

Children's Law Center of Indiana



CHINS

5/12/16

In ***In Re F.S.***, 53 N.E.3d 582 (Ind. Ct. App. 2016), the Court reversed the trial court's order requiring Mother to allow the Crawford County local DCS office to interview her two oldest children as part of a child abuse and neglect assessment. *Id.* at 585. Mother, her four children, and the father of her two youngest children (Father) lived in a trailer in Crawford County. Mother was on probation for theft, and the household had a history with DCS, including a CHINS case which had been closed two months before the events that resulted in the court's order requiring the interview. In March, 2015, DCS received four child abuse and neglect reports alleging frequent drug use and possible drug dealing in the home, domestic violence between Mother and Father, and multiple school absences by the oldest child. Mother believed that the reports might have been made by her sister, citing a text message from her sister stating that she would "keep doing it until you move to [maternal grandmother's house]" because the children weren't "safe" with Father. In addition to the reports made to DCS, Mother's probation officer received an anonymous tip that Mother was using methamphetamine. The probation officer discovered that Mother had bought the maximum allowable amount of pseudophedrine for at least two months. Ms. Hogan, a DCS case manager, initiated an assessment of the report of abuse and neglect by visiting Mother at her home. Ms. Hogan did not see any evidence of drugs or drug use in the home, and observed that the two children who were present appeared healthy and safe. Ms. Hogan asked Mother to take a drug screen, but Mother declined, stating that she wanted to call her lawyer first. After a meeting between Ms. Hogan and Mother at the office of Mother's lawyer and after Father completed a drug screen, the assessment was classified as unsubstantiated and closed.

Ms. Hogan, Mother's probation officer, and a police officer went to Mother's home together to perform a home visit on an assessment of two reports received two weeks later alleging drug use and dealing and domestic violence in Mother's home. Mother refused entry to Ms. Hogan, but allowed her probation officer and the police officer to enter. The probation officer described the home as being "in good shape", and Mother passed a drug screen at the probation officer's office. Based on what the probation officer and police officer told her about Mother's home, Ms. Hogan was "satisfied that there wasn't any evidence of drug use in the house or on [Mother] and that the children were safe." On March 17, 2015, DCS filed a Motion to Control the Conduct of Mother and Father. The motion noted that two reports were received by DCS and stated that, in order for Ms. Hogan to complete a thorough assessment, she would need to interview Mother, Father, and the children. DCS requested that a hearing be held and that an order be entered requiring Mother and Father "to comply with an interview" with DCS. An additional report was made to DCS on March 31, 2015, alleging that Father had purchased and used drugs, Mother

was using drugs, both parents were selling drugs from the home, there were further incidents of domestic violence, and Father had inappropriately disciplined the children. Ms. Tobin, a DCS case manager, conducted the assessment of this report. She visited the home, saw the children, and found that the children were clean and the home environment was safe. Ms. Tobin saw no evidence of drug use or domestic violence. Mother refused to take a drug screen.

Mother, Ms. Hogan, Ms. Tobin, and Mother's probation officer testified at the April 7, 2015 hearing on DCS's Motion to Control the Conduct of Mother and Father. Mother reaffirmed her refusal to consent to the children being interviewed by DCS. Ms. Hogan testified that she was satisfied that there was no evidence of drug use, the children were safe, and she had not since "found any evidence to verify any of the information that was given...by this report source." Ms. Tobin testified that she did not see any evidence of the things reported, and that, from what she saw, the accusations were false. On April 20, 2015, the trial court issued an order granting DCS's request to interview the two oldest children. At Mother's request, the trial court allowed her five days to file a Notice of Appeal, but ordered that, if she did not do so, DCS was allowed to proceed with the interviews. Mother timely filed her Notice of Appeal and on May 19, 2015, the trial court granted her request for a stay pending appeal.

The Court disagreed with the State's request to dismiss the appeal as moot, and decided to give a decision on the merits to offer direction to courts in future cases where DCS seeks an order compelling an interview. *Id.* at 591. In its appellate brief, the State alleged it had learned that: (1) Mother was arrested after testing positive for methamphetamine and amphetamine on July 18, 2015, and she signed a consent for DCS to interview the children; and (2) the children were adjudicated CHINS on September 17, 2015, after Mother admitted that she was unable to provide care and supervision for the children due to her incarceration. The Court noted that the State advised Mother's appellate counsel of these developments when it became aware of them shortly before filing its brief. *Id.* at 590 n. 9. The Court also noted that parties should inform the appellate court "of a post-judgment change in circumstances which might render a pending appeal moot", citing *Cummingham v. Hiles*, 402 N.E.2d 17, 20 (Ind. Ct. App. 1980). *F.S.* at 591. The Court observed that: (1) an appeal or issue is deemed moot when no effective relief can be rendered to the parties; (2) Indiana courts have long recognized that a moot case may nevertheless be decided on its merits when the case involves questions of "great public interest"; (3) cases falling within the public interest exception typically contain issues that are likely to recur; (4) an appeal may be heard which otherwise might be dismissed as moot where leaving the judgment undisturbed might lead to negative collateral consequences. (Multiple citations omitted.) *Id.* at 590. The Court noted that: (1) Mother's claim of constitutional infringement on her right to raise her children rested on the premise that IC 31-33-8-7 allows the trial court to compel any objecting parent to make his child available to DCS for an interview without any evidence that the interview is necessary; and (2) Mother contended that a similar thing might happen to other parents and was likely to evade review. *Id.* at 591.

The Court reversed the trial court's order compelling Mother to submit her children to DCS interviews, stating that the statutes require DCS to show some evidence suggesting abuse or neglect before the trial court may issue such an order. *Id.* at 599. Mother contended that IC 31-33-8-7 is unconstitutional as applied to her because the trial court issued an order without any evidentiary showing of need. Mother acknowledged that another panel of the Court

had decided this issue adversely to her position in In Re A.H., 992 N.E.2d 960 (Ind. Ct. App. 2013). The Court, noting that horizontal stare decisis is not recognized in Indiana, said it had given consideration to the A.H. opinion in its assessment of the facts and circumstances presented by the instant case, but was not bound by the A.H. opinion. F.S. at 596. The Court observed that: (1) IC 31-33-8-1 provides that DCS *shall* initiate an “appropriately thorough” assessment of *every* report of child abuse or neglect it receives; and (2) IC 31-33-8-7 states the assessment *must* include certain things and *may* include an interview with the child. (Emphasis in opinion.) Id. The Court noted that IC 31-33-8-7(d) states DCS *may* petition the court to order the parent to make the child available for an interview and the court *may* issue such an order, if the court “finds that good cause to issue the order is shown upon the record.” (Emphasis in opinion.) Id. The Court opined that, because of the distinction between *must* and *may*, the legislature cannot have intended an interview with a child to be a matter of course in every assessment. (Emphasis in opinion.) Id. at 597. The Court said that DCS is not *required* to conduct an interview with a child as part of its assessment, and the trial court is not *required* to issue an order allowing an interview over a parent’s objection, but the trial court *may* issue such an order *if* DCS shows good cause on the record supporting its request. (Emphasis in opinion.) Id.

The Court also said that a petition seeking to order a parent to make a child available for an interview by DCS is also governed by IC 31-32-13, “which addresses juvenile court procedures generally and the issuance of orders specifically.” Id. at 589. The Court noted that IC 31-32-13-4 [statute on issuance of orders to control conduct of a person in relation to a child] allows the trial court to issue orders after a hearing “if the court finds that good cause to issue the order is shown upon the record.” Id. The Court concluded that the statutes on which DCS based its request to control Mother’s conduct by compelling her to submit the children to interviews require that DCS show some evidence of abuse or neglect before the trial court may issue such an order. Id. at 597. The Court observed that good cause is an admittedly imprecise standard. Quoting Newton v. Yates, 353 N.E.2d 485, 492 (Ind. 1976), the Court noted, “[w]hile an exact definition of good cause is somewhat elusive, it is clear that a mere allegation of need and a summary statement alleging that the information cannot be obtained from another source will not be sufficient to surmount a ‘good cause’ hurdle.” F.S. at 597. The Court opined that, as in Newton, DCS cannot merely allege it “needs” to interview a child to “complete its assessment” and thereby show good cause. Id. The Court held that, before an order can be entered overriding a parent’s wishes and subjecting a child to an interview, DCS must show the court *some* evidence beyond a report from an undisclosed source that abuse or neglect is occurring. (Emphasis added.) Id. at 598. The Court opined that, if, in gathering information about the items required to be included in an assessment, DCS finds some evidence supporting the allegations and determines as a result of the circumstances of the specific case being investigated that an interview is necessary to complete “an appropriately thorough” assessment, DCS may ask the trial court to order an interview if the parent does not consent. Id. The Court found that, in the instant case, multiple reports and multiple visits led to the same result: no evidence supporting an allegation of abuse or neglect. Id. The Court said it was important to consider the nature of the allegations; namely, drug use and physical violence between Mother and Father, external signs of which would likely be apparent to the trained eye. Id. at 599. The Court observed that no official who interacted with the family saw evidence of either. Id. The Court noted that there was no drug paraphernalia in or around the house, no visible marks from drug use or bruises from physical altercations, neither

Mother nor Father ever appeared to be under the influence of drugs, and both consistently passed drug screens. Id. The Court opined that no probative evidence supporting the allegations was shown on the record; accordingly, there was no good cause to compel interviews with the children. Id.

The Court agreed with In Re A.H., 992 N.E.2d 960 (Ind. Ct. App. 2013) that the procedure selected by our legislature for assessing reports of child abuse and compelling interviews with children does not necessarily violate due process. F.S. at 599. The Court concluded that, when the procedure is not observed, such as in the instant case where DCS did not demonstrate by any evidence that an interview was necessary for it to carry out its obligation to investigate reports of abuse or neglect, the law impermissibly infringes upon the parent's fundamental right to raise her children without undue interference by the State. Id.