MEMORANDUM DECISION

ATTORNEY FOR APPELLANT TY. A.

David W. Stone IV
Anderson, Indiana

ATTORNEY FOR APPELLANT D.C.

Dorothy Ferguson
Anderson, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Abigail R. Recker
Robert J. Henke
Deputy Attorneys General

Marjorie Lawyer-Smith
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

In the Involuntary Termination of the Parent-Child Relationship of: T.A. (Minor Child), and Ty.A. (Mother) and D.C. (Alleged Father),

Appellants-Respondents,

v.

Indiana Department of Child Services,

Appellee-Plaintiff.

October 28, 2022

Court of Appeals Case No. 22A-JT-882

Appeal from the Madison Circuit Court

The Honorable Stephen Koester, Judge

Trial Court Cause No. 48C02-2105-JT-85

Brown, Judge.

[1] D.C. ("Father") and Ty.A. ("Mother" and collectively "Parents") appeal the involuntary termination of their parental rights with respect to their child, T.A. We affirm.

Facts and Procedural History

[2] On January 7, 2020, T.A. was born to Mother and Father. On January 9, 2020, the Department of Child Services ("DCS") filed a child in need of services ("CHINS") petition under cause number 48C02-2001-JC-6 ("Cause No. 6"), stating T.A.'s father was unknown and alleging T.A. was a CHINS due to neglect and being born with a controlled substance or legend drug in his body. On January 10, 2020, Mother admitted to the allegations in the petition, and the court determined T.A. to be a CHINS. On January 14, 2020, the court issued an Order on Initial/Detention Hearing accepting DCS's recommendations for placement, services, and programs for T.A. and stating that "Father's initial hearing is scheduled for 2-5-20 at 9:45 a.m." Father's Appellant's Appendix Volume II at 81. On February 5, 2020, the court issued a dispositional order containing a treatment plan for Mother and distributed the order to an alleged father other than Father.

[3] On February 20, 2021, the trial court approved a request for a summons by publication "on [D.C.] (Alleged Father) and Unknown Unknown (Alleged Father) and on 'Alleged Unknown Father' with respect to the Verified Petition Alleging Child in Need of Services filed herein." *Id.* at 73. On March 15, 2021, summons by publication appeared in the Anderson Herald Bulletin naming

Father, noting his "whereabouts are unknown," and commanding him to appear "for an Initial Hearing on 4/22/2021 . . . and Fact-Finding Hearing on 4/22/2021," and upon entry of that adjudication, "[a] dispositional hearing will be held . . . ." *Id.* at 72. On April 22, 2021, the court issued an Order on Initial Hearing, stating that "Alleged and Unknown Father's [sic] fail[ed] to appear," and "Court [d]efaults alleged Father." *Id.* at 71.

[4] On May 7, 2021, under cause number 48C02-2105-JT-85 ("Cause No. 85"), DCS issued a verified petition for termination, and the court issued a Praecipe for Summons by Publication. On May 9, 2021, the court issued an Order for Summons by Publication, authorizing notice by publication, stating that Father's whereabouts were unknown and commanding him to appear at a July 22, 2021 hearing. On May 19, 2021, under Cause No. 6, the court issued a dispositional order directing Father, in part, to stay in contact with the assigned caseworker, keep all required appointments, secure and maintain a stable income, establish paternity, and engage in supervised visitation.

[5] On July 22, 2021, at an initial and fact-finding hearing, Family Case Manager Amanda Ford ("FCM Ford") testified that she had worked with T.A. since the opening of his case and his removal in January of 2020, and that a recent DNA swab and test of Father "came out [] 99.99 percent that he is the father." Transcript Volume I at 35.

[6] On September 21, 2021, the court continued the fact-finding hearing, and Father's attorney stated that she had not had contact with Father, she could not

contact him by phone, and she had last had contact with him "a month or two ago" when "he had indicated . . . he would like to get his daughter placement of [T.A.] and possibly have her adopt but [she had not] heard anything from him since then." *Id.* at 40-41. Father was present and testified that he did not know T.A.'s birthdate, he had been diagnosed with colon cancer, he was "facing a charge . . . for . . . possession of cocaine" and had pled guilty, and he believed having T.A. in his and his family's care was in T.A.'s best interest. *Id.* at 47. He testified that he had met with a court-appointed special advocate and a case manager on August 12, 2021. He supported his adult daughter filing for guardianship of T.A.

[7] Mother testified that T.A. was born "drug exposed," she had her rights terminated with other children, she had consistently visited with T.A., and she did not believe "that right now would be the best for him to be in [her] care but I do think that [T.A.] should be with his family." *Id.* at 59, 65.

[8] FCM Ford testified regarding Mother's lack of compliance with services and continued positive screens. She also testified regarding Father's failure to maintain weekly contact with DCS, his failure to regularly visit T.A., and DCS's efforts to meet with Father.

[9] On January 24, 2022, the court continued the termination hearing, at which court-appointed special advocate Sara Reichart ("CASA Reichart") recommended termination of parental rights because of Mother's instability and because Father "has not been involved for quite a long time and . . . [she] does

not feel that he is . . . capable of playing the . . . parental role as [T.A.] needs." *Id.* at 124.

[10] Father testified that no one at DCS reached out to him to recommend or refer him for services, he did not have income but lived "through his mom," he believed in his ability to care for T.A., and when asked if he would rely on his daughters or other family members to care for T.A., he stated "[w]ell everybody, trust me everybody gonna be involved in that[.]" *Id.* at 141.

[11] Mother testified that she "completed Aspire, and [she] also went to rehab after that" through a separate program. *Id.* at 149. The court admitted the certificate of completion of her program at Aspire. She testified that at the Hickory Treatment Facility she completed a parent skills course, an anger management course, and a recovery course, and the court admitted the certificates of completion. She stated that she has a job and lives in a home that she owns.

[12] On March 24, 2022, the court terminated the parental rights of Parents with respect to T.A. In its order, the court found that Mother failed to comply with several of its dispositional orders and she continued to use illegal substances as recently as December 8, 2021. It found Father's testimony not to be credible, he had stated that his intent was not to bring about the child's reunification with him but instead to allow his adult daughters to have custody of T.A., Father had a history of substance abuse, and Father was not in regular contact with DCS despite participating in a child and family team meeting in August 2021. It found there was a reasonable probability that the conditions that resulted in

the child's removal or the continued placement outside the home would not be remedied, continuation of the parent-child relationship posed a threat to the well-being of the child, and termination of Parents' parental rights was in the child's best interest.

Discussion

I.

[13] The first issue is whether Father was denied due process. Father claims that he was not "provided an initial or fact-finding hearing in the underlying child in need of services action" and that he did not receive notice of the fact-finding or dispositional hearing in the CHINS proceeding. Father's Appellant's Brief at 12. He alleges that he did not receive a fact-finding hearing under Cause No. 85, that he did not receive notice of the dispositional hearing on May 19, 2021, and that "DCS did not ever add him to [the] Petition Alleging Child In Need of Services." *Id.* at 6, 8. He alleges that DCS did not use reasonable efforts to remedy the underlying issues in the case, and "[b]ased on the procedural due process violations in the underlying 'CHINS' matter, DCS failed to show by clear and convincing evidence that [his] rights should be terminated." *Id.* at 8. He further asserts that T.A. "was not removed for six months under a dispositional order as it relates to [him]." *Id.*

[14] Parents facing termination proceedings are afforded due process protections. *In re T.W.*, 135 N.E.3d 607, 612 (Ind. Ct. App. 2019), *trans. denied*. CHINS and termination of parental rights proceedings "are deeply and obviously

intertwined to the extent that an error in the former may flow into and infect the latter," and procedural irregularities in a CHINS proceeding may deprive a parent of due process with respect to the termination of his or her parental rights. *Id.* (citing *Matter of D.H.*, 119 N.E.3d 578, 588 (Ind. Ct. App. 2019), *aff'd in relevant part on reh'g*, *trans. denied*). *See also In re J.K.*, 30 N.E.3d 695, 699 (Ind. 2015) (holding "when the State seeks to terminate the parent-child relationship, it must do so in a manner that meets the requirements of due process") (quoting *In re G.P.*, 4 N.E.3d 1158, 1165 (Ind. 2014) (alteration and internal quotation marks omitted)).

[15] With respect to Father's argument that he did not receive notice of the hearings in the CHINS proceeding, we note that Father did not raise this issue before the trial court, and a parent may waive a due process claim in a CHINS or termination proceeding by raising that claim for the first time on appeal. *S.L. v. Ind. Dep't of Child Servs.*, 997 N .E.2d 1114, 1120 (Ind. Ct. App. 2013). Waiver notwithstanding, the record reveals that Father's whereabouts were unknown on February 2, 2021, and DCS requested authorization for summons by publication for Father. The Affidavit of Diligent Inquiry submitted with the Praecipe for Summons by Publication stated that FCM Ford could not locate Father, had no information about a possible address, "[t]he phone number given [did] not return to [Father]," and she could not find Father in other government databases. Father's Appellant's Appendix Volume II at 75. FCM Ford testified that she "got his information but [Mother] only gave [her] . . . a name and a phone number that didn't match . . . ." Transcript Volume I at 78.

She further testified that she spent "a year and a half trying to find where [Father] was" before he came forward. *Id.* at 92. On March 15, 2021, the Anderson Herald Bulletin published summons including the date, time, and location of the CHINS hearing, naming Father, and providing a phone number to contact. We cannot say procedural irregularities occurred that deprived Father of his due process rights.

[16] To the extent Father asserts that he did not receive notice of the dispositional hearing that occurred on May 19, 2021, and for which the court issued an order, we note that Father did not raise this issue before the trial court. Waiver notwithstanding, the court defaulted Father for a failure to appear, and Ind. Trial Rule 5 provides that "[n]o service need be made on parties in default for failure to appear, except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided by service of summons in Rule 4." *See In re C.C.*, 788 N.E.2d 847, 851 (Ind. Ct. App. 2003) ("To require service of subsequent papers, such as hearing notices, to rise to the level of service of process 'would permit a parent or other party entitled to notice to frustrate the process by failing to provide a correct address and would add unnecessarily to the expense and delay in termination proceedings when existing provisions adequately safeguard a parent's due process rights.'" (quoting *In re A.C.*, 770 N.E.2d 947, 950 (Ind. Ct. App. 2002)), *trans. denied*. We cannot say that Father has shown he was denied due process on this basis.

[17] With respect to Father's claim that he did not receive a fact-finding hearing under Cause No. 85, we note the record reveals that, on May 19, 2021, the

court authorized summons of service by publication and notice of termination hearing for the fact-finding hearing set to occur on July 22, 2021. The Order on Initial Hearing states that Father appeared, and "[t]he Court now sets this matter for a Fact-Finding Hearing on 9/21/2021 . . . ." Father's Appellant's Appendix Volume II at 32. The court then authorized another summons and notice of publication, which notified Father of the fact-finding hearing scheduled for September 21, 2021. Father received notice and appeared with counsel at that hearing, and he or his counsel appeared at the subsequent hearings. Father has not established a violation of his due process rights.

[18] To the extent Father argues that the dispositional order had to be filed six months before the petition to terminate his parental rights, we note that Ind. Code § 31-35-2-4(b)(2) is written in the disjunctive and provides in part that the petition must allege that the child "has been removed from the parent for at least six (6) months under a dispositional decree," "[a] court has entered a finding under IC 31-34-21-5.6 that reasonable efforts for family preservation or reunification are not required," or that the child has been removed from the parent and been under supervision for at least fifteen months of the most recent twenty-two months. T.A. was removed January 10, 2020, and he has never since been placed in either Parent's care. We cannot say that the trial court erred or that DCS's compliance with the statute amounted to a procedural irregularity that violated Father's due process rights. *See In re. B.J.*, 879 N.E.2d 7, 20 (Ind. Ct. App. 2008) (Ind. Code § 31-35-2-4(b)(2)(A) is written in the

disjunctive and thus DCS need only prove one of the enumerated elements), *trans. denied*.

[19] With respect to Father's assertion that DCS did not make reasonable efforts to reunify him with T.A. because it "did not make referral for services for [him] until close to six months after the filing of the termination petition," Father's Appellant's Brief at 12, and visits did not begin with Father until after the termination hearing, we note the following:

> [A]lthough "DCS is generally required to make reasonable efforts to preserve and reunify families during the CHINS proceedings," that requirement under our CHINS statutes "is not a requisite element of our parental rights termination statute, and a failure to provide services does not serve as a basis on which to directly attack a termination order as contrary to law." *[S]ee also Elkins v. Marion Cnty. Off. of Fam. & Child. (In re E.E.)*, 736 N.E.2d 791, 796 (Ind. Ct. App. 2000) ("even a complete failure to provide services would not serve to negate a necessary element of the termination statute and require reversal."); *Stone v. Daviess Cnty. Div. of Child. & Fam. Servs.*, 656 N.E.2d 824, 830 (Ind. Ct. App. 1995) ("under Indiana law, even a complete failure to provide services cannot serve as a basis to attack the termination of parental rights."), *trans. denied*.

In re J.W., Jr., 27 N.E.3d 1185, 1190 (Ind. Ct. App. 2015) (citations omitted). In light of the record, we cannot say that DCS did not make reasonable efforts or that DCS's efforts violated Father's due process rights.

II.

[20] The next issue is whether the trial court erred in terminating Parents' parental rights. Father argues there is no evidence that continuation of the relationship poses a threat to T.A. Mother claims that the court made improper findings, termination is not supported by the evidence and the findings, the finding that she continued to use marijuana does not form a sufficient basis to terminate the relationship, tests for marijuana usage can detect marijuana in the system for up to thirty days, concerns about her drug usage affecting T.A. while pregnant would not recur, "DCS failed to show . . . that the circumstances which caused the removal of the child still existed or posed a risk to t[h]e well being of the child," and it failed to show that she "was either unable or unwilling to fulfill her role as mother of the child at the time of the hearing." Mother's Appellant's Brief at 17.

[21] In order to terminate a parent-child relationship, DCS is required to allege and prove, among other things:

> (B) that one (1) of the following is true:
>
> > (i) There is a reasonable probability that the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied.
> >
> > (ii) There is a reasonable probability that the continuation of the parent-child relationship poses a threat to the well-being of the child.
> >
> > (iii) The child has, on two (2) separate occasions, been adjudicated a child in need of services;

(C) that termination is in the best interests of the child; and

(D) that there is a satisfactory plan for the care and treatment of the child.

Ind. Code § 31-35-2-4(b)(2). If the court finds that the allegations in a petition described in Ind. Code § 31-35-2-4 are true, the court shall terminate the parent-child relationship. Ind. Code § 31-35-2-8(a).

[22] A finding in a proceeding to terminate parental rights must be based upon clear and convincing evidence. Ind. Code § 31-37-14-2. We do not reweigh the evidence or determine the credibility of witnesses but consider only the evidence that supports the judgment and the reasonable inferences to be drawn from the evidence. *In re E.M.*, 4 N.E.3d 636, 642 (Ind. 2014). We confine our review to two steps: whether the evidence clearly and convincingly supports the findings, and then whether the findings clearly and convincingly support the judgment. *Id.* We give due regard to the trial court's opportunity to judge the credibility of the witnesses firsthand. *Id.* "Because a case that seems close on a 'dry record' may have been much more clear-cut in person, we must be careful not to substitute our judgment for the trial court when reviewing the sufficiency of the evidence." *Id*. at 640.

[23] In determining whether the conditions that resulted in a child's removal will not be remedied, we engage in a two-step analysis. *See id.* at 642-643. First, we identify the conditions that led to removal, and second, we determine whether there is a reasonable probability that those conditions will not be remedied. *Id.*

at 643. In the second step, the trial court must judge a parent's fitness as of the time of the termination proceeding, taking into consideration evidence of changed conditions, balancing a parent's recent improvements against habitual patterns of conduct to determine whether there is a substantial probability of future neglect or deprivation. *Id.* We entrust that delicate balance to the trial court, which has discretion to weigh a parent's prior history more heavily than efforts made only shortly before termination. *Id.* Requiring trial courts to give due regard to changed conditions does not preclude them from finding that a parent's past behavior is the best predictor of future behavior. *Id.* The statute does not simply focus on the initial basis for a child's removal for purposes of determining whether a parent's rights should be terminated, but also those bases resulting in the continued placement outside the home. *In re N.Q.*, 996 N.E.2d 385, 392 (Ind. Ct. App. 2013). A court may consider evidence of a parent's drug abuse, history of neglect, failure to provide support, lack of adequate housing and employment, and the services offered by DCS and the parent's response to those services. *Id.* Where there are only temporary improvements and the pattern of conduct shows no overall progress, the court might reasonably find that under the circumstances the problematic situation will not improve. *Id.*

[24] While the involuntary termination statute is written in the disjunctive and requires proof of only one of the circumstances listed in Ind. Code § 31-35-2-4(b)(2)(B), we note the trial court found that the conditions that led to T.A.'s removal would not be remedied and that the continuation of the parent-child

relationship posed a threat to T.A.'s well-being. "Clear and convincing evidence need not reveal that 'the continued custody of the parents is wholly inadequate for the child's very survival.'" *In re G.Y.*, 904 N.E.2d 1257, 1261 (Ind. 2009) (quoting *Bester v. Lake Cnty. Office of Family & Children*, 839 N.E.2d 143, 148 (Ind. 2005) (quoting *Egly v. Blackford Cnty. Dep't of Pub. Welfare*, 592 N.E.2d 1232, 1233 (Ind. 1992))), *reh'g denied*. "Rather, it is sufficient to show by clear and convincing evidence that 'the child's emotional and physical development are threatened' by the respondent parent's custody." *Id.* (quoting *Bester*, 839 N.E.2d at 148 (quoting *Egly*, 592 N.E.2d at 1234)).

[25] To the extent Father and Mother do not challenge the court's findings of fact, the unchallenged facts stand as proven. *See In re B.R.*, 875 N.E.2d 369, 373 (Ind. Ct. App. 2007) (failure to challenge findings by the trial court resulted in waiver of the argument that the findings were clearly erroneous), *trans. denied*.

[26] During her testimony, FCM Ford stated that she did not believe Mother was abstaining from use of illegal substances and Mother continued to have some positive screens when she started regular drug screening at the end of 2020, she did not complete a substance use or parenting assessment, she was not compliant with home-based case work, and "she was closed out of her recovery coach." Transcript Volume I at 74. In response to the question if "there [is] a reasonable probability that the conditions which lead to the removal of [T.A.] would be remedied by parents," she stated that she did not believe so because "[Father] really doesn't have any intention of getting the child," and Mother continued to use illegal substances. *Id.* at 78. CASA Reichart testified that she

felt Father was incapable of playing the parental role. With respect to Mother, she stated "there is too much instability . . . to provide [T.A.] the stability that he needs . . . ." *Id.* at 124. Father agreed with the statement that, at the time of the September 21, 2021 hearing, he was facing a charge for possession of cocaine. The trial court found that "[b]oth Mother and Father have failed to take responsibility for overcoming their parenting deficits so that [T.A.] could be reunified with one of them," and "Mother has continued to use illegal substances, including [c]ocaine and [m]arijuana, as recently as December 8, 2021, well after her successful completion of outpatient treatment at Aspire and inpatient treatment at Hickory." Father's Appellant's Appendix Volume II at 10-11.

[27] We conclude that clear and convincing evidence supports the trial court's determinations that there is a reasonable probability that continuation of the parent-child relationships pose a threat to T.A.'s well-being and that there is a reasonable probability that the conditions that resulted in T.A.'s removal will not be remedied.

[28] In determining what is in the best interests of a child, the trial court is required to look beyond the factors identified by DCS and to the totality of the evidence. *McBride v. Monroe Cnty. Off. of Fam. & Child.*, 798 N.E.2d 185, 203 (Ind. Ct. App. 2003). In so doing, the court must subordinate the interests of the parent to those of the children. *Id.* Children have a paramount need for permanency which the Indiana Supreme Court has called a central consideration in determining the child's best interests, and the Court has stated

that children cannot wait indefinitely for their parents to work toward preservation or reunification, and courts need not wait until the child is irreversibly harmed such that the child's physical, mental, and social development is permanently impaired before terminating the parent-child relationship. *In re E.M.*, 4 N.E.3d at 647-648. However, focusing on permanency, standing alone, would impermissibly invert the best-interests inquiry. *Id.* at 648. Recommendations by both the case manager and child advocate to terminate parental rights, in addition to evidence that the conditions resulting in removal will not be remedied, is sufficient to show by clear and convincing evidence that termination is in the child's best interests. *A.D.S. v. Ind. Dep't of Child Servs.*, 987 N.E.2d 1150, 1158-1159 (Ind. Ct. App. 2013), *trans. denied*.

[29] FCM Ford testified that termination of parental rights was in T.A.'s best interest. CASA Reichart stated that she believed it was in T.A.'s best interest for parental rights to be terminated and that he should be adopted. Based on the testimony, as well as the totality of the evidence in the record and set forth in the trial court's termination order, we conclude that the court's determination that termination is in the best interests of T.A. is supported by clear and convincing evidence.

[30] For the foregoing reasons, we affirm the trial court.

[31] Affirmed.

Altice, J., and Tavitas, J., concur.