MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In re the Termination of the Parent-Child Relationship of: V.N., D.N., S.N., & J.N. (Minor Children), and M.N. (Mother),

Appellant-Respondent,

v.

Indiana Department of Child Services,

Appellee-Petitioner

March 3, 2021

Court of Appeals Case No. 20A-JT-2207

Appeal from Greene Circuit Court

The Honorable Erik C. Allen, Judge

Trial Court Cause Nos.
28C01-2007-JT-10
28C01-2007-JT-11
28C01-2007-JT-12
28C01-2007-JT-13

May, Judge.

[1] M.N. ("Mother") appeals the involuntary termination of her parental rights to Ju.N, V.N., D.N., and S.N. (collectively, "Children"). Mother argues the trial court committed fundamental error when it did not *sua sponte* continue the fact-finding hearing on the petition to terminate Mother's parental rights to Children. We affirm.

Facts and Procedural History

[2] Mother[1] gave birth to Ju.N. on February 21, 2003; V.N. on June 24, 2004; D.N. on April 27, 2009; and S.N. on May 9, 2012. In April 2019, the police called the Department of Child Services ("DCS") after officers found Ju.N. driving Mother's car while Mother was "passed out" in the car after "huffing an inhalant." (Tr. Vol. II at 26.) DCS worked with Mother and service providers in an informal adjustment. Mother tested positive for "meth" during the informal adjustment. (*Id*.)

[3] On September 3, 2019, DCS ended the informal adjustment and filed petitions alleging Children were Children in Need of Services ("CHINS") based on Mother's ongoing substance abuse issues. Children initially remained in Mother's care. However, on October 4, 2019, the trial court held a detention hearing and ordered the Children removed from Mother's care. Mother tested positive for methamphetamine on September 16 and September 27. She

[1] Mother and J.N. ("Father") are the parents of Children. Father voluntarily relinquished his parental rights and does not participate in this appeal.

admitted to using methamphetamine and THC. Mother also failed to maintain contact with DCS and did not engage in the services DCS offered. Children were placed with their Maternal Grandmother, where they have remained throughout the proceedings.

[4] On October 21, 2019, the trial court held a fact-finding hearing regarding the CHINS petitions. Mother did not appear, but her counsel was present. Following the hearing, the trial court adjudicated Children as CHINS. On December 3, 2019, the trial court held its dispositional hearing. Mother was not present at this hearing, but counsel appeared on her behalf. The same day, the trial court entered its dispositional orders, requiring Mother to, among other things: contact the family case manager every week, participate in home-based counseling, complete substance abuse and parenting assessments and follow all recommendations, maintain suitable housing and legal employment, refrain from using drugs or alcohol, obey the law, and submit to random drug screens.

[5] On March 9, 2020, the trial court held a review hearing and Mother did not appear, though her counsel was present. DCS indicated Mother had not participated in services and had not consistently visited Children. On July 6, 2020, the trial court held a review hearing and Mother did not appear, though her counsel was present. DCS reported Mother had not engaged in services, had not consistently submitted to random drug screens, and had not consistently visited with Children. Based on Mother's noncompliance with services, the trial court changed the Children's permanency plans to adoption.

[6] On July 24, 2020, DCS filed petitions to involuntarily terminate Mother's parental rights to Children. The trial court held an initial hearing on the termination petitions on August 10, 2020, and Mother appeared by telephone from the Clay County Jail because she had violated her probation for an earlier substance-related offense. On October 13, 2020, the trial court held a fact-finding hearing on the termination petitions. Mother arrived approximately an hour late. Mother's counsel was present during the entire hearing. On October 22, 2020, the trial court entered its orders terminating Mother's parental rights to Children, finding, regarding its reasons for termination:

> 8. [Mother] was referred for an assessment with Deborah Hoesman, LCSW, (Legacy & Associates) in July 2019, however, the assessment was not completed until October 7, 2019, due to [Mother's] lack of engagement. The date of the assessment is the only date [Mother] met with Ms. Hoesman. [Mother] was recommended [sic] to a place with weekly appointments in an office because [Mother] was not willing to cooperate with home-based services. As a result of the assessment, Ms. Hoesman believes [Mother] has mental health issues besides for [sic] the substance abuse issues, and [Mother] never did any therapy and did not address these issues. Ms. Hoesman observed [Mother] to have signs of an undiagnosed personality disorder as a result of always seeing herself as the victim, and she has had multiple relationships with males that involved turmoil and domestic violence. Ms. Hoesman believes it would put [Children] in turmoil if they were returned to [Mother] because she hasn't addressed any of her issues and has not being willing to participate in any services. Further, Ms. Hoesman questioned [Mother's] ability to meet the basic needs of [Children,] such as providing food, clothing, and shelter. The assessment was the only time [Mother] was willing to meet with Ms. Hoesman.

9. Summer Jerrell is a home based case manager and a visit supervisor. She was the provider that was supposed to supervise weekly visits between [Mother] and [Children] from October 2019 until January 2020, however, [Mother] only attended 4 or 5 visits during that time.

10. Jennifer Wilson is a home based case manager and a visit supervisor. She has been assigned to supervise visits between [Mother] and [Children] since February 2020 to present [sic]. [Mother] has only had 13 visits and only 2 of those have been in person. [Mother] is supposed to confirm visits by noon the day before the visits, but [Mother] has had 14 no confirms and 5 no-shows. Ms. Wilson opined that the visits did not go well and gave the examples that [Mother] did not require [S.N.] to do his homework, and [Mother's] boyfriend was often a distraction.

* * * * *

12. [Family Case Manager] Brown has observed that [Mother] has not participated in services and it is his belief that she has made no progress toward being able to fulfill her parental obligations. There were frequent [Child and Family Team Meetings] scheduled, but [they] were often cancelled the day they were scheduled by [Mother] and her reasons for cancelling them were often determined to be untrue. [Mother] only attended one [Child and Family Team Meeting] and that was by telephone. Through his involvement with [Mother,] [Family Case Manager] Brown has observed [Mother] does not recognize her substance abuse to be an issue that impacts her ability to be an appropriate parent, and she does not recognize any of her other issues. He further opined that [Mother] has not made progress and the issues are unlikely to be remedied based upon [Mother's] lack of compliance and unwillingness to participate in services. Mr. Brown opined that termination of parental rights is in the best interests of [Children] because they are in a safe and appropriate home and they have thrived with the stability, and [Mother has]

> been absent much of the lives of [Children]. According to [Family Case Manager] Brown the current relative placement is willing to adopt [Children].

(App. Vol. II at 40-1.)

Discussion and Decision

[7] We review termination of parental rights with great deference. *In re K.S., D.S., & B.G.*, 750 N.E.2d 832, 836 (Ind. Ct. App. 2001). We will not reweigh evidence or judge credibility of witnesses. *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 most favorable to the judgment. *Id*. In deference to the juvenile court's unique position to assess the evidence, we will set aside a judgment terminating a parent's rights only if it is clearly erroneous. *In re L.S.*, 717 N.E.2d 204, 208 (Ind. Ct. App. 1999), *reh'g denied*, *trans. denied*, *cert. denied* 534 U.S. 1161 (2002). Mother does not challenge any of the trial court's findings or conclusions, and thus they stand proven. *See Madlem v. Arko*, 592 N.E.2d 686, 687 (Ind. 1992) ("Because Madlem does not challenge the findings of the trial court, they must be accepted as correct.").

[8] "The traditional right of parents to establish a home and raise their children is protected by the Fourteenth Amendment of the United States Constitution." *In re M.B.*, 666 N.E.2d 73, 76 (Ind. Ct. App. 1996), *trans. denied*. A trial court must subordinate the interests of the parents to those of the children, however, when evaluating the circumstances surrounding a termination. *In re K.S.*, 750 N.E.2d

at 837. The right to raise one's own children should not be terminated solely because there is a better home available for the children, *id*., but parental rights may be terminated when a parent is unable or unwilling to meet parental responsibilities. *Id*. at 836.

[9] When the State seeks to terminate a parent-child relationship, it must do so in accordance with due process. *Hite v. Vanderburgh Cty. Office of Family & Children*, 845 N.E.2d 175, 181 (Ind. Ct. App. 2006). While the term is not precisely defined, it embodies a requirement of "fundamental fairness." *E.P. v. Marion Cty. Office of Family & Children*, 653 N.E.2d 1026, 1031 (Ind. Ct. App. 1995). Mother argues the trial court violated her right to due process by holding the termination fact-finding hearing when she was not present at the beginning of the hearing.

[10] Neither Mother nor her counsel requested a continuance of the termination fact-finding hearing, and thus the issue is waived. *See McBride v. Monroe Cty. Office of Family & Children*, 798 N.E.2d 185, 194-5 (Ind. Ct. App. 2003) (mother waived due process claim in an involuntary termination case when it was raised for the first time on appeal). To escape waiver, Mother argues the trial court's failure to *sua sponte* continue the proceedings constitutes fundamental error. Fundamental error occurs when there exist egregious trial errors. *In re E.E.*, 853 N.E.2d 1037, 1043 (Ind. Ct. App. 2006), *trans. denied*. "In order for this court to reverse based on fundamental error, the error must have been a clearly blatant violation of basic and elementary principles, and the harm or potential for harm must be substantial and appear clearly and prospectively." *Id*.

[11] Here, Mother does not dispute she had notice of the hearing. During the prior initial hearing, the trial court made her aware of the date of the fact-finding hearing and told Mother "if you are out of custody it is your obligation to be here." (Tr. Vol. II at 15.) The trial court reiterated its mandate, reminding Mother to "notify [her] attorney if [she] is in custody somewhere else so [her attorney] can make arrangements for [her] to be here, if you are not in custody, if you are not in jail, you need to be here otherwise we will proceed with the trial in your absence[.]" (*Id*.) When asked if she understood the trial court's statement, Mother answered in the affirmative.

[12] Mother did not have an absolute right to be present at the fact-finding hearing. *See Tillotson v. Clay Cty. Dept. of Family & Children*, 777 N.E.2d 741, 746 (Ind. Ct. App. 2002) (parents not required to be physically present at termination hearing as long as they are represented by counsel and provided with an opportunity to make arguments, present evidence, and cross-examine witnesses), *trans. denied*. Mother's counsel was present throughout the fact-finding hearing, made arguments, and was provided the opportunity to cross-examine witnesses and present evidence on Mother's behalf. Thus, fundamental error did not occur here. *See In re C.C.*, 788 N.E.2d 847, 853 (Ind. Ct. App. 2003) (father's absence at termination proceeding did not amount to due process error because father was represented by counsel who had the opportunity to make arguments, cross-examine witnesses, and present evidence on father's behalf), *trans. denied*.

Conclusion

[13] The trial court did not create fundamental error when it did not *sua sponte* continue the termination fact-finding hearing. Accordingly, we affirm the involuntary termination of Mother's parental rights to Children.

[14] Affirmed.

Kirsch, J., and Bradford, C.J., concur.