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**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF K.M.,)
A Child in Need of Services)
)
SUSAN KNOTTS,)
)
Appellant-Intervenor,)
)
and)
)
CHILD ADVOCATES, INC.,)
)
Appellant-Guardian Ad Litem,)
)
vs.)
)
THE MARION COUNTY DEPARTMENT)
OF CHILD SERVICES,)
)
Appellee-Petitioner,)
)
and)
)
TIMOTHY GARDNER, Father, and)
BROOKE REGINA MORRISON, Mother,)
)
Appellees-Respondents.)

No. 49A02-0611-JV-1039

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Christopher J. Piazza, Magistrate
Cause No. 49D09-0403-JC-457

August 24, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Susan Knotts appeals the denial of her motion to correct error following the granting of a motion filed by the Marion County Department of Child Services (“MCDCS”) to dismiss a child in need of services (“CHINS”) petition without a hearing. We affirm.

Issue

The issue is whether the trial court abused its discretion in denying Knotts’s motion to correct error.

Facts and Procedural History

On March 16, 2004, MCDCS filed a petition alleging that K.M. was a CHINS.¹ K.M. became a ward of MCDCS and was placed in foster care. On October 14, 2004, K.M. was placed in Knotts’s home. On May 11, 2006, Knotts filed a petition to intervene in the

¹ The record indicates that K.M. was born in February 2004. According to Knotts’s May 2006 foster parent report, K.M. spent his first twenty-one days in the hospital detoxifying from exposure to his mother’s cocaine and heroin usage during pregnancy, the next six months in a temporary foster home, and the next year and a half in Knotts’s home. Appellant’s App. at 5.

CHINS proceeding. On May 15, 2006, the trial court granted Knotts's petition. Also on that date, Knotts submitted a foster parent report that expressed concern about K.M.'s behavior following several recent in-home visits with his father, Timothy Gardner. On May 17, 2006, Knotts requested an evaluation to assess the bonding between her and K.M. At a CHINS review hearing on May 18, 2006, the trial court ordered that K.M. be removed from foster care and placed temporarily with Gardner on a trial basis. On June 26, 2006, the trial court granted Knotts's motion for a bonding evaluation and set a hearing for September 28, 2006. On July 13, 2006, Knotts informed the MCDCS case manager via e-mail that she had scheduled a bonding evaluation for August 1, 2006.

On July 26, 2006, MCDCS filed a motion to dismiss wardship, i.e., a motion to dismiss the CHINS petition. The trial court granted the motion without a hearing that same day and closed K.M.'s case. In its order, the trial court found that "reasonable services [had] been offered and available to prevent or eliminate the continued need for removal of [K.M.] and placement out of home." Appellant's App. at 16. The court further found "that services [had] been offered to both the child and the parent and that such services have allowed for reunification with parent(s)." *Id.*

On August 2, 2006, K.M.'s guardian ad litem ("GAL"), Child Advocates, Inc., filed a motion for reconsideration of the dismissal of wardship. On August 22, 2006, the trial court denied the GAL's motion. On August 23, 2006, Knotts filed a motion to correct error/motion for relief from judgment. The motion stated that Knotts had not been served with a copy of MCDCS's motion to dismiss prior to the trial court's ruling thereon. The trial court

redocketed the case and set a hearing for September 6, 2006. At the conclusion of that hearing, the trial court denied Knotts's motion and closed the case.

On October 4, 2006, Knotts and the GAL filed a joint notice of appeal. The GAL's counsel never filed a notice of appearance with this Court.² On November 8, 2006, the trial court clerk filed a notice of completion of clerk's record. On November 17, 2006, a Marion County public defender, counsel for Gardner and Brooke Regina Morrison, K.M.'s parents ("the Parents"), filed a notice of appearance. On December 22, 2006, the trial court clerk filed a notice of completion of transcript. On January 10, 2007, counsel for MCDCS filed a notice of appearance. On March 15, 2007, the motions panel of this Court issued an order directing the appellants to file an appellant's case summary within thirty days and stating that failure to comply would subject the appeal to dismissal. *See* Ind. Appellate Rule 15(B) ("The Appellant's Case Summary shall be filed within thirty (30) days of the filing of the notice of Appeal[.]"). On April 13, 2007, Knotts's counsel filed an appellant's case summary, an appellant's brief, and an appellant's appendix. *See* Ind. Appellate Rule 15(A) ("The filing of an Appellant's Case Summary satisfies the requirement to file an appearance under Rule 16.").

On April 27, 2007, the Parents filed a motion to dismiss the appeal based in part on Knotts's counsel's failure to serve opposing counsel with the case summary, brief, or appendix and the belated filing thereof. On May 7, 2007, Knotts's counsel filed a response, stating that he had attempted to serve the Parents' counsel but had not been notified that they

² Nevertheless, the GAL remains a party on appeal. *See* Ind. Appellate Rule 17(A) ("A party of record in the trial court ... shall be a party on appeal.").

had retained new counsel until he was served with the motion to dismiss. On May 11, 2007, the Parents filed a motion to preserve the right to respond to Knotts's brief pending a ruling on the motion to dismiss. Knotts filed a response three days later, and the Parents filed a motion for leave to reply the following day.

On May 16, 2007, counsel for the Indiana Department of Child Services filed a notice of appearance for MCDCS and filed an appellee's brief. On May 30, 2007, Knotts filed a response to the Parents' latest filing. On June 4, 2007, Knotts filed an appellant's reply brief. On June 25, 2007, the Parents filed a reply to Knotts's latest response. Also on that date, the motions panel of this Court issued an order denying the Parents' motion to dismiss the appeal, granting the Parents' motion for leave to reply to Knotts's response to the Parents' motion to preserve the right to respond, and granting the Parents' motion to preserve the right to respond to Knotts's brief. On June 26, 2007, the Parents filed their reply, which stated that counsel still had not been served with Knotts's case summary, response to the motion to dismiss, and appellant's brief and appendix. On July 17, 2007, a second Marion County public defender filed both a notice of additional appearance on the Parents' behalf and a notice that she concurred in the arguments in MCDCS's brief and would not be filing a separate appellee's brief. On July 30, 2007, Chief Judge Baker issued an order directing the case to be transmitted as fully briefed.

Discussion and Decision

Given our oft-stated preference for deciding issues on their merits, and given that the Parents have not specifically renewed their motion to dismiss Knotts’s appeal, we will not enter the fray between the Parents and Knotts regarding Knotts’s counsel’s failure to serve various documents on the Parents and his failure to timely file such documents with this Court. We note that an appellant’s failure to timely file or serve a case summary or brief does not automatically result in the forfeiture of the right to appeal. *Compare* Ind. Appellate Rule 15(E) (“The failure to file an Appellant’s Case Summary shall not forfeit the appeal.”) *and* Ind. Appellate Rule 45(D) (“The appellant’s failure to file timely the appellant’s brief *may* subject the appeal to summary dismissal.”) (emphasis added) *with* Ind. Appellate Rule 9(A)(5) (“Unless the Notice of Appeal is timely filed, the right to appeal *shall* be forfeited[.]”) (emphasis added). That said, we advise Knotts’s counsel to better acquaint himself with the Indiana Rules of Appellate Procedure, especially those regarding filing and service requirements, and urge him to follow those rules to the letter in future cases.

Knotts contends that the trial court erred in denying her motion to correct error. Our standard of review is well settled:

We will reverse a trial court’s grant or denial of a motion to correct error only for an abuse of discretion. An abuse of discretion occurs when the trial court’s decision is against the logic and effect of the facts and circumstances before the court or if the court has misinterpreted the law.

In re G.R., 863 N.E.2d 323, 325-26 (Ind. Ct. App. 2007) (citation omitted). “The trial court’s decision on a motion to correct error comes to an appellate court cloaked in a presumption of correctness, and the appellant has the burden of proving that the trial court abused its discretion.” *Page v. Page*, 849 N.E.2d 769, 771 (Ind. Ct. App. 2006).

At the outset, it bears mentioning that “[t]he result of a CHINS proceeding is temporary in nature and enables the parent and child to receive government services, with the ultimate goal of reunification of the parent and child.” *Matter of C.M.*, 675 N.E.2d 1134, 1138 (Ind. Ct. App. 1997). Indiana Code Section 31-34-9-8(a) provides that a person representing the interests of the state may file a motion to dismiss a CHINS petition. Subsection (c) of the statute provides that not later than ten days after the motion to dismiss is filed, “the court shall: (1) summarily grant the motion to dismiss; or (2) set a date for a hearing on the motion to dismiss.” Ind. Code § 31-34-9-8(c). As mentioned above, the trial court summarily granted MCDCS’s motion to dismiss the CHINS petition regarding K.M.

Knotts does not quibble with Indiana Code Section 31-34-9-8; in fact, she does not even mention it in her appellant’s brief. Instead, Knotts focuses on Marion County Civil Rule 203, which states in pertinent part that if a motion “requires a hearing or oral argument, the Court shall set the time and place of hearing or argument on the motion.... [An] objecting party shall have fifteen (15) days from the date of filing to file a response to said motion.” Our supreme court has stated that, “[a]s a general proposition, once made, all litigants, as well as the court, are bound by the [local] rules.” *S.T. v. State*, 764 N.E.2d 632, 635 (Ind. 2002). Knotts seizes on this language and argues that the trial court was required to hold a hearing on MCDCS’s motion to dismiss the CHINS petition and that its failure to do so constitutes reversible error.³

³ We note that Knotts does not raise any specific claims regarding MCDCS’s failure to serve her with a copy of its motion to dismiss the CHINS petition prior to the trial court’s ruling thereon.

Knotts's argument puts the cart before the horse. Clearly, Indiana Code Section 31-34-9-8 does *not* require a trial court to hold a hearing or oral argument on the state's motion to dismiss a CHINS petition. Such being the case, Marion County Civil Rule 203 has no application to this situation. To the extent Knotts suggests that the Indiana Constitution's due course of law provision⁴ *does* require a hearing, we note that she has not challenged the constitutionality of Indiana Code Section 31-34-9-8 in this regard. Moreover, Knotts has not demonstrated that either she or K.M. suffered any prejudice as a result of the trial court's failure to hold a hearing on MCDCS's motion to dismiss the CHINS petition.⁵ *Cf.* Ind. Trial Rule 61 ("The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."). Instead, she claims that "[h]ad the trial court given Knotts the opportunity to testify, it *might* have determined that parental custody of K.M. was not in his best interests." Appellant's Br. at 10 (emphasis added).

The record does not support this speculation. Prior to dismissing the CHINS petition, the trial court had received Knotts's foster parent report detailing her concerns about K.M.'s behavior following his visits with Gardner. At the hearing on Knotts's motion to correct error, the trial court asked Knotts if she had any evidence that K.M. was in any emotional or

⁴ See IND. CONST. art. 1, § 12 ("All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay.").

physical danger. Knotts's counsel referred to a report by the GAL's volunteer, which had been filed with the trial court, and stated,

I couldn't possibly have evidence. I, I don't believe I'm allowed to go visit the home. But I go by the eyes and ears of the Court, which I would hope the Court would take those recommendations seriously. We're just asking for a little further investigation, so the Court's better informed Your Honor.

Tr. at 8. Ultimately, the trial court concluded that

there was no evidence presented that [K.M.'s] not doing well in his current placement. If he weren't doing well in his current placement, and there was evidence to show that the father was not doing what he was supposed do so as a father, not taking care of [K.M.], certainly the Court would consider that. And certainly the Court would consider setting aside [its ruling and] consider other placement. But at this point in time, [when there's] a motion to dismiss given the Court, there's enough information in that motion, or enough information given to [the Court] from [MCDCS] and from the home based counselor, where the Court can make a decision at that point, whether it would be in the best interest of [K.M. to] remain where he is. The Court has no information to show that it would be detrimental to have [K.M.] remaining in his current placement. If the Court receives information like that, [that's another] issue. But at this point in time, the Court does not see a reason to set aside [its] order, unless there's more definitive evidence showing [that] Mr. Gardner is certainly not the proper person [for K.M.] to have. I don't have any information on that. The only thing I have here is, that there was no bonding assessment done as to Ms. Knotts. But that in [and] of itself, doesn't show [that] father is not the proper person.

Id. at 11-12.

In light of the foregoing, we conclude that Knotts has failed to establish that the trial court abused its discretion in denying her motion to correct error. Therefore, we affirm.

Affirmed.

⁵ To the extent that Knotts seeks to raise a due process argument on K.M.'s behalf, we strongly doubt that she has standing to do so. We do not question Knotts's concern for K.M.'s well-being, but we note that her interests and K.M.'s interests are not identical and that it is the province of the GAL to represent K.M.'s interests. See *K.S. v. State*, 849 N.E.2d 538, 543 (Ind. 2006) ("The purpose of a guardian ad litem is to

DARDEN, J., and MAY, J., concur.

represent and protect the best interests of the child.”) (citing Ind. Code § 31-32-3-6). Because Knotts has failed to establish prejudice in any event, we need not explore this matter further.