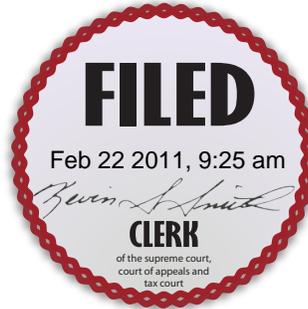


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEYS FOR APPELLANTS:

MARK SMALL
Indianapolis, Indiana

KIMBERLY A. JACKSON
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

KENNETH R. BRUCE
DCS, Local Office in Miami County
Peru, Indiana

ROBERT J. HENKE
DCS Central Administration
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF T.R., A CHILD)
ALLEGED TO BE A CHILD IN NEED)
OF SERVICES,)
)
S.S. AND R.R.,)
)
Appellants-Respondents,)
)
vs.)
)
INDIANA DEPARTMENT OF CHILD)
SERVICES,)
)
Appellee-Petitioner.)

No. 52A05-1008-JC-544

APPEAL FROM THE MIAMI CIRCUIT COURT
The Honorable Robert A. Spahr, Judge
Cause No. 52C01-1002-JC-12

February 22, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

R.R. (“Father”) and S.S. (“Mother,” and together with Father, “Parents”) appeal the juvenile court’s order determining that T.R. is a child in need of services (“CHINS”) and the dispositional order following that determination. Mother raises four issues, which we revise and restate as:

- I. Whether Mother was denied a right to counsel;
- II. Whether the court abused its discretion in denying Mother’s motion to continue the fact-finding hearing; and
- III. Whether the court’s dispositional order was adequate.

Both Parents raise the issue of whether sufficient evidence supports the juvenile court’s determination that T.R. was a CHINS.¹ We affirm and remand.

The facts most favorable to the juvenile court’s order follow. T.R. was born on December 31, 2008. In April 2009, T.R. was diagnosed with a heart murmur. The Indiana Department of Child Services Miami County Local Office (“DCS”) filed a CHINS proceeding in June 2009 to require Parents to take T.R. to appointments at Riley Hospital related to T.R.’s care. In early February 2010, Dr. Hougendobler, a pediatrician in Huntington, Indiana, who had been treating T.R. since approximately one week after her birth, sent a report to DCS regarding his concerns about T.R.’s growth and the possible risks associated with her growth.

DCS began an investigation and two DCS family case managers visited T.R.’s home on February 18, 2010. After observing conditions at the home, including the bottles T.R. had been given which contained curdled milk and day-old prune juice, and

¹ Mother and Father initially filed separate appeals which were later consolidated under the current appellate cause number.

obtaining information regarding when T.R. had been fed, DCS removed T.R. from the home.

On February 22, 2010, DCS filed a Verified Petition Alleging Child is a Child in Need of Services, in which it alleged that T.R. was not being fed properly, failed to thrive, and missed doctor's appointments. That same day, the juvenile court held an initial/detention hearing at which Parents appeared and the court made arrangements to appoint a public defender to represent Parents. On February 24, 2010, the court scheduled a pre-fact-finding hearing for March 10, 2010, and a fact-finding hearing for March 31, 2010. On March 2, 2010, separate counsel, each with the Miami County Public Defender Office, entered appearances on behalf of Mother and Father. At the March 10, 2010 hearing, Mother's counsel advised the court of a conflict he had with the March 31, 2010 hearing date. Mother and Father agreed to be represented by Father's counsel for part of the fact-finding hearing, and the court entered an order reflecting the temporary joint representation.

The juvenile court conducted a fact-finding hearing which was held on March 31, 2010, April 1, 2010, June 1, 2010, and July 26, 2010. At the fact-finding hearing, the parties presented evidence including T.R.'s medical records, photographs of T.R. and conditions at Parents' residence, and the testimony of two DCS family case managers who worked with T.R., Dr. Hougendobler, and a foster parent of T.R. At the hearing on June 1, 2010, Father moved for a continuance in order to call an expert medical witness depending upon the results of certain genetic testing which were expected near the end of June, and the court granted the motion over the objection of DCS. At the hearing on July

26, 2010, Parents requested the court to continue the fact-finding hearing until they received the results of additional medical tests, and the court denied the request.

Following the completion of the fact-finding hearing, the court found that T.R. was a CHINS. After a dispositional hearing, the court entered a dispositional order that T.R. remain in her current placement in foster care with supervision of DCS and that Parents participate in supervised visitation and complete other exams and treatments.

I.

The first issue is whether Mother was denied a right to counsel. Mother argues that: (A) the court erred in failing to appoint counsel during the emergency detention hearing; (B) the court erred in allowing the temporary joint representation of Parents; and (C) she received ineffective assistance of counsel.

A. Emergency Detention Hearing

Mother first argues that the court denied her right to counsel at the emergency detention hearing on February 22, 2010.² We disagree.

Ind. Code § 31-34-4-6 governs the duty to inform parents of their legal rights and provides in part:

- (a) The department shall submit written information to a parent, custodian, or guardian of a child who is alleged to be abused or neglected regarding the following legal rights of the parent, custodian, or guardian:
 - (1) The right to have a detention hearing held by a court within forty-eight (48) hours after the child's removal

² In her amended appellant's brief, Mother cites to Ind. Code § 31-34-4-5(a)(2)(C). However, Ind. Code § 31-34-4-5 does not contain a subsection (a) and relates to the investigation and release or detention of a child by an intake officer under certain circumstances.

from the home and to request return of the child at the hearing.

- (2) The right to:
 - (A) be represented by an attorney;

* * * * *

at each court proceeding on a petition alleging that the child is a child in need of services. The parent, guardian, or custodian has the right to be represented by a court appointed attorney under clause (A) upon the request of the parent, guardian, or custodian if the court finds that the parent, guardian, or custodian does not have sufficient financial means for obtaining representation as described in IC 34-10-1.

* * * * *

- (b) The department shall submit the written information under subsection (a) to the child's parent, guardian, or custodian at the time:
 - (1) the child is taken into custody; or
 - (2) the department files a petition alleging that the child is a child in need of services;

whichever occurs earlier.

Here, at the February 22, 2010 initial/detention hearing, the court explained to Parents the allegations, that they had the right to be represented by an attorney, and that the court would appoint a public defender. The court entered an automatic denial to the allegations and gave Parents information to find out the public defender assigned to them. Later during the hearing, the court noted that the hearing was "not a fact-finding hearing" and that the "focus [was] on an appropriate placement of the child and care" between the detention hearing and the fact-finding hearing when "we can have an attorney present

with the parents.” See Transcript at 19. We also note that Mother does not cite to authority in support of the argument that Ind. Code § 31-34-4-6 required the court to provide her with counsel at the detention hearing stage of the proceedings absent a request. Further, Mother fails to argue or point to the record to show that she was not informed of her right to request counsel as set forth in Ind. Code § 31-34-4-6 or that she requested counsel for the detention hearing. Based upon the record, we cannot say that the court erred in failing to appoint counsel to represent Mother at the detention hearing.

B. Fact-Finding Hearing

Mother next argues that the court abused its discretion in allowing the attorney originally appointed to represent Father to represent both Parents during a portion of the fact-finding hearing. Mother argues that “the conflicts of interests inherent in such joint representation were obvious to those in the courtroom with law degrees” and that Mother was not advised that she could refuse joint representation, retain counsel even if she declined joint representation, seek a continuance, ask the court to require her counsel to be present, or represent herself. Mother’s Brief at 23.

We initially note that Mother does not direct us to authority for the argument that the court was not permitted to appoint one public defender to represent Parents at the hearing. Parents and their appointed counsel were present at the March 10, 2010 pre-fact-finding hearing, and Mother’s counsel advised the court that he would not be able to attend the fact-finding hearing scheduled for March 31, 2010. The court asked Father’s appointed counsel how he felt about representing Parents, and counsel stated that “one person had mainly committed the alleged acts so there was a direct conflict there” but

that “their goals are the same” and that “one’s not blaming the other . . . so I don’t know why we need to have two attorneys here, but I can’t speak for [Mother]. [I]f they both want me to represent them, I’m fine with doing that.” Transcript at 33. The court then asked Father and Mother individually if they were willing to be represented by the same attorney, and Parents answered affirmatively. Also, upon being further questioned separately by the court, Mother and Father each indicated that no one had forced or threatened them to agree to the joint representation for part of the fact-finding hearing, and Mother indicated that the attorney assigned to Father would be able to adequately represent her.

The court issued a written order which provided in part:

Upon oral motion of Mother’s counsel, concurrence of Father’s counsel, and the Court having determined that Mother and Father knowingly consent to joint representation by Father’s counsel . . . at the Fact Finding Hearing, the Court will permit the matter to proceed on March 31, 2010 with [Father’s appointed counsel] representing both Mother and Father. Counsel for parents and Parents were advised to inform the Court if [] any conflict arises.

Mother’s Appendix at 101.

Mother does not point to the record to show, and our review does not disclose, that the joint representation of Parents for a portion of the fact-finding hearing by the public defender originally appointed to represent Father was inadequate, that the appointed attorney’s representation of Father adversely affected the representation of Mother, or that representation by a single attorney led to an unfair hearing. Based upon the record and under the circumstances, we cannot say that the juvenile court abused its discretion in permitting the joint representation during a portion of the fact-finding hearing. See Baker

v. Marion County Office of Family & Children, 810 N.E.2d 1035, 1042 (Ind. 2004) (holding that the parents' joint representation in a termination proceeding did not result in a conflict of interest and noting that "[t]here is nothing to suggest that representation by a single lawyer led to a fundamentally unfair hearing").

C. Ineffective Assistance

Mother next argues that she received ineffective assistance of counsel. Mother argues that her appointed counsel should not have agreed to allow Father's counsel to represent her at the fact-finding hearing and at least should have informed her fully as to the implications of joint representation. Mother argues that her counsel could have asked for a continuance and had an obligation to represent Mother at the proceeding. Mother also argues that "Father's counsel, while representing both parents, did not seek to present evidence establishing any distinctions between the parenting abilities of Mother and Father when he had the opportunity" despite some evidence that Mother was dependent on Father for transportation. Mother's Brief at 26.

The Indiana Supreme Court has stated that a CHINS adjudication focuses on the condition of the child and can come about "through no wrongdoing on the part of either parent, e.g., where a child substantially endangers the child's own health or the health of another individual . . . or when a child is adjudicated a CHINS because the parents lack the financial ability to meet the child's extraordinary medical needs." In re N.E., 919 N.E.2d 102, 105 (Ind. 2010) (citation omitted). The Court also stated that "[s]tanding alone, a CHINS adjudication does not establish culpability on the part of a particular parent." Id. The Court held that "[b]ecause a CHINS determination regards the status of

the child, a separate analysis as to each parent is not required in the CHINS determination stage.” Id. at 106.

With respect to the joint representation, as previously mentioned, Mother does not point to the record to show that the joint representation of Parents for a portion of the fact-finding hearing by the public defender originally appointed to represent Father was inadequate or led to an unfair hearing. In addition, with respect to the representation of Mother at the fact-finding hearing, the record shows that the evidence presented focused on T.R.’s condition and whether she was receiving the care and treatment necessary for her development. Mother does not point to evidence which suggests that the attorneys representing her throughout the hearing, including the public defender who was assigned to represent her and the public defender who was originally assigned to represent Father and represented Mother during a portion of the hearing, failed to challenge the evidence supporting the court’s determination that T.R. was in need of services. Further, we cannot say that Mother’s assertion that she received ineffective assistance of counsel during the proceedings because her attorney failed to request a continuance prior to the fact-finding hearing casts doubt on the ultimate result of the termination proceedings. Mother has failed to show that she was prejudiced by the performance of the attorneys who represented her at any stage in the CHINS proceedings.

II.

The next issue is whether the juvenile court abused its discretion in denying Mother’s motion to continue the fact-finding hearing on July 26, 2010. Mother essentially argues that the court’s failure to grant Parents’ motion denied them the

opportunity to discover whether other possible causes for T.R.'s failure to thrive existed and present that evidence at the fact-finding hearing.

The granting or denial of a continuance is clearly within the discretion of the trial court. Hallberg v. Hendricks County Office of Family & Children, 662 N.E.2d 639, 646 (Ind. Ct. App. 1996). Denial of the motion is an abuse of discretion only if the movant demonstrates good cause for granting the motion. Id.

The record shows that on June 1, 2010, the third day of the fact-finding hearing, DCS rested its case and Father by counsel made a motion for a continuance in order to call an expert medical witness depending upon the results of certain genetic testing which were expected near the end of June. The court granted the motion over the objection of DCS and scheduled the day of July 6, 2010 to continue the fact-finding hearing and set a discovery deadline for June 30, 2010. On July 1, 2010, the court rescheduled the last day of the fact-finding hearing for July 26, 2010.

On July 26, 2010, Parents failed to appear. Mother's counsel told the court that Mother had called Father's counsel and stated that Parents had court in Wabash County. Father's counsel told the court that he had spoken to Mother the previous week, that he had believed Parents would be present, and that he had received a message from Mother stating that Parents' witnesses never received subpoenas³ and that Parents had a conflict with a court scheduling in Wabash. Father's counsel, joined by Mother's counsel, orally requested a continuance because Parents were not present and because, although Parents

³ Father's counsel stated that he did not know he needed to subpoena the witnesses he intended to call during the hearing because the witnesses were his client's mother and sister.

had received the results of genetic testing on July 21, 2010, they had not yet received the results of a throat study and a bone scan. DCS objected to a continuance and argued that the case had already been continued in order for Parents to call a doctor based upon the results of the genetic testing and that Parents' updated witness list did not contain a medical doctor.⁴ Father's counsel clarified that the request for continuance was to obtain the results of a throat study and bone scan, not genetic study results. The court denied the oral motion for continuance and explained: "I am concerned [Parents are] just disappearing and not keeping or maintaining adequate communication with counsel who were [available] all of last week except maybe on Friday . . . suggesting that [Parents] are not placing adequate . . . importance on completing the hearing." Transcript at 220.

Mother and Father were represented by counsel at the July 26, 2010 hearing, and Mother does not point to the record or evidence to show that her absence at that stage of the proceedings resulted in prejudice to her. In addition, the court granted Parents the opportunity to receive the results of the genetic tests and call an expert at the continued hearing if they desired, and Parents did not present expert testimony at the hearing on July 26, 2010. Further, Parents could have discovered and obtained appropriate medical tests in an effort to show that T.R.'s condition was not the result of any lack of care or feeding between the time of the filing of the petition alleging T.R. was a CHINS in February 2010 and the time of the fact-finding hearing which had been extended to July 26, 2010. Parents did not present evidence regarding the throat and bone tests or show how the results of those tests would impact the proceedings, and we note that we consider

⁴ The record does not contain a copy of Parents' updated witness list.

the evidence contained in the record and will not engage in speculation. If the results of further medical tests disclose that T.R.'s failure to thrive may be due to a medical condition outside the control of Parents, then Parents may request the juvenile court to consider those test results in future proceedings regarding T.R. Under the circumstances, we conclude that any risk of error caused by the court's denial of the motion to continue was minimal.

Based upon our review of the record and under the circumstances of this case, we cannot say that the court abused its discretion in denying Mother's motion to continue. See Hallberg, 662 N.E.2d at 646 (holding that the trial court did not abuse its discretion in denying the appellant's motions for continuances of the CHINS fact-finding hearing to complete discovery); see also C.T. v. Marion Cnty. Dep't. of Child Services, 896 N.E.2d 571, 588 (Ind. Ct. App. 2008) (concluding that the risk of error caused by the juvenile court's denial of a motion to continue was minimal), trans. denied.

III.

The next issue is whether the court's dispositional order was adequate. Mother argues that the dispositional order does not contain the findings required by statute, most of the court's findings appear to be conclusions, the findings related to Parents' participation in a care plan did not suggest Parents' inability to provide proper care, and does not refer to any efforts made to prevent T.R.'s removal from Parents or to reunite them. In addition, Mother argues that, even if the dispositional order as a whole is not defective, certain individual components of the order are defective. Specifically, Mother argues that the record does not support and the court offered no reason for the order

requiring T.R. to remain in foster care, that Mother's visitation be supervised, and that Mother be required to obtain a driver's license, GED or high school degree, and employment.

DCS states that it "believes the dispositional order is lacking in substance" and that the findings "may have amounted to technical non-compliance with statutory authority" but argues that the court's reasons for the disposition are found in the order and the order meets the substantive requirements of Ind. Code § 31-34-19-10. Appellee's Brief at 22. DCS further argues that Mother did not object to the requirements related to obtaining a driver's license, education, and employment, that Mother's counsel admitted that the requirements were made because Mother needed to be independent and not rely upon Father, and that although the dispositional order does not specifically make findings on the evidence in these areas, the evidence is sufficient to demonstrate that Mother was made aware of the rationale for the recommendations.

Ind. Code § 31-34-19-10 provides:

The juvenile court shall accompany the court's dispositional decree with written findings and conclusions upon the record concerning the following:

1. The needs of the child for care, treatment, rehabilitation, or placement.
2. The need for participation by the parent, guardian, or custodian in the plan of care for the child.
3. Efforts made, if the child is in need of services, to:
 - (a) prevent the child's removal from; or
 - (b) reunite the child with;

the child's parent, guardian, or custodian in accordance with federal law.

4. Family services that were offered and provided to:
 - (a) a child in need of services; or
 - (b) the child's parent, guardian, or custodian in accordance with federal law.
5. The court's reasons for the disposition.

We have previously said that a trial court's failure to issue findings to support a dispositional decree is a violation of this section. See In re A.I., 825 N.E.2d 798, 814 (Ind. Ct. App. 2005), trans. denied.

Here, after a hearing, the court issued a dispositional order which provided in part that T.R. was a CHINS, will be given medication according to physician's orders, and will receive care in therapeutic foster care. The order also stated that participation by the parents in the plan of care for the child is necessary to increase Parents' ability to provide proper care, treatment, and supervision, increase Parents' ability to have a stable and nurturing parent-child relationship, and allow the child to maintain relationships with Parents, siblings, and/or extended family. With respect to parental participation, the order provided that Parents shall continue supervised visitation with T.R., individual and couples counseling through Family Service Society, and Home Based Services from White's Residential and Family Services, and obtain and maintain employment. The order also required Mother to earn her high school diploma or GED and obtain her driver's license and Father to participate in psychiatric, medical, and substance abuse evaluations.

The dispositional order was not accompanied by written reasoning or findings based upon the evidence presented at the dispositional hearing. Instead, the order for the most part merely sets forth the court's conclusions regarding the placement of T.R., orders supervised visits by Parents, and sets forth the parental participation requirements related to Parents. An omission of written findings concerning a court's reasoning for an out-of-home placement or the steps required of Parents regarding their future participation in the CHINS proceedings may have a substantial impact in a subsequent CHINS or termination proceeding. Accordingly, we remand with instructions for the juvenile court to issue an amended dispositional order in this case which includes specific written reasons and findings for the disposition, based upon the evidence presented at the fact-finding and dispositional hearings, in accordance with Ind. Code § 31-34-19-10. See A.P. v. Porter Cnty. Office of Family & Children, 734 N.E.2d 1107, 1115-1116 (Ind. Ct. App. 2000) (finding that the CHINS dispositional order and the modification of that order providing for the child's out-of-home placement contained no written findings and conclusions upon the record concerning its reasons for those dispositions as required by Ind. Code § 31-34-19-10 and noting that an omission of written findings concerning a court's reasoning for an out-of-home placement may have a substantial impact in a subsequent termination proceeding), reh'g denied, trans. denied; see also In re N.E., 919 N.E.2d at 107-108 (reversing and holding in part that the findings contained in the juvenile court's dispositional decree were deficient with respect to the father and did not address the court's reasons for not placing the child with the father); In re J.Q., 836 N.E.2d 961, 967 (Ind. Ct. App. 2005) (noting that in light of the trial court's failure to

adequately state reasons for its disposition along with other procedural errors the court chose to remand the CHINS determination with instructions that the trial court more specifically follow the requirements of Ind. Code § 31-34-19-10), reh'g denied.

As to the sufficiency of the evidence to support the determination that T.R. was a CHINS, the record reveals that family case manager Cassandra Taylor testified at the fact-finding hearing that she observed that T.R. seemed sickly and lethargic during the February 18, 2010 home visit. Taylor testified that she observed a blue eight-ounce bottle, which Parents stated they had given to T.R. approximately two hours earlier, and the bottle appeared to have about six ounces of spoiled and curdled milk remaining in it with a thick residue in the nipple. A second bottle on a high chair containing prune juice was probably less than half full, and Parents indicated it was left over from the previous day. The tray of the high chair had dried food on it which Parents indicated was also from the previous day. Taylor testified she laid T.R. on the couch to check her diaper and noticed “that [T.R.’s] stool was like rocks” and was “incredibly hard.” Transcript at 110. Parents did not indicate they had fed T.R. any solid food that day, and Taylor did not observe any physical evidence indicating T.R. had been fed.

Dr. Hougendobler testified that he had been treating T.R. since approximately one week after her birth and that he was concerned about T.R.’s development and growth and that T.R.’s growth became more of an issue when she was around seven or eight months old. He testified that T.R.’s growth chart showed that T.R. was “dropping off the curve” in terms of both her weight and height. Id. at 139. DCS presented charts related to the average growth of girls in the United States between birth and thirty-six months old and

indicating T.R.'s growth in terms of her weight, height, and head circumference. Dr. Hougendobler indicated that the chart showed that T.R.'s height was below the tenth percentile and that her weight was well below the third percentile. Dr. Hougendobler also testified that a lack of growth causes concerns related to brain development which would put T.R. at risk for learning disabilities as well as muscle development.

In addition, Dr. Hougendobler acknowledged that T.R. had a previous medical issue involving her heart but that he was not aware of any medical issues which had caused T.R.'s lack of growth. On cross-examination, Dr. Hougendobler testified that he did not order tests regarding certain other medical causes for T.R.'s low weight and that a newborn screen performed in Indiana "pretty much rules out a lot of the metabolic problems." *Id.* at 160. On redirect-examination, when asked why he did not perform certain other medical tests, Dr. Hougendobler testified that he "look[ed] for things besides height and weight in order to justify those kinds of work ups" and that "[t]here's a whole host of things that we look for, none of which [T.R.] exhibited." *Id.* at 171. Dr. Hougendobler stated that he had no medical reason other than a lack of nutrition why T.R.'s growth was an issue.

DCS also presented the testimony of T.R.'s foster parent, who testified that T.R. "could not latch onto the bottle" and "suck on it properly," that T.R. did not know how to chew and could not swallow without choking, and that T.R. was given formula "to get the nutrition and the calories up." *Id.* at 184-185.

The evidence was sufficient to demonstrate that T.R.'s physical condition was "seriously endangered." *See, e.g., Roark v. Roark*, 551 N.E.2d 865, 869-872 (Ind. Ct.

App. 1990) (holding that the evidence presented at a fact-finding hearing was sufficient to support the CHINS finding).

While the evidence was sufficient, due to the deficiencies in the dispositional order, we remand with instructions for the court to issue an amended dispositional order which includes written reasons and findings for the disposition based upon the evidence presented at the fact-finding and dispositional hearings in accordance with Ind. Code § 31-34-19-10. In all other respects, we affirm.

Affirmed and remanded.

RILEY, J., concurs.

ROBB, C.J., concurs in result.