

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In the Matter of the Termination
of the Parent-Child Relationship
of E.L., Mother, C.L., Father,¹
and A.L., Minor Child,

E.L.,

Appellant-Respondent,

v.

Indiana Department of Child
Services,

April 26, 2021

Court of Appeals Case No.
20A-JT-1707

Appeal from the
Howard Circuit Court

The Honorable
Lynn Murray, Judge

Trial Court Cause No.
34C01-2001-JT-25

¹ We note that, although Father does not join in this appeal, under Indiana Appellate Rule 17(A), a party of record in the trial court shall be a party on appeal.

Appellee-Petitioner.

Kirsch, Judge.

[1] E.L. (“Mother”) appeals the juvenile court’s order terminating her parental rights to her minor child, A.L. (“Child”). Mother raises the following restated issues on appeal:

- I. Whether Mother’s right to due process was violated because of several alleged procedural errors; and
- II. Whether the juvenile court’s judgment terminating her parental rights was supported by clear and convincing evidence.

[2] We affirm.

Facts and Procedural History

[3] Mother and C.L. (“Father”)² are the parents of Child, who was born August 15, 2017. *Ex. Vol. 1* at 6. When Child was a year old, the Indiana Department of Child Services (“DCS”) began to receive multiple reports of abuse or neglect by Mother based on her mental health and drug use.³ *Id.*; *Tr. Vol. II* at 21-22. On August 27, 2018, family case manager Constance Peterson (“FCM Peterson”) and family case manager Samantha Merenda (“FCM Merenda”) went to the home to perform an assessment and found Mother acting erratically. *Tr. Vol. II* at 22. When the FCMs asked Mother to provide a drug screen, she became angry and aggressive and began throwing objects in the home. *Id.* FCM Merenda contacted law enforcement out of safety concerns for the FCMs and for Child. *Id.*; *Ex. Vol. 1* at 7.

[4] During the assessment, Mother disclosed to FCM Peterson she was hearing voices and that she believed people were living in her garage. *Tr. Vol. II* at 22. FCM Peterson observed redness around Child’s diaper area and directed Mother to change Child’s diaper. *Id.* at 23. Mother was unable to change Child’s diaper properly and harshly wiped Child’s bottom, which was covered

² Father voluntarily relinquished his parental rights at the termination hearing and does not participate in this appeal. *Tr. Vol. II* at 4-8. We, therefore, only focus on the facts that pertain to Mother.

³ A report was received on August 15, 2018 that Child’s sibling was begging for food from neighbors. *Ex. Vol. 1* at 6. A report from August 22, 2018 stated that a family member went to the home, and Mother appeared intoxicated and was in the crawlspace while Child was in her care. *Id.* at 7. A report from August 23, 2018 stated that there were concerns for Child’s safety because Mother appeared to be under the influence of illicit substances. *Id.*

in a very deep red rash. *Id.* Mother's repeated and forceful rubbing caused Child great pain, but Mother did not stop until the FCMs intervened. *Id.*

[5] While the FCMs were talking with Mother, Child's older sibling suffered a blackout or seizure, and FCM Peterson found him unconscious, lying on his bedroom floor. *Id.* at 22-23. The paramedics were called, and when they arrived, the paramedics required that Child and his sibling be transported to the hospital to be examined. *Id.* at 23, 24. FCM Peterson suggested to Mother that she have an evaluation of her mental state at the hospital. *Ex. Vol. 1* at 7. At the hospital, Mother was incoherent and appeared to be under the influence of controlled substances and then fell asleep in the waiting room. *Id.* at 8. DCS removed Child from Mother's care and initially placed Child and his sibling with Father. *Tr. Vol. II* at 24.

[6] On August 28, 2018, DCS filed a petition alleging that Child was a child in need of services ("CHINS"), and the juvenile court ordered it was in the best interest of Child and his sibling to be removed from Mother's care. *Ex. Vol. 1* at 6-9, 12. On September 18, 2018, DCS removed Child and his sibling from Father's care because Father continued to test positive for methamphetamine and the parents' impending eviction from the family home. *Tr. Vol. II* at 29-30; *Ex. Vol. 1* at 14. Child was placed in foster care at that time, and his sibling was placed with grandparents. *Tr. Vol. II* at 30-31; *Supp. Tr.* at 4. On October 22, 2018, the juvenile court found Child to be a CHINS, and on November 19, 2018, the juvenile court ordered services to assist Mother in reunifying with Child. *Ex. Vol. 1* at 17-19, 35-38. These services included cooperating with and

maintaining contact with DCS, visiting Child on a weekly basis pending clean drug screens, obeying the law, participating in substance abuse and mental health treatment and following all recommendations of the doctors, maintaining safe and stable housing, and engaging in home-based case management, which could assist in housing, parenting skills, and employment. *Id.* at 36-37.

[7] Between August 27, 2018, and July 2019, Mother did not participate in any services or visit Child. *Tr. Vol. II* at 33-34, 35. In May 2019, Mother was arrested on drug-related charges. *Id.* at 34. During the summer of 2019, Mother began supervised visitations with Child and began participating in home-based case management and drug screens and was complying with the services that the criminal court ordered as part of her pre-trial release. *Id.* at 36-37. However, her participation with services and visitation was sporadic, and she still needed to participate in substance abuse treatment, obtain a mental health evaluation, and make more progress with home-based case management to show her independence. *Id.* at 37. In October 2019, Mother completed her mental health assessment and began taking her prescribed medication, but she still remained homeless. *Id.* at 38, 40. Mother was having visitations with Child, but she lacked a bond with Child, had difficulty remaining focused during a two-hour visit with Child, and displayed erratic behavior during the visits. *Id.* at 39; *Ex. Vol. 1* at 60-61.

[8] On November 19, 2019, Mother was arrested for Level 6 felony strangulation and Class A misdemeanor battery, and she pleaded guilty to Level 6 felony

strangulation and was sentenced to 550 days with 180 days executed. *Ex. Vol. 1* at 173-74. Mother stopped taking her prescribed mental health medications while she was incarcerated, even though they were available to her. *Tr. Vol. II* at 88. While she was incarcerated, Mother participated in home-based case management services and worked on her coping skills and parent education. *Ex. Vol. 1* at 63. Mother remained in jail until March 2020. *Id.* at 44. After Mother was released from jail in March 2020, she began to submit to random drug screens, participate in home-based case management, and attend visitations with Child. *Id.*

[9] On February 6, 2020, DCS filed a petition for the involuntary termination of Mother's parental rights as to Child. *Appellant's App. Vol. II* at 25-27. On February 17, 2020, an initial hearing on the termination petition was held concurrently with the CHINS review hearing. *Supp. Tr.* at 4, 6. Mother was not present as she was incarcerated at that time, but her counsel was present. *Id.* at 4. On June 29, 2020, the termination hearing was held, and at the beginning of the hearing, Mother's counsel requested a continuance and asserted that Mother had just recently been released from jail, and counsel needed additional time to confer and prepare with Mother and for Mother to continue with services. *Tr. Vol. II* at 9. DCS objected to the continuance, arguing that Mother had been out of jail since late March. *Id.* The juvenile court denied Mother's request for a continuance, reasoning that child-related matters are time-sensitive, and that Child had been a CHINS placed outside of

the home of the parents since August 2018 and that Mother had been released from jail since late March, and several months had passed since then. *Id.* at 10.

[10] At the termination hearing, family case manager Paula Shelley (“FCM Shelley”), who was the ongoing case manager for this case, testified that, at the time of the hearing, Mother was participating in random drug screens, visitations with Child, and home-based case management, but that she was not participating in any substance abuse treatment or mental health treatment. *Id.* at 44. FCM Shelley testified that Mother did not demonstrate the ability to maintain a stable and suitable independent housing or income. *Id.* at 45-46. Mother had not demonstrated the ability to safely parent and supervise Child during visitations and had not addressed the concerns with her parenting abilities. *Id.* at 46. FCM Shelley stated that Mother still struggled to understand why Child was removed and did not seem to grasp that Child needed stability to thrive and that she did not understand the benefit of consistency for Child. *Id.* at 47.

[11] Although Mother tested negative for drug use after her release from jail in March 2020, she had not participated in any substance abuse treatment to maintain her long-term sobriety. *Id.* at 47-48. At the termination hearing, Mother admitted to having used different illicit substances, including opiates, for many years. *Id.* at 92-93. FCM Shelley explained that although Mother appeared sober “on paper,” since she had not begun any substance abuse treatment, she did not have an understanding of how to maintain long-term sobriety. *Id.* at 47-48.

[12] FCM Shelley testified that, during the pendency of the case, Mother had never fully engaged in services, and at the time of the hearing, Mother's ability to parent Child had actually decreased because Mother had relied on Father to co-parent, and she struggled to do it alone. *Id.* at 49. Mother continued to believe she was not responsible for Child's continued removal from her care, and she did not grasp that her actions affected Child and denied that she needed to make changes or take action so Child could return to her care. *Id.* at 50. FCM Shelley stated that Mother had made no significant progress in remedying the conditions that resulted in Child being removed from her care and that Mother was in no better place than she had been in when the case began because she could not even take care of herself. *Id.* at 53. Court appointed special advocate Cindy Baldwin ("CASA Baldwin") also testified that Mother did not appreciate the effect this case has had on Child and only wanted to focus on what she had been doing. *Id.* at 67. CASA Baldwin stated that she worried about Mother's mental instability and her ability to properly parent Child due to her mental health issues, and CASA Baldwin had concerns for Child's safety and well-being because of Mother's instability. *Id.* at 68. Both FCM Shelley and CASA Baldwin stated that they believed that continuation of the parent-child relationship would be harmful to Child and that termination of Mother's parental rights was in the best interests of Child. *Id.* at 52, 54, 68, 69. DCS's plan for Child's permanency was adoption by the foster family. *Id.* at 52. At the time of the termination hearing, Child had been removed from Mother's care for twenty-three months and had been living with his foster family for twenty-one months. *Id.* at 51.

[13] As to her mental health issues, Mother testified that she was just born being able to “hear[] all these several different people, sometimes it’s involuntary when I start to read [people] and I don’t mean to.” *Id.* at 90. Mother stated that she had stopped taking her medications in December 2019 because she feels she is better and “more heathy” without them. *Id.* at 88. Mother did not agree that she had trouble focusing while having visitations with Child but admitted she would “zone out” at times, but she blamed the medications. *Id.* at 89.

[14] At the conclusion of the termination hearing on June 29, 2020, the juvenile court took the matter under advisement, considered the evidence closed, and gave the parties thirty days to submit proposed orders. *Id.* at 98. At that time, the juvenile court also stated that the underlying CHINS case had a review hearing set for August 3, 2020. *Id.* at 98-99. Sometime after the termination hearing, Mother retained new counsel, and on July 30, 2020, through new counsel, Mother filed a motion to continue the hearing set for August 3 in order to investigate further. *Appellant’s App. Vol. II* at 29. On July 30, 2020, the juvenile court denied Mother’s motion to continue because the hearing on the termination petition was held and concluded on June 29, 2020. *Id.* at 31. On August 3, 2020, Mother filed a motion for further hearing, asserting that she had just obtained new counsel and was unaware that the termination hearing had been fully conducted and attached two emails as exhibits. *Id.* at 32. The first was from Mother’s previous counsel who had represented her at the termination hearing, and in the email, her prior counsel asked if newly retained

counsel was going to represent Mother at the hearing on the termination of her parental rights set for August 3, 2020. *Id.* at 34. The second was from Child’s paternal grandmother (“Grandmother”), who had guardianship of Child’s sibling, and the email contained information and Grandmother’s opinion regarding Mother’s progress for consideration by the juvenile court. *Id.* at 35. DCS filed an objection to Mother’s request for further hearing. *Id.* at 36-38. On August 14, 2020, the juvenile court denied Mother’s request to reopen the evidence. *Id.* at 39-43. On August 17, 2020, the juvenile court issued its order terminating Mother’s parental rights as to Child. *Id.* at 6-24. Mother now appeals.

Discussion and Decision

I. Due Process Violations

[15] Due process safeguards preclude “state action that deprives a person of life, liberty, or property without a fair proceeding.” *In re G.P.*, 4 N.E.3d 1158, 1165 (Ind. 2014). “It is unequivocal that the termination of a parent-child relationship by the State constitutes the deprivation of an important interest warranting deference and protection, and therefore when the State seeks to terminate the parent-child relationship, 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) (quoting *In re G.P.*, 4 N.E.3d at 1165). Due Process has never been defined, but the phrase embodies a requirement of fundamental fairness. *In re C.G.*, 954 N.E.2d 910, 917 (Ind. 2011). The United States Supreme Court has written that “the fundamental requirement of due process is the opportunity to be heard

at a meaningful time and in a meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

[16] The process due in a termination of parental rights proceeding turns on the balancing of three factors from *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. *In re D.H.*, 119 N.E.3d 578, 588 (Ind. Ct. App. 2019) (citing *A.P. v. Porter Cnty. Office of Family & Children*, 734 N.E.2d 1107, 1112 (Ind. Ct. App. 2000), *trans. denied*), *trans. denied*. The private interest affected by the proceeding, a parent’s interest in the care, custody, and control of his or her child, is substantial. *In re D.H.*, 119 N.E.3d 578, 588 (Ind. Ct. App. 2019). The State’s interest in protecting the welfare of a child is also substantial. *Id.* 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. *Id.* “The balancing of these factors recognizes that although due process is not dependent on the underlying facts of the particular case, it is nevertheless ‘flexible and calls for such procedural protections as the particular situation demands.’” *In re C.G.*, 954 N.E.2d at 917 (quoting *Mathews*, 424 U.S. at 334).

[17] Mother argues that her right to due process was violated because of several actions by the juvenile court and DCS. She first contends that it was a due process violation that, due to her incarceration, she was not present at the initial hearing for the termination proceedings that was held on February 17, 2020.

Mother claims that, because she was not present at the hearing, she was not informed of her rights in the termination proceedings and was not aware that the next hearing date was the termination hearing. She also asserts that she was deprived of the opportunity to inform the juvenile court of the services she participated in while incarcerated.

[18] On February 17, 2020, the initial hearing on the termination petition was held in conjunction with a review hearing in the CHINS case. *Supp. Tr.* at 4, 6. Mother was not present at the hearing due to her incarceration after her arrest in December 2019. *Id.* at 4. Mother was present by her attorney, who had represented her throughout the CHINS case. *Id.* A parent in a proceeding to terminate the parent-child relationship is statutorily entitled to (1) cross-examine witnesses, (2) obtain witnesses or tangible evidence by compulsory process, and (3) introduce evidence on behalf of the parent. *In re G.P.*, 4 N.E.3d at 1166 (citing Ind. Code § 31-32-2-3(b)). A parent does not have a constitutional right to be physically present at the termination hearing. *In re K.W.*, 12 N.E.3d 241, 248-249 (Ind. 2014). It would, therefore, be inconsistent for there to be a requirement for a parent to be present at the initial hearing of the termination proceedings when there is no absolute right to be present for the factfinding or termination hearing.

[19] Mother argues that the failure to have her present at the initial hearing violated her right to due process because she could not personally inform the juvenile court of her participation in services while she was incarcerated. During the hearing, the juvenile court noted that Mother would be able to participate in

“certain home-based case management while she’s incarcerated.” *Id.* at 6.

Additionally, the progress report written after the hearing noted that Mother “participate[d] in [home-based case management] while in the Tipton and Cass County Jails . . . [and] worked with Lifeline at the Cass County Jail weekly as she work[ed] on coping skills and parent education.” *Ex. Vol. 1* at 63.

Therefore, although Mother was not present at the initial hearing, the juvenile court obtained the necessary information about her participation in services while incarcerated.

[20] Mother next argues that she was prejudiced by her absence from the initial hearing because she did not know the next date would be the termination trial. At the initial hearing, the juvenile court set the termination case for a fact-finding hearing in April 2020. *Supp. Tr.* at 8. Mother and counsel then received notice that the juvenile court had reset the date for the termination hearing for June 29, 2020. *Appellant’s App. Vol. II* at 4. Before the termination hearing date, DCS gave Mother notice that the June 29, 2020, hearing was the termination trial by way of the required notice. *Id.* Her absence from the initial hearing could not have confused Mother that the next hearing was the fact-finding hearing because Mother received additional notices of the date of the termination hearing after the date of the initial hearing, and she had sufficient time to speak with her attorney and inquire as to the status of the proceedings. Mother’s due process rights were not violated due to her absence from the initial hearing.

[21] Mother next argues that her due process rights were violated because the record does not reflect that there was ever a case plan signed by Mother and filed with the juvenile court. She asserts that this lack of a concrete case plan negotiated with her as required by our statutes led to substantial confusion in this case because she was entitled to know the requirements for reunification as defined by the case plan. Mother contends that the lack of a case plan was prejudicial to her because she was not informed of the progress she needed to make for reunification.

[22] Mother did not raise any objection to the alleged lack of a case plan at any time during the termination hearing, and there is no evidence that she ever objected to the lack of a case plan during the CHINS proceedings. Therefore, her argument is waived. A party on appeal may waive a constitutional claim, including a claimed violation of due process rights, by raising it for the first time on appeal. *In re N.G.*, 51 N.E.3d 1167, 1173 (Ind. 2016) (citing *McBride v. Monroe Cnty. Office of Family & Children*, 798 N.E.2d 185, 194 (Ind. Ct. App. 2003)). Although Mother has waived this issue, we note that the orders that were submitted into evidence consistently refer to the case plan, which raises a reasonable presumption that a case plan existed, and the juvenile court was aware of it. *See Ex. Vol. 1* at 24, 32, 42, 53, 58, 61, 62. The references to the case plan in these orders also mention that a Child and Family Team Meeting/Case Plan Conference occurred at which Mother was present. *Id.* at 24, 53, 61. Mother's due process rights were not violated.

[23] Mother next argues that her right to due process was violated when the juvenile court denied her motion to continue the termination hearing. She asserts that the juvenile court erred in denying the motion to continue because more time was needed to prepare for the termination hearing due to Mother being recently released from incarceration. Mother claims that because she was denied a continuation of the termination hearing, she did not receive a fair hearing.

[24] A trial court's decision to grant or deny a motion to continue is reviewed for an abuse of discretion. *In re K.W.*, 12 N.E.3d at 243-44. “An abuse of discretion may be found in the denial of a motion for a continuance when the moving party has shown good cause for granting the motion’, but ‘no abuse of discretion will be found when the moving party has not demonstrated that he or she was prejudiced by the denial.’” *Id.* (quoting *Rowlett v. Vanderburgh Cnty. Office of Family & Children*, 841 N.E.2d 615, 619 (Ind. Ct. App. 2006), *trans. denied*). “The party seeking a continuance must show that he or she is free from fault[,]” and there is a “strong presumption that the trial court properly exercised its discretion.” *In re B.H.*, 44 N.E.3d 745, 748 (Ind. Ct. App. 2015), *trans. denied*. There are no “mechanical tests” for determining whether a request for a continuance was made for good cause; instead, the decision to grant or deny a continuance turns on the circumstances present in a particular case. *In re M.S.*, 140 N.E.3d 279, 285 (Ind. 2020).

[25] Here, at the beginning of the termination hearing held on June 29, 2020, Mother, by counsel, moved for a continuance with counsel asserting, “[m]y client was just recently released from jail and I need additional time to confer

and prepare with her and for her to, um, continue with the services she's been provided." *Tr. Vol. II* at 9. DCS objected to the continuance because the case had been pending since February, Mother had been released from jail since March, which was three months earlier, and the juvenile court had already continued it from the original trial date in April. *Id.* The juvenile court denied Mother's motion to continue the termination hearing, explaining:

These matters are time sensitive, um, as counsel stated the record does show this Child has been a child in need of services placed outside of the home of the parents, um, since August of 2018. This petition was filed in February [2020,] and it was only continued from April due to the COVID-19 pandemic and emergency orders of the Supreme Court. I understand [Mother] has been released from jail as of late March [2020], which is several months now. I'm going to find that we should proceed.

Id. at 10.

[26] We do not believe that the juvenile court abused its discretion when it denied Mother's motion to continue the termination hearing. Mother was released from incarceration in March 2020 and reestablished services and attended meetings with FCM Shelley. *Id.* at 44. Mother and her counsel had three months to prepare for the termination hearing, which was sufficient time. Mother gave no reason why she and her counsel were unable to prepare for the hearing in the three months after her release from incarceration. We conclude that the trial court did not abuse its discretion in denying Mother's motion to continue the termination hearing, and, therefore, her right to due process was not violated by the denial.

[27] Mother next argues that her right to due process was violated by the trial court's denial of her motion for a further hearing and to reopen evidence. She contends that the juvenile court's denial to reopen the evidence in the termination case denied her a fundamentally fair proceeding because she was denied the opportunity to present further evidence to support her position. Mother asserts that this evidence showed that there had been confusion by her counsel as to whether the June 29, 2020 hearing was the final termination hearing and included information from Child's Grandmother that Mother was improving and was "in a different place now." *Appellant's App. Vol. II* at 35.

[28] On July 29, 2020, Mother, by newly retained counsel ("Retained Counsel"), moved to continue the court's August 3, 2020 hearing, which was a review hearing for the CHINS case, because she needed more time to "investigate and subpoena witnesses" and because Retained Counsel did not yet have all the records from prior counsel "for her preparation of a defense." *Id.* at 29. The juvenile court denied the motion on July 30, 2020. *Id.* at 31. On August 3, 2020, Mother, by Retained Counsel, filed an "Amended Motion for Further Hearing," alleging that Mother did not understand that the June 29, 2020 hearing was the termination hearing and that the termination hearing had been fully conducted. *Id.* at 32. Retained Counsel stated that she had learned that the August 3, 2020 hearing was in the CHINS case and not the termination case, and that she had received an email, which was attached as an exhibit, from Mother's first counsel that showed that there was confusion as to the hearing status. *Id.* at 32, 34. Retained Counsel also alleged that Mother

intended to call additional witnesses to establish that termination was not in the best interests of Child and that additional testimony would show that Mother had been participating in drug screens and mental health counseling. *Id.* at 32-33. Retained Counsel attached an email as an exhibit of additional evidence from Grandmother, who Retained Counsel alleged was a potential witness. *Id.* at 35. In relevant part, Grandmother explained in her email she had seen Mother mature, that an email from FCM Shelley had said Mother had been doing well, and that Mother “was trying to get herself together.” *Id.* at 35. The email stated that Mother was “still fighting and I see her trying” and that Mother was “in a different place now.” *Id.*

[29] “Evidence must be offered during the course of a trial, and it is a matter of discretion whether a trial court will permit a party to present additional evidence after the close of all evidence.” *In re Paternity of M.S.*, 146 N.E.3d 951, 957 (Ind. Ct. App. 2020) (citing *In re D.Q.*, 745 N.E.2d 904, 908 (Ind. Ct. App. 2001)). We will disturb the trial court’s decision only if there is a clear abuse of discretion. *Id.*

Among the factors which weigh in the exercise of discretion are whether there is any prejudice to the opposing party, whether the party seeking to reopen appears to have rested inadvertently or purposely, the stage of the proceedings at which the request is made, and whether any real confusion or inconvenience would result from granting the request.

Moriarty v. Moriarty, 150 N.E.3d 616, 627 (Ind. Ct. App. 2020) (citing *Flynn v. State*, 497 N.E.2d 912, 914 (Ind. 1986)), *trans. denied*. Reversal must be

predicated upon an actual abuse of discretion and a showing of prejudice to the substantial rights of the complaining party. *Alvarado v. State*, 89 N.E.3d 442, 447 (Ind. Ct. App. 2017), *trans. denied*.

[30] The juvenile court did not abuse its discretion when it denied Mother's motion to reopen the evidence in the termination case. The juvenile court found there was no evidence Grandmother was not available to testify at the hearing on June 29, 2020 and found the relevance of her information to the termination petition was "unclear." *Appellant's App. Vol. II* at 42. As to Mother's assertion that she had evidence to present about substance abuse and mental health counseling, the juvenile court found that Mother testified at the June 29, 2020 hearing to having seen a counselor at Four County Counseling in October 2019 and taking prescribed medication until December 2019, when she voluntarily stopped. *Id.* at 42-43. The juvenile court found that Mother could have submitted evidence including records from Four County but chose not to and that, at the time of the June 29, 2020 hearing, Mother testified she had not yet resumed the referred services for counseling or treatment since her release from incarceration in March 2020. *Id.* at 43. The juvenile court further found that Mother's assertion in her motion that she had since made an appointment with Four County Counseling did not justify scheduling an additional hearing. *Id.* Although Mother alleged in her motion that she did not understand that the June 29, 2020 hearing was the termination hearing and that the termination hearing had been fully conducted, she was present at the hearing and was represented by counsel, who cross-examined DCS's witnesses and presented

Mother as a witness, and at the conclusion of the hearing, Mother's counsel stated that she had no further evidence, and the juvenile court stated, "We'll regard the evidence as closed." *Tr. Vol. II* at 98. The juvenile court did not abuse its discretion in denying Mother's motion to reopen the evidence, and it did not violate her right to due process.

[31] Lastly, Mother argues that her right to due process was violated because she claims that a hearing was held on August 3, 2020 on her motion to reopen evidence that was *ex parte*. She asserts that she did not receive any notice of a hearing on August 3, 2020, and any *ex parte* hearing that was conducted was impermissible. Because of this alleged *ex parte* hearing, Mother contends that she was excluded from an important hearing and denied an opportunity to present evidence on her motion.

[32] On August 3, 2020, Mother filed her motion to reopen evidence in the termination case, and on August 7, 2020, DCS filed its objection to Mother's motion. *Appellant's App. Vol. II* at 32-33, 36-38. On August 14, 2020, the juvenile court issued an order denying Mother's motion to reopen evidence. *Id.* at 39-43. Although the juvenile court's order states that both Mother, Retained Counsel, and DCS appeared in person "at a hearing held August 3, 2020," there is no entry in the CCS showing that a hearing on Mother's motion to reopen evidence occurred, and no transcript of such a hearing has been filed with this court. *Id.* at 3. However, the juvenile court's order also states, "The court heard evidence and argument on mother's request [to reopen evidence] in conjunction with the [twelve-]month review hearing in the underlying CHINS

case held August 3, 2020.” *Id.* at 41. There is also a reference to evidence that Mother’s counsel offered at the August 3, 2020 CHINS hearing. *See id.* at 43 (“On August 3rd, mother’s new counsel stated mother had since made an appointment with Four County Counseling.”). The CCS for the underlying CHINS case was entered as an exhibit at the June 29, 2020 termination, but does not contain any entries after March 30, 2020 as it was printed on June 12, 2020 in preparation of the termination hearing. *Ex. Vol. 1* at 66. This explains why the August 3, 2020 hearing and the notices for the hearing do not appear on the CHINS CCS. It does, however, appear that Mother and Retained Counsel were aware of the August 3, 2020 hearing as it was referred to in both Mother’s motion to continue filed on July 30, 2020 and her motion to reopen evidence. *Id.* at 29, 32-33. Mother was also present at the conclusion of the June 29, 2020 termination hearing when the juvenile court affirmed the August 3, 2020 hearing date. *Tr. Vol. II* at 99. The record reflects that Mother had actual notice of the August 3, 2020 hearing.

[33] While it may have been error to not enter the August 3, 2020 hearing into the CCS for the termination case, such an omission does not establish that Mother did not have knowledge of the hearing. Further, Mother has not presented any evidence that the hearing was *ex parte* or that she was prejudiced in any way. Presumably, if an *ex parte* hearing took place, a transcript could be obtained to prove that Mother was not present. Mother, however, has not filed any transcript with this court or made any showing of the existence or nonexistence of such a transcript or any effort made to obtain a transcript. We, therefore,

conclude that Mother has not shown that an ex parte hearing occurred or that her right to due process was violated.

II. Sufficiency of the Evidence

[34] Mother argues that the juvenile court erred in terminating her parental rights because DCS did not prove the requirements by clear and convincing evidence. As our Supreme Court has observed, “Decisions to terminate parental rights are among the most difficult our trial courts are called upon to make. They are also among the most fact-sensitive—so we review them with great deference to the trial courts[.]” *E.M. v. Ind. Dep’t of Child Servs.*, 4 N.E.3d 636, 640 (Ind. 2014). While the Fourteenth Amendment to the United States Constitution protects the traditional right of a parent to establish a home and raise her child, and parental rights are of a constitutional dimension, the law allows for the termination of those rights when a parent is unable or unwilling to meet her responsibility as a parent. *Bester v. Lake Cnty. Office of Family & Children*, 839 N.E.2d 143, 145 (Ind. 2005); *In re T.F.*, 743 N.E.2d 766, 773 (Ind. Ct. App. 2001), *trans. denied*. Parental rights are not absolute and must be subordinated to the child’s interests in determining the appropriate disposition of a petition to terminate the parent-child relationship. *In re J.C.*, 994 N.E.2d 278, 283 (Ind. Ct. App. 2013). The purpose of terminating parental rights is not to punish the parent but to protect the child. *In re D.P.*, 994 N.E.2d 1228, 1231 (Ind. Ct. App. 2013). Termination of parental rights is proper where the child’s emotional and physical development is threatened. *Id.* The juvenile court need not wait until the child is irreversibly harmed such that his physical, mental, and social

development is permanently impaired before terminating the parent-child relationship. *Id.*

[35] When reviewing a termination of parental rights case, we will not reweigh the evidence or judge the credibility of the witnesses. *In re H.L.*, 915 N.E.2d 145, 149 (Ind. Ct. App. 2009). 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. *Id.* at 148-49. A judgment is clearly erroneous only if the legal conclusions made by the juvenile court are not supported by its findings of fact, or the conclusions do not support the judgment. *In re S.P.H.*, 806 N.E.2d 874, 879 (Ind. Ct. App. 2004).

[36] Where, as here, the juvenile court entered specific findings and conclusions, we apply a two-tiered standard of review. *In re B.J.*, 879 N.E.2d 7, 14 (Ind. Ct. App. 2008), *trans. denied*. First, we determine whether the evidence supports the findings, and second, we determine whether the findings support the judgment. *Id.* A finding is clearly erroneous only when the record contains no facts or inferences drawn therefrom that support it. *Id.* If the evidence and inferences support the trial court's decision, we must affirm. *A.D.S. v. Ind. Dep't of Child Servs.*, 987 N.E.2d 1150, 1156 (Ind. Ct. App. 2013), *trans. denied*.

[37] Before an involuntary termination of parental rights may occur, DCS is required to allege and prove, among other things:

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

(i) The child has been removed from the parent for at least six (6) months under a dispositional decree.

(ii) A court has entered a finding under I.C. 31-34-21-5.6 that reasonable efforts for family preservation or reunification are not required, including a description of the court's finding, the date of the finding, and the manner in which the finding was made.

(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 house 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) 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's burden of proof for establishing these allegations in termination cases "is one of 'clear and convincing evidence.'" *In re H.L.*, 915 N.E.2d at 149. Moreover, if the court finds that the allegations in a petition described in section 4 of this chapter are true, the court *shall* terminate the parent-child relationship. Ind. Code § 31-35-2-8(a) (emphasis added).

[38] Mother challenges three of the juvenile court's findings of fact, contending that they did not "fairly characterize" her compliance with services. *Appellant's Br.* at 39. Her assertions that the challenged findings do not fairly characterize the evidence are merely requests to reweigh the evidence, which we cannot do. *In re H.L.*, 915 N.E.2d at 149. Moreover, the challenged findings were proper.

[39] Mother first takes issue with Finding #32 and its statement that, "Overall, while Mother had begun to show some compliance with the court ordered services, no substantial progress toward reunification had been made and the Child remained in his foster placement where all his needs were being well met." *Appellant's App. Vol. II* at 14. Mother claims that this statement was contrary to the juvenile court's August 12, 2019 Order Approving Permanency Plan ("the August 12 Order"), which stated, "[Mother] has complied with [Child's] case plan." *See Ex. Vol. I* at 53. We disagree with Mother's contention that Finding #32 did not fairly characterize her compliance. While Finding #32 contains the challenged statement, it also contains the following unchallenged statements,

Mother had just recently begun to engage with services and DCS. While Mother had been able to start visitation and home based case management services, she had yet to begin any substance abuse treatment or mental health treatment. It was observed during Mother's visits with the child that she had poor parenting skills, and she was not taking steps to be independent.

Appellant's App. Vol. II at 13-14. Based on all of the information included in Finding #32, we do not believe that the challenged portion mischaracterized evidence or was inconsistent with the finding in the August 12 Order. Looking to the unchallenged statements, it is entirely possible to reconcile the statements that Mother has complied with the Child's case plan by beginning "to show some compliance with the court ordered services" but yet showing "no substantial progress toward reunification" with Child. We, therefore, do not find Finding #32 to be erroneous.

[40] Mother next contends that Finding #37 was not supported by the evidence. Finding #37 stated,

On February 17, 2020, the Court held a Six[-]Month Review Hearing, concurrently with the Initial Hearing on the Petition in this matter, wherein Mother failed to appear due to her incarceration but appeared by her public defender counsel Vent. During that review period, Mother had not complied with the Child's case plan, had not enhanced her ability to fulfill her parental obligation, had not visited the Child, and had not cooperated with DCS. Mother remained incarcerated throughout the majority of that review period and no progress toward reunification had been made. The Child remained in his foster placement where all his needs were being well met.

Id. at 15. Mother asserts that this finding is not supported by the evidence because, while incarcerated, she engaged in home-based case management and other services. However, the fact that she participated in some services while incarcerated does not negate the juvenile court's finding that she had not complied with the case plan, had not visited with Child, and had not cooperated with DCS due to her incarceration for the majority of the review period reflected in Finding #37. Finding #37 does not state that she did not participate in any services during the pertinent review period, only that she did not make progress toward reunification during that time and that she was incarcerated for the majority of the review period. Finding #37 was supported by the evidence.

[41] Mother lastly argues that Finding #40 mischaracterized her compliance with services. In pertinent part, Finding #40 stated, "Despite home based case management services, Mother has been unable to obtain stable and suitable independent housing or income. At the June 29, 2020 fact finding hearing, Mother had been residing with her parents, and had just started part-time employment." *Id.* at 16. Mother asserts that because evidence was presented at the termination hearing that DCS found Mother's parents' home to be appropriate, there was no evidence to support a reasonable inference that her living arrangements and alleged lack of independence posed a threat to Child. The evidence presented at the termination hearing showed that Mother was living with her parents at that time and the home was appropriate but that Mother had told FCM Shelley that she could not stay there forever. *Tr. Vol. II*

at 54, 56. Further evidence was presented that Mother had just begun a job at the time of the termination hearing but had only worked there for one day. *Id.* at 71-72. We, therefore, conclude that the evidence presented at the termination hearing supported Finding #40.

[42] Mother does not challenge the accuracy of the rest of the juvenile court's findings of fact, so this court considers them true for purposes of review. *In re S.S.*, 120 N.E.3d 605, 610 (Ind. Ct. App. 2019) (citing *McMaster v. McMaster*, 681 N.E.2d 744, 747 (Ind. Ct. App. 1997)). Mother also does not challenge the juvenile court's conclusions that DCS timely filed its termination petition, that DCS had a satisfactory plan for Child's permanency, or that termination is in Child's best interests under Indiana Code section 31-35-2-4(b). She has, therefore, waived any challenge to the juvenile court's legal conclusions regarding these elements. *In re B.R.*, 875 N.E.2d 369, 373 (Ind. Ct. App. 2007), *trans. denied*.

[43] Mother argues that the juvenile court erred in terminating her parental rights because the conclusion that the conditions that led to Child's removal and continued placement outside the home will not be remedied was not supported by clear and convincing evidence. She asserts that Child was removed due to her substance abuse and undiagnosed mental health issues, and that at the time of the termination hearing, she was participating in drug screens and other services and had only had two failed drug screens in the preceding year. Mother further contends that she had engaged in services while incarcerated, was attending parenting education and home-based case management, and was

participating in visitations with Child at the time of the termination hearing. Mother maintains that the juvenile court looked too stringently at her situation at the time of Child's removal and did not focus on her situation at the time of the termination hearing.

[44] In determining whether there is a reasonable probability that the conditions that led to a child's removal and continued placement outside the home will not be remedied, we engage in a two-step analysis. *K.T.K. v. Ind. Dep't of Child Servs.*, 989 N.E.2d 1225, 1231 (Ind. 2013). First, we must ascertain what conditions led to the child's placement and retention in foster care, and, second, we determine whether there is a reasonable probability that those conditions will not be remedied. *Id.* In the second step, the trial court must judge a parent's fitness at the time of the termination proceeding, taking into consideration evidence of changed conditions and balancing a parent's recent improvements against "habitual pattern[s] of conduct to determine whether there is a substantial probability of future neglect or deprivation." *E.M.*, 4 N.E.3d at 643 (quoting *K.T.K.*, 989 N.E.2d at 1231). Pursuant to this rule, "trial courts have properly considered evidence of a parent's prior criminal history, drug and alcohol abuse, history of neglect, failure to provide support, and lack of adequate housing and employment." *In re D.B.*, 942 N.E.2d 867, 873 (Ind. Ct. App. 2011). In addition, DCS need not provide evidence ruling out all possibilities of change; rather, it need establish only that there is a reasonable probability the parent's behavior will not change. *In re Involuntary Termination of Parent-Child Relationship of Kay L.*, 867 N.E.2d 236, 242 (Ind. Ct. App. 2007).

“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.” *E.M.*, 4 N.E.3d at 643. When determining whether the conditions for the removal would be remedied, the trial court may consider the parent’s response to the offers of help. *D.B.*, 942 N.E.2d at 873.

[45] The CHINS court initially ordered Child removed from Mother on August 28, 2018, because of Mother’s aggression, apparent inability to provide proper care for Child, suspected drug use, and unresolved mental health issues. *Tr. Vol. II* at 24; *Ex. Vol. I* at 10-12. The juvenile court found Child continued to live outside of Mother’s care because:

The out of home placement has continued, as outlined above, due to Mother’s substance abuse, mental health, inability to safely parent or provide for the child, and the lack of bond and relationship that [sic] between Mother and Child following Mother’s extended absence. There is no indication that those circumstances have significantly changed to the degree that reunification is in the Child’s best interest.

Appellant’s App. Vol. II at 20.

[46] In its order terminating Mother’s parental rights, the juvenile court concluded it was not probable that Mother would remedy the reasons for Child’s removal and continued placement out of her care, stating,

Mother has failed to remedy the reasons for removal, and the reasons for the continuation of the out of home placement of the Child: primarily, Mother’s habitual criminal behavior and substance abuse; Mother’s untreated mental health conditions

that directly impact her ability to safely parent the Child; Mother's inability to independently provide for herself, let alone provide safe, stable housing for the Child; Mother's lack of bond and relationship with the Child; and Mother's inability to safely and independently parent the Child. Mother was completely absent for the first ten (10) months of this nearly twenty-three (23) month CHINS case and was further incarcerated for approximately five (5) months. Out of the remaining eight (8) months, Mother showed some compliance with services to address these issues, yet no real progress was ever made. Mother contends that her current sobriety should be reason enough to continue the parent-child relationship. While there is conflicting evidence regarding how long Mother has maintained her sobriety, the issue is a moot point. Even if the issue of Mother's substance abuse could be considered remedied at this moment, that would simply be the tip of the proverbial iceberg.

Id. at 17-18.

[47] The evidence presented at the termination hearing established that DCS received multiple reports of abuse or neglect by Mother based on her mental health and drug use. *Tr. Vol. II* at 21-22. On August 27, 2018, FCM Peterson and FCM Merenda went to the home to perform an assessment and found Mother acting erratically, and Mother began throwing objects in the home when asked to provide a drug screen. *Id.* at 22. Mother disclosed to FCM Peterson she was hearing voices and that she believed people were living in her garage. *Id.* FCM Peterson observed that Child was suffering from a severe diaper rash, and when she asked Mother to change Child's diaper, Mother was unable to change Child's diaper properly and harshly wiped Child's bottom, causing Child great pain. *Id.* at 23. While the FCMs were talking with Mother,

Child's older sibling suffered a blackout or seizure, and he was found unconscious on his bedroom floor. *Id.* at 22-23. FCM Peterson suggested to Mother that she have an evaluation of her mental state at the hospital, and at the hospital, Mother was incoherent and appeared to be under the influence of controlled substances. *Ex. Vol. 1* at 7-8. Father reported that Mother had been demonstrating erratic behaviors when DCS interviewed him later. *Tr. Vol. II* at 29.

[48] Mother continued to behave erratically during visits with Child throughout the CHINS case and had trouble focusing for the full visit. *Id.* at 39. Mother was unable to manage her own appointment schedule, did not understand the importance of consistency in both her life and in Child's life, and was unable to care for herself, let alone Child. *Id.* at 47, 53. As of the date of the termination hearing, Mother had not begun any mental health counseling. *Id.* at 95. Mother completed a mental health assessment in October 2019, which recommended individual counseling and medications. *Id.* at 38, 87. Mother only took her medications from October 2019 until December 2019 and voluntarily stopped taking them when she went to jail in December 2019. *Id.* at 87, 88. Mother testified she felt better when she was not medicated and that she chose not to take the medications while she was incarcerated. *Id.* at 88. Mother said that DCS told her she was "special," which Mother interpreted as not needing mental health treatment. *Id.* at 87. Mother explained she was just born being able to "hear[] all these several different people, sometimes it's involuntary when I start to read and I don't mean to." *Id.* at 90. Mother did

not believe a medication would dull that ability and make it go away because she could not “just turn that off.” *Id.* Mother admitted she still “zone[d] out” for periods of time, but she blamed the medicine for it. *Id.* at 88.

[49] The evidence at the termination hearing also showed that, between August 27, 2018, and July 2019, Mother did not visit Child and that Mother continued to use drugs and refused to participate in services. *Id.* at 33-34, 35, 93. Mother explained that she refused to cooperate with DCS during this time because DCS told her that she had repeatedly failed tests for illegal substances, and “[s]o, if they said that I was, I said that I wasn’t going to cooperate with DCS anymore.” *Id.* at 93. In May 2019, Mother was arrested on drug-related charges. *Id.* at 34. At the termination hearing, Mother admitted to having used different illicit substances, including opiates, for around twenty years. *Id.* at 92-93. On November 19, 2019, Mother was arrested for Level 6 felony strangulation and Class A misdemeanor battery, and she pleaded guilty to Level 6 felony strangulation and remained in jail until March 2020. *Ex. Vol. 1* at 173-74; *Tr. Vol. II* at 44. After Mother was released from jail in March 2020, she began to submit to random drug screens, participate in home-based case management, and attend visitations with Child. *Tr. Vol. II* at 44. Although Mother appeared to be sober between March 2020 and June 2020, she had not begun any substance abuse treatment in order to maintain her long-term sobriety. *Id.* at 47-48, 95.

[50] Mother’s drug use and uncontrolled mental health issues impaired her parenting skills and posed a safety risk to Child. On the date Child was

removed from Mother's care, she became violent and showed paranoid ideations. *Id.* at 22. Mother continued her erratic behavior during visitation with Child, and she had trouble focusing on Child during her visits. *Id.* at 88, 89. After a few months, it was clear she could not parent Child and his sibling at the same time, so her visitations were changed to having Mother visit Child individually, but she was still unable to stay focused on Child for even two hours at a time. *Id.* at 37, 39. She spoke at Child not with him, and there was no bond between Mother and Child. *Id.* at 39. Child was very confused about who Mother was, and Mother did not demonstrate that she understood Child's need for a stable environment. *Id.* at 39, 47. FCM Shelley testified that there were still concerns about Mother's parenting and that she would threaten Child when she could not control his behavior. *Id.* at 45. As to progress in Mother's parenting, FCM Shelley testified that Mother did not take DCS's concerns well and would state that Child is hers and she can parent him any way she wants. *Id.* at 46.

[51] During the summer of 2019, Mother began participating in home-based case management and drug screens and was complying with the services that the criminal court ordered as part of her pre-trial release. *Id.* at 36-37. However, her participation in services was sporadic, and at the time of the termination hearing, she still needed to participate in substance abuse treatment, obtain a mental health evaluation, and make more progress with home-based case management to show her independence. *Id.* at 37. Further, although she was living at her parents' home at the time of the termination hearing, Mother had

told FCM Shelley that she could not stay there forever. *Id.* at 54, 56. Evidence was also presented that Mother had just begun a job at the time of the termination hearing but had only worked there for one day. *Id.* at 71-72.

Mother, therefore, at the time of the termination hearing, had not demonstrated that she could maintain stability in housing and income.

[52] Mother's pattern of unwillingness to deal with her parenting problems and to cooperate with those providing services, in conjunction with unchanged conditions in her mental health and substance abuse treatment support a finding that there exists no reasonable probability that the conditions resulting in removal and continued placement outside of her care will change. The reasons for removal were Mother's drug use, uncontrolled mental illness, poor parenting, and unstable lifestyle. During the duration of the case, Mother had either been in jail or was not participating in services when out of jail for fifteen of the twenty-three months. During the remaining eight months, Mother made no real progress in resolving the issues that caused Child's removal. Even assuming that Mother had shown some ability to remain sober since her March 2020 release from incarceration, she had not addressed any of her mental health issues, sought substance abuse treatment to maintain her sobriety, gained proper parenting skills, or shown she can maintain stable housing or employment.

[53] DCS is not required to rule out all possibilities of change; it need only establish that there is a reasonable probability the parent's behavior will not change. *In re Kay L.*, 867 N.E.2d at 242. "A pattern of unwillingness to deal with parenting

problems and to cooperate with those providing social services, in conjunction with unchanged conditions, support a finding that there exists no reasonable probability that the conditions will change.” *Lang v. Starke Cnty. Office of Family & Children*, 861 N.E.2d 366, 372 (Ind. Ct. App. 2007), *trans. denied*. Also, as we have recognized, “Even assuming that [the parent] will eventually develop into a suitable parent, we must ask how much longer [the child] should have to wait to enjoy the permanency that is essential to her development and overall well-being.” *Castro v. State Office of Family & Children*, 842 N.E.2d 367, 375 (Ind. Ct. App. 2006), *trans. denied*. We, therefore, conclude that the juvenile court’s conclusion that there was a reasonable probability Mother would not remedy the conditions resulting in Child’s continued removal from Mother’s care was not clearly erroneous.

[54] Mother also argues that DCS failed to prove by clear and convincing evidence that the continuation of the parent-child relationship posed a threat to Child’s well-being. However, we need not address this contention because Indiana Code section 31-35-2-4(b)(2)(B) is written such that, to properly effectuate the termination of parental rights, the juvenile court need only find that one of the three requirements of subsection (b)(2)(B) has been established by clear and convincing evidence. *A.D.S.*, 987 N.E.2d at 1157 n.6. Therefore, as we have found that sufficient evidence was presented to support the juvenile court’s conclusion that there is a reasonable probability that the conditions that led to a child’s removal and continued placement outside the home will not be remedied, we do not reach Mother’s argument.

[55] Based on the record before us, we cannot say that the juvenile court's termination of Mother's parental rights to Child was clearly erroneous. We, therefore, affirm the juvenile court's judgment.

[56] Affirmed.

Altice, J., and Weissmann, J., concur.