ATTORNEY FOR APPELLANT

David W. Stone
Anderson, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Robert J. Henke
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

A.S.,

Appellant-Respondent,

v.

Indiana Department of Child Services,

Appellee-Petitioner.

July 30, 2021

Court of Appeals Case No. 20A-JT-1525

Appeal from the Madison Circuit Court

The Honorable G. George Pancol, Judge

Trial Court Cause No. 48C02-2005-JT-114

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Respondent, A.S. (Mother), appeals the trial court's Order terminating her parental rights to her minor daughter, S.S. (Child).[1]

[2] We affirm.

ISSUES

[3] Mother raises two issues on appeal which we restate as the following:

(1) Whether the trial court's denial of Mother's motion to continue denied her due process; and

(2) Whether the trial court's order certifying the statement of the evidence was erroneous.

FACTS AND PROCEDURAL HISTORY

[4] Mother and A.B. (Father), are the biological parents of Child born on March 23, 2004. On December 8, 2014, the Madison County Department of Child Services (DCS) filed a child in need of services (CHINS) petition alleging that Mother had abandoned Child and her siblings with someone she had met just a month prior. On January 7, 2015, Mother admitted that Child was a CHINS, and the trial court entered its adjudication order. On February 5, 2015, the trial court entered a dispositional decree and ordered Mother into reunification

[1] Father does not participate in this appeal.

services. On July 22, 2019, DCS filed its first petition to terminate Mother's parental rights. On October 30, 2019, Mother and Father signed a consent for Child to be adopted.

[5] On February 27, 2020, Mother rescinded her consent for Child's adoption. Based on Mother's recission, DCS filed its second petition to terminate Mother's parental rights to Child on May 20, 2020. On May 21, 2020, the trial court held the initial hearing on DCS's petition and set the factfinding hearing for July 14, 2020. On July 7, 2020, Mother filed a motion to continue, but that motion was denied on July 10, 2020. On July 14, 2020, the trial court held the termination factfinding hearing, at which Mother was not present, but Mother's counsel was present. Mother's counsel renewed the motion to continue due to Mother's absence, but the trial court denied the motion and went ahead with the termination hearing. On July 20, 2020, six days after the termination hearing, the trial court issued finding of facts and conclusions thereon terminating Mother's parental rights to Child.

[6] Due to an equipment malfunction, most of the hearing was not recorded. On October 20, 2020, Mother filed a motion to remand the case to the trial court for the purpose of reconstructing the unavailable part of the record. We remanded to the trial court, and by the time the parties filed their statements of the evidence, the judge who had heard the case was succeeded by the successor judge who certified the statements of the evidence.

[7] Mother now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

A. *Due Process*

[8] Mother contends that it was an abuse of discretion for the trial court to deny her motion to continue and to conduct the termination hearing in her absence. Thus, she argues that the termination Order must be reversed, and we should remand to the trial court for a retrial.

[9] Due process safeguards preclude "state action that deprives a person of life, liberty, or property without a fair proceeding." *In re G.P.,* 4 N.E.3d 1158, 1165 (Ind. 2014). "'It is unequivocal that the termination of a parent-child relationship by the State constitutes the deprivation of an important interest warranting deference and protection, and therefore when the State seeks to terminate the parent-child relationship, it must do so in a manner that meets the requirements of due process.'" *In re J.K.*, 30 N.E.3d 695, 699 (Ind. 2015) (quoting *In re G.P.*, 4 N.E.3d at 1165). Due process has never been defined, but the phrase embodies a requirement of fundamental fairness. *In re C.G.*, 954 N.E.2d 910, 917 (Ind. 2011). The United States Supreme Court has written that "the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

[10] The process due in a termination of parental rights proceeding turns on the balancing of three factors from *Mathews*: (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. *In re D.H.,* 119 N.E.3d 578, 588 (Ind. Ct. App. 2019), *trans. denied*. The private interest affected by the proceeding, a parent's interest in the care, custody, and control of his or her child, is substantial. *Id.* The State's interest in protecting the welfare of a child is also substantial. *Id*. Because the State and the parent have substantial interests affected by the proceeding, we focus on the risk of error created by DCS's actions and the trial court's actions. *Id*. "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.'" *In re C.G.*, 954 N.E.2d at 917 (quoting *Mathews*, 424 U.S. at 334).

[11] We find that Mother has waived this issue because she failed to object on due process grounds before the trial court when her motion to continue was denied. It is axiomatic that an argument cannot be presented for the first time on appeal. *Ind. Bureau of Motor Vehicles v. Gurtner*, 27 N.E.3d 306, 311 (Ind. Ct. App. 2015). "[A]ppellate review presupposes that a litigant's arguments have been raised and considered in the trial court." *Plank v. Cmty. Hosps. of Ind., Inc.*, 981 N.E.2d 49, 53 (Ind. 2013). Because Mother did not present her due process argument to the trial court, this argument is waived for purposes of appeal. *See id*. Waiver notwithstanding, we address her claim.

[12] A trial court's decision to grant or deny a motion to continue is reviewed for an abuse of discretion. *In re K.W.*, 12 N.E.3d 241, 243-44 (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', but 'no abuse of discretion will be found when the moving party has not demonstrated that he or she was prejudiced by the denial.'" *Id*. (quoting *Rowlett v. Vanderburgh Cnty. Off. of Family & Children*, 841 N.E.2d 615, 619 (Ind. Ct. App. 2006), *trans. denied*). "The party seeking a continuance must show that he or she is free from fault[,]" and there is a "strong presumption that the trial court properly exercised its discretion." *In re B.H.*, 44 N.E.3d 745, 748 (Ind. Ct. App. 2015), *trans. denied*. There are no "mechanical tests" for deciding whether a request for a continuance was made for good cause; instead, the decision to grant or deny a continuance turns on the circumstances present in a particular case. *In re M.S.*, 140 N.E.3d 279, 285 (Ind. 2020).

[13] At the beginning of the termination hearing, Mother, by counsel, stated that she had filed a motion to continue a week before the termination hearing. Mother's counsel claimed that Mother could not leave work to attend the termination hearing because she was at risk of losing her job if she attended the Zoom hearing. When the trial court asked Mother's counsel if he had received any verification of that fact from Mother's employer, Mother's counsel stated that he did not have that confirmation. DCS strongly objected to the continuance arguing that Mother had received notice of the hearing through an email a month prior and that Mother had responded to that email. DCS stated that it had all the witnesses available and was ready to proceed with the hearing, and it continued to state that Mother had more than a month to seek permission from her employer to attend the fact-finding Zoom hearing.

[14] With Mother's counsel present, DCS then presented evidence supporting the involuntary termination of Mother's parental rights to Child. DCS stated that throughout the vast majority of the six-year-old case, Mother made no progress in participating in services or enhancing her parenting skills and abilities to parent Child. DCS' family case manager (FCM) testified that Mother had threatened suicide if the Child was not returned to her, she was inconsistent in communicating, and she was mentally unstable. In addition to the suicide threats, FCM testified that Mother's behavior would radically change from one day to the next. FCM believed there was no reasonable probability that the reasons for removal would be remedied because Mother was not participating in services, and Child, who was sixteen years old at the time of the termination hearing, did not want to return to her care. DCS' permanency case manager equally testified that she was concerned with Mother's mental instability and housing instability, as Mother worked as a traveling exotic dancer and had trouble with consistent income to maintain a residence.

[15] Perhaps most telling, the DCS' CASA in this case responded to Mother's motion to continue by stating that Child was "ready for this to be over with so she can find her permanency. Um, [Child] had stated multiple times that she is ready to move on." (Transcript p. 10). CASA was concerned that if the case were continued to "drag this out," it would affect Child's mental health. (Tr. p. 10). Child testified that she did not believe Mother was able to parent her appropriately, and that continuation of her relationship with Mother was a danger to her. Child's therapist also testified that any further ongoing contact

between Mother and Child would inhibit the Child to heal from her trauma. Child's foster mother said that Mother reported to her that she would drag out the "legal case" until Child was "too old" to be adopted. (Appellant's App. Vol. II, p. 54).

[16] Mother knew of the factfinding hearing and was simply intent on avoiding it. 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 In re B.J.,* 879 N.E.2d 7, 17 (Ind. Ct. App. 2008). 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 because counsel represented Mother, the trial court did not violate Mother's right to due process in denying her counsel's motion to continue the fact-finding hearing. *See id.* Based on the foregoing, we conclude that the trial court did not abuse its discretion when it denied Mother's motion to continue.

II. *Statement of the Evidence*

[17] Due to an equipment malfunction, most of the hearing was not recorded. Indiana Appellate Rule 31 governs situations when no transcript is available. The procedures outlined in Indiana Appellate Rule 31(A) call for a "party or a party's attorney to prepare a verified statement of the evidence from the best available sources, which may include the party's or the attorney's recollections." Once compiled, the statement of evidence is to be presented in a

motion to the trial court for certification. Ind. Appellate Rule 31(A). Section B gives the opposing party, here, DCS, fifteen days to respond. Section C authorizes the trial court, after a hearing, if necessary, to certify a statement of evidence, which then becomes part of the clerk's record. *Childress v. State*, 96 N.E.3d 632, 637 (Ind. Ct. App. 2018). We also note that Indiana Appellate Rule 32 provides that if a disagreement arises as to whether the clerk's record or transcript accurately discloses what occurred in the trial court, any party may move the trial court to resolve the disagreement, and the trial court "shall" issue an order that either confirms that the clerk's record or transcript is accurate or corrects the clerk's record or transcript to reflect what actually occurred.

[18] As noted, on October 20, 2020, Mother filed a motion to remand the case to the trial court for the purpose of reconstructing the unavailable portion of the record. In the meantime, the judge who heard the case lost the election in early November 2020, but before the completion of his term at the end of December 2020, was certified as a senior judge on December 21, 2020. The successor judge was sworn into office in early January 2021. Only on February 15, 2021, almost 100 days after the date by which this court ordered her to complete her statement of the evidence, did Mother abide. The successor judge certified the statements of the evidence. Mother argues that the successor judge who certified the statements of the evidence, lacked authority and that she is entitled to a retrial of the fact-finding hearing.

[19] In support of her argument, Mother cites to *Flores v. Flores*, 658 N.E.2d 95 (Ind. Ct. App. 1995), in which a judge, who held an in-camera hearing on a child

support issue without it being recorded, passed away after issuing his child support order. *Id*. at 96. Because the mother wanted to appeal the order of which there was no record, she attempted to reconstruct the record. *Id*. However, the parties could not agree on the evidence. *Id*. at 97. Mother then filed a motion for relief from judgment under Trial Rule 60(B)(8). *Id*. The successor judge granted the motion. *Id*. On appeal, the father claimed as error the trial court granting the mother's motion and holding a new hearing. *Id*. This court, in finding no error, held that Trial Rule 63 provides that if a successor judge is "satisfied that he cannot perform [the] duties of the former trial judge, [Rule 63] expressly grants wide discretion to a successor judge in granting a new hearing or trial." *Id*. at 97. The *Flores* case is distinguishable from this current case, because there is no evidence of a contentious disagreement as to Mother's and DCS' respective recreations of the missing portion of the record.

[20] Mother also relies on *In re I.P.*, 5 N.E.3d 750 (Ind. 2014). In *re I.P.*, the trial court held a termination factfinding hearing, but then the magistrate who heard the evidence resigned "before reporting recommended findings and conclusions to the judge." *Id*. at 751. Our supreme court held, "A party is entitled to a determination of the issues by the judge who heard the evidence, and, where a case is tried to a judge who resigns before determining the issues, a successor judge cannot decide the issues or enter findings without a trial *de novo*." *Id*. at 752. In this case, the sitting judge who heard the evidence at the fact-finding hearing issued his very detailed Order prior to his term ending. The successor

judge only certified the statement of evidence and did not issue an order relating to the termination of Mother's parental rights to Child. Therefore, contrary to Mother's argument, *I.P.* does not support her position.

[21] The interpretation of a trial rule is a question of law, which this court reviews *de novo*. *Morrison v. Vasquez*, 124 N.E.3d 1217, 1219 (Ind. 2019). None of the provisions of Indiana Appellate Rule 31 supports Mother's argument that a successor judge cannot certify the recreated record.

[22] Secondly, had Mother abided by this court's October 22, 2020, order to complete her statement of evidence within 15 days, the presiding judge who heard the case, would have been available. In addition, Mother's failure to object on grounds that successor judge could not certify the reconstructed record, raised a question of invited error. A party may not take advantage of an error that she invites. *Brewington v. State*, 7 N.E.3d 946, 975 (Ind. 2014); see also Durden v. State, 99 N.E.3d 645, 651 (Ind. 2018) (stating that invited error forbids a party from "taking advantage of an error that she commits, invites, or which is the natural consequence of her own neglect or misconduct"). As noted, Appellate Rule 31 does not support Mother's position on appeal, and we also find that the very problem of which Mother complains—that the successor judge who certified the statement of the evidence was different from the judge who heard the evidence—is attributable to Mother. Therefore, we find no error here.

CONCLUSION

[23] Based on the foregoing, we conclude that the denial of Mother's motion to continue did not deny her due process and that no error occurred when the successor judge certified the statement of the evidence.

[24] Affirmed.

[25] Mathias, J. and Crone, J. concur

[26]