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.

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IN THE COURT OF APPEALS OF INDIANA

In the Termination of the Parent-Child Relationship of:

M.H. III & E.H. *(Minor Children)*,

and

M.H. *(Father)*

Appellant-Respondent,

v.

The Indiana Department of Child Services,

Appellee-Petitioner,

March 17, 2020

Court of Appeals Case No. 20A-JT-1796

Appeal from the St. Joseph Probate Court

The Honorable Ashley M. Colborn, Magistrate

Trial Court Cause Nos.
71J01-1910-JT-154
71J01-1910-JT-155

Robb, Judge.

Case Summary and Issue

[1] M.H. ("Father") appeals the juvenile court's judgment terminating his parental rights to his children M.H. III and E.H. Father presents one issue, which we restate as whether the Indiana Department of Child Services ("DCS") deprived Father of due process by failing to make reasonable efforts to reunify the family before filing its petition to terminate his parental rights. Concluding DCS did not deprive Father of due process, we affirm.

Facts and Procedural History

[2] M.H. III was born on January 4, 2017 to Father and R.H. ("Mother").[1] On September 8, 2017, DCS removed M.H. III from the home and placed him in foster care due to domestic violence between Father and Mother resulting in Mother's hospitalization. *See* Exhibit Index, Volume 1 at 173. DCS subsequently filed a petition alleging that M.H. III was a child in need of services ("CHINS"). On October 5, the juvenile court held an initial hearing, and after Father failed to appear, the court deemed the material allegations admitted. On November 2, M.H. III was adjudicated a CHINS.

[3] On December 14, 2017, the juvenile court held a dispositional hearing and entered its dispositional decree ordering Father into reunification services. Specifically, the juvenile court ordered Father to complete a domestic violence

[1] Mother signed a voluntary consent to adoption and does not participate in this appeal.

assessment and all recommended treatment, establish paternity, and maintain contact with DCS. *See id.* at 141.

On May 5, 2018, Mother and Father had a second child together, E.H. Shortly thereafter, DCS removed E.H. from the home because Mother took E.H. to the hospital due to constipation and was observed to be highly intoxicated. Further, E.H.'s umbilical cord blood tested positive for cocaine metabolites, and Mother was detained on a seventy-two-hour psychiatric hold for self-harming behavior after learning E.H. was being detained. On June 4, 2018, DCS filed a petition alleging E.H. was a CHINS. Subsequently, the juvenile court held a status hearing and after both parents admitted to DCS's allegations, the juvenile court adjudicated E.H. a CHINS. On September 27, 2018, the juvenile court ordered Father to participate in reunification services, including random drug screens, supervised visitation, a parenting evaluation assessment, a substance abuse evaluation, and a domestic violence assessment. Ex., Vol. 2 at 27. Father was to follow all recommendations from the assessments. *See id.*

[4] After Father completed the domestic violence assessment, the assessor recommended Father complete a forty-week batterer's intervention program. However, Father failed to complete the program. Similarly, Father completed a parenting evaluation. The evaluator recommended parenting classes, moral recognition therapy ("MRT"), and batterer's intervention. Father failed to attend all of the recommended parenting classes, attending only six out of ten classes. *See* Transcript of Evidence, Volume 2 at 101. Father attended the MRT orientation but failed to attend individual therapy sessions. *See id.*

[5] The juvenile court approved permanency plans of adoption for M.H. III and E.H. on March 21 and May 21, 2019 respectively. On October 10, Father was arrested for failure to pay child support. On November 1, DCS filed petitions to terminate Mother's and Father's parental rights to M.H. III and E.H. Later that month, DCS suspended Father's visitation because Father was not consistently attending and had a long period of disengagement. During the underlying CHINS case, Father spent approximately nine months in jail.[2] Margaret Batteast, a DCS case manager for the family, testified that despite Father's jail time, "when he was released, he had the opportunity to contact and engage with me and service providers on numerous occasions[,]" but he did not. *See* Tr., Vol. 2 at 99.

[6] On July 10, 2020, the juvenile court held the termination hearing. Father failed to attend the hearing personally, but his counsel did attend. The juvenile court subsequently entered its order terminating Father's parental rights. Father now appeals.

Discussion and Decision

[7] Father acknowledges that he failed to raise a due process claim at the factfinding hearing. Generally, an argument cannot be presented for the first time on appeal, *McBride v. Monroe Cnty. Off. Fam. and Child.*, 798 N.E.2d 185,

[2] Father has four pending charges for felony non-support of a defendant. *See* Tr., Vol. 2 at 97.

194 (Ind. Ct. App. 2003), because "appellate review presupposes that a litigant's arguments have been raised and considered in the trial court[,]" *Plank v. Cmty. Hosp. of Ind., Inc.*, 981 N.E.2d 49, 53 (Ind. 2013). However, our courts have applied the fundamental error doctrine in termination cases. *See S.M. v. Elkhart Cnty. Off. of Fam. & Child.*, 706 N.E.2d 596, 599 (Ind. Ct. App. 1999).

[8] Further, this court has stated that "we have discretion to address such claims, especially when they involve constitutional rights, the violation of which would be fundamental error." *Matter of D.H.*, 119 N.E.3d 578, 586 (Ind. Ct. App. 2019), *trans. denied.*

> The fundamental error doctrine is a narrow exception to the waiver doctrine and applies to an error that was so egregious and abhorrent to fundamental due process that the trial judge should or should not have acted, irrespective of the parties' failure to object or otherwise preserve the error for appeal. For our court to overturn a trial court ruling based on fundamental error, the error must have been a clearly blatant violation of basic and elementary principles, *and* the harm or potential for harm therefrom must be substantial and appear clearly and prospectively.

N.C. v. Ind. Dep't of Child Servs., 56 N.E.3d 65, 69 (Ind. Ct. App. 2016) (citations and internal quotations omitted), *trans. denied*. Here, Father's due process rights are at issue; therefore, we exercise our discretion to review Father's due process claim even though it was not raised below. *See Pierce v. State*, 29 N.E.3d 1258, 1267 (Ind. 2015) ("[W]henever possible, we prefer to resolve cases on the merits[.]") (quotation omitted).

I. Standard of Review

[9] 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) (quotations and citations omitted). The nature of the process due in proceedings to terminate parental rights is governed by a balancing of "three distinct 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." *A.P. v. Porter Cnty. Off. of Fam. & Child.*, 734 N.E.2d 1107, 1112 (Ind. Ct. App. 2000) (internal quotations and citations omitted), *trans. denied*.

> 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 Serv., 997 N.E.2d 1114, 1120 (Ind. Ct. App. 2013) (citations omitted).

II. Termination of Parental Rights: Due Process

[10] The Fourteenth Amendment to the United States Constitution protects the traditional right of parents to establish a home and raise their children. *Bester v. Lake Cnty. Off. of Fam. & Child.*, 839 N.E.2d 143, 147 (Ind. 2005). Although parental rights are of a constitutional dimension, the law allows for the

termination of those rights when parents are unable or unwilling to meet their parental responsibilities. *In re T.F.*, 743 N.E.2d 766, 773 (Ind. Ct. App. 2001), *trans. denied*. Parental rights, therefore, are not absolute and must be subordinated to the best interests of the children. *Id.* Termination of parental rights is proper where the children's emotional and physical development is threatened. *Id.* The juvenile court need not wait until the children are irreversibly harmed such that their physical, mental, and social development is permanently impaired before terminating the parent–child relationship. *Id.*

[11] Before an involuntary termination of parental rights can occur in Indiana, DCS is required to allege and prove, among other things: (1) that the child has been removed from the parent for at least fifteen of the most recent twenty-two months; (2) that there is a reasonable probability that the conditions resulting in the child's removal will not be remedied or the continuation of the parent-child relationship poses a threat to the child's well-being; and (3) termination is in the best interests of the child. Ind. Code § 31-35-2-4(b)(2).

[12] However, Father's sole contention is that his right to due process was violated when DCS "did not make reasonable efforts to reunify the family[.]"[3] Appellant's Brief at 6. Our supreme court has stated:

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[3] Father also argues that DCS "did not provide the necessary services to him." Appellant's Br. at 6. However, Father fails to make a cogent argument regarding any failure to provide services. Further, we have stated that "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); *Stone v. Daviess Cnty. Div. of Child. & Fam. Servs.*, 656 N.E.2d 824, 830 (Ind. Ct. App. 1995) ("[U]nder Indiana law, even a complete failure to

> Due process protections bar state action that deprives a person of life, liberty, or property without a fair proceeding. 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 [w]hen 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 G.P., 4 N.E.3d 1158, 1165 (Ind. 2014) (citations and internal quotations omitted).

[13] This court has held that for due process rights to be protected in the context of termination proceedings, DCS must have made reasonable efforts to reunify the family in the CHINS case. *In re T.W.*, 135 N.E.3d 607, 615 (Ind. Ct. App. 2019), *trans. denied*. "What constitutes 'reasonable efforts' will vary 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." *Id.* Father contends that "the procedure chosen by the State was to ignore Father's successes and write him off[;] no effort was made to examine Father's home to see if it was appropriate." Appellant's Br. at 8. However, Batteast testified that seeing Father's home was not ever warranted because DCS was "not in a position to transition the children in his care." Tr., Vol. 2 at 100.

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provide services cannot serve as a basis to attack the termination of parental rights."), *trans. denied*. Under this precedent, it is clear that DCS's alleged failure to provide services cannot act as a basis for Father to attack the termination order.

[14] Father argues that he "completed all required assessments." Appellant's Br. at 8. However, Father was also ordered to follow the recommendations stemming from those assessments. *See* Ex., Vol. 2 at 46; Ex., Vol. 1 at 158. The record shows that Father was referred to various services based on these assessments and failed to complete them. The services recommended to Father included a forty-week batterer's intervention program that Father failed to complete; parenting classes, of which Father attended only six out of ten classes; and MRT, of which Father attended only the orientation session. Further, Father was also required to establish paternity of M.H. III and E.H. *See id.* However, he only established paternity for M.H. III. *See* Tr., Vol. 2 at 96, 100.

[15] Thus, contrary to Father's claim on appeal, the record reveals that Father was not granted reunification due to his failure to complete the necessary requirements rather than a lack of effort on the part of DCS. In fact, DCS provided Father with a path to reunification through the various services recommended to him. Based on the record before us, we conclude that Father has failed to establish that he was denied due process in relation to the termination of his parental rights to M.H. III and E.H. or that any such denial constituted fundamental error.

Conclusion

[16] We conclude that Father was not deprived of due process in the termination proceeding. Therefore, we affirm the juvenile court's termination of his parental rights to M.H. III and E.H.

[17] Affirmed.

Bailey, J., and Tavitas, J., concur.