

MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



ATTORNEY FOR APPELLANT

Cara Schaefer Wieneke
Wieneke Law Office, LLC
Brooklyn, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana
Monika Prekopa Talbot
Deputy Attorney General
Robert J. Henke
Supervising Deputy Attorney
General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

In the Termination of the Parent-Child Relationship of: J.B., J.W., and H.W. (Minor Children), and I.W. (Father),

Appellant-Respondent,

v.

Indiana Department of Child Services,

Appellee-Plaintiff.

December 7, 2023

Court of Appeals Case No.
23A-JT-1499

Appeal from the Shelby Superior Court

The Honorable R. Kent Apsley,
Judge

Trial Court Cause Nos.
73D01-2302-JT-5
73D01-2302-JT-6
73D01-2302-JT-7

Memorandum Decision by Judge Brown
Judges Vaidik and Bradford concur.

Brown, Judge.

- [1] I.W. (“Father”) appeals the involuntary termination of his parental rights with respect to his children, J.B., J.W., and H.W. We affirm.

Facts and Procedural History

- [2] Father and R.B. (“Mother,” and together with Father, “Parents”) are the parents of J.B., J.W., and H.W. (the “Children”). On March 12, 2021, the Department of Child Services (“DCS”) filed a petition alleging the Children and Ju.B., Mother’s other child, were children in need of services (“CHINS”). DCS alleged that Ju.B. was born in February 2021 with methamphetamine and amphetamine in his body and Mother tested positive for those substances as well. DCS alleged that Father’s address was unknown.
- [3] On April 14, 2021, the court entered an order finding that Mother admitted the Children were CHINS. The order listed Father’s address as unknown. On May 10, 2021, the court entered a dispositional order. In November 2021, the court held a hearing at which Father appeared in person.¹ On December 2, 2022, the court entered an Order on Fact Finding Hearing stating that it held a hearing on November 28, 2022, at which Father appeared in person and with

¹ The record does not contain a transcript of this hearing.

counsel, and that Father admitted to having an inability to provide necessary care and supervision for the Children. On January 27, 2023, the court entered a dispositional order finding that Father appeared in person, in custody, and with counsel, for a hearing on January 23, 2023, and ordering him to obey the law and not use any illegal controlled substances.

[4] On February 28, 2023, DCS filed a petition for the involuntary termination of the parent-child relationships between Parents and the Children. On March 27, 2023, the court held an initial hearing at which Father appeared. Father indicated that he was in the Shelby County Jail and was going to be there for two additional months. The court indicated it would appoint Father counsel and enter a denial on his behalf to preserve his rights.

[5] On April 17 and 24, 2023, the court held hearings at which Father appeared with counsel. Father's counsel indicated that Father was incarcerated and was "in the [Jail Intervention] Program" and "his potential outdate is in May." Transcript Volume II at 32.²

[6] On May 22, 2023, the court held a factfinding hearing at which Father appeared with counsel. DCS presented the testimony of Shelbyville Police Officer Alex Miller, Father, Family Case Manager Amanda Grossi ("FCM

² We cite the page numbers as they appear consecutively in the PDF of the Electronic Record. *See* Ind. Appellate Rule 28(A) (The electronic Transcript is to be prepared in accordance with Appendix A, which provides in part: "Each volume of the Transcript . . . shall be independently and consecutively numbered. All pages of the Transcript, including the front page (see Appendix A(12)), shall be consecutively numbered at the bottom. Each volume shall begin with numeral one on its front page.").

Grossi”), and Family Case Manager Duane Tripp (“FCM Tripp”). The court also heard testimony from Court Appointed Special Advocate Linda Simmons (“CASA Simmons”).

[7] On June 13, 2023, the court entered an order finding that Father “repeatedly failed to appear for hearings in the underlying CHINS cases” and “[h]is absences were generally due to either being on the lamb, in custody or in treatment.” Appellant’s Appendix Volume II at 53. It found that “Father, by his own admission, is unable to provide for his children at this time due to his history of drug addiction, the need to focus on his recovery and required participate [sic] in the Shelby County Jail Intervention Program.” *Id.* at 54. It stated: Father has had a serious drug addiction that began when he was nine years old; he reported having overdosed on drugs more than once; he has lived his life as a drug addict with numerous attempts at sobriety; he acknowledged being directed into treatment on numerous occasions as a result of his delinquency and criminal matters and those treatments were not successful; and his long history of drug abuse has caused him to be unable to provide for the Children for significant periods of their lives. It found that Father has a conviction for felony neglect of a dependent as well as domestic battery in the presence of two of the Children. It further found that Father “has been through numerous addiction programs, including through the underlying CHINS cases. However, he consistently returns to using drugs and criminal activity even though he has been given the tools necessary to get control of his addiction.” *Id.* at 55. It concluded that: the conditions that led to the removal of the

Children or their placement outside the home will not be remedied; there was a reasonable probability that continuation of the parent-child relationship posed a threat to the well-being of the Children; and termination of the parent-child relationships was in the best interests of the Children.

Discussion

[8] Father argues that his “substantive due process right to raise the children was violated.” Appellant’s Brief at 11. He acknowledges he did not raise this claim to the trial court but asserts it constitutes fundamental error. He argues DCS acknowledged that it failed “to provide [him] the opportunity for counsel and both factfinding and dispositional hearings until just before the termination petition was filed.” *Id.* at 12. He contends he received no services from DCS for most of the CHINS proceedings given his incarceration, his lack of counsel until shortly before the termination proceedings began, and the lack of an order that DCS provide services. He asserts that the “unexplainable delay in formally involving [him] in the CHINS proceedings and in providing reunification services, even as he was incarcerated, did not constitute ‘reasonable efforts’ to reunify [him] with” the Children. *Id.* at 13.

[9] “To qualify as fundamental error, an error must be so prejudicial to the rights of the defendant as to make a fair trial impossible and must constitute a blatant violation of basic principles.” *D.T. v. Ind. Dep’t of Child Servs.*, 981 N.E.2d 1221, 1225 (Ind. Ct. App. 2013). “The harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process.” *Id.* See also *Matter of D.H.*, 119 N.E.3d 578, 586 (Ind. Ct. App. 2019)

(holding that we have discretion to address claims not raised before a trial court, “especially when they involve constitutional rights, the violation of which would be fundamental error” and quoting *S.B. v. Morgan Cnty. Dep’t of Public Welfare (In re L.B.)*, 616 N.E.2d 406, 407 (Ind. Ct. App. 1993), *trans. denied*, for the proposition that “[t]he constitutionally protected right of parents to establish a home and raise their children . . . mandates that the failure of a trial court to require compliance with any condition precedent to the termination of this right constitutes fundamental error which this court must address sua sponte”), *opinion adhered to as modified on reh’g*, 122 N.E.3d 832 (Ind. Ct. App. 2019), *trans. denied*.

[10] As a matter of statutory elements, DCS is not required to provide parents with services prior to seeking termination of the parent-child relationship. *In re T.W.*, 135 N.E.3d 607, 612 (Ind. Ct. App. 2019), *trans. denied*. However, parents facing termination proceedings are afforded due process protections. *Id.* We have discretion to address such due process claims even where the issue is not raised below. *Id.* CHINS and termination of parental rights proceedings “are deeply and obviously intertwined to the extent that an error in the former may flow into and infect the latter,” and procedural irregularities in a CHINS proceeding may deprive a parent of due process with respect to the termination of his or her parental rights. *Id.* (citing *Matter of D.H.*, 119 N.E.3d 578, 588 (Ind. Ct. App. 2019), *aff’d in relevant part on reh’g, trans. denied*). See also *In re J.K.*, 30 N.E.3d 695, 699 (Ind. 2015) (holding “when the State seeks to terminate the parent-child relationship, it must do so in a manner that meets the

requirements of due process”) (quoting *In re G.P.*, 4 N.E.3d 1158, 1165 (Ind. 2014) (alteration and internal quotation marks omitted)). To the extent Father cites *In re T.W.*, that Court 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)” and that “[w]hat constitutes ‘reasonable efforts’ will vary by case, and as noted above, it does not necessarily always mean that services must be provided to the parents.” 135 N.E.3d at 615.

[11] “Due process requires ‘the opportunity to be heard at a meaningful time and in a meaningful manner.’” *In re K.D.*, 962 N.E.2d 1249, 1257 (Ind. 2012) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893 (1976)). The Indiana Supreme Court has held that “the process due in a termination of parental rights action turns on balancing three *Mathews* factors: (1) the private interests affected by the proceeding; (2) the risk of error created by the State’s chosen procedure; and (3) the countervailing governmental interest supporting use of the challenged procedure.” *Id.* (citing *In re C.G.*, 954 N.E.2d 910, 917 (Ind. 2011)). “In balancing the three-prong *Mathews* test, we first note that the private interest affected by the proceeding is substantial – a parent’s interest in the care, custody, and control of her child.” *In re C.G.*, 954 N.E.2d at 917. “We also note the countervailing *Mathews* factor, that the State’s *parens patriae* interest in protecting the welfare of a child is also substantial.” *Id.*

[12] The record and Indiana's Odyssey Case Management System reveal that: Father appeared at a hearing in November 2021; on December 2, 2022, the trial court entered an order indicating that it held a hearing on November 28, 2022, at which Father appeared in person and with counsel, and Father admitted to having an inability to provide necessary care and supervision for the Children; and the trial court entered a dispositional order on January 27, 2023, finding that Father appeared in person, in custody, and with counsel, for a hearing on January 23, 2023. After DCS filed the petition to terminate the parent-child relationship between Father and the Children on February 28, 2023, Father appeared with counsel at hearings on April 17 and 24, 2023.

[13] At the May 22, 2023 factfinding hearing, Father was represented by counsel who objected to certain exhibits and cross-examined multiple witnesses including Father, FCM Grossi, FCM Tripp, and CASA Simmons. FCM Grossi testified that she met with Father a couple of times while he was incarcerated. She testified that there was an open referral for Fatherhood Engagement for Father while he was incarcerated and Father contacted her after his release from custody in an email which she received the prior Friday morning, three days prior to the hearing, to have services restarted. FCM Tripp testified that he spoke with Father on March 18, 2021, Father had not seen the Children for six months at that time, Father "was actually doing services" and seeing the Children three to four times per week, but there were many times when he could not locate Father. Transcript Volume II at 145. He stated that he attempted to reach Father in early 2022 but later discovered that he had been

arrested for possession of paraphernalia. He also testified that, during a portion of his involvement, Father acknowledged that he was using methamphetamine. When asked “what other types of services were in place for” Father when he was involved, he answered: “At that time, he, for a while, early in the case he was doing real well with Probation. He was on a number of programs.” *Id.* at 150. He stated that Father was doing well until he relapsed and was arrested again, and “he then got involved with the case that summer,” and “we were going to make referrals regarding, for Fatherhood Engagement etcetera at that time, unfortunately he was arrested.” *Id.* at 151. In light of the record, we cannot say that Father is entitled to reversal on due process grounds. We further note that Father does not challenge the trial court’s findings or conclusions resulting in the termination of the parent-child relationships.

[14] For the foregoing reasons, we affirm the trial court.

[15] Affirmed.

Vaidik, J., and Bradford, J., concur.