

## 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 Termination of the Parent-Child Relationship of: M.O., T.O., and Z.O. (Minor Children),  
D.O. (Father),  
*Appellant-Respondent,*

v.

Indiana Department of Child Services,  
*Appellee-Plaintiff.*

June 29, 2022

Court of Appeals Case No.  
21A-JT-2910

Appeal from the Tippecanoe Superior Court

The Honorable Tricia L. Thompson, Juvenile Magistrate

Trial Court Cause Nos.  
79D03-2103-JT-32  
79D03-2103-JT-33  
79D03-2103-JT-34

**Brown, Judge.**

[1] D.O. (“Father”) appeals the trial court’s denial of a motion to dismiss filed by the Department of Child Services (“DCS”). We affirm.

### *Facts and Procedural History*

[2] Father and M.N. (“Mother,” and collectively with Father, “Parents”) are the parents of Z.O., born in 2011, T.O., born in 2012, and M.O., born in 2016. On December 11, 2019, DCS filed a petition alleging the children were in need of services (“CHINS”). DCS alleged that Father claimed he was violently robbed in February 2019, which left him with a traumatic brain injury; Mother left the home in October 2019 and had not returned; DCS received a report on November 1, 2019, alleging educational neglect and neglect due to a lack of food in the home; Z.O. had a total of sixteen absences, ten truant tardies, and one tardy since the beginning of the school year in August 2019; and T.O. had a total of twenty-one absences since the beginning of the school year in August 2019. DCS also alleged that when T.O. and Z.O. went to school, they were often starving; the home had very little furniture and little food for the three children; Father was taken to the hospital twice during the DCS assessment; and, according to Father, he passed out due to lack of food. In January 2020, the court entered an order finding the children to be CHINS. In March 2020, the court entered a dispositional order.

[3] On March 18, 2021, DCS filed a petition for involuntary termination of the parent-child relationship between Parents and the children. On May 7, 2021, the court held a hearing. On July 6, 2021, DCS filed a Motion to Dismiss Termination Petition which asserted that, “pursuant to I.C. 31-35-2-4.5(d)(1), a

compelling reason, documented in the case plan, exists to conclude that termination of the parent-child relationship is not in the best interests of the child.” Appellant’s Appendix Volume II at 41. DCS alleged that Father suffered a traumatic brain injury before the start of the case; Father struggled to keep appointments and participate in services at the start of the case as a result of the injury; Father’s service providers had seen improvements in Father’s behaviors in recent months; and Parents and the court appointed special advocate (“CASA”) were in agreement with dismissal.<sup>1</sup>

[4] On July 19, 2021, the court held a hearing. DCS presented the testimony of Laura Houze, a therapist, Ashley Montoya, a home-based provider, Jason Goyer, Father’s home-based case manager, and Permanency Family Case Manager Debi Pellam (“FCM Pellam”). FCM Pellam testified that she received the case at the end of May and discovered that Father was referred to Valley Oaks for assessment related to his traumatic brain injury but missed three appointments. She testified that DCS believed the case should be structured to move forward quickly if the petition to terminate is not pursued and that DCS formulated a “30-60-90 day plan.”<sup>2</sup> Transcript Volume II at 32.

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<sup>1</sup> On appeal, Father asserts that he was the victim of a violent attack in early 2019 which left him with a traumatic brain injury.

<sup>2</sup> When asked to describe the 30-60-90 day plan, FCM Pellam answered:

[I]n the first thirty days for [Father], we are, we are getting nurse case management in place, um, increased visits with approval to twice a month, and, um, hopefully locate an . . . opening with an ACT or CPS within that timeframe. The goal we want to see from [Father] is that he does not miss any appointments at all for visits or therapy or home-based case management, and the nurse case management as well when that starts. And in sixty

On cross-examination by CASA’s counsel, FCM Pellam indicated she had not had contact with Father’s neurologist. CASA’s counsel asked: “[W]e don’t know whether he’s done, through any type of medical or medically supervised services where they retrain his brain to react more quickly or to learn to rethink processes that he may have lost from the” traumatic brain injury. *Id.* at 37. FCM Pellam answered: “Correct, yes. We don’t have that.” *Id.*

[5] The court asked what were “the odds that the neuro-psych is actually going to be done in ninety days,” and FCM Pellam answered: “I’m gonna say around fifty to sixty percent if at all, if I can push.” *Id.* at 40. She testified that a referral was made for the “neuro-psych” with Valley Oaks and Father missed three scheduled appointments. *Id.* at 41. She indicated the children’s therapists recommended that visits either increase or be stopped “because the once a month is really causing some confusion with the children.” *Id.* The court asked if “at the ninety days, you’ll just then have the information from” the evaluation, and she answered affirmatively. *Id.* at 43. The court asked: “So, at that point, we’d be at, at the beginning?” *Id.* at 44. FCM Pellam answered: “Of what they recommend, yes.” *Id.* After the presentation of DCS’s evidence,

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days, we wanna see an increase in his medication compliance through nurse case management and his, his medical, attending his medical appointments, and get his neuro-psychological evaluation completed, if at all possible for that one. Um, that depends on the availability of the provider. And also in sixty days, increase visits to three times a month . . . for the kids. And then, in ninety days, increase visits to four times a month with the children and continued compliance with attending all services with the nurse case manager, his home-based case manager, his therapist, and visits, and medical.

Transcript Volume II at 32-33.

Father's counsel indicated that she had no evidence but asserted Father was "in agreement with dismissing." *Id.* at 45.

[6] The court stated:

[R]egarding the motion to dismiss, the Court is not granting the motion to dismiss. What the Court will do is allow the parties to present . . . jurisdiction and venue today and then continue the case to allow these services to be put in place and then the Court will allow DCS to renew its motion to dismiss at the next hearing if that is still the position of DCS. [H]owever, we are at, past fifteen out of twenty-two and so the Court's not going to dismiss the petition altogether . . . because, best case scenario, with the ninety-day plan, you're hoping to have visits once a week in ninety days. And so, and you're hoping to just get this neuro-psychological back. And so, it's not that you think you're gonna be in a trial home visit and close to dismissing the case in ninety days. You're talking about essentially being at the beginning of a case in another ninety days and that is a terribly long time for children. I get, absolutely, sir, that . . . it's in your best interest for these things to be in place and to go forward, but the Court has to look at what's in the best interest of the children and I have to compare the progress made versus where the children are and how long the children have been out of the home. And, when you're looking at just being at the start of the case in another ninety days, that's a terribly long time for children. So, the Court will allow the parties to start with jurisdiction and venue today and set it out for ninety days to give [Father] additional chance to progress. DCS, you've gotta be on it and you've gotta get these services in place right away. [B]ut there, there's nothing new. This neuro-psychological evaluation has been recommended for over a year. Father's had three separate opportunities. He's had case management in place to help him get there and he's not taken advantage of that. And so, sir, you are doing better. I, I, based upon the evidence today, you're doing better in the last two months. I don't know what's caused

that. It coincides with the filing of the TPR. And so, I don't know if it's just you've realized now what's at stake and that's what[s] causing it. I don't know if it's just progress with your mental condition. I don't know what's causing it. The Court's gonna give you an opportunity to show that you can sustain that and keep moving forward, but you've gotta put in that effort and you've gotta make your appointments and you've gotta reach out for help.

*Id.* at 48-49.

- [7] On July 21, 2021, the court denied DCS's motion to dismiss. On August 16, 25, and 27, 2021, the court held a hearing. Father did not object to the hearing, and DCS did not renew its motion. The court heard testimony from multiple witnesses including Jennifer Soelke, a licensed mental health counselor associate and M.O.'s therapist, Alexandria Bien, the visit facilitator for Father and the children, Lana Hammel, a visit supervisor, and Goyer.
- [8] On November 27, 2021, the court entered an order terminating Parents' parental rights. It found there was a reasonable probability the conditions resulting in removal of the children from the Parents' home or reasons for placement of the children outside the home would 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 was in the best interests of the children.

## *Discussion*

[9] Father argues that the trial court erred in denying DCS’s motion to dismiss. He asserts that, “if the evidence supporting the allegations in the motion is not disputed, the wording ‘shall dismiss’ [in Ind. Code § 31-35-2-4.5(d)] requires the court to grant the motion.” Appellant’s Brief at 19. DCS argues that “it is unclear what standing Father has to appeal the court’s denial of [its] motion to dismiss” and, “[e]ven if Father has standing, he has failed to show that the court abused its discretion in denying [its] Motion for dismissal.” Appellee’s Brief at 20-21. In reply, Father argues the “only means that a parent has to protect his due process right to raise his family when such a motion is denied is to appeal the denial” and “[t]herefore, [he] has standing to appeal the denial of DCS’s motion to dismiss.” Appellant’s Reply Brief at 5.

[10] We generally review trial court rulings on motions to dismiss for an abuse of discretion. *J.F. v. L.K.*, 136 N.E.3d 624, 627 (Ind. Ct. App. 2019). Assuming that Father has standing, we cannot say that reversal is warranted. “In 1998, the General Assembly enacted Public Law No. 35 1998, which became effective July 1, 1999, as Indiana Code section 31-35-2-4.5.” *M.H.C. v. Hill*, 750 N.E.2d 872, 875-876 (Ind. Ct. App. 2001). “The new state law was a response to 1997 amendments to the federal Adoption Assistance and Child Welfare Act seeking ‘to ensure that children did not spend long periods of their childhoods in foster care or other settings designed to be temporary.’” *Id.* at 876 (quoting *Phelps v. Sybinsky*, 736 N.E.2d 809, 813 (Ind. Ct. App. 2000), *trans. denied*). Ind. Code § 31-35-2-4.5 provides:

(a) This section applies if:

(1) a court has made a finding under IC 31-34-21-5.6 that reasonable efforts for family preservation or reunification with respect to a child in need of services are not required;

or

(2) a child in need of services or a delinquent child:

(A) has been placed in:

(i) a foster family home, child caring institution, or group home licensed under IC 31-27; or

(ii) the home of a relative (as defined in IC 31-9-2-107(c));

as directed by a court in a child in need of services proceeding under IC 31-34 or a delinquency action under IC 31-37; and

(B) has been removed from a parent and has been under the supervision of the department or county probation department for not less than fifteen (15) months of the most recent twenty-two (22) months, beginning with the date the child is removed from the home as a result of the child being alleged to be a child in need of services or a delinquent child.

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(d) A person described in section 4(a)<sup>[3]</sup> of this chapter may file a

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<sup>3</sup> Ind. Code § 31-35-2-4(a) provides:

A petition to terminate the parent-child relationship involving a delinquent child or a child in need of services may be signed and filed with the juvenile or probate court by any of the following:



motion to dismiss the petition to terminate the parent-child relationship if any of the following circumstances apply:

(1) That the current case plan prepared by or under the supervision of the department or the probation department under IC 31-34-15, IC 31-37-19-1.5, or IC 31-37-22-4.5 has documented a compelling reason, based on facts and circumstances stated in the petition or motion, for concluding that filing, or proceeding to a final determination of, a petition to terminate the parent-child relationship is not in the best interests of the child. A compelling reason may include the fact that the child is being cared for by a custodian who is a relative (as defined in IC 31-9-2-107(c)).

\* \* \* \* \*

The motion to dismiss shall specify which of the allegations described in subdivisions (1) through (4) apply to the motion. If the court finds that any of the allegations described in subdivisions (1) through (4) are true, as established by a preponderance of the evidence, the court shall dismiss the petition to terminate the parent-child relationship.

[11] Based upon the trial court's comments at the July 19, 2021 hearing, we conclude that the court found that the allegation in DCS's motion to dismiss was not established by a preponderance of the evidence. The record reveals that, while Father had made some improvement prior to the hearing, Houze, the therapist, characterized the improvement as "slight." Transcript Volume II

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- (1) The attorney for the department.
  - (2) The child's court appointed special advocate.
  - (3) The child's guardian ad litem.

at 16. As pointed out by the trial court, the children had been removed from Father's home for more than fifteen months. With respect to the 30-60-90 day plan, the court asked FCM Pellam if "at the ninety days, you'll just then have the information from" the evaluation, and FCM Pellam answered affirmatively. *Id.* at 43. The court asked: "So, at that point, we'd be at, at the beginning?" *Id.* at 44. FCM Pellam answered: "Of what they recommend, yes." *Id.*

[12] Moreover, the trial court noted that the neuro-psychological evaluation had been recommended for over a year and Father had missed three separate opportunities. The court also emphasized that it had to "look at what's in the best interest of the children and I have to compare the progress made versus where the children are and how long the children have been out of the home." *Id.* at 48. We also note that, at the July 19, 2021 hearing, the court stated that it would "continue the case to allow these services to be put in place" and "allow DCS to renew its motion to dismiss at the next hearing if that is still the position of DCS." *Id.* DCS did not renew its motion.

[13] At the August 16, 2021 hearing, Soelke, M.O.'s therapist, testified that finding permanency for M.O. was the most important thing for her well-being.<sup>4</sup> Bien, the visit facilitator for Father and the children between July 2020 and

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<sup>4</sup> To the extent Father argues the trial court scheduled a hearing prior to the expiration of the ninety-day period following the July 19, 2021 hearing, we note that Father did not object at the August 16, 2021 hearing to going forward. Accordingly, we find Father has waived his claim. *See In re N.G.*, 51 N.E.3d 1167, 1173 (Ind. 2016) (holding that mother had procedurally defaulted a claim on appeal by not making an objection in the trial court, mother's due process claim was waived, and a party on appeal may waive a constitutional claim, including a claimed violation of due process rights, by raising it for the first time on appeal).

September 2020, testified that visitation services were stopped due to inconsistency with attendance. She testified that Father did not demonstrate adequate parenting skills during the visits. When asked if she was indicating that she believed continued contact between Father and the children would be more destructive to the children than beneficial, she answered affirmatively. She indicated she was aware Father had a traumatic brain injury which affected his short-term memory and that she sent him text reminders for his visits.

[14] Hammel, the visit supervisor who accepted a referral on October 4, 2020, testified that Father showed up for one of five visits and was unprepared for that visit so it had to be canceled. She also testified that Father was discharged on December 5, 2020, and she did not believe she was able to even assess Father's parenting ability. She also testified that she called "him ahead to remind him of visits." *Id.* at 129.

[15] At the August 25, 2021 hearing, Goyer, who worked with Father in home-based casework since September or October 2020 before going on FMLA leave on July 24, 2021, testified that an appointment was scheduled at the Bauer Family Resources House during the time he was on FMLA leave and Father "never showed up for that appointment." *Id.* at 153.

[16] FCM Pellam testified that Father was referred to a psychological evaluation and completed it in April 2020. She indicated that recommendations based on the psychological evaluation included psychiatric medication management, weekly cognitive behavioral therapy sessions, and physician monitoring for his

traumatic brain injury. She testified that Father had been consistently inconsistent with visits. She indicated that Father had been discharged from home-based case management services through Bauer in the end of July or beginning of August 2021 for “no showing.” *Id.* at 195. When asked if there were further services that she believed may be necessary for Father when she took over the case, she stated that she had been attempting to “get him into an neuro-psychological evaluation” but the waitlist was “pretty long.” *Id.* at 195. She testified that she looked into referrals for nursing-based case management but there were no available nurse case managers. She also indicated that DCS recommended termination of parental rights.

[17] At the August 27, 2021 hearing, Court Appointed Special Advocate Elizabeth Dunlap testified that, if the petition to terminate parental rights were denied, she would be “very concerned that the children would be removed from their current placements because it has been so long . . . .” *Id.* at 224. She thought that Father’s parental rights should be terminated and the children should be placed for adoption. She stated: “They need permanency. I think that because they don’t have the permanence that there’s the constant question about their future that, um, continuing to linger in that state would be detrimental to the children.” *Id.* Under these circumstances, we cannot say that the trial court abused its discretion in denying DCS’s motion to dismiss.<sup>5</sup>

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<sup>5</sup> Father does not challenge or develop an argument regarding the court’s order terminating his parental rights.

[18] For the foregoing reasons, we affirm the trial court's denial of DCS's motion to dismiss.

[19] Affirmed.

Mathias, J., and Molter, J., concur.