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 C.P., Father, B.W., Mother, and L.P. and C.W., Minor Children,

C.P. and B.W.,

Appellants-Respondents,

v.

Indiana Department of Child Services,

Appellee-Petitioner.

May 20, 2022

Court of Appeals Case No. 21A-JT-2773

Appeal from the Vigo Circuit Court

The Honorable Daniel W. Kelly, Magistrate

Trial Court Cause Nos. 84C01-2106-JT-609 84C01-2106-JT-610

Molter, Judge.

[1] L.P. and C.W. (collectively "Children") were born to B.W. ("Mother") and C.P. ("Father") (collectively "Parents"). When Children were both under the age of three, they were removed from the home after a failed informal adjustment. DCS had also received multiple reports that Mother was either abusing illegal drugs or neglecting Children, and Father was not involved in Children's lives. The Indiana Department of Child Services ("DCS") subsequently petitioned to have Children adjudicated as children in need of services. After those services failed to yield improvement, DCS petitioned to terminate Parents' parental rights to Children, and a DCS family case manager and Children's court appointed special advocate both testified that termination was in Children's best interests. The juvenile court agreed and terminated the parental rights.

[2] Parents, individually, now appeal. Father contends that the juvenile court erred in terminating his parental rights because DCS failed to prove by clear and convincing evidence the required elements for termination. He also argues that he was denied his substantive due process right to raise Children. Relatedly, Mother contends that her trial counsel performed deficiently, violating her procedural due process right to fair proceedings in this matter. Because we disagree, we affirm.

Facts and Procedural History

[3] Mother and Father are the parents of Children. L.P. was born on May 22, 2017, and C.W. was born on November 28, 2018. In 2019, DCS received multiple reports that Mother was either abusing illegal drugs or neglecting Children. Particularly, one report alleged that Children were victims of neglect because Mother had been arrested for operating a vehicle while intoxicated and possessing methamphetamine and paraphernalia while L.P. was in the car. Mother and DCS subsequently entered an informal adjustment. At the time, Father had no relationship with Children and was not involved in their lives.

[4] In the fall of 2019, DCS initiated a child in need of services ("CHINS") case. The petition alleged that Mother had failed to comply with the informal adjustment by consistently testing positive for methamphetamine and failing to participate in services. Also, Father lived in another residence in a different county. A couple of days later, DCS removed Children from Mother's care because Mother could not be located, and C.W. required medical attention. The juvenile court adjudicated Children to be CHINS a couple of months later, finding that (among other things) Mother admitted to the CHINS allegations and that Father failed to appear for the CHINS fact-finding hearing.

[5] On December 19, 2019, the juvenile court entered its dispositional order, with a plan of reunification. The order, among other things, required Parents to notify DCS of any changes in address and contact information; notify DCS of any new arrests or criminal charges; allow DCS and service providers to make announced or unannounced visits to the home; keep all appointments with

DCS and service providers; attend all scheduled visitations with Children; not use or consume any illegal drugs or alcohol; complete substance abuse assessment and treatment; and submit to random drug screens.

[6] The juvenile court entered a permanency order several months later, finding that the objectives of its dispositional order were not accomplished. Parents failed to comply with the dispositional order. Specifically, Mother continued to test positive for methamphetamine, was unemployed and homeless, and was inconsistent with her services and visitation. Similarly, Father failed to engage in any services or consistently visit with Children. The juvenile court then approved adoption as Children's concurrent permanency plan. Because Parents continued to be substantially noncompliant with their services, DCS filed a petition to terminate their parental rights on June 2, 2021. A few months later, the juvenile court held an evidentiary hearing on the termination petition.

[7] Family Case Manager ("FCM") Logan MacLaren, who worked with the family for roughly two years, testified that, while Mother was compliant with services for a short time, she later disappeared and began using methamphetamine again. She also testified that Father had visited Children roughly five times during the proceedings and that the inconsistency of Parents' visits with Children particularly affected L.P., with L.P. wetting herself, having tantrums, and struggling to sleep after visits. FCM MacLaren further described how Father did not consistently maintain contact with DCS. She ultimately concluded that termination was in Children's best interests so that they could receive the "most thriving environment." Tr. Vol. 2 at 55.

[8] Similarly, FCM Shane Smith, who began working with the family in May 2021, testified that he was unable to consistently maintain contact with Parents during the proceedings. When Father was asked if there was a reason for his absence from the visitations, he replied, "Uh, no." Id. at 185. Also, Children's court appointed special advocate ("CASA") Diana Fagg testified that Father has not been a consistent individual in Children's lives and that she had concerns about Mother's ability to be a stable parent to Children. Particularly, CASA Fagg explained that she does not think Mother "is capable at this very moment [of putting] the [C]hildren first" and giving "them a safe and sober home for them to live in." Id. at 128. She additionally described how Children are happy in their current placement, deserve stability, and termination is in their best interests.

[9] Further, at the hearing, Mother admitted that DCS had given her many chances and provided extensive services to attempt reunification with Children. Moreover, she admitted that she was in no position to care for Children and that she would likely test positive for methamphetamine if screened that day. DCS also presented evidence regarding Father's history of criminal offenses.

[10] In November 2021, the juvenile court entered its order terminating Parents' parental rights. It concluded, among other things: there was a reasonable probability that the conditions which resulted in Children's placement outside the home will not be remedied; there was a reasonable probability that the continuation of the parent-child relationship between Parents and Children threaten their well-being; termination of parental rights was in Children's best

interests; and Children's adoption was the satisfactory plan that DCS had for the care and treatment of Children. Parents, individually, now appeal.

Discussion and Decision

I. Sufficiency of the Evidence

A. Standard of Review

[11] When reviewing a termination of parental rights, we will not reweigh the evidence or judge the credibility of witnesses. *In re H.L.*, 915 N.E.2d 145, 149 (Ind. Ct. App. 2009). Instead, we consider only the evidence and reasonable inferences 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 juvenile court's judgment terminating a parent-child relationship only if it is clearly erroneous. *Id.* at 148–49.

[12] Where, as here, the juvenile court entered specific findings of fact 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 must determine whether the evidence supports the findings,[1] 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.

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[1] Parents do not challenge the juvenile court's findings of fact. So, they have waived any argument relating to the unchallenged findings. *See In re S.S.*, 120 N.E.3d 605, 610 (Ind. Ct. App. 2019) (noting this court accepts unchallenged trial court findings as true).

A.D.S. v. Ind. Dep't of Child Servs., 987 N.E.2d 1150, 1156 (Ind. Ct. App. 2013), *trans. denied*.

[13] As our Supreme Court has observed, "[d]ecisions 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 their child, the law allows for the termination of those rights when a parent is unable or unwilling to meet their responsibility as a parent. *Bester v. Lake Cnty. Off. of Fam. & Child.*, 839 N.E.2d 143, 145 (Ind. 2005); *In re D.P.*, 994 N.E.2d 1228, 1231 (Ind. Ct. App. 2013).

[14] 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 for terminating parental rights is not to punish the parent but to protect the child. *In re D.P.*, 994 N.E.2d at 1231. 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 their physical, mental, and social development is permanently impaired before terminating the parent-child relationship. *Id.*

B. Father's Allegation of Insufficient Evidence

[15] Before an involuntary termination of parental rights may occur, the State 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 [CHINS];
>
> (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). The State'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).

[16] The juvenile court found that DCS proved, by clear and convincing evidence, that there was a reasonable probability that: (1) the conditions that resulted in

Children's removal or the reasons for placement outside the home of the parents will not be remedied and (2) the continuation of the parent-child relationship poses a threat to the well-being of Children. *See* Ind. Code § 31-35-2-4(b)(2)(B).

[17] On appeal, Father alleges error only from the juvenile court's conclusion regarding subsection (ii) of Indiana Code section 31-35-2-4(b)(2)(B). He does not challenge the juvenile court's conclusions regarding any other subsection of Indiana Code section 31-35-2-4(b)(2)(B). Thus, because Indiana Code section 31-35-2-4(b)(2)(B) is written in the disjunctive and requires the juvenile court to find only one of the three requirements of subsection (b)(2)(B) by clear and convincing evidence, Father has waived his sufficiency claim for our review.

[18] Waiver notwithstanding, we find no error in the trial court's conclusion that there was a reasonable probability that the continuation of the parent-child relationship poses a threat to the well-being of Children. Neither actual abuse nor a physical threat to a child is required to find that continuation of the parent-child relationship poses a threat to the child's well-being. *In re A.I.*, 825 N.E.2d 798, 811 (Ind. Ct. App. 2005), *trans. denied*. Instead, when determining whether the continuation of the parent-child relationship poses a threat to the child's well-being, termination is proper when the evidence shows that the emotional and physical development of a child is threatened. *C.A. v. Ind. Dep't of Child Servs.*, 15 N.E.3d 85, 94 (Ind. Ct. App. 2014). A juvenile court need not wait until a child is irreversibly influenced by a deficient lifestyle such that his or her physical, mental, and social growth is permanently impaired before

terminating the parent-child relationship. *In re G.F.*, 135 N.E.3d 654, 661 (Ind. Ct. App. 2019). In addition, the juvenile court must subordinate the interests of the parent to those of the child when evaluating the circumstances surrounding the termination. *Id.* at 600.

[19] The evidence showed that Father's continued relationship with Children was causing them to suffer emotionally, behaviorally, and physically. FCM MacLaren testified that the inconsistency of Father's visits and his lack of involvement in their lives affected Children. Particularly, she explained that L.P. would wet herself, have tantrums, and not sleep after visits with Father. FCM MacLaren also stated that L.P.'s behavior was partly due to Father's infrequent visits and that Children's therapist recommended that Father and Children participate in therapeutic visitations. Further, FCM MacLaren testified that Father was aware that L.P. was reacting this way after their visits and that, although he was initially willing to participate in therapeutic visits, she was ultimately unable to arrange any such visitations because she could not contact him. Tr. Vol. 2 at 50–51.

[20] Children's therapist, Janel Quillin, also explained that Children need to be with consistent caregivers to feel safe, secure, and to thrive. Ex. Vol. 4 at 149. She emphasized that Children, particularly L.P., had been in "numerous placements and had to endure numerous caregivers and family members come in and out" of their lives. *Id.* Thus, given L.P.'s behavior after visits with Father, she opined that it was a "determent and traumatic" for L.P. to see him.

Quillin ultimately recommended that all visits with Father stop to help maintain L.P.'s mental stability. *Id.*

[21] In evaluating the circumstances surrounding termination, the juvenile court must subordinate the interests of the parent to those of their child, and termination is proper when the evidence shows that the emotional and physical development of a child is threatened. *In re G.F.*, 135 N.E.3d at 660, *C.A.*, 15 N.E.3d at 94. Clear and convincing evidence supported the juvenile court's conclusion that continuation of the parent-child relationship posed a threat to Children's well-being.

II. Constitutional Claims

A. Standard of Review

[22] Father also argues he was denied his substantive due process right to raise Children. And Mother, relatedly, contends that her procedural due process right to fair proceedings was violated in this matter. But they both concede that they did not raise their due process claims in the juvenile court.

[23] Generally, an argument cannot be presented for the first time on appeal. *In re D.H.*, 119 N.E.3d 578, 586 (Ind. Ct. App. 2019), *trans. denied*. However, parents' constitutionally protected right to establish a home and raise their children "mandates that the failure of a trial court to require compliance with any condition precedent to the termination of this right constitutes fundamental error which this court must address sua sponte." *S.B. v. Morgan Cnty. Dep't of Pub. Welfare*, 616 N.E.2d 406, 407 (Ind. Ct. App. 1993), *trans. denied*. Therefore,

"we have discretion to address [due process] claims, especially when they involve constitutional rights, the violation of which would be fundamental error," *D.H.*, 119 N.E.3d at 586, and we exercise that discretion here.

[24] When the State 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) (quotation marks omitted). Procedural due process addresses the right to a fair proceeding, and substantive due process involves a parent's right to raise his or her children. *In re T.W.*, 135 N.E.3d 607, 613 (Ind. Ct. App. 2019), *trans. denied*. The nature of the process due in any proceeding is governed by a balance of three factors: "the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." *D.H.*, 119 N.E.3d at 588. We have described those interests in the context of termination proceedings 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.

S.L. v. Ind. Dep't of Child Servs., 997 N.E.2d 1114, 1120 (Ind. Ct. App. 2013) (citations omitted).

B. Father's Allegation of Denial of Substantive Due Process

[25] Father argues his substantive due process rights were violated when DCS did not make reasonable efforts to reunify the family. Particularly, he asserts that DCS denied him visitation. Father also emphasizes that his visits with Children were suspended until DCS could arrange for the family to participate in therapeutic visitations. However, the therapeutic visitations were "never arranged." Appellant Father's Br. at 12. Because a parent has substantive due process rights to raise their children, DCS "must have made reasonable efforts to preserve and/or reunify the family unit in the CHINS case." *In re T.W.*, 135 N.E.3d at 615. "What constitutes 'reasonable efforts' will vary by case, and . . . it does not necessarily always mean that services must be provided to the parents." *Id.*

[26] FCMs MacLaren and Smith testified that DCS did provide Father with services. He was offered visitation, but he rarely took advantage of it. Between October 2019 and May 2021, Father only visited Children five times, with three of the visits taking place in person and two virtually. Appellants' Joint App. Vol. 2 at 70. Further, FCMs MacLaren and Smith testified that they were unable to reach Father to schedule visits with Children during this time and that Father failed to stay in regular contact with DCS or participate in other services.

[27] Father argues DCS denied him the opportunity to participate in therapeutic visitations with Children, but the record shows otherwise. While Father initially attempted to arrange therapeutic visits with DCS, Tr. Vol. 2 at 50,

FCM MacLaren, FCM Smith, and CASA Fagg all testified that DCS could not contact Father to set up those visits. *Id.* at 50–51, 101, 144–45. Particularly, FCM Smith explained that he provided Father with his contact information to arrange the therapeutic visits, but Father never reached out to him. *Id.* at 51. CASA Fagg similarly testified that she confirmed that DCS tried to contact Father to set up the therapeutic visits, but Father never responded to them. *Id.* at 144. She further stated that Father's behavior "shocked and concerned" her because he was not "reaching out and doing everything he could to reach" DCS. *Id.* at 145.

[28] Moreover, Father contends that DCS never visited his home to determine whether it was an appropriate placement for Children. While this is true, the record reflects that DCS did consider placing Children with Father. However, Children were not placed with him because he continued to live with his fiancée, who had a history with DCS involving her own children. *Id.* at 44. Also, DCS was concerned by some of Father's criminal charges, arrest warrants, and lack of involvement in Children's lives. *Id.* Father also failed to participate in services. *Id.* at 48–49. Thus, until Father demonstrated that he could provide a safe and stable environment for Children, he was not considered as an appropriate placement for Children. *Id.* at 44.

[29] "[T]he responsibility to make positive changes will stay where it must, on the parent. If the parent feels the services ordered by the court are inadequate to facilitate the changes required for reunification, then the onus is on the parent to request additional assistance from the court or DCS." *Prince v. Dep't of Child*

Servs., 861 N.E.2d 1223, 1231 (Ind. Ct. App. 2007). Further, "a parent may not sit idly by without asserting a need or desire for services and then successfully argue that he was denied services to assist him with his parenting." *In re B.D.J.*, 728 N.E.2d 195, 201 (Ind. Ct. App. 2000). The underlying reason DCS was unable to reunify Children with Father was because of his own conduct, not any dereliction of duty by DCS. Thus, we find no violation of Father's substantive due process rights as a result of DCS's actions.

C. Mother's Allegation of Denial of Procedural Due Process

[30] Mother argues her trial counsel was ineffective in counsel's representation of her before the trial court because counsel did not call Mother to testify on her own behalf, therefore depriving Mother of due process by denying her the opportunity to defend herself or explain why her parental rights should not be terminated.

[31] "The due process standard for evaluating ineffective assistance of counsel—though applied in various contexts and using varying language—essentially asks whether counsel represented the client in a procedurally fair proceeding that yielded a reliable judgment from the trial court." *A.M. v. State*, 134 N.E.3d 361, 365 (Ind. 2019). "Where parents whose rights were terminated upon trial claim on appeal that their lawyer underperformed, we deem the focus of the inquiry to be whether it appears that the parents received a fundamentally fair trial whose facts demonstrate an accurate determination." *Baker v. Marion Cnty. Off. of Fam. & Child.*, 810 N.E.2d 1035, 1041 (Ind. 2004). Accordingly, "[t]he question is not whether the lawyer might have objected to this or that, but

whether the lawyer's overall performance was so defective that the appellate court cannot say with confidence that the conditions leading to the removal of the children from parental care are unlikely to be remedied and that termination is in the child's best interest." *Id.* Moreover, in determining whether parents received effective representation, "we must also examine the evidence supporting the termination of [their] parental rights." *In re A.P.*, 882 N.E.2d 799, 806–07 (Ind. Ct. App. 2008).

[32] Contrary to Mother's contention, the record reflects that Mother's counsel zealously represented her by cross-examining witnesses, objecting to evidence, and defending Mother's interests throughout the proceedings. Also, regarding whether Mother had an opportunity to testify on her own behalf, the record indicates that Mother's counsel did not call Mother to testify on direct examination because Mother felt that she had testified enough. Tr. Vol. 2 at 189. And as discussed above, the evidence presented clearly and convincingly supported the termination of Mother's parental rights. Further, during the evidentiary hearing on the termination petition, Mother admitted that she was in no position to care for Children. Thus, Mother has failed to show that her counsel's performance was so defective that it deprived her of a fair proceeding.

[33] In sum, the juvenile court made findings sufficient to terminate Parents' parental rights, and those findings are supported by the evidence. Also, Parents have failed to show that their due process rights were violated in this matter. Accordingly, we affirm the juvenile court's order terminating Parents' parental rights.

[34] Affirmed.

Mathias, J., and Brown, J., concur.