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IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF T.A. and K.S. CHILDREN ALLEGED TO BE CHILDREN IN NEED OF SERVICES,	)	
L.F.,	)	
Appellant- Petitioner,	)	
vs.	)	No. 66A04-0807-JV-435
DEPARTMENT OF CHILD SERVICES, PULASKI COUNTY,	)	
Appellee- Respondent,	)	

APPEAL FROM THE PULASKI CIRCUIT COURT
The Honorable John D. Potter, Special Judge
Cause No. 66C01-0611-JC-121
66C01-0611-JC-122

May 28, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue[1]

L.F. ("Mother") appeals the trial court's denial of her motion to correct error. For our review, Mother raises a single issue, whether the trial court abused its discretion when it granted Pulaski County Department of Child Services' ("DCS") motion to dismiss Mother's petition to hold DCS in contempt. Concluding the trial court did not abuse its discretion, we affirm.

Facts and Procedural History[2]

On December 20, 2005, J.S., Mother's fourteen-year-old child, died unexpectedly. Nearly eleven months later, on November 1, 2006, DCS removed two of Mother's other children, T.A. and K.S., from Mother's home. DCS filed CHINS petitions for both children on November 16, 2006 alleging that J.S. died as a result of physical abuse or

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[1] We held oral arguments on April 20, 2009, at Ivy Tech Community College in Lafayette. We thank counsel for their advocacy and extend our appreciation to Ivy Tech for hosting the oral argument. We also thank the Tippecanoe County Bar Association for hosting a continuing legal education program following the oral arguments.

[2] Mother's counsel submitted three supplemental appendices: one with Mother's reply brief; one prior to oral arguments; and one following oral arguments. In each of these supplemental appendices, Mother's counsel included materials that do not appear to be a part of the trial record, including emails, reports, and materials from trial proceedings in other courts. DCS filed a general objection to our consideration of any materials outside of the trial record, and Mother filed a reply. Indiana Appellate Rule 50(2) lists the materials that may be included in a party's appendix. In reaching our decision, we have ignored any materials submitted by Mother's counsel that are neither contemplated by Appellate Rule 50(2) nor included in the trial record.

In addition, in each of Mother's two motions to file a supplemental appendix, Mother's counsel includes additional arguments regarding the issue on appeal. Mother had her opportunity to make her arguments in her principal and reply briefs. It is highly improper for Mother's counsel to attempt to insert additional arguments under the guise of a motion to file a supplemental appendix. In reaching our decision, we have similarly ignored any additional arguments contained in Mother's motions to file supplemental appendices.

Finally, prior to oral arguments, we requested that the parties produce transcripts from trial court hearings directly relating to the issue raised on appeal. Mother's counsel submitted two incomplete, photocopied transcripts purporting to be parts one and two of the July 17, 2008 hearing; however, it is clear that portions of the official transcript occurring between the two parts submitted have been omitted. The lack of certified transcripts of the relevant trial court hearings has made our review of this case much more difficult. Further, Mother's counsel's attempt to supplement the lack of certified transcripts with emails and self-created summaries that are not a part of the trial record is highly improper. Mother's counsel is advised to abide by the Appellate Rules in future dealings with this court.

neglect by Mother and her husband. Subsequent medical evidence showed no evidence of any physical abuse; rather J.S. had died from sudden cardiac arrest brought on by a seizure. A Coroner's report concluded J.S. died an accidental death as a result of prescription errors in her medication. The prescription error caused J.S. to be given a double dose of Warfarin – an anticoagulant – but no Dilantin – an anti-seizure medication that J.S. routinely took for epilepsy – for approximately two months prior to her death.[3] The prescription error combined with several other factors, including a viral infection, the onset of J.S.'s first menstrual period, and a recent vaccination, led to extensive internal bleeding, which, in turn, led to J.S.'s seizure and cardiac arrest.

After the second coroner's report was filed, DCS and Mother reached an agreement regarding the return of T.A. and K.S. The agreement, as recited in the trial court's order for T.A. states, in relevant part, as follows:

> 1. The child will be placed in the home of her mother, following a transition period, which shall be as follows:
>
> (a) The child shall continue to have supervised visits with her mother during the next 7 days to give the State of Indiana through the Prosecuting Attorney an opportunity to depose the child.
>
> (b) At the conclusion of the 7 day period set out in paragraph (a), the child will begin to have unsupervised visits in her mother's home following summer school, but the visits shall not be overnight until recommended by the child's counselor.
>
> (c) At the conclusion of a 7 day period of unsupervised visits, the child shall be placed in the home of her mother, and jurisdiction shall be terminated, <u>if dispute is resolved regarding best interests and reasonable efforts</u>.

Appellee's App. at 9-10 (the underlined portion is handwritten on the typed order). The agreement, as recited in the trial court's order for K.S. states, in relevant part, as follows:

[3] At birth, J.S. had congenital heart defects that required multiple surgeries to create a two-chambered heart. As a result, J.S. was required to take heart medication and Warfarin.

> 1. The child will transition to the home of her mother, upon the following terms and conditions:
>
> (a) The child shall continue to have supervised visits with her mother during the next 7 days to give the State of Indiana through the Prosecuting Attorney an opportunity to depose the child.
>
> (b) At the conclusion of the 7 day period set out in paragraph (a), the child will begin to have unsupervised visits in her mother's home after summer school, but the visits shall not be overnight until recommended by the child's counselor.
>
> (c) At the conclusion of a 7 day period of unsupervised visits, the child shall be placed in the home of her mother.

Id. at 11-12. Both orders conclude, "ALL SO ORDERED the 19th day of July, 2007, and entered this 27th day of July, 2007." Id. at 10, 13.

On July 25, 2007, DCS initiated an ex parte communication with the trial court, stating the children had expressed a desire not to return home.[4] The trial court disclosed the ex parte contact to all parties through their counsel and scheduled a hearing on the issue for July 27, 2007; however, the hearing does not seem to have been held. DCS did not return either T.A. or K.S. to Mother on August 3, 2007, the date which was fourteen days after the July 19th order.

The order regarding K.S. contains an additional requirement not present in the order for T.A.:

> Further, the child's mother and stepfather shall obtain a psychological assessment from an agency approved by [DCS] and shall comply with any services recommended as a result of the evaluation. The DCS shall submit a list of agencies to mother and stepfather who shall choose a provider from the list so that an appointment may be scheduled and attended within 30 days.

[4] DCS's attempt to communicate ex parte with the trial court is highly improper. "Improper ex parte contacts are among the most pernicious of ethical violations." Cannon v. State, 866 N.E.2d 770, 773 (Ind. 2007). They undermine the fairness of the case at hand and they threaten the reputation of the legal profession and the integrity of our system of justice. Id. Luckily, the trial court acted quickly to advise all parties of the ex parte contact. However, given DCS's frequent interaction with trial courts, it should know the rules against ex parte contacts and must refrain from such attempts to improperly influence the trial court.

Id. at 12.

DCS provided a list of three approved therapists on August 23, 2007. At some point between the fact-finding hearing and August 1, 2007, DCS, apparently without Mother's consent or knowledge and prior to Mother choosing a therapist, scheduled appointments for Mother and her husband to undergo psychological assessments on August 3, 2007 with Dr. Rupley, a therapist chosen by DCS. Mother cancelled the appointments and later scheduled appointments with a therapist of her own choosing, who was apparently not included in the list provided by DCS.

On August 6, 2007, Mother filed a motion to hold DCS in contempt, impose sanctions, and conform order to agreement. The motion set forth, at length, the events leading up to the fact-finding hearing on July 18; the details of the hearing; the agreement reached between Mother and DCS; the details of the trial court's order; and the events occurring after the trial court's order culminating in the children not being returned on August 3, 2007. The motion also alleges several problems with the trial court's order, specifically that certain sections do not reflect the parties' agreement and are not supported by the evidence in the record. The motion requests several revisions and deletions in the trial court's order, sanctions imposed on DCS of $10,000 per day for noncompliance with the trial court's order, reimbursement of Mother's expenses in obtaining a psychologist to perform the psychological assessments required by the court, and reasonable attorney fees.

On August 6 and 7, 2007 DCS filed motions to clarify the trial court's July 19 2007 orders. On August 9, the trial court held a hearing on the issue of returning the

children to Mother and issued separate identical orders stating:

> 1. The child … shall be returned to the home of her mother and stepfather … this date.
> 2. That the foster parents shall transport and deliver the child … at 8:30 p.m. this date at the Marathon gas station in Plymouth, Indiana to meet her mother and stepfather ….
> 3. The child's mother and stepfather … are directed to transport and deliver the child … to the Bowen Center on Friday, August 10, 2007 to meet with [counselor] at 11:00 a.m. on said date.

Id. at 180, 182. Both children were returned to Mother on August 9, 2007.

DCS filed motions to dismiss the CHINS petitions on August 13, 2007, and October 11, 2007. The trial court set the matter for hearing on November 27, 2007. On November 26, 2007, DCS filed its motion to discharge Mother's contempt motion. On November 27, 2007, the trial court dismissed both CHINS petitions but retained jurisdiction over some collateral matters, including Mother's contempt motion.

On January 16, 2008, the trial court held a hearing on DCS's motion to discharge Mother's contempt motion. The trial court then dismissed Mother's motion for contempt in an order dated January 22, 2008. In granting the motion to dismiss at the January 16th hearing, the trial court stated the following reasons:

> "(1) it wasn't verified, but you know, that is a nitpicky reason. The Court will admit that. Obviously [DCS] knew it wasn't verified for four months, and didn't file your petition for four months. That's hardly – there is [sic] problems with complying with the rule with the contempt citation and how it is drafted to put someone on reasonable notice with regard to the contempt citation, and moreover, uh, there's nothing left to do. The children have been returned home. The State has been – has dismissed their case. … I can't issue monetary damages against the State."

Transcript at 33. On February 21, 2008, Mother filed a motion to correct error, which the trial court denied, after a hearing, on May 30, 2008. Mother now appeals.

Discussion and Decision

I. Standard of Review

We review the denial of a motion to correct error for an abuse of discretion. Scales v. Scales, 891 N.E.2d 1116, 1118 (Ind. Ct. App. 2008). The trial court abuses its discretion when its decision is against the logic and effect of the facts and circumstances before the court or if it misinterpreted the law. Id. In addition, the determination of whether a party is in contempt of court is a matter within the discretion of the trial court. Mitchell v. Mitchell, 871 N.E.2d 390, 394 (Ind. Ct. App. 2007). Therefore, we review the decision to dismiss a motion for contempt for an abuse of that discretion, which occurs when the decision is against the logic and effect of the facts and circumstances before the court or is contrary to law. Id. "We will affirm unless, after a review of the entire record, we have a firm and definite belief that a mistake has been made by the trial court." Id.

II. Contempt

Mother argues that the trial court abused its discretion when it dismissed her motion to hold DCS in contempt for failing to abide by the July 19, 2007 order.

> Contempt proceedings are sui generis, neither civil nor criminal in nature, even though both of those labels are used to describe certain categories of contempt. Because both civil and criminal contempts can arise out of the same conduct, these categories of contempts are not readily distinguishable. Generally, contempts have been categorized by the nature and purpose of the sanction imposed.

Mitchell v. Stevenson, 677 N.E.2d 551, 559-60 (Ind. Ct. App. 1997). Civil contempt is failing to do something that a trial court, in a civil action, has ordered to be done for the benefit of an opposing party. Flash v. Holtsclaw, 789 N.E.2d 955, 958 (Ind. Ct. App.

2003). "A party who has been injured or damaged by the failure of another to conform to a court order may seek a finding of contempt." Id. The primary purpose of civil contempt is not to punish a party, but rather to coerce compliance with a court's order or to compensate the aggrieved party. Id. at 959. Thus, any type of penalty in a civil contempt proceeding must be coercive or remedial in nature. In re Direct Criminal Contempt Proceedings, 864 N.E.2d 425, 428 (Ind. Ct. App. 2007). In addition, a civil contempt order must offer an opportunity for the recalcitrant party to purge itself of the contempt. Flash, 789 N.E.2d at 959.

A. Willful Disobedience

DCS points to several procedural defects in Mother's contempt motion; however, we need not address these procedural defects because the issue of willful disobedience is dispositive. In order to be held in contempt, a party must have willfully disobeyed a trial court's order. Ind. High School Athletic Ass'n v. Martin, 765 N.E.2d 1238, 1241 (Ind. 2002). The order must have been clear and certain so that there could be no question what the party must do, or not do, and no question regarding when the order is violated. Id. DCS argues any violation of the trial court's order was not willful because the trial court's order did not clearly state a definitive deadline for return of the children. DCS asserts the trial court's orders are ambiguous and based on the occurrence of certain events rather than expiration of time periods. Because the orders for T.A. and K.S. contain different language and different ambiguities, we address each order separately below.

1. Order Regarding T.A.

Paragraph 1(c) of the order regarding T.A. states: "At the conclusion of a seven day period of unsupervised visits, the child shall be placed in the home of her mother, and jurisdiction shall be terminated, if dispute is resolved regarding best interests and reasonable efforts."[5] Appellee's App. at 10 (underlined portions are handwritten onto the order). This provision can be interpreted in two different ways, either: 1) T.A. shall be placed in her mother's home at the conclusion of the seven-day period of unsupervised visits, but jurisdiction will not be terminated until the dispute regarding best interests and reasonable efforts is resolved; or 2) T.A. will not be placed in the home of her mother until after the dispute regarding best interests and reasonable efforts is resolved. Compounding this ambiguity is the fact that K.S.'s order separates the provision regarding return of the children from the provision regarding best interests and reasonable efforts. Neither do we find any definitive explanation of the timeline for the return of the children in the transcript of the July 19th hearing.

DCS raised this precise issue in its motion to clarify the order regarding T.A., stating, "DCS seeks clarification as to whether the child should be returned before the question of best interests and reasonable efforts is resolved, or if the Court intends for the child to be returned home, but the case not dismissed pending resolution of the issues raised." Id. at 14. The order is ambiguous and does not meet the clear and certain

[5] DCS also argues on appeal that the order is not clear whether it intends two consecutive one-week periods regardless of the number of actual visits or seven actual supervised visits followed by seven actual unsupervised visits prior to the return of the children. However, in its oral argument, DCS conceded that the fourteen days of visits had been completed prior to August 3, 2008. Therefore, this argument has no merit.

requirement regarding the exact timeline for the return of T.A. Therefore, DCS could not be found to have willfully violated the order.

2. Order Regarding K.S.

Paragraph 1(b) of the order regarding K.S. states: "At the conclusion of the 7 day period set out in paragraph (a), the child will begin to have unsupervised visits in her mother's home after summer school, but the visits shall not be overnight until recommended by the child's counselor." Id. at 11. This provision can also be interpreted in two ways: 1) K.S. should go to Mother's house for unsupervised visits each afternoon once she has finished summer school classes for that day; or 2) K.S. should begin having unsupervised visits with Mother after summer school classes have finished for the summer. Although DCS argues this provision is ambiguous, the issue is moot because DCS conceded in its oral argument that the fourteen days of visits had been completed prior to August 3, 2008. See supra, at note 5.

However, a second ambiguity exists in the order regarding K.S. Paragraph 1(d) sets forth the requirement that Mother and her husband obtain psychological assessments. Paragraph 2 then states:

> The court finds that an immediate return to the home of the child's mother would be contrary to the welfare of the child for the reason that she should finish summer school, and the services set about above should be in place prior to placement of the child in the home of her mother.

Id. at 12. This statement seems to indicate that K.S. should not be returned to Mother until after she has finished summer school and Mother and her husband have obtained a

psychological evaluation.[6] This latter interpretation seems to conflict with the language of paragraph 1(c) which states: "At the conclusion of a 7 day period of unsupervised visits, the child shall be placed in the home of her mother." Id.

In its motion to clarify the order regarding K.S., DCS requests the trial court to clarify "[s]hould the child be returned to the unsupervised care of her mother after completion of the extended Starkey schedule, or rather returned immediately, even though the conditions precedent to reunification have not been accomplished?" Id. at 16-17. Just as above, this order is ambiguous and does not meet the clear and certain requirement regarding the exact timeline for the return of K.S. Therefore, DCS could not be found to have willfully violated the order.

Both orders contain ambiguous language regarding the conditions precedent to the return of T.A. and K.S. In addition, the two orders seem to set separate criteria for the return of each girl. In light of this ambiguity, DCS could not have willfully violated the orders. Therefore, the trial court did not abuse its discretion when it dismissed Mother's motion for contempt.

Conclusion

The trial court did not abuse its discretion when it dismissed Mother's motion for contempt.

Affirmed.

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[6] K.S. apparently completed summer school on August 3, 2008. However, Mother and her husband had not yet obtained psychological evaluations. DCS provided Mother with a list of three therapists to perform the evaluations. There is no evidence that Mother attempted to strike the names of any of the therapists; similarly, there is no evidence that DCS sought permission from the trial court to schedule an appointment on Mother's behalf given her alleged refusal to schedule it herself. Further, the trial court's order is confusing because on one hand it allows Mother thirty days to schedule the evaluations, but, on the other hand, it seems to require the evaluations as a condition to the return of K.S.

RILEY, J., and BRADFORD, J., concur.