MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In the Termination of the Parent-Child Relationship of:

K.M. (Minor Child),

and

J.B. (Father),

Appellant-Respondent,

v.

Indiana Department of Child Services,

Appellee-Petitioner

September 7, 2023

Court of Appeals Case No. 23A-JT-964

Appeal from the Morgan Circuit Court

The Honorable Matthew Hanson, Judge

Trial Court Cause No. 55C01-2204-JT-140

Memorandum Decision by Judge May
Chief Judge Altice and Judge Foley concur.

May, Judge.

[1] J.B. ("Father") appeals the involuntary termination of his parental rights to K.M. ("Child"). He argues he was denied his Sixth Amendment right to counsel during the termination proceedings. Because Father knowingly and voluntarily waived his right to counsel, we affirm.

Facts and Procedural History

[2] Mother[1] gave birth to Child on November 18, 2019. Father did not establish paternity at Child's birth, and Mother was Child's sole caregiver. On April 28, 2020, the Department of Child Services ("DCS") received a report that Mother was neglecting Child based on her noncompliance with services in a Child in Need of Services ("CHINS") proceeding involving Mother's older child. Specifically, DCS alleged that Mother and Father were not following a no-contact order protecting Mother from Father, Mother and Father were using illegal substances together, and Mother had not submitted required random drug screens as part of the CHINS case involving Mother's older child.

[1] Mother's parental rights were also terminated. She does not appeal that decision. Therefore, we will focus on the facts relevant to Father's involvement in the CHINS and termination cases.

[3] During the DCS investigation into the report, Mother admitted using heroin. A drug screen on May 1, 2020, was positive for methamphetamine, fentanyl, and amphetamine. Mother explained "it was not meth she used, and that it was heroin . . . the meth and heroin were in the same bag and they could have seeped through." (Tr. Vol. II at 61.) Mother indicated Father was her drug dealer. Additionally, Mother told Family Case Manager ("FCM") Kylee Hannahs that Father had not been involved in Child's life and had "only seen [Child] a couple times" and Mother "would be concerned for [Child's] safety if [Father] was around." (*Id*.)

[4] On May 1, 2020, DCS filed a petition alleging Child was a CHINS as to Mother based on Mother's drug use and the volatile situation between Mother and Father. On May 13, 2020, Father met with FCM Hannahs and submitted to a DNA test to determine Child's paternity. Regarding his relationship with Child, Father told her "he had only seen [Child] twice because [Mother] keeps [Child] from him." (*Id*. at 63.) On the same day, FCM Hannahs asked Father to complete a drug screen. Father refused and told FCM Hannahs that he was "not that kind of person who uses drugs but he had been using for the past 5 days." (*Id*. at 62.) Father then told FCM Hannahs "he no longer wanted to talk and would like to remain silent." (*Id*.) On May 15, 2020, Mother admitted Child was a CHINS and Child was adjudicated as such as to Mother.

[5] On June 17, 2020, DCS informed the trial court that Father was the father of Child. Based thereon, the trial court set Father's initial hearing for July 1, 2020. The trial court continued the July 1 hearing to July 8, 2020, because "Father

was in the Marion County [J]ail and he could not be reached for the hearing." (App. Vol. II at 83.) The trial court attempted to hold Father's initial hearing on July 8, but Father was still unavailable due to his incarceration at the Marion County Jail. On July 21, 2020, the trial court conducted its initial hearing regarding Child's status as a CHINS as to Father. Father requested counsel and the trial court appointed Joseph Gaunt. The trial court scheduled another initial hearing for Father on August 6, 2020. The August 6 hearing was reset to August 13, 2020. At Father's initial hearing on August 13, 2020, Father "appeared and decided to remain silent" regarding whether Child was a CHINS. (*Id*.) On August 25, 2020, the trial court entered its dispositional order as to Father. The order required Father to, among other things, complete all assessments recommended by the FCM and follow any recommendations based on those assessments; refrain from using illegal substances or consuming alcohol; obey the law; submit to random drug screens; and attend visitation with Child.

[6] Sometime after the trial court entered its dispositional order, Father was incarcerated and therefore unable to participate in services during the CHINS proceedings. However, he met with FCM Sally Messer "monthly or so via video." (*Id*. at 86.) On February 22, 2021, Father refused to meet with FCM Messer. During a permanency hearing on April 8, 2021, Father appeared via video and asked the trial court to consider placing Child with Father's new wife. The trial court continued Child in placement with Father's niece. Based

on Father's noncompliance with services, the trial court changed Child's permanency plan to reunification with a concurrent plan of adoption.

[7] At some point prior to September 9, 2021, DCS filed a petition to terminate Father's parental rights to Child. On September 23, 2021, Father appeared at an initial hearing in the termination matter. At that hearing, Father asked that his counsel, Gaunt, "be removed from the case and that he would proceed pro se." (*Id*. at 88.) At some point after this hearing DCS withdrew its termination petition and requested further review hearings as to the CHINS case, which the trial court granted.

[8] On February 23, 2022, the trial court appointed Dakota VanLeeuwen to represent Father in the CHINS proceedings. On April 7, 2022, DCS filed a petition to terminate Father's parental rights to Child. The trial court appointed VanLeeuwen to represent Father in the termination proceedings. The trial court held an initial hearing on the matter on April 25, 2022. Father was not present but appeared via counsel. Counsel waived formal service of the petition to Father and told the trial court that Father "is waiting on a plea to get himself out of prison." (*Id*. at 90.) The trial court set the termination matters "for a start/stop hearing on June 2, 2022 and a full-blown termination hearing on September 28, 2022." (*Id*.)

[9] The trial court held the next hearing on June 23, 2022, during which DCS presented evidence over Father's objection. On November 17, 2022, Father and his counsel did not appear for the scheduled hearing because Father was

"waiting on permission from the U.S. Marshalls [sic] to get [Father] on a [Z]oom platform to conduct a hearing." (*Id*. at 93.) The trial court rescheduled the termination fact-finding hearing for January 19, 2023.

[10] On November 29, 2022, VanLeeuwen filed a motion to withdraw her appearance. In her motion, she indicated "a breakdown in the attorney-client relationship has occurred" that prevented her from continuing to represent Father. (*Id*. at 53.) She further stated, "[Father] has asked that I be removed from his case. He would like to proceed pro se." (*Id*.) The trial court granted VanLeeuwen's request.

[11] Sometime prior to January 19, 2023, Father told the trial court he intended to hire private counsel. At the January 19, 2023, hearing, Father told the trial court he had not yet hired private counsel and wanted more time to do so. The trial court denied Father's request for more time to hire counsel. Father then asked the trial court to appoint him counsel. The trial court appointed Ryan Dillon and stated, "[a]lright, so understand [Father] he's your attorney. You fire him, you're going on your own next time. I'm not gonna we can't keep pushing this off. I need to at least get permanency one way or another here." (Tr. Vol. II at 29.) The trial court set the fact-finding hearing for February 16, 2023, and, at Father's request, continued that hearing until March 15, 2023, so Dillon could prepare.

[12] On March 15, 2023, the trial court began what was scheduled to be the fact-finding hearing. Father was not present. Dillon reported that, at 3:52 a.m. that

day, Dillon received a message from Father's chirp device.[2] Dillon told the trial court that in that text message, Father was

> upset with that it was the day before the hearing. How dare I send that to him at that point. Um, that there was no way that I could say that I was prepared to represent him. Telling me not to even make an appearance on his behalf and telling me, you are official fired for sure.

(*Id*. at 40.) The trial court reported Father also called the trial court's staff for "just long enough to fire his attorney." (*Id*.) The trial court granted Dillon's request to withdraw from the case and asked court staff to "make sure [Father] does get on for his next hearing but he is pro se." (*Id*. at 42.)

[13] On March 29, 2023, the trial court held the termination fact-finding hearing. Father appeared and engaged in an exchange with the trial court regarding the status of his attorney:

> [Father]: Your Honor, I don't have a [sic] an attorney present.
>
> [Court]: [Father], I think we've been through this 100 times. I think you've fired your attorneys every time we've been through this. Is that not correct?
>
> [Father]: Well I've had the right to [an] adequate attorney. You know what I mean?

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[2] Father indicated a chirp device was "a[n] i[P]hone that you can send text only." (Tr. Vol. II at 25.)

> [Court]: Yes, sir. You had a right to an attorney every time your [sic] fired one. So, you're your own attorney now. I've already made that finding I believe on the record, at least once, if not twice.
>
> [Father]: I'm not an attorney and I refuse to act as an attorney.
>
> [Court]: Okay, well then you have the right to turn off the hearing if you wish to do so, sir. We're still having the hearing without you.
>
> [Father]: Don't I have a right to be present and have an attorney?
>
> [Court]: [Father], you are present right now and you have the right to stay in here and you have the right to be your own attorney. You've already gone through your attorneys. We've [sic] you've had multiple attorneys assigned to you throughout the life of this case and you fired each one of them. You do not have the right to fire attorneys and keep getting new attorneys. That's not your right.

(*Id*. at 45-6.) The trial court advised Father that he could proceed pro se, object to evidence, and cross-examine witnesses.

[14] During the hearing, Father cross-examined FCM Hannahs, though the trial court stopped him when he attempted to testify during cross-examination. Father then "bounced off" the video call. (*Id*. at 70.) The trial court asked the bailiff to see if Father would return to the call, and the bailiff indicated jail staff checked and "[Father] is refusing to get back on." (*Id*.) The trial court clarified with the bailiff that "[Father's] basically telling [jail staff] he's done." (*Id*.) The

trial court asked the bailiff to notify the trial court if Father returned to the video call. The trial court continued to conduct the fact-finding hearing. Father never returned to the hearing.

[15] The trial court entered a twenty-three-page order terminating Father's parental rights to Child. In its order, the trial court first addressed the issues "regarding [F]ather and counsel." (App. Vol. II at 79.) The trial court outlined the chronology of the matter and also found:

> 23) That based upon the actions of [Father] over the life of the CHINS and termination case[s] it is apparent that he refuses to cooperate with court procedures, with his court appointed attorneys, and believes that his stall tactics will somehow result in this court not taking necessary actions to conclude these cases.
>
> 24) That [F]ather has been obstinate in his approach to court procedures, has stalled whenever he could and has been given every chance to participate in hearings when he could be reached in Federal custody, including at this final hearing that he essentially left on his own volition.
>
> 25) As such the court will find that more than reasonable steps have been taken to protect [Father's] rights and he has outrightly refused to participate or be involved in the hearings on this matter in a manner that permits this court, [Child] and these cases to move forward as required by law.
>
> 26) That while the court essentially could have defaulted [F]ather for walking away from this final hearing, this order will treat [F]ather as if he was present during the entire hearing and the evidence in his/against his favor will be contained herein.

(*Id*. at 80-1.)

Discussion and Decision

[16] "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., D.S., & B.G.*, 750 N.E.2d 832, 837 (Ind. Ct. App. 2001). 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. We review termination of parental rights with great deference. *Id*. However, when the challenge to the trial court's judgment is one related to the constitutionality of that decision, we review the trial court's judgment de novo. *In re Adoption of K.W.*, 21 N.E.3d 96, 97 (Ind. Ct. App. 2014).

[17] Father argues the trial court violated his right to due process when it did not appoint counsel to represent him at the termination fact-finding hearing. Pursuant to Indiana Code section 31-32-2-5, "[a] parent is entitled to representation by counsel in proceedings to terminate the parent-child relationship." However, "[a] parent who is entitled to representation by counsel may waive that right if the parent does so knowingly and voluntarily." Ind. Code § 31-32-5-5.

[18] Due process is essentially "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). "Although due process has never been precisely defined, the phrase embodies a requirement of 'fundamental fairness.'" *E.P. v. Marion Cnty. Office of Family & Children*, 653 N.E.2d 1026, 1031 (Ind. Ct. App. 1995) (quoting *Lassiter v. Dept. of Social Servs.*, 452 U.S. 18, 26 (1981)). "When the State seeks to terminate the parent-child relation, it must do so in a manner that meets the requirements of due process." *In re C.G.*, 954 N.E.2d 910, 917 (Ind. 2011). Furthermore, "if the State imparts a due process right, then it must give that right." *Id*.

[19] We find *Keen v. Marion County Department of Public Welfare*, 523 N.E.2d 452 (Ind. Ct. App. 1988), instructive. In *Keen*, the mother, Keen, signed an acknowledgement that she had the right to appointed counsel as part of the proceedings to involuntarily terminate her parental rights. *Id*. at 454. At Keen's initial hearing on March 13, 1986, her court-appointed counsel withdrew from the case because Keen had not responded to his attempts to communicate with her. *Id*. at 453. At a hearing on May 22, 1986, Keen appeared and asked the trial court to appoint her counsel. *Id*. The trial court did so and provided Keen with "several stamped envelopes addressed to her court appointed counsel to aid in her communications with him." *Id*.

[20] At a hearing on August 21, 1986, Keen's attorney requested a continuance so Keen could obtain private counsel. *Id*. In support of her attorney's request, Keen expressed "her dissatisfaction with the services of the public defender because of the lack of communication between them." *Id*. The trial court

granted Keen's motion for continuance, but admonished her that "she was waiving her right to court-appointed counsel and that there would be no further continuances of the trial[.]" *Id*. Keen indicated she would "most definitely" have private counsel with her at the fact-finding hearing. *Id*. at 454. The trial court scheduled the fact-finding hearing for October 2, 1986. *Id*.

[21] On September 25, 1986, Keen told the trial court "that she would not have the money to hire a lawyer until October 1, 1986." *Id*. The trial court advised Keen she must proceed with the fact-finding hearing on October 2, 1986. The trial court held the fact-finding hearing as scheduled. *Id*. Keen appeared at the hearing and requested appointed counsel. *Id*. The trial court "reminded her that she had waived that right on August 21, 1986." *Id*. The trial court held the fact-finding hearing and ultimately terminated Keen's parental rights to her child. *Id*.

[22] On appeal, Keen argued the trial court erred when it did not appoint her counsel on October 2, 1986, because she did not knowingly and voluntarily waive her right to appointed counsel. *Id*. As an issue of first impression, we noted the existing law regarding waiver:

> "Waiver is an election to forego some advantage that might otherwise have been insisted upon." In a criminal proceeding, we impose "the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver [of the right to counsel] by the accused." Not only must an accused be aware of the nature, extent and importance of the right to counsel, but the accused must be made aware of the dangers and disadvantages of self-representation and

> the possible consequences thereof so "his choice is made with his eyes open."

Id. at 454-5 (internal citations omitted). We noted that while parents facing termination of their parental rights have a right to counsel,[3] termination proceedings are civil in nature and thus "[i]f ordinary rules of trial procedure are applicable in these proceedings, the legislature must have intended fewer safeguards than that afforded when criminal procedures are applicable." *Id*. at 455. We concluded the examination of waiver of a party's right to appointed counsel as part of a termination proceeding is "less restrictive than that required in criminal trials[.]" *Id*. at 455. Based thereon, we held:

> The record reveals that Keen did have counsel but was dissatisfied. She was granted numerous continuances by the trial court. She was even provided stamped, addressed envelopes to assist her in communications with her previous court-appointed counsel. She was aware that she was entitled to appointed counsel yet she knowingly, intelligently, and voluntarily waived this right. The trial court emphasized over and again the importance of counsel and the seriousness of her decision in the event she had to represent herself. The nature and the serious consequences of a termination proceeding were explained to her in the written advisement which she acknowledged as having read and understood. The advisement explained all rights and

[3] *Keen* examines the former versions of what are now Indiana Code sections 31-32-2-5 and 31-32-5-5. The language of the prior and current versions are virtually identical. *Compare* Ind. Code § 31-6-5-3(7) (1982) (parents are "entitled to representation by counsel, provided by the state if necessary, throughout any proceedings to terminate the parent-child relationship against their will") *with* Ind. Code § 31-32-2-5 ("parent is entitled to representation by counsel in proceedings to terminate the parent-child relationship"); *and compare* Ind. Code § 31-6-7-3(6)(e) (1982) ("parent who is entitled to representation by counsel may waive that right if he does so knowingly and voluntarily") *with* Ind. Code § 31-32-5-5 ("parent who is entitled to representation by counsel may waive that right if the parent does so knowingly and voluntarily").

> privileges pertaining to custody, control, and visitation would be permanently terminated. So we can only conclude that the trial court properly determined that Keen waived her right to appointed counsel. Even in a criminal proceeding, a defendant may not disrupt orderly judicial administration through a deliberate process of discharging retained or assigned counsel whenever the case is called for trial. One may go to the well only so many times.

Id. at 456.

[23] Similarly, in the case before us, Father requested and was appointed counsel three times. Prior to the appointment of his second attorney, Father indicated he wanted to hire private counsel but later told the trial court he was unable to do so. When Father fired the second attorney, VanLeeuwen, she told the trial court that Father indicated to her that he wished to proceed pro se. After VanLeeuwen's withdrawal, Father again requested appointed counsel. When the trial court appointed Father a third attorney, the trial court told Father "[y]ou fire [the third attorney], you're going on your own next time." (Tr. Vol. II at 29.) Father fired his third court-appointed attorney.

[24] At the fact-finding hearing, Father appeared and requested counsel. The trial court reminded Father of its earlier admonishment that he would have to proceed pro se if he fired his third court-appointed attorney. Father indicated he was not an attorney and did not want to proceed without an attorney. The trial court denied his request and proceeded with the fact-finding hearing. Like in *Keen*, Father knew of his right to an attorney; was appointed several attorneys, all of which he fired; and was advised he would be required to

proceed pro se if he fired his third attorney.[4] Based thereon, we conclude Father knowingly and voluntarily waived his right to court-appointed counsel to defend him at the termination fact-finding hearing.[5] *Cf. Taylor v. Scott*, 570 N.E.2d 1333, 1335 (Ind. Ct. App. 1991) (father did not knowingly and voluntarily waive his right to counsel when he was never informed of his right to counsel or of the consequences of self-representation).

Conclusion

[25] Father knowingly and voluntarily waived his right to court-appointed counsel during the termination fact-finding hearing. Accordingly, we affirm the decision of the trial court.

[26] Affirmed.

Altice, C.J., and Foley, J., concur.

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[4] While the trial court did not explicitly state the consequences of self-representation, we believe it is fair to infer Father knew them based his extensive experience with the criminal justice system. *See*, *e.g.*, Tr. Vol. II at 45 ("I'm not an attorney and I refuse to act as an attorney.").

[5] Father also argues the trial court violated his due process rights because it did not let him object to evidence or cross-examine witnesses during the fact-finding hearing. As noted in the facts, the trial court allowed Father to object to evidence and cross-examine witnesses. However, when the trial court told Father he could not testify while cross-examining the first witness, Father left the hearing and refused to return. Therefore, Father's inability to cross-examine witnesses and/or object to evidence was invited error. *See Matter of J.C.*, 142 N.E.3d 427, 432 (Ind. 2020) (The invited error doctrine "forbids a party from taking advantage of an error that she commits, invites, or which is the natural consequence of her own neglect or misconduct. Where a party invites the error, she cannot take advantage of that error.").