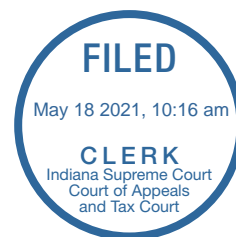


## MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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## IN THE COURT OF APPEALS OF INDIANA

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In the Matter of the Termination  
of the Parent-Child Relationship  
of K.H. and E.M. (Minor  
Children);

J.M. (Father) and K.L. (Mother),  
*Appellants-Respondents,*

v.

Indiana Department of Child  
Services,

*Appellee-Petitioner.*

May 18, 2021

Court of Appeals Case No.  
20A-JT-2267

Appeal from the St. Joseph Probate  
Court

The Honorable Ashley Mills  
Colborn, Magistrate

Trial Court Cause Nos.  
71J01-1912-JT-176  
71J01-1912-JT-177

**Najam, Judge.**

## **Statement of the Case**

[1] K.L. (“Mother”) and J.M. (“Father”) (collectively, “Parents”) appeal the trial court’s termination of their parental rights over their minor children. Parents present the following restated issues for our review:

1. Whether the trial court violated Father’s right to due process.
2. Whether the Indiana Department of Child Services (“DCS”) presented sufficient evidence to support the termination of their parental rights.

[2] We affirm.

## **Facts and Procedural History**

[3] Parents have one child together, E.M., born October 2, 2017, and Mother has another child from a previous relationship, K.H., born September 28, 2016. In early August 2018, DCS received reports that Mother was physically abusing E.M. and K.H. (collectively, “the Children”). At that time, Mother and the Children were living at the YMCA, and Father was living in a homeless shelter. On August 8, DCS filed petitions alleging the Children were children in need of services (“CHINS”) “due to Mother’s homelessness, mental health concerns, and inappropriate discipline of the [C]hildren.” Appellants’ App. Vol. 2 at 19. Following a detention hearing on August 9, the trial court placed the Children in foster care and authorized unsupervised visitation for Parents. On August

16, the trial court ordered that Parents' visitation with the Children be supervised.

[4] At a factfinding hearing on the CHINS petitions on December 13, Parents admitted that the Children were CHINS. At the conclusion of a disposition hearing on January 3, 2019, the trial court ordered Mother to: undergo a psychological parenting evaluation and follow all recommendations; undergo a medication management evaluation and follow all recommendations; participate in home based case management services; participate in individual therapy; maintain contact with the family case manager ("FCM"), including notifying the FCM of any changes in contact information; allow the FCM to make home visits; keep all appointments with service providers; maintain suitable housing; not use drugs, other than those legally prescribed to her; submit to random drug screens; complete a parenting assessment; and attend all visitation appointments with the Children. The trial court ordered Father to: undergo a psychological parenting evaluation and follow all recommendations; maintain contact with the family case manager ("FCM"), including notifying the FCM of any changes in contact information; allow the FCM to make home visits; keep all appointments with service providers; maintain suitable housing; complete a parenting assessment; and attend all visitation appointments with the Children.

[5] Mother completed a psychological parenting assessment, "which recommended Mother participate in medication management, individual therapy, and parenting education." *Id.* at 23. Mother was diagnosed with bipolar mood

disorder and borderline functioning disorder. Mother was referred to a therapist, but she “avoided attending therapy.” *Id.* at 24. Mother did not consistently manage her mental illness. She did not take medication as prescribed. Mother sought inpatient treatment on occasion, but she did not keep up with treatment recommendations after she left. Mother did not submit to drug screens as required, and she was unsuccessfully discharged from homebased case management. Mother did not maintain stable housing or employment.

[6] Father also completed a psychological parenting assessment, “which recommended [that] Father participate in individual therapy and work on parenting tactics.” *Id.* at 23. Father attended individual therapy for approximately one year to address “coping skills, working on accountability, anger issues, and parenting.” *Id.* However, after one year, Father’s therapist found that Father had not made “any substantial progress” and concluded that, “even if Father w[ere] given more time, nothing would fundamentally change.” *Id.* Father did not maintain stable housing, and he did not successfully complete any services.

[7] On December 9, 2019, DCS filed petitions to terminate Parents’ parental rights over the Children. The trial court held a factfinding hearing on July 28, 2020. Parents were represented by counsel at the hearing. Father appeared in person, but Mother failed to appear. On November 12, the trial court entered an order terminating Parents’ parental rights. This appeal ensued.

## Discussion and Decision

### *Standard of Review*

[8] Parents contend that the trial court erred when it terminated their parental rights. We begin our review of this issue by acknowledging that “[t]he traditional right of parents to establish a home and raise their children is protected by the Fourteenth Amendment of the United States Constitution.” *Bailey v. Tippecanoe Div. of Fam. & Child. (In re M.B.)*, 666 N.E.2d 73, 76 (Ind. Ct. App. 1996), *trans. denied*. However, a trial court must subordinate the interests of the parents to those of the child when evaluating the circumstances surrounding a termination. *Schultz v. Porter Cnty. Off. of Fam. & Child. (In re K.S.)*, 750 N.E.2d 832, 837 (Ind. Ct. App. 2001). Termination of a parent-child relationship is proper where a child’s emotional and physical development is threatened. *Id.* Although the right to raise one’s own child should not be terminated solely because there is a better home available for the child, parental rights may be terminated when a parent is unable or unwilling to meet his or her parental responsibilities. *Id.* at 836.

[9] Before an involuntary termination of parental rights can occur in Indiana, DCS is required to allege and prove:

(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.

\* \* \*

(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) (2020). DCS’s “burden of proof in termination of parental rights cases is one of ‘clear and convincing evidence.’” *R.Y. v. Ind. Dep’t of Child Servs. (In re G.Y.)*, 904 N.E.2d 1257, 1260-61 (Ind. 2009) (quoting I.C. § 31-37-14-2).

[10] When reviewing a termination of parental rights, we will not reweigh the evidence or judge the credibility of the witnesses. *Peterson v. Marion Cnty. Off. of Fam. & Child. (In re D.D.)*, 804 N.E.2d 258, 265 (Ind. Ct. App. 2004), *trans. denied*. Instead, we consider only the evidence and reasonable inferences that are most favorable to the judgment. *Id.* Moreover, in deference to the trial court’s unique position to assess the evidence, we will set aside the court’s judgment terminating a parent-child relationship only if it is clearly erroneous. *Judy S. v. Noble Cnty. Off. of Fam. & Child. (In re L.S.)*, 717 N.E.2d 204, 208 (Ind. Ct. App. 1999), *trans. denied*.

[11] Here, in terminating Parents’ parental rights, the trial court entered specific findings of fact and conclusions thereon. When a trial court’s judgment

contains special findings and conclusions, we apply a two-tiered standard of review. *Bester v. Lake Cnty. Off. of Fam. & Child.*, 839 N.E.2d 143, 147 (Ind. 2005). First, we determine whether the evidence supports the findings and, second, we determine whether the findings support the judgment. *Id.*

“Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference.” *Quillen v. Quillen*, 671 N.E.2d 98, 102 (Ind. 1996). If the evidence and inferences support the trial court’s decision, we must affirm. *In re L.S.*, 717 N.E.2d at 208.

### ***Issue One: Due Process***

[12] Father contends that “his due process rights were violated because DCS did not make reasonable efforts to reunify the family and did not provide the family with domestic violence programming.” Father’s Br. at 7. Because Father did not raise this issue to the trial court, he argues that the due process violation amounted to fundamental error. We cannot agree.

[13] When seeking to terminate a parent-child relationship, the State must satisfy the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *K.M. v. Ind. Dep’t of Child Servs. (In re S.L.)*, 997 N.E.2d 1114, 1120 (Ind. Ct. App. 2013). Relevant here, a parent has a substantive due process right to raise his children, which means that DCS “must have made reasonable efforts to preserve and/or reunify the family unit.” *T.K. v. Ind. Dep’t of Child Servs. (In re T.W.)*, 135 N.E.3d 607, 615 (Ind. Ct. App. 2019), *trans. denied*. Generally, a party waives on appeal an issue that was not raised before the trial court. *L.H. v. Ind. Dep’t of Child Servs. (In re D.H.)*, 119

N.E.3d 578, 586 (Ind. Ct. App. 2019), *aff'd on reh'g*, 122 N.E.3d 832, *trans. denied*. However, we have discretion to address such claims, especially when they involve constitutional rights, the violation of which would be fundamental error. *Id.*

[14] Here, Father asserts that “DCS and the service providers were aware of the domestic violence that was occurring” between Mother and Father, “yet they did not offer any domestic violence treatment for Father. This failure was a significant factor in Father’s perceived lack of success in completing services that would allow him to regain custody of his children.” Father’s Br. at 9. It is well settled that, in a termination of parental rights proceeding, DCS need not plead or prove that it provided any services in the underlying CHINS proceeding. *See* Ind. Code § 31-35-2-4 (2020); *see also S.E.S. v. Grant Cnty. Dep’t of Welfare*, 594 N.E.2d 447, 448 (Ind. 1992). Still, this Court has held that,

for a parent’s due process rights to be protected in the context of termination proceedings, DCS must have made reasonable efforts to preserve and/or reunify the family unit in the CHINS case (unless the no reasonable efforts exception applies). What constitutes “reasonable efforts” will vary by case, and . . . it does not necessarily always mean that services must be provided to the parents. In the end, we think that it does not ask too much of DCS to behave reasonably under such grave circumstances.

*In re T.W.*, 135 N.E.3d at 615.

[15] We agree with the State that Father has not shown any violation of his right to due process, let alone fundamental error. DCS removed Father’s child E.M.



from Parents' care in August 2018. DCS then offered multiple services to Father, including individual therapy, over the course of more than one year. Father's therapist, Anthony Coleman, testified at the final hearing that he had been meeting with Father twice a week for "close to a year maybe," and the sessions were ongoing at that time. Tr. at 35. Each session lasted one and one-half to two hours. Coleman described his work with Father on "coping skills[,] accountability[,] some anger issues[,] parenting stuff[, and h]elping him to be a better father, a better man, and so on and so forth." *Id.* at 36.

[16] Regarding Father's relationship with Mother, Coleman testified that Father was "intimidated" by Mother. *Id.* at 37. In the following colloquy, Coleman explained his effort to address Parent's relationship:

Q: . . . Was his, we'll call it fearfulness, of [Mother] a common theme that maybe was not said out loud, but that you felt that you were consistently addressing with [Father]?

A: I think it was something that was consistently avoided while I attempted to address it with [Father] because then we tie it back to the kids. We need to make sure we can keep the kids safe, however, if you won't even say her name outside of her presence, how can you ensure that the children are safe in her presence?

\* \* \*

Q: And do you believe that based on how [Father] presents the symptoms [that he] . . . is a victim of abuse?

A: At times.

Q: And did you implement any strategies, either through therapy or in speaking with the FCM to determine whether something directly related—services that is—directly related to a person who has suffered from domestic violence be implemented?

A: So I think—I think one thing we have to understand, especially with therapy, even though we present the opportunity to address it and deal with it therapeutically, the client is still the professional. So the client still has to have some level of motivation to want better.

Case in point, if this w[ere] a reversed situation and I was dealing with a female victim of abuse[,] . . . we would advocate for her to move. Well, in [Father’s] situation, there w[ere] multiple opportunities for [him] to step away from the situation and he chose not to.

So then, when we would work through therapy, we would take [Mother] out of the picture and say, okay, what do we need to do to help you become better? You know? If she never changes, how do we help you become better? You know?

*Id.* at 43-44. Coleman concluded that Father had a “lack of motivation” to address the problems in his relationship with Mother. *Id.* at 45.

[17] The trial court found that Father “consistently denied that he was in fear of Mother” and that it was “disingenuous for Father to now claim he was not provided a service for a problem that Father so adamantly denied throughout the course of the CHINS matter.” Appellants’ App. Vol. 2 at 32. We must agree. Given the long term and intensive outpatient therapy DCS provided for Father, which included Coleman’s multiple attempts to address the domestic

abuse in Parents' relationship, we cannot say that DCS denied Father's right to due process in the underlying CHINS proceeding. Further, to the extent Father contends that DCS should have done more to reunify the family, he does not explain what more should have been done. Father's contention on this issue is without merit.

### *Issue Two: Sufficiency of the Evidence*

[18] Parents do not challenge any of the trial court's findings, and they make no specific contention that the trial court erred when it concluded that the conditions that resulted in the Children's removal and the reasons for their placement outside of Parents' home will not be remedied, there is a reasonable probability that the continuation of the parent-child relationships poses a threat to the well-being of the Children, and termination is in the Children's best interests. Rather, Parents make general assertions that DCS presented insufficient evidence to support the termination of their parental rights. Parents do nothing more than ask that we reweigh the evidence, which we cannot do. In any event, given the nature of the interests at stake, we consider the sufficiency of the evidence to support the court's conclusions. As Indiana Code Section 31-35-2-4(b)(2)(B) is written in the disjunctive, we need not address the issue of whether there is a reasonable probability that the continuation of the parent-child relationships poses a threat to the well-being of Children.

### *Reasons for Children's Placement Outside of Parents' Home*

[19] This court has clarified that, given the wording of the statute, it is not just the basis for the initial removal of the child that may be considered for purposes of

determining whether a parent's rights should be terminated, but also any basis resulting in the continued placement outside of a parent's home. *Inkenhaus v. Vanderburgh Cnty. Off. of Fam. & Child. (In re A.I.)*, 825 N.E.2d 798, 806 (Ind. Ct. App. 2005), *trans. denied*. Here, the trial court properly considered the conditions leading to the continued placement of the Children outside of Parents' home. Put simply, Parents have not demonstrated any willingness or ability to provide a stable home for the Children.

[20] We hold that the evidence supports the trial court's findings and conclusion on this issue. To determine whether there is a reasonable probability that the reasons for Children's continued placement outside of Parents' home will not be remedied, the trial court should judge Parents' fitness to care for the Children at the time of the termination hearing, taking into consideration evidence of changed conditions. *See E.M. v. Ind. Dep't of Child Servs. (In re E.M.)*, 4 N.E.3d 636, 643 (Ind. 2014). However, the court must also "evaluate the parent[s]' habitual patterns of conduct to determine the probability of future neglect or deprivation of the child[ren]." *Moore v. Jasper Cnty. Dep't of Child Servs.*, 894 N.E.2d 218, 226 (Ind. Ct. App. 2008) (quotations and citations omitted). Pursuant to this rule, courts have properly considered evidence of a parent's prior criminal history, drug and alcohol abuse, history of neglect, failure to provide support, and lack of adequate housing and employment. *Id.* Moreover, DCS is not required to rule out all possibilities of change; rather, it need establish only that there is a reasonable probability the parent's behavior will not change. *Id.*

[21] The trial court found, and the evidence supports, that “Mother and Father are in the exact same situation as of the date of the [final] hearing as they were when the [C]hildren were detained.” Appellants’ App. Vol. 2 at 29. Neither parent had successfully completed any services. At the time of the final hearing, Mother was homeless, was not “interested in obtaining employment,” and was not managing her mental illness. *Id.* Father also did not have a home, but was “staying with someone temporarily[.]” Tr. at 163. Parents’ supervised visits with Children had been tumultuous and sporadic, and both Parents’ visitation rights were ultimately suspended.

[22] Again, Parents’ arguments on appeal are simply invitations for this Court to reweigh the evidence and judge the credibility of the witnesses, which we cannot do. Based on the totality of the circumstances, we hold that the trial court’s findings support its conclusion that there is a reasonable probability the conditions that resulted in Children’s removal and the reasons for their placement outside of Parents’ home will not be remedied.

#### *Best Interests*

[23] In determining what is in a child’s best interests, a juvenile court is required to look beyond the factors identified by DCS and consider the totality of the evidence. *A.S. v. Ind. Dep’t of Child Servs. (In re A.K.)*, 924 N.E.2d 212, 223 (Ind. Ct. App. 2010). A parent’s historical inability to provide “adequate housing, stability, and supervision,” in addition to the parent’s current inability to do so, supports finding termination of parental rights is in the best interests of the child. *Id.*

[24] When making its decision, the court must subordinate the interests of the parents to those of the child. *See Stewart v. Ind. Dep't of Child Servs. (In re J.S.)*, 906 N.E.2d 226, 236 (Ind. Ct. App. 2009). “The court need not wait until a child is irreversibly harmed before terminating the parent-child relationship.” *Id.* Moreover, this Court has previously held that recommendations of the family case manager and court-appointed advocate to terminate parental rights, coupled with evidence that the conditions resulting in removal will not be remedied, are sufficient to show by clear and convincing evidence that termination is in the child’s best interests. *Id.*

[25] As the trial court’s extensive findings demonstrate, Parents have not shown that they are capable of parenting the Children. The Children are bonded and thriving in their pre-adoptive home. Both the FCM and the CASA testified that termination of Parents’ parental rights is in the Children’s best interests. Given the totality of the evidence, Parents cannot show that the trial court erred when it concluded that termination of their rights is in the Children’s best interests.

### ***Conclusion***

[26] Father has not shown that DCS violated his substantive right to due process. And Parents have not shown that DCS presented insufficient evidence to support the termination of their parental rights over the Children.

[27] Affirmed.

Pyle, J., and Tavitas, J., concur.