FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-2788

B.T., Father of B.L.T. and B.T.,
Minor Children,

Appellant,

v.

STATE OF FLORIDA DEPARTMENT
OF CHILDREN AND FAMILIES; and
GUARDIAN AD LITEM, on behalf of
B.L.T. and B.T.,

Appellees.

No. 1D19-2791

B.T., Father of M.T., a Minor
Child,

Appellant,

v.

STATE OF FLORIDA DEPARTMENT
OF CHILDREN AND FAMILIES; and
GUARDIAN AD LITEM, on behalf of
M.T.,

Appellees.

No. 1D19-2974

X.T., Mother of M.T., a Minor Child,

Appellant,

v.

STATE OF FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES; and GUARDIAN AD LITEM, on behalf of M.T.,

Appellees.

On appeal from the Circuit Court for Santa Rosa County.
Ross M. Goodman, Judge.

August 11, 2020

TANENBAUM, J.

Here we have consolidated appeals from an unmarried man, B.T. (to avoid confusion, let us call him "Mr. B.T."), and an unmarried woman, X.T., regarding an order for termination of their parental rights ("TPR") as to three children—M.T., B.L.T., and B.T.[1] Mr. B.T. and X.T. do not dispute the sufficiency of the

[1] Mr. B.T. parented M.T. with X.T. Mr. B.T. separately parented B.L.T. and B.T. with another woman, who is not involved in these appeals. The Florida Department of Children and Families ("DCF") filed two TPR petitions: one against Mr. B.T. and X.T. regarding M.T., and one against Mr. B.T. and the other mother regarding B.L.T. and B.T.

evidence presented at trial to support termination. They do not contend that there was any flaw in the two-day trial that led to the TPR. The parents instead contend that two deficiencies in the trial court's final TPR order violate their respective rights to due process.

Their first claim stems from the trial court's citation in its order to several grounds for termination listed in section 39.806(1), Florida Statutes (2018), that were not pleaded by DCF in the TPR petitions against the parents. The trial court, however, cited those statutory grounds *in addition* to at least one statutory ground for termination as to each parent that *was* pleaded. Neither parent raised this purported facial defect in a motion for rehearing, which would have given the trial court an opportunity to consider whether there was an error it needed to correct. The parents, then, did not preserve the issue for appellate review, so in the absence of fundamental error, we affirm on this claim.

The parents' other claim addresses the trial court's failure to advise them, orally and in writing, of their rights to challenge the effectiveness of their lawyers' representation within 20 days of the TPR order being rendered. Florida Rule of Juvenile Procedure 8.530(a) does require this notice, but we reject this claim as a basis for reversal. This procedural defect itself did not affect the TPR order, and the parents fail to identify a substantive right that they lost as a result of not receiving the required notice. There is no due process violation here to remedy, so we affirm on this claim as well.

I.

Florida law requires that a TPR petition "contain facts supporting," *inter alia*, an allegation "[t]hat at least one of the grounds listed in s. 39.806 has been met." § 39.802(4)(a), Fla. Stat. (2018). There must be an adjudicatory hearing (*i.e.*, a trial) at which the trial court will "consider the elements required for termination," each of which "must be established by clear and convincing evidence before the petition is granted." § 39.809(1), Fla. Stat. (2018); *see also* Fla. R. Juv. P. 8.525(a). Those required elements are as follows: 1) sufficient proof "of at least one of the grounds for termination" listed in section 39.806, Florida Statutes; 2) the child's manifest best interests would be served by granting the petition to terminate parental rights, based on the criteria set

out in section 39.810, Florida Statutes; and 3) termination "is the least restrictive means of protecting the child from serious harm." *C.M. v. Dep't of Children & Families*, 953 So. 2d 547, 550 (Fla. 1st DCA 2007). The trial court must "enter a written order with the findings of fact and conclusions of law." § 39.809(5), Fla. Stat.

Mr. B.T. and X.T. do not contend that these requirements were not met. The TPR petitions by DCF made allegations supporting multiple statutory grounds for termination as to each parent. There was a trial. The trial court entered a written order that made findings of fact and set out the statutory grounds for termination that were supported by those findings. Moreover, neither Mr. B.T. nor X.T. challenge the trial court's findings as to the manifest best interests of the children or the least restrictive means to protect their safety, though the trial court concluded that those elements had been satisfied as well.

The parents instead focus their first claim on a straight facial comparison of the statutory references in the TPR order against those in the TPR petitions. In the two petitions pertaining to Mr. B.T., DCF alleged that it could prove two statutory grounds. First, DCF alleged that Mr. B.T.'s continuing conduct threatened the life, safety, well-being, and health of the three children (M.T., B.L.T., and B.T.). *See* § 39.806(1)(c), Fla. Stat. (2018). DCF described Mr. B.T.'s "violent behaviors," his continued neglect of the children, and the ongoing domestic violence between him and the mother of B.L.T. and B.T. It also described how Mr. B.T. "allowed the children to be around his father, who is on sexual offender probation." According to DCF in its petitions, Mr. B.T. "refuses to see . . . the danger that his violence and neglectful care poses to the children" and that he "does not understand his protective role." Second, DCF alleged that three other children of the prolific Mr. B.T. previously had been removed from his custody, never to return. *See* § 39.806(1)(l), Fla. Stat. (2018). In addition, M.T., B.L.T., and B.T. previously had been removed from B.T.'s custody on at least one other occasion.

Regarding X.T. (M.T.'s mother), DCF alleged it could prove two statutory grounds for termination as well. One of those also was section 39.806(1)(c). DCF described how X.T. had "been under protective services on multiple occasions since 2013 and has never

completed a reunification case plan." Moreover, DCF referenced X.T.'s "history of substance abuse," involvement with Pennsylvania's "[d]ependency system," her "history of instability," her homelessness several years back, her failure to engage in a prior case plan and to maintain contact with M.T., and her violation of prior court orders governing visitation. According to DCF, X.T. could not "safely be reunified with the child." DCF's second ground for termination as to X.T. was abandonment. *See* § 39.806(1)(b), Fla. Stat. (2018). To buttress this statutory basis, DCF alleged that X.T. "while being able, has made no significant contribution to [M.T.'s] care and maintenance," that she "does not financially support" M.T., and that she "has not been regularly involved in the child's life since 2013" and has not "demonstrated a desire to be reunified with [M.T.]."

In the TPR order now on review, the trial court set out facts that it "found by clear and convincing evidence" to support each of the elements of termination. As to Mr. B.T., the trial court determined that previously there "were at least three removals" of children of his. The order includes findings that Mr. B.T. "had a constant problem with housing," such that he "has not had an adequate home where he could safely raise a child"; that he "has an anger control problem that has never been fully addressed by completing the tasks on his case plans"; that he had boasted to a case worker that his father had sexually abused M.T. but "was no longer a problem because [the two men] had a fist fight"; that Mr. B.T. cursed at and threatened M.T., belittled her, and once referred to M.T. as "that little bitch"; and that Mr. B.T. "takes no responsibility for his anger, his drinking, his fighting, his manipulation, or anything else." As to X.T., the trial court did not make as many findings, but it still determined that "there were three removals from" her as well.[2] Furthermore, according to the order, X.T. "never completed a case plan" and there was "no proof that she has housing, support for any of the children, or has in any

[2] At the trial, X.T.'s counsel did not object to the introduction of any evidence supporting this statutory ground. Even after opposing counsel pointed out that DCF did not allege prior removals of X.T.'s children as a basis for termination, X.T.'s counsel continued to argue the point on the merits.

way prepared to act as the mother to any of these children." To be clear here, neither parent challenges the sufficiency of the evidence supporting these findings.

In sum, the order catalogs the following five paragraphs of section 39.806 as statutory grounds for termination, which the trial court concluded were established by the facts: (1)(c) (conduct threatening the children, which DCF had cited in its petitions against both Mr. B.T. and X.T.); (1)(e) (failure to complete a case plan); (1)(i) (prior termination of parental rights to siblings); (1)(j) (extensive history of substance abuse); and (1)(l) (three or more prior removals, which DCF had cited regarding Mr. B.T. but not X.T.).

Before delving into the parents' first claim, we should be clear on what is not in contention in these appeals. In their exiguous initial briefs, the parents do not (and of course could not) contend that the final order relies *entirely* on statutory bases that went unmentioned in the petitions against them. Indeed, one statutory basis for termination cited in the order, section 39.806(1)(c), appears in the petitions against both parents. As we already noted, the parents also do not contest the sufficiency of the evidence supporting the statutory bases on which the trial court relied for termination, or of the evidence supporting the other two elements required for termination. Finally, the parents do not address any of the trial proceedings or any of the evidence that was introduced.

The parents, then, effectively concede on appeal that the trial court terminated their parental rights based on the constitutionally and statutorily mandated minimum requirements. "It is an established rule that points covered by a decree of the trial court will not be considered by an appellate court unless they are properly raised and discussed in the briefs." *City of Miami v. Steckloff*, 111 So. 2d 446, 447 (Fla. 1959). If the initial brief does not raise a claim of error, it is "abandoned." *Id.*; *D.H. v. Adept Cmty. Servs., Inc.*, 271 So. 3d 870, 880 (Fla. 2018); *Hoskins v. State*, 75 So. 3d 250, 257 (Fla. 2011) (noting that any argument not raised in the initial brief "is barred"); *Parker-Cyrus v. Justice Admin. Comm'n*, 160 So. 3d 926, 928 (Fla. 1st DCA 2015) ("In fact, a party abandons any issue that was not raised in the initial petition."); *cf. Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990)

(noting that even mere reference to arguments in an appellate brief "without further elucidation does not suffice to preserve issues," which "are deemed to have been waived"); *Coolen v. State*, 696 So. 2d 738, 742 n.2 (Fla. 1997) (noting that "failure to fully brief and argue" an issue "constitutes a waiver of" of that claim).

As the Fourth District once observed, we "will not depart from [our] dispassionate role and become an advocate by second guessing counsel and advancing for him theories and defenses which counsel either intentionally or unintentionally has chosen not to mention." *Polyglycoat Corp. v. Hirsch Distributors, Inc.*, 442 So. 2d 958, 960 (Fla. 4th DCA 1983) (on denial of rehearing). The duty is on counsel to brief a case "so as to acquaint the Court with the material facts, the points of law involved, and the legal arguments supporting the positions of the respective parties." *Id.* "When points, positions, facts and supporting authorities are omitted from the brief, [we are] entitled to believe that such are waived, abandoned, or deemed by counsel to be unworthy." *Id.*

All we have left, then, is the parents' argument that we should reverse simply because, on the face of the order, there are references to statutory bases for termination that were not expressly cited in the petition. Essentially, they make a facial attack on a defect first appearing in the final order, which the parents nonetheless contend violates their respective rights to due process. Neither parent, however, brought this purported defect to the trial court's attention through a motion for rehearing. The issue, then, is not preserved for appeal. *Cf. D.T. v. Dep't of Children & Families*, 54 So. 3d 632, 633 (Fla. 1st DCA 2011) (affirming on issue that trial court failed to make the required statutory findings in a dependency case "because the appellant failed to preserve this issue by a motion for rehearing or to otherwise bring the claimed deficiency to the attention of the trial court at a point when it could have been corrected"); *see Eaton v. Eaton*, 293 So. 3d 567, 567–68 (Fla. 1st DCA 2020) (noting that there is no "class of cases" exempt from the preservation requirement; affirming dissolution judgment asserted to be inconsistent with oral pronouncement "[b]ecause the alleged inconsistencies were never brought to the trial court's attention via a motion for rehearing" and "not preserved for appellate review"); *K.J. v. Dep't of Children & Families*, 33 So. 3d 88, 89–90 (Fla. 1st DCA 2010) (affirming TPR

order based on failure to preserve issue for appeal via appropriate motion).

As this court has stated repeatedly, "where an error by the [trial] court appears for the first time on the face of a final order, a party must alert the court of the error via a motion for rehearing or some other appropriate motion in order to preserve it for appeal." *Smith v. Smith*, 273 So. 3d 1168, 1171 (Fla. 1st DCA 2019) (original brackets omitted; remaining brackets supplied) (quoting *Williams v. Williams*, 152 So. 3d 702, 704 (Fla. 1st DCA 2014)). This rule exists for good reason. It ensures "that the trial court has an opportunity to correct an error at the earliest opportunity, when the court is still in a position to recall the basis of its ruling." *Eaton*, 293 So. 3d at 568.

These appeals certainly illustrate the wisdom of the preservation rule. On the face of the order, there appear to be statutory bases for termination that were not alleged in the petition. These additional references might be error; but they might not. We cannot be certain because whether they were erroneous would turn on how the proceedings unfolded before the trial court. A parent must object at trial to evidence being introduced in support of an unpleaded ground. Otherwise, the parent will be deemed to have tried that ground by consent. *See In re D.J.*, 9 So. 3d 750, 755 (Fla. 2d DCA 2009) (holding that there was no due process violation in the trial court's reliance on unpleaded ground for dependency where evidence and argument supporting that ground were presented without objection, so "tried by implied consent"); *W.S. v. Dep't of Children & Families*, 961 So. 2d 1131, 1132 (Fla. 4th DCA 2007) (concluding that unpleaded statutory ground "was [] tried by implied consent as the evidence of compliance with the case plan was the central issue at trial without objection"); *K.S. v. Dep't of Children & Families*, 940 So. 2d 577, 578 (Fla. 5th DCA 2006) (determining that unpleaded statutory basis was "tried by implied consent" because "extensive evidence was introduced during the three-day hearing implicating [the unpleaded provision], [] the attorneys discussed this ground in closing[,]" and "counsel did not object").

The court entered its TPR order just over a month after the trial. The rules governing TPR proceedings authorize a motion for

rehearing on an expedited timeline in a TPR case. *See* Fla. R. Juv. P. 8.265(a)–(b) (allowing any party to move for rehearing on various legal grounds within ten days of entry of the order). A motion for rehearing by Mr. B.T. or X.T. as to the additional statutory grounds would have allowed the trial court, close in time to the trial, to assess whether the additional grounds truly were included in error, or instead whether they appeared in the order because those grounds were tried by consent (absent any due process objection at trial) and supported by the evidence. The parents did not give the trial court that opportunity before taking their appeal, so the defect is not one we ordinarily would even consider. "Normally, the failure to object to error, even constitutional error, results in a waiver of appellate review." *D'Oleo-Valdez v. State*, 531 So. 2d 1347, 1348 (Fla. 1988).

Because the issue was not raised for the trial court to address in the first instance, we will not send the order back to the trial court now for it to reconsider why it included those additional statutory bases, unless we first conclude that citation to those additional grounds amounts to fundamental error. *Cf. Sanford v. Rubin*, 237 So. 2d 134, 137 (Fla. 1970) ("Constitutional issues, other than those constituting fundamental error, are waived unless they are timely raised.").

To the extent there is error at all here (we are not stating for sure that there is), there is no fundamental error necessitating reversal. "'Fundamental error,' which can be considered on appeal without objection in the lower court, is error which goes to the foundation of the case or goes to the merits of the cause of action." *Id.* We are to exercise our discretion under this doctrine "very guardedly." *Id.* "[I]t 'goes to the very heart of the judicial process' and 'extinguishes a party's right to a fair trial,' such that it results in a miscarriage of justice." *Hendricks v. State*, 34 So. 3d 819, 830 (Fla. 1st DCA 2010) (quoting *Martinez v. State*, 933 So. 2d 1155, 1158, 1159 (Fla. 3d DCA 2006)). "The doctrine of fundamental error should be applied only in rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application." *Smith v. State*, 521 So. 2d 106, 108 (Fla. 1988). "[F]or error to be so fundamental that it may be urged on appeal, though not properly presented below, the error must

amount to a denial of due process." *Ray v. State*, 403 So. 2d 956, 960 (Fla. 1981).

A trial court's citation to other statutory grounds for termination, *in addition to* those that were pleaded by DCF in its petitions, by itself does not amount to a denial of due process and does not constitute fundamental error. Let us review briefly what is meant by "due process." The guarantee of due process under the Florida Constitution "contemplates that the defendant shall be given fair notice and afforded a real opportunity to be heard and defend in an orderly procedure, before judgment is rendered against him." *J.B. v. Fla. Dep't of Children & Family Servs.*, 768 So. 2d 1060, 1064 (Fla. 2000) (quotation, citation, and emphasis omitted); *M.J.W. v. Dep't of Children & Families*, 825 So. 2d 1038, 1040 (Fla. 1st DCA 2002) (same). A TPR order is entered without due process when the statutory basis on which it is based was one for which the parent had no notice and, therefore, no opportunity to prepare for and defend against it at trial. *Cf. R.S. v. Dep't of Children & Families*, 872 So. 2d 412, 413 (Fla. 4th DCA 2004) ("R.S. was unaware that her parental rights were subject to termination at the hearing on the ground not pleaded, and consequently, she was unprepared to rebut the ground, especially where the ground was not even mentioned until the trial court's ruling."); *see also Santosky v. Kramer*, 455 U.S. 745, 753–54 (1982) ("When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.").

There can be no doubt, though, that Mr. B.T. and X.T. had notice of what would be at stake and at issue at their two-day trial. The petitions had detailed numerous alleged facts, many of which, if proven could support multiple statutory bases for termination. *Cf. W.S.*, 961 So. 2d at 1133 (rejecting "the contention that failure to cite to the exact statutory reference for a ground for termination alleged in the petition is fatal, so long as the substance of the ground is alleged in the pleading"). Fourteen witnesses, including Mr. B.T., and X.T., testified. Both parents had counsel who cross-examined the witnesses called by DCF in support of its petitions. Mr. B.T. and X.T., through counsel, contested DCF's evidence and made arguments against the TPR. Neither parent objected to any of DCF's presentation of evidence as violative of his or her right to due process (*i.e.*, because of lack of notice), save for a single

objection by Mr. B.T.'s counsel regarding testimony about events occurring after the filing of the petition—which counsel does not address on appeal.

Establishment of but one of the statutory grounds for termination by clear and convincing evidence is enough to affirm a TPR order. *See C.M.*, 953 So. 2d at 550 (noting that the trial court must determine whether DCF proved *at least one* statutory ground). DCF did not need to prove all of the grounds it alleged. *Cf. M.S. v. Dep't of Children & Families*, 765 So. 2d 152, 153 (Fla. 1st DCA 2000) (affirming TPR because competent, substantial evidence supported trial court's findings as to one statutory ground, and refusing to address challenge to other ground for TPR). Our review of the record leads us to conclude that there was competent, substantial evidence to support the trial court's conclusion that the three elements required for termination had been proven by clear and convincing evidence, including at least one pleaded statutory ground (or at least one tried by consent) for each parent. Paragraph (1)(c) was pleaded and proved as to both parents; paragraph (1)(l) was pleaded and proved as to Mr. B.T. and tried by consent and proved as to X.T. The additional statutory grounds cited in the order, even if one or more of them had not been tried by consent, did not undercut the foundation of the case or constitute a denial of due process for either parent. With or without those additional grounds, the TPR order stands as constitutionally and statutorily valid, and the parents' rights are terminated.

Before concluding this discussion, we pause to address an opinion of this court that the parents primarily rely on to support reversal as to this claim. The opinion, filed in *Z.M. v. Department of Children & Family Services*, is limited in application (and inapposite here) because it was, as we characterized it, "unusual." 981 So. 2d 1267, 1270 (Fla. 1st DCA 2008). In *Z.M.* DCF asserted a single statutory basis for termination, and throughout the entire case, the agency "litigated the case as it had pleaded it in its petition." *Id.* at 1269. At the close of the department's case and after the parent moved to dismiss, the trial court suggested that a different statutory basis seemed "more apt." *Id.* The final order of termination cited both statutory bases. *Id.* The panel reversed for two specific errors, neither of which is relevant here. One was the

trial court's "overstepp[ing] the bounds of strict neutrality" by raising the additional statutory basis for DCF and then relying on that basis in part in the TPR order. *Id.* That, the panel in *Z.M.* explained, was a denial of due process. *Id.* The other error was an "apparent use of the wrong evidentiary standard." *Id.* at 1271. Statements by the trial court regarding the department's case suggested that it applied an "impermissibly lax standard" to the evidence presented in support of the statutory ground that the agency *did* plead. *Id.* at 1270. In other words, it appeared from the record the trial court concluded that the department had failed to establish by clear and convincing evidence its pleaded statutory ground. *Id.* The circumstances behind the appeals here, discussed above, are different in material ways, so the holding in *Z.M.* does not point us toward a conclusion different than the one we reach here.[3]

Upon consideration of the foregoing, we find no basis to reverse the termination of the parents' parental rights because of the asserted facial defect in the order. Mr. B.T. and X.T. received the procedural protections to which they were entitled. The TPR order relies on at least one statutory ground that was pleaded and supported by competent, substantial evidence that the trial court

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[3] The parents also rely on *R.S. v. Department of Children & Families*, 872 So. 2d 412 (Fla. 4th DCA 2004). We do not find this one persuasive, either. First, unlike in the appeals before us, in *R.S.* the additional ground "was not tried by consent" or "even mentioned until the trial court's ruling." *Id.* at 413. Second, the Fourth District reversed and remanded, but only to remove "all findings and references relevant to" the unpleaded statutory ground. *Id.* It nonetheless left in place the actual termination of parental rights because a pleaded ground *did* support termination. *Id.* As the court noted, "the ultimate outcome of this case is not impacted by the need to correct this error." *Id.* We are unsure how what amounted to a correctable scrivener's error appearing on the face of the final termination order could have been fundamental error, especially when the district court itself acknowledged that the error essentially was harmless (that is, had no effect on the judgment). The district court did not discuss it, and it proves unhelpful in our disposition of these appeals.

concluded was clear and convincing. The facial error claimed by the parents, under some circumstances, might be a basis for reversal, if preserved. But striking those additional grounds still would not change the grave outcome of *these* cases—the termination of Mr. B.T.'s and X.T.'s parental rights. The putative error then, by definition, could not be fundamental. *Cf. Reed v. State*, 837 So. 2d 366, 370 (Fla. 2002) ("By its very nature, fundamental error has to be considered harmful. If the error was not harmful, it would not meet our requirement for being fundamental.").

We close with the following observation made previously by this court:

> It is difficult to overemphasize the importance, absent fundamental error, of preserving issues and arguments before asking an appellate court to reverse a trial court's final judgment. The importance of this principle is too often not appreciated, and appellate courts are constrained, as we are here, to affirm orders which otherwise might have been reversed.

Pensacola Beach Pier, Inc. v. King, 66 So. 3d 321, 326 (Fla. 1st DCA 2011). As to this issue, we affirm.

II.

Mr. B.T. and X.T. also seek reversal because the trial court failed to provide them with oral and written notice of their right to claim ineffective assistance of counsel. The appellees concede the trial court's failure to comply with notice requirements, but they essentially contend that this procedural defect is not *per se* reversible. We agree. Before we can act to remedy a due process violation, there must be a deprivation of a substantive right, not just a procedural defect. The parents fail to identify such a substantive deprivation.

As we explained in the preceding section, there was no due process deficiency underlying the merits of the TPR order, which adjudicated the termination of the parents' rights. The substantive right at the heart of *that* analysis was each parent's "natural God-given legal right to enjoy the custody, fellowship and

companionship of his [or her] offspring. This is a rule older than the common law itself." *Padgett v. Dep't of Health & Rehab. Servs.*, 577 So. 2d 565, 570 (Fla. 1991) (quoting *State ex rel. Sparks v. Reeves*, 97 So. 2d 18, 20 (Fla. 1957)); *see Santosky v. Kramer*, 455 U.S. 745, 753 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."). The parents received the required notice and opportunity to be heard before their rights were extinguished.

The notice that we consider in connection with this second claim relates to an ancillary, but different, right. A parent has a constitutional right to counsel in TPR proceedings. *In re D.B.*, 385 So. 2d 83, 90 (Fla. 1980); *cf. J.B. v. Dep't of Children & Families*, 170 So. 3d 780, 791 (Fla. 2015) (explaining that right derives from the due process clause of the Florida Constitution). That right "includes the right to effective assistance and requires a means of vindicating that right." *J.B.*, 170 So. 3d at 785. The supreme court devised such means, which now are reflected in Florida Rule of Juvenile Procedure 8.530. *Cf. id.* at 793–95 (limning "interim procedure" that "will remain in place until the rules governing such a process become effective upon approval by this Court"). Among other things, Florida Rule of Juvenile Procedure 8.530 requires that the trial court "orally inform the parents who are represented by an attorney of . . . the right to file a motion in the circuit court claiming . . . ineffective assistance if the court enters an order terminating parental rights." Fla. R. Juv. P. 8.530(a). The TPR order also "must include a brief statement informing the parents of the right to file a motion claiming ineffective assistance of counsel and a brief explanation of the procedure for filing the motion." Fla. R. Juv. P. 8.530(a); *see also* Fla. R. Juv. P. 8.525(j)(1)(C).

The parents' claim here rests on the failure of notice, and nothing more. They fall short on that claim because the notice requirement itself is not a substantive right. It could not be. The supreme court does not have the authority to create substantive rights, only rules of practice and procedure. *Cf.* Art. V, § 2, Fla. Const. (authorizing the supreme court to "adopt rules for the practice and procedure in all courts"); *see Haven Fed. Sav. & Loan*

Ass'n v. Kirian, 579 So. 2d 730, 732 (Fla. 1991) (distinguishing between "substantive law, which is within the legislature's domain," and "matters of practice and procedure," over which the supreme court has "exclusive authority to regulate"); *Boyd v. Becker*, 627 So. 2d 481, 484 (Fla. 1993) ("While the Florida Constitution grants this Court exclusive rule-making authority, this power is limited to rules governing procedural matters and does not extend to substantive rights. Art. V, § 2(a), Fla. Const."); *Allen v. Butterworth*, 756 So. 2d 52, 59 (Fla. 2000) ("Generally, the Legislature has the power to enact substantive law, while the Court has the power to enact procedural law.").

Rule 8.530(a)'s notice requirement necessarily is a matter of practice or procedure. *Cf. Kirian*, 579 So. 2d at 732 ("[P]ractice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion." (internal quotation omitted)); *id.* (describing practice and procedure "as the machinery of the judicial process as opposed to the product thereof" (quotation once again omitted)). The rule requires both oral and written notice to balance the parent's substantive right to vindicate his or her entitlement to effective assistance of counsel with the need for that vindication to "proceed to resolution within a strictly limited timeframe." *J.B.*, 170 So. 3d at 793–94.[4] Put differently, the supreme court's rule requires the written and oral notice because the rule also extinguishes, in short order, a parent's right to seek vindication of his or her constitutional entitlement to effective assistance of counsel. *See* Fla. R. Juv. P. 8.530(l)(1) ("Untimely Motion") (requiring trial court to summarily deny "with prejudice *any* motion filed after the 20-day limitation for filing" (emphasis supplied)). Presumably, due process demands proper notice and an opportunity to take advantage of the process before the time bar could be enforced. *Cf. Dep't of Law Enforcement v. Real Prop.*, 588 So. 2d 957, 960 (Fla. 1991) ("[D]ue process serves as a vehicle to ensure fair treatment through the proper administration of justice where substantive rights are at issue."); *id.* ("The manner in which

[4] The motion "*must* be filed within 20 days of the date the court entered the written" TPR order. Fla. R. Juv. P. 8.530(e) ("Time Limitations") (emphasis supplied).

due process protections apply vary with the character of the interests and the nature of the process involved.").

If the notice itself is not a substantive right, what substantive right was either Mr. B.T. or X.T. deprived of that could give rise to a due process claim? The parents do not say. The right to due process is violated only "when a deprivation of a right has occurred without notice and opportunity to be heard." *Joshua v. City of Gainesville*, 768 So. 2d 432, 438 (Fla. 2000). It should be obvious, then, that a party complaining about a putative due process violation must point to a substantive right that actually has been deprived; "[a]bsent such a deprivation, there can be no denial of due process." *Id.* (quoting *Econ. Dev. Corp. v. Stierheim*, 782 F.2d 952, 954 (11th Cir 1986)).

Here, the parents fail to make any such connection. Neither parent attempted to file a motion challenging the effectiveness of trial counsel, before or after the time for doing so expired.[5] Neither asked this court to relinquish jurisdiction to allow that process to proceed beyond the established time limit. There simply is nothing in the record that demonstrates that either parent lost a right to challenge the effectiveness of counsel without proper notice. In turn, there is no due process violation to be remedied on appeal.

This conclusion dovetails with the Fifth District's handling of a similar scenario. *See T.D. v. Dep't of Children & Families*, 187 So. 3d 365 (Fla. 5th DCA 2016). In *T.D.*, which was decided after *J.B.* but before the adoption of rule 8.530, the Fifth District considered "whether the trial court's failure to orally inform a parent in a [TPR] proceeding of the right to assert an ineffective assistance of counsel claim in the circuit court necessitates the abatement of the direct appeal and a remand to allow the parent to file the motion." *Id.* at 365. The TPR order nevertheless provided written notice of the parent's right. 187 So. 3d at 366–67. The mother did not file any motion claiming ineffective assistance of

[5] Notably, both parents filed their appeals within the 20-day limit for bringing a motion for ineffective assistance of counsel. Despite having appellate counsel who would eventually raise the rule 8.530(a) notice issue on appeal, neither parent filed such a motion.

counsel during the 20-day time limit, despite filing her appeal within that same period. *Id.* at 366, 368. Finding that the mother "made no effort to demonstrate even a prima facie claim of ineffective assistance of trial counsel," and given "the heightened necessity for the timely determination of [termination of parental rights] proceedings and the high standard of proof required to establish ineffective assistance of counsel in these cases," the Fifth District affirmed the termination of parental rights without a remand. *Id.* at 369.

The parents here ask us to distinguish *T.D.* solely on the basis that they received *neither* oral *nor* written notice of their right to file a motion claiming ineffective assistance of counsel. This is not a meaningful distinction. The real takeaway from *T.D.* is that a procedural defect involving notice, by itself, is not reversible error. The rule requires both oral and written notice, but the trial court in *T.D.* did not give the oral notice. The Fifth District was unmoved by this defect, because

> [a]t no time did [the parent] file a motion alleging ineffective assistance of counsel, nor did her conflict-free appellate counsel, [appointed before the deadline for the parent to file her pro se motion], represent in the initial brief that such a motion had been prepared and that jurisdiction should be relinquished to allow the trial court to belatedly consider such a motion.

Id. at 368. In other words, the parent did nothing to show a deprivation of a right that flowed from the lack of notice. The district court was "unwilling to reverse or delay an otherwise unchallenged final judgment under the present circumstances." *Id.*

We take the same view and affirm as to this claim.

III.

The TPR order as to both parents is the product of a fair and orderly process. Mr. B.T. and X.T. had notice of the grounds on which DCF sought to terminate their parental rights. They had a full opportunity to participate in the trial that led to the order we have on review. The parents failed to preserve any claim they may have had regarding a facial deficiency in the order, and the facial

deficiencies the parents identify on appeal do not amount to fundamental error. And even though the trial court failed to provide Mr. B.T. or X.T. oral or written notice under rule 8.530(a), the parents cannot show that this procedural defect resulted in an actual deprivation of their entitlement to seek vindication of their right to effective counsel. There is no due process violation to remedy in this appeal.

AFFIRMED.

OSTERHAUS and JAY, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

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