

MEMORANDUM DECISION

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ATTORNEY FOR APPELLANT

Katherine N. Worman
Evansville, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Katherine A. Cornelius
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

In Re: The Termination of the
Parent-Child Relationship of
A.H. (Minor Child);

M.H. (Mother),
Appellant-Respondent,

v.

The Indiana Department of
Child Services,
Appellee-Petitioner.

June 28, 2021

Court of Appeals Case No.
21A-JT-239

Appeal from the Vanderburgh
Superior Court

The Honorable Brett J. Niemeier,
Judge

Trial Court Cause No.
82D04-2002-JT-249

Pyle, Judge.

Statement of the Case

[1] M.H. (“Mother”) appeals the termination of the parent-child relationship with her daughter (“A.H.”), claiming that: (1) the Department of Child Services (“DCS”) violated her right to due process; and (2) there is insufficient evidence to support the termination. Concluding that: (1) DCS did not violate Mother’s right to due process; and (2) there is sufficient evidence to support the trial court’s decision to terminate the parent-child relationship, we affirm the trial court’s judgment.¹

[2] We affirm.

Issues

1. Whether DCS violated Mother’s right to due process.
2. Whether there is sufficient evidence to support the termination of the parent-child relationship.

Facts

[1] Mother is the parent of A.H., who was born in December 2012. In June 2018, DCS received a report that: (1) A.H. was being neglected; (2) Mother’s home was filthy; (3) Mother’s landlord was attempting to evict the family; and (4) there was a history of domestic violence in the family.

¹ A.H.’s father’s (“Father”) parental rights were terminated in August 2020, and he is not a party to this appeal.

- [2] Two DCS case managers went to the home to investigate the report. Mother, who became irate when she opened her front door to find the case managers, yelled and cursed at them. Mother told the case managers that she was “not in the mood to deal with” them that day. (Ex. Vol. 2 at 9). Although she refused to allow the case managers to enter her home, Mother admitted to them that: (1) there was no food in the home; (2) the house was not clean; (3) she did not have a reliable source of income; (4) she had a history of bipolar disorder and depression, for which she was not receiving treatment; and (5) she had a history of substance use but was not currently using illegal substances.
- [3] Mother eventually threw the front door open and told the case managers to do what they needed to do. As the case managers entered Mother’s home, they saw that the home was full of trash and rancid food. There was also a damp mattress in the middle of the kitchen that had “a foul smell.” (Ex. Vol. 2 at 9). The case managers, who also noticed cigarette butts and animal feces on the floor, offered to move Mother and A.H. into a shelter to prevent A.H.’s removal. The case managers further explained the possible services, including a parent aide, that they could offer to Mother. Mother, however, refused the services, became aggressive with the case managers, and fled on foot in the rain with A.H. The case managers called law enforcement officers, who assisted with removing A.H. from Mother.
- [4] DCS placed A.H. with her maternal aunt (“Maternal Aunt”) and filed a petition alleging that A.H. was a child in need of services (“CHINS”). At the June 2018 initial hearing, Mother admitted that A.H. was a CHINS, and the

trial court ordered Mother to: (1) obtain a mental health evaluation and follow all treatment recommendations; (2) participate in supervised visits with A.H.; (3) remain drug and alcohol free; and (4) submit to random drug screens. At a July 2018 hearing, DCS reported that Mother had tested positive for methamphetamine.

[5] Following the August 2018 CHINS dispositional hearing, the trial court further ordered Mother to: (1) contact the DCS family case manager every week; (2) notify the family case manager of any changes in address within five days of said change; (3) maintain suitable, safe, and stable housing; (4) secure and maintain a legal and stable source of income; and (5) participate in parent aide services.

[6] Pursuant to the trial court's orders, DCS Family Case Manager Crystal Derhaag ("FCM Derhaag") offered Mother: (1) mental health services; (2) a parent aide to help Mother find suitable housing and employment; (3) and supervised visitation with A.H. Mother had been diagnosed with depression when she was a teenager and had attempted suicide in 2017 while A.H. was on a visit with Father. Following her suicide attempt, Mother was referred to mental health treatment but did not attend her scheduled appointment and did not seek further treatment. Following A.H.'s removal, Mother completed a court-ordered mental health evaluation and was referred to group therapy. After Mother refused to attend group therapy because her anxiety disorder caused her to feel overly anxious in a group setting, FCM Derhaag approved

individual therapy for Mother. Mother, however, refused to attend individual therapy and never completed mental health treatment.

[7] Also following A.H.'s removal in June 2018, Mother obtained a job at Subway but did not secure stable housing until March 2019, when a parent aide helped Mother find an apartment. DCS paid for the deposit on the apartment and for the first month of rent. When FCM Derhaag attempted to contact Mother in June 2019, the family case manager was unable to reach Mother. In July 2019, FCM Derhaag learned that Mother had been incarcerated "for [Mother's] license" and had been evicted from her apartment for failure to pay her rent. (Tr. Vol. 2 at 36). DCS was unable to obtain another apartment for Mother because the agency had used the maximum allowance that was available to help Mother with housing costs. Following Mother's eviction from the apartment that DCS had helped her to obtain, Mother stayed with friends and in hotels.

[8] In addition, following A.H.'s removal, Mother regularly attended supervised visits with A.H. through the end of 2018. However, Mother's attendance at the supervised visits became more sporadic in 2019. In addition, the visitation supervisor often had to remind Mother to keep the topics of her conversations with then-six-year-old A.H. appropriate to A.H.'s age to avoid upsetting A.H. For example, at a March 2019 visit, Mother read to A.H. the funeral memorial of a distant relative. When A.H. became upset and started crying, Mother remarked that A.H. had not been that upset when another family member had died. At the mention of the other family member that had died, A.H. started

crying again and told Mother that she was worried and scared. During an April 2019 visit, Mother told A.H. about a woman that would be going to jail for killing her baby. Mother also told A.H. that she had allowed a friend that had been recently released from jail to stay with her and the friend had stolen Mother's new shoes. During a May 2019 visit, Mother told A.H. that she did not have any money or food stamps, and, in June 2019, Mother told A.H. not to throw away any of the food that Mother had brought to the visit because Mother did not have any other food to eat. During the June 2019 visit, Mother had also told A.H. that she was so stressed that she had started her day off by crying.

[9] In July 2019, Mother attended only one of five scheduled supervised visits. During that visit, Mother told A.H. that someone had broken into her apartment and taken her purse and jewelry. Six weeks later, during her next visit, Mother told A.H. that she had been incarcerated and that someone had broken into her apartment again. At an August 2019 review hearing, which Mother had failed to attend, the trial court ordered the cessation of Mother's visits because of her sporadic attendance and the distress to A.H.

[10] Also in August 2019, DCS filed a petition to terminate Mother's parental relationship with A.H. In February 2020, DCS filed a motion to dismiss the termination petition because the termination factfinding hearing had not been timely held. The trial court granted DCS' motion, and, that same day, DCS filed a second petition to terminate Mother's parental relationship with A.H.

- [11] In February 2020, the trial court held an initial hearing on the termination petition. FCM Derhaag advised the trial court that Mother had stopped communicating with DCS in January 2020. Mother advised both the trial court and FCM Derhaag that she had moved to Owensboro, Kentucky to live with her grandmother. Mother asked DCS to provide her services in Kentucky. Also at the hearing, the trial court advised Mother of her rights and the allegations in the termination petition. The trial court also ordered Mother to complete an updated mental health evaluation.
- [12] At another hearing two weeks later, FCM Derhaag explained to Mother that DCS was unable to pay for Mother's services in Kentucky. However, FCM Derhaag further explained that DCS would accept Kentucky services if Mother paid for them. In the alternative, Mother could travel to Indiana for services.
- [13] The trial court held the factfinding hearing on the second termination petition in October and November 2020. FCM Derhaag testified that she had been the case manager on Mother's case from August 2018 until February 2020, when another case manager had been assigned to the case after Father had physically assaulted the case manager following a court hearing. FCM Derhaag further testified to the facts as set forth above. She also testified that, following A.H.'s removal from Mother's home and placement with Maternal Aunt, A.H. had demonstrated behavioral issues, including hoarding food in her bedroom. A.H. had also exhibited aggressive behaviors and had feared being locked in her bedroom. According to FCM Derhaag, A.H.'s behavioral issues had improved after A.H. had participated in individual therapy and A.H. was "extremely

bonded” with Maternal Aunt, who planned to adopt A.H. (Tr. Vol. 2 at 79). FCM Derhaag further pointed out that Mother had failed to maintain regular contact with DCS, had never completed mental health treatment, and had lacked stable housing and employment throughout the proceedings. In addition, FCM Derhaag testified that termination was in A.H.’s best interests.

[14] DCS Family Case Manager Jake McCandless (“FCM McCandless”), who had been assigned to the case in February 2020, testified that DCS had removed A.H. from Mother because of a “dirty home and mental health concerns.” (Tr. Vol. 2 at 93). FCM McCandless further testified that, pursuant to the trial court’s February 2020 order, Mother had had another mental health assessment. However, according to FCM McCandless, Mother had failed to follow the assessor’s recommendations for mental health treatment. FCM McCandless also testified that termination of the parental relationship was in A.H.’s best interests.

[15] Lastly, CASA Molly Johnson (“CASA Johnson”) testified that Mother was unable to offer A.H. stability and safety. According to CASA Johnson, A.H. was stable, happy, and attached to Maternal Aunt. CASA Johnson also testified that termination was in A.H.’s best interests.

[16] Mother testified that she and her infant son, who was born in May 2020, lived with Mother’s grandmother in Kentucky. She further testified that she had been employed at Burger King since February 2020. However, she tendered no documentation in support of her employment. Mother’s grandmother testified

that Mother had been living with her in Owensboro for the previous eight months.

[17] In February 2020, the trial court issued a detailed termination order, which concluded that DCS had met its burden of proving the allegations in its termination petition by clear and convincing evidence. Mother now appeals the termination.

Decision

[18] Mother contends that: (1) DCS violated her right to due process; and (2) there is insufficient evidence to support the termination. We address each of her contentions in turn.

1. Due Process

[19] Mother first argues that she “was denied due process as a result of the procedural irregularities in the underlying CHINS action as well as DCS’ failure to make reasonable efforts to preserve and/or reunify the family unit.” (Mother’s Br. 16). When DCS seeks to terminate parental rights, “it must do so in a manner that meets the requirements of due process.” *In re J.K.*, 30 N.E.3d 695, 699 (Ind. 2015) (cleaned up). Due process requires “the opportunity to be heard at a meaningful time and in a meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (cleaned up). Whether due process has been afforded in termination proceedings is determined by balancing the following “three distinct factors” specified in *Mathews*: (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. *A.P. v. Porter Cnty. Office of Family and Children*, 734 N.E.2d 1107, 1112 (Ind. Ct. App. 2000), *trans. denied*.

[20] In *S.L. v. Ind. Dep't of Child Servs.*, 997 N.E.2d 1114, 1120 (Ind. Ct. App. 2013) (citing *In re C.G.*, 954 N.E.2d 910, 917 (Ind. 2011)), this Court further explained the *Mathews* factors as follows:

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.

[21] DCS must “make reasonable efforts to preserve and reunify families.” IND. CODE § 31-34-21-5.5(b). In addition, “due process protections at all stages of CHINS proceedings are vital because every CHINS proceeding has the potential to interfere with the rights of parents in the upbringing of their children.” *In re G.P.*, 4 N.E.3d 1158, 1165 (Ind. 2014) (cleaned up). “[T]hese two proceedings - CHINS and TPR - are deeply and obviously intertwined to the extent that an error in the former may flow into and infect the latter[.]” *Id.*

[22] However, the “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); *see also In re E.E.*, 736 N.E.2d 791, 796 (Ind. Ct. App. 2000) (“[T]he provision of family services is not a requisite element of

our parental rights termination statute, and thus, even a complete failure to provide services would not serve to negate a necessary element of the termination statute and require reversal.”). Further, a parent may not sit idly by without asserting a need or desire for services and then successfully argue that he or she was denied services to assist him with her parenting. *In re B.D.J.*, 728 N.E.2d 195, 201 (Ind. Ct. App. 2000).

[23] As a preliminary matter, we note that the law is well-established that a party on appeal may waive a constitutional claim. *McBride v. Monroe Cnty. Office of Family and Children*, 798 N.E.2d 185, 194 (Ind. Ct. App. 2003). For example, in *In re K.S.*, 750 N.E.2d 832, 834 n.1 (Ind. Ct. App. 2001), this Court determined that a mother had waived her claim that the trial court had violated her due process rights because she raised the constitutional claim for the first time on appeal. Here, Mother did not object to any alleged deficiencies in the CHINS process during the CHINS proceedings, nor did she argue during the termination proceedings that those alleged deficiencies constituted a due process violation. Rather, Mother has raised her due process claim for the first time on appeal. She has therefore waived appellate review of this issue. *See id.*

[24] Waiver notwithstanding, our review of the record reveals that DCS offered Mother the following services: (1) mental health assessments and treatment; (2) a parent aide to help Mother find stable housing and employment; and (3) supervised visits with A.H. DCS provided these services to Mother in an attempt to reunify her with her daughter. Mother, however, failed to successfully complete these services. Mother has not established that DCS

violated her due process rights because it failed to make reasonable efforts to preserve her parent-child relationship with A.H.

[25] Regarding Mother's other allegations of due process violations, we note Mother has not established that DCS engaged in conduct that affected her ability to participate in and complete services aimed at reunifying her with A.H. *Cf. In re T.W.*, 135 N.E.3d 607, 618 (Ind. Ct. App. 2019) (concluding that the "insufficient process employed in the CHINS case created a risk of the erroneous filing of a petition to terminate Father's parental rights to [his child], in violation of Father's due process rights.") *trans. denied; Matter of C.N.S.T.*, 111 N.E.3d 207, 213 (Ind. Ct. App. 2018) (concluding that "the chaotic and unprofessional handling" of a CHINS case violated the parents' due process rights, requiring reversal of the termination order); *A.P.*, 734 N.E.2d at 1117 (finding parents' due process rights were violated in a termination proceeding where DCS made multiple procedural errors, such as failing to provide parents with copies of case plans and filing CHINS and termination petitions that did not meet statutory requirements).

[26] In sum, Mother was heard "at a meaningful time and in a meaningful manner." *See Mathews*, 424 U.S. at 333. Specifically, Mother: (1) was served with the termination petition; (2) was notified of the termination hearing date; (3) was given an initial hearing where the trial court advised her of her rights and the allegations in the petition; (4) appeared and testified at the termination hearing; and (5) was vigorously represented by an attorney who frequently objected to

the admission of DCS's evidence and the testimony of DCS's witnesses and called witnesses on Mother's behalf. We find no due process violation here.

2. Sufficiency of the Evidence

- [27] Mother further argues that there is insufficient evidence to support the termination of her parental rights. The Fourteenth Amendment to the United States Constitution protects the traditional right of parents to establish a home and raise their children. *In re K.T.K.*, 989 N.E.2d 1225, 1230 (Ind. 2013). However, the law provides for termination of that right when parents are unwilling or unable to meet their parental responsibilities. *In re Bester*, 839 N.E.2d 143, 147 (Ind. 2005). The purpose of terminating parental rights is not to punish the parents but to protect their children. *In re L.S.*, 717 N.E.2d 204, 208 (Ind. Ct. App. 1999), *trans. denied*.
- [28] When reviewing the termination of parental rights, we will not reweigh the evidence or judge the credibility of the witnesses. *K.T.K.*, 989 N.E.2d at 1229. Rather, we consider only the evidence and reasonable inferences that support the judgment. *Id.* Where a trial court has entered findings of fact and conclusions thereon, we will not set aside the trial court's findings or judgment unless clearly erroneous. *Id.* (citing Ind. Trial Rule 52(A)). In determining whether the court's decision to terminate the parent-child relationship is clearly erroneous, we review the trial court's judgment to determine whether the evidence clearly and convincingly supports the findings and the findings clearly and convincingly support the judgment. *Id.* at 1229-30.

[29] A petition to terminate parental rights must allege:

(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 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). DCS must prove the alleged circumstances by clear and convincing evidence. *K.T.K.*, 989 N.E.2d at 1231.

[30] We further note that, in determining whether to terminate a parent-child relationship, trial courts have discretion to weigh a parent's prior history more heavily than efforts made only shortly before termination and may find that a parent's past behavior is the best predictor of future behavior. *D.B.M. v. Ind. Dep't of Child Servs.*, 20 N.E.3d 174, 181-82 (Ind. Ct. App. 2014), *trans. denied*. We have also stated that the time for a parent to rehabilitate himself or herself is during the CHINS process, before DCS files a termination petition. *Prince v. Dep't of Child Servs.*, 861 N.E.2d 1223, 1230 (Ind. Ct. App. 2007).

- [31] In addition, as a general rule, appellate courts grant latitude and deference to trial courts in family law matters. *Matter of D.P.*, 72 N.E.3d 976, 980 (Ind. Ct. App. 2017). “This deference recognizes a trial court’s unique ability to see the witnesses, observe their demeanor, and scrutinize their testimony, as opposed to this court[] only being able to review a cold transcript of the record.” *Id.*
- [32] Here, Mother argues that there is insufficient evidence to support the termination of her parental rights. Specifically, she contends that the evidence is insufficient to show both that there is a reasonable probability that the conditions that resulted in A.H.’s removal or the reasons for placement outside the parent’s home will not be remedied and a continuation of the parent-child relationship poses a threat to A.H.’s well-being.
- [33] However, we note that INDIANA CODE § 31-35-2-4(b)(2)(B) is written in the disjunctive. Therefore, DCS is required to establish by clear and convincing evidence only one of the three requirements of subsection (B). *In re A.K.*, 924 N.E.3d 212, 220 (Ind. Ct. App. 2010). We therefore discuss only whether there is a reasonable probability that the conditions that resulted in A.H.’s removal or the reasons for her placement outside Mother’s home will not be remedied.
- [34] In determining whether the conditions that resulted in a child’s removal or placement outside the home will not be remedied, we engage in a two-step analysis. *In re E.M.*, 4 N.E.3d 636, 642-43 (Ind. 2014). We first identify the conditions that led to removal or placement outside the home and then determine whether there is a reasonable probability that those conditions will

not be remedied. *Id.* at 643. The second step requires trial courts to judge a parent's fitness at the time of the termination proceeding, taking into consideration evidence of changed conditions and balancing any recent improvements against habitual patterns of conduct to determine whether there is a substantial probability of future neglect or deprivation. *Id.* DCS need not rule out all possibilities of change. *In re Kay. L.*, 867 N.E.2d 236, 242 (Ind. Ct. App. 2007). Rather, DCS need establish only that there is a reasonable probability that the parent's behavior will not change. *Id.*

[35] Here, our review of the evidence that supports the judgment reveals that DCS removed A.H. from Mother because of inappropriate conditions in the home and concerns about Mother's mental health. More than two years after A.H.'s removal from Mother's home, Mother had had two mental health evaluations but had failed to follow the assessors' treatment recommendations. In addition, for most of the case, Mother had not had stable housing. It was only after DCS had filed its first termination petition that Mother had moved to Kentucky to live with her grandmother. At the time of the termination hearing, Mother had not seen A.H. in over a year. This evidence supports the trial court's conclusion that there was a reasonable probability that the conditions that resulted in A.H.'s removal would not be remedied.

[36] Mother also argues that there is insufficient evidence that the termination was in A.H.'s best interests. In determining whether termination of parental rights is in the best interests of a child, the trial court is required to look at the totality of the evidence. *In re D.D.*, 804 N.E.2d 258, 267 (Ind. Ct. App. 2004), *trans.*

denied. In so doing, the court must subordinate the interests of the parents to those of the child involved. *Id.* Termination of the parent-child relationship is proper where the child's emotional and physical development is threatened. *In re R.S.*, 774 N.E.2d 927, 930 (Ind. Ct. App. 2002), *trans. denied*. “A parent's historical inability to provide adequate housing, stability and supervision coupled with a current inability to provide the same will support a finding that continuation of the parent-child relationship is contrary to the child's best interest.” *In re B.D.J.*, 728 N.E.2d 195, 203 (Ind. Ct. App. 2000) (quoting *Matter of Adoption of D.V.H.*, 604 N.E.2d 634, 638 (Ind. Ct. App. 1992), *trans. denied, superseded by rule on other grounds*). Further, the testimony of the service providers may support a finding that termination is in the child's best interests. *McBride*, 798 N.E.2d at 203.

[37] Here, our review of the evidence reveals that, when A.H. was removed from Mother, A.H. had demonstrated behavioral issues, including hoarding food in her bedroom. A.H. had also exhibited aggressive behaviors and had feared being locked in her bedroom. At the time of the termination hearing, A.H.'s behavioral issues had improved, and A.H. was “extremely bonded” with Maternal Aunt, who planned to adopt A.H. (Tr. Vol. 2 at 79). In addition, FCM Derhaag, FCM McCandless, and CASA Johnson all testified that termination was in A.H.'s best interests. The testimony of these service providers, as well as the other evidence previously discussed, supports the trial court's conclusion that termination was in A.H.'s best interests. There is sufficient evidence to support the termination.

[38] Affirmed.

Najam, J., and Tavitas, J., concur.