MEMORANDUM DECISION

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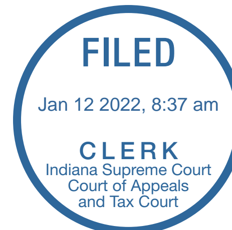

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IN THE COURT OF APPEALS OF INDIANA

In re the Termination of the Parent-Child Relationship of S.D. and O.D. (Minor Children) and R.D. (Father) and R.Y. (Mother)

R.D. (Father) and R.Y. (Mother),

Appellants-Respondents,

v.

January 12, 2022

Court of Appeals Case No. 21A-JT-1443

Appeal from the Perry Circuit Court

The Honorable Karen Werner, Magistrate

Trial Court Cause Nos. 62C01-2103-JT-66 62C01-2103-JT-67

Indiana Department of Child Services,
Appellee-Petitioner

Vaidik, Judge.

Case Summary

[1] R.D. ("Father") and R.Y. ("Mother") appeal the termination of their parental rights to S.D. and O.D. ("the children"). We affirm.

Facts and Procedural History

[2] Father and Mother are the biological parents of S.D., born in 2009, and O.D., born in 2010. In February 2019, the Department of Child Services (DCS) in Perry County received a report that Mother was out of state and Father had left the children with a grandparent who could not enroll them in school. Family Case Manager (FCM) Tasha George conducted an assessment and spoke to the children, who reported they had not been to school since December and that the homes they stayed in with Father often lacked necessities such as water and heat. FCM George also noted the children had insufficient clothing and poor hygiene. She contacted Mother, who reported she lived in Arkansas and had

not seen the children since Thanksgiving, when she left Father due to domestic abuse. FCM George also met with Father, who was staying at a friend's home in Indiana. Father admitted he would test positive for marijuana but refused to submit to a drug screen.

[3] DCS removed the children and placed them in foster care, where they have since remained. The next day, DCS filed petitions alleging the children were children in need of services (CHINS). The cases were dismissed in June, pursuant to Indiana statutes that require a CHINS factfinding hearing to be held within 120 days of the petition being filed.[1] However, neither parent could be located, and the children remained in foster care. In July 2019, DCS again filed petitions alleging the children were CHINS, for the same reasons as the earlier case. That same month, Mother admitted the children were CHINS. Two months later, the court adjudicated the children to be CHINS as to Father. At their respective dispositional hearings, the Parents were ordered to, among other things, attend visits with the children, complete a substance-abuse and parenting assessment, and submit to weekly drug screening.

[4] For the next year and a half, Parents failed to comply with the case plan. Father visited the children only a few times after their removal. His last in-person visit

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[1] Indiana Code section 31-34-11-1(a) and (b) state a trial court "shall" hold a factfinding hearing on a CHINS petition within sixty days, with a sixty-day extension upon consent of all parties. Indiana Code section 31-34-11-1(d) states, "If the factfinding hearing is not held within the time set forth in subsection (a) or (b), upon a motion with the court, the court shall dismiss the case without prejudice." Here, when the factfinding hearing was not held within 120 days, Father filed a motion to dismiss under Section 31-34-11-1(d), and the court dismissed the case without prejudice.

occurred in September 2019. In June 2020, he indicated he wished to restart visitation, and he participated in four telephone visits, before stopping altogether in July. Father attended only nine sessions of Fatherhood Engagement, refused to undergo a substance-abuse or parenting assessment, did not submit to any drug screens, would not allow DCS access to his home, and was frequently out of contact with DCS. Mother, still in Arkansas, participated inconsistently in telephone visits after the children's removal and stopped altogether by December 2019. She did not submit to drug screens or participate in DCS services, although many services were unavailable to her while out of state.

[5] In July 2020, Mother moved to Indiana and began participating in some DCS services and weekly visitation with the children. She completed a substance-abuse assessment, which led to a recommendation she attend weekly individual therapy. Her participation in therapy was "not consistent[]." Tr. Vol. II p. 102. She also began submitting drug screens; however, she submitted only twenty screens throughout the two-year CHINS case, although they were required weekly. Four of the twenty tests were positive for methamphetamine. She also refused to participate in any services relating to domestic violence.

[6] In March 2021, DCS filed petitions to terminate Parents' rights. On April 6, the trial court held an initial hearing on the termination proceedings. Father failed to appear. The trial court appointed him counsel and reset the initial hearing for April 20. Father's counsel appeared, but Father again did not. The trial court then scheduled a factfinding hearing for June 2021. At the hearing, Mother

appeared in person with counsel. Father was incarcerated at the time of the hearing. His counsel appeared in person, and Father initially participated by telephone. A few times, particularly during Mother's testimony, Father indicated he was having trouble hearing over the phone. Each time, the court stopped the testimony and attempted to fix the issue, including reminding witnesses to speak up and asking the jail to keep noise down so Father's environment did not make it difficult to hear. After the lunch break, Father participated in the hearing via videoconferencing and did not alert the court to any further issues.

[7] Father testified and admitted to hitting Mother during their relationship. He also testified he had been "in jail a couple different times" during the CHINS case. *Id.* at 39. Father stated he has two homes—one in Kentucky and one in Arkansas—but that neither home had running water. Mother testified she married R.K. ("Husband") a month before the hearing. Mother testified she did not work and instead stayed at home because Husband could financially support her. However, she also stated she had several jobs throughout the case and was currently sending out employment applications. Mother admitted to testing positive for methamphetamine on a pre-employment drug screen in April 2021 but stated she believed her brother had drugged her. Mother also stated that a week before the hearing she asked DCS to conduct a background check of Husband. FCM Bailey Robbins testified Mother asked for the background check because she believed Husband had convictions for crimes against children, and that Mother stated Husband and Father were friends, she

feared they were working together to hurt her, and Husband had threatened to kill her.

[8] FCM Robbins also testified Mother had made "[m]inimal progress" throughout the CHINS case and had "trouble maintaining any progress that she makes long-term." *Id.* at 121-22. She noted there were concerns regarding Mother bringing up age-inappropriate topics with the children, including discussing the termination case and asking them if she should go to "rehab." *Id.* at 109. FCM Robbins also testified she believed it in the children's best interests for parental rights to be terminated and that the plan for the future care of the children is adoption. FCM George testified she met with Mother twice in March 2021 and both times Mother appeared under the influence. Katlyn Mendoza, Mother's visitation supervisor, testified Mother began weekly visits with the children in January 2021 and that the visits had been going well, but stated Mother often needed assistance handling the children's behavioral issues.

[9] After the hearing, the trial court issued an order terminating Parents' rights to both children.

[10] Parents now appeal separately.

Discussion and Decision

I. Constitutional Claims

[11] Father first argues he was denied due process and equal protection under the law because he was not present for the initial hearing and not physically present

for the termination hearing. Father concedes he failed to raise these issues to the trial court, so to avoid waiver of his argument on appeal, he maintains his absences constituted fundamental error. The fundamental-error doctrine is a narrow exception to the waiver doctrine and applies to an "error that was so egregious and abhorrent to fundamental due process that the trial judge should or should not have acted, irrespective of the parties' failure to object or otherwise preserve the error for appeal." *In re G.P.*, 4 N.E.3d 1158, 1167 n.8 (Ind. 2014).

[12] The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits state action that deprives a person of life, liberty, or property without a fair proceeding. *In re C.C.*, 788 N.E.2d 847, 852 (Ind. Ct. App. 2003), *trans. denied*. When the State seeks to terminate the parent-child relationship, it must do so in a manner that meets the requirements of due process. *Id.* "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 (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)). Because both a parent's and the State's countervailing interests are substantial, when faced with a claim of denial of due process in a termination-

of-parental-rights case, we focus on the second factor, the risk of error created by the State's chosen procedure. *In re C.G.*, 954 N.E.2d at 917-18.

[13] Father first asserts he was denied due process because he was not physically present at the termination hearing. Notably, a parent does not have an absolute right to be physically present during a termination hearing. *In re C.G.*, 954 N.E.2d at 921. Here, Father was represented by counsel at the hearing, who presented evidence and cross-examined witnesses. *See Tillotson v. Clay Cnty. Dep't of Family & Children*, 777 N.E.2d 741, 746 (Ind. Ct. App. 2002) (proper representation by counsel in a termination proceeding significantly decreases the risk of an inaccurate result), *trans. denied*. And Father was given alternative means to be heard. In the morning, Father was able to participate by telephone, including giving lengthy testimony. In the afternoon, he participated via videoconferencing. These methods gave him a meaningful opportunity to be heard. *See In re J.E.*, 45 N.E.3d 1243, 1248 (Ind. Ct. App. 2015) (finding an incarcerated father's due-process rights were not violated in part because he was able to participate by telephone and video feed), *trans. denied*. Father contends that participating remotely prejudiced him because at times he could not hear the proceedings. But the record shows Father clearly felt comfortable alerting the trial court when he could not hear, and the trial court stopped the proceedings and attempted to fix the issue. Given these circumstances, that Father did not physically attend the factfinding hearing did not constitute a violation of due process, let alone a fundamental error.

[14] Father also argues he was denied due process because he "was not included in the initial hearing." Father's Br. p. 14. He admits he was given notice of the initial hearing and did not attend. Furthermore, the record indicates Father was actually given two opportunities to attend the hearing, as the trial court reset the hearing after Father's first failure to appear. Father cites no support for his contention that he has an absolute right to be present at the initial hearing. Nor does Father allege any prejudice from his absence at the initial hearing. His counsel was present at the hearing, and a copy of the termination petition and notice of the termination hearing were sent to Father. Again, this does not amount to a violation of due process or a fundamental error.

[15] As to his equal-protection claim, Father contends he was denied equal protection because he was treated differently than Mother, who was physically present at the hearing. The Equal Protection Clause of the Fourteenth Amendment prohibits states from treating individuals who are similarly situated differently. U.S. Const. amend. XIV. However, equal protection does not mandate similar treatment for individuals not similarly situated. *Mullis v. Kinder*, 568 N.E.2d 1087, 1090-91 (Ind. Ct. App. 1991). Here, Mother and Father were not similarly situated, as Father was incarcerated and Mother was not. As this was the clear basis for her physical presence at the termination hearing and his absence, there is no equal-protection issue.

[16] Father has not shown his physical absence at the initial hearing or final termination hearing amounted to a constitutional violation, let alone a fundamental error.

II. Sufficiency of Evidence

[17] Both Father and Mother argue DCS did not prove the statutory requirements for termination. When reviewing the termination of parental rights, we do not reweigh the evidence or judge witness credibility. *In re K.T.K.*, 989 N.E.2d 1225, 1229 (Ind. 2013). Rather, we consider only the evidence and reasonable inferences that are most favorable to the judgment of the trial court. *Id.* When a trial court has entered findings of fact and conclusions of law, we will not set aside the trial court's findings or judgment unless clearly erroneous. *Id.* To determine whether a judgment terminating parental rights is clearly erroneous, we review whether the evidence supports the trial court's findings and whether the findings support the judgment. *In re V.A.*, 51 N.E.3d 1140, 1143 (Ind. 2016).

[18] A petition to terminate parental rights must allege, among other things:

> (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. *In re K.T.K.*, 989 N.E.2d at 1231. If the court finds the allegations in a petition are true, it "shall terminate the parent-child relationship." I.C. § 31-35-2-8(a).

A. Findings of Fact

[19] Mother argues the evidence does not support several of the trial court's findings of fact. Mother first challenges Finding 5, that "Mother does not have stable employment." Mother's App. Vol. II p. 103. Mother concedes this finding is "technically correct" in that she does not have stable employment; however, she argues it is "misleading" because she is voluntarily unemployed. Mother's Br. p. 11. We disagree. While Mother testified she is voluntarily unemployed because her husband financially supports her, she also testified she was currently applying for positions and went through several jobs during the CHINS case. The trial court's finding is not erroneous.

[20] Mother then challenges Finding 10: "Parents have not improved their parenting ability." Mother's App. Vol. II p. 103. While there was not direct testimony on Mother's parenting ability, FCM Robbins testified she had concerns regarding Mother bringing up age-inappropriate topics with the children, and Mendoza

testified Mother continues to need assistance handling the children's behavioral issues. This evidence supports the trial court's finding.

[21] Mother also challenges Finding 11: "Since the Dispositional Hearing in October 2019, Mother has submitted only 20 drug screens, 4 of which were positive for methamphetamine." *Id*. Mother concedes this finding is correct but argues it is "irrelevant" because the exact dates of the positive tests were not given. Mother's Br. p. 13. We disagree. The children were removed in part due to Parents' drug use, so Mother's refusal to submit to the majority of scheduled drug screens and submitting four positive screens during the life of the CHINS case is relevant. Mother also challenges Finding 12: "Mother has recently tested positive for methamphetamine on a pre-employment screening." Mother's App. Vol. II p. 104. She argues this is irrelevant because she testified this positive test was the result of being drugged by her brother. This is a request to reweigh evidence, which we do not do.

[22] Mother also challenges Finding 14: "Mother has shown a pattern of not being able to maintain any progress that is made." *Id.* She acknowledges FCM Robbins testified that Mother struggles to maintain progress but contends this testimony is not enough to support the trial court's finding. Again, this is a request to reweigh evidence, which we do not do.

[23] Finally, Mother challenges Finding 17: "DCS' plan for [the children] is that they be adopted, this plan is satisfactory for [the children's] care and treatment and **an adoptive family has been identified**," and Finding 19: "DCS believes it

is in the best interests of the [children] to be adopted by current **pre-adoptive** placement." *Id.* (emphases added). Mother contends these two findings are erroneous because there is no evidence the children have an adoptive family or pre-adoptive placement. We agree there was no evidence showing the children had an adoptive family or were in a pre-adoptive placement. However, we believe these errors to be "sufficiently minor so as not to affect the substantial rights" of Mother. *See* Ind. Appellate Rule 66(A). Even without the erroneous portions of these findings, there is sufficient evidence to support the termination.

[24] In any event, Mother does not challenge the trial court's conclusion that DCS has a satisfactory plan for the care and treatment of the children. Nor would such a challenge have been successful, as even without an identified adoptive family, DCS presented evidence the plan for the children is adoption, which is sufficient. *In re A.S.*, 17 N.E.3d 994, 1007 (Ind. Ct. App. 2014) ("[A] plan is not unsatisfactory if DCS has not identified a specific family to adopt the children."), *trans. denied*.

B. Conclusions of Law

[25] Both Father and Mother challenge the trial court's conclusion there is a reasonable probability the conditions resulting in the children's removal and continued placement outside the home will not be remedied. In determining whether the conditions resulting in a child's removal will not be remedied, the trial court engages in a two-step analysis. First, the trial court must ascertain

what conditions led to the child's placement and retention outside the home. *In re K.T.K.*, 989 N.E.2d at 1231. Second, the trial court must determine whether there is a reasonable probability those conditions will not be remedied. *Id.* The "trial court must consider a parent's habitual pattern of conduct to determine whether there is a substantial probability of future neglect or deprivation." *Id.* (quotation omitted).

1. Mother

[26] Here, the reasons for the children's removal and continued placement outside the home were concerns over Parents' substance use, domestic violence, and unsuitable housing conditions. DCS presented sufficient evidence there is a reasonable probability that several of these conditions will not be remedied by Mother. Most notably, Mother refused to participate in DCS services relating to domestic violence because she was no longer in a relationship with Father. However, Mother also told FCM Robbins she feared Husband and Father were going to hurt her and that Husband had threatened to kill her. Mother also asked DCS to conduct a background check on Husband because she believed he had past convictions for harming children. As for substance abuse, Mother was ordered to submit to weekly drug screens. However, throughout the CHINS case, she had submitted only twenty screens, four of which were positive. She tested positive for methamphetamine as recently as April 2021, just two months before the termination hearing, and FCM George reported Mother appeared under the influence both times she met with her in March 2021. As such,

Mother has not shown an ability to provide the children with a safe, drug-free environment.

[27] The trial court did not err in determining there is a reasonable probability that the conditions that led to the children's removal from Mother and continued placement outside of her home will not be remedied.[2]

2. Father

[28] As an initial matter, we note Father challenges only the trial court's conclusion there is a reasonable probability that the conditions leading to the children's removal and continued placement outside the home will not be remedied. He does not challenge whether the trial court's findings support its other conclusion that there is a reasonable probability the continuation of the parent-child relationship poses a threat to the children's well-being. DCS is not required to prove both that there is a reasonable probability the continuation of the parent-child relationship poses a threat and a reasonable probability exists that the conditions which resulted in removal will not be remedied, because Indiana Code section 31-35-2-4(b)(2)(B) is written in the disjunctive. *See* I.C. § 31-35-2-4(b)(2)(B) (listing three options and noting DCS has to prove "one"). Because

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[2] Mother also challenges the trial court's conclusion that the continuation of the parent-child relationship poses a threat to the children's well-being. Because we affirm the trial court's conclusion there is a reasonable probability the conditions resulting in the children's removal will not be remedied, we need not address its alternate conclusion there is a reasonable probability the continuation of the parent-child relationship poses a threat to the well-being of the children. *See In re A.G.*, 45 N.E.3d 471, 478 (Ind. Ct. App. 2015) (Indiana Code section 31-35-2-4(b)(2)(B) is written in the disjunctive and requires trial courts to find only one of the two requirements of subsection (b) has been established by clear and convincing evidence), *trans. denied*.

Father does not present an argument challenging the trial court's conclusion that there is a reasonable probability that the continuation of the parent-child relationship poses a threat to the children's well-being, we may affirm under that portion of the statute and, thus, need not address Father's argument that the findings do not support the trial court's conclusion that the conditions under which the children were removed would not be remedied. Nonetheless, we prefer to resolve cases on the merits, especially when there is an "important parental interest at stake." *In re D.J.*, 68 N.E.3d 574, 580 (Ind. 2017). As such, we will review Father's claim that DCS did not present sufficient evidence that there is a reasonable probability that the conditions that resulted in the children's removal will not be remedied.

[29] Again, the children were removed from Parents due to unsuitable housing and concerns about domestic violence and substance abuse in the home. During the over two-year CHINS case, Father has shown no improvement in these areas. Father has been incarcerated several times throughout the CHINS case, including during the termination hearing. He does not have stable employment, and his home lacks basic necessities, including running water. Furthermore, Father barely participated in, let alone completed, DCS services. Father admitted to hitting Mother during their relationship yet would not participate in domestic-violence services. Nor would he submit to the substance-abuse evaluation or any drug screens. Father also attended only eight Fatherhood Engagement sessions and visited the children only a few times in 2019 and 2020. He has not seen the children in-person since September 2019. Ultimately,

Father is no closer to providing the children a safe and stable environment than he was at the beginning of the case.

[30] As such, the trial court did not err when it concluded there is a reasonable probability the conditions leading to the children's removal will not be remedied.

[31] Affirmed.

Najam, J., and Weissmann, J., concur.