MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In the Matter of the Termination of the Parent Child Relationship of N.G. and J.G, children

And

A.B. and J.G., parents

Appellants-Respondents,

v.

Indiana Department of Child Services,

February 14, 2022

Court of Appeals Case No. 21A-JT-1844

Appeal from the Porter Juvenile Court

The Honorable Nancy Gettinger, Senior Judge

Trial Court Cause Nos. 64C01-2105-JT-418 & 64C01-2105-JT-419

Appellee-Petitioner.

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellants-Respondents, A.B. (Mother) and J.G. (Father) (collectively, Parents), appeal the trial court's termination of their parental rights to the minor children, N.G. and J.G. (Children).

[2] We affirm.

ISSUES

[3] Mother and Father separately claim errors on appeal, which we consolidate and restate as follows:

(1) Whether the trial court retained personal jurisdiction over Father when he was not served with a summons;
(2) Whether the Senior Judge, presiding over the cause, entered the Order terminating the parent-child relationship while lacking color of authority;

(3) Whether the trial court failed to formally appoint a CASA to represent Children during the termination proceedings;

(4) Whether Indiana Code section 31-35-2-4 is unconstitutional as applied to Father due to ongoing delays resulting from the COVID-19 pandemic;

(5) Whether the Indiana Department of Child Services (DCS) presented sufficient evidence to support its petition to terminate the parent-child relationship;

(6) Whether Father's trial counsel was ineffective; and

(7) Whether Father's due process rights were violated because of the multiplicity of alleged errors.

FACTS AND PROCEDURAL HISTORY

[4] Parents are the biological parents to N.G., born on January 30, 2013, and J.G., born on February 4, 2015. On May 7, 2018, DCS received a report, alleging that Mother "beats the hell out of the kids," and "the walls are broken because [Mother] busted holes in the wall from punching, kicking and throwing [C]hildren into the wall." (CHINS Exh. pp. 6-7). N.G. sustained a black eye and a broken nose. The home lacked electricity or water, was found to be "deplorable," and the family was "pooping and peeing in buckets." (CHINS Exh. p. 7). Mother admitted that she and Children were homeless, and Father admitted that he was "only 3 days clean from heroin." (CHINS Exh. p. 7). On May 22, 2018, DCS removed Children and filed its Children in Need of Services (CHINS) petition because Mother was homeless and was unable to provide for Children's basic needs, while Father had ongoing issues with

substance abuse, including heroin, that interfered with his ability to safely parent Children. That same day, the trial court conducted an initial hearing, appointed CASA for Children, and ordered Children to remain in foster care, with supervised visits for Parents. On June 5, 2018, the trial court adjudicated Children to be CHINS as to Mother, and on July 13, 2018, Children were adjudicated CHINS as to Father.

[5] On June 20, 2018, CASA reported to the trial court that Children were showing behavioral issues, including aggression and anger. According to CASA, Mother reported that N.G. "imitates a lot of his [Father's] bad behaviors," and had "a bad temper and kicked her in the mouth one time when his temper flared up." (CHINS Exh. p. 18). N.G. tried to hurt J.G. when J.G. refused to follow him around. CASA also reported that Father was in the Porter County Jail on a failure to appear charge.

[6] On July 13, 2018, the trial court ordered Parents to participate in reunification services. Mother was required to attend home-based case management and therapy, and to follow all recommendations, while Father was ordered to submit to drug screens, attend a substance abuse assessment and follow all recommendations, and upon his release from incarceration, to participate in supervised visitation with Children. The dispositional order would be modified several times during the course of these proceedings, requiring other or additional services for Parents, including psychological assessments, medication management, and substance abuse counseling.

[7] Two months later, on September 17, 2018, during a review hearing, the trial court concluded that Father had not complied with Children's case plan, had recently been released from incarceration but had not visited with Children, and had not cooperated with DCS. At the time, Mother was employed at a hotel and was living with a friend, while claiming to be looking for a home of her own. By December 2018, Mother "continued to struggle [] with maintaining employment and obtaining permanent housing." (CHINS Transcript p. 45). Mother had lost two jobs and admitted to being homeless, but she did not want to go to a homeless shelter and would rather "stay on the street." (CHINS Tr. p. 61). A service provider reported that Mother was very difficult to work with "due to her mood swings and her aggressive behavior" and she was not open to suggestions to find housing. (CHINS Tr. p. 46). Mother was struggling with mental health issues which were "shown to be rather significant." (CHINS Tr. p. 56).

[8] During the review hearing of March 5, 2019, evidence was presented that although Mother had been able to obtain housing through Housing Opportunities, Parents were subsequently evicted for noncompliance with rules, not having employment, having arguments that required intervention, and possessing synthetic marijuana in the residence. Mother's recent drug screen tested positive for THC and synthetic marijuana. DCS recommended, and the trial court affirmed, that Mother should start submitting to drug screens. When the trial court advised Mother to stop smoking synthetic marijuana, Mother replied, "I'm not gonna stop." (CHINS Tr. p. 86). The trial court noted that

Mother appeared to be "mentally unstable." (CHINS Tr. p. 93). Father was not compliant with drug screens, and his most recent drug screen, taken on the same day as Mother's, was positive for amphetamines, methamphetamines, THC cocaine, and buprenorphine. While Mother's visits with Children were going well, Father admitted that he only attended visitation "when he feels like it." (CHINS Tr. p. 79).

[9] On May 14, 2019, the trial court conducted a permanency hearing at which it was reported that Children were doing well in foster care, and were attending therapy to address their behavioral issues of aggression and defiance. Father was not compliant with Children's case plan, was re-arrested, and was in jail for burglary. Although Mother still had no stable home and had moved in with her mother, she had obtained employment. While Mother had completed her substance abuse assessment, she had yet to commence any of the other recommended services.

[10] By August 2019, Children continued to struggle with aggressive behavior, with J.G. biting his foster mother "pretty severely." (CHINS Tr. p. 116). Mother opined that Children's behaviors could be related to them seeing Father "put[ting] his hands on [her.]" (CHINS Tr. p. 133). Although Father had been released from incarceration two months previously, Father had yet to commence services. He also had an active warrant for his arrest for escaping from house arrest and for failing to appear for a court hearing. Mother had yet to obtain permanent housing and was by then living at Mosley Motel in Gary,

Indiana. She was not meeting consistently with her therapist, had not been compliant with drug screens, and had not been participating in other services.

[11] During the review hearing on November 26, 2019, the trial court was advised that Father was incarcerated for Level 6 felony theft, with an expected release date of January 12, 2020. Mother had not yet found stable housing and had moved out of the long stay motel because she had lost her employment. Although she was again staying with her mother, the home was unsuitable for visits with Children because there was no running water or heat in the residence. Mother had yet to be compliant with submitting to drug screens; she admitted that she had tested positive for cocaine on "screens for jobs," and conceded to using marijuana daily. (CHINS Tr. p. 141). Evidence was presented indicating that Children continued to struggle and had started to see a therapist specializing in dealing with trauma in children. Children were afraid to go home "to Mom" because they were scared she could not take care of them. (CHINS Exh. 17). J.G. had started wetting his bed after visits with Mother, and his aggression had increased. At the close of the evidence, the trial court approved a permanency plan of adoption.

[12] Three months later, around February 2020, Children's aggression had increased significantly after Mother caused their medication to be stopped. Although Mother had been working with Children's therapist and had given her consent for Children's medication, she revoked her consent when she could not agree with the therapist as to the kind of medication used to manage N.G.'s ADHD and she refused any medication for J.G. While Children had been doing well at

the foster home and at school when taking medication, after Mother revoked her consent, Children's behaviors escalated, with J.G. breaking his foster mother's clavicle. Because N.G.'s behavior had "gotten so much worse," he was hospitalized to receive emergency medicine. (CHINS Tr. p. 197). DCS recommended that Children participate in neuropsychological evaluations to help understand the reasons for their behaviors and their triggers. The trial court ordered that Children be prescribed the medications and follow the recommendations of the therapist. The court advised that if Children continued to "pose a danger to themsel[ves] or others while medicated," residential care was an option. (CHINS Tr. p. 188). Since visitation stopped in January 2020, N.G.'s behaviors improved dramatically but J.G.'s therapy had to be increased to address his fear and anxiety of Mother taking him from the foster home.

[13] By July 2020, Father had been released from incarceration but had yet to contact DCS. Mother had moved in with a friend and had yet to secure a permanent home. Children had been moved from their foster placement and placed in a residential facility where they both were participating in individual and behavioral therapies. While in residential care, Children showed significant improvement and their aggressive behaviors reduced. J.G.'s behaviors were more in line with those typical of a five-year-old. Children were placed back in foster care in October 2020, with a family "experienced in working with children that have trauma-based behaviors." (CHINS Tr. p. 213). They were doing well in school, both academically and socially, and became bonded to their foster family.

[14] On January 28, 2021, the trial court conducted a permanency hearing. At the time, Father was still incarcerated. Mother had completed fourteen drug screens, of which eight were positive for THC and/or alcohol. While Mother had engaged in some casework services, she expressed frustration and refused to engage further. Her last participation in casework services dated from December 2020. She continued to have housing instability and refused to acknowledge her own and Children's mental health issues. Instead of seeking appropriate medical treatment, she persisted in using marijuana. Mother was difficult to engage and always had "a reason why something wasn't done and it's always someone else's fault." (CHINS Tr. Vol. II, p. 24). Even in texts, Mother made "accusations" and was threatening. (CHINS Tr. Vol. II, p. 25). Mother's housing continued to be unstable and by July 2021, Mother was living in her mother's residence, where she was taking care of her mother and grandmother.

[15] On May 5, 2021, DCS filed its petition to terminate Parents' rights to Children. On July 13 and 14, 2021, the trial court conducted a factfinding hearing, and on July 26, 2021, the trial court issued its Order, terminating Parents' parental rights, concluding, in pertinent part:

> 6. It was established by clear and convincing evidence that there is a reasonable probability that the conditions that resulted in [Children's] removal and placement outside of the home will not be remedied.
> 7. It was also established by clear and convincing evidence that the continuation of parent-child relationship poses a threat to the well-being of [Children].
> ****

9. In support thereof, the [c]ourt makes the following findings:
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ii. Although Mother now contends that she has a home, it is not clear where she actually [] lives.
iii. She contends she is in the process of becoming a paid caretaker for her mother and that she is working on making her mother's home safe and appropriate. Mother also contends that she stays there with her mother, but she also states that she lives with her grandmother and sometimes stays with her sister.
iv. Mother has a history of unstable housing. Credible evidence was presented during the fact-finding hearing that she had moved ten (10) times during the pendency of the underlying CHINS case.
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xix. Father, in fact has been incarcerated for most of the time [Children] have been out of the home. The time during which Father was not incarcerated and able to visit with [Children] he submitted to the only drug test he has had during the pendency of the CHINS and was positive for methamphetamine, THC, and cocaine.
xx. Father argues that because he was incarcerated during the COVID-19 pandemic, services were not available to him. However, when he was released pending sentencing on drug related charges, he continued to use illegal substances and did not take any steps towards initiating any services before he was once again detained and returned to jail. Moreover, he has been charged with additional drug related charges in Lake County.
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xxviii. [Mother] has heretofore been resistant to medication and as recently as July 1, 2021 shared with her Family Case Manager from DCS that she has been prescribed medication, is seeing a clinician in order to get her prescriptions refilled, but that she does not like being "chemically altered." However, she also admitted she feels she can focus better on her medication.
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xxxi. Only within a very short time before the TPR trial has Mother in this case somewhat complied with the [c]ourt's order and has been evaluated for medication. There is no indication, however, that she has gained significant insight with respect to her own mental health or the mental health of [Children].
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xxxiv. Both [Children] also have mental health issues and are currently taking prescription medications and participating in individual and family therapy with their foster parents and foster parents' older son.
xxxv. Mother believes that [Children's] behavior and lashing out is because they want to be home with [Mother].
xxxvi. Although Mother has had the opportunity with [Children's] current therapist to discuss [Children's] mental health needs, [Children's] therapist reports that Mother has trouble focusing on the needs of [Children], but rather focuses on how she has been "wronged" by DCS.
xxxvii. According to [Children's] therapist, although Mother has never specifically stated that she is anti-medication, she has never focused on or engaged in significant inquiry about their current medication, but rather brings up that [Children] never needed medication when they were in her care.
xxxviii. Both [Children] will need long term mental health interventions and Mother minimizes the need for those interventions.
xxxix. [Children] will need stability: remaining in the same school, consistency with appointments and medication management and this will be a long-term need.
xl. When during the pendency of the CHINS, [Children's] behavior became difficult to manage and medication was recommended and prescribed by [the therapist], the [c]ourt, after a hearing on the matter, ordered the medication be administered over Mother's objection.
xli. [Children's] outbursts and destructive behaviors continued and, in fact, escalated in foster care, they were both placed at Carmelite Home, a residential treatment center.
xlii. [Children] have since transitioned into their current foster home where they have made significant improvement with the continuation of, [and] monitoring of their prescribed medications and their involvement in therapy.
xliii. It is undisputed that these two [Children] have endured inconsistency and disruption during their time under the supervision of the DCS, including placement disruptions, placement within the restrictions of congregate care and the gaps in medication due to glitches in the transfer of psychiatrists.
xliv. [Children] have been in five (5) different placements in the past three (3) years.

> xlv. However, the good news is that they are now placed in a foster home that has provided them with the interventions that they need, that they are thriving and have been improving significantly in their current placement. They are now living in a family that is stable, consistent and vigilantly and diligently involved in their treatment, including the management of their medication.
> ****
> xlviii. Continuing to work towards reunification could mean [Children] would remain in limbo rather than achieving the permanency they need and deserve. Although Mother had made recent improvements while these [Children] who have special needs have not been in her home, it is not clear that she will ever be able to or willing to meet their special needs. The court need not wait until [Children] have suffered irreparable harm before terminating parental rights. []
> xlix. [Children's] CASA was appointed by the court in both the CHINS and the TPR to represent and protect the best interest of a child and to research, examine, advocate, facilitate, and monitor a child's situation.
> l. CASA's position is that it [is in] the best interests of [Children] for parental rights to be terminated and that the continuation of the parent-child relationship poses a threat to [Children].

(Father's App. Vol. II, pp. 17-22).

[16] Parents now appeal. Additional facts will be provided if necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

[17] Parents challenge the trial court's termination of their parental rights to their Children. The Fourteenth Amendment to the United States Constitution protects the traditional right of parents to establish a home and raise their children. *Bester v. Lake Cnty. Office of Family & Children*, 839 N.E.2d 143, 147 (Ind. 2005). "A parent's interest in the care, custody, and control of his or her

children is 'perhaps the oldest of the fundamental liberty interests.'" *Id.* (quoting *Troxel v. Granville*, 530 U.S. 57, 65 (2000)). However, parental rights "are not absolute and must be subordinated to the child's interests in determining the proper disposition of a petition to terminate parental rights." *Id.* If "parents are unable or unwilling to meet their parental responsibilities," termination of parental rights is appropriate. *Id.* We recognize that the termination of a parent-child relationship is "an 'extreme measure' and should only be utilized as a 'last resort when all other reasonable efforts to protect the integrity of the natural relationship between parent and child have failed.'" *K.E. v. Ind. Dep't of Child Servs.*, 39 N.E.3d 641, 646 (Ind. 2015) (quoting *Rowlett v. Vanderburgh Cnty. Office of Family & Children*, 841 N.E.2d 615, 623 (Ind. Ct. App. 2006)).

[18] Indiana courts rely on a "deferential standard of review in cases concerning the termination of parental rights" due to the trial court's "unique position to assess the evidence." *In re A.K.*, 924 N.E.2d 212, 219 (Ind. Ct. App. 2010), *trans. dismissed*. Our court neither reweighs evidence nor assesses the credibility of witnesses. *K.T.K. v. Ind. Dep't of Child Servs.,* 989 N.E.2d 1225, 1229 (Ind. 2013). We consider only the evidence and any reasonable inferences that support the trial court's judgment, and we accord deference to the trial court's "opportunity to judge the credibility of the witnesses firsthand." *Id.*

[19] Although Parents challenge the sufficiency of the evidence supporting the trial court's Order terminating their parental rights, they, either separately or jointly,

also raise a number of procedural issues. As these procedural challenges are presented as threshold questions, we will turn to those first.

II. *Trial Court's Personal Jurisdiction Over Father*[1]

[20] Initially, Father contends that the trial court lacked personal jurisdiction over him because he had not been served with a summons to appear for the termination proceedings. "Personal jurisdiction refers to a court's power to impose judgment on a particular defendant." *Boyer v. Smith*, 42 N.E.3d 505, 509 (Ind. 2015). A challenge to personal jurisdiction is a question of law, which we review *de novo*. *Id*. at 508.

[21] Indiana Trial Rule 12(B) provides a mechanism for raising defenses such as a lack of personal jurisdiction or insufficient service of process by requiring that the defenses or objections be asserted in the responsive pleading (where one is required) or by motion. The rule further states,

> A motion making any of these defenses shall be made before pleading if a further pleading is permitted or within twenty [20] days after service of the prior pleading if none is required. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, any of the defenses in section (B)(2), (3), (4), (5) or (8) is waived to the extent

[1] This court acknowledges Father's motion to strike DCS's Appellate Brief and DCS's Verified Response thereto. Although Father requested this court to strike DCS's Appellate Brief and Appendix due to defects in DCS's Appendix which were not timely rectified, we denied Father's motion on January 19, 2022. However, we do accept DCS's concession to strike certain sentences from its Brief and will analyze the issue without taking into account the stricken paragraph.

> constitutionally permissible unless made in a motion within twenty [20] days after service of the prior pleading. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion.

Ind. T.R. 12(B). Accordingly, "[a] party can waive lack of personal jurisdiction and submit himself to the jurisdiction of the court if he responds or appears and does not contest the lack of jurisdiction." *Matter of K.P.G.*, 99 N.E.3d 677, 680-81 (Ind. Ct. App. 2018), *trans. denied*.

[22] Here, Father was not required to file a responsive pleading to DCS's petition to terminate his parental rights. As such, he had twenty days from the date of service of the petition to file a motion challenging personal jurisdiction. Father never challenged personal jurisdiction in the trial court, and readily appeared in court. Simply put, Father submitted himself to the trial court's jurisdiction by appearing in court and failing to contest personal jurisdiction at that time or within the time limitations found in Trial Rule 12(B). As a result, he has waived his claim and he may not contest the issue for the first time on appeal. *See Matter of K.P.G.*, 99 N.E.3d at 681.

III. *Color of Authority*

[23] In a second procedural challenge, Father contends that the Order terminating the parent-child relationship is void because the senior judge who entered the order had not been duly appointed and did not have authority to hear the evidence and issue a final order pursuant to the jurisdictional requirements of Indiana Administrative Rule 5(B)(4).

[24] Although the initial hearing was presided over by the Porter County Juvenile Court's magistrate, a conflict prevented the magistrate from conducting the trial and a senior judge, Nancy Gettinger (Senior Judge), was appointed to preside in this Cause. Indiana Code section 33-38-13-8 provides that the supreme court "may authorize retired justices and judges to perform temporary judicial duties in any state court." Pursuant to Indiana Code section 33-23-3-2, the supreme court is empowered to appoint a senior judge to serve any trial court. On February 9, 2018, the Indiana Supreme Court first certified Nancy Gettinger as Senior Judge in accordance with Ind. Code § 33-23-3-2. At all times relevant to this Cause, the Senior Judge had senior judge status under the authority of the Indiana Supreme Court.

[25] Indiana Administrative Rule 5 addresses the payment of fees by the Indiana Office of Judicial Administration and qualification of benefits to senior judges when acting in such capacities in Indiana courts. In this regard, Ind. Admin. R. 5(B)(4) requires that a "presiding judge wishing to use a senior judge shall issue an order naming the senior judge who will serve the court. The order shall specify the day(s) the senior judge is to serve the court and whether the service is limited to the regular business hours of the court or is for the full twenty-four (24) hours." Once appointed, a senior judge "shall have the same jurisdiction as the presiding judge of the court where the senior judge is serving, but only during the time specified in the order naming the senior judge to serve the court." Ind. Admin. R. 5(B)(4). The senior judge "retains jurisdiction in an

individual case on the order of the presiding judge of the court in which the case is pending." Ind. Admin. R. 5(B)(4).

[26] Because no reference to the Senior Judge's assignment was made on the Chronological Case Summary (CCS), on September 8, 2021, Father filed a motion to modify the record seeking to have the trial court order a modification to include the orders addressed in Admin R. 5(B)(4) into the CCS. On September 17, 2021, the Porter County Circuit Court Judge responded to Father's motion, as follows:

> The [c]ourt, having reviewed the record, now GRANTS the motion in part. The JT Chronological Case Summary cannot be modified as the appointments were issued a CB Cause Number. The [c]ourt orders the Clerk to supplement the JT Chronological Case Summary by attaching a copy of each Order Naming Senior Judge with the CB designation for the following orders: July 1, 2021; July 13, 2021; July 14, 2021; and July 26, 2021.
>
> The [c]ourt finds the orders filed May 5, 2021; July 9, 2021; July 30, 2021; and August 17, 2021, do not have an order appointing the Honorable Nancy Gettinger as Senior Judge on those dates. However, the [c]ourt finds the orders were to effectuate procedural, not substantive, matters in this cause.

(Father's App. Vol. II, p. 83). Asserting a three-fold error in the appointment of the Senior Judge, Father claims that (1) the Senior Judge did not retain jurisdiction over the termination proceedings on May 5, July 9, July 30, and August 17, 2021; (2) none of the Orders Naming Senior Judge called for the Senior Judge to retain jurisdiction over these specific termination cases, as is

permitted by Admin R. 5(B)(4) and only if ordered by the presiding judge; and (3) the Senior Judge did not file her verified written statement affirming that she did not practice law before the Porter County Circuit Court until well after the Order terminating the parent-child relationship had been entered.

[27] The Indiana Constitution requires that judicial acts be performed by judges. Ind. Const. art 7, §1. As such, only duly elected or appointed judges of the court may enter final appealable judgments. *Floyd v. State*, 650 N.E.2d 28, 29-30 (Ind. 1994). "When a court official who is not a duly elected or appointed judge of the court purports to make a final order or judgment, that decision is a nullity." *Id*. In *Floyd*, our supreme court addressed the authority of a court officer to enter a final appealable order and the way in which reviewing courts should handle challenges to such an officer's authority on appeal. *Id*. at 29. The *Floyd* court concluded that:

> The proper inquiry for a reviewing court when faced with a challenge to the authority and jurisdiction of a court officer to enter a final appealable order is first to ascertain whether the challenge was properly made in the trial court so as to preserve the issue for appeal. In *Survance v. State*, 465 N.E.2d 1076 (Ind. 1984), defendant was convicted of Conspiracy to Commit Arson. On appeal, defendant argued that no proper appointment of the judge presiding at trial as judge pro tempore was made prior to trial. We stated that an improperly appointed judge pro tempore could present a problem compelling reversal but that such error was not "fundamental." *Id*. at 1081. We went on to observe:
>
> > Any objections to the authority of an attorney appointed to try a cause must be made at the time when he assumes to act or they will be deemed

> waived on appeal. *Gordy v. State*, [315 N.E.2d 362, 367 (Ind. 1974)], and cases cited therein.

In *Gordy* we were presented with a situation similar to the case at bar. Quoting from the Court of Appeals we held:

> The assignment of errors presenting this question is grounded on the proposition that the trial court had no jurisdiction to render the judgment from which this appeal is taken. The position of appellant on this proposition cannot be maintained. It is not contended that the Superior Court of Marion county did not have jurisdiction of the class of cases to which this one belongs; and its jurisdiction of the person of appellant is not questioned. It is therefore apparent that the court had jurisdiction of the subject-matter of the action and of the person of appellant, and had power to proceed to judgment. The defect pointed out was not affecting the jurisdiction of the court, but the right and authority of its presiding judge to act as such. The judge who presided at the trial of this case was acting under color of authority, and he was a judge de facto if not a judge de jure.
>
> It has been held repeatedly by this court and the Supreme Court that when a judge has been called or an attorney appointed to try a cause, and no objection is made at the time, or to his sitting in the cause when he assumes to act, all objections thereto will be deemed waived on appeal. We see no reason why the rule announced and applied to special judges should not apply with equal force to a judge pro tempore.
>
> [*Gordy*, 315 N.E.2d at 367]

Id. at 32. Accordingly, "it has been the long-standing policy of this court to view the authority of the officer appointed to try a case not as affecting the jurisdiction of the court." *Id*. Therefore, "the failure of a party to object at trial to the authority of a court officer to enter a final appealable order waives the issue for appeal." *Id*. Although *Floyd* addressed the authority of judges pro tempore and special judges, *Becker v. State*, 646 N.E.2d 978, 980 (Ind. Ct. App. 1995) applied the *Floyd* doctrine to senior judge appointments.

[28] As Father conceded in his appellate brief that he did not raise the issue of Senior Judge's authority at trial, Father waived the claim for our review. Even though Father contends that the authority of an improperly appointed judge implicates the judge's partiality and bias and should therefore be considered a fundamental error, *Floyd* and its progeny are adamant that errors in the appointment of a court officer are not fundamental and Father has not presented this court with a compelling argument to revisit this Indiana precedent. *See id*.

[29] Nevertheless, in an effort to avoid waiving review of his claim, Father insists that this court should still reach the merits of the issue because "the impropriety of the [S]enior [J]udge's appointment presents a structural error." (Father's Br. p. 22). A structural error refers to "a limited class of fundamental constitutional errors that defy analysis by harmless error standards," thus requiring automatic reversal without the need to show prejudice. *Durden v. State*, 99 N.E.3d 645, 653 (Ind. 2018). These errors, known as "structural errors," affect "the framework within which the trial proceeds, rather than simply an error in the

trial process itself." *Durden*, 99 N.E.3d at 653. Some structural errors, such as the deprivation of counsel or defective reasonable-doubt instructions, always result in prejudicial harm to the defendant. *Id*. (citing *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)). However, a structural error need "not lead to fundamental unfairness in every case." *Durden*, 99 N.E.3d at 653. A structural error may arise when it threatens an interest other than protecting the defendant against wrongful conviction. *Id.* A structural error also results if "the precise effect of the violation cannot be ascertained." *Id*. Father now "asserts that the structural error doctrine should apply to questions of judicial partiality or bias in termination hearings. [] Applying structural error to a termination case just makes sense given the magnitude of the constitutional rights at stake." (Father's Br. pp. 22-23). Without deciding whether judicial partiality or bias amounts to a structural error, we note that Father, at no point during these proceedings or in his appellate brief, asserted the Senior Judge's partiality or bias towards him. Accordingly, as no cogent argument was made, we find his claim of structural error to be waived. *See Nix v. State*, 158 N.E.3d 795, 800 (Ind. Ct. App. 2020) ("almost any claim, structural or not, can be forfeited through procedural default."), *trans. denied*.

IV. *CASA's Appointment*

[30] Parents contend that a remand for a new hearing is required because the trial court failed to appoint a CASA to advocate for Children's interests during the termination proceedings. Indiana Code section 31-35-2-7(a) requires a that trial

court to appoint a guardian *ad litem* and/or a CASA in all termination proceedings where a parent objects to the termination. However, if a CASA has previously been appointed in the CHINS proceeding, the trial court may reappoint the CASA to represent and protect the best interest of the child in the termination proceedings. *See* I.C. § 31-35-2-7(b).

[31] The record reflects that on June 7, 2018, the trial court appointed Timothy Patterson (Patterson) as CASA to represent Children in the CHINS proceeding. Later that same month, on June 21, 2018, the trial court entered its order to replace Patterson with Cissie Wardell as CASA (CASA Wardell) in the CHINS proceedings. However, despite the trial court's finding in its termination Order that "[C]hildren's CASA was appointed by the court in both the CHINS and TPR to represent and protect the best interest of a child," no such order of appointment is noted on the CCS of the termination proceedings. (Father's App. Vol. II, p. 22). Accordingly, Parents contend that Children were not represented by a CASA during the termination proceedings and this court should remand for a new hearing.

[32] Our review of the evidence confirms that since her appointment on June 21, 2018, CASA Wardell continuously advocated for the best interests of Children up and through the termination hearing. By the time of the termination factfinding hearing on July 13, 2021, she had been representing Children's best interests for over three years, meeting with Children at least once a month. During those same three years, she submitted reports to the trial court reporting on Children's welfare and making recommendations with regard to their

wellbeing. During the two-day termination hearings, CASA Wardell testified, cross-examined witnesses, and presented a closing argument. Without at any point objecting to CASA Wardell's representation of Children, both Mother and Father separately cross-examined CASA Wardell as to her testimony.

[33] In their appellate briefs, Parents acknowledge CASA Wardell had been involved in both the CHINS and termination proceedings "throughout their duration." (Father's Br. p. 25; Mother's Br. p. 39 (tacit acknowledgment by adoption of Father's argument)). By now insisting that the trial court committed a reversible error by not formally including a specific order of appointment of CASA in the termination proceeding, Parents are elevating form over substance.[2] Because of CASA Wardell's documented continuous advocacy for Children in both the CHINS and termination proceedings, we cannot conclude that Children were harmed and we find at most harmless error.[3]

V. *COVID-19 Pandemic*

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[2] We find Parents' suggested caselaw distinguishable from the facts before us. In both *Jolley v. Posey Cty. Dep't of Pub. Welfare*, 624 N.E.2d 23 (Ind. Ct. App. 1993) and *Matter of S.L.,* 599 N.E.2d 227, 229-30 (Ind. Ct. App. 1992), we found reversible error in the trial court's failure to appoint a guardian *ad litem* or CASA for the child. However, here, CASA was appointed during the CHINS proceeding and continuously served throughout the termination proceeding, albeit without a formal appointment.

[3] Mother also asserts some factual allegations that CASA did not adequately represent Children's best interests because, among others, CASA never spoke to Children about Mother, and it does not appear from the record that she took Children's opinions into consideration. Mother is requesting this court to reweigh the evidence, which we decline to do. *See K.T.K.*, 989 N.E.2d at 1229.

[34] Next, Father contends that due to COVID-19, the statutory requirements of the termination statute enumerated in Indiana Code section 31-35-2-4(b)(2) are "unconstitutional as applied to him" because these statutory factors were "impermissibly negatively impacted by the COVID-19 pandemic" and resulted in a violation of "his constitutional rights." (Father's Br. p. 26). In essence, Father maintains that the pandemic lengthened the duration of time Children were removed from him and it impacted his ability to access services and improve himself.

[35] When the validity of a statute is challenged, appellate courts begin with a "presumption of constitutionality." *State v. Lombardo*, 738 N.E.2d 653, 655 (Ind. 2000). Thus, "[e]very statute stands before [this court] clothed with the presumption of constitutionality until that presumption is clearly overcome by a contrary showing." *Wallace v. State*, 905 N.E.2d 371, 378 (Ind. 2009). The party challenging the constitutionality of the statute bears the burden of proof, and all doubts are resolved against that party. *Id*. Where, as here, a party makes an as-applied constitutional challenge, the party need only show that the statute is unconstitutional concerning the facts of the particular case. *State v. Zerbe*, 50 N.E.3d 368, 359 (Ind. 2016).

[36] In January 2020, the United States government declared COVID-19 a public health emergency and by March 6, 2020, Indiana's Governor issued Executive Order 20-01 declaring a public health emergency throughout Indiana. The Governor extended this initial declaration in numerous subsequent Executive Orders. On March 16, 2020, pursuant to Indiana Administrative Rule 17, the

Indiana Supreme Court "[t]oll[ed] for a limited time all laws, rules, and procedures setting time limits for speedy trials in criminal and juvenile proceedings, public health, mental health, and appellate matters; all judgments, support, and other orders; and in all other civil and criminal matters before all State of Indiana trial courts." *Matter of Admin Rule 17 Emergency Relief for Indiana Trial Courts Relating to 2019 Novel Coronavirus (COVID-19)*, 141 N.E.3d 388 (Ind. 2020). On November 10, 2020, the supreme court reiterated its tolling rules and procedures setting time limits in civil matters. Accordingly, due to the COVID-19 orders, court cases have been extended out beyond their normal timeframes.

[37] By November 2019, the trial court changed Children's permanency plan from reunification to adoption because of Parents' noncompliance with Children's case plan and DCS was no longer required to offer services to Parents. *See In re A.W.D.*, 907 N.E.2d 533, 538 (Ind. Ct. App. 2008) (Once permanency plan changes to adoption, reunification services are no longer required). The global COVID-19 Pandemic commenced in January 2020, with Indiana declaring a health emergency in March of 2020. Because of the tolled timelines, DCS did not file its petition to terminate parental rights until May 2021. Accordingly, Father had an additional eighteen months to take steps to persuade DCS that he had become a better parent. *See C.T. v. Marion Cty Dep't of Child Servs.*, 896 N.E.2d 571, 583(Ind. Ct. App. 2008) (once the trial court has determined that DCS is no longer required to provide reunification services, the parent may still take steps to remedy the reasons for the child's removal). We have consistently

held that "DCS is generally required to make reasonable efforts to preserve and reunify families during the CHINS proceedings," but that requirement "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 H.L.*, 915 N.E.2d 145, 148, n.3 (Ind. Ct. App. 2009). Likewise, "a parent may not sit idly by without asserting a need or desire for services and then successfully argues that he was denied services to assist him with his parenting." *In re B.D.J.,* 728 N.E.2d 195, 202 (Ind. Ct. App. 2000). As such, "the responsibility to make positive changes will stay where it must, on the parent." *Prince v. Dep't of Child Servs.,* 861 N.E.2d 1223, 1231 (Ind. Ct. App. 2007).

[38] Here, Father had eighteen months to contact DCS and request additional services from DCS or the trial court to effect reunification. Father failed to do so or even point us to any evidence reflecting that he made an effort to better himself as a parent. Although Father was incarcerated for the better part of these proceedings, even when he was released Father failed to make any contact with DCS to initiate services. Therefore, we cannot conclude that Father carried his burden to establish that Indiana Code section 31-35-2-4(b) is unconstitutional as applied to him.

VI. *Sufficiency of the Evidence*

[39] Both Parents challenge the sufficiency of the evidence supporting the trial court's termination of their parental rights. In order to terminate a parent's rights to his or her child, DCS must prove:

> (A) that one (1) of the following is true:
>
> (i) The child has been removed from the parent for at least six (6) months under a dispositional decree.
> * * * *
> (iii) The child has been removed from the parent and has been under the supervision of a local office . . . 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 [CHINS] . . . ;
>
> (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 [CHINS];
>
> (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 must prove each of the foregoing elements by clear and convincing evidence. *C.A. v. Ind. Dep't of Child Servs.*, 15 N.E.3d 85, 92 (Ind. Ct. App. 2014). "[C]lear and convincing evidence requires the existence of a fact to be highly probable." *Id.*

[40] It is well-established that "[a] trial court must judge a parent's fitness as of the time of the termination hearing and take into consideration evidence of changed conditions." *Stone v. Daviess Cnty. Div. of Children & Family Servs.*, 656 N.E.2d 824, 828 (Ind. Ct. App. 1995), *trans. denied*. In judging fitness, a trial court may properly consider, among other things, a parent's substance abuse and lack of adequate housing and employment. *McBride v. Monroe Cnty. OFC*, 798 N.E.2d 185, 199 (Ind. Ct. App. 2003). The trial court may also consider a parent's failure to respond to services. *Lang v. Starke Cnty. OFC*, 861 N.E.2d 366, 372 (Ind. Ct. App. 2007), *trans. denied*. "[H]abitual patterns of conduct must be evaluated to determine whether there is a substantial probability of future neglect or deprivation." *Stone*, 656 N.E.2d at 828. A trial court "need not wait until the child[] [is] irreversibly influenced by [its] deficient lifestyle such that [its] physical, mental and social growth is permanently impaired before terminating the parent-child relationship." *Id*. Furthermore, "[c]lear and convincing evidence need not reveal that the continued custody of the parents is wholly inadequate for the child's very survival. Rather, it is sufficient to show by clear and convincing evidence that the child's emotional and physical development are threatened by the respondent parent's custody." *K.T.K.*, 989 N.E.2d at 1230.

[41] In adjudicating Children as CHINS, the trial court determined that Children were removed from Parents' care because Mother was homeless and unable to provide for Children's basic needs and that Father had ongoing issues with substance abuse, including heroin, that interfered with his ability to safely parent Children.

A. *Mother*

1. *Reasonable Probability*

[42] In challenging the statutory requirement that there is a reasonable probability that the conditions that resulted in the Children's removal or the reasons for placement outside the home of Mother will not be remedied, Mother focuses her entire argument on the trial court's finding that Mother, throughout the proceedings, remained homeless. She now maintains that she was never homeless and always had a place to stay even though she did not have a home of her own. However, Mother misunderstands the trial court's homelessness finding. The trial court did not intend to find Mother homeless, *i.e.*, as without a place to reside; rather, the trial court required Mother to acquire "safe, permanent and suitable housing for herself and her [C]hildren." (Father's App. Vol. II, p. 19).

[43] At no point during these proceedings did Mother obtain permanent and suitable housing. In May 2018, at the time Children were removed, Mother admitted that she was homeless and by December 2018, she refused to go to a homeless shelter, stating that she would rather "stay on the street." (Father's App. Vol.

II, p. 61). Mother changed her address six times. She tended to stay some place and then look for somewhere else, whether it be with friends or at a hotel. None of the places Mother resided at were in her own name and she never cooperated with home-based services to help her secure permanent and stable housing, in which Children would be safe. At the time of the termination hearing, Mother testified that she resided with her mother and grandmother in her mother's residence. Mother had previously admitted to DCS that her mother's home was not suitable for Children because the house did not have running water or heat. Although Mother assured DCS that she was renovating the home, at the time of the termination hearing, she admitted that the house still needed work. Accordingly, three years after Children were adjudicated CHINS, Mother still had not secured appropriate and safe housing.

[44] Although the cause had been pending for three years, at the time of the termination hearing Mother had just started to participate in some services. Nevertheless, Mother was still not meeting regularly with her caseworker, she had stopped casework services since December 2020, she was not compliant with drug screens, and was not participating in counseling. Mother always had "a reason why something wasn't done and it's always someone else's fault." (CHINS Tr. p. 24).

[45] Mother's failure to engage in services during these proceedings demonstrates a "lack of commitment to complete the actions necessary to preserve [the] parent-child relationship." *In re A.L.H.*, 774 N.E.2d 896, 900 (Ind. Ct. App. 2002). It is generally held that "parents' past behavior is the best predictor of their future

behavior." *In re E.M.*, 4 N.E.3d 636, 643 (Ind. 2014). Although Mother very recently engaged in some services, we agree with the trial court that it is "too little too late." (Father's App. Vol. II, p. 21). The trial court was entitled to weigh the evidence as it found appropriate in the context of this case, and we affirm the trial court's conclusion that a reasonable probability exists that the conditions that resulted in Children's removal will not be remedied. *See K.T.K.*, 989 N.E.2d at 1234.[4] As such, we affirm the trial court's decision.

2. *Best Interests*

[46] Mother also challenges the trial court's conclusion that termination of parental rights is in Children's best interests. To determine whether termination is in a child's best interests, the trial court must look to the totality of the evidence. *A.D.S. v. Ind. Dep't of Child Servs.*, 987 N.E.2d 1150, 1158-59 (Ind. Ct. App. 2013), *trans. denied*. The trial court must subordinate the interests of the parents to those of the child and need not wait until a child is irreversibly harmed before terminating the parent-child relationship. *Id.* In this regard, "recommendations by both the case manager and the child advocate to terminate parental rights, in addition to evidence that the conditions resulting in removal will not be

[4] Because Ind. Code § 31-35-2-4(b)(2)(B) is written in the disjunctive, and we affirmed the trial court's Order based on the fact that there is a reasonable probability that the conditions that resulted in the Children's removal or the reasons for placement outside the home of Mother will not be remedied, we will not address whether there was a reasonable probability that continuation of Mother's relationship with Children threatened Children's wellbeing.

remedied, is sufficient to show by clear and convincing evidence that termination is in the child's best interests." *Id*.

[47] Here, CASA testified that Children would be at risk if returned to Parents because Mother will not attend to Children's medical needs and therapy based on her prior objections to medication for both herself and Children. The trial court found, and Mother did not contest, that Mother never focused on Children's needs for medication, and rather minimized the need for Children's medical interventions. Thus, CASA opined that it would be in Children's best interests for parental rights to be terminated. Likewise, DCS's Family Case Manager (FCM) opined that termination would be in Children's best interests and that Children should have no further contact with Parents. Accordingly, in light of CASA's and FCM's testimony, as well as our conclusion that the conditions resulting in removal will not be remedied, we affirm the trial court's Order on this issue. *See id.*

B. *Father*

[48] Father's main challenge with respect to the sufficiency of the evidence supporting the trial court's Order focuses on DCS's satisfactory plan for the care and treatment for Children.[5] Both CASA and DCS agreed that adoption was

[5] Father also made a single-sentence reference that termination is not in Children's best interests because of "Father's ability to access treatment and his ability to interact with [C]hildren has been greatly hampered by the COVID-19 pandemic." (Father's Br. p. 34). As we already addressed that argument above and found it to be without merit, we will not repeat the analysis here.

Children's permanency plan, that adoption was appropriate, and that their foster parents were willing to adopt Children. One of the foster parents affirmed this plan during the termination hearing.

[49] Without any citations to caselaw or statutes, Father maintains that the trial court and DCS are required to perform a more in-depth assessment of foster parents' background. Focusing on the fact that foster parents are in a same sex relationship, Father asserts that "a plan to place [C]hildren with a same sex married couple should include an examination of how [C]hildren feel about this sensitive cultural issue. Despite the difficulty of respectfully navigating such sensitive issues, the discussions must be had to assure that [C]hildren's best interests are met." (Father's Br. p. 37).

[50] We have previously held that for a plan to be "satisfactory" in accordance with the termination statute, it "need not be detailed, so long as it offers a general sense of the direction in which the child will be going after the parent-child relationship is terminated." *In re A.S.*, 17 N.E.3d 994, 1007 (Ind. Ct. App. 2014). Generally, adoption is a satisfactory plan. *In re S.L.H.S.*, 885 N.E.2d 603, 618 (Ind. Ct. App. 2008). "[T]here need not be a guarantee that a suitable adoption will take place, only that DCS will attempt to find a suitable adoptive parent." *See id*. This is exactly what DCS did and its efforts were supported by the evidence presented at the termination hearing. "[I]it is within the authority of the adoption court, not the termination court, to determine whether an adoptive placement is appropriate." *Id*. Accordingly, within the boundaries of a termination of parental rights proceeding, "[t]ermination, allowing for a

subsequent adoption, would provide [Children] with the opportunity to be adopted into a safe, stable, consistent, and permanent environment where all their needs will continue to be met, and where they can grow." *In re A.D.S.*, 987 N.E.2d at 1159.

[51] Based on the evidence before us, Parents failed to avail themselves of the opportunities and services offered by DCS to reunite with Children and made no progress nor commitment during the proceedings of the case. "[C]hildren cannot wait indefinitely for their parents to work toward preservation or reunification." *In re E.M.*, 4 N.E.3d at 648. Even though "the ultimate purpose of the law is to protect the child, the parent-child relationship will give way when it is no longer in the child's interest to maintain this relationship." *In re B.D.J.*, 728 N.E.2d 195, 200 (Ind. Ct. App. 2000). Parents' historical inability to provide a safe environment for Children, together with their current lack of participation in services requested by DCS to address family's issues, supports the trial court's conclusion that termination of parental rights is in the best interests of Children. Accordingly, we affirm the trial court's Order.

VII. *Effective Assistance of Trial Counsel*

[52] Next, Father contends that his trial counsel was ineffective in her representation of him before the trial court because she failed to object to Senior Judge's jurisdiction, she failed to object to the constitutionality of I.C. § 31-35-2-4 as applied to Father in light of the COVID-19 pandemic, and she failed to timely file her appearance after her appointment by the trial court.

[53] "Where parents whose rights were terminated upon trial claim on appeal that their lawyer underperformed, we deem the focus of the inquiry to be whether it appears that the parents received a fundamentally fair trial whose facts demonstrate an accurate determination." *Baker v. Marion Cty. Office of Family & Children*, 810 N.E.2d 1035, 1041 (Ind. 2004). Accordingly, "[t]he question is not whether the lawyer might have objected to this or that, but whether the lawyer's overall performance was so defective that the appellate court cannot say with confidence that the conditions leading to the removal of the children from parental' care are unlikely to be remedied and that termination is in the child's best interest." *Id*.

[54] The evidence reflects that the trial court appointed Father's trial counsel at the initial hearing on May 20, 2021. She represented Father at the July 1, 2021 status hearing. However, trial counsel did not file her formal appearance with the trial court until July 9, 2021, fifty days after her appointment. Although trial counsel did not immediately file her formal appointment, she did represent Father's interests and zealously represented him by reading reports, examining drug screens, cross-examining witnesses, and defending Father's interests throughout these proceedings, as well as during the two-day factfinding hearing and during closing argument, in which she asserted the COVID-19 issue. Therefore, in light of the facts before us, we conclude that Father received a fundamentally fair trial. *See id*.

VIII. *Multiplicity of Errors*

[55] Lastly, because "the termination proceedings were riddled with error," Father now claims that "these errors worked to deprive Father and [C]hildren of due process." (Father's Br. p. 41; Reply Br. p. 18). However, despite Father's assertion, we did not find any errors, and even the issues that had been waived by trial counsel did not amount to a finding of ineffective representation. Accordingly, we affirm the trial court's Order terminating Parents' rights to Children.

CONCLUSION

[56] Based on the foregoing, we hold that (1) Father submitted to the personal jurisdiction of the trial court; (2) Father waived his objection to the Senior Judge's authority; (3) CASA represented Children throughout the termination proceedings; (4) Indiana Code section 31-35-2-4 is not unconstitutional as applied to Father; (5) DCS presented sufficient evidence to support its petition to terminate the parent-child relationship; (6) Father's trial counsel was not ineffective; and (7) Father was not deprived of due process.

[57] Affirmed.

[58] Robb, J. and Molter, J. concur