

Children's Law Center of Indiana



CHINS

9/5/14

In ***In Re B.W.***, 17 N.E. 3d 299 (Ind. Ct. App. 2014), the Court reversed the trial court's order appointing guardians over the two children. *Id.* at 31. The Court remanded the case with instructions that the trial court reunite the children with Mother. *Id.* The two children were born on January 19, 2009, and on January 25, 2011. On approximately September 29, 2011, when the younger child was eight months old, Mother observed that the younger child's right arm was swollen. On October 4, 2011, Mother took the child to her pediatrician, who ordered x-rays, which revealed a fracture. The child was referred to the hospital, where one of her health care providers concluded that the child's injury was not accidental. The child was also diagnosed with four other fractures that "were in different stages of healing, indicating that they may have occurred on more than one occasion." A doctor concluded that the injuries had been caused by child abuse. The doctor found it "exceptionally difficult to get a medical history from Mother" and observed that Mother "did not seem remorseful or upset that [the younger child] was injured." Mother and her boyfriend were the sole caretakers of the children. When asked how the injuries occurred, Mother "was inconsistent with her explanation of details." Mother stated that she had left the children in the care of her boyfriend while she attended night school, and Mother's boyfriend denied having hurt the child.

DCS removed both children from Mother's care and placed them in foster care. On October 24, DCS filed CHINS petitions, and the trial court appointed a Guardian ad Litem. On November 14, Mother married her boyfriend. On December 16, the trial court ordered that the children be placed with their maternal great uncle and great aunt. On April 26, 2012, at the fact-finding hearing, Mother and her husband (who was formerly her boyfriend and whom DCS named as a custodian in an amended CHINS petition) stipulated that the younger child received injuries that would not have occurred but for the act or omission of a parent or custodian and that "there is no adequate explanation for such injuries." Mother and her husband stipulated that the children were CHINS. On May 24, the trial court entered a dispositional order which prohibited Mother's husband from having any contact with the children, and which set out a parental participation plan for Mother consisting of twenty-two requirements, including a parenting assessment, a psychological evaluation, and individual therapy. The purpose of the plan was to reunite Mother with the children. On June 6, Mother's husband moved the trial court to dismiss him from the CHINS proceedings because he had filed for dissolution of his marriage to mother. The trial court granted his motion. At the end of June 2012, the children were separated; the older child

was placed with his father and paternal grandmother in Ohio, and the younger child was placed with her paternal aunt and uncle.

Mother participated in weekly therapy and was reported to be very insightful and making significant progress. Mother also was doing “a wonderful job of applying the skills she is learning in home-based services to her interactions with her children during supervised visits,” according to her home-based case manager. In January 2013, the DCS family case manager submitted a progress report in January 2013, in which she stated: (1) Mother had obtained a new apartment that was “very clean and appropriate”; (2) Mother continued in supervised visits with the children, and was in full compliance with the parental participation plan; (3) Mother had changed her story regarding the younger child’s injuries from what she reported to DCS, law enforcement, and medical personnel, and was now reporting that the younger child’s father was caring for the child, but did not initially report this to anyone; (4) the time frame of when Mother was reporting that the younger child’s father cared for the child did not seem to match when medical professionals believed the injuries occurred; (5) DCS was still unaware of who hurt the younger child and if Mother would keep the children safe. DCS requested that the court change the permanency plan from reunification to termination of parental rights. The trial court entered an order in February 2013 that DCS continue services and efforts to reunite the children with Mother and reluctantly authorized DCS to increase Mother’s parenting time with the children.

On October 29, 2013, the trial court held a permanency hearing. On December 20, the trial court entered an order appointing guardians for the children. The trial court found and concluded that: (1) Mother had given several contradictory statements on the younger child’s injuries including blaming the younger child’s father, her boyfriend, and the older child for the injuries; (2) Mother delayed seeking medical care for the child; (3) Mother had been unwilling to take a therapeutic polygraph; (4) the specific cause of the younger child’s injuries remained unexplained, which was of great concern to the court; (5) although Mother had completed a number of services, the court noted that her body language, attitude, demeanor, and the substance of her most recent testimony evidenced a continued self-centered way of thinking, and an inability or unwillingness to put her children’s interests and needs before her own; (6) the court appointed special advocate had served on the case since May 22, 2012, had conducted a thorough investigation, and continued to have concerns that the younger child would not be safe in Mother’s care; (7) the court appointed special advocate’s testimony was credible and her conclusions were rationally based on the evidence. Mother appealed.

The Court held that the trial court abused its discretion when its appointed guardians for the children. *Id.* at 311. The Court reviewed IC 31-34-21-7, which provides that, when the trial court holds a permanency hearing in a CHINS proceeding, it shall make the determinations and findings required by IC 31-34-21-5. The Court also looked to the factors listed at IC 31-34-21-5 and *In Re Guardianship of B.H.*, 770 N.E. 2d 283, 287-88 (Ind. 2002), in which the Indiana Supreme Court opined:

“In a proceeding to determine whether to place a child with a person other than the natural parent, evidence establishing the natural parent’s unfitness or acquiescence, or demonstrating that a strong emotional bond has formed between the child and the third person, would of course be important, but the trial court is

not limited to these criteria. The issue is not merely the “fault” of the natural parent. Rather, it is whether the important and strong presumption that a child’s interests are best served by placement with the natural parent is clearly and convincingly overcome by evidence proving that the child’s best interests are substantially and significantly served by placement with another person.”

The Court found the evidence was undisputed that Mother has successfully completed every requirement of the twenty-two part parental participation plan ordered by the trial court. Id. at 307. The Court noted that: (1) Mother’s home-based case manager and therapist had consistently reported Mother’s progress and recommended that Mother be reunited with the children; (2) the only evidence presented by DCS was Mother’s unwillingness to take a polygraph examination or divulge information she might know about how the younger child was injured; (3) the DCS case manager and the court appointed special advocate both testified that Mother was unable to provide a safe home for the children, but each stated only that Mother needed to take a polygraph examination and to explain how the younger child was injured. Id. at 307-309.

The Court, quoting Hubbard v. State, 742 N.E. 2d 919, 923 (Ind. 2001) observed that it is well settled that polygraph examinations are notoriously unreliable. B.W. at 309. The Court found that Mother’s refusal to take a polygraph examination was therefore justified. Id. at 310. The Court also noted that the trial court did not require Mother to take a polygraph examination as part of her parental participation plan; thus, DCS’s assertion that Mother’s refusal to take a polygraph demonstrated that she was incapable of providing a safe home was unfounded. Id. The Court quoted In Re R.S., 987 N.E. 2d 155, 159 (Ind. Ct. App. 2013), saying that it is well established “that a CHINS adjudication may not be based solely on conditions that no longer exist. The trial court should also consider the parents’ situation at the time the case is heard.” B.W. at 310. The Court found R.S., which was a CHINS adjudication, appropriate to the issue on appeal of the permanency plan in the B.W. case. B.W. at 310. The Court said that, in this case, DCS had been focused solely on understanding how the younger child was injured and the conditions that existed at the time of the children’s removal from Mother’s custody. Id. The Court found that DCS presented no evidence to demonstrate any conditions existing at the time of the final permanency hearing to justify the permanent removal of the children. Id.

The Court observed that this was not a case where a parent made an eleventh-hour effort to show compliance with a parental participation plan, and there was no dispute that Mother had complied with and satisfied every condition of the plan, the purpose of which was to reunify her with the children. Id. The Court said that DCS and the trial court wholly ignored this undisputed evidence and suggested instead that Mother’s past mistakes dictated her future. Id. The Court held that DCS had not presented clear and convincing evidence to show that Mother’s failure to explain how the younger child was injured, absent evidence that Mother could do anything more than speculate on the cause, trumped Mother’s successes in all court ordered aspects of the CHINS case. Id.

The Court observed that Mother’s present ability to provide a safe home for her children was shown by the following evidence: (1) her full compliance with the parental participation plan and positive recommendations from her therapist and home-based manager; (2) the court appointed special advocate reported that Mother is a good parent; (3) the DCS case manager acknowledged

that Mother's parenting assessment and psychological evaluation showed no indication of violent tendencies; (4) Mother's former boyfriend, whom DCS and the trial court suspect caused the younger child's injuries, had been out of Mother's life for well over a year by the time of the guardianship hearing; (5) Mother had gained insight into her past bad choices in relationships with men. Id. The Court said that there was no clear and convincing evidence that the children would be in any danger if they were reunited with Mother. Id. The Court noted that, while the children have been placed outside of Mother's home since 2012, Mother had consistently visited with the children, and DCS presented no evidence that anything other than a strong family bond between Mother and the children. Id. Citing In Re B.H., 770 N.E. 2d at 287, the Court said that there is a presumption that a child's best interests are ordinarily served by placement in the custody of the natural parent. B.W. at 311. Quoting Hendrickson v. Binkley, 316 N.E. 2d 376 (Ind. Ct. App. 1974), the Court observed that the presumption will not be overcome merely because "a third party could provide the better things in life for the child." B.W. at 311.