

## MEMORANDUM DECISION

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IN THE  
**Court of Appeals of Indiana**

In the Termination of the Parent-Child Relationship of:

A.H. and L.S. (Minor Children),

and

C.S. (Mother),

*Appellant-Respondent,*

v.

Indiana Department of Child Services,

*Appellee-Petitioner,*

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February 27, 2024

Court of Appeals Case No.

23A-JT-1723

Appeal from the Marion County Superior Court

The Honorable Alicia Gooden, Judge

Trial Court Cause Nos.

**Memorandum Decision by Judge Bradford**  
Chief Judge Altice and Judge Felix concur.

**Bradford, Judge.**

## Case Summary

[1] C.S. (“Mother”) is the biological mother to two minors, L.S. and A.H. (“the Children”).<sup>1</sup> The Department of Child Services (“DCS”) petitioned the juvenile court to adjudicate the Children to be children in need of services (“CHINS”) based on Mother’s substance-abuse issues, home conditions, and prior CHINS cases. Eventually, DCS successfully sought to terminate Mother’s parental rights based on Mother’s failure to complete services, her substance-abuse issues, and home instability. Mother challenges the termination, arguing that (1) her due-process rights were violated when the termination hearing proceeded in her absence; (2) she received ineffective assistance of counsel; and (3) the evidence fails to show that the conditions that led to the Children’s removal will not be remedied, the continuation of the parent-child relationship threatens the Children’s well-being, and that termination is in the Children’s best interests. We affirm.

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<sup>1</sup> The Children’s biological fathers do not participate in this appeal.

## Facts and Procedural History

- [2] In September of 2021, DCS petitioned the juvenile court to find the Children to be CHINS based on Mother's substance abuse and housing instability. That same day, the juvenile court ordered the Children removed from Mother's home. On November 5, 2021, the juvenile court held a fact-finding hearing that Mother failed to attend, after which it found the Children to be CHINS. The juvenile court placed the Children in the care of their maternal grandmother ("Grandmother") due to Mother's housing instability and substance-abuse issues. The juvenile court further ordered DCS to provide Mother with certain services after Mother attended a review hearing on January 21, 2022.
- [3] In February and March of 2022, Therapist Nikki Rogers supervised Mother's visits with the Children. These visits were the first time Mother had seen the Children since their removal in September of 2021. During those visits, Mother "exhibit[ed] erratic behavior and the visits were chaotic[,]” which caused the Children to display “negative behaviors” afterwards. Appellant's App. Vol. II p. 35. After these visits, Mother's visits became inconsistent, and she began to cancel or miss visits, which exacerbated the Children's negative behaviors. In April of 2022, the juvenile court suspended Mother's visitation. In October of 2022, Mother had an additional DCS-approved visit to A.H.'s baseball game, during which she “became belligerent” to the point at which the game “had to be suspended until Mother left the premises.” Appellant's App. Vol. II p. 35. Mother even “showed her butt as [...] she was out there screaming and yelling and ranting and raving.” Tr. Vol. II p. 127.

[4] From May of 2022, until February 1, 2023, FCM Christina Petty managed the Children’s case. In May of 2022, FCM Petty attempted to contact Mother several times, including visiting the motel where Mother lived with her boyfriend. In June of 2022, FCM Petty made contact with Mother at the motel and Mother told FCM Petty that if she took a drug screen, it would be positive for heroin, but that she “was going to seek out treatment on her own.” Appellant’s App. Vol. II p. 31. FCM Petty did not hear from Mother again until September of 2022 when Mother “disclosed that she had been incarcerated.” Appellant’s App. Vol. II p. 31.

[5] On September 27, 2022, Jennifer Lee, an intake specialist at Cummins Behavioral Health (one of the service providers referred to Mother by DCS), completed an intake assessment for Mother. During the assessment, Mother “disclosed a history of using cannabis, using heroin daily, and methamphetamine. Mother also disclosed that she was homeless.” Appellant’s App. Vol. II p. 31. After the assessment, Lee determined that Mother met the criteria for generalized anxiety disorder, major depressive disorder, and post-traumatic stress disorder. As a result, Lee recommended that Mother engage in intensive outpatient treatment (“IOT”) to address her substance-abuse issues. From November to January, Mother’s participation was sporadic and then she “just kind of disappeared.” Tr. Vol. II p. 42. On January 12, 2023, Cummins discharged Mother due to her inconsistent engagement, failure to submit to urine drug screens, and failure to respond to Cummins’s outreach efforts.

- [6] DCS also referred Mother to Ireland Home Based Services in December of 2022 for home-based care and therapy. Providers at Ireland made numerous attempts to contact Mother, but “never successfully engaged” her. Appellant’s App. Vol. II p. 33. Due to Mother’s failure to respond, Ireland closed the referral at the end of the month.
- [7] Mother failed to meet multiple requirements imposed by DCS and the juvenile court’s order. Mother never completed a substance-abuse treatment program or home-based therapy. Additionally, Mother failed to engage in consistent drug screening; in fact, she missed 109 calls for screens and had thirty-eight “unforgiven missed tests.” Ex. Vol. p. 172. Despite her inconsistent participation in the required random drug testing, Mother produced several positive screens. Specifically, in April of 2023, Mother tested positive for fentanyl, methamphetamine, amphetamine, and oxymorphone.
- [8] Moreover, Mother has failed to maintain appropriate housing. In the winter of 2022, Mother appeared “to be living in a homeless encampment in the woods[,]” which was “covered in trash and populated with other homeless individuals, including grown men who also appeared to be under the influence.” Appellant’s App. Vol. II pp. 33–34. At the May of 2023 termination hearing, Grandmother testified that she had visited Mother’s house just a few days earlier and the house had “holes in the walls[,]” “drywall missing[,]” “huge rats[,]” “trash everywhere[,]” smelled “like death[,]” and is “[a]bsolutely not” fit for human habitation. Tr. Vol. II p. 122.

- [9] In September of 2021, Rogers began working with the Children and noted that they “were behind academically and socially.” Appellant’s Ap. Vol. II p. 34. The Children “behaved inappropriately in public and did not even know what a library was.” Appellant’s App. Vol. II p. 34. Specifically, A.H., despite her age, was not even enrolled in kindergarten at the time. Rogers testified that the Children’s behavior was “typical of children who have experienced a chaotic home environment and inconsistent or absent parenting from a parent with substance abuse issues.” Appellant’s App. Vol. II p. 34.
- [10] In May of 2023, the juvenile court conducted a termination hearing. Mother failed to appear for the start of the hearing and, one-half hour after the hearing had been scheduled to begin, “indicated to her counsel that she was on her way[.]” Tr. Vol. II p. 4. However, Mother “did not appear.” Tr. Vol. II p. 139. The juvenile court proceeded with the termination hearing in Mother’s absence.
- [11] At the termination hearing, Rogers explained that the Children’s behaviors had improved due “to the stability and structure of” Grandmother’s home. Appellant’s App. Vol. II p. 35. Rogers had also discussed with the Children the possibility of adoption and expressed to the juvenile court her support for the termination of Mother’s parental rights to the Children and adoption by Grandmother. Importantly, the Children had been with Grandmother throughout the CHINS case, Grandmother has participated in services to learn how to parent the Children, and she is prepared to adopt them and provide a stable home.

[12] FCM Logan Grever, who had taken over management of the Children’s case in February of 2021, testified at the termination hearing that termination of Mother’s parental rights and adoption by Grandmother is in the best interests of the Children. FCM Grever further explained that he “believes Mother is unlikely to remedy the reasons for the [C]hildren’s removal from her care.” Appellant’s App. Vol. II p. 36. At the time of the termination hearing, Guardian ad Litem (“GAL”) Jessica Blevins had been working with the Children for approximately one year and agreed that termination of Mother’s parental rights and adoption by Grandmother would serve the Children’s best interests. GAL Blevins explained that Mother had not remedied the conditions leading to the Children’s removal, obtained suitable housing or sobriety, and had simply not moved any closer towards reunification. In June of 2023, the juvenile court terminated Mother’s parental rights.

## Discussion and Decision

### I. Due Process

[13] To start, Mother argues that the juvenile court abused its discretion by proceeding with the termination hearing in her absence. Specifically, Mother argues that, although she never appeared for the hearing, her counsel failed to object to proceeding in her absence or move to continue the hearing on Mother’s behalf. For its part, the State argues that Mother waived her due-process claim by raising it for the first time on appeal. We agree with the State.

[14] It is well settled that we may consider a party's claim, even a constitutional one, waived if raised for the first time on appeal. *See McBride v. Monroe Cnty. Off. of Fam. and Child.*, 798 N.E.2d 185, 195 n.4 (Ind. Ct. App. 2003) (“To preserve her constitutional claim for appeal, McBride could and should have raised her due process argument during the termination proceedings.”). Moreover, “a parent does not have a constitutional right to be physically present at a final termination hearing.” *Thompson v. Clark Cnty. Div. of Fam. and Child.*, 791 N.E.2d 792, 794 (Ind. Ct. App. 2003), *trans. denied*. Here, Mother was represented by counsel at the termination hearing and counsel had the opportunity to raise arguments, present evidence, and cross-examine witnesses, and, in fact, did so. We have previously held that “such representation by counsel in the party's absence is appropriate if counsel [was] able to make argument and cross examine witnesses.” *Matter of C.C.*, 170 N.E.3d 669, 677 (Ind. Ct. App. 2021). Therefore, Mother's counsel's decision not to object to or otherwise raise a due-process argument against proceeding in Mother's absence at the termination hearing waives the issue for appellate review.

## II. Assistance of Counsel

[15] Mother claims that she received ineffective assistance of counsel due to her counsel's failure to ascertain her whereabouts and move to continue the termination hearing, rendering the termination hearing fundamentally unfair. We disagree. When reviewing a claim by a parent whose rights were terminated that their counsel underperformed, we focus on “whether it appears

that the parent[] received a fundamentally fair trial[.]” *Baker v. Marion Cnty. Off. of Fam. & Child.*, 810 N.E. 2d 1035, 1041 (Ind. 2004).

The question is not whether the lawyer might have objected to this or that, but whether the lawyer’s overall performance was so defective that the appellate court cannot say with confidence that the conditions leading to the removal of the children from parental care are unlikely to be remedied and that termination is in the child’s best interest.

*Id.* Thus, we do not focus on counsel’s particular actions; instead, we ask whether counsel’s performance in general undermines our confidence in the juvenile court’s termination decision.

[16] We conclude that Mother has failed to show that she received ineffective assistance of counsel or that the termination hearing was fundamentally unfair. Here, the juvenile court “delayed the start of the trial to accommodate Mother; however, Mother never appeared” and never attempted to explain her absence. Appellant’s App. Vol. II p. 30. As noted, Mother’s counsel still presented evidence, raised arguments, and cross-examined witnesses. In any event, “[t]he party seeking a continuance must show that he or she is free from fault.” *In re B.H.*, 44 N.E.3d 745, 748 (Ind. Ct. App. 2015), *trans. denied*. Consequently, even if Mother’s counsel had moved for a continuance based on her absence, the juvenile court was under no obligation to grant it. We cannot say that Mother’s absence undermines our confidence in the juvenile court’s decision when Mother’s counsel adequately represented her interests at the termination hearing.

### III. The Termination Order

[17] The federal Constitution protects parents' right to raise their children; however, that right "may be terminated when parents are unable or unwilling to meet their parental responsibilities." *In re N.G.*, 51 N.E.3d 1167, 1169 (Ind. 2016) (citing *Bester v. Lake Cnty. Off. of Fam. & Child.*, 839 N.E.2d 143, 147 (Ind. 2005)). In other words, parental rights, when necessary, must be subordinate to the children's best interests. *In re A.B.*, 887 N.E.2d 158, 164 (Ind. Ct. App. 2008). The termination of parental rights is appropriate "where the children's emotional and physical development is threatened." *In re T.F.*, 743 N.E.2d 766, 773 (Ind. Ct. App. 2001), *trans. denied*. However, juvenile courts "need not wait until the children are irreversibly harmed [...] before terminating the parent-child relationship." *Id.*

[18] When reviewing the termination of a parental relationship,

[w]e 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. 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.

*In re N.G.*, 51 N.E.3d at 1170. Given the juvenile court's proximity to the evidence and witnesses, we will reverse its decision to terminate a parent-child relationship only if the decision is clearly erroneous. *In re E.M.*, 4 N.E.3d 636, 642 (Ind. 2014). "A finding is clearly erroneous when there are no facts or

inferences drawn therefrom that support it. A judgment is clearly erroneous only if the findings of fact do not support the [juvenile] court's conclusions thereon, or the conclusions thereon do not support the judgment." *In re A.B.*, 887 N.E.2d at 164 (internal citations omitted).

[19] Of relevance to us in this appeal, DCS was required to prove the following:

(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[.]

Ind. Code § 31-35-2-4(b)(2). Mother argues that the evidence is insufficient to show that the conditions leading to the Children's removal will be remedied and that the continuation of the parent-child relationship threatens the Children's wellbeing. Notably, Indiana Code section 31-35-2-4(b)(2)(B) is written in the disjunctive, requiring only one of those things be established. *See In re A.K.*, 924 N.E.2d 212, 220 (Ind. Ct. App. 2010).

## **A. Conditions Justifying Removal**

[20] When considering the likelihood of Mother's remedying the conditions for the Children's removal, we must evaluate not only her fitness at the time of the

termination proceeding, but also her habitual standards of conduct. *McBride*, 798 N.E.2d at 199. Here, DCS removed the Children due to Mother’s long-standing issues with substance abuse and housing instability. Mother has failed to remedy these concerns.

[21] The record shows that Mother never completed a substance-abuse treatment program. Mother failed to engage in consistent drug screening; in fact, she missed 109 calls for screens and had thirty-eight “unforgiven missed tests.” Ex. Vol. p. 172. Moreover, Mother produced several positive drug screens, including one in April of 2022 in which she tested positive for fentanyl, methamphetamine, amphetamine, and oxymorphone. Additionally, Mother failed to complete multiple services, including “substance abuse treatment, home-based case management, [and] home-based therapy.” Appellant’s App. Vol. II p. 36.

[22] Mother has failed to maintain suitable housing. At one point during the CHINS case, Mother was “living in a homeless encampment in the woods[,]” which was “covered in trash and populated with other homeless individuals, including grown men who also appeared to be under the influence.” Appellant’s App. Vol. II pp. 33–34. When Mother obtained housing, it was “[a]bsolutely not” fit for human habitation at the time of the termination hearing. Tr. Vol. II p. 122. Mother’s persistent drug use, failure to engage in services, and failure to maintain suitable housing show a habitual unwillingness and lack of commitment to resolve her parenting issues, which, in turn, demonstrates a reasonable probability that the conditions that led to the

Children’s removal will not be remedied. *Matter of G.M.*, 71 N.E.3d 898, 908 (Ind. Ct. App 2017).<sup>2</sup>

## **B. Best Interests of the Children**

[23] Mother also contends that DCS failed to produce evidence sufficient to sustain a finding that termination of her parental rights was in the Children’s best interests. When considering whether termination of parental rights is in a child’s best interests, we look at “the totality of the evidence.” *Matter of Ma.H.*, 134 N.E.3d 41, 49 (Ind. 2019). Here, the totality of the evidence supports the juvenile court’s conclusion that termination of the parent-child relationship was in the Children’s best interests.

[24] As noted, throughout the CHINS case, Mother failed to meet the requirements set by DCS and the juvenile court. Mother failed to maintain adequate housing, complete a substance-abuse program, maintain consistent legal employment, and consistently participate in drug screens, and she tested positive for illegal substances in several screens. Put simply, “Mother has not demonstrated a willingness, ability, or interest in properly parenting her children.” Appellant’s App. Vol. II p. 36. We cannot make children “wait indefinitely for their parents to work toward preservation or reunification.” *In re E.M.*, 4 N.E.3d at 648.

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<sup>2</sup> Because we agree that the juvenile court’s decision that the conditions leading to the Children’s removal will not be remedied, we need not address Mother’s claim that continuing the parent-child relationship does not threaten the Children’s well-being.

[25] Moreover, the Indiana Supreme Court has consistently relied on the recommendation of FCMs, court-appointed special advocates (“CASAs”), GALs, and other service providers when considering whether “a reasonable finder of fact could conclude based on clear and convincing evidence” that “the termination is in the best interests of” a child. *In re N.G.*, 51 N.E.3d at 1173; *see also K.T.K v. Ind. Dept. of Child Servs., Dearborn Cnty. Off.*, 989 N.E.2d 1225, 1235–36 (Ind. 2013) (relying on testimony from the FCM, GAL, and CASA to determine that termination of parental rights served the children’s best interests). Here, FCMs Grever and Petty, GAL Blevins, and Rogers all testified that termination and adoption was in the Children’s best interests. Additionally, since staying with Grandmother, “the [C]hildren’s behaviors [have] improved.” Appellant’s App. Vol. II p. 35. Grandmother has also completed services “to help her learn to parent children who have undergone trauma[,]” and is “prepared to adopt the [C]hildren and continue to provide them with a safe, stable and loving home environment.” Appellant’s App. Vol. II p. 34. “[C]hildren have an interest in terminating parental rights that prevent adoption and inhibit establishing secure, stable, long-term, continuous relationships.” *K.T.K.*, 989 N.E.2d at 1230. Given this testimony and the ample evidence in the record regarding Mother’s unfitness, we cannot say that the juvenile court’s decision is clearly erroneous.

Altice, C.J., and Felix, J., concur.

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