MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.

IN THE

Court of Appeals of Indiana

In the Termination of the Parent-Child Relationship of:
K.B., Ka.M., O.T. (Minor Children),

and

K.M. (Mother) and P.B. (Father),

Appellants-Respondents

v.

Indiana Department of Child Services,

Appellee-Petitioner

and

Kids' Voice of Indiana,

Appellee-Guardian Ad Litem

March 25, 2024

Court of Appeals Case No.
23A-JT-1726

Appeal from the Marion Superior Court

The Honorable Geoffrey A. Gaither, Judge

The Honorable Duane E. Merchant, Magistrate

Trial Court Cause Nos.
49D09-2204-JT-2820
49D09-2204-JT-2821
49D09-2204-JT-2822

Memorandum Decision by Judge Mathias
Judges May and Vaidik concur.

Mathias, Judge.

[1] K.M. ("Mother") and P.B. ("Father") (collectively, "Parents") appeal the Marion Superior Court's termination of their parental rights over their minor children K.B. and Ka.M. In addition, Mother appeals the court's termination of her parental rights over her minor child O.T.[1] (collectively, "the Children"). Mother presents the following issues for our review:

> 1. Whether the trial court clearly erred when it concluded that the conditions that resulted in the removal of the Children from Mother's care are not likely to be remedied.

[1] O.T.'s father does not participate in this appeal.

2. Whether the trial court clearly erred when it concluded that termination of Mother's parental rights is in the Children's best interests.

[2] Father presents the following issues for our review:

3. Whether DCS violated his right to due process.

4. Whether DCS presented sufficient evidence to terminate his parental rights over K.B. and Ka.M.

[3] We affirm.

Facts and Procedural History

[4] Parents have two children together, K.B., born May 10, 2013, and Ka.M., born December 17, 2014. In addition, Mother has a child, O.T., born July 21, 2017. Father lives in Massachusetts, where Mother, K.B., and Ka.M. used to live. Father has never visited K.B. and Ka.M. in Indianapolis, where they have lived for several years. In fact, Father has never met Ka.M.

[5] On November 14, 2019, the Department of Child Services ("DCS") received a report that the Children were the victims of abuse or neglect. In particular, Mother had left the Children with a person who could not care for them. A few weeks later, on December 6, DCS received a report that Mother had neglected to pick up the Children from daycare. On that date, DCS removed the Children and placed them in an emergency shelter. Father's whereabouts were unknown. When DCS was able to find Mother a few days later, Mother stated that she did not have addresses for either of the Children's fathers.

[6] On December 10, DCS filed petitions alleging that the Children were Children in Need of Services ("CHINS"), and the trial court appointed both a Guardian ad Litem ("GAL") and a court appointed special advocate ("CASA") for the Children. On December 23, Mother was referred for supervised visitation with the Children. She was unsuccessfully discharged on January 30, 2020. DCS was able to find Father in Massachusetts, and both he and Mother appeared by counsel at the initial hearing on January 29, 2020. The trial court ordered Father to submit to DNA testing to determine his paternity, but he failed to do so. On June 3, 2020, the trial court adjudicated the Children to be CHINS. Also in June, Mother requested visitation with the Children. She was again referred for supervised visitation, and she was unsuccessfully discharged in August.

[7] In its July 1 disposition and parental participation orders, the trial court ordered Mother to engage in homebased therapy, homebased case management, a parenting assessment, and random drug screens. Mother did not successfully complete any of those services. The court again ordered Father to establish paternity of K.B. and Ka.M., which he did not do.

[8] Given Mother's failure to complete services and Father's failure to establish paternity of K.B. and Ka.M., in April 2022, DCS filed petitions to terminate the Parents' parental rights to the Children. In August, Father finally established his paternity of K.B. and Ka.M. But Father had not seen K.B. since before Ka.M.'s birth in December 2014, and, again, Father had never even met Ka.M.

[9] Following an evidentiary hearing which concluded on April 27, 2023, the trial court terminated Parents' parental rights to the Children and found and concluded in relevant part:

> 28. Despite the permanency plan being changed to Adoption, DCS continued to offer services to Mother and Fathers.
>
> 29. On December 6, 2021, Mother had her intake with her new home-based caseworker named Nikki Harris. The goals of home-based Casework were obtaining stable housing; improving parenting skills; and maintaining employment. Mother had employment. Ms. Harris explained the important of finding stable housing in order to reunify with the Children. Despite many attempts from Ms. Harris, Mother refused to make progress towards finding stable housing for her and the Children. At the time Mother said someone else would parent her kids. Mother was evasive about giving Ms. Harris her home address. Ms. Harris never saw her home and Mother explained that she didn't want her kids over there because it was dangerous for them. Mother did not work on parenting skills with Ms. Harris. Mother's involvement waned in March of 2022. She was unsuccessfully discharged on June 14, 2022.
>
> 30. In December of 2021, Mother started Home Based Therapy through Embrace with Carolyn Lee Carter to work on emotion regulation, past trauma, and parenting skills. Mother met with [her] therapist nine (9) times at the library. At that time Mother wanted to see the Children but not parent them. She admitted it was too much for her to handle. She also discussed living with her boyfriend, Devonte Lampkins, and his mother and having issues. Mother then tapered off and continued to cancel appointments. Mother was unsuccessfully discharged in September of 2022.

31. On April 6, 2022, DCS filed a Verified Petition for Termination of Parental Rights regarding the Child[ren].

32. On October 5, 2022, [O.T.'s father] signed a voluntary consent to adoption document on behalf of [O.T.].

33. In November 2022, a service referral was put in place for Father to have supervised virtual visits with [K.B. and Ka.M.]. Father never participated in this service referral.

34. Father has no bond with [K.B. and Ka.M.]. He has been absent almost their entire lives. [K.B. and Ka.M.] have never been placed with Father. [Ka.M.] has never met Father.

35. Father has never contributed to the financial needs of [K.B. or Ka.M.]. Father doesn't know [K.B. or Ka.M.'s] dates of birth.

36. No service provider assigned to Mother or Father's case has recommended that the Children be placed back in either of their care.

37. All Children are currently in relative care pre-adoptive homes. There are no safety concerns, the Children are well taken care of, and all medical, educational, and psychological needs are being met. Ms. Melony Dorsey intends to adopt [K.B. and Ka.M.]. Ms. Speikes intends to adopt [O.T.]. Their caregivers are ready, willing, and able to adopt the Children. There is no violence in their homes.

38. As of the completion of the TPR trial, Mother was noncompliant with her court ordered services; had not provided background checks for cohabitants to ensure the safety of the children if placed on Trial Home Visitation; had not done consistent random drug screens; was discharged from Home Based Case Management due to noncompliance; and had been inconsistent with Home Based Therapy.

Appellant P.B.'s App. Vol. 2, pp. 41-42. This appeal ensued.

Discussion and Decision

Standard of Review

[10] Indiana appellate courts have long adhered to a highly deferential standard of review in cases involving the termination of parental rights. *In re S.K.*, 124 N.E.3d 1225, 1230-31 (Ind. Ct. App. 2019). In analyzing the trial court's decision, we neither reweigh the evidence nor assess witness credibility. *Id.* We consider only the evidence and reasonable inferences favorable to the court's judgment. *Id.* In deference to the trial court's unique position to assess the evidence, we will set aside a judgment terminating a parent-child relationship only if it is clearly erroneous. *Id.*

[11] To determine whether a termination decision is clearly erroneous, we apply a two-tiered standard of review to the trial court's findings of facts and conclusions of law. *Bester v. Lake Cnty. Off. of Fam. & Child.*, 839 N.E.2d 143, 147 (Ind. 2005). First, we determine whether the evidence supports the findings; second, we determine whether the findings support the judgment. *Id.* "Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference." *In re A.D.S.*, 987 N.E.2d 1150, 1156 (Ind. Ct. App. 2013), *trans. denied*. If the evidence and inferences support the court's termination decision, we must affirm. *In re L.S.*, 717 N.E.2d 204, 208 (Ind. Ct. App. 1999), *trans. denied*. We will accept unchallenged factual findings as true. *See In re S.S.*, 120 N.E.3d 605, 614 n.2 (Ind. Ct. App. 2019).

[12] It is well-settled that the parent-child relationship is one of society's most cherished relationships. *See, e.g.*, *In re A.G.*, 45 N.E.3d 471, 475 (Ind. Ct. App. 2015), *trans. denied*. Indiana law thus sets a high bar to sever that relationship by requiring DCS to prove four elements by clear and convincing evidence. Ind. Code § 31-35-2-4(b)(2) (2023). We need only discuss two of those elements raised by Parents in this appeal: (1) whether there is a reasonable probability that the conditions that resulted in the Children's removal or the reasons for placement outside of Parents' homes will not be remedied; and (2) whether termination of Parents' parental rights is in the Children's best interests. I.C. § 31-35-2-4(b)(2)(B)(i) and (C).

[13] Clear and convincing evidence need not establish that the continued custody of a parent is wholly inadequate for a child's very survival. *Bester*, 839 N.E.2d at 148. It is instead sufficient to show that the child's emotional and physical development are put at risk by the parent's custody. *Id.* If the court finds the allegations in a petition are true, the court shall terminate the parent-child relationship. I.C. § 31-35-2-8(a).

Issue One: Reasons for the Children's Removal

[14] Mother contends that DCS failed to prove that there is a reasonable probability that the conditions that resulted in the Children's removal and continued placement outside of her home will not be remedied. Consideration of this argument involves a two-step analysis: first, identifying the conditions that led to removal, and, second, determining whether there is a reasonable probability those conditions will be remedied. *In re E.M.*, 4 N.E.3d 636, 642-43 (Ind. 2014).

In the second step, the trial court determines a parent's fitness at the time of the termination proceeding, taking into consideration evidence of changed conditions; in other words, the court must balance a parent's recent improvements against habitual patterns of conduct to determine whether there is a substantial probability of future neglect or deprivation. *Id.* In conducting its analysis, the trial court may also consider the reasons for the child's continued placement outside the home. *In re N.Q.*, 996 N.E.2d 385, 392 (Ind. Ct. App. 2013).

[15] Here, the Children were removed from Mother's care due to Mother's inability to maintain stable and suitable housing or to provide appropriate supervision for the Children. Mother's argument on appeal focuses on the reasons for the Children's removal from her home, but she largely ignores the reasons for the [Children's] continued placement outside the home. *See id.* For instance, Mother states that, "[i]nstead of examining whether Mother had remedied the problem of not picking up the Children from daycare, the juvenile court provided a laundry list of alleged problems with Mother in the CHINS action – none of which were the reason the Children were removed." Appellant K.M.'s Br. at 22. Mother does not deny that she failed to complete any of the services ordered under the parental participation plan. Rather, she argues that she should be given an opportunity to show that she is capable of picking up the Children from daycare. Mother's argument completely misses the mark.

[16] After the Children's removal from Mother's care in December 2019, Mother has continued to struggle to find stable and suitable housing. At the time of the

final hearing, Mother was living with a boyfriend with whom she had a recent history of domestic violence. And Mother did not complete any of the court-ordered services, including homebased therapy and homebased case management. In August 2022, right before Mother was unsuccessfully discharged from homebased therapy, she told her therapist that she did not want to parent the Children but wanted her mother to adopt them. Tr. Vol. 2, p. 51. Indeed, Mother did not get beyond supervised visitation with the Children.

[17] Mother's arguments on appeal simply seek to have this Court reweigh the evidence, which we will not do. The trial court's findings that the conditions that resulted in the Children's removal and continued placement outside her home will not be remedied are supported by the record. We therefore affirm the trial court's judgment on this issue.

Issue Two: Best Interests

[18] Mother next contends that DCS failed to prove that termination of her relationship with the Children is in the Children's best interests. In determining what is in a child's best interests, a court is required to look beyond the factors identified by DCS and consider the totality of the evidence. *A.S. v. Ind. Dep't of Child Servs. (In re A.K.)*, 924 N.E.2d 212, 223 (Ind. Ct. App. 2010). A parent's historical inability to provide "adequate housing, stability, and supervision," in addition to the parent's current inability to do so, supports finding termination of parental rights is in the best interests of the child. *Id.*

[19] When making its decision, the court must subordinate the interests of the parents to those of the child. *See Stewart v. Ind. Dep't of Child Servs. (In re J.S.)*, 906 N.E.2d 226, 236 (Ind. Ct. App. 2009). "The court need not wait until a child is irreversibly harmed before terminating the parent-child relationship." *Id.* Moreover, this Court has previously held that recommendations of the family case manager and court-appointed special advocate to terminate parental rights, coupled with evidence that the conditions resulting in removal will not be remedied, are sufficient to show by clear and convincing evidence that termination is in the child's best interests. *Id.*

[20] In her brief on appeal, Mother acknowledges that both the GAL and the FCM testified that termination of her parental rights is in the Children's best interests. But she maintains that their opinions were based primarily on how well the Children are doing in their current placements and not on Mother's deficiencies. Mother is incorrect. While the GAL testified that the Children were "thriving" in their current placements, she also testified that termination of Parents' parental rights is in the Children's best interests "[b]ecause the [Parents'] services have not been completed, . . . the length of the case, [and] the hostility that still remains within the family that is very clear." Tr. Vol. 2, p. 237. The FCM testified that the Children "would be in danger" if they were reunited with Parents and that termination of Parents' parental rights is in the Children's best interests because it would give them "stability" and "permanency." *Id.* at 85-87.

[21] Once again, Mother asks that we reweigh the evidence. At the time of the factfinding hearing, the Children had been removed from Mother's care for more than three years. When Mother exercised visits with the Children, which was not consistent, the visits were always supervised. The GAL testified that the Children had suffered "trauma" from their time in Mother's care and that they were working through that in therapy. *Id.* at 231. Mother has not shown that she is able to provide the care for the Children that they need. We affirm the trial court's conclusion that termination of Mother's parental rights is in the Children's best interests.

Issue Three: Due Process

[22] Father contends that DCS violated his right to due process when it terminated his parental rights. He argues that DCS excluded him from the reunification process and refused to arrange for visits with K.B. and Ka.M., which "prevented him from forging the bond with his children." Appellant P.B.'s Br. at 20. And he maintains that "DCS then used that lack of bond, which they had created, to terminate his parental relationship," which "violated his due process rights to be a parent to K.B. and K.[a]M." *Id.* Father is incorrect.

[23] Initially, we note that Father raises this issue for the first time on appeal. It is well settled that "a party on appeal may waive a constitutional claim, including a claimed violation of due process rights, by raising it for the first time on appeal." *In re N.G.*, 51 N.E.3d 1167, 1173 (Ind. 2016). DCS is generally required to make reasonable efforts to preserve and reunify families during CHINS proceedings. *In re H.L.*, 915 N.E.2d 145, 148 (Ind. Ct. App. 2009); Ind.

Code § 31-34-21-5.5. We also note that Indiana Code section 31-35-2-4.5 allows the filing of a motion to dismiss a petition for termination of parental rights under certain circumstances if DCS has failed to provide appropriate family services. There is no indication in the record that Father challenged the lack of services during the CHINS proceedings, filed a motion to dismiss the termination proceedings, or made a due process argument to the trial court. Father's argument is, thus, waived.

[24] Waiver notwithstanding, we briefly address Father's claim. "Due process protections bar 'state action that deprives a person of life, liberty, or property without a fair proceeding.'" *In re G.P.*, 4 N.E.3d 1158, 1165 (Ind. 2014) (quoting *In re C.G., Z.G. v. Marion Cnty. Dep't of Child Servs.*, 954 N.E.2d 910, 916 (Ind. 2011)). "It is unequivocal that the termination of a parent-child relationship by the State constitutes the deprivation of 'an important interest warranting deference and protection,' and therefore '[w]hen the State seeks to terminate the parent-child relationship, it must do so in a manner that meets the requirements of due process.'" *Id.* (quoting *C.G.*, 954 N.E.2d at 916-17).

[25] Father has not shown that DCS's failure to provide Father with services was a violation of due process. Father testified that he was notified by DCS that the Children had been removed from Mother's home approximately one month after their removal. Father testified that the DCS FCM had kept in touch with him by phone and by email. He testified that, other than a virtual tour of his home, he did not remember what DCS had told him that he had to do in order to get custody of the Children. Father ignored the court's orders to get DNA

testing until after the petition to terminate his parental rights had been filed. He testified that he did not regularly attend "child family and team meetings" because "he works a lot." Tr. Vol. 2, p. 211. And Father did not participate in the virtual parenting time offered by DCS because he thought that they were "parenting classes" and he did not think he needed them. *Id.* at 214. Father has never traveled to Indiana, and he has never met Ka.M., who was born in 2014.

[26] We have held that "the CHINS provision 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." *H.L.*, 915 N.E.2d at 148 n.3. Father has not shown that DCS violated his right to due process.

Issue Four: Insufficient Evidence

[27] Finally, Father contends that DCS presented insufficient evidence to support the termination of his parental rights. Father maintains that the trial court's findings focus primarily on the reasons supporting the termination of Mother's parental rights. He argues that the termination is based "solely" on the lack of any bond between Father and his children and his failure to visit with them. Appellant P.B.'s Br. at 9. Father is incorrect.

[28] First, to the extent Father contends that DCS doomed him to fail when it did not offer him services to facilitate reunification with K.B. and Ka.M., it is well settled that "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). Second, Father's own testimony undermines his effort on appeal to appear interested in parenting K.B. and Ka.M. Father does not know either child's date of birth. Father has never provided financial support for them. Father has not seen K.B. since prior to Ka.M.'s birth in 2014, and he has never met Ka.M., who is now nine years old. And Father testified that he could not afford to parent K.B. and Ka.M. "right now." Tr. Vol. 2, p. 209. As the trial court found, Father is not bonded with either K.B. or Ka.M.

[29] Father's contentions on appeal are merely a request that we reweigh the evidence. Father had more than three years before the final hearing to demonstrate an interest in and willingness to parent K.B. and Ka.M., and he failed to do so. When Father learned that K.B. and Ka.M. had been removed from Mother's care, he could have taken steps to take custody of them, but he did nothing. Father's attempt to blame DCS for his shortcomings is not well taken. DCS presented sufficient evidence to support the termination of Father's parental rights over K.B. and Ka.M.

Conclusion

[30] For all of the above stated reasons, we affirm the trial court's termination of Mother's parental rights over the Children and the termination of Father's parental rights over K.B. and Ka.M.

[31] Affirmed.

May, J., and Vaidik, J., concur.

ATTORNEY FOR APPELLANT P.B.

Steven J. Halbert
Indianapolis, Indiana

ATTORNEY FOR APPELLANT K.M.

Don R. Hostetler
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE INDIANA DEPARTMENT OF CHILD SERVICES

Theodore E. Rokita
Attorney General of Indiana

Katherine A. Cornelius
Deputy Attorney General
Indianapolis, Indiana