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IN THE
COURT OF APPEALS OF INDIANA

In the Matter of the Involuntary
Termination of the Parent-Child
Relationship of: C.C. (Minor
Child),

and

C.W. (Mother),

Appellant-Respondent,

v.

The Indiana Department of
Child Services,

Appellee-Petitioner.

May 19, 2021

Court of Appeals Case No.
20A-JT-1999

Appeal from the Fayette Circuit
Court

The Honorable Hubert Branstetter,
Jr., Judge

Trial Court Cause No.
21C01-2005-JT-88

Tavitas, Judge.

Case Summary

- [1] C.W. (“Mother”) appeals from the termination of her parent-child relationship with C.C. (the “Child”). Finding that: (1) Mother received statutory and actual notice of the fact-finding hearing before she failed to appear without good cause; (2) Mother was not denied procedural due process from the denial of her motion to continue the termination fact-finding hearing; and (3) the termination of Mother’s parental rights is supported by the unchallenged findings of fact and conclusions thereon, we must affirm.

Issues

- [2] Mother raises two issues on appeal, which we restate as follows:
- I. Whether Mother received sufficient notice of the termination fact-finding hearing.
 - II. Whether Mother was denied procedural due process when the trial court denied her motion to continue the fact-finding hearing.
 - III. Whether Mother is entitled to remand to file an Indiana Trial Rule 60(B) motion.

Facts

- [3] Mother and M.C. (“Father”) are the biological parents of the Child, who was born in October 2011.¹ The Child was extremely premature at birth and suffers from various medical conditions, including “spastic cerebral palsy with muscle spasticity, congenital hip dislocation, incontinence, intellectual disability, and a feeding dysfunction.” Mother’s App. Vol. II p. 22. As a result, the Child requires diligent caregiving and treatment from numerous medical specialists.
- [4] The Fayette County Office of the Department of Child Services (“DCS”) was previously involved with Mother and the Child on two occasions. DCS filed a child in need of services (“CHINS”) petition regarding the Child on August 19, 2015, related to domestic violence, drugs, alcohol, and unsafe home conditions. A juvenile court adjudicated the Child as a CHINS on November 30, 2015. The wardship was dismissed in October 2016, and Mother and the Child were reunified. Also, on January 25, 2017, DCS filed a CHINS petition based on Mother’s failure to: (1) adhere to the Child’s scheduled medical appointments; (2) maintain his nursing care; (3) take the Child to school; and (4) take Mother’s prescribed medications. A juvenile court adjudicated the Child as a CHINS on May 19, 2017. The matter was subsequently dismissed, and Mother and the Child were again reunified.

¹ The trial court terminated Father’s parental rights to the Child contemporaneously with Mother’s parental rights. Father is not a party to this appeal.

- [5] In April 2018, DCS and Mother entered an informal adjustment regarding the Child. Mother agreed to participate in services aimed at ensuring the Child consistently took his medication, attended necessary medical appointments, and maintained a healthy body weight. During the extended informal adjustment period, DCS provided Mother with services “to address concerns for medical neglect, substance abuse, and an inadequate living environment in an effort to prevent [the Child]’s removal” *Id.* Also, service providers delivered in-home healthcare for the Child and case management services for Mother.
- [6] On August 23, 2018, Mother tested positive for amphetamine, benzodiazepines, methamphetamine, and oxycodone. Mother failed to undergo substance abuse treatment as the informal adjustment prescribed. In addition to failing to properly care for herself, Mother failed to take the Child to necessary medical appointments. On December 27, 2018, the Child was hospitalized for severe malnutrition resulting from Mother’s failure to provide an adequate and proper diet. Medical staff determined that the Child was “not receiving the proper and proscribed [sic] nutrition in his home environment”; “[m]edical staff also expressed concerns for medical neglect [because the Child] missed a number of medical appointments.” *Id.*
- [7] DCS removed the then-seven-year-old Child from Mother’s care on an emergency basis on January 2, 2019. The next day, DCS filed a petition alleging that the Child was a CHINS pursuant to Indiana Code Section 31-34-1-1 and Indiana Code Section 31-34-1-9. Specifically, DCS alleged that, despite

the active informal adjustment, Mother failed to provide vital medical care and supervision. In February 2019, Mother was convicted of operating a motor vehicle while intoxicated endangering a person, a Class A misdemeanor.

[8] On March 1, 2019, based on Mother’s admission that she struggled to manage the Child’s significant medical challenges and required support to ensure that the Child’s needs were met, the trial court adjudicated the Child as a CHINS. Following a hearing, the trial court entered its dispositional order as to Mother on March 27, 2019, wherein the trial court ordered Mother to: (1) undergo a substance abuse assessment and a mental health evaluation and to follow ensuing recommendations regarding her parenting, mental health, and substance abuse issues; (2) meet the Child’s medical and mental health needs; (3) ensure that Mother’s own medical needs were met; (4) submit to random drug screens; (5) attend scheduled visitations; (6) maintain suitable housing; (7) secure and maintain a legal source of income; (8) refrain from consuming illegal controlled substances; (9) maintain open communication with caseworkers, the court-appointed special advocate, and service providers; and (10) “[b]e an effective caregiver[,] possess[ing] the necessary skills, knowledge, and abilities to provide the [C]hild with a safe, secure, and nurturing environment on a long-term basis to provide the [C]hild with permanency.” *Id.* at 23.

[9] During the CHINS pendency, Mother informed DCS that she uses marijuana regularly and uses methamphetamine to cope. Although Mother completed two substance abuse assessments during the CHINS pendency, Mother failed to comply with the ensuing related recommendations to participate in substance

abuse services and repeatedly tested positive for illegal substances during the pendency of this matter.² Specifically, “Mother tested positive for methamphetamine on: 8/20/2018, 3/15/2019, 5/10/2019, 6/4/2019, 10/28/2019, 8/25/2020, 8/12/2020.” Mother’s App. Vol. II p. 24. Mother tested positive for amphetamine, benzodiazepines, methamphetamine, marijuana, and opiates on March 22, 2019, and again on June 1, 2019. On June 13, 2019, Mother’s drug screen was positive for amphetamine and methamphetamine. Mother completed a seventy-five-day inpatient drug rehabilitation program in June 2019; however, she failed to participate in subsequent outpatient drug rehabilitation services and relapsed in August 2019. After Mother’s relapse, she failed to undergo substance abuse treatment. On November 2, 2019, Mother tested positive for amphetamine, benzodiazepines, and methamphetamine. Forensic Fluids Laboratory and Redwood Toxicology Laboratory conducted and processed Mother’s drug screens.

[10] Also, during the CHINS pendency, Mother committed criminal offenses. In addition to her aforementioned conviction for operating a motor vehicle while intoxicated endangering a person, a Class A misdemeanor, in November 2019, Mother pleaded guilty to operating a motor vehicle with a Schedule I or Schedule II controlled substance or its metabolite in her body, a Level 6 felony.

² Mother completed substance abuse assessments in May 2018 and May 2019.

[11] Additionally, Mother remained largely uncompliant with her service providers and DCS for much of the CHINS period. Mother was discharged from supervised visitation services; missed at least fifteen of the Child’s medical appointments; and rejected service providers’ recommendations. Despite being offered both financial assistance with her gas expenses, transportation services, and opportunities for virtual visits, Mother has not visited with the Child since September 2019. Mother has also declined opportunities to visit in-person with the Child. On February 21, 2020, the trial court changed the permanency plan from reunification to termination of parental rights and adoption.

[12] DCS filed a petition to terminate Mother’s parental rights on May 20, 2020. The trial court conducted Mother’s initial hearing on July 22, 2020, and Mother appeared telephonically with counsel. Following the initial hearing, the trial court issued an order scheduling the fact-finding hearing for September 21, 2020, at 9:00 a.m. *See id.* at 13. The chronological case summary (“CCS”) entry regarding the initial hearing provides, in part: “Termination hearing set for September 21, 2020, at 9:00 a.m.” *Id.* at 4. On August 12, 2020, the trial court conducted a pretrial hearing, and Mother appeared in person with counsel. Following the pretrial hearing, the trial court reaffirmed: “Termination hearing set for September 21, 2020, at 9:00 a.m.[,]” as confirmed in the CCS. *Id.* at 5.

[13] Mother failed to appear at the fact-finding hearing on DCS’s petition to terminate Mother’s parental rights on September 21, 2020. Counsel for Mother made an oral motion for a continuance and stated he was unable to explain

Mother's absence. There was no "showing of good cause established by affidavit or other evidence" as to why Mother failed to appear. *See* Ind. Trial Rule 53.5. DCS objected to the requested continuance, which the trial court denied before proceeding in absentia.

[14] On October 13, 2020, the trial court issued its order terminating Mother's parental rights. After Mother filed a notice of appeal, she filed a petition with this Court to stay the proceedings and for remand ("motion for remand") to the trial court in order for Mother, pursuant to Indiana Trial Rule 60(B), to litigate alleged fraud by Redwood's Toxicology Laboratory's subcontractor, TOMO Drug Testing. On October 30, 2020, DCS issued a press release announcing its decision to halt referrals to TOMO Drug Testing, a subcontractor of Redwood Toxicology Laboratory that collects samples for testing by Redwood Toxicology Laboratory. Apparently, TOMO Drug Testing inaccurately listed a cooperative DCS testing subject as having failed to appear for a drug screen. The validity of Mother's test results, however, was not in dispute. The motions panel of this Court denied Mother's verified petition to stay proceedings and to remand. Mother now appeals.

Analysis

[15] The Fourteenth Amendment to the United States Constitution protects the traditional rights of parents to establish a home and raise their children. *In re K.T.K. v. Indiana Dept. of Child Services, Dearborn County Office*, 989 N.E.2d 1225, 1230 (Ind. 2013). "[A] parent's interest in the upbringing of [his or her] child is 'perhaps the oldest of the fundamental liberty interests recognized by th[e]

[c]ourt[s].” *Id.* (quoting *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054 (2000)). We recognize, of course, 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. *Id.* Thus, “[p]arental rights may be terminated when the parents are unable or unwilling to meet their parental responsibilities by failing to provide for the child’s immediate and long-term needs.” *K.T.K.*, 989 N.E.2d at 1230 (quoting *In re D.D.*, 804 N.E.2d 258, 265 (Ind. Ct. App. 2004), *trans. denied*).

I. Unchallenged Findings and Conclusions

[16] As an initial matter, we note that Mother does not challenge the trial court’s findings of fact and conclusions thereon as clearly erroneous. Mother has, thereby, waived any arguments relating to the unchallenged findings. *See In re S.S.*, 120 N.E.3d 605, 614 n.2 (Ind. Ct. App. 2019) (explaining that this Court will accept unchallenged trial court findings as true). By her failure to challenge the trial court’s conclusions, which included multiple failed drug tests, Mother has conceded that DCS proved, by clear and convincing evidence, the allegations in the petition to terminate her parental rights.

[17] Specifically, Mother has failed to challenge the trial court’s conclusions, pursuant to Indiana Code Section 31-35-2-4, that: (1a) 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 or (1b) there is a reasonable probability that the continuation of the parent-child relationship poses a threat to the well-being of the Child; (2) termination of

Mother's parental rights is in the best interests of the Child; and (3) a satisfactory plan exists for the care and treatment of the Child. To the extent Mother argues that the trial court's conclusions are clearly erroneous, Mother has waived those arguments by her failure to make a cogent argument thereon. *Runkel v. Miami Cty. Dep't of Child Servs.*, 875 N.E.2d 369, 373 (Ind. Ct. App. 2007) (citing Ind. Appellate Rule 46(A)(8)(a)), *trans. denied*.

II. Statutory Notice

- [18] First, Mother alleges a denial of due process stemming from allegedly insufficient notice of the fact-finding hearing. Specifically, Mother contends that reversal for lack of statutory notice is warranted because “DCS did not present, nor did the trial court require, any documentary or testimonial evidence regarding notice to Mother that her parental rights were about to be terminated.” *See* Mother's Br. p. 15. We cannot agree inasmuch as DCS testified that notice of the fact-finding hearing was sent to Mother, and Mother failed to assert a lack of statutory notice before the trial court.
- [19] Indiana Code Section 31-35-2-6.5, pertaining to the notice requirements in a termination proceeding, provides in part as follows:

At least ten (10) days before a hearing on a petition or motion under this chapter: the person or entity who filed the petition to terminate the parent-child relationship . . . shall send notice of the review to . . . [t]he child's parent . . . and . . . [a]ny other party to the [CHINS] proceeding.

As this Court has previously found: “[f]ailure to comply with statutory notice is [] a defense that must be asserted[;] [o]nce placed in issue, [DCS] bears the burden of proving compliance with the statute.” *In re H.K.*, 971 N.E.2d 100, 103 (Ind. Ct. App. 2012).

[20] Indiana Code Section 31-35-2-6.5 does not require compliance with Indiana Trial Rule 4, which governs service of process and incorporates a jurisdictional component. *In re B.J.*, 879 N.E.2d 7, 14-15 (Ind. Ct. App. 2008) (citing *In re A.C.*, 770 N.E.2d 947, 950 (Ind. Ct. App. 2002)), *trans. denied*. Rather, to comply with the notice statute, a party need only satisfy the requirements of Indiana Trial Rule 5, governing the service of subsequent papers and pleadings in the action. *Id.* at 15.

[21] Indiana Trial Rule 5 authorizes service by U.S. mail and provides that “[s]ervice upon the attorney or party shall be made by delivering or mailing a copy of the papers to [the attorney or party] at his last known address.” *B.J.*, 879 N.E.2d at 15 (citing Ind. Trial Rule 5(B)).

To require service of subsequent papers, such as hearing notices, to rise to the level of service of process would permit a parent or other party entitled to notice to frustrate the process by failing to provide a correct address and would add unnecessarily to the expense and delay in termination proceedings “when existing provisions adequately safeguard a parent’s due process rights.”

Id. (quoting *In re C.C.*, 788 N.E.2d 847, 851 (Ind. Ct. App. 2003)).

[22] The record here reveals that, at the telephonic initial hearing on July 22, 2020, DCS asked the trial court to elicit Mother’s current address because DCS was not in possession of that information. The trial court acquiesced, and Mother supplied DCS with her then-current mailing address. Subsequently, at the fact-finding hearing on September 21, 2020, counsel for DCS advised the trial court that DCS mailed the statutory ten-day notice of the fact-finding hearing to Mother’s last known address. Counsel for Mother failed to argue a lack of statutory notice in the trial court. Accordingly, this issue is waived. *See H.K.*, 971 N.E.2d at 102-03 (finding failure to challenge notice before the trial court results in waiver on appeal).

[23] Waiver notwithstanding, we find that DCS satisfied Indiana Trial Rule 5(B) by mailing the ten-day notice to the mailing address that Mother tendered at her initial hearing. *See B.J.*, 879 N.E.2d at 16 (“By sending notice to Father’s last known address on Meridian Street, the MCDCS complied with Indiana Trial Rule 5(B) and notice was therefore not defective under Indiana Code section 31-35-2-6.5.”). Notably, Mother’s attorney did not cross-examine witnesses on the issue of notice and made no arguments regarding notice.

[24] Moreover, in addition to the presumed-delivered statutory notice, Mother received actual notice of the fact-finding hearing from the trial court at the telephonic initial hearing and the pretrial conference on August 12, 2020. It is undisputed that Mother and her counsel received actual notice on these occasions; however, only counsel appeared for the scheduled fact-finding hearing. Counsel was unable to explain Mother’s failure to appear for the fact-

finding, and Mother offers no explanation on appeal. Further still, Mother was represented by counsel throughout the termination proceedings, which provided due process protections to Mother. Mother's counsel was able to make argument and cross examine witnesses, as occurred here. Based on the foregoing, we conclude that Mother cannot establish she lacked proper notice.

III. Denial of Motion for Continuance

[25] Next, Mother asserts on appeal that the trial court abused its discretion in denying her counsel's oral motion to continue the fact-finding hearing, where Mother did not appear. "Generally speaking, a trial court's decision to grant or deny a motion to continue is subject to abuse of discretion review." *In re K. W.*, 12 N.E.3d 241, 244 (Ind. 2014). 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; however, no abuse of discretion will be found when the moving party has not demonstrated that he or she was prejudiced by the denial. *Rowlett v. Vanderburgh Cty. Office of Family & Children*, 841 N.E.2d 615, 619 (Ind. Ct. App. 2006) (internal citations omitted), *trans. denied*.

[26] It is well-settled that parents possess certain due process rights regarding a termination of parental rights proceeding:

The process due in a termination of parental rights proceeding turns on the balancing of three 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. The balancing of these factors recognizes that

although due process is not dependent on the underlying facts of the particular case, it is nevertheless “flexible and calls for such procedural protections as the particular situation demands.” Finally, we must keep in mind the general principle that “if the State imparts a due process right, then it must give that right.” A parent in a proceeding to terminate the parent-child relationship is statutorily entitled to (1) cross-examine witnesses, (2) obtain witnesses or tangible evidence by compulsory process, and (3) introduce evidence on behalf of the parent. Ind. Code § 31-32-2-3(b) (2008).

In re C.G., 954 N.E.2d 910, 917 (Ind. 2011) (internal citations and quotations omitted).

- [27] We begin with the first factor, identifying the private interest affected by the termination of parental rights proceeding. Mother’s interest in the care, custody, and control of the Child is certainly a weighty concern of constitutional import. *See Troxel*, 530 U.S. at 65 (“[A] parent’s interest in the upbringing of [her] child is ‘perhaps the oldest of the fundamental liberty interests’”). This factor inures to Mother’s benefit.
- [28] “The second factor requires an assessment of the risk of error created by the challenged procedure[—]namely, proceeding without [Mo]ther’s physical presence.” *B.J.*, 879 N.E.2d at 16. Parents do not have a constitutional right to be present at a termination of parental rights hearing, *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.’” In her absence, Mother was represented by counsel at the termination fact-finding

hearing. This Court has held that such representation by counsel in the party's absence is appropriate if counsel is able to make argument and cross examine witnesses, which occurred here. *See In re J.T.*, 740 N.E.2d 1261, 1264 (Ind. Ct. App. 2000) (finding no fundamental error when father not physically present at termination hearing because father was represented by counsel who presented argument and cross-examined witnesses), *trans. denied, abrogated on other grounds by Baker*, 810 N.E.2d at 1041. We find that counsel's representation of Mother's interests at the fact-finding hearing vastly reduced the risk of error, which was minimal. This factor weighs in the State's favor.

[29] 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 County Dep't of Family and Children*, 777 N.E.2d 741, 745 (Ind. Ct. App. 2002), *trans. denied* (quotation omitted).

[30] Here, DCS removed the Child on January 2, 2019, and filed the CHINS petition on January 3, 2019. Mother has not visited with the Child since September 2019, and she has since rejected opportunities to visit with the Child. The trial court conducted the fact-finding hearing on September 21, 2020, by

which time the Child had been removed from Mother's care for over twenty months. During the protracted informal adjustment and CHINS periods, Mother: (1) failed to comply with and rejected recommendations from her service providers; (2) was discharged from services; (3) missed the Child's medical appointments; (4) abused drugs; and (5) was convicted of crimes.

[31] Mother's failure to progress in her ability to manage the Child's special needs was the impetus for the petition to terminate her parental rights. This Court has 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." *See B.J.*, 879 N.E.2d at 17 (quoting *Tillotson*, 777 N.E.2d at 745). In balancing Mother's fundamental interest against the State's own compelling interest and given the minimal risk of error from the trial court's decision to proceed in Mother's absence, where Mother was represented by counsel, we conclude that the trial court did not violate Mother's right to due process in denying her counsel's motion to continue the fact-finding hearing.

[32] The trial court's decision to deny counsel's motion to continue, absent a showing of good cause for the continuance, was not against the logic and effect of the facts and circumstances before the trial court. We find no abuse of the trial court's discretion. Mother's claim, thus, fails.

IV. Motion for Remand

[33] Lastly, Mother filed a motion for remand with this Court, which our motions panel denied. Mother argues that, "[u]pon counsel's realization that potential

issues of fraud existed regarding at least part of Mother’s drug screens,” Mother sought remand “to test the validity of those results[.]” Mother’s Br. p. 14.

Mother asserts that, “[b]ecause remand and litigation pursuant to Ind. Tr. Rule 60(B) was Mother’s only recourse . . . , the denial of remand was a violation of Mother’s right to a fair hearing.” *Id.* at 15.

[34] “It is well established that we may reconsider a ruling by the motions panel.” *D.C., Jr. v. C.A.*, 5 N.E.3d 473, 475 (Ind. Ct. App. 2014) (quoting *Cincinnati Ins. Co. v. Young*, 852 N.E.2d 8, 12 (Ind. Ct. App. 2006), *trans. denied*). “While we are reluctant to overrule orders decided by the motions panel, this [C]ourt has inherent authority to reconsider any decision while an appeal remains in fieri.” *Id.* (quoting *Miller v. Hague Ins. Agency, Inc.*, 871 N.E.2d 406, 407 (Ind. Ct. App. 2007)).

[35] As an initial matter, we observe that Mother’s motion for remand seeks to litigate the validity of the drug test results generated by Redwood Toxicology Laboratory regarding two of Mother’s samples that were collected by TOMO Drug Testing.³ *See* Mother’s App. Vol. II pp. 39, 43-49. Mother does not, however, challenge the validity of her numerous failed drug tests based on samples that were tested by Forensic Fluids Laboratory. Nothing in the record undermines the validity of Mother’s unchallenged drug tests and requires

³ “Analysis of Mother’s screens collected on March 15, 2019, and May 13, 2019[,] was done by Redwood on samples collected by TOMO.” Mother’s App. Vol. II p. 44; *see also id.* at 24 (trial court’s order terminating Mother’s parental rights: “Mother tested positive for methamphetamine on: 8/20/2018, . . . 6/4/2019, 10/28/2019, 8/25/2020, 8/12/2020.”).

remand. Accordingly, even if we were to reconsider the motions panel's order, we would deny Mother's motion to remand.

Conclusion

[36] Mother was not denied procedural due process, and the trial court did not abuse its discretion in denying counsel for Mother's request for a continuance, absent good cause for Mother's failure to appear. Because sufficient evidence supports the termination of Mother's parental rights, we must affirm the trial court, and we decline to reconsider the motion panel's denial of remand to file an Indiana Trial Rule 60(B) motion. We affirm.

[37] Affirmed.

Najam, J., and Pyle, J., concur.