

## MEMORANDUM DECISION

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## IN THE COURT OF APPEALS OF INDIANA

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In the Matter of the Termination  
of the Parent-Child Relationship  
of E.W., Mother, Z.L., Father  
and K.W., Child,

Z.L.,

*Appellant-Respondent,*

v.

Indiana Department of Child  
Services,

*Appellee-Petitioner.*

March 24, 2023

Court of Appeals Case No.  
22A-JT-2507

Appeal from the  
Huntington Superior Court

The Honorable  
Jennifer E. Newton, Judge

Trial Court Cause No.  
35D01-2112-JT-14

**Memorandum Decision by Judge Foley**  
Judges Vaidik and Tavitas concur.

**Foley, Judge.**

- [1] Z.L. (“Father”) is the father of K.W. (“Child”), and his parental rights were terminated by the juvenile court. Father appeals the juvenile court’s judgment and argues that the juvenile court abused its discretion when it denied his motion to continue the termination hearing. Because we find that the trial court did not abuse its discretion, we affirm.

**Facts and Procedural History**

- [2] Father and E.W. (“Mother”) are the parents of Child. Father has a lengthy criminal history, which dates back to 2004 and consists of multiple convictions, including for battery, dealing in a lookalike substance, operating a vehicle while intoxicated, intimidation, resisting law enforcement, disorderly conduct, residential entry, and invasion of privacy. In January 2017, the State charged Father with Level 5 felony battery resulting in bodily injury to a pregnant woman and Level 5 felony criminal confinement and alleged that Father was a habitual offender. Father was convicted on the battery charge, and he admitted being a habitual offender. In September 2017, Father was sentenced to ten and a half years executed.
- [3] In March 2017, the Indiana Department of Child Services (“DCS”) first became involved with Father, Mother, and Child. Father was incarcerated at the time, and Child was removed from Mother’s care and adjudicated a child in need of

services (“CHINS”). That 2017 CHINS case was resolved with Child being reunited with Mother.

[4] On February 5, 2020, the present CHINS case began. On that date, DCS again removed Child from Mother’s care due to allegations of neglect and abandonment. Mother was using methamphetamine, and her mother and other relatives had been caring for Child. These relatives “were no longer able” to care for Child, and Mother asked DCS to detain Child. Appellant’s App. Vol. 2 p. 42. Father was incarcerated at Wabash Valley Correctional Facility at that time. On February 6, 2020, DCS filed a petition alleging that Child was a CHINS. On February 14, 2020, Father admitted the allegations in the petition, and the trial court adjudicated Child to be a CHINS. On March 3, 2020, the trial court entered its dispositional decree. Child was never returned to the care of Father or Mother after Child’s removal on February 5, 2020. While the CHINS proceedings were pending, review and permanency hearings were held, and Father remained incarcerated and appeared via telephone several times and in person once. On December 29, 2021, DCS filed its petition to terminate the parental rights of Father and Mother. On May 18, 2022, the termination factfinding hearing was held.<sup>1</sup>

[5] Before the hearing began, the trial court was informed that Father had been in an altercation with guards at the jail where he was being held prior to the

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<sup>1</sup> At the beginning of the termination hearing, Mother voluntarily relinquished her parental rights to Child and was released from participation in the hearing.

hearing. During the altercation, Father was tased and brought into the hearing in a restraint chair because he was alleged to have harmed the guards.

[6] Father's counsel made an oral motion to continue the termination hearing because of the altercation and the fact that Father had been tased. Father's counsel stated that he had spoken with Father and that he was "looked at," but counsel did not know "the extent or nature of any kind of medical care or treatment that [Father] received." Tr. Vol. 2 p. 42. Father's counsel also asked that the record reflect that Father was in the restraint chair and that "there is a very prominent red mark on the left side above [Father]'s left eye" and a "very noticeable" mark on the inside of Father's left elbow, as well as other alleged injuries. *Id.* at 42–43. Father's counsel asserted that "due to the paramount rights that are at stake with parental rights being terminated," he did not believe that Father could appropriately participate due to a possibly impaired mental or physical state. *Id.* at 43–44. Because of the rights at stake, Father's counsel stated he believed that the termination hearing should be moved to a future date so that Father would be able to assist in his defense.

[7] DCS objected to the motion to continue the termination hearing because Father was physically present in the courtroom and was able to participate and talk to his counsel, stating, "they can communicate back and forth during the trial and work on things." *Id.* at 44. DCS stated that it believed that Father would be able to participate with his attorney in a meaningful way at that hearing on that day. DCS also objected because the 180-day statutory timeframe was approaching on June 27.

[8] Father's counsel responded that although Father was "physically in close proximity" to counsel and able to communicate, counsel did not know if Father was in an excited state and able to comprehend the proceedings. *Id.* at 46. He further stated that he was not sure if there was any issue that might prevent Father from "adequately participating in his defense." *Id.*

[9] The trial court denied the motion after acknowledging that Father was physically present at the hearing and stating that the trial court had observed Father talking with his counsel during the permanency hearing that was held immediately prior to the termination hearing beginning. The trial court further stated, "there's nothing indicating to me that he, um, is not able to fully participate in his hearing, um, so we are going to go forward today." *Id.* at 46. The trial court then stated for the record:

that now through June 27th, um, the Court's calendar is very congested, um, other cases would have to be moved, um, in order to accommodate another day for this, and the Court does not believe that is necessary because there's nothing been show[n] that he cannot participate in the hearing today, um, anymore than he would be able to a week from now, um, so we will go forward today.

*Id.* at 46–47.

[10] At the termination hearing, Father testified on direct and cross-examination. During his testimony, he did not mention any physical or mental impediment resulting from the altercation at the jail, and he did not request any medical attention. Father's counsel never renewed his motion for continuance based on

Father's testimony or for any other reason. Father testified that his earliest possible release date from prison was 2028. However, he acknowledged that he may be incarcerated beyond 2028 because of his pending criminal cases. Father had two pending charges for Level 4 felony prisoner possessing a deadly weapon. At the time of the termination factfinding, Father's scheduled jury trials had been vacated.<sup>2</sup>

[11] Evidence at the termination hearing demonstrated that Father never substantially complied with the court-ordered rehabilitative reunification services. He was not able to participate in services because he was in long-term segregation at Wabash Valley Correctional Facility, where he cannot have visitors and cannot participate in educational programs or services at the Indiana Department of Correction. According to Father, Child was not able to visit him in prison because Father "was put on permanent no contact or visitation" because of his "alleged conduct and behavior while incarcerated." *Id.* at 83. But Father could communicate through phone calls and mail. DCS had placed Child with Father's aunt and uncle on April 23, 2020, based on Father's request. Father testified that he spoke to Child on the phone "a few times" when Child was placed with aunt and uncle, but Child "was very young,

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<sup>2</sup> On August 24, 2022, Father was sentenced to ten years in the Department of Correction after he was found guilty of one count of Level 4 felony prisoner possessing a deadly weapon in cause number 77D01-1911-F4-771. Father's appeal is currently pending. According to the Indiana Department of Correction's Incarcerated Locator, Father's earliest possible release date is now January 22, 2034. *See* Ind. Dept. of Correction, Inmate Locator <https://www.in.gov/apps/indcorrections/ofs/ofs> (last visited Mar. 13, 2023).

and he probably don't [sic] even remember." *Id.* at 82. Other than those few phone calls, Father did not have any communication with Child in the previous four years. Child's family case manager and guardian ad litem both testified that they believed that termination of Father's parental rights was in Child's best interest. DCS's plan if termination was granted was adoption.

[12] On October 4, 2022, the trial court entered its order terminating Father's parental rights to Child. In the order, the trial court concluded that DCS proved by clear and convincing evidence the statutory elements under Indiana Code section 31-35-2-4(b)(2). Father now appeals.

### **Discussion and Decision**

[13] The decision to grant or deny a motion for a continuance is within the sound discretion of the trial court. *F.M. v. N.B.*, 979 N.E.2d 1036, 1039 (Ind. Ct. App. 2012). We will reverse the trial court's decision only for an abuse of that discretion. *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." *In re K.W.*, 12 N.E.3d 241, 244 (Ind. 2014) (quotations omitted).

[14] Father argues that the juvenile court abused its discretion when it denied his motion to continue the termination hearing. He contends that the denial of his motion to continue violated his right to due process because (1) termination of parental rights cases involves significant rights which should be given additional

protections, (2) there was a high risk of error because the trial court could not be sure that Father was not somehow affected by the tasing and the physical altercation that occurred prior to the hearing, and (3) despite the strong government interest in achieving permanency for Child through termination proceedings, the delay from a continuance would not have hindered this interest.

- [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). Due process requires “the opportunity to be heard at a meaningful time and in a meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). The nature of the process due in proceedings to terminate parental rights is governed by a balancing of the 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. *In re T.W.*, 135 N.E.3d 607, 613 (Ind. Ct. App. 2019), *trans. denied*.
- [16] As to the first factor, the private interest affected by the termination of parental rights proceeding is Father’s interest in the care, custody, and control of Child. “[T]he interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.” *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Thus, the private interest affected is certainly a weighty concern of constitutional import and weighs in Father’s favor.



[17] The second factor requires an assessment of the risk of error created by the challenged procedure—denying Father’s motion to continue and holding the termination hearing over his assertion of the “potential unknown physical or mental affects [sic] that Father may have been suffering” due to the altercation prior to the hearing. Appellant’s Br. p. 13. Parents do not have a constitutional right to be present at a termination of parental rights hearing, *In re K. W.*, 12 N.E.3d at 249; however, pursuant to Indiana Code section 31-35-2-6.5(e), courts are required to provide parties “[an] “opportunity to be heard . . . at the hearing.” Here, Father had an opportunity to be heard in a meaningful time and manner, and he had counsel representing him throughout the proceedings. Father fails to point to any evidence that he was actually suffering any impairment or any ill effects from the incident during the termination hearing. He merely speculates there were unknown effects he may have been suffering from. The trial court was able to observe Father before the hearing commenced and found that there was “nothing indicating . . . that he . . . [was] not able to fully participate in this hearing.” Tr. Vol. 2 p. 46. Father fully participated in the termination hearing and testified on both direct and cross examination. At no time during his testimony did he mention any issues he was experiencing from the prior altercation or indicate that he was experiencing any difficulties in participating in the termination hearing. Father has not shown that the actions by the trial court in denying his motion to continue resulted in any risk of error, and this factor weighs in the State’s favor.

[18] Regarding the third factor—the governmental *parens patriae* interest supporting use of the challenged procedure—it is well-settled that parental interests are not absolute and must be subordinated to the child’s best interests when determining the proper disposition of a petition to terminate parental rights. *See Troxel*, 530 U.S. at 65. “‘Although the State does not gain when it separates children from the custody of fit parents, the State has a compelling interest in protecting the welfare of the child by intervening in the parent-child relationship when parental neglect, abuse, or abandonment are at issue.’” *Tillotson v. Clay Cnty. Dep’t of Fam. & Child.*, 777 N.E.2d 741, 745 (Ind. Ct. App. 2002) (quoting *E.P. v. Marion Cnty. Off. of Fam. & Child.*, 653 N.E.2d 1026, 1032 (Ind. Ct. App. 1995)), *trans. denied*.

[19] DCS removed Child on February 5, 2020, due to allegations of neglect and abandonment. Father was incarcerated at Wabash Valley Correctional Facility at that time. Child was never returned to the care of Father or Mother since the removal, and Father remained incarcerated through the duration of the CHINS and termination proceedings. Father never substantially complied with the court-ordered rehabilitative reunification services. He was not able to participate in services because he was in long-term segregation at Wabash Valley Correctional Facility, where he cannot have visitors and cannot participate in educational programs or services. Child was unable to visit Father in prison because Father “was put on permanent no contact or visitation” because of his “alleged conduct and behavior while incarcerated.” Tr. Vol. 2 p. 83. Other than a few phone calls, Father did not have any

communication with Child in the four years prior to the hearing. At the time of the termination hearing Father's earliest possible release date from prison was 2028, but because of pending criminal cases, his release date will be beyond that.

[20] Father argues that, because the foster mother indicated that she could no longer care for Child, DCS was in the same position whether the continuance had been granted or not, and there would be no delay in Child's permanency. Father's incarceration and inability to care for Child was the impetus for the petition to terminate his parental rights, and over the duration of the proceedings, there was no progress in righting those issues. We have recognized that delays in the adjudication of a case "impose significant costs upon the functions of government as well as an intangible cost to the lives of the children involved." *In re B.J.*, 879 N.E.2d 7, 17 (Ind. Ct. App. 2008) (quoting *Tillotson*, 777 N.E.2d at 745), *trans. denied*. In balancing Father's fundamental interest against the State's own compelling interest and given the minimal risk of error from the trial court's decision to deny Father's motion to continue the hearing, where Father was represented by counsel and was able to participate in the hearing with no evidence of impairment, we conclude that the trial court did not violate Father's due process right in denying his motion to continue the termination hearing.

[21] Further, in order to demonstrate that the denial of a motion to continue was an abuse of discretion, the moving party must show that he or she was prejudiced by the denial. *In re K.W.*, 12 N.E.3d at 244. Here, Father has not indicated

how the proceedings would have had a different outcome if he had been granted the continuance. He does not challenge the findings and conclusions of the trial court in its order terminating his parental rights. The trial court's decision to deny Father's motion to continue, absent a showing of prejudice by the denial, was not against the logic and effect of the facts and circumstances before the trial court. We conclude that the trial court did not abuse its discretion in denying Father's motion to continue the termination hearing.

[22] Affirmed.

Vaidik, J., and Tavitas, J., concur.