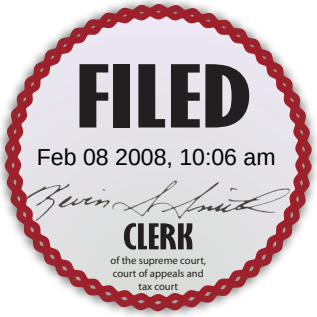

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IN THE
COURT OF APPEALS OF INDIANA

In the Matter of the Termination of the Parent-Child Relationship of B.H., B.H., and B.H., and Ronald H., natural Father,	)	
RONALD H.,	)	
Appellant-Respondent,	)	
vs.	)	No. 79A04-0704-JV-199
TIPPECANOE COUNTY DEPARTMENT OF CHILD SERVICES,	)	
Appellee-Petitioner.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Loretta H. Rush, Judge
Cause Nos. 79D03-0607-JT-150, -153, and -154

February 8, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Ronald H. ("Father") appeals the involuntary termination of his parental rights, in Tippecanoe Superior Court, to his three children, B.K.H., B.N.H., and B.F.H. Father raises several issues on appeal, which we consolidate and restate as:

I. Whether the trial court had subject matter jurisdiction over the CHINS proceedings;

II. Whether the Father's constitutional right to due process was violated; and,

III. Whether the trial court's judgment terminating Father's parental rights to the children was supported by clear and convincing evidence.

We affirm.

FACTS AND PROCEDURAL HISTORY

The facts most favorable to the judgment reveal that Father and his wife, Rhonda H. ("Mother") are the legal parents of B.K.H., born on September 25, 1996, B.N.H., born on April 27, 2000, and B.F.H., born on August 2, 2001.[1] On November 4, 2004, William and Leann Thornton (collectively, "the Thorntons") filed a petition for guardianship over all three children in Tippecanoe Circuit Court, alleging that both Mother and Father were unable to care for the children and that it was necessary for a guardian to be appointed for the children "in order to provide for their care, custody, support and maintenance due to their minority." *Appellant's App*. at 651. The parents had arranged for and consented to the guardianship because of Father's incarceration and Mother's pending incarceration. On November 16,

[1] Father and Mother were married at the time of the birth of all three children and are the children's legal parents. However, Richard W. is the biological father of B.F.H. Richard W. has had no contact with B.F.H. since the time of her birth and did not participate in this appeal or in any of the proceedings below. Mother is also not a party to this appeal.

2004, the Tippecanoe Circuit Court entered an order appointing the Thorntons as guardians, finding that the allegations contained in the petition were true.

The guardianship proceeded thereafter without apparent incident while both parents remained incarcerated. However, Leann became concerned for the well-being of the children because Mother informed Leann that she intended to secure custody of the children as soon as she was released from prison. Leann had many concerns pertaining to Mother's past treatment and care of the children; so, when Mother contacted Leann after she was released from prison and stated that she wanted the children back, Leann directed Mother to contact the Tippecanoe County Department of Child Services ("TCDCS"). Mother subsequently contacted the TCDCS, and on June 1, 2005, Mother, Leann and the TCDCS entered into an Informal Adjustment. The Informal Adjustment required Mother, among other things, to exercise supervised visitation, and to participate in individual and family counseling and parenting classes. Mother was minimally cooperative and eventually dropped from some services.

On September 15, 2005, in Tippecanoe County Superior Court III (the county's designated juvenile court), the TCDCS filed a request to take the children into custody and a request for authorization to file a petition alleging the children were in need of services ("CHINS" petition) because Mother had failed to fully participate in services under the Informal Adjustment. The juvenile court granted both requests. Upon being advised of the CHINS proceedings in the juvenile court, the Tippecanoe Circuit Court issued an order stating that it no longer had jurisdiction over the children.

The TCDCS filed its CHINS petition, and the juvenile court set the initial hearing for

October 24, 2005. In October 2005, Mother returned to prison where she remained incarcerated with an earliest possible release date of July 14, 2007. During the October 24th hearing on the CHINS petition, Father, with the advice of counsel, admitted to the CHINS petition and to the allegations contained in the Affidavit of Probable Cause. Mother denied the allegations. On December 21, 2005, the juvenile court held a fact-finding hearing where Mother admitted to the CHINS petition and to the allegations of the probable cause affidavit. The court then found the children to be CHINS and entered a dispositional order.

Throughout the CHINS proceedings, both Father and Mother were incarcerated. The juvenile court's parental participation decree ordered both Father and Mother to avail themselves of all available services through the facilities in which they were incarcerated.

On July 12, 2006, the TCDCS filed its petitions to terminate Father's and Mother's parental rights to the children. The fact-finding hearing commenced on October 10, 2006,[2] and completed on November 13, 2006. At the termination hearing, TCDCS case supervisor Angela Guimond ("Guimond") testified that when the TCDCS became involved with the case "it was merely a continuation of the concerns that Benton County had had when they took protective custody of the children." *Appellant's App*. at 52. Guimond further testified that both parents were "unable to provide any stability or permanency for the children[,]"

[2] It appears from the record that sometime prior to the termination hearing, Father filed a preliminary motion to dismiss based on the fact he was not present or represented by counsel at the permanency hearing during the CHINS proceedings, *see Appellant's App*. p. 11-12; however, a copy of the motion was not included in the record. The trial court denied Father's motion to dismiss. *Id*. at 13. Father does not specifically appeal the trial court's denial of his motion to dismiss, but does complain on appeal that he was not represented by council at the permanency hearing. We remind counsel that "[a]ny record material cited in an appellate brief must be reproduced in an Appendix or the Transcript or exhibits." Ind. Appellate Rule 22(C).

despite services offered through both Tippecanoe County and Benton County offices and that she believed there was a reasonable probability that the condition that resulted in the children's removal would not be remedied. *Id.* at 52-53.

Similarly, when Rhonda Friend ("Friend"), TCDCS family case manager, was asked if she believed that the conditions that led to removal of the children had a reasonable probability of being remedied, she testified as follows:

> This case more than probably any case I've ever dealt with in the 20 years I've been a caseworker has demonstrated to me the most instability, the most neglect, irresponsible behavior of the parents towards their children that I have seen . . . . [B.K.H.] has lived in 13 different homes, she is just now 10 . . . . [H]er mom has been in jail 11 times since [she] was born. [B.K.H.] has attended seven different schools . . . before her second grade of school. She has been molested at least three times. She has been physically abused. . . . [B.K.H.] has no desire to return to her mom's home . . . . That is not a normal situation. Most children that we work with want to go home no matter what their parent has done to them. [B.K.H.] does not want to do that. She is begging that she not be made to go back home. She does not feel that she will be safe if she goes back home.
>
> * * *
>
> [B.N.H.] in the six years of her life has been with her mother off and on for three and a half years and has moved with her parents eight times and that's not including her three foster home placements, her aunt and uncle's home when we removed [her through a CPS removal] and a grandparent's home. . . . [B.N.H.] also does not have a desire to go home . . . and that is also unusual given her age at six. . . . [B.F.H.] has only been with her mom about two years out of her five years of life. She has moved with her parents three different times that we can list and that also does not include her [three] stays in foster care . . . her aunt and uncle['s] and a grandparent's. [B.F.H.] was molested at five months of age; she was also beaten to the point that she had to be life[-]lined to Riley Hospital. She still has seizures today because of the abuse that she has suffered.

Appellant's App. at 100-104. Friend further testified that she "[a]bsolutely" felt it was in the best interests of the children to terminate Mother's and Father's parental rights to the children

and that the children needed permanency. *Id.* at 106, 143. Likewise, Angie Wilhoit ("Wilhoit"), the court appointed special advocate ("CASA") for the children, testified that she agreed with the TCDCS's recommendation to terminate parental rights in this case because, after visiting the children and talking to therapists and family members, including the parents, she felt the "behavior pattern of the parents will . . . never change." *Id*. at 205. She went on to testify, "The girls . . . feel so safe and comfortable right now with the Thornton[s] and I feel . . . it's not fair to keep jerking them around. . . . [T]hey love the Thornton[s] and they hope they never have to leave their house . . . . They deserve to have the comfort and security of a forever home." *Id.*

Jennifer Samuels ("Samuels"), the family preservation counselor testified that she had concerns with the stability of the relationship between the parents and the children stating, "There was a history of domestic violence in the marriage; there was also issues with drugs, lack of supervision. [Mother's] denial . . . [a]nd I just believe the kids need permanency, they've been in and out of the system for several years and they need permanency." *Id.* at 80.

On February 20, 2007, the juvenile court issued its judgment terminating both Mother's and Father's parental rights to B.K.H., B.N.H., and B.F.H. This appeal ensued.

DISCUSSION AND DECISION

I. Subject Matter Jurisdiction

Father first challenges the trial court's subject matter jurisdiction. Specifically, Father asserts, without any citation to authority, that when the TCDCS filed its CHINS petition, the juvenile court was required to "first determine the legal primary caregiver of the child. If the caregiver is a legally appointed guardian, the court must then ascertain whether the

allegations relate to the actions or omissions of the guardian. If not, the juvenile court no longer has subject matter jurisdiction of the case and must dismiss the [p]etition." *Appellant's Br*. at 12.

Indiana trial courts possess two kinds of jurisdiction. Subject matter jurisdiction is the power to hear and determine cases of the general class to which any particular proceeding belongs. *K.S. v. State*, 849 N.E.2d 538, 540 (Ind. 2006). Personal jurisdiction requires that appropriate process be effected over the parties. *Id.* Where these two exist, a court's decision may be set aside for legal error only through direct appeal and not through collateral attack. *Id.*

Our Supreme Court has recently explained, "Attorneys and judges alike frequently characterize a claim of procedural error as one of jurisdictional dimension. The fact that a trial court may have erred along the course of adjudicating a dispute does not mean it lacked jurisdiction." *Id.* at 541. The Court further explained that, "Indiana has adhered to the rule that the judgment of a court having jurisdiction of the subject matter of the suit and of the person, however irregular, is not void and not impeachable collaterally, unless it may be for fraud." *Id.*

Father's assertion that the juvenile court lacked subject matter jurisdiction rests on I.C. § 31-34-1-1 (2001 & Supp. 2007) which provides:

> 1. A child is a child in need of services if before the child becomes eighteen (18) years of age:
> (1) the child's physical or mental condition is seriously impaired or seriously endangered *as a result of the inability, refusal, or neglect of the child's parent, guardian, or custodian to supply the child with necessary food, clothing, shelter, medical care, education, or supervision*; and

(2) the child needs care, treatment, or rehabilitation that:
(A) the child is not receiving; and
(B) is unlikely to be provided or accepted without the coercive intervention of the court.

(Emphasis added). Based on the foregoing, Father argues that because there were no allegations of endangerment or neglect relating to the actions or omissions of the Thorntons, who were the children's legally appointed guardians when the TCDCS filed its CHINS petition, the CHINS petition should have been dismissed for want of subject matter jurisdiction and oversight of the guardianship of the children should have remained with the Tippecanoe Circuit Court.

Resolution of Father's contention as to whether the TCDCS was required to show that the children were CHINS as a result of the actions or omissions of their guardians instead of their natural parents has no bearing on whether the juvenile court had the requisite subject matter jurisdiction to hear the case. The question of subject matter jurisdiction involves a determination of whether a court has jurisdiction over the general class of actions to which a particular case belongs. *Troxel v. Troxel*, 737 N.E.2d 745, 749 (Ind. 2000). The only relevant inquiry in determining whether a court has subject matter jurisdiction is whether the kind of claim advanced by the petitioner falls within the general scope of authority conferred upon such a court by the constitution or by statute. Hite v. Vanderburgh County Office of Family & Children, 845 N.E.2d 175, 179 (Ind. Ct. App. 2006).

I.C. § 31-30-1-1(2) (1999) confers upon juvenile courts exclusive original jurisdiction over proceedings where a child is alleged to be a child in need of services. *See id.* (providing that "[a] juvenile court has exclusive jurisdiction . . . in . . . [p]roceedings in which a child . .

. is alleged to be a child in need of services"; *see also K.S.*, 849 N.E.2d at 542 (stating that juvenile courts have subject matter jurisdiction over CHINS proceedings). Thus, Tippecanoe County Superior Court III, the county's designated juvenile court, had subject matter jurisdiction to entertain the TCDCS's CHINS petition. As for personal jurisdiction, Father does not contend that the juvenile court lacked personal jurisdiction on appeal. In addition, Father, who was represented by counsel, submitted himself to the authority of the court. Thus, contrary to Father's assertion on appeal, Tippecanoe County Superior Court III had the requisite subject matter and personal jurisdiction to hear the underlying cause.

Father's allegation of procedural error is untimely. Assuming, arguendo, that the alleged procedural error in the underlying CHINS proceedings is true, Father failed to object to either the filing of the CHINS petition or the trial court's determination that the children were in need of services. In fact, Father, who was represented by counsel, admitted to the allegations in the CHINS petition.

We conclude that Father's collateral attack on the judgment, characterized as jurisdictional, is not a question of jurisdiction but an untimely allegation of procedural error and, therefore, must fail.

II. Constitutional Right to Due Process

Next, father argues that he was denied his constitutional right to due process because of ineffective assistance of counsel as well as several alleged defects in the underlying CHINS proceeding. We address each argument in turn.

A. Effective Assistance of Counsel

First, Father contends that he was denied his constitutional right to effective assistance of counsel. In support of this contention, Father states that the juvenile court granted his request for appointment of counsel on October 24, 2005, immediately prior to the hearing on the CHINS petition. Consequently, Father argues he was only afforded a brief opportunity to consult with his new attorney before he admitted to the material allegations in the CHINS petition. Based on these facts, Father asserts that effective counsel "would have advised denying the Petition and allegations of the Affidavit until he had the opportunity to consider and research possible defenses to the Petition." Appellant's Br. at 15.

Initially, we note that any parent participating in a CHINS proceeding may be represented by counsel, and parents must be given an opportunity to secure counsel if desired. *In re R.R.*, 587 N.E.2d 1341, 1345 (Ind. Ct. App. 1992). However, the Federal Constitution does not require the appointment of counsel in every parental termination proceeding. *Baker v. Marion County Office of Family & Children*, 810 N.E.2d 1035, 1038 (Ind. 2004) (citing *Lassiter v. Dep't of Soc. Servs. of Durham County, N.C.*, 452 U.S.18, 32, 101 S.Ct. 2153, 2162 (1981)). While the juvenile court does have the *discretion* to appoint counsel for a parent in any juvenile proceeding, no statute provides a parent the right to court-appointed counsel in CHINS proceedings. *Baker*, 810 N.E.2d at 1083 (emphasis

added); *see also* I.C. § 31-6-7-2(b).

In termination of parental rights proceedings where parents whose rights have been terminated claim on appeal that their lawyer underperformed, the focus of the inquiry is whether it appears that the parents received a fundamentally fair trial in which the facts demonstrate an accurate determination. *Baker*, 810 N.E.2d at 1041. Thus, 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 children's best interest. *Id.*

As an initial matter, we point out that Father is presenting this issue for the first time on appeal, following the termination proceedings. The time for appealing an issue in the CHINS proceeding commences when the dispositional decree is entered. *Smith v. Marion County Dep't of Pub. Welfare*, 635 N.E.2d 1144, 1146 (Ind. Ct. App. 1994), *trans. denied*. Even after the time had expired permitting Father to appeal, he did not move to set aside the judgment; nor did he raise the issue at the trial stage of the termination proceedings. A party may not raise an issue for the first time on appeal. *Id.* A party may waive a constitutional claim. *McBride v. Marion County Office of Family & Children*, 798 N.E.2d 185, 194 (Ind. Ct. App. 2003). Father has therefore waived this argument. *See id.* (concluding that mother, who claimed she was denied her right to court-appointed counsel during the CHINS proceedings, may not raise issue for first time on appeal); *see also Smith*, 635 N.E.2d at 1148 (concluding that mother had waived her right-to-counsel argument by raising it for the first time on appeal from the termination proceedings).

Waiver notwithstanding, Father would not prevail. Father fails to point to any excluded evidence or alleged defense that would have assisted his CHINS case had he been given more time to consult with his attorney prior to the fact-finding hearing. Nor does Father challenge the sufficiency of the evidence supporting the juvenile court's determination that the children were in need of services. Assuming without deciding that the standard of review applied in termination proceedings for ineffective assistance of counsel claims is also applicable in CHINS proceedings, Father has failed to show that he was prejudiced in any way by his counsel's performance at any time during the CHINS proceedings. Without more, Father's mere assertion that he received ineffective assistance of counsel during the CHINS proceedings because his attorney failed to request a continuance prior to the fact-finding hearing on said petition in no way casts doubt on the ultimate result of the termination proceedings. *See infra* Part III; *see also Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001) (stating that a strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment), *cert. denied* (2002); *see also Stevens v. State*, 770 N.E.2d 739, 747 (Ind. 2002) (stating that isolated omissions or errors, poor strategy, or bad tactics do not necessarily render representation ineffective), *cert. denied* (2002). Father's argument must therefore fail.

B. Notice of Permanency Hearing

Father next asserts that the "TCDCS did not give [him] notice of the [permanency] hearing[.]" *Appellant's Br*. at 16. Thus, Father claims his constitutional right to due process was violated when the court proceeded with the permanency hearing without securing his presence and that the order terminating his parental rights should therefore be vacated.

The Fourteenth Amendment to the United States Constitution provides that "no person shall be deprived of life, liberty, or property without due process of law." Although due process has never been precisely defined, the phrase expresses the requirement of "fundamental fairness." *In re M.M.*, 733 N.E.2d 6, 9 (Ind. Ct. App. 2000). "The right to raise one's children is essential, basic, more precious than property rights, and within the protection of the Fourteenth Amendment to the United States Constitution." *Id.* On the other hand, the State has a compelling interest in protecting the welfare of children and advancing their best interests. *Id.*

Father is correct in his assertion that he was entitled to notice as to the time, date and location of the permanency hearing. *See* I.C. § 31-35-2-6.5(c) (1998 & Supp 2007) (providing that a child's parent shall receive notice of a hearing on a petition or motion filed under this chapter at least ten days before the hearing). However, our review of the record leaves this court convinced that the trial court fulfilled the statutory notice obligation regarding the permanency hearing.

We have previously held that I.C. § 31-35-2-6.5 does not require compliance with Indiana Trial Rule 4, which governs service of process and incorporates a jurisdictional component. *See In re A.C.*, 770 N.E.2d 947, 950 (Ind. Ct. App. 2002). Instead, in order to

comply with the notice statute, a party need only meet the requirements of Indiana Trial Rule 5, which governs service of subsequent papers and pleadings in the action. *Id.*

Indiana Trial Rule 5 authorizes service by U.S. mail and "'[s]ervice upon the attorney or party shall be made by delivering or mailing a copy of the papers to him at his last known address.'" *In re C.C.*, 788 N.E.2d 847, 851 (Ind. Ct. App. 2003) (footnote omitted) (citing Ind. Trial Rule 5(B)), *trans. denied*. 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." *C.C.*, 788 N.E.2d at 851.

Here, the record reveals that on April 24, 2006, following a review hearing, the juvenile court issued an order wherein it set the permanency planning hearing for July 12, 2006. Father, who was incarcerated with the Indiana Department of Correction Correctional Industrial Facility at the time of the review hearing did not attend the hearing, but was represented by counsel. The record further reveals that the distribution statement on the bottom of the court's order indicates that both Father's attorney and Father were sent a copy of the trial court's April 24th order via U.S. mail. Father's copy was sent to his last known address, which was the Department of Correction Correctional Industrial Facility, in care of the Superintendent of said facility. By sending notice to Father's last known address at the Correctional Industrial Facility the juvenile court complied with Indiana Trial Rule 5(B), and notice was therefore not defective under I.C. § 31-35-2-6.5. *See C.C.*, 788 N.E.2d at 852 (concluding notice of termination hearing was valid where notice letter was sent to homeless

shelter even though caseworker knew that father no longer lived there, where homeless shelter was father's last known address, and father had failed to report change of address).

C. Guardians Not Listed As Parties in the CHINS Petition

Next, Father points to the fact that the Thorntons were not named as parties in the CHINS petition as further evidence of procedural irregularities that, when added up, constitute a violation of his constitutional right to due process. Once again, Father failed to raise this issue in the underlying proceedings and raises it for the first time on appeal following the termination proceedings; thus, we deem the issue is waived. *See Smith*, 635 N.E.2d at 1146 (stating the time for appealing an issue in CHINS proceedings commences when the dispositional order is entered). Nevertheless, we shall address Father's claim.

We proceed by first addressing whether Father has standing to bring this claim of error. The standing requirement mandates that courts act in real cases, and eschew actions when called upon to engage in abstract speculation. In other words, standing focuses generally upon the question of whether the complaining party is the proper person to invoke the court's power. *State ex. rel. Indiana State Bd. of Tax Com'rs v. Indiana Chamber of Commerce, Inc.*, 712 N.E.2d 992, 996 (Ind.Ct.App.1999). This doctrine remains a significant restraint on the ability of Indiana courts to act, as it denies the courts any jurisdiction absent an actual injured party participating in the case. *Id.*

Under the traditional standing doctrine, only those persons who have a personal stake in the outcome of the litigation and who show that they have suffered or were in immediate danger of suffering a direct injury as a result of the complained-of conduct will be found to

have standing. *Id.* Absent this showing, complainants may not invoke the jurisdiction of the court. *Id.*

Father's brief is absolutely silent as to how he was injured by the omission of the Thorntons both as parties to the CHINS proceedings and in the order setting initial hearing on the CHINS petition. Regardless of these omissions, we observe that the Thorntons were present for a majority, if not all, of the hearings in both the CHINS and termination proceedings and do not now, nor have they ever, challenged the propriety of these proceedings. Because Father has failed to show he suffered any injury as a result of the complained of omissions, he has no standing to bring this claim. Accordingly, this allegation of error must fail.

D. Cumulation of Alleged Procedural Errors

Lastly, Father asserts that the juvenile court's alleged failure to adhere to statutory procedures in the underlying CHINS proceedings, as set forth above when considered in total, violated his constitutional right to due process. We disagree.

As explained earlier, when the State seeks to terminate the parent-child relationship, it must do so in a manner that meets the requirements of due process. *Hite*, 845 N.E.2d at 180. Due process in parental rights cases therefore involves the balancing of three factors: (1) the private interests affected by the proceeding; (2) the risk of error created by the State's chosen procedure; and (3) the countervailing government interest supporting use of the challenged procedure. *Id.*

Here, Father's private interest is substantial inasmuch as his parental rights have been terminated. The United States Supreme Court has recognized that "a parent's interest in the

care, custody, and control of his children is 'perhaps the oldest of the fundamental liberty interests.'" *J.T. v. Marion County Office of Family & Children*, 740 N.E.2d 1261, 1264 (Ind. Ct. App. 2000) (quoting *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 2060 (2000)). The government's countervailing interest is also substantial in that the State of Indiana has a compelling interest in protecting the welfare of children. *Hite*, 845 N.E.2d at 181.

Turning to the third factor regarding the risk of error in this case, Father argues that the aforementioned procedural irregularities in the CHINS proceedings combined to deprived him of procedural due process rights in the termination proceedings. In so doing, Father relies on our holding in *A.P. v. Porter County Office of Family & Children*, 734 N.E.2d 1107 (Ind. Ct. App. 2000), *trans denied*, where we stated that "procedural irregularities in a CHINS proceeding[] may be of such import that they deprive a parent of procedural due process with respect to the termination of his or her parental rights." *Id.* at 1112-13. In *A.P.*, however, we considered a record "replete with procedural irregularities throughout the CHINS and termination proceedings that [were] plain, numerous, and substantial[.]" *Id.* at 1118. In sum, we analyzed seven substantial irregularities that, when taken together, required reversal of the trial court's termination decision as a violation of due process. *Hite*, 845 N.E.2d at 182-83. However, of those seven irregularities, we noted that none of the deficiencies, standing alone, would have resulted in a due process violation. *Id.* at 183.

In considering the risk that the procedure used will lead to an erroneous result, we do not question that "CHINS proceedings are a complex legal matter" and that litigating any case, including a CHINS matter, without the benefit of counsel may increase the risk of an erroneous decision. *E.P. v. Marion County Office of Family & Children*, 653 N.E.2d 1026,

1032 (Ind. Ct. App. 1995). However, "unlike a termination proceeding, or a paternity proceeding, where an erroneous result obviously would be disastrous, an erroneous CHINS adjudication has a far less disastrous impact on the parent-child relationship." *M.M.*, 733 N.E.2d at 10 (footnote omitted).

Father was represented by counsel throughout both the CHINS and termination proceedings. Father does not claim that he was unaware of the date, time, or location of the permanency planning hearing. Moreover, Father, who was incarcerated in a federal prison in Sandstone, Minnesota, at the time of the termination hearing, was permitted to attend the hearing telephonically and was also represented by counsel, who had the opportunity to cross-examine the State's witnesses and to introduce evidence in defense of the action. Under these circumstances, the risk of an inaccurate result decreases significantly. *See In re J.T.*, 740 N.E.2d 1261, 1264 (Ind. Ct. App. 2000), *trans. denied.*

While procedural irregularities in a CHINS proceeding may be of such import that they deprive a parent of procedural due process with respect to the termination of his or her parental rights, this was not such a case. After balancing the substantial interest of Father with that of the State, and in light of the minimal risk of error created by the challenged procedure, we conclude that the juvenile court did not violate Father's constitutional right to due process of law when it proceeded with the permanency hearing during the CHINS proceeding in Father's absence.

III. Clear and Convincing Evidence

In his final argument to the court, Father appears to allege that the TCDCS failed to prove by clear and convincing evidence all the elements set forth in I.C. § 31-35-2-4(b)(2)

(1999 & Supp. 2007) as is required for the involuntary termination of parental rights. In so doing, Father claims that because parents have "a fundamental liberty interest" in the care and custody of their children, and because he was "[availing] himself of numerous programs and classes while in prison[,]" the juvenile court should have vacated the termination petition and continued the guardianship with the Thorntons. *Appellant's Brief* at 8.

Initially, we note our standard of review. This court has long had a highly deferential standard of review in cases concerning the termination of parental rights. *In re K.S.*, 750 N.E.2d 832, 836 (Ind. Ct. App. 2001). Thus, when reviewing the termination of parental rights, we will not reweigh the evidence or judge the credibility of the witnesses. *In re D.D.*, 804 N.E.2d 258, 264 (Ind. Ct. App. 2004), *trans. denied*. Instead, we consider only the evidence and reasonable inferences that are most favorable to the judgment. *Id*. Moreover, in deference to the juvenile court's unique position to assess the evidence, we will set aside the court's judgment terminating a parent-child relationship only if it is clearly erroneous. *In re L.S.*, 717 N.E.2d 204, 208 (Ind. Ct. App. 1999), *trans. denied*. Thus, if the evidence and inferences support the juvenile court's decision, we must affirm. *Id.*

"The traditional right of parents to establish a home and raise their children is protected by the Fourteenth Amendment of the United States Constitution." *In re M.B.*, 666 N.E.2d 73, 76 (Ind. Ct. App. 1996), *trans. denied*. However, the juvenile court must subordinate the interests of the parents to those of the child when evaluating the circumstances surrounding the termination. *K.S.*, 750 N.E.2d at 837. Parental rights may be terminated when the parents are unable or unwilling to meet their parental responsibilities. *Id.* at 836.

In order to terminate a parent-child relationship, the State is required to allege that:

> (A) one (1) of the following exists:
> (i) the child has been removed from the parent for at least six (6) months under a dispositional decree;
>
> * * *
>
> (B) there is a reasonable probability that:
> (i) the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied; or
> (ii) the continuation of the parent-child relationship poses a threat to the well-being of the child;
>
> (C) termination is in the best interests of the child; and
>
> (D) there is a satisfactory plan for the care and treatment of the child.

I.C. § 31-35-2-4(b)(2) (1998 & Supp. 2007). The State must establish each of these allegations by clear and convincing evidence. *Egly v. Blackford County Dep't of Pub. Welfare*, 592 N.E.2d 1232, 1234 (Ind. 1992). Father does not challenge the fact that the children were removed from his care for at least six months pursuant to a dispositional decree. However, he does challenge the evidence supporting the remaining factors set forth above.

A. Reasonable Probability Conditions Will Not Be Remedied

When determining whether a reasonable probability exists that the conditions justifying a child's removal and continued placement outside the home will not be remedied, the juvenile court must judge a parent's fitness to care for his or her children at the time of the termination hearing, taking into consideration evidence of changed conditions. *In re J.T.*, 742 N.E.2d 509, 512 (Ind. Ct. App. 2001), *trans. denied*. The court must also evaluate the

parent's habitual patterns of conduct to determine whether there is a substantial probability of future neglect or deprivation of the children. *M.M.*, 733 N.E.2d at 13. Additionally, the TCDCS is not required to rule out all possibilities of change; rather, it need establish "only that there is a reasonable probability that the parent's behavior will not change." *In re Kay. L.*, 867 N.E.2d 236, 242 (Ind. Ct. App. 2007).

In this case, there is ample evidence to demonstrate that there is a reasonable probability that Father's behavior will not change and, consequently, that the conditions resulting in the children's removal from his care will not be remedied, despite his participation in various services while incarcerated. The record reveals that the "conditions" that resulted in the children's removal and the "reasons" for their placement in a guardianship with the Thorntons was Father's incarceration, Mother anticipated incarceration, and the consequential inability of either to provide "food, shelter, clothing, medical care, education or supervision for [the children]. *Appellant's App*. at 598. Furthermore, Father was in prison throughout the entire CHINS and termination proceedings, and was in federal prison in Sandstone, Minnesota, at the time of the termination hearing. Father attended the termination hearing telephonically and testified that he did not expect to finish his current prison term until August or September of 2007, which would be followed by a six-month stay at a halfway house, and a subsequent one-year additional stay at another half-way house because of a suspended two-year sentence in Tippecanoe County, resulting in an earliest possible projected release date of "[S]pring of 2009[.]" *Id.* at 235.

If, as projected, Father will not be released until 2009, he is obviously helpless to remedy the conditions resulting in removal within a meaningful timeframe. Therefore, while

we acknowledge Father's efforts to improve himself during his time in prison, we cannot say that the juvenile court committed clear error when it found there is a reasonable probability that the conditions that led to the children's removal from Father would not be remedied. *See Castro v. State Office of Family and Children*, 842 N.E.2d 367, 374 (Ind. Ct. App. 2006) (concluding that the trial court did not commit clear error in determining that the conditions leading to the child's removal from Father would not be remedied where Father, who had been incarcerated throughout the CHINS and termination proceedings had seven felony convictions on his record and was not expected to be released for several years after the termination hearing), *trans. denied*. This court has previously recognized that "individuals who pursue criminal activity run the risk of being denied the opportunity to develop positive and meaningful relationships with their children." *Id.* (quoting *In re A.C.B.*, 598 N.E.2d 570, 572 (Ind. Ct. App. 1992)).

B. Best Interests of the Children

Father's brief also suggests that the TCDCS failed to present clear and convincing evidence that termination of the parent-child relationship was in the children's best interests.

The purpose of terminating parental rights is not to punish the parents but to protect the children involved. *K.S.*, 750 N.E.2d at 836. In determining the best interests of the children, the juvenile court must subordinate the interests of the parents to those of the children. *McBride*, 798 N.E.2d at 203. Additionally, in determining what is in the best interests of the children, the court is required to look beyond the factors identified by the Department of Child Services and look to the totality of the evidence. *Id.* at 203.

A parent's historical inability to provide adequate housing, stability, and supervision

coupled with a current inability to provide the same will support a finding that termination of the parent-child relationship is in the child's best interests. *In re A.L.H.*, 774 N.E.2d 896, 900 (Ind. Ct. App. 2002). Because of Father's lengthy and enduring incarceration, which began sometime prior to the filing of the petition for guardianship in November of 2004, Father has an historical inability to provide adequate housing, stability, and supervision for his children. Likewise, Father's continued incarceration at the time of the termination hearing is strong evidence of his current inability to provide the same.

Keeping in mind that the purpose of terminating parental rights is not to punish parents, but to protect the children, several other factors in this case weigh in favor of the juvenile court's conclusion that the termination of Father's parental rights was in the best interests of the children, including: (1) the children are in need of stability and permanency now; (2) the children are doing well in their current placements; and (3) there is no guarantee that Father will be a suitable parent once he is released from prison or that he will ever be able to obtain custody.

At the time of the termination hearing, the children had been removed from their parents, first pursuant to the guardianship and later due to the filing of the CHINS petition, for over two years. In addition, case manager Friend and counselor Samuels both testified that the children needed stability and permanency in their lives. Likewise, Friend testified that she felt termination of Father's parental rights was in the children's best interests. CASA Wilhoit concurred with the TCDCS's recommendation to terminate Father's parental rights, stating that it was not fair to keep "jerking [the kids] around" and that they "deserve[d] to have the comfort and security of a forever home." *Appellant's App*. at 205.

Even assuming that Father will eventually develop into a suitable parent, we cannot force the children to wait any longer for the opportunity to enjoy the permanency that is essential to their development and overall well-being. *See In re S.P.H.*, 806 N.E.2d 874, 883 (Ind. Ct. App. 2004) (stating that the needs of the children are too substantial to force them to wait while determining if their incarcerated father would be able to appropriately parent them). As our Supreme Court has explained:

> To permit the children to travel from one home to another while termination proceedings span across the years is incongruous and contrary to the federal and state policy of minimizing the 'foster care drift' that has doomed millions of children to interim, multiple and otherwise impermanent placement. Due to the immeasurable damage a child may suffer amidst the uncertainty . . . it is in the child's best interest and overall well being to limit the potential for years of litigation and inability. It is undisputed that children require secure, stable, long-term, continuous relationships with their parents or foster parents. There is little that can be as detrimental to a child's sound development as uncertainty.

Baker, 810 N.E.2d at 1040 (quotations and citations omitted).

The TCDCS proved by clear and convincing evidence that there is a reasonable probability that the conditions that led to the children's removal from Father would not be remedied, that termination of the parent-child relationship is in the children's best interests and that there is a satisfactory plan for the care and treatment of the children, namely: adoption. *See In re A.N.J.*, 690 N.E.2d 716, 722 (Ind. Ct. App. 1997) (stating adoption is a satisfactory plan for the care and treatment of children following the termination of their parents' parental rights). Accordingly, we affirm the trial court's judgment terminating Father's and Mother's parental rights to the children.

Affirmed.

RILEY, J., and MAY, J., concur.