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

In Re: The Termination of the Parent-Child Relationship of C.B., B.B., and Br.B. (Minor Children);

B.B. (Father),

Appellant-Respondent,

v.

Indiana Department of Child Services,

Appellee-Petitioner,

and

Kids' Voice of Indiana,

August 23, 2022

Court of Appeals Case No. 22A-JT-175

Appeal from the Marion Superior Court

The Honorable Geoffrey Gaither, Judge

The Honorable Scott B. Stowers, Magistrate

Trial Court Cause Nos.
49D09-2104-JT-2802
49D09-2104-JT-2803
49D09-2104-JT-2804

Guardian Ad Litem.

Pyle, Judge.

Statement of the Case

[1] B.B. ("Father") appeals the termination of the parent-child relationships with his three sons, Br.B. ("Br.B."), Bra.B. ("Bra.B."), and C.B. ("C.B.") (collectively "the children").[1] Father argues that he was denied due process because the Department of Child Services ("DCS") failed to make reasonable efforts to preserve the parent-child relationships and that there is insufficient evidence to support the terminations. Concluding that Father was not denied due process and that there is sufficient evidence to support the terminations, we affirm the trial court's judgment.

[2] We affirm.

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[1] The children's mother ("Mother") voluntarily relinquished her parental rights to C.B. Although the trial court terminated Mother's parental relationships with Br.B. and Bra.B., Mother is not participating in this appeal.

Issues

1. Whether Father was denied due process.
2. Whether there is sufficient evidence to support the termination of the parent-child relationships.

Facts

[3] The facts most favorable to the terminations reveal that Mother and Father (collectively "Parents") are the parents of twins, Br.B and Bra.B, (collectively "the twins"), who were born in August 2016, and C.B., who was born in December 2018. In April 2019, Mother and Father, who lived in Indianapolis with the children, became involved in a domestic dispute while staying at a motel in Decatur County. During the physical altercation, which occurred in the presence of the children, Father threw Mother against a wall and broke her collar bone as well as a bone in her shoulder. When law enforcement officers arrived at the scene, Mother was transported to the hospital, and Father was arrested and transported to the Decatur County Jail.

[4] While the officers were in the motel room, the officers smelled marijuana. The officers also noticed marijuana on a table and a burned marijuana cigarette on the table between the two beds. Following the execution of a search warrant, law enforcement officers located drug paraphernalia, scales, and a gallon size bag that was half-full of marijuana. The State charged Father with Level 3 aggravated battery, Level 5 domestic battery, Level 6 felony dealing in marijuana, Level 6 felony maintaining a common nuisance, Level 6 felony neglect of a dependent, Class B misdemeanor possession of marijuana, and

Class C misdemeanor possession of paraphernalia. In addition, the trial court issued a protective order prohibiting Father from contacting Mother.

[5] DCS in Decatur County removed the children from Parents and placed them with a family member. DCS in Decatur County also filed a petition alleging that the children were children in need of services ("CHINS") based upon the incident of domestic violence, the drug paraphernalia and large quantity of marijuana that had been found in the motel room, and drug screen results that revealed one of the twins had tested positive for THC. Father admitted to the allegations in the CHINS petition at an initial hearing in Decatur County.

[6] In May 2019, the Decatur County trial court granted DCS' motion for change of venue and transferred the CHINS case to Marion County. In June 2019, Father attended via teleconference the CHINS hearing in Marion County and "maintain[ed] his admission offered at the initial hearing [in Decatur County]." (Ex. Vol. at 36). Following the hearing, in July 2019, the trial court issued an order adjudicating the children to be CHINS. In this order, the trial court "authorize[d] supervised parenting time for [F]ather in accordance [with] the Decatur County Jail [policies and] conditioned upon the positive recommendations of the child and family team." (Ex. Vol. 37).

[7] However, in its August 2019 dispositional order, the trial court stated that because Father was incarcerated for criminal charges related to domestic violence, "on[-]going contact [with the children] would not be in the children's best interests." (Ex. Vol. at 43). The trial court ordered Father to contact DCS

within 72 hours of his release from incarceration. DCS recommended that Father complete a Fatherhood Engagement course, domestic violence services, and a substance abuse assessment. The trial court's dispositional order further noted that C.B. had been placed in relative care with Mother's cousin and the twins had been placed together in foster care.

[8] DCS Family Case Manager Brittany Montgomery ("FCM Montgomery") attempted to contact Father by telephone while he was incarcerated in the Decatur County Jail but was never able to reach him. When FCM Montgomery asked jail personnel if she could meet with Father at the jail, she was advised that "only attorneys not related in the CHINS case were allowed there, so [she] was not allowed to go visit him physically[.]" (Tr. Vol. 2 at 42). FCM Montgomery also scheduled a Family Engagement program provider to visit Father at the jail, but "still had no success." (Tr. Vol. 2 at 42). Because FCM Montgomery had been unable to meet with Father at the jail, FCM Montgomery sent Father an incarcerated parent letter providing him with information about maintaining contact with the children by sending them letters. FCM Montgomery's letter also provided Father with information regarding how to contact her. Father did not send any letters to the children or contact FCM Montgomery.

[9] In February 2020, while still incarcerated at the Decatur County Jail, Father pleaded guilty to two of the 2019 charges that had led to the removal of the children. Specifically, Father pleaded guilty to Level 5 felony domestic battery and Level 6 felony dealing in marijuana, and the State dismissed the remaining

five charges. In March 2020, the trial court sentenced Father to 1620 days in the Department of Correction ("the DOC") and 180 days of probation. In addition, Father's conviction for Level 5 felony domestic battery led to a domestic violence determination pursuant to INDIANA CODE § 35-38-1-7.7. The trial court advised Father that pursuant to his domestic battery conviction and the domestic violence determination, Father's "parenting time with minor children m[ight] be restricted[.]" (Ex. Vol. at 177).

[10] In April 2020, Father was transferred to the DOC's Reception and Diagnostic Center, which does not provide programs. In June 2020, Father was transferred to Heritage Trail Correctional Facility ("Heritage Trail").

[11] FCM Montgomery attempted to contact Father several times after he had been transferred to Heritage Trail but was unable to reach him. According to FCM Montgomery, "[p]eople [at Heritage Trail] would tell [her] . . . [when she] was supposed to call back." (Tr. Vol. 2 at 47). However, when FCM Montgomery called back at the appointed times, Heritage Trail staff "would give [FCM Montgomery] another day [to call back][.]" (Tr. Vol. 2 at 47). FCM Montgomery "was going through social worker after social worker and representative after representative that would pick up the phone on each day." (Tr. Vol. 2 at 47). FCM Montgomery also scheduled a Family Engagement program provider to visit Father at Heritage Trail. However, the provider was not able "to get in and provide that service[.]" (Tr. Vol. 2 at 51).

[12] At a July 1, 2020, permanency hearing, DCS requested a two-week continuance so that Father could attend the hearing via teleconference. On July 15, 2020, Father was available via teleconference at 9:00 a.m. However, the hearing had apparently been rescheduled to a different time. The trial court asked the staff at Heritage Trail to allow Father to appear by phone for the next hearing. Father appeared via teleconference at the August 2020 hearing and told the trial court that he had not spoken with his court-appointed attorney. The trial court requested that Heritage Trail staff "make [Father] available to speak with his attorney[.]" (Ex. Vol. at 70).

[13] At the September 2020 permanency hearing, Father's attorney reported that she had spoken with Father at Heritage Trail and that he had requested virtual parenting time with the children. In its order, the trial court authorized supervised virtual parenting time "as may be conducted according to the policy of where [F]ather is incarcerated." (Ex. Vol. at 76).[2]

[14] Father attended a child and family team meeting in January 2021 via teleconference and told FCM Montgomery that he had not had parenting time with the children. FCM Montgomery "assured him that [she] was working on

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[2] The trial court's order specifically provided that the trial court was continuing the authorization for supervised parenting time. However, the only previous order that had authorized parenting time was the July 2019 order that had authorized supervised parenting in accordance with the Decatur County Jail's policies and had been conditioned upon the positive recommendations of the child and family team. One month later in its CHINS dispositional order, the trial court had found that because Father was incarcerated for criminal charges related to domestic violence, "on[-]going contact [with the children] would not be in the children's best interests." (Ex. Vol. at 43).

trying to get the visits, that it ha[d] been extremely hard[.]" (Tr. Vol. 2 at 43). FCM Montgomery told Father that he could send photographs to her, and she could show them to the children. FCM Montgomery also gave recent photographs of the children to Father's father and asked him to send them to Father.

[15] Also, at the child and family team meeting, FCM Montgomery offered to provide Father with domestic violence services and parenting education. However, Father told FCM Montgomery that Heritage Trail was "providing those services and so there was no need for him to double up on those services through DCS." (Tr. Vol. 2 at 52-53).

[16] In April 2021, DCS filed petitions to terminate Parents' parental relationships with the children. At the three-day termination hearing in October and November 2021, the trial court heard the evidence as set forth above. In addition, Father testified that regarding the April 2019 domestic violence incident that had led to the removal of the children, Father had simply tripped over a box and had fallen on Mother, who had then fallen against the wall and broken her collarbone.

[17] Father also testified that when he had arrived at Heritage Trail, he had requested to participate in a domestic violence program but learned that Heritage Trail did not offer such a program. According to Father, he had completed an employment program, an NA/AA program, an Inside/Outside Dad parenting program, and a Thinking for a Change program. At the time of

the termination hearing, Father was participating in a work release program. Father acknowledged that he had learned in the Inside/Outside Dad parenting program that he could maintain a relationship with the children by sending them cards and letters but had never done so. Father also acknowledged that he had not done anything to maintain his relationship with the children since his incarceration in April 2019. In addition, Father acknowledged that FCM Montgomery had worked hard to arrange parenting time.

[18] FCM Montgomery testified that she had spent two years on the case before leaving DCS in June 2021. According to FCM Montgomery, during those two years, she believed that she had made reasonable efforts to offer reunification services to Father. FCM Montgomery further testified that the children had been in stable homes during those two years and were flourishing. FCM Montgomery also testified that she supported the termination of Father's parental relationships with the children.

[19] Guardian ad Litem Greg Cannon ("GAL Cannon"), who had been assigned to the case in June 2019, testified that when C.B. had been removed from Parents, C.B. had been an infant, and there had been no concerns about him. However, Br.B. and Bra.B. had exhibited behavioral issues. For example, Br.B had an incident of smearing feces shortly after going into foster care. In addition, the twins "would flinch" when the foster parents approached them. (Tr. Vol. 2 at 105). This behavior "raised some red flags about some of the things [the twins] might have experienced before [going] into [foster] care[.]" (Tr. Vol. 2 at 106). GAL Cannon was also concerned about "the length of time that [the twins]

continued to flinch even though they were clearly be[ing] consoled[.]" (Tr. Vol. 2 at 111). According to GAL Cannon, "it [was] concerning that it took so long for them [to] become trusting that they weren't going to be physically hurt." (Tr. Vol. 2 at 111). Further, at the time of removal, the twins had elevated lead levels that were still being monitored at the time of the termination hearing. In addition, at the time of removal, the twins had "struggled in general with routine and structure" and were not able to sit at the table and feed themselves. (Tr. Vol. 2 at 106). Also, at the time of the hearing, Br.B. was attending occupational and speech therapies.

[20] GAL Cannon also expressed his concern that Father had testified at the hearing that Mother's injury in the motel room had been an accident. GAL Cannon specifically explained that he was concerned that Father "continue[d] to deny that there [was] any domestic violence issues despite that being part of . . . his admission[.]" (Tr. Vol. 2 at 109). According to GAL Cannon, he was concerned that Father was not at a point to address the domestic violence issue if he was denying that domestic violence had occurred. GAL Cannon testified that "it [was] difficult to believe someone w[ould] remedy a concern that they are denying." (Tr. Vol. 2 at 114).

[21] In addition, GAL Cannon testified that he had provided his contact information to Father; however, Father had never contacted him to inquire about the children's well-being. GAL Cannon further testified that it had been exceedingly difficult to schedule parenting time for Father because of Father's incarceration. GAL Cannon explained that he and FCM Montgomery had

"tr[ied] to work around the barriers that [Father's] incarceration [had] presented." (Tr. Vol. 2 at 125).

[22] GAL Cannon concluded that termination and adoption were in the children's best interests. Specifically, GAL Cannon testified that the children would be able to maintain their stability in their pre-adoptive homes where they were thriving and achieve permanency.

[23] Following the hearing, the trial court issued a detailed order terminating Father's parental relationships with the children. Father now appeals the terminations.

Decision

[24] Father argues that he was denied due process and that there is insufficient evidence to support the terminations. We address each of his contentions in turn.

1. Due Process

[25] Father first argues that he was denied due process because DCS failed to make reasonable efforts to preserve the parent-child relationships. When DCS 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) (cleaned up). Due process requires "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Whether due process has been afforded in termination proceedings is determined by balancing the following "three distinct factors"

specified 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. *A.P. v. Porter County Office of Family and Children*, 734 N.E.2d 1107, 1112 (Ind. Ct. App. 2000), *trans. denied*.

[26] In *S.L. v. Indiana Department of Child Services*, 997 N.E.2d 1114, 1120 (Ind. Ct. App. 2013) (cleaned up), this Court further explained the *Mathews* factors as follows:

> 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.

[27] DCS must "make reasonable efforts to preserve and reunify families." IND. CODE § 31-34-21-5.5(b). In addition, "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) (cleaned up). "[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.*

[28] However, the "failure to provide services does not serve as a basis on which to directly attack a termination order as contrary to law." *In re H.L.*, 915 N.E.2d

145, 148 n.3 (Ind. Ct. App. 2009); *see also In re E.E.*, 736 N.E.2d 791, 796 (Ind. Ct. App. 2000) ("[T]he provision of family services is not a requisite element of our parental rights termination statute, and thus, even a complete failure to provide services would not serve to negate a necessary element of the termination statute and require reversal."). Further, a parent may not sit idly by without asserting a need or desire for services and then successfully argue that he or she was denied services to assist him with his parenting. *In re B.D.J.*, 728 N.E.2d 195, 201 (Ind. Ct. App. 2000).

[29] Here, although Father argues that his right to due process was violated because DCS failed to make reasonable efforts to preserve the parent-child relationships, our review of the record reveals otherwise. Specifically, Father was incarcerated during the entire pendency of the CHINS proceedings. While Father was incarcerated in the Decatur County jail, FCM Montgomery attempted to contact him by telephone and to meet with him in person. However, she was unable to do so because of the jail's policies. FCM Montgomery also scheduled a Family Engagement provider to meet with Father at the jail, but that did not work out either.

[30] When Father was transferred to Heritage Trail, FCM Montgomery again attempted to contact Father but was unable to reach him. FCM Montgomery also scheduled a Family Engagement program provider to visit Father at Heritage Trail, but the provider was not able to get into the facility to provide the service. In addition, as Father acknowledged, FCM Montgomery also

worked extremely hard to schedule supervised parenting time for Father while he was incarcerated at Heritage Trail but was unable to do so.

[31] This Court has previously explained that DCS' inability to provide services in such circumstances does not amount to a denial of due process. *See In re H.L.*, 915 N.E.2d at 148. Further, our Indiana Supreme Court has previously explained that "[i]ndividuals who pursue criminal activity run the risk of being denied the opportunity to develop positive and meaningful relationships with their children." *K.T.K. v. Indiana Department of Child Services.,* 989 N.E.2d 1225, 1235-36 (Ind. 2013) (cleaned up). Father has not established that DCS violated his due process rights because it failed to make reasonable efforts to preserve his parent-child relationships with the children.

2. Sufficiency of the Evidence

[32] Father also argues that there is insufficient evidence to support the termination of the parent-child relationships. We disagree.

[33] The traditional right of parents to establish a home and raise their children is protected by the Fourteenth Amendment to the United States Constitution. *In re J.W., Jr.*, 27 N.E.3d 1185, 1187-88 (Ind. Ct. App. 2015), *trans. denied*. However, a trial court must subordinate the interests of the parents to those of the child when evaluating the circumstances surrounding a termination. *Id.* at 1188. A trial court need not wait until children are irreversibly influenced by a deficient lifestyle such that their physical, mental, and social growth are

permanently impaired before terminating the parent-child relationship. *In re D.L.*, 814 N.E.2d 1022, 1027 (Ind. Ct. App. 2004), *trans. denied*. Indeed, the purpose of terminating parental rights is not to punish parents but to protect children. *Id*. When the evidence shows that the emotional and physical development of a child in need of services is threatened, termination of the parent-child relationship is appropriate. *Id*.

[34] Before an involuntary termination of parental rights may occur, 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). DCS must prove the alleged circumstances by clear and convincing evidence. *K.T.K.,* 989 N.E.2d at 1230.

[35] When reviewing a termination of parental rights, this Court will not reweigh the evidence or judge the credibility of the witnesses. *In re R.S.*, 56 N.E.3d 625, 628 (Ind. 2016). We consider only the evidence and any reasonable inferences to be drawn therefrom that support the judgment and give due regard to the trial court's opportunity to judge the credibility of the witnesses firsthand. *K.T.K.*, 989 N.E.2d at 1229.

[36] In addition, as a general rule, appellate courts grant latitude and deference to trial courts in family law matters. *Matter of D.P.*, 72 N.E.3d 976, 980 (Ind. Ct. App. 2017). "This deference recognizes a trial court's unique ability to see the witnesses, observe their demeanor, and scrutinize their testimony, as opposed to this court[] only being able to review a cold transcript of the record." *Id*.

[37] Here, Father argues that there is insufficient evidence to support the termination of his parental rights. Specifically, Father contends that (1) the evidence is insufficient to show that there is a reasonable probability that the conditions that resulted in his children's removal or the reasons for placement outside the parent's home will not be remedied, and (2) a continuation of the parent-child relationships poses a threat to the children's well-being.

[38] However, we note that INDIANA CODE § 31-35-2-4(b)(2)(B) is written in the disjunctive. Therefore, DCS is required to establish by clear and convincing evidence only one of the three requirements of subsection (B). *In re A.K.,* 924 N.E.2d 212, 220 (Ind. Ct. App. 2010). We therefore discuss only whether there is a reasonable probability that the conditions that resulted in the children's

removal or the reasons for their placement outside Father's home will not be remedied.

[39] In determining whether the conditions that resulted in a child's removal or placement outside the home will not be remedied, we engage in a two-step analysis. *In re E.M.,* 4 N.E.3d 636, 642-43 (Ind. 2014). We first identify the conditions that led to removal or placement outside the home and then determine whether there is a reasonable probability that those conditions will not be remedied. *Id.* at 643. The second step requires trial courts to judge a parent's fitness at the time of the termination proceeding, taking into consideration evidence of changed conditions and balancing any recent improvements against habitual patterns of conduct to determine whether there is a substantial probability of future neglect or deprivation. *Id.* DCS need not rule out all possibilities of change. *In re Kay. L.,* 867 N.E.2d 236, 242 (Ind. Ct. App. 2007). Rather, DCS need establish only that there is a reasonable probability that the parent's behavior will not change. *Id.*

[40] Here, our review of the evidence that supports the judgment reveals that DCS removed the children from Father based upon the incident of domestic violence as well as the drug paraphernalia and the large quantity of marijuana that had been found in the motel room. Although Father engaged in an NA/AA program while incarcerated at Heritage Trail, Father did not participate, during the pendency of the CHINS proceeding, in a recommended domestic violence program. Specifically, when FCM Montgomery offered to provide Father with domestic violence services, Father told FCM Montgomery that Heritage Trail

was providing those services and there was no need for him to double up on those services. However, at the termination hearing, Father testified that Heritage Trail did not offer domestic violence services. Also, at the termination hearing, Father minimized the domestic violence incident at the motel and explained it in terms that were more accidental than intentional. Father's failure to participate in a domestic violence program in conjunction with his minimization of the domestic violence incident supports the trial court's conclusion that there was a reasonable probability that the conditions that resulted in the children's removal would not be remedied.

[41] We have previously recognized that this Court is ever mindful of the fact that the trial court must subordinate the interests of the parents to those of the children when evaluating the circumstances surrounding the termination of the parent-child relationship. *Matter of D.G.,* 702 N.E.2d 777, 781 (Ind. Ct. App. 1998). Recognizing that the trial court listened to the testimony of all the witnesses at the termination hearing, observed their demeanor, and judged their credibility, as a reviewing court, we must give proper deference to the trial court. Accordingly, we hold that the trial court did not err in concluding that the DCS proved by clear and convincing evidence that Father's parental rights should be terminated.

[42] Affirmed.

Robb, J., and Weissmann, J., concur.