

MEMORANDUM DECISION

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ATTORNEY FOR APPELLANT

Lisa M. Johnson
Brownsburg, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Natalie F. Weiss
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

In the Matter of the Termination
of the Parent-Child Relationship
of J.S., Mother and W.S., Minor
Child,

J.S.,

Appellant-Respondent,

v.

Indiana Department of Child
Services,

Appellee-Petitioner.

December 7, 2023

Court of Appeals Case No.
23A-JT-1289

Appeal from the
Vigo Circuit Court

The Honorable
Daniel W. Kelly, Magistrate

Trial Court Cause No.
84C01-2209-JT-947

Memorandum Decision by Judge Foley
Judges Pyle and Tavitias concur.

Foley, Judge.

[1] J.S. (“Mother”) appeals the involuntary termination of her parental rights to W.S (“Child”).¹ Mother raises the following restated issue for our review: Whether the trial court violated her procedural due process rights when Child was initially removed from Mother’s care in connection with the underlying Child in Need of Services (“CHINS”) proceedings.

[2] We affirm.

Facts and Procedural History

[3] On November 27, 2021, Mother “tested positive for methamphetamine and cannabinoids[,]” and gave birth to Child, who “tested positive for methamphetamine and THC.” Ex. Vol. 3 p. 5. Shortly thereafter, Child was taken to the NICU due to respiratory distress and an infection. The Indiana Department of Child Services (“DCS”) received a report stating that Mother had little prenatal care throughout the pregnancy and admitted to using methamphetamine prior to delivering Child. While Child was in the NICU, Mother “only visited him once per day despite remaining in the hospital maternity ward one floor above [Child].” *Id.* Child was later diagnosed with truncus arteriosus (Edwards type II) which required an open-heart surgery to

¹ Mother has another child, M.S. (“Child’s older half-brother”). Mother’s parental rights as to Child’s older half-brother were involuntary terminated in another termination proceeding, and that termination is not the subject of this appeal.

repair the defect. Child was transferred to Riley Children’s Hospital to undergo surgery. When DCS tried to arrange a meeting to observe Mother’s home, Mother did not cooperate.

[4] In its preliminary inquiry prepared on December 12, 2021, DCS recommended filing a CHINS petition and sought an out-of-home placement for Child because:

. . . [Mother] has been noncompliant with all services through the open CHINS case. She has continued to abuse illegal substances in addition to being noncompliant with intervening services and is thus unable to care for a newborn with significant medical needs.

. . . .

In-home services are not appropriate given [Mother’s] level of impairment, ongoing lack of compliance with DCS and DCS services, and [Child’s] fragility as a medically unstable newborn.

. . . .

[Mother] has not demonstrated sufficient knowledge or ability to care for a young child through this assessment or the ongoing CHINS case for her other son. [Mother] has been noncompliant with all services through the open CHINS case, including ongoing abuse of illegal substances, and she has had a notable lack of care for [Child] throughout her pregnancy and his hospitalization. [Mother] will likely continue to be unable to provide for [Child’s] care given consistent impairment by methamphetamine and refusal to engage in supportive services to assist her in achieving sobriety and parenting competency.

Id. at 32.

[5] Subsequently, DCS filed a CHINS petition alleging that Child’s physical or mental health was seriously impaired as a result of Mother’s neglect, Child was born with a controlled substance in his body, and Child was at continued risk of injury arising from Mother’s drug use. DCS also requested a detention hearing to remove Child from Mother’s care. The trial court held a detention hearing regarding the removal of Child from Mother’s care. However, Mother failed to personally attend the hearing. The trial court found that:

. . . [I]t is in the best interests of the child to be removed from the home environment and remaining in the home would be contrary to the welfare of the child because: [Child] has special needs that require services for care and treatment that cannot be provided in the home.

. . . [R]easonable efforts to prevent or eliminate removal of the child was not required due to the emergency nature of the situation, as follows: Mother and [Child] screened positive for methamphetamine at delivery/birth. [Child] has a congenital defect that may require surgery to repair.

Id. at 41. Based “on the finding of probable cause, the allegations in the petition, and the Report of Preliminary Inquiry[,]” the trial court granted DCS’s request to remove Child from Mother’s care on December 9, 2021, because removal was: (1) authorized under statute; (2) necessary to protect Child; and (3) in the best interest of Child. *See id.*

[6] On February 2, 2022, the trial court held a fact-finding hearing regarding DCS’s CHINS petition and Mother failed to personally attend. The trial court adjudicated Child a CHINS. Eventually, DCS petitioned to terminate Mother’s parental rights. The trial court held a fact-finding hearing on April 24, 2023, and ultimately granted DCS’s petition. Mother now appeals.²

Discussion and Decision

[7] In appealing the termination of her parental rights, Mother does not challenge the trial court’s findings of fact nor its conclusions, thus she appears to concede that sufficient evidence supports the termination order. Mother instead claims that she was deprived of “due process” warranting reversal of the termination order because “the initial removal of [Child] was done in violation of [her] procedural due process rights” and that violation tainted the ensuing termination proceedings. Appellant’s Br. p. 4. Specifically, Mother argues that drug use during her pregnancy with Child did not warrant his initial removal without “additional evidence that [she] was unable or unwilling to meet [Child’s] needs.” *Id.* at 10.

[8] A party generally waives on appeal an issue that was not raised before the trial court. *See, e.g., Plank v. Cmty. Hosp. of Ind., Inc.*, 981 N.E.2d 49, 53 (Ind. 2013). However, this court has discretion to address such claims, especially when they involve constitutional rights, the violation of which would be fundamental

² Child’s father is deceased.

error. *Id.* at 53–54; *see also, e.g., Parent-Child Relationship of L.B. & S.B. v. Morgan Cnty. Dep't of Pub. Welfare*, 616 N.E.2d 406, 407 (Ind. Ct. App. 1993) (citations omitted) (“The constitutionally protected right of parents to establish a home and raise their 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[.]”), *trans. denied*. Here, Mother’s substantive due process right to raise her children and her procedural due process right to fair proceedings are at issue; therefore, we exercise our discretion to review Mother’s due process claim even though it was not raised below. *Plank*, 981 N.E.2d at 53–54; *see also Pierce v. State*, 29 N.E.3d 1258, 1267 (Ind. 2015) (quotation and citation omitted) (“[W]henever possible, we prefer to resolve cases on the merits. . .”).

[9] 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). The nature of the process due in proceedings to terminate parental rights is governed by a balancing of the 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. *In re T.W.*, 135 N.E.3d 607, 613 (Ind. Ct. App. 2019), *trans. denied*. The private interest affected by the proceeding—a parent’s interest in the care, custody, and control of his or her child—is substantial, and the State’s interest in protecting the welfare of a child is also substantial. *Id.* Therefore, we focus on the risk of error created by DCS’s actions and the trial court’s actions. *See id.*

[10] Mother asserts that DCS’s request for Child’s removal from Mother’s care and the trial court’s grant of DCS’s request the same day the request was filed was in violation of her procedural due process rights because “[p]renatal drug use, standing alone, does not show probable cause that a child needs services or that removal is necessary to protect the child.” Appellant’s Reply Br. p. 4. Furthermore, Mother claims that there was no evidence that “Mother abused or neglected [Child] in any way during the eleven days between his birth and the removal.” Appellant’s Br. p. 11. We disagree.

[11] The trial court granted DCS’s request to remove Child—pursuant to Indiana Code sections “31-34-2 or 2.5”³—because: (1) Mother and Child tested positive for methamphetamine upon delivery of Child; (2) Child has special needs that require services for care and treatment that could not be provided in the home; and (3) Child had a congenital defect that may require surgery to repair.⁴ See Ex. Vol. 3 p. 41. The record indicates that Mother jeopardized Child’s wellbeing by abusing substances during her pregnancy. Child was born neglected in that he tested positive for both methamphetamine and THC and had to be moved to the NICU for respiratory distress and an infection. While Child was in the NICU, Mother visited him only once per day despite the fact

³ Indiana Code section 31-34-2-1 provides: “A child may be taken into custody by law enforcement under an order of the court.” In addition, Indiana Code section 31-34-2.5-1(a)(1) provides: “An emergency medical services provider . . . shall, without a court order, take custody of a child who is, or who appears to be, not more than thirty (30) days of age if . . . the child is voluntarily left . . . with the provider by the child’s parent.”

⁴ Child was later transferred to Riley Children’s Hospital due to his truncus arteriosus (Edwards type II) diagnosis. See Appellant’s App. Vol. 2 p. 71.

that she was still admitted to the maternity ward located a floor above the NICU. When DCS tried to arrange a meeting to observe Mother's home, Mother did not cooperate. At the same time, Mother had an ongoing CHINS case regarding Child's older half-brother wherein Mother refused drug screening on multiple occasions and was "wholly noncompliant with all services" required for reunification with Child's older half-brother. *See Ex. Vol. 3 pp. 27–28.*

[12] As a result, DCS filed a CHINS petition and requested that Child be removed from Mother's care. The trial court held a detention hearing regarding the removal of Child from Mother's care, but Mother failed to personally attend the hearing. DCS presented evidence demonstrating Mother's abuse and neglect of Child (drug use during pregnancy, Child's positive drug screen for two substances, Mother's insufficient visits while Child was in the NICU, and Mother's failure to cooperate with DCS) during the primitive stage of his life and recommended that Child be removed from Mother's care. The trial court—without any evidence to the contrary—granted DCS's request. *See In re R.S.*, 987 N.E.2d 155, 159 (Ind. Ct. App. 2013) (noting that the trial court should consider the parents' situation at the time the case is heard by the court). Mother has failed to demonstrate how DCS's request for Child's removal and the trial court's grant of DCS's request violated her procedural due process rights.

[13] Based on the foregoing, we conclude that Mother's procedural due process rights were not violated when Child was initially removed from her care. Thus, Mother has not identified grounds to support reversing the termination order.

[14] Affirmed.

Pyle, J, and Tavitas, J., concur.