MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In the Termination of the Parent-Child Relationship of: J.M. (Minor Child), and W.M. (Father),

Appellant-Defendant,

v.

Indiana Department of Child Services,

Appellee-Plaintiff.

June 30, 2023

Court of Appeals Case No. 23A-JT-43

Appeal from the Washington Superior Court

The Honorable Frank Newkirk, Jr., Judge

Trial Court Cause No. 88D01-2203-JT-77

Memorandum Decision by Judge Brown
Judge Crone and Senior Judge Robb concur.

Brown, Judge.

[1] W.M. ("Father") appeals the involuntary termination of his parental rights with respect to his child, J.M. We affirm.

Facts and Procedural History

[2] Father and A.G. ("Mother") are the parents of J.M., who was born in April 2017. J.M. was born exposed to illegal substances. The Indiana Department of Child Services ("DCS") attempted an informal adjustment in June 2017 and J.M. was detained due to ongoing drug use and criminal matters. DCS alleged that J.M. was a child in need of services ("CHINS"). Father tested positive on multiple drug screens in 2017 and 2018 including methamphetamine and marijuana. The case was closed successfully after a trial home visit with Father in 2020.

[3] On January 4, 2021, DCS filed a verified petition alleging J.M. was a CHINS. DCS alleged: it received a report on September 2, 2020, that Mother had been arrested for operating a vehicle while intoxicated while J.M. was in the car; Mother admitted to the use of heroin and tested positive for methamphetamine, heroin, and marijuana; Mother agreed to participate in an informal adjustment; Mother tested positive for fentanyl on fifteen drug screens over the course of two months during the informal adjustment; C.T., Mother's long-time boyfriend, tested positive for fentanyl on fourteen drug screens over the course of two months; and Father was arrested on December 17, 2020, and remained

incarcerated at the Washington County Jail on charges of dealing in and possession of methamphetamine.

[4] On March 9, 2021, Father and Mother admitted that J.M. was a CHINS. On April 13, 2021, the court entered a Dispositional Order which stated:

> This order finds that the incarcerated parent has maintained a meaningful role in the child's life, and this order allows a reasonable opportunity for that parent to maintain that relationship by . . . ensuring that [Father] will be offered services during his incarceration to ensure that he is able to maintain sobriety and build parenting skills so that he is safe for the child.

Exhibits Volume III at 127. The court ordered Father to complete a parenting assessment and substance abuse assessment, follow all recommendations, and participate in "home based casework and therapy to address his stability and underlying needs." *Id.* at 133.

[5] On March 16, 2022, DCS filed a petition to terminate Father's parental rights.[1] On October 27 and November 4, 2022, the court held a factfinding hearing at which Father appeared with counsel virtually from the Wabash Valley Correctional Institution. DCS presented testimony of multiple witnesses including Jessica Lewis, a Family Case Manager Supervisor, Kalaina Baker, a case manager, Family Case Manager Tabitha McClain ("FCM McClain"), and Court Appointed Special Advocate Donna Collins ("CASA Collins"). The

[1] The record does not contain a copy of the petition.

court also admitted the charging informations and chronological case summaries related to certain criminal cases involving Father. Under cause number 88D01-2012-F3-843 ("Cause No. 843"), Father was convicted of dealing in methamphetamine as a level 4 felony related to events occurring in October 2020 and was sentenced on April 21, 2022, to seven years with an indication that the court would consider a modification after successful completion of Purposeful Incarceration. Under cause number 88D01-1809-F6-677 ("Cause No. 677"), Father pled guilty to resisting law enforcement as a level 6 felony in January 2019 related to events that occurred in September 2018. Under cause number 88C01-1408-F6-459, Father pled guilty to domestic battery in the presence of a child less than sixteen years old as a level 6 felony related to events occurring in August 2014 and later violated his probation after being convicted of counterfeiting as a level 6 felony under cause number 88C01-1707-F6-473 in 2017. Father testified that his "current out date" was March 16, 2026, according "to the CPCT time cuts that DOC's offering," he would receive 730 days resulting in a release date of March 14, 2024, and that he could apply for a modification after completing the RWI program, which if granted could result in his release in March or April 2023. Transcript Volume II at 210.

[6] On December 9, 2022, the court entered a twenty-three page order concluding that the reasons for removal or continued removal from the home had not been remedied, continuation of the parent-child relationship posed a serious threat to

J.M.s well-being, and termination of the parent-child relationship was in J.M.'s best interests.[2]

Discussion

[7] Father argues that DCS offered him no help or services while he was incarcerated which deprived him of his substantive due process right to raise his child and his procedural due process right to fair proceedings. He argues that there was no pressing reason why his parental rights should be terminated and DCS failed to prove that termination was in J.M.'s best interests.

[8] To the extent Father asserts DCS did not afford him due process, it has been established that, as a matter of statutory elements, DCS is not required to provide parents with services prior to seeking termination of the parent-child relationship. *In re T.W.*, 135 N.E.3d 607, 612 (Ind. Ct. App. 2019), *trans. denied*. However, parents facing termination proceedings are afforded due process protections. *Id.* We have discretion to address such due process claims even where the issue is not raised below. *Id.* CHINS and termination of parental rights proceedings "are deeply and obviously intertwined to the extent that an error in the former may flow into and infect the latter," and procedural irregularities in a CHINS proceeding may deprive a parent of due process with respect to the termination of his or her parental rights. *Id.* (citing *Matter of D.H.*, 119 N.E.3d 578, 588 (Ind. Ct. App. 2019), *aff'd in relevant part on reh'g*, *trans.*

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[2] The court's order found that Mother signed a consent to the adoption of J.M.

denied). *See also In re J.K.*, 30 N.E.3d 695, 699 (Ind. 2015) (holding "when the State seeks to terminate the parent-child relationship, it must do so in a manner that meets the requirements of due process") (quoting *In re G.P.*, 4 N.E.3d 1158, 1165 (Ind. 2014) (alteration and internal quotation marks omitted)).

[9] "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.* Thus, we turn to the risk of error created by the actions of DCS and the trial court. *See id.*

[10] With respect to DCS's provision of services, its policy manual provides directions regarding the provision of services and states: "Family services are provided to all children and families with an open case to address identified needs." Indiana Child Welfare Policy Manual, Ch. 5, Sec. 10 (Published May 11, 2023), https://www.in.gov/dcs/files/Child_Welfare_Policy_Manual.pdf

[https://perma.cc/BVX5-FNNV]. It provides: "An incarcerated parent may have access to and receive services and/or treatment while incarcerated. DCS will discuss and document any services and/or treatment available to the incarcerated parent, including visitation, in the Case Plan/Prevention Plan." *Id.* It also provides: "DCS will reassess the strengths and needs of the child and family throughout the life of the case and will adjust services, if necessary, to meet identified needs." *Id.*

[11] Ind. Code § 31-34-15-4, which Father cites on appeal, provides:

> A child's case plan must be set out in a form prescribed by the department that meets the specifications set by 45 CFR 1356.21. The 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.

[12] The trial court's order stated:

> 19. [Father] claims that he attempted to visit the child and asks this court to determine that DCS could have and should have made more efforts to maintain a relationship and support reunification. Prior court orders in the underlying CHINS cases were followed by DCS and there were specific findings that DCS

> had made appropriate efforts. It was [Father's] own actions leading to his incarceration and the trauma caused to his child that have undermined reunification efforts, not any specific action or lack of action by DCS.
>
> 20. [Father] has pointed to a good relationship with his child, but he has failed to take action to maintain this relationship while incarcerated, such as writing letters to the Child or by seeking assistance from the Court. . . .

Appellant's Appendix Volume II at 20-21.

[13] Lewis, the Family Case Manager Supervisor, testified that when she received a report in December, she attempted to meet with Father a few times at his home but was unsuccessful and was "finally able to meet with [Father] after he was arrested on December 15th of 2020." Transcript Volume II at 75. Lewis testified that Father was recommended for specific services but was not able to participate in most of them due to his incarceration. She stated Father was incarcerated during her entire involvement with the case and she spoke with him a few times. She testified that when she met with Father on December 16, 2020, he admitted to using substances and refused a drug screen indicating that it would be positive for methamphetamine, marijuana, and Xanax. When asked if she made any kind of progress in services with Father, she answered: "I was extremely restricted. The only . . . actual thing that we attempted, or that we were able to provide him is . . . phone calls . . . and contact with his daughter was done through his daughter's service provider . . . and even that was not very successful as [J.M.] would often refuse to engage in that interaction." *Id.* at 87. She later testified that Father "had the potential to be

incarcerated for a pretty significant amount of time due to his drug related charges that stemmed after . . . we got involved in this case." *Id.* at 89.

[14] On cross-examination, Lewis testified that "we were extremely limited as to what we could provide [Father] in the Washington County Jail." *Id.* at 94. When asked if therapy could not be provided by phone or video, she answered: "[N]ot at the time that I had it. I did not have . . . the ability to put . . . a provider in for him at that time." *Id.* Lewis testified that there were no services available to Father while he was incarcerated in the Washington County Jail outside of phone calls with J.M. She testified that visitation opportunities with J.M. were provided to Father "[t]o the best of our ability." *Id.* at 98. On redirect examination, Lewis testified that "J.M. was encouraged and we attempted to engage." *Id.* at 101-102. When asked if she made attempts to make contact between J.M. and Father, she answered:

> The service provider did. [A]dditionally I spoke with the service provider at one (1) point about attempting to see if there was a virtual option. . . . I'm not sure what the jail's software is called, but we attempted to see if that would be a potential . . . but I'm not sure that that was something that the service provider was able to accommodate.

Id. at 102. She also testified:

> We did not believe it . . . was appropriate for the child to be brought into the jail to have visits . . . based on her age, her history . . . and the fact that [J.M.] is [sic] just been in a lot of different places, and in and out of . . . DCS care her whole life. . .

> . [T]here were just concerns about what the potential for bringing this child to the jail might do.

Id.

[15] Baker, a case manager, testified that she supervised three visits which consisted of phone calls between J.M. and Father beginning in October 2021 through December 2021 while Father was incarcerated.[3] She stated the visits went well, J.M. "would act normal and talk to [Father] until the last one (1) in December," J.M. "started saying that she did not want to talk to [Father] at all and started running away from [her] and hiding from [her]." *Id.* at 43. She testified that calls were supposed to occur weekly but it was "very inconsistent" because Father would not call or J.M. would refuse to speak to him. *Id.* When asked why the phone calls did not continue after December 2021, she stated: "Because [J.M.] reported to me some stuff that was upsetting her and reminding her when she talked to [Father]." *Id.* She indicated that she tried to talk to J.M. about talking to Father on the phone but J.M. would run away and hide. She testified that she began therapeutic case management for J.M. in January 2021 because she was having some issues managing her emotions and was being violent toward her siblings. She indicated that J.M. "was not getting anywhere" and decided "to see if she would open up to a licensed therapist." *Id.* at 46. She also testified that J.M. described two incidences of trauma that

[3] On cross-examination, Baker indicated that she did not provide case management for Father.

occurred with Father in his home. On cross-examination, Baker was asked when efforts to help J.M. communicate with Father ceased, and she answered: "When [J.M.] just refused to talk about anything. She shut down completely and would not talk. She would run and hide . . . and would not talk to either me or her licensed therapist." *Id.* at 52.

[16] When asked what efforts she had made regarding providing services to Father while he was incarcerated, FCM McClain answered: "I myself have called the jail several times to ask if services were available to those who are incarcerated. I was told no. [A]nd then on 6/30 I spoke to Sheriff Miller myself and I asked him if in person or video visits were allowed and he told me no." *Id.* at 134. On cross-examination, FCM McClain stated she had a conversation with Sheriff Miller on visitations and "spoke to the jail itself a few times about services." *Id.* at 148. On redirect examination, FCM McClain indicated that it was fair to say that Father's incarceration prevented her from implementing services or visits. DCS's counsel asked: "[Y]ou did make efforts to engage in some of those things, it's just that you, you did not understand that incarceration . . . wouldn't . . . allow you to engage in any of that, correct?" *Id.* at 152. FCM McClain answered affirmatively. Under these circumstances, we cannot say that Father's due process rights were violated.

[17] In order to terminate a parent-child relationship, DCS is required to allege and prove, among other things:

> (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;
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> (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). If the court finds that the allegations in a petition described in Ind. Code § 31-35-2-4 are true, the court shall terminate the parent-child relationship. Ind. Code § 31-35-2-8(a).

[18] A finding in a proceeding to terminate parental rights must be based upon clear and convincing evidence. Ind. Code § 31-37-14-2. We do not reweigh the evidence or determine the credibility of witnesses but consider only the evidence that supports the judgment and the reasonable inferences to be drawn from the evidence. *In re E.M.*, 4 N.E.3d 636, 642 (Ind. 2014). We confine our review to two steps: whether the evidence clearly and convincingly supports the findings, and then whether the findings clearly and convincingly support the judgment. *Id.* We give due regard to the trial court's opportunity to judge the credibility of the witnesses firsthand. *Id.* "Because a case that seems close on a 'dry record' may have been much more clear-cut in person, we must be careful

not to substitute our judgment for the trial court when reviewing the sufficiency of the evidence." *Id.* at 640.

[19] In determining whether the conditions that resulted in a child's removal will not be remedied, we engage in a two-step analysis. *See id.* at 642-643. First, we identify the conditions that led to removal, and second, we determine whether there is a reasonable probability that those conditions will not be remedied. *Id.* at 643. In the second step, the trial court must judge a parent's fitness as of the time of the termination proceeding, taking into consideration evidence of changed conditions, balancing a parent's recent improvements against habitual patterns of conduct to determine whether there is a substantial probability of future neglect or deprivation. *Id.* We entrust that delicate balance to the trial court, which has discretion to weigh a parent's prior history more heavily than efforts made only shortly before termination. *Id.* Requiring trial courts to give due regard to changed conditions does not preclude them from finding that a parent's past behavior is the best predictor of future behavior. *Id.* The statute does not simply focus on the initial basis for a child's removal for purposes of determining whether a parent's rights should be terminated, but also those bases resulting in the continued placement outside the home. *In re N.Q.*, 996 N.E.2d 385, 392 (Ind. Ct. App. 2013). A court may consider evidence of a parent's prior criminal history, drug abuse, history of neglect, failure to provide support, lack of adequate housing and employment, and the services offered by DCS and the parent's response to those services. *Id.* Where there are only temporary improvements and the pattern of conduct shows no overall progress, the court

might reasonably find that under the circumstances the problematic situation will not improve. *Id.*

[20] To the extent Father does not challenge the court's findings of fact, the unchallenged facts stand as proven. *See In re B.R.*, 875 N.E.2d 369, 373 (Ind. Ct. App. 2007) (failure to challenge findings by the trial court resulted in waiver of the argument that the findings were clearly erroneous), *trans. denied*.

[21] When asked if she believed Father had his own issues or if she believed he could parent J.M. "right now," CASA Collins, who was assigned in 2017 with the first CHINS case and was reassigned to the subsequent CHINS case that started in 2020, answered that she believed he had issues, there was much unknown for Father, she believed he loved J.M., and the possibility of visitation in the future "would probably be okay," but she did not see that he had shown "any indication, not even, I couldn't even call it consistent, but any indication, especially in the last year that . . . [J.M. is his] first priority." Transcript Volume II at 161. When asked about Father's progress in remedying his initial issues or participating in services, she answered:

> I realize that he was not in a position, really, to make progress, but, I look at his history um, he had custody of [J.M.] and he made the choice to . . . not consider her his first priority that he made the choice to choose the drugs and . . . the criminal activity over what he had already had in place so, I don't consider that to be any progress towards being a good, a responsible, long term father.

Id. She also indicated that Father's "criminal problems" had been ongoing. *Id.* at 162. When asked if she had seen anything that indicated Father would be able to "steer clear of any kind of further criminal involvement," CASA Collins answered: "No . . . because he was there. He had that opportunity and he choose [sic] to go back into the criminal activity." *Id.* at 163-164.

[22] When asked if she saw any kind of reasonable probability that Father was going to be able to resolve his ongoing issues, Lewis answered: "[W]e still were not aware of what was going on with his charges, how long he would be incarcerated . . . we just knew that he was facing a pretty significant amount of time. . . . I had no reason to believe, at that time, any of the issues had been on their way to being remedied." *Id.* at 89.

[23] FCM McClain indicated that she did not believe Father had made any kind of significant progress as far as services. When asked if she thought that there was any reason to believe Father would be able to remedy the original issues, she answered: "[B]ased on where we've been for the last year to two (2) years, I do not." *Id.* at 139.

[24] On cross-examination by CASA Collins, Father acknowledged that he had been incarcerated three times since J.M.'s birth. During cross-examination by DCS's counsel, Father admitted that he had used illegal substances including methamphetamine and marijuana for eleven years, was involved in a prior DCS case in 2017, had been involved in six criminal cases, and his dealing in methamphetamine charge occurred while he had custody of J.M.

[25] In light of the unchallenged findings and the evidence set forth above and in the record, we cannot say the trial court clearly erred in finding a reasonable probability exists that the conditions resulting in J.M.'s removal and the reasons for placement outside Father's care will not be remedied.

[26] In determining the best interests of children, the trial court is required to look to the totality of the evidence. *McBride v. Monroe Cnty. Office of Family & Children*, 798 N.E.2d 185, 203 (Ind. Ct. App. 2003). The court must subordinate the interests of the parent to those of the children. *Id.* The court need not wait until a child is irreversibly harmed before terminating the parent-child relationship. *Id.* The recommendation of a case manager and child advocate to terminate parental rights, in addition to evidence that the conditions resulting in removal will not be remedied, is sufficient to show by clear and convincing evidence that termination is in the children's best interests. *A.D.S. v. Ind. Dep't of Child Servs.*, 987 N.E.2d 1150, 1158-1159 (Ind. Ct. App. 2013), *trans. denied*.

[27] When asked if she believed that termination was in J.M.'s best interests, FCM McClain answered affirmatively. When asked why, she stated:

> [B]ecause [J.M.] has been, besides six (6) months of her life, removed from the home. [T]here have been several incarcerations. [Father] is not even able to try to get out on good terms for another two (2) years. So that would be seven (7) years of her life out of the home. . . . [J.M.] has a lot of . . . trauma that she has not been able to process and get through . . . and [she is] scared of leaving [her] placement. . . . [J.M.] even last night was screaming and did not want to leave to go to a visit with [Mother] last night.

Transcript Volume II at 137-138. She stated that J.M. "has a lot of trauma and remembers a lot of things that she has not even barely spoken of from the criminal history and drug use of" Father. *Id.* at 139. She also indicated that she did not believe it would be appropriate to have J.M. wait for Father's release and that waiting would not be in J.M.'s best interests. CASA Collins testified that she believed termination was in J.M.'s "very best interest" and that "there's a harm in waiting." *Id.* at 171-172.

[28] Based on the totality of the evidence, we conclude the trial court's determination that termination is in J.M.'s best interests is supported by clear and convincing evidence.[4]

[29] For the foregoing reasons, we affirm the trial court.

[30] Affirmed.

Crone, J., and Robb, Sr.J., concur.

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[4] To the extent Father relies upon *In re G.Y.*, 904 N.E.2d 1257 (Ind. 2009), *reh'g denied*, we find that case distinguishable. In *In re G.Y.*, the mother was her child's sole caretaker for the first twenty months of his life. 904 N.E.2d at 1258. A year before the child's birth, the mother had delivered drugs to a police informant, she was arrested and incarcerated for the offense thirty-two months later when the child was twenty months old, and the trial court later terminated her parental rights. *Id.* at 1258-1259. The Court reversed and observed the mother's offense occurred before she became pregnant, there was no indication that she was anything but a fit parent during the first twenty months of the child's life, and she obtained post-release employment and suitable housing. *Id.* at 1262-1263. It also observed the mother maintained a consistent, positive relationship with her child while incarcerated, she had a lot of interaction with the child during their visits, and there was evidence of her commitment to reunification from the moment of her arrest including her attempt to arrange foster care with her sister and a friend. *Id.* at 1264-1265. Here, the record reveals that J.M. was born in April 2017 and Father pled guilty to resisting law enforcement as a level 6 felony under Cause No. 677 in January 2019 related to events that occurred in September 2018, and was convicted of dealing in methamphetamine as a level 4 felony under Cause No. 843 for events occurring in October 2020 while he had custody of J.M.