

## MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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## IN THE COURT OF APPEALS OF INDIANA

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In the Termination of the Parent-Child Relationship of:

Ja., Jo., and Ji. (*Minor Children*),

and

J.G. (*Father*),

*Appellant-Respondent*,

v.

Indiana Department of Child Services,

*Appellee-Petitioner*,

November 29, 2021

Court of Appeals Case No.  
21A-JT-1059

Appeal from the Allen Superior Court

The Honorable Charles F. Pratt,  
Judge

Trial Court Cause Nos.  
02D08-2003-JT-89  
02D08-2003-JT-90  
02D08-2003-JT-91

**Robb, Judge.**

## Case Summary and Issues

- [1] J.G. (“Father”) appeals the juvenile court’s termination of his parental rights to his three children. Father raises two issues for our review: 1) whether his procedural due process rights were violated because the fact-finding hearing on the petition for involuntary termination of parental rights was held outside the time allowed by statute, and 2) whether his substantive due process rights were violated because the Indiana Department of Child Services (“DCS”) failed to make reasonable efforts to reunify the family. Concluding that Father’s due process rights were not violated, we affirm the juvenile court’s termination order.

## Facts and Procedural History

- [2] Father and N.K. (“Mother”) are the parents of Ja., Jo., and Ji. (“Children”).<sup>1</sup> On December 19, 2017, Mother was visibly intoxicated and arrested for resisting law enforcement. The Children were in Mother’s care at the time, and she was unable to identify any appropriate caregivers for them. DCS intervened and placed the Children with relatives.<sup>2</sup> At a Child In Need of Services (“CHINS”) initial hearing in January 2018, Father admitted to recent positive tests for THC, several prior arrests, and to being incarcerated and

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<sup>1</sup> Father signed a paternity affidavit at Jo.’s birth in 2015, and his paternity of Ja. and Ji. was established by court order in April 2018.

<sup>2</sup> The Children were ultimately placed in foster care, where they remained at the time of the termination hearing.

unable to care for the Children.<sup>3</sup> The Children were adjudicated CHINS. The juvenile court's dispositional order required Father, among other things, to maintain suitable housing, maintain contact with DCS, participate in supervised visits with the Children, submit to diagnostic and drug and alcohol assessments and follow all recommendations, and enroll in home-based services.

[3] During the CHINS proceedings, Father tested positive for illegal substances, did not regularly visit with the Children, did not participate in recommended therapy, and did not cooperate or maintain contact with DCS. Father did submit to a diagnostic assessment, and it was recommended, in part, that he participate in home-based casework specifically to address parenting skills. Home-based casework can also assist with issues regarding housing, employment, and transportation, and can connect parents to community resources. Referrals were not initially made for home-based services because Father told DCS that he was not going to do any services. And the family case manager ("FCM") did not make the referral later because Father "was not in compliance with any [other] services nor did he have any place to live for him to start home-based services[.]" Transcript, Volume 2 at 42. In addition, because Father did not maintain contact with DCS, it could not "even try to engage him to do those services." *Id.* at 67. The FCM indicated her focus was

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<sup>3</sup> Mother also made certain admissions at this time. She passed away in January 2021. We have accordingly limited our recitation of the facts to those pertaining to Father.

on “try[ing] to get him in some help, to get into a halfway house, to get substance abuse treatment. If he had started at that point then yes, we eventually could’ve moved onto [sic] to home-based services.” *Id.*

[4] DCS filed a petition for termination of parental rights on March 27, 2020. An initial hearing was set for April 28, 2020. That hearing was continued “[i]n accordance with the Supreme Court order in case number 20S-CB-123 on April 3, 2020,” Appendix of Appellant, Volume 2 at 122, and eventually held on November 17, 2020. On that date, the fact-finding hearing was set to begin on February 1, 2021 and conclude on February 9, 2021. However, on January 26, 2021, Father filed a motion to continue the fact-finding hearing. The juvenile court held a hearing on the motion. In granting Father’s motion to continue, the juvenile court noted that Father had been hospitalized on January 5 due to a drug overdose, had only recently been released from the hospital, and was in jail under a COVID-19 quarantine and unable to consult with his attorney in preparation for the hearing. The fact-finding hearing was rescheduled and held on March 15, 2021.

[5] Following the fact-finding hearing, the juvenile court issued its Findings and Order Terminating Parental Rights, concluding that DCS had proven by clear and convincing evidence that Father’s parental rights to the Children should be terminated. Specifically, the juvenile court concluded:

By the clear and convincing evidence, the court determines that there is a reasonable probability that reasons that brought about the children’s placement outside the home will not be remedied.

The underlying CHINS case began with the father incarcerated. At the time of the conclusion of evidence in this case he was again in jail. Despite being referred for group and individual drug and alcohol counseling, he did not take advantage of those services. Instead he ingested illegal substances resulting in an overdose and hospitalization three years after the commencement of the CHINS case. He has not cooperated with [DCS] and has not visited his children. He has not demonstrated any willingness to engage in services designed for his own health and the restoration of his family.

Appealed Order at 4. Father now appeals.

## Discussion and Decision

### I. Standard of Review

[6] Father does not challenge the factual findings of the juvenile court or its conclusions thereon.<sup>4</sup> He argues solely that his procedural due process right to fair proceedings and his substantive due process right to raise his children were violated in this termination proceeding. He concedes, however, that he did not raise his due process claims in the juvenile court. *See* Brief of Appellant at 15.

[7] Generally, an argument cannot be presented for the first time on appeal. *Matter of D.H.*, 119 N.E.3d 578, 586 (Ind. Ct. App. 2019), *trans. denied*. However, parents' constitutionally protected right to establish a home and raise their

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<sup>4</sup> Unchallenged findings stand as proven. *Matter of De.B.*, 144 N.E.3d 763, 772 (Ind. Ct. App. 2020). And the juvenile court's findings here support its judgment that DCS proved by clear and convincing evidence that termination was appropriate.

children “mandates that the failure of a trial court to require compliance with any condition precedent to the termination of this right constitutes fundamental error which this court must address sua sponte.” *S.B. v. Morgan Cnty. Dep’t of Pub. Welfare*, 616 N.E.2d 406, 407 (Ind. Ct. App. 1993), *trans. denied*. Therefore, “we have discretion to address [due process] claims, especially when they involve constitutional rights, the violation of which would be fundamental error[,]” *D.H.*, 119 N.E.3d at 586, and we exercise that discretion here.

[8] When the State seeks to terminate parental rights, “it must do so in a manner that meets the requirements of due process.” *In re J.K.*, 30 N.E.3d 695, 699 (Ind. 2015) (quotation omitted). Procedural due process addresses the right to a fair proceeding, and substantive due process involves a parent’s right to raise his or her children. *In re T.W.*, 135 N.E.3d 607, 613 (Ind. Ct. App. 2019), *trans. denied*. The nature of the process due in any proceeding is governed by a balance of three factors: “the private interests affected by the proceeding; the risk of error created by the State’s chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure.” *D.H.*, 119 N.E.3d at 588. We have described those interests in the context of termination proceedings as follows:

The private interest affected by the proceeding is substantial—a parent’s interest in the care, custody, and control of his or her child. And the State’s interest in protecting the welfare of a child is also substantial. Because the State and the parent have substantial interests affected by the proceeding, we focus on the risk of error created by DCS’s actions and the trial court’s actions.

*S.L. v. Ind. Dep't of Child Servs.*, 997 N.E.2d 1114, 1120 (Ind. Ct. App. 2013)  
(internal citations omitted).

## II. Procedural Due Process

[9] Father contends he was denied procedural due process when the fact-finding hearing on the termination petition was not held within the time prescribed by statute. Indiana Code section 31-35-2-6 provides the following time requirements for termination proceedings and the remedy for noncompliance:

(a) [T]he person filing the [termination] petition shall request the court to set the petition for a hearing. Whenever a hearing is requested under this chapter, the court shall:

(1) commence a hearing on the petition not more than ninety (90) days after a petition [for termination] is filed under this chapter; and

(2) complete a hearing on the petition not more than one hundred eight (180) days after a petition is filed under this chapter.

(b) If a hearing is not held within the time set forth in subsection (a), upon filing a motion with the court by a party, the court shall dismiss the petition to terminate the parent-child relationship without prejudice.

[10] DCS filed the petition to terminate Father's rights on March 27, 2020, an initial hearing was held on November 17, 2020, and this case was finally adjudicated on March 15, 2021. There is no dispute that the juvenile court did not commence the hearing within ninety days or complete it within 180 days after

the petition for termination was filed. However, for several reasons, we conclude this did not violate Father’s right to a fair proceeding.

[11] First, on March 23, 2020 – prior to the termination petition being filed in this case – the Indiana Supreme Court issued an order in response to the COVID-19 public health emergency in Indiana that tolled “all laws, rules, and procedures setting time limits [in] juvenile proceedings” through April 6, 2020. *In the Matter of Admin. Rule 17 Emergency Relief for Ind. Trial Cts. Relating to the 2019 Novel Coronavirus (COVID-19)*, 141 N.E.3d 389, 390 (Ind. 2020). This order was extended multiple times, ultimately tolling time limits through August 14, 2020. *In the Matter of Admin. Rule 17 Emergency Relief for Ind. Trial Cts. Relating to the 2019 Novel Coronavirus (COVID-19)*, 145 N.E.3d 787, 787 (Ind. 2020). Father did not acknowledge these orders in his brief,<sup>5</sup> but pursuant to the Supreme Court orders that were already in place when the termination petition was filed, the time requirements of Indiana Code section 31-35-2-6 did not begin to run in this case until August 14, 2020.

[12] Second, although Father is correct that the hearing on the petition for termination did not commence within ninety days, he waived any objection to

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<sup>5</sup> For instance, Father calculates the time from when the petition for termination was filed until the initial hearing was held on November 17, 2020 as 235 days, which does not take into account the period during which the time limit was tolled by the Supreme Court’s order. *See* Br. of Appellant at 6. Thus, Father’s premise for calculating days is faulty.



the untimely commencement.<sup>6</sup> Ninety days after August 14, 2020, was Thursday, November 12, 2020. The initial hearing in the case was held on November 17, 2020 and the fact-finding hearing began (and ended) on March 15, 2021. Therefore, whether the “hearing” referred to in Indiana Code section 31-35-2-6(a)(1) is an initial hearing or the fact-finding hearing, the hearing commenced more than ninety days after August 14, 2020. Father notes that Indiana Code section 31-35-2-6(b) sets forth the “specific enforcement mechanism” of dismissal for noncompliance with the time limits set forth in subsection (a). Br. of Appellant at 18 (citing *Matter of N.C.*, 83 N.E.3d 1265, 1268 (Ind. Ct. App. 2017)). However, subsection (b) also imposes an affirmative duty on a party to file a motion to dismiss when one is warranted. See Ind. Code § 31-35-2-6(b) (stating that “upon filing a motion with the court by a party, the court shall dismiss the petition to terminate” if the hearing is not held within the stated time) (emphasis added); see also *Matter of N.C.*, 83 N.E.3d at 1267 (noting the “plain language” of subsection (b) “contemplates the filing of a motion with the court”). Subsection (b) is not self-executing and Father acknowledges that he did not file a motion to dismiss. See Br. of Appellant at 19-20. Therefore, he has waived any objection to the late commencement of the hearing. Further, Father has not demonstrated that DCS and the juvenile court’s non-compliance with Indiana Code section 31-35-2-6(a)(1) created a risk

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<sup>6</sup> Father does briefly mention that the hearing was not commenced within ninety days, and we will discuss that issue although the bulk of Father’s argument concerns failure to complete the hearing within 180 days.

of error that prejudiced him or substantially affected his rights. *See S.L.*, 997 N.E.2d at 1120.

[13] Third, turning to the time for completing the hearing, the juvenile court set the fact-finding hearing for several days, scheduled to end by February 9, 2021. Indiana Code section 31-35-2-6(a)(2) allows 180 days from the filing of the petition to conclude a hearing in a termination case, and counting from August 14, 2020, the statute required this case to be completed by February 10, 2021. Therefore, had the hearing been held as scheduled, it would have been completed within the statutory timeframe.

[14] But the hearing was not completed as scheduled because Father filed a motion to continue the hearing. In early January 2021, Father was hospitalized for an overdose, underwent several surgeries, and was left partially paralyzed. He filed a motion to continue the February fact-finding hearing because these circumstances left him unable to confer with his attorney in order to prepare for the hearing. The juvenile court held a hearing on the motion and over the objection of DCS, granted the continuance and reset the fact-finding hearing. In *Matter of M.S.*, our supreme court held that when good cause is shown, the juvenile court had discretion to grant a continuance pushing completion of the hearing past the statutory time limitation without risking mandatory dismissal.

140 N.E.3d 279, 281 (Ind. 2020).<sup>7</sup> Here, Father showed good cause when requesting additional time to consult with his attorney and the juvenile court did not abuse its discretion in granting the continuance and completing the fact-finding hearing more than 180 days after the petition for termination was filed. Further, even if the juvenile court had abused its discretion in continuing the fact-finding hearing, the error was invited by Father’s own motion to continue the hearing. Having not only acquiesced in but affirmatively requested a hearing outside the statutory time limit, Father cannot take advantage of the fact the hearing was completed after the 180-day limitation. *Cf. In re J.C.*, 142 N.E.3d 427, 432 (Ind. 2020) (holding where mother affirmatively waived the 180-day requirement, she could not later successfully invoke it as a basis for reversal).

[15] For the reasons stated above, DCS and the juvenile court did not deny Father a fundamentally fair proceeding and his procedural due process claim fails.

### III. Substantive Due Process

[16] Father also argues his substantive due process rights were violated when DCS did not make reasonable efforts to reunify the family. Specifically, Father asserts that the failure to make a referral for home-based casework prevented

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<sup>7</sup> *Matter of M.S.* was decided in the context of a CHINS fact-finding hearing governed by a CHINS statute that has similar time limitations and the same remedy for non-compliance. *See* Ind. Code § 31-34-11-1. In *Matter of J.C.*, 142 N.E.3d 427, 431 (Ind. 2020), our supreme court stated that given the CHINS and TPR statutes’ similarity, “opinions decided under one statute should inform a court when applying the other[.]”

him from accessing the parenting curriculum that was recommended or addressing other basic needs that acted as a barrier to reunification. Because a parent has a substantive due process right to raise their children, DCS “must have made reasonable efforts to preserve and/or reunify the family unit in the CHINS case[.]” *In re T.W.*, 135 N.E.3d at 615. “What constitutes ‘reasonable efforts’ will vary by case, and . . . it does not necessarily always mean that services must be provided to the parents.” *Id.*

[17] The FCM testified that DCS did provide Father with services. He was offered visitation, of which he rarely availed himself, last visiting with the Children in May 2020. The visit supervisor had to intervene in each of the last two visits because Father was being disruptive. He was referred to individual and group therapies as recommended by a substance abuse assessment, in which Father did not participate. He was referred for a medication evaluation but did not follow through. Moreover, he did not maintain contact with DCS such that it could facilitate services. It is true, as Father alleges, that the parenting curriculum that was recommended for him would have been provided through home-based casework. However, the FCM testified that because Father was not compliant with the other services offered to him and because Father did not have a stable home in which to engage in home-based casework, that particular service was not offered to him. If he had participated in other services, found a stable home, and maintained contact with DCS, DCS “eventually could’ve moved onto [sic] to home-based services.” *Tr.*, Vol. 2 at 67. In other words,

Father needed to lay the foundation upon which additional services could be added, and he failed to do so.

[18] “[T]he 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). Further, “a parent may not sit idly by without asserting a need or desire for services and then successfully argue that he was denied services to assist him with his parenting.” *In re B.D.J.*, 728 N.E.2d 195, 201 (Ind. Ct. App. 2000). The underlying reason DCS was unable to provide Father with home-based services was his own conduct, not any dereliction of duty by DCS. Thus, we find no violation of Father’s substantive due process rights as a result of DCS’s actions.

## Conclusion

[19] Father has not established a violation of his due process rights and has not independently challenged the juvenile court’s order as clearly erroneous; therefore, the juvenile court’s order is affirmed.

[20] Affirmed.

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