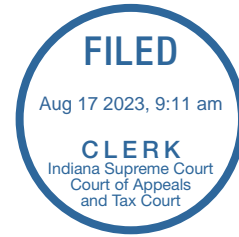


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



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IN THE COURT OF APPEALS OF INDIANA

In re the Involuntary
Termination of the Parent-Child
Relationship of Ky.H. and
Ko.H. (Minor Children) and
L.H. (Mother),
Appellant-Respondent,

v.

Indiana Department of Child
Services,
Appellee-Petitioner

August 17, 2023

Court of Appeals Case No.
23A-JT-453

Appeal from the Greene Circuit
Court

The Honorable Erik C. Allen,
Judge

Trial Court Cause Nos.
28C01-2207-JT-12, -13

Memorandum Decision by Judge Crone
Judges Brown and Felix concur.

Crone, Judge.

Case Summary

- [1] L.H. (Mother) appeals the trial court’s order involuntarily terminating her parent-child relationship with Ky.H., born in 2018, and Ko.H., born in 2019 (collectively the Children). We affirm.

Facts and Procedural History

- [2] In January 2021, the Indiana Department of Child Services (DCS) received a report regarding the conditions within the home in which Mother, the Children, and their father (Father)¹ were living. After being denied entry on several occasions, DCS secured an order to compel access to the home.
- [3] In March 2021, DCS employees Kathrine Word and Kathryn Hayes entered the home and observed “deplorable” conditions, including “lots of trash, clutter, debris, broken objects, clothing, markings on the walls, not clear pathways through the bedrooms, piles and mounds of trash[.]” Tr. Vol. 2 at 85. Word had to step over trash and other items throughout the home, was unable to access the bathroom due to clutter, observed no “appropriate sleeping arrangements for either of the [Children,]” and was informed that the water had been turned off. *Id.* Neither of the Children was present, and Word located them at the maternal grandmother’s residence. Both Children were dressed in

¹ Father does not participate in this appeal. We include information about his involvement only to the extent that it paints a fuller picture of the present case.

only a diaper, appeared quite dirty and unkempt and had food and dirt on their bodies.

[4] That same month, DCS filed petitions alleging that Ky.H. and Ko.H. were children in need of services (CHINS) due to illegal substance use by both Mother and Father, uninhabitable, unsafe, and deplorable home conditions, homelessness, and “lack of care.” Ex. Vol. 3 at 23. The petition further alleged that Mother and Father had been “totally uncooperative and deceitful in their dealings with DCS.” *Id.* Three-year-old Ky.H. and two-year-old Ko.H. were placed in foster care. The foster parents noted that the Children arrived “very dirty,” with “really filthy” feet and “rashes on their bodies.” Tr. Vol. 2 at 163. The Children suffered from head lice that required “several rounds of treatment” to address. *Id.* Both Ky.H. and Ko.H. were “very small” in height and weight, had difficulty walking in shoes, and appeared to have speech delays. *Id.* Regarding one of the Children, the foster mother stated: “He didn’t know many words except for curse words. Within 30 minutes of us meeting him, he had said the F word to us, and he would [refer to his brother] as Bubba and he would curse and those were the only words that he seemed to know.” *Id.* at 164.

[5] In May 2021, the trial court found the Children to be CHINS, based upon deplorable home conditions, trash throughout the house, no clear walking paths, substance abuse by Mother, and “methamphetamine use” by Father. Ex. Vol. 3 at 29. The court also found that Father had been in jail and was recently released, and his whereabouts were unknown. Further, the court found that

Mother and Father had been evicted, they had not established a new residence, and Mother was living in a hotel. *Id.*

[6] In June 2021, the court held a dispositional hearing and thereafter issued an order directing Mother and Father to participate in various reunification services. These included maintaining safe and stable housing and employment, not consuming alcohol or illegal substances, completing assessments and recommendations, submitting to “random drug screens,” meeting with all providers, visiting with the Children, and providing them with a safe, secure, nurturing environment free from abuse and neglect. *Id.* at 32-34. DCS made referrals for Mother to have home-based services, drug screens, therapy, a substance abuse assessment, and supervised visits with the Children.

[7] Over time, the referrals changed due to parental noncompliance, personnel turnover, and the variety of places where Mother and Father stayed. Mother did not take responsibility for the involvement of DCS, claimed that the deplorable home conditions were the result of the family moving out, and did “not believe that she ever needed home-based casework.” Tr. Vol. 2 at 211. She skipped multiple drug screens, could not maintain employment for more than a few months at a time, did not keep in good contact with some providers, and never established stable, independent housing. *Id.* at 36, 17, 116.

[8] In January 2022, the Children’s permanency plan was “changed to adoption with a concurrent plan of reunification.” Ex. Vol. 3 at 42-43. By June 2022, the court found that Mother and Father were “not currently in compliance with the

case plan due to lack of consistent participation in services and visits,” though they had “somewhat enhanced their ability to fulfill their parental obligations” and “mostly cooperated with DCS.” *Id.* at 44. In July 2022, fifteen months after the Children had been removed, DCS filed a termination of parental rights petition. Appellant’s App. Vol. 2 at 9-12.

[9] For the next two to three months, Mother stopped participating in services because “she was not getting along with” DCS and “had fallen off and had not completed the services.” Tr. Vol. 2 at 97. The services Mother missed included “a period of two months where there was no visit at all” with the Children. *Id.* at 168. In the meantime, the Children thrived with their foster family, which expressed their willingness to adopt the Children if reunification was not possible.

[10] In December 2022, the trial court held a TPR factfinding hearing. Evidence included testimony by Mother, Father, DCS, service providers, the court appointed special advocate (CASA) for the Children, and the foster mother, as well as photographs and pertinent documents. DCS employees and the CASA discussed the assorted services offered throughout the case, the lack of progress by Mother and Father, and how termination and adoption by the foster family was in the best interests of the Children. DCS employee Hayes identified the Children’s need for permanency and their need to be with sober caregivers who place the Children’s needs (basic, medical, financial, housing stability, routine) “before their own.” *Id.* at 215. When asked if additional time for Mother would matter, the CASA opined that it would not, noting that even twenty months

since removal, “we are still talking about screening, drug screening, so safety for the kids. The[re] is still no housing. There is still no job. We have regressed so now they are back on supervised visits. So, there has actually been a regression of the case.” *Id.* at 200.

[11] In a six-page order issued in February 2023, the trial court terminated the parent-child relationship between Mother (and Father) and the Children. This appeal ensued.

Discussion and Decision

[12] On appeal, Mother does not challenge the sufficiency of the evidence to support the termination of parental rights. Rather, she contends that DCS did not provide her with transportation, and that DCS’s “failure” in that regard violated her substantive due process right to raise her children. Appellant’s Br. at 10, 17.

[13] As a threshold issue, we address the State’s argument that Mother waived her due process claim by failing to raise it to the trial court. Generally, a party waives on appeal an issue that was not raised before the trial court. *See, e.g., Plank v. Cmty. Hosp. of Ind., Inc.*, 981 N.E.2d 49, 53 (Ind. 2013). However, we have discretion to address such claims, especially when they involve constitutional rights, the violation of which would be fundamental error. *Id.* at 53-54.

[14] Mother acknowledges that she did not raise this claim before the trial court but couches the issue as one of fundamental error. “[O]ne of the most valued relationships in our culture” is that between a parent and his or her child. *In re*

G. Y., 904 N.E.2d 1257, 1259 (Ind. 2009). Indeed, “[a] parent’s interest in the care, custody, and control of his or her children is ‘perhaps the oldest of the fundamental liberty interests.’” *Id.* (quoting *Troxel v. Granville*, 530 U.S. 57, 65 (2000)). The State’s interest in “protecting the welfare” of children “is also substantial.” *Matter of C.G.*, 954 N.E.2d 910, 917 (Ind. 2011). Given the importance of the interests at stake, we elect to address the merits of Mother’s claim, despite her waiver. *See Matter of D.H.*, 119 N.E.3d 578, 586 (Ind. Ct. App. 2019), *aff’d in relevant part on reh’g*, 122 N.E.3d 832, *trans denied*.

[15] 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) (quoting *In re G.P.*, 4 N.E.3d 1158, 1165 (Ind. 2014)); U.S. Const. amend. XIV (“no person shall be deprived of life, liberty, or property without due process of law”). “[F]or a parent’s due process rights to be protected in the context of termination proceedings, DCS must have made reasonable efforts to preserve and/or reunify the family unit in the CHINS case[.]” *In re T.W.*, 135 N.E.3d 607, 615 (Ind. Ct. App. 2019), *trans. denied* (2020); *see also* Ind. Code § 31-34-21-5.5 (stating that DCS is generally required to make reasonable efforts to preserve and reunify family during CHINS proceedings). But what constitutes “reasonable efforts” varies by case, and the requirement that DCS make reasonable efforts to reunite a family “does not necessarily always mean that services must be provided to the parents.” *T.W.*, 135 N.E.3d at 615. Moreover, the general requirement to make reasonable efforts to reunify families during CHINS proceedings is not an element of the termination

statute, “and a failure to provide services does not serve as a basis on which to directly attack a termination order as contrary to law.” *In re H.L.*, 915 N.E.2d 145, 148 n.3 (Ind. Ct. App. 2009); *see* Ind. Code § 31-35-2-4. We recognize, however, that CHINS and termination proceedings are “deeply and obviously intertwined to the extent that an error in the former may flow into and infect the latter[.]” *In re G.P.*, 4 N.E.3d at 1165.

[16] When asked why she became less compliant with services in late summer 2022, Mother explained:

I didn't you know I don't have a vehicle. That is when my vehicle went down. I, if it was you know home-based casework its either because I wasn't comfortable with the home-based caseworker or you know our schedules just didn't you know work together and then working. You know I can't work because I don't have a car and drug screens was because I don't have a car.

Tr. Vol. 2 at 39. In a nutshell, Mother blames her missed drug screens, lack of steady employment, and lack of stable housing on her transportation problems. She seems to fault DCS for either not addressing her transportation issues or not addressing them to her satisfaction. Mother's argument is misplaced.

[17] No evidence was presented that Mother requested assistance with transportation and was given none. To the contrary, between December 2021 and November 2022, Mother failed to call in for drug testing seventy-eight times and missed seventeen random tests. Ex. Vol. 4 at 37. She had abnormal results in two of the eight drug screens that she completed. *Id.* When presented

with the option of DCS coming to wherever Mother was staying to facilitate drug screening, Mother maintained that those with whom she stayed did not want DCS around. When offered the possibility of meeting at a different location, Mother claimed that she did not have a key to the home where she was living, and the inhabitants wanted the door locked. Tr. Vol. 2 at 96.²

[18] Similarly, during one of Mother's visits with the Children, there was some miscommunication regarding the start and end time. Mother's ride was due to pick her up after only one hour. To facilitate the full two hours of visitation, the visit supervisor offered to drive Mother home so that she could enjoy the full extent of her time with the Children. Mother declined because she did not want DCS to know where she was staying. *Id.* at 148.

[19] As for why she did not keep jobs for more than a few months, Mother stated "it is just a different, at each job, it is something different." *Id.* at 36. She mentioned car issues, incidents with coworkers that she did not believe were handled properly, her discomfort around people, and a fear that a job would not accommodate her visitation schedule. *Id.* at 36, 98. Again, she did not state that she asked for bus passes or any other assistance to enable keeping a job. In fact, she raised three additional excuses for her failure to maintain employment. Absent steady employment, housing was undoubtedly difficult to obtain.

² Mother claimed to be drug-free yet did acknowledge purchasing THC vape pens from gas stations. She testified that, after speaking with her attorney, she stopped using these THC vape pens approximately one week before the factfinding. *Id.* at 25.

However, there was no indication that submitting a housing form required transportation that was unavailable.

[20] Given the circumstances presented, we are not persuaded that DCS failed in some way to solve Mother's transportation problems let alone that this so-called failure increased the risk of error in her termination proceeding. "[A] parent may not sit idly by without asserting a need or desire for services and then successfully argue" that he or she was denied services to assist him or her with his or her parenting. *In re B.D.J.*, 728 N.E.2d 195, 201 (Ind. Ct. App. 2000). Based on the foregoing, Mother has neither established a violation of her due process rights nor demonstrated fundamental error.

[21] Affirmed.

Brown, J., and Felix, J., concur.