MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In the Involuntary Termination of the Parent-Child Relationship of: K.B. (Minor Child)

J.B. (Father),

Appellant-Respondent,

v.

Indiana Department of Child Services,

Appellee-Petitioner.

May 5, 2022

Court of Appeals Case No. 21A-JT-1817

Appeal from the Madison Circuit Court

The Honorable Angela Sims, Special Judge

Trial Court Cause No. 48C02-2010-JT-171

Weissmann, Judge.

[1] J.B. (Father) appeals the termination of his parental rights as to K.B. (Child), arguing that his constitutional rights were violated and the evidence does not support termination. Though Father raises several troubling concerns about the way DCS handled his case, he ultimately fails to show that termination was clearly erroneous. Accordingly, we affirm the trial court's termination order.

Facts

[2] Father won custody of Child after a previous Child in Need of Services (CHINS) finding in 2015. In that case, the Indiana Department of Child Services (DCS) in Marion County removed Child from Father and K.M. (Mother) because Mother and Father (Parents) used drugs, which inhibited their ability to provide Child with a safe, stable living environment. In that case, Father was compliant: he got clean and got Child back.[1]

[3] Another CHINS case was filed in Marion County in February 2018. DCS alleged that Father's inability, refusal, or neglect to care for Child seriously impaired Child's mental or physical condition. DCS had received several reports that Child's maternal grandmother was sexually abusing Child but suspected that Father was coaching Child to recount fabricated instances of abuse. Father pursued therapy for Child, and DCS feared that Father's response

[1] Child's placement was with Father alone.

to the alleged molestation would "further traumatiz[e] [Child] and jeopardiz[e] her well being." Exh. Vol. I, p. 71.

[4] The CHINS court denied DCS's petition that August, finding that "the evidence indicates that [Father] informed [Child] to tell the therapists of the abuse, but does not support a claim of coercion of the child." *Id.* at 191. Accordingly, "DCS did not present evidence to support that [Child's] physical or mental condition is seriously impaired or seriously endangered . . . ." *Id.* The court discharged Child to Father.

[5] Just months later, DCS filed a third petition alleging Child to be a CHINS, this time in Madison County. The petition was based on allegations that Father was sexually abusing Child. Father was arrested and charged with Level 4 felony child molestation the same day. The criminal court entered a no-contact order forbidding Father from any contact with Child other than through an attorney of record. Child was placed with an adult cousin.

[6] The CHINS court found Child to be a CHINS in part because Father stipulated that she had been molested—though not by him—and that she needed mental health services and treatment. Father also stipulated that he was unable to provide the care Child needs because of the criminal court's no-contact order. The court ordered Father to participate in services, including a substance abuse assessment, supervised visitation, home-based casework services, parenting classes, individual counseling, and random drug screens.

[7] Father refused. DCS later testified that Father's counsel had advised against participating in services for fear of making him look guilty in his criminal trial. Father testified that he believed the no-contact order also prohibited him from contacting DCS. He told DCS to speak with him through his attorney. Two DCS caseworkers testified that their attempts to contact Father, either directly or through his attorney, were unsuccessful. Though Father did not participate in DCS services, he testified that he was receiving similar services from other providers, including regular drug screens. He also asked the criminal court to lift the no-contact order; DCS testified against this change at the related hearing.

[8] Almost two years after the CHINS petition was filed, DCS petitioned to terminate Parents' rights to Child (TPR). In its petition, DCS alleged that the requisite statutory requirements for termination were met, including that Child was removed due to allegations of abuse or neglect, there was a reasonable probability that these conditions would not be remedied, that removal was in Child's best interest, and a satisfactory plan for care and treatment was in place. The trial court (TPR court) agreed with DCS's assessment of the case and terminated Parents' rights to Child.

[9] Father alone appeals.

Standard of Review

[10] A petition to terminate parental rights must allege, in relevant part:

> (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 wellbeing of the child.

(iii) The child has, on two (2) separate occasions, been adjudicated a child in need of services;

(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). If the TPR court finds these allegations are true by clear and convincing evidence, it shall terminate the parent-child relationship. Ind. Code §§ 31-35-2-8, -37-14-2.

[11] To review a TPR court's termination of parental rights, we first determine whether the evidence supports the findings and, second, whether the findings support the judgment. *In re R.S.*, 56 N.E.3d 625, 628 (Ind. 2016). Father does not challenge the court's findings of fact, so we take them as true. *S.S.*, 120 N.E.3d 605, 610 (Ind. Ct. App. 2019). We do not reweigh evidence or judge witness credibility. *R.S*, 56 N.E.3d at 628. The judgment will be set aside only if it is clearly erroneous. *Id.*

Discussion and Decision

[12] We restate Father's arguments as follows:

I. DCS and the TPR court violated Father's constitutional right to due process and his fundamental rights as a parent; and

II. DCS failed to present evidence that the reasons for removal would not be remedied, a continued parent-child relationship posed a threat to Child, and termination was in her best interests.

[13] As a preliminary matter, we note that every termination case implicates a parent's constitutionally protected interest in the care, custody, and control of their children. *In re I.A.*, 934 N.E.2d 1127, 1132 (Ind. 2010) (citing *Troxel v. Granville*, 530 U.S. 57, 65 (2000)). Father's case also implicates his rights as a criminal defendant. There has been no adjudication, either in the underlying CHINS case or in criminal court, finding him guilty of molesting Child. Pandemic-related delays have prevented Father's criminal trial, putting us in the awkward position of reviewing a termination spurred by criminal allegations that have yet to be tried in a criminal court or found true in a CHINS or termination proceeding.[2]

[2] Generally speaking, where removal is predicated on criminal charges and the child is in a relative placement, we encourage DCS to delay termination proceedings until after the criminal case has been resolved or there has been a formal finding in the CHINS court. *See R.S.*, 56 N.E.3d at 630 ("[W]hen a child is in relative placement, and the permanency plan is adoption into the home where the child has lived for years already, prolonging the adoption is unlikely to have an effect upon the child."); *Adams v. Marion Cnty. Office Fam. & Child.*, 659 N.E.2d 202 (Ind. Ct. App. 1995) (upholding termination where children were removed due to allegations of sexual abuse that were found true in the underlying CHINS proceeding and parents did not complete treatment or counseling, including sexual abuse services).

I. Constitutional Claims

[14] Although Father's due process claims are undercooked—he fails to identify the appropriate framework for analyzing due process claims of this sort, he cites to cases for general propositions of law that only tangentially relate to the issues at hand, and his brief is riddled with typos and grammatical errors—the claims are cogent enough that we must address them. *See generally* Ind. App. R. 46(8)(a). Three factors govern the process due in termination proceedings: "the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." *Matter of D.H.*, 119 N.E.3d 578, (Ind. Ct. App. 2019) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

> The private interest affected by the proceeding is substantial—a parent's interest in the care, custody, and control of his or her child. And the State's interest in protecting the welfare of a child is also substantial. Because the State and the parent have substantial interests affected by the proceeding, we focus on the risk of error created by DCS's actions and the trial court's actions.

Id. (quoting *K.M. v. Ind. Dep't of Child Servs.*, 997 N.E.2d 1114, 1120 (Ind. Ct. App. 2013)). Relevant to Father's claim, "if the State imparts a due process right," generally "it must give that right." *Id.* (quoting *In re C.G.*, 954 N.E.2d 910, 918 (Ind. 2011)).

[15] DCS must make "reasonable efforts to preserve and reunify families" so a child can return home as soon as possible. *Lang v. Starke Cnty. Office Fam. & Child.*,

861 N.E.2d 366, 377 (Ind. Ct. App. 2007) (quoting Ind. Code § 31-34-21-5.5(b)). "In determining the extent to which reasonable efforts to reunify or preserve a family are appropriate . . . the child's health and safety are of paramount concern." Ind. Code § 31-34-21-5.5(a). Father argues that DCS failed to comply with the statute, including by failing to contact Father throughout the life of the CHINS case, failing to refer Father to any services, failing to adjust services to his family's identified needs, and acting to prohibit Father from seeing Child, despite the CHINS court order that Father participate in supervised visitation. Father also points to DCS's own policy manual, citing provisions that require DCS to provide family services, make appropriate service referrals, and reassess the family's needs throughout the life of the case.[3]

A. Failing to Contact Father

[16] Father claims that DCS failed to make reasonable efforts pursuant to Indiana Code § 31-34-21-5.5 because it only contacted either his attorney or him twice throughout the underlying CHINS case. According to unchallenged evidence, however, Father directed DCS to communicate with him through his attorney. Tr. Vol. II, pp. 16, 78-79. His attorney, in turn, directed DCS to contact Father directly. *Id.* at 36-37. At no point did Father attempt to contact DCS, either personally or through his attorney. *Id.* at 77. Father cannot benefit from his own efforts to shut out DCS communication. "Error invited by the complaining

[3] Father also argues that the criminal no-contact order violated his constitutional rights. This order was issued by the criminal court, not the TPR court, thus it is not properly before us. Indiana Appellate Rule 9.

party is not reversible error." *C.T. v. Marion Cnty. Dep't Child Servs.*, 896 N.E.2d 571, 588 (Ind. Ct. App. 2008) (citing *Szpunar v. State*, 783 N.E.2d 1213, 1217 (Ind. Ct. App. 2003)) (finding a father invited any error caused by his absence at the termination hearing and lack of communication with counsel about the hearing because the father received actual notice of the hearing, requested he not be transported to the hearing, and communicated weekly with counsel).

B. Failing to Offer or Adjust Services

[17] Father also argues that DCS did not meet its statutory mandate to make reasonable efforts to preserve and reunify his family when it failed to offer him any services, let alone services adjusted to his family's needs. But DCS's service offerings—or lack thereof—were dictated by Father's impossible contact demands, *supra*, Part I(A), as well as his outright refusal to participate in services. Tr. Vol. II, p. 76; App. Vol. II, p. 9.

[18] First, the evidence does not support Father's claim that DCS did not offer him services. One of the findings of fact in the termination order states, "[Father] was given many opportunities to participate in services that would aid towards reunification with his child but refused to do so." App. Vol. II, p. 9-10. Because Father does not challenge these factual findings, we take them as true. *See S.S.*, 120 N.E.3d at 610.

[19] Second, the TPR court found that "[Father] refuses to participate in any services with the Department." App. Vol. II, p. 9. Father's own testimony supports this finding. In response to a question about his nonparticipation in

services beyond one drug screen, Father testified: "I don't feel like I have to . . . . I've done things twice already for three (3) years in fighting for my daughter, you're telling me I have to do it for a third time . . . ?" Tr. Vol. II, p. 76. We cannot know what services would have been offered had Father been a more active participant in the underlying proceeding. Father's refusal to communicate with DCS invited any error here. *See C.T.*, 896 N.E.2d at 588.

C. Acting to Keep No-Contact Order in Place

[20] Father's final due process argument against DCS is that it acted against its statutory prerogative when it testified against a modification to the criminal no-contact order against Father. While Father is correct that Indiana Code § 31-34-21-5-5(b) requires DCS to make "reasonable efforts to preserve and reunify families," he overlooks that Child's health and safety are the "paramount concern." Ind. Code § 31-34-21-5.5(a). Given the existence of the protective order arising from allegations that Father sexually molested Child, we cannot say that DCS failed to follow the mandates of § 31-34-21-5.5 here.

II. Sufficiency of the Evidence

[21] Father next argues that DCS failed to prove that there is no reasonable probability that conditions necessitating removal would be remedied, continuation of the parent-child relationship posed a threat to Child, and termination was in her best interests.

A. Conditions for Removal and Threat to Child

[22] The trial court found:

> 7) There is no reasonable probability that the conditions that resulted in the child's removal from and continued placement outside the care and custody of the parents willbe (sic) remedied. [Father] has been given over 2 years to participate and comply with court orders and has continuously refused.
>
> 8) [Father's] criminal past, current criminal charge, and two-year span of indifference toward the needs of his child shows the continued parental relationship is a danger to the well-being of the minor child.

App. Vol. II, p. 19. DCS is only tasked with proving one of the three conditions in Indiana Code § 31-35-2-4(b)(2)(B), *see supra* ¶ 10, by clear and convincing evidence. The above findings concern prongs (i) and (ii), that the conditions resulting in removal will not be remedied and the continued relationship constitutes a threat to Child, respectively. Indiana Code §§ 31-35-2-4(b)(2)(B)(i), -(ii). This means that if either of the above findings is not clearly erroneous, then the termination may stand.

[23] We first address the TPR court's conclusion that the conditions resulting in Child's removal and continued placement outside the care and custody of parents will not be remedied. We engage in a two-step analysis: (1) we identify the conditions that led to removal or continued placement outside the home; and (2) we determine whether there is a reasonable probability those conditions

will not be remedied. *In re E.M.*, 4 N.E.3d 636, 642-43 (Ind. 2014); *see also In re I.A.*, 903 N.E.2d 146, 154 (Ind. Ct. App. 2009) ("[I]t 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 those bases resulting in the continued placement outside of the home."). In performing the second step, we evaluate Father's fitness at the time of the termination hearing. *Id.* We entrust the trial court with balancing any recent improvements against habitual patterns of conduct to determine whether there is a substantial probability of future neglect or deprivation. *Id.* (quoting *K.T.K.*, 989 N.E.2d 1225, 1231 (Ind. 2013)).

[24] Because the TPR court's order was not clearly erroneous in finding that there was a reasonable probability that the conditions for continued removal would not be remedied, we need not reach its threat determination. Indiana Code § 31-35-2-4(b)(2)(B). The TPR court's remedying conditions conclusion notably avoids citing Father's pending criminal charges and inability to contact Child as the reason that will not be resolved, instead citing two years of noncompliance with court orders. Father challenges this finding by focusing on the services he completed in the prior CHINS cases. Father blames DCS for its ignorance of this progress, but as discussed in Part I(A), *supra*, Father made contact extremely difficult and neglected to reach out himself. The trial court found that Father's extended noncompliance *in this case* is the reason for "continued placement outside the care and custody of the parents." App. Vol. II, p. 19; *In re I.A.*, 903 N.E.2d at 154.

[25] Given that finding, we consider whether there is a reasonable probability those conditions will persist. Even now, Father insists that he should not have to participate in services. As the TPR court observed, Father refused to participate in services "not only to his detriment, but without regard to the well being or best interests of his child." App. Vol. II, pp. 19-20. The TPR court acknowledged that the no-contact order impeded certain aspects of Father's case. *Id.* But the order did not bar him from asking DCS about Child or engaging in other court-ordered services. Father's continued insistence that he does not need services and should not have to participate in them, or even contact DCS, supports the court's finding that conditions were unlikely to be remedied.

B. Best Interests of the Child

[26] A determination of Child's best interests should be based on the totality of the evidence. *In re A.S.*, 17 N.E.3d 994, 1005 (Ind. Ct. App. 2014). The interests of the child come before the interests of the parent. *Id.*

> The court need not wait until a child is irreversibly harmed before terminating the parent-child relationship. Recommendations of the case manager and court-appointed advocate, in addition to 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. (internal citations omitted).

[27] Father argues that there is no evidence to support the best interests finding—except the testimony of the court-appointed special advocate (CASA) and one of the family case managers. He argues that their testimony alone is not enough. But their testimony, along with the evidence that the conditions for continued removal will not be remedied, *supra* Part II(A), altogether are sufficient to show that termination is in Child's best interests. *See In re A.S.*, 17 N.E.3d at 1006 ("[W]e have previously held that recommendations of the case manager and [CASA], in addition to evidence that the conditions resulting in removal will not be remedied, are sufficient to show by clear and convincing evidence that termination of parental rights is in a child's best interests."). In sum, Father's arguments amount to an improper request for us to reweigh evidence. *See R.S.*, 56 N.E.3d at 628.

[28] Termination was due to Father's complete nonparticipation in services, *not* the conditions created by the criminal no-contact order and an as-yet unresolved criminal charge. Because Father has not made a showing of clear error, we affirm the TPR court.

Najam, J., and Vaidik, J., concur.