MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In the Matter of the Involuntary Termination of the Parent-Child Relationship of H.P. (Minor Child)

and

M.P. (Mother),

Appellant-Respondent,

v.

Indiana Department of Child Services,

Appellee-Petitioner

May 20, 2021

Court of Appeals Case No. 20A-JT-2357

Appeal from the Vanderburgh Superior Court

The Honorable Renée Allen Ferguson, Magistrate

Trial Court Cause No. 82D04-2007-JT-1028

Crone, Judge.

Case Summary

[1] M.P. (Mother) appeals an order involuntarily terminating her parent-child relationship with H.P. (Child). She claims that the Indiana Department of Child Services (DCS) violated her due process rights by failing to provide reasonable services to address her mental health issues. She also challenges the sufficiency of the evidence to support the termination order. We affirm.

Facts and Procedural History

[2] In December 2005, Mother gave birth to Child. In February 2019, DCS received a report that Mother was using illegal drugs, engaging in domestic violence in front of Child, and neglecting Child's emotional and educational needs. Around that same time, Mother had tested positive for methamphetamine, amphetamines, THC, K2, benzodiazepines, opiates, and tricyclic antidepressants. DCS removed Child from Mother's care and filed a petition seeking to have Child adjudicated a child in need of services (CHINS), citing all of the aforementioned, plus Mother's admitted mental health issues.[1] Child was placed in relative care. In April 2019, the trial court adjudicated Child a CHINS. Per the dispositional order, Mother was required to engage in evaluations and services to address her drug use, mental health issues, and

[1] Separate CHINS cases were filed as to three of Child's siblings. We will address the siblings only where relevant to Child's case.

parenting and to refrain from alcohol and drug use, submit to random drug screens, and engage in visitation and family team meetings.

[3] Mother completed a dual assessment aimed at addressing both her drug and mental health issues, but she failed to attend many of her scheduled treatment sessions and ultimately was discharged from the program. She was referred to another provider, where she completed the assessment but again was discharged due to chronic absence and her admission to having used THC laced with K2. In February 2020, Mother was found in contempt for failure to comply with court orders. She missed several supervised visits with Child, and when she did attend, the visits sometimes ended early due to arguments between her and Child. During one visit, she told Child and the visitation worker to "F**k off," and said that as far as she knew, Child was no longer her daughter. Tr. Vol. 2 at 11. Afterward, Mother refused to go back to visitation, which resulted in its being canceled. DCS changed the permanency plan from reunification to termination and adoption.

[4] In July 2020, DCS filed a petition to terminate the relationship between Mother and Child.[2] Mother was notified of the factfinding hearing, which was scheduled for the afternoon of October 6, 2020. On the morning of the hearing, she was at the courthouse for another matter and indicated to the trial court that she was not going to be present for the hearing that afternoon. She did not

[2] The petition also sought to terminate the parental rights of Child's father, D.P., but his whereabouts were unknown throughout the proceedings and DCS was unsuccessful in its attempts to locate him.

provide a reason for her upcoming absence and appeared only by counsel, who sought but was denied a continuance. On December 8, 2020, the trial court issued an order with findings of fact and conclusions thereon terminating Mother's parental relationship with Child. Mother now appeals. Additional facts will be provided as necessary.

Discussion and Decision

Section 1 – Mother has waived her due process claim, and her due process rights were not violated.

[5] Mother first asserts that DCS violated her due process rights in allegedly failing to provide services. When seeking to terminate a parent-child relationship, the State must satisfy the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *S.L. v. Ind. Dep't of Child Servs.*, 997 N.E.2d 1114, 1120 (Ind. Ct. App. 2013). This means that the State must proceed in a fundamentally fair manner that affords parents the opportunity to be heard at a meaningful time and in a meaningful manner. *In re C.G.*, 954 N.E.2d 910, 917 (Ind. 2011). A parent has a substantive due process right to raise her children, which means that DCS "must have made reasonable efforts to preserve and/or reunify the family unit." *In re T.W., 135 N.E.3d 607, 615 (Ind. Ct. App. 2019), trans. denied* (2020).

[6] Mother asserts that DCS failed to make reasonable efforts to assist her with her mental health needs and that this alleged failure amounted to a denial of due process. Mother failed to raise this claim below. To avoid waiver, a parent

must raise her due process claim in the trial court. *S.L.*, 997 N.E.2d at 1120; *see also McBride v. Monroe Cnty. Off. of Fam. & Child.*, 798 N.E.2d 185, 194-95 (Ind. Ct. App. 2003) (a party may waive a constitutional claim, including due process, by raising it for first time on appeal). Mother did not provide the trial court "a bona fide opportunity to pass upon the merits" of her claim before seeking an opinion on appeal and therefore waived it for review. *Endres v. Ind. State Police*, 809 N.E.2d 320, 322 (Ind. 2004). Even now, she has failed to develop cogent argument on this issue in her brief as required by Indiana Appellate Rule 46(A)(8). Thus, she has waived it for lack of cogency as well. *N.C. v. Ind. Dep't of Child Servs.*, 56 N.E.3d 65, 69 (Ind. Ct. App. 2016), *trans. denied*.

[7] Waiver notwithstanding, Mother's due process claim is based on DCS's alleged dereliction of duty in providing services. However, "the responsibility to make positive changes will stay where it must, on the parent. If the parent feels the services ordered by the court are inadequate to facilitate the changes required for reunification, then the onus is on the parent to request additional assistance from the court or DCS." *Prince v. Dep't of Child Servs.*, 861 N.E.2d 1223, 1231 (Ind. Ct. App. 2007). DCS is not required to prove that services have been offered to the parent to assist her in fulfilling her parental obligations. *In re J.W., Jr.*, 27 N.E.3d 1185, 1190 (Ind. Ct. App. 2015), *trans. denied*. Nevertheless, DCS did provide Mother with repeated opportunities to address her mental health issues. She was referred and re-referred for assessments, and after having completed each, she failed to attend the treatment sessions as

required. She was discharged due to her own conduct, not due to any dereliction of duty by DCS. Thus, even if she had preserved her claim, her due process rights simply were not violated.

Section 2 – Mother has failed to establish that the trial court clearly erred in terminating her parental relationship with Child.

[8] Mother contends that the trial court erred in terminating her parental relationship with Child. When reviewing a trial court's findings of fact and conclusions thereon in a case involving the termination of parental rights, we first determine whether the evidence supports the findings and then whether the findings support the judgment. *In re E.M.*, 4 N.E.3d 636, 642 (Ind. 2014). We will set aside the trial court's judgment only if it is clearly erroneous. *Bester v. Lake Cnty. Off. of Fam. & Child.*, 839 N.E.2d 143, 147 (Ind. 2005). "A judgment is clearly erroneous if the findings do not support the trial court's conclusions or the conclusions do not support the judgment." *In re A.G.*, 45 N.E.3d 471, 476 (Ind. Ct. App. 2015), *trans. denied* (2016). Unchallenged findings stand as proven. *Matter of De.B.*, 144 N.E.3d 763, 772 (Ind. Ct. App. 2020). In conducting our review, we neither reweigh evidence nor judge witness credibility. *E.M.*, 4 N.E.3d at 642. Rather, we consider only the evidence and inferences most favorable to the judgment. *Id.* "[I]t is not enough that the evidence might support some other conclusion, but it must positively require the conclusion contended for by the appellant before there is a basis for reversal." *Best v. Best*, 941 N.E.2d 499, 503 (Ind. 2011) (citations omitted).

[9] "Parents have a fundamental right to raise their children – but this right is not absolute. When parents are unwilling to meet their parental responsibilities, their parental rights may be terminated." *Matter of Ma.H.*, 134 N.E.3d 41, 45-46 (Ind. 2019) (citation omitted), *cert. denied* (2020). To obtain a termination of a parent-child relationship, DCS is required to establish in pertinent part:

> (A) that one (1) of the following is true:
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> (i) The child has been removed from the parent for at least six (6) months under a dispositional decree.
>
> ….
>
> (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.
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> (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).

[10] In recognition of the seriousness with which we address parental termination cases, Indiana has adopted a clear and convincing evidence standard. *In re R.S.*, 56 N.E.3d 625, 629 (Ind. 2016); Ind. Code § 31-37-14-2. "Clear and convincing evidence need not reveal that the continued custody of the parents is wholly inadequate for the child's survival. Rather, it is sufficient to show by clear and convincing evidence that the child's emotional and physical development are threatened by the respondent parent's custody." *In re K.T.K.*, 989 N.E.2d 1225, 1230 (Ind. 2013) (citation omitted). "[I]f the court finds that the allegations in a [termination] petition … are true, the court *shall* terminate the parent-child relationship." Ind. Code § 31-35-2-8(a) (emphasis added).

[11] The trial court issued extensive findings of fact, and Mother challenges several of those findings. Her challenges essentially fall into the following categories: findings that include a clerical error and those that are "conclusionary statements." Appellant's Br. at 19. As for the former, she challenges two findings that include erroneous dates, one that lists the year as 2020 instead of 2019 and another that lists a date as April 17 instead of April 3. *See* Appealed Order at 3-4 (findings B.h. and B.k.). As for the latter, she complains that some of the findings are conclusory statements pertaining to her failure to participate

in or benefit from various court-ordered services. *See id*. at 5-11 (findings C.a. through C.n. and D.e.).[3]

[12] First, we note that Mother neither recites each challenged finding nor specifies what statements are allegedly erroneous in each challenged finding. Rather, highlighting what she believes to be accomplishments, she points to testimony from the factfinding hearing indicating that she completed two dual assessments for mental health and substance abuse; tested "positive[] only 30 to 40 percent of the time" that she submitted to the screens; regularly met with the DCS family case manager (FCM) during "April 2020"; and was "clean and sober from January 22, 2020 to April 22, 2020." Appellant's Br. at 19. We will incorporate these claims into our discussion below. That said, we note that findings of fact on a given issue or statutory element often culminate in an ultimate finding, which sounds conclusory in tone but which essentially ties together the preceding findings and the applicable statutory element. Ultimate findings often are repeated in the conclusion section, here, conclusion 2, pertaining to the reasonable probability of unremedied conditions. Appealed Order at 13-14. This is why courts often incorporate their findings into the conclusions and vice versa. Simply put, Mother's challenges to the findings either address minute clerical errors or lack merit, as discussed below.

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[3] Mother also purports to challenge findings B.n. through B.q. Appellant's Br. at 19. However, section B of the order ends after paragraph m and does not include any paragraphs n through q. *See* Appealed Order at 4-5.

[13] Mother asserts that the trial court clearly erred in concluding that a reasonable probability exists that the conditions that led to Child's removal or continued placement outside the home will not be remedied.[4] When assessing whether there is a reasonable probability that conditions that led to a child's removal will not be remedied, we must consider not only the initial basis for the child's removal but also the bases for continued placement outside the home. *In re A.I.*, 825 N.E.2d 798, 806 (Ind. Ct. App. 2005), *trans. denied*. Moreover, "the trial court should judge a parent's fitness to care for [her] children at the time of the termination hearing, taking into consideration evidence of changed conditions." *In re J.T.*, 742 N.E.2d 509, 512 (Ind. Ct. App. 2001), *trans. denied*. "Requiring trial courts to give due regard to changed conditions does not preclude them from finding that parents' past behavior is the best predictor of their future behavior." *E.M.*, 4 N.E.3d at 643. "Due to the permanent effect of termination, the trial court also must evaluate the parent's habitual patterns of conduct to determine the probability of future neglect or deprivation of the child." *J.T.*, 742 N.E.2d at 512. In making its case, "DCS need not rule out all possibilities of change; rather, [it] need establish only that there is a reasonable probability that the parent's behavior will not change." *In re Kay.L.*, 867 N.E.2d 236, 242 (Ind. Ct. App. 2007). A trial court may properly consider evidence of a parent's substance abuse, criminal history, lack of employment or

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[4] Mother also challenges the trial court's conclusion that there is a reasonable probability that the continuation of the parent-child relationship poses a threat to Child's well-being. Indiana Code Section 31-35-2-4(b)(2)(B) requires DCS to prove only one of the three circumstances listed. Because we find no error concerning the first, we need not address the second.

adequate housing, history of neglect, and failure to provide support. *McBride*, 798 N.E.2d at 199.

[14] One of Mother's pervasive and persistent problems was her substance abuse, which was a catalyst for Child's initial removal from the home. She was ordered to refrain from all alcohol and drug use and to submit to random drug screens. Yet, she participated in only forty to fifty percent of the screens during the pendency of the proceedings. Of those, she tested positive thirty to forty percent of the time. She claims that absences from drug screens should not be held against her. We disagree and note that each refusal to submit to a screen amounted to disobedience of a court order, and her positive test rate of "only 30 to 40 percent" is unimpressive, given that each positive test reflected a violation of the court's prohibition against *any* drug or alcohol use. Appellant's Br. at 19. Additionally, the record reflects incidents during the pendency of the proceedings when Mother's abuse of substances resulted in life-threatening circumstances, i.e., her blackout from using marijuana laced with K2 and her overdose on 170 Prozac pills. Moreover, while we agree with Mother that she had spurts of compliance, e.g., attended meetings with the FCM during a given month, these spurts were intermittent and were exceptions rather than trends, when viewed over the scope of the proceedings.

[15] Overall, Mother's pattern of noncompliance extended to nearly every ordered service and included repeated failures to attend court hearings. She was held in contempt of court due to her noncompliance with the dispositional order. Even then, she failed to appear for sentencing on the contempt citation and was

sentenced to a ninety-day suspended jail term. When it came to her court-ordered services, her trend was to start them but not see them through to completion. For example, she underwent a joint mental health and drug use assessment during which she admitted to daily use of marijuana and alcohol. She was ordered to abstain and to complete a therapy program. However, her sporadic attendance for the therapy sessions resulted in discharge. DCS re-referred her for a similar evaluation and services at another provider, and again, she completed the evaluation only to be unsuccessfully discharged for failure to attend treatment thereafter.

[16] With respect to services aimed at improving Mother's parenting, we note that she refused to participate in family team meetings, and her attendance record at visitation was inconsistent at best. When she did attend visits with Child, she often did not comply with even simple instructions such as bringing a meal for Child. Her visitation was temporarily suspended while she tended to some pending legal matters, but when DCS attempted to restart the sessions, Mother stated that she did not like the current provider's rules and refused to participate unless visitation was changed to a new provider. DCS accommodated her request and referred her for therapeutic visitation at a new provider, but even then, the visits did not go well. Sometimes Mother would cancel at the last minute when Child was already en route. When she did attend, she often argued with the provider or with Child. The sessions sometimes ended early due to the arguments that ensued. FCM Chad McKinley testified that during what ultimately would prove to be Mother's last visit with Child, Mother

became irate and, as she got up to leave the room, she told Child and the visitation provider to "F**k off," and said that, as far as she knew, Child no longer was her daughter. Tr. Vol. 2 at 11. The provider's records show that despite Mother's outburst, attempts were made to bring her back to visitation, but she refused. DCS Ex. J. After having pursued Mother's return for two months, the provider canceled visitation services. *Id*. Mother's pattern of conduct with respect to visitation reflects her lack of commitment to preserving her relationship with Child. *See Lang v. Starke Cnty. Off. of Fam. & Child.*, 861 N.E.2d 366, 372 (Ind. Ct. App. 2007) (failure to exercise right to visit one's children demonstrates lack of commitment to complete actions necessary to preserve parent-child relationship), *trans. denied*. In short, Mother has failed to demonstrate that the trial court clearly erred in concluding that there is a reasonable probability that the conditions that led to Child's removal from and continuation outside the home will remain unremedied.

[17] Finally, Mother maintains that the trial court clearly erred in concluding that termination is in Child's best interests. To determine what is in the best interests of a child, we must look at the totality of the circumstances. *In re A.W.*, 62 N.E.3d 1267, 1275 (Ind. Ct. App. 2016). The trial court "need not wait until a child is irreversibly influenced by a deficient lifestyle such that her physical, mental, and social growth is permanently impaired before terminating the parent-child relationship." *K.E. v. Ind. Dep't of Child Servs.*, 39 N.E.3d 641, 649 (Ind. 2015) (citation omitted). Although not dispositive, permanency and stability are key considerations in determining the child's best interests. *In re*

G.Y., 904 N.E.2d 1257, 1265 (Ind. 2009). "A parent's historical inability to provide a suitable environment along with the parent's current inability to do the same supports a finding that termination of parental rights is in the best interests of the children." *In re A.P.*, 981 N.E.2d 75, 82 (Ind. Ct. App. 2012) (quoting *Lang*, 861 N.E.2d at 373). Likewise, "the testimony of the service providers may support a finding that termination is in the child's best interests." *In re A.K.*, 924 N.E.2d 212, 224 (Ind. Ct. App. 2010), *trans. dismissed*.

[18] At the factfinding hearing, FCM McKinley and court-appointed special advocate Debbie Gamache opined that termination and adoption are in Child's best interests. FCM McKinley testified concerning Mother's repeated failure to follow through with services despite DCS's efforts to accommodate her preferences. He also testified about Mother's continued drug use and incidents of domestic violence involving Child's siblings' father and one particularly troubling account of an incident in which one of Child's siblings told him that Mother had choked him. McKinley emphasized the disruption to Child's life from Mother's patterns of behavior and contrasted Child's academic success since moving to her relative placement. Gamache emphasized her concern over Mother's chaotic and sometimes violent lifestyle, as well as Mother's noncompliance with court-ordered services and her tendency to deflect blame to Child rather than accept responsibility for her shortcomings as a parent. She relayed her observations regarding the safety, security, and structure provided to Child in her relative placement and the positive changes that she had seen in Child's confidence and schoolwork as a result.

[19] Mother appears to characterize the service providers' testimony and recommendations as being improperly based solely on their belief that the relatives can provide a "better" home for Child. *See K.E.*, 39 N.E.3d at 649 (mere fact that children are in better home should not be sole basis for termination). The record simply does not support this assertion. Based on our review of the record, we find the service providers' testimony and recommendations to be reflections of the totality of the circumstances surrounding Child's case, based on their work with Mother and Child over the course of the proceedings.

[20] Sadly, the totality of the circumstances reflects a teenager in dire need of the stability and security that have eluded her for most of her life, and a mother whose mental health issues and patterns of drug use, angry outbursts, and domestic violence are not being addressed, not because of any dereliction by DCS or service providers, but because of her own inability to commit to and follow through with services aimed at getting her clean and making her well. Meanwhile, Child is enjoying long-awaited stability, security, confidence, and academic success in her placement. Mother has failed to demonstrate that the trial court clearly erred in concluding that termination and adoption are in Child's best interests. Accordingly, we affirm the termination order.

[21] Affirmed.

Riley, J., and Mathias, J., concur.