MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT

Mark Small
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Marjorie Lawyer-Smith
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

In the Involuntary Termination of the Parent-Child Relationship of: D.M. (Minor Child), and S.T. (Father),

Appellant-Respondent,

v.

Indiana Department of Child Services,

Appellee-Petitioner.

August 30, 2022

Court of Appeals Case No. 22A-JT-1168

Appeal from the Greene Circuit Court

The Honorable Erik C. Allen, Judge

Trial Court Cause No. 28C01-2112-JT-35

Brown, Judge.

[1] S.T. ("Father") appeals the involuntary termination of his parental rights to his child, D.M. We affirm.

Facts and Procedural History

[2] In June 2020, D.M. was born to G.M. ("Mother") and Father. On July 9, 2020, the Indiana Department of Child Services ("DCS") filed a petition alleging that D.M. was a child in need of services ("CHINS"). On September 1, 2020, the court entered an order finding D.M. to be a CHINS and that D.M. had been born severely premature with methamphetamine and THC in his system. On October 2, 2020, the court entered a dispositional order. On December 9, 2021, DCS filed a petition for the involuntary termination of the parent-child relationship between Father and D.M.

[3] On December 20, 2021, the court conducted a pretrial conference at which Father appeared in person. On January 10, 2022, the court conducted a pretrial conference at which Father's counsel appeared in person and Father appeared by telephone. The court discussed setting a factfinding hearing for May 5, 2022, and Father's counsel stated: "I'm good, Your Honor." Transcript Volume II at 13. The court asked Father: "[A]ny reason you know of that Thursday, May 5th, would not be an available date for you?" *Id.* Father answered: "It sounds great to me." *Id.* The court set the factfinding hearing for May 5, 2022, ordered Father and Mother to appear, and stated: "If you fail to appear, the matter could be tried in your absence. So, it is important that you be present in person." *Id.*

[4] On May 5, 2022, the court held a factfinding hearing.[1] Father's counsel appeared in person, and Father did not appear. The court stated:

> Now, regarding [Father], it is my understanding from Court Staff he telephoned the Court just about 10 minutes before the proceeding was scheduled to begin and alleged that he . . . was in a rehab facility. I don't know that other than his representations, and maybe he is, maybe he isn't, but, [Father's counsel], do you have any information regarding [Father]?

Id. at 21. Father's counsel stated that he checked with his office, Father had not been in contact with him that day, and "apparently my understanding is he wanted me to ask for a continuance of this proceeding because he was checking himself into rehab and that he wanted the proceeding to be held after the time he was released." *Id.*

[5] When asked by the court if Father was in contact with him leading up to the proceeding, Father's counsel answered: "Yes, Your Honor. I have previously went over the file and things with him and seen him in the last, at least in the last week, if not a few extra days and we have talked to him on the phone several times." *Id.* The court asked if Father had discussed checking himself into rehab at this point, and Father's counsel answered that Father did not discuss checking himself into rehab today. Counsel for DCS stated: "Well, I don't know if that was a motion for continuance but if it was, the Department

[1] Mother signed a Voluntary Relinquishment Form and indicated she wished to voluntarily terminate her parental rights.

objects to it. We have all our witnesses ready to testify and this CHINS case has been open for 2 years now." *Id.* at 22.

[6] The court asked Mother if she had communication with Father, and Mother indicated that Father said he "was going to do whatever he can to continue it until it won't be continued anymore." *Id.* The court asked Mother if Father "made representations to [her] that his effort or his representation that he was enrolling in a rehab facility today was an effort to delay the proceedings here." *Id.* at 23. Mother answered affirmatively.

[7] The court stated:

> Alright, [Father], even assuming that he is being truthful, not saying that he isn't, but I don't know other than his representations that he is in a rehab facility but assuming that that is the case it appears to be dilatory effort on his part to delay the proceedings. Clearly, he had the option of waiting until after today to day [sic] that. So, again, I think the information is pretty clear it is a dilatory effort and I understand there may be some evidence later on regarding prior efforts at rehab that [Father] has made that were not successful. So, I think that this the evidence, the information, here is certainly persuasive and pretty indictive [sic] that it is just a dilatory effort and not a legitimate effort to attend rehabilitation. So, I'm going to deny the Father's request for a continuance . . . .

Id.

[8] DCS presented the testimony of Mother who stated that Father had consistently been dealing methamphetamine and using it every day for the last five to ten years. She also stated: "I don't see him stopping anytime soon." *Id.* at 27.

[9] Jared Comfort, a therapist and licensed social worker, testified that he received a referral in January 2021 to provide individual therapy and supervised visitation for Father. He stated that Father tested positive for methamphetamine between January 2021 and December 2021 and "[t]here were several instances where [Father] would report that he was clean and then he would continue to test positive." *Id.* at 34. He testified that Father completed rehab but he believed that Father was still using. He stated that Father completed thirty days of rehab in December but did not "follow-up with out-patient with Transitions . . . until just recently," and he was provided services through Centerstone but Father "denied that." *Id.* at 36. He also did not think Father had participated in AA or NA meetings despite being provided with information.

[10] Upon questioning by the court, Comfort testified that he had his last session with Father two days earlier. When asked if Father discussed his plan to enroll in inpatient rehab at that time, Comfort answered:

> No, I believe so we did meet with the FCM I believe 2 weeks ago during a visit and at that time [Father] did report the possibility of going to rehab but he never provided any definitive plans. That was the only time that I have heard him bring up entering rehab again.

Id. at 43.

[11] Brooklyn Barlow, a family consultant who worked with Father, testified that Father appeared for a majority of his appointments but was unable to complete

his goals. Court Appointed Special Advocate Vickie Halt testified that there had been no progress with respect to Father's substance abuse. She stated that services were in place through the life of the case and several attempts to provide more services occurred. She testified that Father had not stopped using methamphetamine and that she felt "it is extremely unlikely that he is going to stop using in the foreseeable future." *Id.* at 59. When asked why she would say that, she answered: "Because he hasn't in two years. I mean even to the point I mean last week or whatever he was still using. I mean even with us on a termination he is still using." *Id.*

[12] DCS also presented the testimony of Mother's mother who cared for D.M. as well as Family Case Manager Chelsey Todd ("FCM Todd"), who was the case manager from December 2019 until June 2021. When asked how much progress Father made on his issues, FCM Todd answered: "Not a lot of progress at all." *Id.* at 71.

[13] Family Case Manager Katherine Word ("FCM Word") testified that she was the assessor for the report that resulted in the CHINS case and then became the family case manager after FCM Todd. She testified that Father had consistently tested positive for methamphetamine. She indicated Father enrolled in rehab in December 2021 and completed the twenty-eight-day stay but tested positive after being released. When asked if she had any advanced knowledge of Father checking into Transitions that day, she answered:

> So I actually met with [Father] yesterday at his residence and we were just kind of I just wanted to observe his home and just kind

> of chat with him . . . . So, he had made prior conversation with me about wanting to go back to rehab and I explained to him you know he had free will to do what he wanted but in previous [child family team meetings] that we had discussed with him after he got out of rehab the first time, we encouraged him to reach out to out-patient services. That was back in February of '21. We all encouraged him to seek some sort of out-patient services, [Father] said he didn't need it but now all of sudden he needs it. So, within the last week or so he has reached out to Transitions in Bloomington to follow-up for out-patient services and then I received a message from him this morning that just said I'm at Transitions. I don't know, I did not know what that meant. I did not know any other indication that he was going to admit himself back into rehab.

Id. at 82-83. She also stated: "We talked about court yesterday and he indicated that he would be here, and I even told him the other day he acted like he didn't know what time court was today and I reminded him that it was at 9:00 a.m. and that was as far as the conversation went." *Id.* at 83. She indicated that termination was in D.M.'s best interest because Father had not overcome his substance abuse despite having services for the prior two years and had "been given every opportunity to address his substance use." *Id.* at 83-84. Father's counsel cross-examined all of DCS's witnesses except for Mother's mother.

[14] On May 6, 2022, the court entered an order terminating Father's parental rights to D.M., which found in part:

> Notice has been provided to all persons required by statute in the most effective means under the circumstances. [Father] called the Court office approximately 10-15 minutes before the scheduled start time for the fact-finding hearing and advised that

> he had checked into a rehab program. [Father] had maintained contact with his attorney and with FCM Word, however, he did not indicate to either of them in recent communications that he was going to check into a rehab program. [Mother] testified that she communicated with [Father] either earlier on May 5, 2022, or the evening of May 4, 2022, and he indicated he was checking into rehab in order to get a continuance for the fact-finding hearing and that he intended to try to continue the proceeding as long as he could. The Court concludes [Father's] motive for enrolling into a rehab program (if in fact he actually is in a rehab program) on the morning of his fact-finding hearing is simply a dilatory effort and the Court denies the continuance requested by [Father's] counsel.

Appellant's Appendix Volume II at 17.

[15] On May 20, 2022, Father filed a letter with the court in which he requested it to "cancel the default judgment." *Id.* at 22. He asserted: "I was in rehab at Transition recovery in Bedford and I called with my case manager at 8:30 and was denied a telephonic court hearing[.] I am and have been in outpatient rehab after release from Transitions Recovery in [B]edford IN[.] I was released on 12-27-21." *Id.* He attached a letter on Transitions letterhead which stated that Father began Transitions Recovery at the inpatient facility in Bedford, Indiana on December 3, 2021, left Transitions on December 27, 2021, after he "graduated build 1," started services with Transitions Medical Bloomington for outpatient care on December 27, 2021, and was seen on a weekly basis at Transitions Medical of Bloomington. *Id.* at 23. Also on May 20, 2022, Father filed a notice of appeal of the court's May 6, 2022 order.

Discussion

[16] Father argues that he was denied due process of law because he was denied meaningful participation in the proceedings "where not only was [his] continuance denied, but no effort was made by the Court or counsel for any of the parties to ascertain whether [he] could participate by telephone, as he had for the pre-trial conference." Appellant's Brief at 17. He asserts that "[f]undamental error is the standard of review for this issue." *Id.* He cites Ind. Code § 31-35-2-6.5(e), which provides that the court shall provide a parent "an opportunity to be heard and make recommendations to the court at the hearing," and Ind. Code § 31-32-2-3(b), which provides that "[a] parent, guardian, or custodian is entitled: (1) to cross-examine witnesses; (2) to obtain witnesses or tangible evidence by compulsory process; and (3) to introduce evidence on behalf of the parent, guardian, or custodian." He also asserts that "DCS is required to give at least ten (10) days before a hearing on a 'petition or motion under this chapter . . . the person or entity who filed the petition to terminate the parent-child relationship . . [.] shall send notice of the review to . . . [t]he child's parent . . . ." *Id.* at 18 (quoting Ind. Code § 31-35-2-6.5). He contends that he "could have addressed whether his checking into drug rehab was for purposes of delay," he "might have been able to address Mother's allegations regarding his drug use and patterns of behavior," and "[w]e cannot tell further what errors [he] could have addressed because he was not present and the record is closed." *Id.* at 20.

[17] To the extent Father argues that he was denied due process, we note that Father did not specifically raise a due process argument before the trial court. On appeal, Father asserts that "[f]undamental error is the standard of review for this issue." Appellant's Brief at 17. "To qualify as fundamental error, an error must be so prejudicial to the rights of the defendant as to make a fair trial impossible and must constitute a blatant violation of basic principles." *D.T. v. Ind. Dep't of Child Servs.*, 981 N.E.2d 1221, 1225 (Ind. Ct. App. 2013). "The harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process." *Id. See also Matter of D.H.*, 119 N.E.3d 578, 586 (Ind. Ct. App. 2019) (holding that we have discretion to address claims not raised before a trial court, "especially when they involve constitutional rights, the violation of which would be fundamental error" and quoting *S.B. v. Morgan Cnty. Dep't of Public Welfare (In re L.B.)*, 616 N.E.2d 406, 407 (Ind. Ct. App. 1993), *trans. denied*, for the proposition that "[t]he constitutionally protected right of parents 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"), *opinion adhered to as modified on reh'g*, 122 N.E.3d 832 (Ind. Ct. App. 2019), *trans. denied*.

[18] "Due process requires 'the opportunity to be heard at a meaningful time and in a meaningful manner.'" *In re K.D.*, 962 N.E.2d 1249, 1257 (Ind. 2012) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893 (1976)). The Indiana Supreme Court has held that "the process due in a termination of parental

rights action turns on balancing three *Mathews* factors: (1) the private interests affected by the proceeding; (2) the risk of error created by the State's chosen procedure; and (3) the countervailing governmental interest supporting use of the challenged procedure." *Id.* (citing *In re C.G.*, 954 N.E.2d 910, 917 (Ind. 2011)). "In balancing the three-prong *Mathews* test, we first note that the private interest affected by the proceeding is substantial – a parent's interest in the care, custody, and control of her child." *In re C.G.*, 954 N.E.2d at 917. "We also note the countervailing *Mathews* factor, that the State's *parens patriae* interest in protecting the welfare of a child is also substantial." *Id.*

[19] With respect to Father's mention of the court's denial of his motion to continue, generally, a trial court's decision to grant or deny a motion to continue is subject to abuse of discretion review. *In re K.W.*, 12 N.E.3d 241, 244 (Ind. 2014). Ind. Trial Rule 53.5 provides that, "[u]pon motion, trial may be postponed or continued in the discretion of the court, and shall be allowed upon a showing of good cause established by affidavit or other evidence." Discretion is a privilege afforded a trial court to act in accord with what is fair and equitable in each circumstance. *J.M. v. Marion Cnty. Office of Family & Children*, 802 N.E.2d 40, 43 (Ind. Ct. App. 2004), *trans. denied*. A decision on a motion for continuance will be reversed only upon a showing of an abuse of discretion and prejudice resulting from such an abuse. *Id.* "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.* The Indiana Supreme Court has explained that an abuse of discretion analysis consists of an "evaluation of facts in relation to legal formulae. In the final analysis, the reviewing court is concerned with the reasonableness of the action in light of the record." *Id.* at 44 (citing *Tapia v. State*, 753 N.E.2d 581, 585 (Ind. 2001)). Thus, a trial court's ruling should be set aside only if it is clearly against the logic and effect of the facts and circumstances before the court, and we will not substitute our judgment for that of the trial court. *Id.*

[20] This Court has previously observed that there is a cost in delaying the adjudication of termination cases in that they impose a strain upon the children involved and exact "an intangible cost to their lives." *In re E.E.*, 853 N.E.2d 1037, 1043 (Ind. Ct. App. 2006), *trans. denied*. While continuances may certainly be necessary to ensure the protection of a parent's due process rights, courts must also be cognizant of the strain these delays place on a child. *In re C.C.*, 788 N.E.2d 847, 852 (Ind. Ct. App. 2003), *trans. denied*.

[21] The record reveals that, at the January 10, 2022 pretrial conference, the trial court discussed setting a factfinding hearing for May 5, 2022, and asked Father if there was "any reason you know of that Thursday, May 5th, would not be an available date for you?" Transcript Volume II at 13. Father answered: "It sounds great to me." *Id.* The court set the factfinding hearing for May 5, 2022, ordered Father to appear, and stated: "If you fail to appear, the matter could be tried in your absence. So, it is important that you be present in person." *Id.* The chronological case summary indicates that DCS filed a TPR Notice of

Hearing on April 25, 2022. At the May 5, 2022 hearing, Father's counsel appeared in person, and Father did not appear. The court observed that Father telephoned court staff ten minutes before the hearing was scheduled to begin and asserted that he was in a rehab facility. Father's counsel stated that Father did not discuss "checking himself into rehab today" and stated: "I don't believe he told me he was going to go into rehab today." *Id.* at 22. Upon questioning by the court, Mother testified that she communicated with Father and he said he "was going to do whatever he can to continue it until it won't be continued anymore." *Id.* The court asked Mother if Father "made representations to [her] that his effort or his representation that he was enrolling in a rehab facility today was an effort to delay the proceedings here," and Mother answered affirmatively. *Id.* at 23. We cannot say the trial court abused its discretion in finding that Father's absence was "just a dilatory effort and not a legitimate effort to attend rehabilitation." *Id.*

[22] Further, we note that, while Father's counsel asserted that his understanding was that Father was "checking himself into rehab," the letter from Transitions attached to Father's May 20, 2022 correspondence to the court indicated that Father merely started services with Transitions Medical of Bloomington for outpatient care on December 27, 2021, and was seen on a weekly basis at Transitions Medical of Bloomington. Appellant's Appendix Volume II at 23. We also note that Father was represented by counsel at the hearing, his counsel cross-examined all of the witnesses except for Mother's mother, Father does not specifically indicate what evidence he would have produced had he been

present, and he does not challenge any of the trial court's findings or conclusions resulting in the termination of the parent-child relationship. Under the circumstances, we cannot say that Father has shown good cause for a continuance, that the court abused its discretion in denying his motion for a continuance, or that he is entitled to reversal on due process grounds. *See Matter of C.C.*, 170 N.E.3d 669, 678 (Ind. Ct. App. 2021) ("In balancing [the mother's] fundamental interest against the State's own compelling interest and given the minimal risk of error from the trial court's decision to proceed in [the mother's] absence, where [she] was represented by counsel, we conclude that the trial court did not violate [her] right to due process in denying her counsel's motion to continue the fact-finding hearing.").[2]

[23] For the foregoing reasons, we affirm the termination of Father's parental rights.

[24] Affirmed.

---

[2] To the extent Father cites *Tillotson v. Clay Cnty. Dep't of Family & Children*, 777 N.E.2d 741 (Ind. Ct. App. 2002), *trans. denied*, we find that case distinguishable. In *Tillotson*, the parents were sentenced on February 6, 2001, to four years in prison. 777 N.E.2d at 742. They filed a *pro se* Motion to Transport on September 6, 2001, seeking an order authorizing the Clay County Sheriff's Department to transport them from their respective places of incarceration to the Clay County Circuit Court for the termination hearing involving their children. *Id.* The trial court denied their motion. *Id.* Parents filed a second Motion to Transport, which the court also denied. *Id.* at 743. During the termination hearing, the parents' counsel objected to proceeding without the parents' presence and requested that the court consider an alternate method for them to testify. *Id.* This Court concluded that "under the narrow facts of this case, the trial court's failure to implement alternative means for Parents to testify at the termination hearing did not deny them due process of law," but cautioned "in future cases, trial courts would be well advised to fully consider alternative procedures by which an incarcerated parent could meaningfully participate in the termination hearing when the parent cannot be physically present." *Id.* at 746. Unlike the parents in *Tillotson*, Father was not incarcerated. Rather, he agreed to the scheduling of the termination hearing.

Mathias, J., and Crone, J., concur.