MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In the Termination of the Parent-Child Relationship of:

E.C. (*Minor Child*),

And

M.D. (*Mother*) & T.C. (*Father*),

Appellants-Respondents,

v.

Indiana Department of Child Services,

Appellee-Petitioner,

October 20, 2021

Court of Appeals Case No. 21A-JT-785

Appeal from the Johnson Circuit Court

The Honorable Michael Bohn, Magistrate

Trial Court Cause No. 41C01-2007-JT-40

Robb, Judge

Case Summary and Issues

[1] T.C. ("Father") and M.C. ("Mother") (collectively, "Parents") are the parents of E.C. ("Child"). In late 2019, Child was adjudicated a child in need of services ("CHINS") and in August 2020, the Indiana Department of Child Services ("DCS") filed a petition for the involuntary termination of Parents' parental rights. On March 31, 2021, the juvenile court issued an order making findings and concluding Parents' parental rights should be terminated. Parents now appeal, raising two issues for our review: 1) whether they were entitled to a jury trial in these termination proceedings, and 2) whether the appropriate standard of proof in termination proceedings should be beyond a reasonable doubt rather than clear and convincing evidence. Concluding Parents were not entitled to a jury trial and the juvenile court applied the appropriate standard of proof, we affirm the juvenile court's judgment terminating Parents' rights.

Facts and Procedural History

[2] When Child was born on September 16, 2019, both she and Mother tested positive for methamphetamine. Child was removed from Parents by emergency detention order on September 18, 2019, and a CHINS petition was filed on September 20, 2019. Father indicated to DCS that he did not want parenting time with Child. Mother participated in a few supervised visits, but her last visit with Child was October 2, 2019. Parents failed to appear at the November 2019 factfinding hearing and Child was adjudicated a CHINS on November 20, 2019. Parents also failed to appear at the dispositional hearing in December

2019 and review hearings in March and June 2020. From the time Child was removed, Parents did not participate in any services, including supervised visitation, and maintained little to no contact with DCS. In addition, Father was charged in two separate cases with offenses related to possession of or dealing in methamphetamine. The juvenile court found that Parents were "entirely non-compliant" during this time. Appealed Order at 5.

[3] DCS filed a petition for termination of Parents' parental rights on August 19, 2020. At the initial hearing, counsel was appointed for Parents at their request.[1] Parents began participating in visitation in October 2020 but continued the trend of "general non-compliance": they refused most drug screens, with Mother only submitting to three screens and Father two, and they made no meaningful progress in services. *Id.* at 6.

[4] The juvenile court held a factfinding hearing on February 10, 2021. At the outset of the hearing, Parents filed a written Demand for Jury Trial. Parents' counsel stated, "My clients would like to make a jury trial demand. I know there is no right. But they did want me to make that request." Transcript of Evidence, Volume 2 at 5. The juvenile court denied the request and proceeded with the factfinding hearing. DCS presented the testimony of various DCS employees and service providers. DCS had identified a prospective relative care

[1] Parents had hired two private attorneys early in the CHINS proceeding but neither was still representing Parents by the time of the CHINS factfinding hearing. Parents did not request appointed counsel until the initial hearing on the termination petition.

adoptive placement for Child and the current DCS family case manager ("FCM") and the court-appointed special advocate ("CASA") both supported termination. During closing arguments, counsel for Parents acknowledged that the relevant statute says DCS has to prove its case by clear and convincing evidence but argued that "[i]n criminal cases it's obviously beyond a reasonable doubt. There's no . . . just reason for why that should not be the same standard in [termination] cases." *Id.* at 95.

[5] On March 31, 2021, the juvenile court issued findings of fact, concluded DCS had proven the required elements for termination by clear and convincing evidence, and terminated the parent-child relationship between Parents and Child. Parents now appeal.

Discussion and Decision

I. Right to Jury Trial

[6] Parents first argue that the juvenile court erred in denying their demand for a jury trial because Article 1, section 20 of the Indiana Constitution guarantees the right to trial by jury "[i]n all civil cases[.]" And they argue that Indiana Code section 31-32-6-7(a), which states that, with an exception not relevant

here, "all matters in juvenile court shall be tried to the court[,]" violates this provision.[2]

[7] When a statute is challenged as an alleged violation of the Indiana Constitution, our standard of review is well settled: "[e]very statute stands before us clothed with the presumption of constitutionality until that presumption is clearly overcome by a contrary showing." *Wallace v. State*, 905 N.E.2d 371, 378 (Ind. 2009). The party challenging the constitutionality of the statute bears the burden of proof, and all doubts are resolved against that party. *Id*.

[8] It has long been held that Article 1, section 20 preserves the right to a jury trial only as it existed at common law. *Cutter v. Classic Fire & Marine Ins. Co.*, 926 N.E.2d 1067, 1084 (Ind. Ct. App. 2010). And in *E.P. v. Marion Cnty. Off. of Fam. & Child.*, we noted that "[a]s for the Indiana Constitutional right to a jury trial [in juvenile proceedings,] the law is settled." 653 N.E.2d 1026, 1030 (Ind. Ct. App. 1995) (footnote omitted). "Because no special judicial system for juveniles existed at common law, juvenile matters obviously were not triable by jury. Thus, we have consistently held that [section 20] does not give a party a

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[2] DCS argues Parents have waived this issue by failing to raise it to the juvenile court. *See* Brief of Appellee at 22-23. However, Parents both filed a written Demand for Jury Trial (albeit on the day of the factfinding hearing) and made an oral request at the start of the hearing. *See* Appellant's Appendix, Volume II at 99; Tr., Vol. 2 at 5. Although Parents' jury trial demand was late, *see* Ind. Trial Rule 38(B), and they did not specifically argue to the juvenile court that denial of a jury trial was unconstitutional, we decline to decide this issue on the basis of waiver because of the magnitude of the rights at stake. *See Plank v. Cmty. Hosps. of Ind., Inc.*, 981 N.E.2d 49, 53-54 (Ind. 2013) (noting that appellate courts "are not prohibited from considering the constitutionality of a statute even though the issue otherwise has been waived").

right to a jury in juvenile court proceedings." *Id.* (citing *Bible v. State*, 253 Ind. 373, 254 N.E.2d 319, 320 (1970) and *Gray v. Monroe Cnty. Dep't of Pub. Welfare*, 529 N.E.2d 860, 861 (Ind. Ct. App. 1988)).

[9] Parents contend, however, that two more recent cases "sketch a more holistic approach to determining the extent of the Section 20 jury right" and "should control whether parents have a jury trial right when the State attempts to permanently and forever terminate their rights as parents." Brief of Appellant at 13-14 (citing *Songer v. Civitas Bank*, 771 N.E.2d 61 (Ind. 2002) and *Midwest Sec. Life Ins. Co. v. Stroup*, 730 N.E.2d 163 (Ind. 2000) (Boehm, J., concurring)). *Songer* addressed the question of whether a right to trial by jury exists "whenever a complaint joins claims in law and equity" and concluded that the "appropriate question is whether the essential features of the suit are equitable" and therefore draw the entire suit into equity and extinguish the right to a trial by jury. 771 N.E.2d at 62, 68. Despite Parents' lengthy analysis culminating in the assertion that a termination of parental rights proceeding "is more akin to a legal, rather than an equitable, claim[,]" Br. of Appellant at 14, there are no mixed claims in this termination case, and therefore the *Songer* analysis applicable to multi-count complaints is not relevant.[3] Parents have not convinced us that Indiana Code section 31-32-6-7(a), implementing the long-

[3] The language from *Stroup* that Parents rely on is found in a concurring opinion by Justice Boehm, joined by Justice Dickson. 730 N.E.2d at 169-71. The majority opinion does not address the right to trial by jury, deciding only the issue of "whether common law claims for breach of contract and bad faith are preempted by the Employee Retirement Income Security Act of 1974 (ERISA)." *Id.* at 165.

standing rule that juvenile proceedings are not triable by jury, violates Article 1, section 20. The termination proceeding was appropriately tried to the juvenile court.

II. Standard of Proof

[10] Parents also argue the standard of proof in termination of parental rights cases should be beyond a reasonable doubt rather than clear and convincing evidence, arguing such standard is required by both the due process protections of Article 1, section 12 of the Indiana Constitution and the equal protection clause of the Fourteenth Amendment to the United States Constitution.[4]

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[4] Again, DCS alleges Parents have waived this issue for failure to raise it below. Parents did argue to the juvenile court during closing argument that the standard of proof should be beyond a reasonable doubt. *See* Tr., Vol. 2 at 95. They did not, however, offer any basis for that assertion, least of all a state or federal constitutional basis. As DCS points out, in order to properly preserve an issue for appeal, "[a]t a minimum, a party must show that it gave the trial court a bona fide opportunity to pass upon the merits of the claim before seeking an opinion on appeal." *Endres v. Ind. State Police*, 809 N.E.2d 320, 322 (Ind. 2004). The juvenile court did not have that opportunity below.

Although we consider Parents' state due process claim notwithstanding waiver for the same reason we exercised our discretion to decide the jury trial issue, *supra* n.2, we decline to consider the waived federal equal protection claim. Parents' equal protection argument is based on the fact that the Indian Child Welfare Act provides that parental rights of Native Americans may be terminated only upon evidence beyond a reasonable doubt. *See* 25 U.S.C. § 1912(f). The right to a jury in juvenile proceedings and the scope of the state due process clause are matters of settled law in Indiana. But Indiana courts have not had occasion to consider whether the differing state and federal standards violate equal protection, and we will not undertake that analysis when it was not developed at all in the juvenile court and is raised for the first time on appeal.

Waiver notwithstanding, we note that the United States Supreme Court has routinely rejected claims that laws that treat Native Americans as a distinct class violate the equal protection rights of non-Native Americans, *see, e.g.*, *United States v. Antelope*, 430 U.S. 641, 646 (1977) (concluding "federal regulation of Indian affairs is not based upon impermissible classifications"), and states that have had occasion to consider whether their clear and convincing standard violates the equal protection clause have found no violation, *see, e.g.*, *Matter of M.K.*, 964 P.2d 241, 244 (Okla. Civ. App. 1998) (holding heightened burden of proof required for termination of Native American parental rights is "rationally tied to Congress' responsibility for policy toward [Native American] families" and lower state standard did not violate non-Native American father's right to equal protection).

[11] As Parents acknowledge, the United States Supreme Court has held that the clear and convincing standard

> strikes a fair balance between the rights of the natural parents and the State's legitimate concerns. . . . [S]uch a standard adequately conveys to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process [but] determination of the precise burden equal to or greater than that standard is a matter of state law properly left to state legislatures and state courts.

Santosky v. Kramer, 455 U.S. 745, 769-70 (1982).[5] They argue, however, that just because the clear and convincing standard passes muster under the due process clause of the United States Constitution does not necessarily mean the same under Indiana's due process clause.

[12] Article 1, section 12 of the Indiana Constitution provides:

> All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay.

[5] Prior to *Santosky*, the standard of proof required in a termination of parental rights proceeding in Indiana was a preponderance of the evidence. *See Ellis v. Knox Cnty. Dep't of Pub. Welfare*, 433 N.E.2d 847, 848 (Ind. Ct. App. 1982) (citing Ind. Code § 31-6-7-13(a) (1979)). Following *Santosky*, this court declared that statute unconstitutional, *id.*, and the statute was amended to require the higher clear and convincing evidence standard of proof, *see* Ind. Code § 31-6-7-13 (1984).

Parents contend that "Indiana's individualistic constitutional heritage, coupled with repeated decisions by Indiana's high Court providing greater protections than the U.S. Constitution, provides a sound basis for concluding" Article 1, section 12 mandates a higher standard of proof than clear and convincing evidence in termination cases. Br. of Appellant at 11-12. Parents have the burden of "clearly overcom[ing]" the presumption that Indiana Code section 31-37-14-2, which prescribes the standard of proof for termination cases, is constitutional. *Wallace*, 905 N.E.2d at 378.

[13] Parents correctly point out that several provisions of the Indiana Constitution, despite having the same or similar language to an analogous provision of the United States Constitution, have been interpreted to give greater protection to Hoosiers. *See, e.g.*, *Andrews v. State*, 978 N.E.2d 494, 502-03 (Ind. Ct. App. 2012) (noting that Indiana's ex post facto clause offers greater protection than that of the United States Constitution's and stating, "Greater protection of Hoosier's rights under the Indiana Constitution is not an uncommon principle in our state's jurisprudence."), *trans. denied*; *see also State v. Gerschoffer*, 763 N.E.2d 960, 965 (Ind. 2002) (addressing Indiana's search and seizure provision and noting, "The Indiana Constitution has unique vitality, even where its words parallel federal language."). However, "Indiana courts have consistently construed Article 1, Section 12 . . . as analogous to the federal due process clause." *Melton v. Ind. Athletic Trainers Bd.*, 53 N.E.3d 1210, 1215 (Ind. Ct. App. 2016).

[14] In addition to the fact that our supreme court has construed the two due process clauses as analogous, the court has also consistently cited the clear and convincing evidence standard as a "heightened burden of proof" that appropriately reflects termination's "serious social consequences" even while acknowledging that "parental rights are precious and protected by our Federal and State constitutions." *In re E.M.*, 4 N.E.3d 636, 641-42 (Ind. 2014) (citations omitted); *see also J.C.C. v. State*, 897 N.E.2d 931, 934-35 (Ind. 2008) ("[T]he clear and convincing standard is employed in cases where the wisdom of experience has demonstrated the need for greater certainty, and where this high standard is required to sustain claims which have serious social consequences or harsh or far reaching effects on individuals to prove willful, wrongful and unlawful acts to justify an exceptional judicial remedy[.]") (quotation omitted). In other words, the clear and convincing standard already encompasses consideration of the "important nature of the parent-child relationship and parents' fundamental right to raise their child[.]" Br. of Appellant at 19.

[15] Parents have not convinced us that Article 1, section 12 should be interpreted differently than the Fourteenth Amendment in this context or that Indiana Code section 31-37-14-2 violates the Indiana Constitution and the beyond a reasonable doubt standard should be required instead. *See Castro v. State Off. of Fam. & Child.*, 842 N.E.2d 367, 377 (Ind. Ct. App. 2006) (rejecting a claim that the clear and convincing standard of Indiana's termination scheme deprives parents of due process, stating, "Our General Assembly has adopted the clear and convincing standard for termination cases, the Indiana Supreme Court has

consistently applied it, and the United States Supreme Court has held that such a standard satisfies the requirements of due process."), *trans. denied*. The juvenile court appropriately considered the evidence under the clear and convincing standard. *See* Appealed Order at 10.

III. Termination of Parental Rights

[16] Parents do not make any argument regarding the merits of the juvenile court's decision, requesting only that we remand the case for a jury trial to be decided beyond a reasonable doubt. As discussed above, Parents are not entitled to that relief, but we will briefly address whether the juvenile court's decision is supported by clear and convincing evidence.

[17] In determining whether a judgment terminating parental rights is clearly erroneous, we consider "whether the evidence clearly and convincingly supports the findings and the findings clearly and convincingly support the judgment." *In re R.S.*, 56 N.E.3d 625, 628 (Ind. 2016) (quotation omitted). Because Parents do not challenge any of the juvenile court's findings, we accept the findings as true and supported by the evidence. *In re A.M.*, 121 N.E.3d 556, 562 (Ind. Ct. App. 2019), *trans. denied*. Therefore, we will consider only whether the juvenile court's findings support its judgment.

[18] To support the juvenile court's judgment terminating Parents' rights, there must have been clear and convincing evidence that A) Child had been removed from Parents for at least six months under a dispositional decree; B) there is a reasonable probability that the conditions that resulted in Child's removal will

not be remedied or that continuation of the parent-child relationship poses a threat to Child's well-being; C) termination is in Child's best interests; and D) there is a satisfactory plan for Child's care and treatment. Ind. Code § 31-35-2-4(b)(2)(A)-(D).

[19] The dispositional decree in the CHINS case was entered on December 12, 2019, and the termination petition was filed on August 19, 2020, showing that Child had been removed from Parents for at least six months under a dispositional decree.[6] Ind. Code § 31-35-2-4(b)(2)(A)(i). As for Child's best interests, the current FCM testified that based on considerations for Child's safety, stability, well-being, and permanency, terminating the parent/child relationship was in Child's best interest. *See* Tr., Vol. 2 at 77. The CASA also recommended termination. *See id.* at 96. And the plan for Child's care and treatment was for relative care adoption with a great-uncle and great-aunt who had begun "developing a relationship" with Child in July 2020 through visitation, including three-day overnight visits that began in December 2020. Appealed Order at 8.

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[6] An alternative to proving removal for six months under a dispositional decree is for DCS to prove that the child had been removed from the parent and under DCS supervision for at least fifteen of the most recent twenty-two months. Ind. Code § 31-35-2-4(b)(2)(A)(iii). The petition filed by DCS in this case alleged that at least one of these timing requirements were true. *See* Appellant's App., Vol. II at 27. Although Child had been under DCS supervision for at least fifteen months by the time of the factfinding hearing, at the time the petition was filed, Child had been removed for only eleven months. Nonetheless, this timing requirement is written in the disjunctive, and only one provision must be proven.

[20] As for whether the conditions that resulted in Child's removal will be remedied and/or whether continuation of the parent-child relationship poses a threat to Child's well-being, the juvenile court made the following relevant findings:

- Mother tested positive for methamphetamine at Child's birth but largely refused any further drug screens, "making it impossible to know Mother's level of sobriety."
- Father has pending drug-related charges and largely refused to submit to drug screens that could "demonstrate his own sobriety and ability to act as the sober caregiver for Child."
- After the detention hearing, Parents refused to participate in any hearings or court ordered services, including visitation, for approximately one year and did not engage with DCS' attempt to communicate with them.
- Parents only engaged in the case after the termination petition was filed and even then only participated in supervised visitation, failing to meaningfully engage in other court ordered services, including a parenting assessment, substance abuse treatment, home-based case management, or psychological evaluations, despite encouragement from the juvenile court to do so in order to be reunified with Child.
- Parents lack insight into the reasons for Child's removal and the importance of participation, lack the "judgment and foresight that are integral to successful and responsible parenting[,]" and are unwilling and unable to meet their parental responsibilities.

Id. at 9-10. Based on these findings, the juvenile court concluded that returning Child to Parents would threaten the emotional and physical development of Child and that the conditions that resulted in her removal were unlikely to be remedied "due to Parents' continued failure to meaningfully participate in services and Parents' effective abandonment of Child for the majority of the case." *Id.* at 10.

[21] This evidence and these findings clearly and convincingly support the judgment of the juvenile court terminating Parents' parental rights.

Conclusion

[22] Parents were not entitled to a jury trial or to have the beyond a reasonable doubt standard applied to DCS' proof in this termination proceeding. The juvenile court's judgment terminating their parental rights is supported by clear and convincing evidence as to each element. Accordingly, the judgment is affirmed.

[23] Affirmed.

Bradford, C.J., and Altice, J., concur.