutional claim, including a claimed violation of due process rights, may be waived when it is raised for the first time on appeal). Waiver notwithstanding, Parents contend that the alleged due process violations constituted fundamental error.

[16] On rare occasions, we will analyze an issue under the fundamental error doctrine to examine an otherwise procedurally defaulted claim. *Matter of Eq. W.,* 124 N.E.3d 1201, 1215 (Ind. 2019). Review is extremely narrow and "available only when the record reveals a clearly blatant violation of basic and elementary principles, where the harm or potential for harm cannot be denied, and [the] violation is so prejudicial to the rights of the defendant as to make a fair trial impossible." *Id.* Even an error that is prejudicial or that implicates a constitutional right is not itself sufficient to constitute fundamental error. *Id.* A finding of fundamental error in these circumstances "essentially means that the trial judge erred . . . by not acting when he or she should have, even without being spurred to action by a timely objection." *Id.*

[17] While Mother contends that the trial court committed fundamental error in admitting exhibits at the May 7 hearing and excusing her from the proceedings, the evidence that was admitted pertained only to the termination of T.R.'s

parental rights. Mother has made no showing as to how her right to due process may have been violated.

[18] As for Parents' failure to attend the September 11, 2020 final hearing, the evidence established that DCS had provided them with the proper statutory notice of the hearing. Indiana Code § 31-35-2-6.5 provides that at least ten days before a hearing on a petition to terminate parental rights, "the person or entity who filed the petition to terminate the parent-child relationship . . . shall send notice" to the child's parent. To comply with the statute, "one need only meet the requirements of Indiana Trial Rule 5," which governs service of subsequent papers and pleadings in an action and authorizes service by United States mail "by delivering or mailing a copy of the papers to him at his last known address." *In re C.C.,* 788 N.E.2d 847, 851 (Ind. Ct. App. 2003), *trans. denied; In re M.P.,* 115 N.E.3d 498, 503-04 (Ind. Ct. App. 2018).

[19] The record shows that on August 3, 2020, DCS sent notice of the September hearing dates and times to Parents. DCS sent the notice to Mother's last known address, and she appeared with counsel on September 1. At that time, the trial court specifically advised Mother of the September 11 date. It was also established that DCS sent notice of the hearings to Father's last known address. Hence, the statutory notice requirement was satisfied. *See M.P.,* 115 N.E.3d at 503-04.

[20] In sum, it is apparent that Parents absented themselves from the case and Children's lives. As this court has observed, a parent's failure to attend court

hearings "reflects ambivalence." *A.F. v. Marion Cty. Off. of Fam. & Children,* 762 N.E.2d 1244, 1252 (Ind. Ct. App. 2002), *trans. denied*. Parents' failure to attend the termination factfinding—and indeed their failure to substantially engage in court ordered services and visitation with Children—demonstrates their unwillingness to fulfil their parental obligations.

[21] Parents were provided with notice of the hearings, and they were represented by counsel throughout the proceedings. Under these circumstances, we cannot say that Parents' constitutional rights were infringed when they were not present at the termination hearing. *See C.T. v. Marion Cty. Dep't of Child Servs.,* 896 N.E.2d 571, 587 (Ind. Ct. App. 2008) (observing that there is a minimal risk of error where parent was represented by counsel who had the opportunity to cross-examine witnesses and introduce evidence even though counsel was not able to confer with parents prior to evidentiary hearing), *trans. denied*. For these reasons, it was not fundamental error for the trial court to conduct the termination proceedings in absentia, and Parents have failed to show a violation of their due process rights.

[22] Judgment affirmed.

Kirsch, J. and Weissmann, J, concur.