MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Jessica L. Richert
Dudas Law
Richmond, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

David E. Corey
Robert H. Henke
Deputy Attorneys General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

In the Matter of the Termination of the Parent-Child Relationship of J.S., Father, M.S., Mother,[1] and J.S. and M.S., Minor Children,

J.S.,

Appellant-Respondent,

v.

March 10, 2021

Court of Appeals Case No. 20A-JT-1778

Appeal from the Wayne Superior Court

The Honorable Darrin M. Dolehanty, Judge
The Honorable Kaarin M. Lueck, Magistrate

[1] Mother is not participating in this appeal because after the Indiana Department of Child Services sought to terminate her parental rights, Mother consented to the adoption of J.S. and M.S. However, because Mother was a party of record in the juvenile court, she is a party on appeal. *See* Ind. Appellate Rule 17(A).

Indiana Department of Child Services, *Appellee-Petitioner*.	Trial Court Cause Nos. 89D03-2005-JT-11 89D03-2005-JT-12

Kirsch, Judge.

[1] J.S. ("Father") appeals the juvenile court's termination of his parental rights to his children, J.S. and M.S. (collectively, "Children"). On appeal, he raises two issues, which we restate as:

> I. Whether the juvenile court committed clear error in determining there was a reasonable probability that the conditions that led to the removal of Children would not be remedied; and
>
> II. Whether the juvenile court violated Father's right to due process.

[2] We affirm.

Facts and Procedural History

[3] Father and Mother (collectively, "Parents") were together as a couple for about four years. *Appellant's App. Vol. II* at 144. J.S. was born on February 2, 2013, and M.S. was born on April 6, 2015. *Id*. at 141-42. Throughout Mother and

Father's relationship, Mother was the victim of domestic violence perpetrated by Father, and Children witnessed incidents of domestic violence more than once. *Id*. at 142. This included Father hitting Mother and calling her names, including "b*tch" and wh*re." *Id*. at 144. This upset Children, and J.S. cried or acted out when these incidents occurred. *Id*. Father hit J.S. a few times "in anger," including blows to J.S.'s buttocks and head. *Id*. Mother failed to notify law enforcement about the domestic violence against her and J.S. *Id*. Father used marijuana more than once in the home when Children were there. *Id*.

[4] Father took a drug screen, and on July 4, 2016, it returned positive for THC and cocaine. *Id*. Three days later, the Indiana Department of Child Services ("DCS") removed Children because Parents were arrested and "were abusing controlled substances." *Id*. Mother was arrested because she lied to police about Father's location. *Tr. Vol. II* at 41. Police were looking for Father because "he was involved in a robbery." *Id*. Another drug screen for Father tested positive for THC. *Appellant's App. Vol. II* at 144.

[5] DCS filed petitions alleging that Children were children in need of services ("CHINS") on July 11, 2016, because Children and the home were dirty, and the home "had dangerous objects within the reach of the children." *Id*. DCS also filed the petitions due to the domestic violence and Parents' use of illegal substances. *Id*. The juvenile court adjudicated Children as CHINS on August 16, 2016, based on Parents' admissions, including Father's admission that he "has a substance abuse problem, was currently incarcerated, and was incapable of caring for the children due to incarceration." *Id*. The juvenile court signed

dispositional orders on September 12, 2016 and ordered Father, who remained incarcerated at the Wayne County Jail, to: 1) sign necessary releases so the DCS family case manager ("FCM") can monitor compliance; 2) not use illegal controlled substances and submit to random drug screens; 3) obey the law; and 4) participate in the Father Engagement program or other case management services to the extent recommended by the service provider and as allowed by the Wayne County Sheriff or the Indiana Department of Correction ("DOC"). *Ex. Vol.* at 64-65, 68-69.

[6] Since July 7, 2016, Father has consistently remained incarcerated either in the Wayne County Jail or DOC. *Appellant's App. Vol. II* at 143. By the time of the September 2016 dispositional hearing, DCS had referred Father to Father Engagement Services and a substance abuse assessment while he was incarcerated in the Wayne County Jail. *Id*. at 145. Father had completed the assessment and was participating in the Father Engagement program. *Id*.; *Ex. Vol*. at 68, 104.

[7] On May 3, 2017, only nine months after Children were declared CHINS, Father was convicted of aiding, inducing, or causing attempted burglary, a Level 2 Felony, and was sentenced to fifteen years of incarceration, with five years suspended to probation. *Appellant's App. Vol. II* at 143. Around the same time, Father was transferred to DOC. *Ex. Vol*. at 192. At the time of the fact-finding hearing, Father's earliest possible release date was July 6, 2023. *Appellants App. Vol. II* at 143. Meanwhile, well before the fact-finding hearing, FCM Jamie Quire ("FCM Quire") sent photos of Children and court reports to

Father at DOC. *Tr. Vol. II* at 211, 228. Both FCM Quire and her predecessor, FCM Terri Witham ("FCM Witham"), spoke with Father's DOC case managers so they could keep Father updated about the case and Children. *Id.* at 211. Father also received copies of the case plans. *Id.* DCS did not refer Father for services after he was transferred to DOC because "DCS cannot refer services at [DOC]." *Appellant's App. Vol. II* at 145. Even so, FCM Quire inquired with Father's DOC case managers about what programs DOC offered and any programs in which Father could participate. *Tr. Vol. II* at 222.

[8] Father participated in educational programs at DOC, and his time of incarceration was reduced twice for completing a literacy program and a GED. *Appellant's App. Vol. II* at 143. Father, however, was also found guilty of conduct violations at DOC resulting in the loss of his earned credit time. *Id.* The violations included:

> a. In 2017, Father was disciplined twice for refusing a work assignment, both C-level conduct violations.
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> b. In 2018, Father was disciplined for disruptive behavior and refusing an assignment, both C-level conduct violations.
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> c. On June 5, 2019, Father [pleaded] guilty to Possession-Solicitation of Unauthorized Personal Information, for which Father received sanctions, including earned credit time deprivation of thirty (30) days, suspended, a B-level conduct violation.

> d. In December 2019, Father was disciplined for an Unauthorized Financial Transaction, a B-Level conduct violation.
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> e. On February 28, 2020, Father [pleaded] guilty to Counterfeit Documents, for which Father received sanctions, including earned credit time deprivation of sixty (60) days, a B-Level conduct violation.
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> f. On June 22, 2020, Father [pleaded] guilty to Use-Possession of Controlled Substance, for which Father received sanctions, including earned credit time deprivation of ninety (90) days, a B-Level conduct violation.

Id. Because of his two B-level conduct violations, Father was not eligible to participate in Recovery While Incarcerated ("RWI"), which was the only substance abuse treatment program at Plainfield Correctional Facility where Father was incarcerated. *Id*.

[9] Meanwhile, Father had participated in the Plus Program, a character and faith-based program, from October 3, 2018, to December 10, 2019. *Id*. The Plus Program was a completely separate program from RWI. *Tr. Vol. II* at 128. Father's participation in Plus Program "was terminated after it was determined that Father was inappropriate for the services, and Father's application for reenrollment was denied." *Appellant's App. Vol. II* at 143. However, even though Father was eligible to participate in other programs – AA/NA, Inside/Outside Dads, and anger management – he chose to not do so. *Id*.

[10] In May 2020, Father was placed on a psychiatric watch at DOC after he communicated with a friend about his suicidal ideation. *Id*. Despite this, Father did not believe he needed any type of mental health treatment. *Tr. Vol. II* at 138. Later, when Father received notice that Mother signed the adoption consent forms, Father "threatened to kill Mother, 'lay down' Mother's boyfriend [S.T.], and take the children from the current foster placement, which made Mother afraid." *Appellant's App. Vol. II* at 143. Mother planned on getting a restraining order against Father, and she had registered so she can be notified when Father is released from DOC. *Id*.

[11] Father, throughout the CHINS cases, had requested parenting time with Children. *Id*. at 145. The juvenile court's eventual findings regarding visitation, in its order terminating Father's parental rights, included:

> 60. Before cellphones were banned from the Wayne County Courthouse, Foster Mother showed Father pictures of [Children] before and after hearings.
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> 61. Foster Mother gave pictures of [Children] to the assigned FCMs to send to Father.
>
> 62. Father has only been included in one (1) Child and Family Team Meeting (CFTM), which was held in June 2020, during which parenting time via Zoom was discussed.
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> 63. The DCS did not arrange Father's parenting time, in part, because: a. Father's [DOC] case manager did not respond to FCM Jamie Quire to arrange for the video or telephonic parenting time; b. the DCS allotted money for Father to pay for

> the video or telephone calls, but the DCS did not transfer the money to the [DOC]; c. the DCS could not figure out how to ensure that the money was only used by Father for parenting time calls, and not general commissary purchases; and d. FCM Quire did not believe that Father should have contact with the children.
>
> 64. Father has not sent letters or cards to [Children].

Id. FCM Quire testified that setting up visits at DOC was "very complicated." *Tr. Vol. II* at 225. FCM Quire was still trying to work with DOC at the time of the termination fact-finding to arrange visits. *Id*.

[12] On September 28, 2016, Children were placed with foster parents ("Foster Parents"). *Appellant's App. Vol. II* at 145. At the time of the August 6, 2020 fact-finding hearing, M.S. was five years old. *Id*. at 141. She had a significant speech impediment and received weekly speech therapy. *Id*. at 142. She also had slow cognitive processing and had an Individualized Education Plan at preschool. *Id*. She also exhibited some negative behaviors – bedwetting, crying for no reason, and she was "very unhappy" – during a trial home visit with Mother. *Tr. Vol. II* at 133-34, 219-20.

[13] On May 11, 2020, DCS filed petitions to terminate Parents' parental rights. *Appellant's App. Vol. II* at 26, 36. The fact-finding hearing on the petitions was held on August 6, 2020. *Tr. Vol. II* at 32. J.S. was seven years old at the time of the fact-finding hearing. *Appellant's App. Vol. II* at 142. He had significant, ongoing medical needs due to being born with gastroschisis (at birth his

intestines were outside his body) and saw a specialist at Riley Children's Hospital. *Id*. He also had mental health needs:

> 9. [J.S.] has significant, ongoing mental health needs due to diagnoses of Reactive Attachment Disorder, Post-Traumatic Stress Disorder, and Attention Deficit/Hyperactivity Disorder.
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> 10. [J.S.] [has been] prescribed Adderal, Resperdone, and Tenex for his mental health needs.
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> 11. [J.S.] gets angry easily, has a hard time showing emotions other than anger, is often irrational without thinking of the consequences of behaviors, and does better when around the same people with a structured routine.
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> 12. [J.S.] receives individual therapy and family therapy with [J.S.'s] foster parents . . . as well as counseling assistance at least four (4) days per week while [J.S.] is at school.
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> . . . .
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> 14. In January 2020, [J.S.] was admitted to the Cincinnati Children's Hospital after [J.S.] attacked two (2) children, including another child in the [Foster Parents'] home, who required seven (7) stitches in his head.
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> . . . .
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> 18. [Foster Parents] received special training to help [J.S.], including new ways to discipline [J.S.] as the [Foster Parents] could not use the same discipline methods used with the [Foster Parents'] other children.

> 19. [J.S.] was suspended from kindergarten several times . . . and had to repeat kindergarten.
>
> 20. [J.S.] has advanced to first grade during the 2020-2021 academic year.

Id. The incident that led to J.S.'s admission to Cincinnati Children's Hospital occurred when Foster Parents were on vacation. *Tr. Vol. II* at 69-70. Foster Mother believed that the incident would not have happened if Foster Father, who normally drove Children's school bus, had been there. *Id*. She testified that J.S. "does better with the same routine, the same people, same structure." *Id*. at 69.

[14] Karen Bowen ("Bowen") was the director of the CASA program in Wayne County. *Id.* at 96. She opposed starting visits between Children and Father because of J.S.'s negative reactions to Father. *Id*. at 106-07. The other participants in a Child and Family Team Meeting shared the same concerns. *Id*. at 213. Bowen testified that when J.S. remembered events about Father and Mother, he "gets angry." *Id*. at 99.

[15] Chris Stamm ("Stamm") was J.S.'s therapist, and when he started discussing Father with J.S. during their sessions, J.S.'s negative behaviors increased; J.S. would wet the bed, destroy property in the Foster Parents' home, and attacked another child in the foster home. *Appellant's App. Vol. II* at 142. Therefore, Stamm and J.S. stopped discussing Father during therapy sessions. *Id*. During the June 2020 Child and Family Team Meeting, Stamm encouraged contact

between J.S. and Father but said the process of reinstating visitation should proceed slowly. *Id*. Despite entertaining the possibility of reinstating visitation between Father and J.S., Stamm would be very concerned if J.S. were to be removed from Foster Parents' care. *Tr. Vol. II* at 116, 119. Stamm explained that while in the care of Foster Parents, J.S. was "in a very stable, structured environment" where his needs were being met, J.S. loves Foster Parents, and Children were placed together with Foster Parents. *Id*. at 116. FCM Quire also testified that Children need permanency. *Id*. at 220. If the juvenile court granted DCS's petitions to terminate Father's parental rights, DCS's plan was adoption, and Foster Parents were prepared to adopt Children. *Id*. at 61, 75, 220.

[16] Stamm testified that J.S. needed continued, ongoing therapy. *Id*. at 117. Father, however, "does not believe that J.S. needs ongoing services, because J.S. has the same diagnoses as Father, and Father can teach J.S. how to cope without services." *Appellant's App. Vol. II* at 143. When FCM Quire spoke to Father about J.S.'s negative behaviors when Father was discussed, Father told FCM Quire, "I don't care, I want to see my kids, I want to talk to my kids." *Tr. Vol. II* at 223-24.

[17] Bowen recommended termination of Father's parental rights partly because termination was in the best interests of Children. *Appellant's App. Vol. II* at 145. She noted that waiting until Father was released from prison and completed the necessary services upon release from prison would significantly delay creation of a permanent situation for Children and that such a significant delay would

negatively impact Children. *Id.*; *Tr. Vol. II* at 98-99, 103. J.S. had been in Foster Parents' home since he was three years old, and Foster Parents had met his physical, emotional, and mental health needs. *Tr. Vol. II* at 97. M.S. had been in the same home since she was only a year old; Foster Parents were her "mom" and "dad." *Id*. Bowen recommended Children remain with and be adopted by Foster Parents. *Id*. at 96. Children had bonded with each other and with Foster Parents. *Appellant's App. Vol. II* at 145.

[18] On August 26, 2020, the juvenile court entered its termination order and concluded as to Father:

> 1. [Children] have been removed from Mother's and Father's homes, and under the supervision of the DCS, by way of a Dispositional Order, for forty-[seven] (47) months.
>
> 2. [Children] have been removed from Mother's and Father's homes, and under the supervision of the DCS, for the past forty-eight (48) months.
>
> 3. There is **a** reasonable probability that the conditions that resulted in the [removal of Children], including Father's substance abuse, will not be remedied. As recently as June 2020, Father abused controlled substances while at the [DOC].
>
> 4. There is a reasonable probability that continuation of the parent-child relationship as to Father poses a threat to the well-being of [Children].
>
> 5. Termination of the parent-child relationship as to Father is in the . . . best interests [of Children].

. . . .

7. There is a satisfactory plan of care and treatment of [Children].

Id. at 145-46. Father now appeals. We will provide additional facts as necessary.

Discussion and Decision

[19] As our Supreme Court has observed, "Decisions 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 his child and parental rights are of a constitutional dimension, the law allows for the termination of those rights when a parent is unable or unwilling to meet his responsibility as a parent. *Bester v. Lake Cnty. Office of Family & Children*, 839 N.E.2d 143, 145 (Ind. 2005); *In re T.F.*, 743 N.E.2d 766, 773 (Ind. Ct. App. 2001), *trans. denied*. 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 of terminating parental rights is not to punish the parent but to protect the child. *In re D.P.*, 994 N.E.2d 1228, 1231 (Ind. Ct. App. 2013). 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 his physical, mental, and social development is permanently impaired before terminating the parent-child relationship. *Id*.

[20] When reviewing a termination of parental rights case, we will not reweigh the evidence or judge the credibility of the witnesses. *In re H.L.*, 915 N.E.2d 145, 149 (Ind. Ct. App. 2009). Instead, we consider only the evidence and reasonable inferences that are most favorable to the judgment. *Id*. Moreover, in deference to the juvenile 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. A judgment is clearly erroneous only if the legal conclusions made by the juvenile court are not supported by its findings of fact, or the conclusions do not support the judgment. *In re S.P.H.*, 806 N.E.2d 874, 879 (Ind. Ct. App. 2004).

[21] Where the juvenile court enters specific findings and conclusions, we determine whether the evidence supports the findings, and second, we determine whether the findings support the judgment. *In re B.J.*, 879 N.E.2d 7, 14 (Ind. Ct. App. 2008), *trans. denied*. 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. *A.D.S. v. Ind. Dep't of Child Servs.*, 987 N.E.2d 1150, 1156 (Ind. Ct. App. 2013), *trans. denied.* Here, however, because Father does not claim the findings are not supported by the evidence in the record, we need only determine whether the

findings support the juvenile court's legal conclusions. *See Madlem v. Arko*, 592 N.E.2d 686, 687 (Ind. 1992) (Unchallenged findings "must be accepted as correct.").

[22] Before an involuntary termination of parental rights may occur, DCS is required to allege and prove:

> (A) that one (1) of the following is true:
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> (i) The child has been removed from the parent for at least six (6) months under a dispositional decree.
>
> (ii) A court has entered a finding under IC 31-34-21-5.6 that reasonable efforts for family preservation or reunification are not required, including a description of the court's finding, the date of the finding, and the manner in which the finding was made.
>
> (iii) The child has been removed from the parent and has been under the supervision of a local office or probation department for at least fifteen (15) months of the most recent twenty-two (22) months, beginning with the date the child is removed from the home as a result of the child being alleged to be a child in need of services or a delinquent child;
>
> (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 child in need of services;

(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). DCS's burden of proof for establishing these allegations is clear and convincing evidence. *H.L.*, 915 N.E.2d at 149. Moreover, if the court finds that the allegations in a petition are true, the juvenile court shall terminate the parent-child relationship. Ind. Code § 31-35-2-8(a).

[23] Here, Father contends that the juvenile court committed clear error in determining there was a reasonable probability that the conditions that led to the removal of Children would not be remedied.[2] The juvenile court's relevant finding stated: "There is a reasonable probability that the conditions that resulted in the children's removal, including Father's substance abuse, will not

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[2] Because Indiana Code section 31-35-2-4 (b)(2)(B) is written in the disjunctive, we may affirm the termination of Father's parental rights if DCS proved only one of the elements of subsection (b)(2)(B) by clear and convincing evidence. *See K.E. v. Ind. Dep't of Child Servs.*, 39 N.E.3d 641, 646 n.4 (Ind. 2015). Therefore, we need not consider whether "[t]here is a reasonable probability that the continuation of the parent-child relationship poses a threat to the well-being of [Children]" or that Children have "on two (2) separate occasions, been adjudicated a child in need of services." *See* Ind. Code § 31-35-2-4(b)(2)(ii), (iii).

be remedied. As recently as June 2020, Father abused controlled substances while at the [DOC]." *Appellant's App. Vol. II* at 145. In determining whether there is a reasonable probability that the conditions that led to a child's removal and continued placement outside the home would not be remedied, we engage in a two-step analysis. *K.T.K. v. Ind. Dep't of Child Servs.*, 989 N.E.2d 1225, 1231 (Ind. 2013). First, we determine what conditions led to the child's placement and retention in foster care, and, second, we determine whether there is a reasonable probability that those conditions will not be remedied. *Id.* We consider not only the initial reasons the child was removed but also any basis resulting in the continued placement outside of a parent's home. *In re N.Q.*, 996 N.E.2d 385, 392 (Ind. Ct. App. 2013). In the second step, the juvenile court must judge a parent's fitness at the time of the termination proceeding, considering evidence of changed conditions and balancing a parent's recent improvements against habitual patterns of conduct to determine if there is a substantial probability of future neglect or deprivation. *E.M.*, 4 N.E.3d at 643. The juvenile court has discretion to weigh a parent's prior history more heavily than efforts made only shortly before termination. *Id.* at 642-43. "Requiring trial courts to give due regard to changed conditions does not preclude them from finding that parents' past behavior is the best predictor of their future behavior." *Id.* at 463. Pursuant to this rule, "trial courts have properly considered evidence of a parent's prior criminal history, drug and alcohol abuse, history of neglect, failure to provide support, and lack of adequate housing and employment." *In re D.B.*, 942 N.E.2d 867, 873 (Ind. Ct. App. 2011). In addition, DCS need not provide evidence ruling out all

possibilities of change; rather, it need establish only that there is a reasonable probability the parent's behavior will not change. *In re Kay L.*, 867 N.E.2d 236, 242 (Ind. Ct. App. 2007).

[24] When determining whether there was a reasonable probability that the conditions that led to the removal would be remedied, a juvenile court may consider the parent's response to the offers of help, including services offered by DCS and the parents' response to those services. *D.B.,* 942 N.E.2d at 873. "A pattern of unwillingness to deal with parenting problems and to cooperate with those providing social services, in conjunction with unchanged conditions, support a finding that there exists no reasonable probability that the conditions will change." *Lang v. Starke Cnty. Office of Family & Children*, 861 N.E.2d 366, 372 (Ind. Ct. App. 2007), *trans. denied*.

[25] Father argues, more specifically, that the juvenile court committed clear error in finding that the conditions that led to removal of Children would not be remedied because the juvenile court overlooked positive steps Father had taken since Children were removed. For instance, Father observes that he had participated in services offered by DCS as long as those services were available to him. Father also notes that during his incarceration in a DOC facility, he had earned credit time by participating in a literacy program and by obtaining a GED. *See Tr. Vol. II* at 189. Father also contends that even though his earliest release date is not until July 2023, this should not count against him on the issue of whether the there was a reasonable probability that the conditions that led to removal of Children would not be remedied. In support, he analogizes

his situation to that of the father in *K.E. v. Indiana Department of Child Services*, 39 N.E.3d 641, 643 (Ind. 2015), which held, among other things, that incarceration, standing alone, is an insufficient basis for terminating parental rights. *Id*. The father in *K.E.* was incarcerated when the CHINS case began. *Id*. Because of the father's incarceration, DCS provided services only to the mother. *Id*. In finding there was a reasonable probability that the reasons for removal would not be remedied, the juvenile court found, in part: 1) the father was unable to receive services from DCS because he was incarcerated; 2) the father had a long criminal history; 3) the father's release date was more than two years after the date of the fact-finding hearing; and 4) the father had a history of drug and alcohol use. *Id*. at 647. The Indiana Supreme Court, however, reversed the termination of parental rights, stating, in part:

> Although at the time of the termination hearing [the father's] possible release was still over two years away[,] that alone is insufficient to demonstrate that the conditions for removal will not be remedied. Indiana courts have upheld parental rights of incarcerated parents who still had a year or more to serve before possible release, and we have not established a bright-line rule for when release must occur to maintain parental rights.

Id. at 648. Here, Father contends that, as in *K.E.*, the fact that he was incarcerated and that his earliest possible release date was July 2023, two years and eleven months after the fact-finding hearing, did not justify the trial court's finding that the conditions that led to the removal of Children would not be remedied.

[26] We reject Father's claim that the juvenile court committed clear error in determining there was a reasonable probability that the reasons Children were removed from the home would not be remedied. We first observe that Children were removed because of Father's admissions that he had a substance abuse problem, was currently incarcerated, and was incapable of caring for the children due to his incarceration. *Appellant's App. Vol. II* at 144. Since Children were removed from the home, Father had taken few steps, if any, to remedy his drug problem and his proclivity for committing crimes or violations of DOC rules, both of which have prolonged his period of incarceration.

[27] As to Father's lack of progress on his substance abuse problems, on June 22, 2020, just six weeks before the fact-finding hearing, Father violated DOC rules regarding controlled substances and thus pleaded guilty to Use-Possession of Controlled Substance; Father's sanction included a ninety-day deprivation of credit time. *Id.* at 143. Moreover, while at DOC, Father chose to not participate in programs offered by DOC that could have helped him with his substance abuse problems such as AA/NA. *Id*. It is true that early in his period of incarceration, while confined at the Wayne County Jail, Father completed a substance abuse assessment and a program called "Father Engagement Services." *Id*. at 145. However, it was the prerogative of the juvenile court to assign less weight to this evidence and more weight to the evidence regarding Father's chronic substance abuse problems.

[28] As to Father's incarceration as a reason for the removal of Children, Father has made little to no progress in refraining from criminal activity or in squandering

credit time by violating DOC rules. On May 3, 2017, just nine months after the juvenile court found that Children were CHINS, Father was convicted of aiding, inducing, or causing attempted burglary, a Level 2 felony. *Id.* at 143-44. His fifteen-year sentence, with five years suspended to probation, increased the time that Father was away from Children and furthered delayed his participation in programs that once he is eventually released from DOC, could, at least theoretically, make him a positive influence in the lives of Children. *See id*. at 143. Admittedly, Father received some credit time at DOC for completing a literacy program and obtaining a GED, but he lost a significant amount of credit time, 180 days, by committing eight violations of DOC rules between June of 2017 and June 2020. *Id*. The juvenile court was free to assign more weight to Father's multiple violations of DOC rules that resulted in significant loss in credit time than to the credit time Father earned from obtaining his GED and participating in a literacy program.

[29] These details about Father's drug problems and counterproductive behavior while incarcerated show that his reliance on *K.E.* to reverse the termination of his parental rights is misplaced. While it is true that Father and the father in *K.E.* both had drug problems and were incarcerated, the similarity between the cases ends there. Unlike Father, the father in *K.E.* had pursued every avenue possible to complete programs to better prepare himself for parenthood and a drug-free lifestyle after being released. *K.E.*, 39 N.E.3d at 651. Among other things, the father in *K.E.* participated in fourteen remedial programs, including 1) Alcoholics Anonymous and Narcotics Anonymous; 2) The Spiritual Literacy

Program; 3) Community Service (more than 230 hours); 4) Prevention and Relationship Enhancement Program; 5) Financial Planning; 6) The Seven Habits of Highly Effective People; and 7) Responsible Parenting. *Id*. at 648-49. Thus, instead of supporting Father's argument that we should reverse the termination of his parental rights, *K.E.* highlights how inadequate Father's efforts have been to deal with his drug problem and to reduce his time of incarceration, or at the very least, not increase the time of his incarceration. Accordingly, the trial court did not commit clear error in determining that there was a reasonable probability that the factors that led to the removal of Children would not be remedied.

[30] Moreover, even though Father does not argue that the juvenile court committed clear error in finding that termination of Father's parental rights was in the best interest of Children, we briefly observe that Father's inability, or refusal, to remedy the factors that led to the removal of Children supports the juvenile court's finding that termination was, indeed, in the best interest of Children, both of whom have special needs. For instance, because M.S. has a significant speech impediment and slow cognitive processing, she has an Individualized Education Plan and received weekly speech therapy. *Appellant's App. Vol. II* at 142. J.S. has significant, ongoing medical needs due to being born with gastroschisis; at birth, his intestines were outside his body, and he sees a specialist at Riley Children's Hospital. *Id.* He also has mental health needs, because of Reactive Attachment Disorder, Post-Traumatic Stress Disorder, and Attention Deficit/Hyperactivity Disorder and is on several medications for his

mental illnesses. *Id*. J.S. needs continued, ongoing therapy, but Father does not believe J.S. needs services because, according to Father, J.S. "has the same diagnoses as Father, and Father can teach J.S. how to cope without services." *Id*. at 143. Because of these acute needs, J.S. needs stability and a predictable routine. *Id*. at 142; *Tr. Vol. II* at 69. Thus, Father's failure to remedy the factors that led to the removal of Children from the home support the trial court's determination that termination of Father's parental rights was in the best interest of children.

II. Due Process

[31] Father argues that his right to due process was violated because DCS failed to provide services for him. Because Father did not raise this issue in the juvenile court, Father has waived this issue on appeal. *See In re N.G.*, 51 N.E.3d 1167, 1173 (Ind. 2016) ("[A] party on appeal may waive a constitutional claim, including a claimed violation of due process rights, by raising it for the first time on appeal."). Father has also waived this claim for failure to cite legal authority. While Father does cite cases that discuss general due process principles within the context of termination of parental rights, Father fails to cite legal authority that relates to his specific due process allegations. Thus, he has waived the due process issue for failure to make a cogent argument. "The argument must contain the contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be supported by citations to the *authorities*, *statutes*, and the Appendix or parts of the Record on Appeal relied on, in accordance with Rule 22." Ind. Appellate Rule 46(A)(8)(a)

(emphasis added); *see also Jarman v. State*, 114 N.E.3d 911, 915 n.2 (Ind. Ct. App. 2018), *trans. denied*.

[32] Nonetheless, we will address Father's arguments on the merits. When the State seeks to terminate parental rights, it must provide the parents with "fundamentally fair procedures." *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982). This includes a heightened standard of proof, which is clear and convincing evidence. *Id*. at 769. 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 (1976). The process that is 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 DCS's chosen procedure; and (3) the countervailing governmental interest supporting use of the challenged procedure. *In re C.G.*, 954 N.E.2d 910, 917 (Ind. 2011).

[33] Father, in more specific terms, argues that his right to due process was violated because DCS failed to make reasonable efforts to preserve and unify his family. He cites Indiana Code section 31-34-21-5.5, which provides, in part: "[T]he department shall make reasonable efforts to preserve and reunify families." We find this argument unpersuasive. The Indiana Supreme Court has ruled that in seeking termination of parental rights, DCS has no obligation "to plead and prove that services have been offered to the parent to assist in fulfilling parental obligations." *S.E.S. v. Grant Cnty. Dep't of Welfare*, 594 N.E.2d 447, 448 (Ind. 1992). Similarly, "although '[t]he DCS is generally required to make

reasonable efforts to preserve and reunify families during the CHINS proceedings,' that requirement under our CHINS statutes 'is not a requisite element of our parental rights 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 J.W., Jr.*, 27 N.E.3d 1185, 1190 (Ind. Ct. App. 2015) (quoting *H.L.*, 915 N.E.2d at 148 n.3), *trans. denied* (internal emphasis removed). Similarly, while a case is pending, DCS is not required to provide services to incarcerated parents. *Rowlett v. Vanderburgh Cnty. Office of Family & Children*, 841 N.E.2d 615, 622 (Ind. Ct. App. 2006), *trans. denied*.

[34] Father makes a similar argument in claiming that DCS failed to meet its duties under a different statute, Indiana Code section 31-34-15-4(7), which requires a case plan to describe services for a parent and child if the parent is incarcerated:

> A child's case plan . . . must include a description and discussion of the following:
>
> . . . .
>
> (7) If the parent of a child is incarcerated:
>
> (A) the services and treatment available to the parent at the facility at which the parent is incarcerated; and
>
> (B) how the parent and the child may be afforded visitation opportunities, unless visitation with the parent is not in the best interests of the child.

Id. Despite the requirements of this statute, Father contends that he was never given appropriate services, including the opportunity to visit with Children. He also contends that while Mother was given opportunities to visit Children, he was not.

[35] This argument is unavailing for two reasons. First, Indiana Code section 31-34-15-4(7) did not take effect until July 1, 2019. *See id*. Here, the case plans that were admitted as evidence were created and filed in 2017 and 2018, and the last on June 20, 2019 – all before the statute's effective date. *See Ex. Vol.* at 107, 115, 139, 155, 172.

[36] Second, DCS made reasonable efforts to arrange services for Father. DCS referred Father for services while he was incarcerated in the Wayne County Jail, but when Father was transferred to DOC, DCS could no longer arrange services for him. *Appellant's App. Vol. II* at 145. Nonetheless, FCMs Terri Witham and FCM Quire spoke with Father's DOC case managers so they could keep Father updated about the case and Children. *Tr. Vol. II* at 188, 211, 221-22. FCM Lesley Hamilton-Williams also spoke with Father about his ability to participate in DOC services. *Id*. at 13. Indeed, Father had the ability to participate in other services, such as AA/NA, Inside/Outside Dads, and anger management but chose to not do so. *Appellant's App. Vol. II* at 143. Father also received copies of the case plans as well as pictures of Children, as he requested. *Tr. Vol. II* at 211, 223. FCM Quire also spoke with the DOC case managers about what programs DOC offered and what was available for Father. *Id*. at 222.

[37] DCS also made efforts to arrange visitation for Father. We first note that DCS was reluctant to arrange visits for fear of upsetting Children, especially J.S. Bowen opposed starting visits between Children and Father because of J.S.'s negative reactions to Father. *Id.* at 96, 106-07. The other participants in Child and Family Team Meetings shared these concerns. *Id*. at 213. Stamm, J.S.'s therapist, also had concerns about arranging visits. When Stamm discussed Father with J.S., J.S.'s negative behaviors increased; J.S. would wet the bed, destroy property in the Foster Parents' home, and he attacked another child in the foster home. *Appellant's App. Vol. II* at 142. Stamm eventually encouraged contact between J.S. and Father but said the process of reinstating visitation would have to proceed slowly. *Id*.

[38] Even so, DCS did attempt to arrange visits for Father with Children, but these efforts were unsuccessful. *Id.* at 145. Even up to the point of the fact-finding hearing, FCM Quire was still trying to work with DOC to arrange visitation but setting up visits at a DOC facility was "very complicated." *Tr. Vol. II* at 225. To the extent that Mother was able to visit Children and Father was not, because he was incarcerated, we note that "[i]ndividuals who pursue criminal activity run the risk of being denied the opportunity to develop positive and meaningful relationships with their children." *K.T.K.*, 989 N.E.2d at 1235-36 (quoting *In re A.C.B.*, 598 N.E.2d 570, 572 (Ind. Ct. App. 1992)). Thus, the juvenile court could have concluded that DCS made reasonable efforts to arrange visitation for Father and Children. Therefore, we reject Father's argument that the juvenile court denied his right to due process.

[39] In sum, Father has failed to show that the juvenile court's findings of fact do not support its conclusions of law. *See S.P.H.*, 806 N.E.2d at 879. Thus, Father has failed to establish that the juvenile court's conclusions do not support the judgment, and, consequently, he has failed to show that the trial court committed clear error in terminating his parental rights. *See id*.; *H.L.*, 915 N.E.2d 148-49.

[40] Affirmed.

Bradford, C.J., and May, J., concur.