MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In the Matter of the Involuntary Termination of the Parent-Child Relationship of J.F. and T.F. (Minor Children),

and

J.F. (Father),

Appellant-Respondent,

v.

Indiana Department of Child Services,

Appellee-Petitioner

January 29, 2021

Court of Appeals Case No. 20A-JT-1789

Appeal from the Fayette Circuit Court

The Honorable Daniel Lee Pflum, Senior Judge

Trial Court Cause Nos. 21C01-2005-JT-79 21C01-2005-JT-80

Crone, Judge.

Case Summary

[1] J.F. (Father) appeals the involuntary termination of his parental rights to his two minor children, J.F. and T.F. His sole contention is that the trial court violated his procedural due process rights when it denied his motion to continue the factfinding hearing. Concluding that Father has waived our review of this issue, we affirm.

Facts and Procedural History

[2] Father and T.S. (Mother) are the parents of J.F., born April 11, 2008, and T.F., born January 18, 2013. In September 2018, the Fayette County Department of Child Services (DCS) filed petitions alleging the Children were children in need of services (CHINS) due to Father's and Mother's illegal drug use and domestic violence in the home. In January 2019, Father and Mother agreed to the terms of a program of informal adjustment, and DCS dismissed the CHINS petitions.

[3] On February 4, 2019, DCS removed the Children from the home due to ongoing concerns of domestic violence in the presence of the Children as well as continued illegal drug use, including Fentanyl, by both parents. The Children were placed with their maternal aunt and have remained in her care since removal. DCS filed new CHINS petitions on February 5, 2019. Father and Mother admitted to the allegations, and the Children were adjudicated CHINS on March 7, 2019. The trial court entered a dispositional decree ordering both parents to participate in services with the permanency plan for the Children being reunification. After both parents "made minimal to no effort to

reunify with the Children or enhance their ability to fulfill their parental obligations and were otherwise non-compliant with the Dispositional Decree," the trial court entered an order changing the permanency plan from reunification to termination and adoption. Appealed Order at 2.

[4] DCS filed petitions to terminate both Father's and Mother's parental rights on May 4, 2020. An initial hearing was held on May 27, 2020. Both parents appeared with court-appointed counsel at the hearing. During the hearing in open court, counsel scheduled the final pretrial conference for July 1, 2020, and the factfinding hearing for July 6, 2020, at 1:00 p.m. on both days. The trial court advised both Father and Mother that if they failed to appear at the factfinding hearing that the court could still hold the hearing in their absence.

[5] The pretrial conference was held as scheduled. Father did not appear. Father's counsel made an oral motion to continue the factfinding hearing, stating that although he knew that Father had recently been released from the Franklin County Jail, counsel did not know Father's whereabouts. DCS objected to the continuance, arguing that Father was aware of the date of the factfinding hearing. The trial court denied the motion to continue.

[6] The factfinding hearing commenced as scheduled on July 6, 2020. Again, Father did not appear. The trial court noted on the record that a written notice of the factfinding hearing had been sent to Father on June 3, and that the notice had not been returned as undeliverable. The distribution list on the June 3, 2020 notice shows Father's address as the Franklin County Jail. Father's

counsel again made an oral motion to continue over the objections of both DCS and the court-appointed special advocate. The trial court denied the motion. The factfinding hearing was held in Father's and Mother's absence on that date and also on July 10, 2020.

[7] On August 31, 2020, the trial court issued its findings of fact, conclusions thereon, and order terminating both Father's and Mother's parental rights. In its order, the trial court specifically noted that although both Father and Mother failed to appear during factfinding, "[b]oth parents were present at the initial hearing where they were notified of this hearing's date and time." Appealed Order at 1. The court further found that "DCS sent 10 Day Notice letters to the last known address of both parents." *Id.* Father now appeals.[1]

Discussion and Decision

[8] Father challenges the involuntary termination of his parental rights. We begin by noting that Father does not specifically challenge any of the trial court's findings of fact or conclusions thereon. Accordingly, Father has waived the ability to challenge those findings or conclusions as clearly erroneous by failing to make a cogent argument. *See In re B.R.*, 875 N.E.2d 369, 373 (Ind. Ct. App. 2007) (citing Ind. Appellate Rule 46(A)(8)(a)), *trans. denied*.

[9] Father's sole assertion on appeal involves his due process rights. When seeking to terminate a parent-child relationship, the State must satisfy the requirements

[1] Although Mother's parental rights were also terminated, she does not participate in this appeal.

of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *S.L. v. Ind. Dep't of Child Servs.*, 997 N.E.2d 1114, 1120 (Ind. Ct. App. 2013). This means that the State must proceed in a fundamentally fair manner that affords parents the opportunity to be heard at a meaningful time and in a meaningful manner. *In re C.G.*, 954 N.E.2d 910, 917 (Ind. 2011). In termination cases, this requires the trial court to balance 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." *In re K.D.*, 962 N.E.2d 1249, 1257 (Ind. 2012) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)).

[10] Father contends that he was denied procedural due process when the trial court denied his oral motion to continue the factfinding hearing. A trial court's ruling on a motion to continue ordinarily is a matter within its discretion; we review a trial court's denial of a motion to continue for an abuse of discretion. *Rowlett v. Vanderburgh Cnty. Off. of Fam. & Child.*, 841 N.E.2d 615, 619 (Ind. Ct. App. 2005), *trans. denied* (2006). Father's counsel sought a continuance when Father failed to appear for the pretrial conference and for the first day of the factfinding hearing. The trial court noted that Father was present in open court when the factfinding was scheduled, and that written notice of the hearing date was sent to his last known address, which was the Franklin County Jail. The trial court denied counsel's oral motion and conducted the factfinding hearing in absentia. At no time did counsel assert or suggest that a denial of the motion to continue would result in a violation of Father's due process rights.

[11] Only now does Father frame his argument in terms of due process, claiming that he had a constitutional right to notice and an opportunity to be heard. Our supreme court has emphasized that a parent's right to be heard does not mean that the parent has an absolute right to be physically present at the hearing. *In re K.W.*, 12 N.E.3d 241, 248-49 (Ind. 2014). A parent's appearance by counsel has been held to satisfy the requirements of due process. *See, e.g., Hite v. Vanderburgh Cnty. Off. of Fam. & Child.*, 845 N.E.2d 175, 184 (Ind. Ct. App. 2006) (finding no due process violation where incarcerated father appeared only by counsel at permanency hearing).

[12] Although procedural irregularities during CHINS and termination proceedings may be of such significance that they deprive a parent of procedural due process, the parent must raise due process at the trial level to avoid waiver. *S.L.*, 997 N.E.2d at 1120; *see also McBride v. Monroe Cnty. Off. of Fam. & Child.*, 798 N.E.2d 185, 194-95 (Ind. Ct. App. 2003) (a party may waive a constitutional claim, including due process, by raising it for first time on appeal). Here, as noted above, Father was present by counsel, who did not raise procedural due process concerns or argue that Father lacked notice of the factfinding hearing. Indeed, there is evidence in the record that Father did have notice.[2] Significantly, in failing to specifically raise procedural due process below, Father did not provide the trial court "a bona fide opportunity to pass

[2] When asked whether he believed his client had notice of the factfinding hearing, Father's counsel stated, "Judge he had notice …." Tr. Vol. 2 at 12. The trial court then reviewed its record and found that Father was given notice in open court and that the required statutory written notice was sent to Father's last known address and was not returned as undeliverable. Tr. Vol. 2 at 14.

upon the merits" of his claim before seeking an opinion on appeal. *Endres v. Ind. State Police*, 809 N.E.2d 320, 322 (Ind. 2004). Thus, Father has waived this issue for our consideration.[3] The trial court's termination of Father's parental rights is affirmed.

[13] Affirmed.

Najam, J., and Riley, J., concur.

[3] Father concedes that he did not raise any due process concerns below but argues that this Court has the discretion to consider the issue as fundamental error. However, other than simply mentioning fundamental error, Father does not attempt to adequately explain how this narrow exception to the waiver doctrine applies. In other words, Father does not explain how the denial of his motion for continuance constituted an error "so egregious and abhorrent to fundamental due process that the trial judge should or should not have acted, irrespective of the parties' failure to object or otherwise preserve the error for appeal." *Whiting v. State*, 969 N.E.2d 24, 34 (Ind. 2012). Consequently, we decline to exercise our discretion to address this bald claim.