MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In re the Involuntary Termination of the Parent-Child Relationship of: L.G. (Minor Child),

and M.G.,

Appellant-Respondent,

v.

Indiana Department of Child Services,

Appellee-Petitioner.

November 30, 2021

Court of Appeals Case No. 21A-JT-1261

Appeal from the Knox Superior Court

The Honorable Gregory A. Smith, Special Judge

Trial Court Cause No. 42D01-2007-JT-17

Bradford, Chief Judge.

Case Summary

[1] On October 5, 2014, the Department of Child Service ("DCS") received a report that M.G. ("Father") and S.F.[1] ("Mother) (collectively "Parents") were manufacturing methamphetamine. L.G. ("Child") was removed from Parents' care shortly thereafter and adjudicated a child in need of services ("CHINS") later that year. In early 2015, the juvenile court entered a dispositional order with an ultimate plan of reunification, ordering Father to participate in services, follow the law, and abstain from using drugs and alcohol among other things. Father largely failed to participate in services unless he was incarcerated and tested positive for methamphetamine and amphetamine at least six times during these proceedings. On February 10, 2020, the juvenile court discontinued visitation. On May 28, 2021, the juvenile court entered its decree terminating Father's parental rights. Father appeals, arguing that the juvenile court erroneously terminated his parental rights and that his due process rights were violated by DCS's failure to provide him services while he was incarcerated. Because the juvenile court did err when terminating Father's parental rights and

[1] Mother does not participate in this appeal.

because Father was in fact offered services when possible while incarcerated, we affirm.

Facts and Procedural History

[2] On October 5, 2014, DCS received a report that Parents were manufacturing methamphetamine. DCS removed Child, who was fourteen months old at the time, from Parents' care on October 16, 2014, when Mother tested positive for marijuana, amphetamine, and methamphetamine and Father refused to submit to a drug test. On October 20, 2014, DCS filed a petition alleging that Child was a child in need of services. Later that year, on December 9, 2014, and upon Parents' admission, the juvenile court adjudicated Child to be a CHINS.

[3] On January 30, 2015, the juvenile court entered a dispositional order with an ultimate plan of reunification. The order required that Father remain alcohol and drug-free, obtain a substance-abuse evaluation and follow recommended treatments, submit to drug screens, participate in visitation, contact the family case manager ("FCM") weekly, and otherwise obey the law. Throughout DCS's involvement with Father, and depending on his status of incarceration or work release, Father was offered random drug screens, therapeutic supervised visitation, the opportunity to complete parenting and substance-abuse assessments, parent aid, and therapy.

[4] Therapist Heidi Tapia Aguilar, who was referred to offer Father services in June of 2019, was unable to reach him, despite numerous attempts, until

September of 2019. Father agreed to meet Aguilar weekly for Matrix program and anger management services, but failed to attend his first appointment and was inconsistent in attending thereafter. During their sessions Father admitted to Aguilar that he had struggled with methamphetamine addiction for five years and that he had not maintained long-term sobriety in that period. In November of 2019, Father texted Aguilar and explained that he was not willing to meet again. Father was incarcerated shortly thereafter and could not attend any sessions. When Father was released on March 31, 2020, he attended only three sessions between his release and June of 2020, when Aguilar closed services as unsuccessful.

[5] Home-based therapist Chelsea Risley provided therapy for Child between January of 2017 and March of 2021. When Risley became involved in the case Father was on work release and there had been no visits since September of 2016. Though there were an unspecified number of visits between August and October of 2017, those visits stopped thereafter. In March of 2018, Child stated that she was bothered by not having visits with Parents. Risley helped Child write letters to Parents, which helped Child. In May of 2018, Child consistently asked about Father and Risley tried to explain her Father's incarceration to Child. On November 13, 2018, Child stated that Father had forgotten that she was his daughter, adding that Father just played with her and did not take care of her. In 2019, after a visit to Knox County Jail, Child stated that she did not like to go to the jail for visits. In March 2019, Child said that she had two sets of parents and that Father and Mother were not really her family. On July 25,

2019, Child asked why Father kept going to jail. On February 10, 2020, the juvenile court discontinued visitation.

[6] Child has been at the same placement since her removal from Parents in 2014. Child has a strong bond with her foster parents and their extended family. Despite foster parents going through a divorce at the time of the factfinding hearing, Child has maintained a bond with both foster parents, foster parents work together to ensure that Child's needs are met, and they are willing to adopt her.

[7] On April 12, 2021, the juvenile court held a factfinding hearing in which Father participated from the Daviess County Jail. At that hearing, Father agreed that he has a lengthy criminal history and that he has been incarcerated or on work release for approximately "[eighty] to [eighty-five] percent of the time since the first filing." Appellant's App. Vol. II p. 62. At the time of the termination hearing, Father estimated that he would be incarcerated in Daviess County for at least another year on a federal charge for possession of a firearm by a felon. Father also testified that he had a pending charge for possession of methamphetamine in Knox County.

[8] On May 28, 2021, the juvenile court entered its decree terminating Father's parental rights, concluding, in part, that there was a reasonable probability that the conditions which resulted in Child's removal and continued placement outside the home would not be remedied, there was a reasonable probability

that the continuation of the parent-child relationship posed a threat to Child's wellbeing, and that termination of parental rights was in Child's best interests.

Discussion and Decision

[9] 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, 145 (Ind. 2005). Moreover, we acknowledge that the parent-child relationship is "one of the most valued relationships of our culture." *Id*. However, although parental rights are of a constitutional dimension, the law allows for the termination of those rights when parents are unable or unwilling to meet their responsibilities as parents. *In re T.F.*, 743 N.E.2d 766, 773 (Ind. Ct. App. 2001), *trans. denied*. Therefore, parental rights are not absolute and must be subordinated to the child's interests in determining the appropriate disposition of a petition to terminate the parent-child relationship. *Id*. The Indiana Supreme Court has made clear that the "purpose of terminating parental rights is not to punish parents, but to protect the children." *Egly v. Blackford Cnty. Dep't. of Pub. Welfare*, 592 N.E.2d 1232, 1234–35 (Ind. 1992). The *Egly* Court also explained that "[a]lthough parental rights are of a constitutional dimension, the law allows for the termination of those rights when parents are unable or unwilling to meet their responsibilities as parents." *Id*. at 1234. Termination of parental rights is proper where the child's emotional and physical development is threatened. *In re T.F.*, 743 N.E.2d at 773. The juvenile court need not wait until a child is

irreversibly harmed such that their physical, mental, and social development is permanently impaired before terminating the parent-child relationship. *Id.*

[10] When reviewing an order terminating parental rights, we do not "reweigh the evidence or determine the credibility of witnesses," but instead determine only whether the evidence supports the judgment. *In re N.G.*, 51 N.E.3d 1167, 1170 (Ind. 2016). This is a two-step review, which requires us to determine "whether the evidence clearly and convincingly supports the findings, and whether the findings clearly and convincingly support the judgment." *Id*. We "give 'due regard' to the juvenile court's opportunity to judge the credibility of the witnesses firsthand." *K.T.K. v. Ind. Dep't of Child Servs., Dearborn Cnty. Office*, 989 N.E.2d 1225, 1229 (Ind. 2013). We will "not set aside findings or judgment unless clearly erroneous." Ind. Trial Rule 52(A); *see also In re G.Y.*, 904 N.E.2d 1257, 1260 (Ind. 2009). "Reversal is appropriate only if we find the trial court's decision is against the logic and effect of the facts and circumstances before the Court or the reasonable inferences drawn therefrom." *In re Guardianship of B.H.*, 770 N.E.2d 283, 288 (Ind. 2002) (citation omitted).

[11] Indiana Code section 31-35-2-4(b)(2) governs what DCS must allege and establish to support the termination of parental rights, and, for purposes of our disposition, that was:

> (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 or

probation department for at least fifteen (15) months of the most recent twenty-two (22) months, beginning with the date the child is removed from the home as a result of the child being alleged to be a child in need of services or a delinquent child;

(B) that one (1) of the following is true

(i) There is a reasonable probability that the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied [or]

(ii) There is a reasonable probability that the continuation of the parent-child relationship poses a threat to the well-being of the child.

[….]

(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.

Father concedes that Indiana Code subsections 31-35-2-4(b)(2)(A) and (D) and have been satisfied, so we confine our review to the remaining subsections required in order to support termination and his argument concerning his due process rights.

I. Indiana Code Section 32-35-2-4(b)(2)(B)(i)[2]

[12] Father argues that the juvenile court erroneously determined that he was unable or unwilling to remedy the conditions which resulted in the Child's removal.

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[2] Because Indiana Code section 31-35-2-4(b)(2)(B) is written in the disjunctive, DCS need only establish one of the circumstances described in that subsection. *In re S.K.*, 124 N.E.3d 1225, 1233 (Ind. Ct. App. 2019), trans. denied. Father does not challenge the juvenile court's conclusion that, under Indiana Code section 31-35-2-4(b)(2)(B)(ii), there is a reasonable probability that the continuation of the parent-child relationship poses a threat to the well-being of Child. Although it is unnecessary for us to do so because Father failed to address juvenile court's determination that Indiana Code section 31-35-2-4(b)(2)(B)(ii) had been established, we choose to address Father's argument pursuant to Indiana Code section 32-35-2-4(b)(2)(B)(i) on the merits.

The juvenile court did not err in determining that the conditions which resulted in Child's removal and continued placement outside the home would not be remedied. Child was removed from Parents and declared a CHINS in 2014 after receiving a report that they were manufacturing methamphetamine. Father has also tested positive for methamphetamine and amphetamine at least six times since Child was declared a CHINS. Further, FCM McKannan testified that Father largely failed to participate in services unless he was incarcerated. Services were offered to Father during his incarceration except for brief pauses due to COVID requirements and his incarceration out of state. Though Father may have complied and followed some of DCS's recommendations, he admittedly failed to follow many of DCS's recommendations. Further, Father cannot blame DCS for a failure to contact him when he refused to keep DCS apprised of his whereabouts when he became incarcerated. In the time since that CHINS declaration, Father agrees that he has been incarcerated for "[eighty] to [eighty-five] percent of the time since the first filing[,]" he has approximately another year of incarceration to serve in Daviess County, and there is a pending charge for possession of methamphetamine in Knox County. Father's arguments on appeal amount to nothing more than a request that we reweigh the evidence, which we will not do. *In re N.G.*, 51 N.E.3d at 1170 (stating that in appellate review of a termination of a parent-child relationship we will not reweigh the evidence).

II. Indiana Code Section 31-25-2-4(b)(2)(C)

[13] Father also argues that the juvenile court erred in determining that it was in the best interests of the Child to terminate the parent-child relationship. We are mindful that the juvenile court is required to look beyond the factors identified by DCS and look to the totality of evidence when determining what is in the best interests of the child. *McBride v. Monroe Cnty. Office of Family & Children*, 798 N.E.2d 185, 203 (Ind. Ct. App. 2003). In doing so, the interests of the child involved must supersede that of the parents. *Id*.

[14] Father argues specifically that

> [Father] and [Child] have a strong parental-child bond that is evident from the testimony provided to the trial court. [Father] interacted with [Child] during the visitations and she responded to [Father] as her father. He was "good," bonded with his daughter, had good interaction, provided food, there were no safety concerns, and was appropriate toward his daughter.

Appellant's Br. p. 22 (internal record citations omitted). Father argues that his willingness to work toward reunification and his behavior during visitations shows that it is in the best interests of Child that their parent-child relationship remains intact. In 2017, when Child was still having visitation with Parents, she was exhibiting anxious behavior, like "digging in her legs," and would often become upset. Tr. p. 114. Therapist Risley testified that it often bothered Child that she was unable to visit consistently with Father, which was due in part to his incarceration. Child also stated in 2018, that "[Father] forgot I was his daughter," and that, though Father was still in fact her father, he only plays with her and does not take care of her. Appellant's Br. p. 123. In 2019, Child

visited Father at the Knox County Jail, which she said she did not enjoy doing. Later that year, Child asked why Father kept going to jail. In 2020, the juvenile court discontinued visitation. Risley testified that she believed that, after being in a stable placement for the last five years, it would be a "traumatic event" for Child to continue with reunification. Appellant's App. Vol. II p. 127. To the extent Father argues that there is evidence which shows that it is in Child's best interests that the parent-child relationship not be terminated, this again is simply a request that we reweigh the evidence, which we will not do. *In re N.G.*, 51 N.E.3d at 1170 (stating that, in appellate review of a termination of a parent-child relationship, we will not reweigh the evidence).

III. Due Process Claims

[15] Father also argues that his due process rights were violated because DCS failed to offer him adequate services while he was incarcerated, making reunification impossible. Father, however, did not make this argument before the juvenile court. *See L.H. v. Ind. Dep't of Child Servs.*, 119 N.E.3d 578, 586 (Ind. Ct. App. 2019) ("Generally, a party waives on appeal an issue that was not raised before the trial court."), *aff'd on reh'g*, 122 N.E.3d 832, *trans. denied*. Further, while waiver does not preclude our review[3], Father has failed to even argue that fundamental error has occurred and has therefore waived appellate review of

[3] "Fundamental error is a substantial, blatant violation of due process." *Hall v. State*, 937 N.E.2d 911, 913 (Ind. Ct. App. 2010).

this claim. *Truax v. State*, 856 N.E.2d 116, 123 (Ind. Ct. App. 2006) (determining that a claim for fundamental error is waived when an appellant fails to argue it).

[16] The judgment of the juvenile court is affirmed.

Robb, J., and Altice, J., concur.