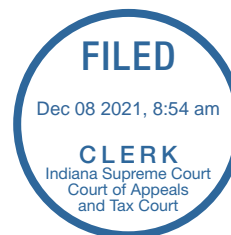


## MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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## IN THE COURT OF APPEALS OF INDIANA

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In re the Termination of the  
Parent-Child Relationship  
of: X.M. (Minor Child),  
and X.H. (Father),  
*Appellant-Respondent,*

v.

Indiana Department of Child  
Services,  
*Appellee-Petitioner.*

December 8, 2021

Court of Appeals Case No.  
21A-JT-1162

Appeal from the Allen Superior  
Court

The Honorable Lori K. Morgan,  
Judge

Trial Court Cause No.  
02D08-2007-JT-197

**Bailey, Judge.**

# Case Summary

- [1] X.H. (“Father”)<sup>1</sup> appeals the trial court judgment terminating his parental rights to his child, X.M. (“Child”).
- [2] We affirm.

## Issues

- [3] Father raises the following consolidated and restated issues:
- I. Whether the Indiana Department of Child Services (“DCS”) violated Indiana Code Section 31-34-6-2 by failing to consider placement of Child with a relative.
  - II. Whether the termination of parental rights (“TPR”) order was clearly erroneous.
  - III. Whether the termination of his parental rights violated his due process rights because DCS failed to provide him with needed services during the Child in Need of Services (“CHINS”) proceedings.

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<sup>1</sup> Father is Child’s putative Father, as he has admitted but not established his paternity of Child. However, for brevity and clarity’s sake, we refer to him as “Father.”

In addition, we note that Child’s mother, M.M. (“Mother”), whose parental rights were also terminated, is not an active participant in this appeal.

## Facts and Procedural History

- [4] Child was born on September 6, 2017, and, at that time, tested positive for marijuana. “Before DCS received notice that [Child] had tested positive at birth for an illegal substance, [Mother] transferred physical custody of [Child to D.M., a relative,] in an effort to hide [Child] from DCS and, even after a court ordered her to provide the whereabouts of [Child] to DCS, [Mother] continued to lie to DCS about [Child’s] whereabouts.” Ex. at 63. Child lived with D.M., Father’s second cousin and Child’s godparent, until DCS removed Child from D.M.’s home on April 15, 2019, and placed Child in foster care.
- [5] DCS filed a CHINS petition in which it noted it had removed Child because Child was born testing positive for marijuana, Mother tested positive for drugs, and Mother was incarcerated and unable to meet Child’s needs. DCS also alleged Father was incarcerated in Illinois and therefore unable to meet Child’s needs. DCS noted that Father’s arrest and incarceration stemmed, in part, from Father “discharg[ing] several gunshots at a car occupied by [Mother] and her boyfriend, as their car sped away, while [Child] and [another child] were in the backseat of the car,” all while Father was on probation in Indiana. *Id.* at 64.
- [6] At a May 30, 2019, initial hearing, Father admitted that he was the Father of Child, was unable to provide material and financial support for Child due to his incarceration, was unable to provide housing for Child due to his incarceration, and he and Child would benefit from the intervention of the court in order to receive services; however, Father denied that Child was a CHINS. The juvenile

court entered a provisional order that Father, among other things, refrain from criminal activity, cooperate in establishing paternity and child support for Child, and engage in specified services upon his release from incarceration. In July 2019, the juvenile court adjudicated Child a CHINS. The court subsequently entered an order on the dispositional hearing in which it ordered, among other things, that Father participate in specified services, including refraining from criminal activity, establishing paternity and child support for Child, obtaining and complying with diagnostic and drug and alcohol assessments, and complying with rules of probation and/or release from incarceration. The court noted in the dispositional order that DCS had “considered placement of the child in the home of the child’s relative,” but that “[n]o suitable and willing relative caretakers are available for the child’s placement.” App. at 25.

[7] Father was released from incarceration in Illinois in December of 2019. That same month Father was convicted in Indiana of dealing in a look-alike substance and was placed on probation. Father was arrested again on February 4, 2020, when his probation was revoked due to his failure to contact probation and obtain a monitoring ankle bracelet. Father continues to be incarcerated to this date, with a potential release date in March of 2022.

[8] During the brief time that Father was not incarcerated, he did not attempt to establish paternity or custody of Child and he did not visit Child. Family Case Manager Diandra Bruen (“FCM Bruen”) first contacted Father on February 8, 2020, when he was being transferred from Allen County Jail to Westville

Correctional Facility. At that time FCM Bruen had a discussion with Father regarding how he could establish paternity of Child. When FCM Bruen subsequently attempted to contact Father again at Westville Correctional Facility, she was unable to do so either because Father was in lockdown or because of COVID-19 restrictions. FCM Bruen did not make referrals for services for Father because he was incarcerated.

[9] On February 24, 2020, the juvenile court held a permanency hearing and adopted a plan of termination of parents' parental rights to Child and adoption of Child. The court noted in its order that DCS had considered relative placement for Child, but "no suitable and willing relative caretakers [were] available." App. at 31. FCM Bruen was eventually able to speak with Father by telephone before hearings, and on June 15, 2020, Father appeared telephonically for a second permanency hearing.

[10] On July 13, 2020, DCS filed a petition to terminate Father's parental rights as to Child. DCS arranged for Father to participate in the TPR proceedings, but Father hung up the telephone during such proceedings and "chose not to participate." Appealed Order at 5. At the TPR fact-finding hearings held on January 11 and February 18, 2021, FCM Bruen stated that she had considered placing Child with several relatives, including D.M. However, the relatives were unable to accept placement of Child for various reasons. DCS did not place Child with D.M. because DM was not "consistent" in maintaining employment and contact with DCS. Tr. at 123. FCM Buren further testified that Child is in a pre-adoptive foster home where he is "thriving." *Id.* at 114.

[11] On May 17, 2021, the juvenile court entered an order terminating Father's parental rights. The court entered findings which stated, in addition to the above, that:

J. ... [Father] has been incarcerated for the majority of the underlying CHINS proceedings. ... Since he has been incarcerated, he has been unable to comply with the requirements of his Parent Participation Plan due to his incarceration. The DCS family case manager acknowledged at trial that she has not made referrals for services for the father because he is incarcerated and she wasn't aware of what services he might be able to participate in while incarcerated. ... [Father] has made it clear through his actions that he does not have a desire to participate in the [TPR] proceedings, let alone care for the child.

... [Father] will not be released from incarceration until the year 2022. During the trial itself, he was given an opportunity to participate in the proceedings, however, disconnected the phone and chose not to participate. The condition of the father's incarceration and resultant inability to provide for the child[,] which condition existed at the time of the initiation of the underlying CHINS proceedings[,] continued to exist at the time of the hearing on the Petition for Termination. The condition will not be remedied prior to the father's release from incarceration in March of 2022.

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K. The child is currently in placement in licensed foster care and has been in placement in licensed foster care for approximately two (2) years. His foster parents want to adopt him. He is well bonded with the foster parents. They are providing the child with a safe, stable home environment. The child has not had

contact of any type with his alleged father during the course of the underlying CHINS proceedings.... Both of his parents have been incarcerated for a significant portion of the underlying CHINS proceedings. They have not provided materially or financially for the child over the course of the underlying CHINS proceedings. They have not provided care for the child or provided him with the basic necessities of a suitable home over the course of the CHINS proceedings. The Guardian Ad Litem and CASA [Court Appointed Special Advocate] both concur that the child's best interests are served by the Court granting the Petition for Termination (Involuntary) and freeing the child for adoption so that the child can have a safe, stable home environment to be raised in. The Court finds that the underlying CHINS proceedings have been pending for approximately two (2) years. At the time of the hearing on the Petition for Termination, neither of the child's parents were [in] a position to provide care for him. The child is [in] need of permanency sooner rather than later. He should not be required to wait for his parents to ready themselves to provide care for him. He is currently in a loving and stable home environment. His best interests are served by the entry of an order granting the Petition for Termination.

Appealed Order at 4-5.

[12] The trial court held that Father's parental rights as to Child were terminated because there is a reasonable probability that the conditions which resulted in Child's removal will not be remedied, and termination of parental rights is in Child's best interests. This appeal ensued.

# Discussion and Decision

## Standard of Review

[13] Father maintains that the trial court's order terminating his parental rights was clearly erroneous. We begin our review of this issue by acknowledging that the traditional right of a parent to establish a home and raise his or her children is protected by the Fourteenth Amendment of the United States Constitution. *See, e.g., In re C.G.*, 954 N.E.2d 910, 923 (Ind. 2011). However, a trial court must subordinate the interests of the parent to those of the child when evaluating the circumstances surrounding a termination. *In re K.S.*, 750 N.E.2d 832, 837 (Ind. Ct. App. 2001). Although the right to raise one's own child should not be terminated solely because there is a better home available for the child, parental rights may be terminated when a parent is unable or unwilling to meet his or her parental responsibilities. *Id.* at 836.

[14] Before an involuntary termination of parental rights can occur in Indiana, DCS is required to allege and prove, among other things:

(A) that one (1) of the following is true:

\* \* \*

(iii) The child has been removed from the parent and has been under the supervision of a local office or probation department for at least fifteen (15) months of the most recent twenty-two (22) months, beginning with the date the child is removed from the home as a result of the child being alleged to be a child in need of services or a delinquent child;



(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) [and] that termination is in the best interests of the child . . . .

Ind. Code § 31-35-2-4(b)(2). DCS need establish only one of the requirements of subsection (b)(2)(B) before the trial court may terminate parental rights. *Id.* DCS's "burden of proof in termination of parental rights cases is one of 'clear and convincing evidence.'" *In re G.Y.*, 904 N.E.2d 1257, 1260-61 (Ind. 2009) (quoting I.C. § 31-37-14-2).

[15] When reviewing a termination of parental rights, we will not reweigh the evidence or judge the credibility of the witnesses. *In re D.D.*, 804 N.E.2d 258, 265 (Ind. Ct. App. 2004), *trans. denied*. Instead, we consider only the evidence and reasonable inferences that are most favorable to the judgment. *Id.* Moreover, in deference to the trial court's unique position to assess the evidence, we will set aside the court's 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*.

- [16] Here, in terminating Father’s parental rights, the trial court entered specific findings of fact and conclusions thereon. When a trial court’s judgment contains special findings and conclusions, we apply a two-tiered standard of review. *Bester v. Lake Cnty. Off. of Fam. & Child.*, 839 N.E.2d 143, 147 (Ind. 2005). First, we determine whether the evidence supports the findings and, second, we determine whether the findings support the judgment. *Id.* “Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference.” *Quillen v. Quillen*, 671 N.E.2d 98, 102 (Ind. 1996). If the evidence and inferences support the trial court’s decision, we must affirm. *In re L.S.*, 717 N.E.2d at 208.

## Consideration of Placement with Relative

- [17] Father contends that DCS violated Indiana Code Section 31-34-6-2 by not considering placement of Child with D.M., a relative related by blood. That statute requires that the juvenile court or DCS “shall consider placing a child alleged to be a child in need of services with a suitable and willing relative or de facto custodian of the child before considering any other placement.” *Id.*
- [18] First, Father’s assertion regarding this statute is waived, as it was not raised in the CHINS or termination of parental rights proceedings. *See, e.g., A.S. v. Ind. Dep’t of Child Servs.*, 175 N.E.3d 318, 322 (Ind. Ct. App. 2021). Second, waiver notwithstanding, it is clear from FCM Bruen’s testimony that DCS did

consider, and ultimately reject, placement of Child with relatives, including D.M. DCS did not violate Indiana Code Section 31-34-6-2.

## Conditions that Resulted in Child's Removal/Continued Placement

[19] Father does not challenge any specific factual findings of the court. Rather, he maintains that the trial court erred in determining that there is a reasonable probability that the conditions that resulted in Child's removal and continued placement outside the home will not be remedied. We must determine whether the evidence most favorable to the judgment supports the trial court's determination. *In re D.D.*, 804 N.E.2d at 265; *Quillen*, 671 N.E.2d at 102. In doing so, we engage in a two-step analysis. *In re E.M.*, 4 N.E.3d 636, 643 (Ind. 2014). "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.* (quotations and citations omitted).

[20] In the first step, we consider not only the initial reasons for removal, but also the reasons for continued placement outside the home. *In re N.Q.*, 996 N.E.2d 385, 392 (Ind. Ct. App. 2013). In the second step, the trial court must judge a parent's fitness to care for his or her children at the time of the termination hearing, taking into consideration evidence of changed conditions. *In re E.M.*, 4 N.E.3d at 643. The court must also "evaluate the parent's habitual patterns of conduct to determine the probability of future neglect or deprivation of the child." *Moore v. Jasper Cnty. Dep't of Child Servs.*, 894 N.E.2d 218, 226 (Ind. Ct.

App. 2008) (quotations and citations omitted); *see also In re M.S.*, 898 N.E.2d 307, 311 (Ind. Ct. App. 2008) (noting the “trial court need not wait until a child is irreversibly harmed such that his physical, mental, and social development are permanently impaired before terminating the parent-child relationship”). In evaluating the parent’s habitual patterns of conduct, the court may disregard efforts made shortly before the termination hearing and weigh the history of the parent’s prior conduct more heavily. *In re K.T.K.*, 989 N.E.2d 1225, 1234 (Ind. 2013). DCS is not required to rule out all possibilities of change; rather, it need establish only that there is a reasonable probability the parent’s behavior will not change. *Moore*, 894 N.E.2d at 226.

[21] Here, when Child was removed from the home of a relative where Mother was hiding Child from DCS, Father was not living with Child due to his incarceration. Thus, constructive removal from Father occurred when DCS removed Child from Mother’s custody/the relative’s home and was unable to place Child with Father due to his incarceration. *See In re A.G.*, 45 N.E.3d 471, 476-77 (Ind. Ct. App. 2015) (holding “constructive removal” from Father occurred when paternity was established and DCS was unable to place child with Father due to his incarceration) (citing *In re I.A.*, 934 N.E.2d 1127, 1134 (Ind. 2010)), *trans. denied*. Father remained incarcerated throughout all but approximately one month of the CHINS and TPR proceedings. At the time of the termination hearing, Father was still incarcerated, with his earliest possible release from prison being over one year away. Thus, at the time of the termination hearing, Father had not remedied the reason for Child’s

constructive removal from him, i.e., his incarceration. *See Castro v. State Off. of Fam. & Child.*, 842 N.E.2d 367, 374 (Ind. Ct. App. 2006) (concluding that the trial court did not commit clear error in finding that conditions leading to the child’s removal from father would not be remedied where father, who had been incarcerated throughout the CHINS and termination proceedings, was not expected to be released until after the termination hearing), *trans. denied*. The juvenile court did not clearly err when it found that Father is not likely to remedy the reasons for Child’s removal.<sup>2</sup>

## Child’s Best Interests

[22] In determining whether termination of parental rights is in the best interests of a child, the trial court is required to look at the totality of the evidence. *In re A.K.*, 924 N.E.2d 212, 224 (Ind. Ct. App. 2010). “A parent’s historical inability to provide adequate housing, stability and supervision coupled with a current inability to provide the same will support a finding that termination of the parent-child relationship is in the child’s best interests.” *Castro*, 842 N.E.2d at 374. “Additionally, a child’s need for permanency is an important consideration in determining the best interests of a child, and the testimony of the service providers may support a finding that termination is in the child’s best interests.” *In re A.K.*, 924 N.E.2d at 224. Such evidence, “in addition to

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<sup>2</sup> Because DCS need only establish one of the requirements of subsection (b)(2)(B) of Indiana Code Section 31-35-2-4, we do not address whether Father’s relationship with Child would pose a threat to Child’s well-being.

evidence that the conditions resulting in removal will not be remedied, is sufficient to show by clear and convincing evidence that termination is in the child's best interests." *In re A.D.S.*, 987 N.E.2d 1150, 1158-59 (Ind. Ct. App. 2013), *trans. denied*.

[23] Father has been incarcerated for most of Child's life, and he has had no contact with Child during the CHINS and TPR proceedings. "[I]ndividuals who pursue criminal activity run the risk of being denied the opportunity to develop positive and meaningful relationships with their children." *Castro*, 842 N.E.2d at 374 (quotation and citation omitted). In *Castro*, we noted that, when a parent has been incarcerated for most of a child's life, the parent has a "historic inability to provide housing, stability and supervision" for the child. *Id.* Such is the case here. And Father's continued incarceration at the time of the termination hearing "is strong evidence of his current inability to provide [housing, stability, and supervision]." *Id.*

[24] Furthermore, the evidence established that (1) Father did not attempt to visit Child during the brief period of time when Father was not incarcerated, (2) Father never attempted to establish paternity and child support for Child, despite being ordered to do so, (3) Father refused to participate in the TPR proceedings, (3) Child needs stability and permanency, (4) Child is doing well in his current, pre-adoptive foster care placement, (5) there is no evidence that Father would be able to parent Child upon his release from prison, and, (6) in any case, Father cannot provide any care at all for Child until at least March of 2022. Thus, it is unsurprising that FCM Buren, the Guardian ad Litem, and the

CASA all concurred that termination of parental rights is in Child's best interests. See *In re S.P.H.*, 806 N.E.2d 874, 883 (Ind. Ct. App. 2004) (holding that the needs of the children were too substantial to force them to wait while determining if their incarcerated father would be able to be a parent for them).

[25] The trial court did not clearly err in finding that termination was in Children's best interests.

## Due Process

[26] Father maintains that the juvenile court's order terminating his parental rights violated his constitutional due process rights. Specifically, he contends that the termination order must be reversed because DCS failed to provide him with necessary services and that failure 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 *In re D.H.*, 119 N.E.3d 578, 586 (Ind. Ct. App. 2019) (noting "we have discretion to address such [due process] claims, 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*.

[27] When the State seeks to terminate parental rights, "it must do so it 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 at 917).

[28] In looking at the risk of error created by DCS’s actions, we keep in mind that “due process protections at all stages of CHINS proceedings are vital because every CHINS proceeding has the potential to interfere with the rights of parents in the upbringing of their children.” *In re G.P.*, 4 N.E.3d 1158, 1165 (Ind. 2014) (quotations and citations omitted). “[T]hese two proceedings—CHINS and TPR—are deeply and obviously intertwined to the extent that an error in the former may flow into and infect the latter.” *Id.* And “[a]ny procedural irregularities in a CHINS proceeding may be of such significance that they deprive a parent of procedural due process with respect to the termination of his or her parental rights.” *In re S.L.*, 997 N.E.2d at 1120; *see also Matter of C.M.S.T.*, 111 N.E.3d 207, 213 (Ind. Ct. App. 2018) (holding that “the chaotic



and unprofessional handling” of a CHINS case violated the parents’ due process rights, requiring reversal of the termination order). Thus,

for a parent’s due process rights to be protected in the context of termination proceedings, DCS must have made reasonable efforts to preserve and/or reunify the family unit in the CHINS case (unless the no reasonable efforts exception applies). What constitutes “reasonable efforts” will vary by case, and ... it does not necessarily always mean that services must be provided to the parents.

*In re T.W.*, 135 N.E.3d 607, 615 (Ind. Ct. App. 2019), *trans. denied*; *see also* I.C. § 31-34-21-5.5.

[29] Here, we have identified no procedural irregularities in either the CHINS or TPR proceedings. Father did not receive services aimed at reunification while the CHINS action was pending;<sup>3</sup> however, the reason for the lack of such services was Father’s incarceration. DCS’s inability to provide services to a parent due to the parent’s incarceration does not, alone, result in a deprivation of due process. *See In re S.K.*, 124 N.E.3d 1225, 1233 (Ind. Ct. App. 2019) (finding no due process violation where DCS was not able to provide the parent with services due to the parent’s incarceration); *In re H.L.*, 915 N.E.2d 145, 148 (Ind. Ct. App. 2009) (finding no due process violation where “the absence of services was due to Father’s incarceration” and he “[did] not point to any

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<sup>3</sup> We note that the “reasonable efforts” CHINS provision is not a requisite element of our parental rights termination statute, and a failure to provide services does not serve as a basis on which to directly attack a termination order as contrary to law. *E.g., In re H.L.*, 915 N.E.2d 145, 148 n.3 (Ind. Ct. App. 2009).

evidence that he specifically requested visitation or other services”); *Castro*, 842 N.E.2d at 377 (holding DCS’s inability to evaluate and offer services to the parent due to the parent’s incarceration did not constitute a deprivation of due process rights).

[30] Furthermore, there was no evidence that Father ever requested the provision of services. “[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.” *In re B.D.J.*, 728 N.E.2d 195, 202 (Ind. Ct. App. 2000); *see also Prince v. Dep’t Child Servs.*, 861 N.E.2d 1223, 1231 (Ind. Ct. App. 2007) (“If the parent feels the services ordered by the court are inadequate to facilitate the changes required for reunification, then the onus is on the parent to request additional assistance from the court or DCS.”).

[31] The trial court did not enter the termination of parental rights order in violation of Father’s due process rights.

## Conclusion

[32] By failing to raise the claim below, Father waived his claim that DCS violated Indiana Code Section 31-34-6-2, and, in any case, the record indicates that DCS considered and rejected placement of Child with relatives. And the trial court did not violate Father’s due process rights or otherwise commit clear error when it ordered the termination of his parental rights as to Child.

[33] Affirmed.

Mathias, J., and Altice, J., concur.