

# Children's Law Center of Indiana



## CHINS

12/27/13

In ***M.S. v. Indiana Dept. of Child Services***, 999 N.E.2d 1036 (Ind. Ct. App. 2013), the Court affirmed the trial court's dismissal of the CHINS case after the child had been placed out-of-state with Father. On February 4, 2013, DCS received a report that Mother was abusing drugs in the home and leaving her five children with their sick grandmother while Mother went out seeking drugs. (This appeal concerns only one of Mother's five children.) On February 6, a DCS case manager visited Mother's home and asked her to submit to a random drug test. Mother submitted to the drug test and admitted to the case manager that she would likely "test positive for Vicodin, marijuana, and morphine." On February 8, DCS again visited the home and learned from the children that: (1) Mother had been missing since the prior DCS visit; (2) Mother had given one of the children a black eye the previous year; (3) the two-year-old child was kept strapped into a car-seat constantly throughout the day and slept in the car-seat at night; (4) the children's grandmother or low-functioning aunt were often left to take care of the children; (5) the grandmother takes a lot of medicine and often falls asleep while watching the children; (6) the grandmother hits the children on the arms and legs with a wooden backscratcher. The DCS case manager also observed that the children exhibited a foul odor as if they had not bathed for a while. The children were removed from the home that afternoon and a CHINS petition was filed on February 12, 2013. A detention and initial hearing was held on the same day, but Mother failed to appear because DCS could not contact her. DCS was also in the process of locating the child's father, who was in the military and stationed in the State of Washington. Mother's drug test results came back positive for methamphetamine, amphetamine, cocaine, BZE, hydromorphone, and morphine. The child remained in the foster care after the hearing. On February 28, 2013, the trial court held an admission hearing at which Mother and Father were present. Mother admitted to the allegations of the CHINS petition and that the child was a CHINS. Father indicated that he was willing and able to care for the child, he rented an apartment and he would be honorably discharged in three months and planned to find employment in the private sector. Mother stated that she would rather see the child placed with Father than with a foster family but expressed concern about the long-distance placement.

On March 4, 2013, the trial court issued a written Order on Initial/Detention and Custody Hearing which provided for the emergency placement of the child with Father over the objection of DCS. The Order stated that foster care placement was more restrictive than necessary, Father was fit, willing, and able to care for the child, and it was in the child's best interest to be in the care and custody of Father. The trial court also ordered an inspection of Father's home to determine the safety and fitness of the home, which was to be completed by March 21, 2013. A dispositional hearing was held on March 21. At that time, DCS had not yet arranged an

inspection of Father's home in Washington and Mother had no permanent residence, vehicle, or phone. Father informed the court that his military term would be over at the end of May, he planned to move to San Diego, California at that time, and paternal grandmother had come from San Diego to Washington to watch the child. Father had obtained a default divorce from Mother in 2009 in San Diego County, but that court declined jurisdiction over the child, and thus, no custody determination had ever been made with respect to the child. On April 17, 2013, the Community and Family Services Foundation of Port Orchard Washington (CFSF), inspected Father's home, found no substantial safety concerns, and reported that the child was very happy, well adjusted, and wanted to live with Father. On April 23, 2013, DCS filed a Motion to Dismiss the CHINS proceedings as to the child. DCS attached the CFSF report as an exhibit to the motion to dismiss, and stated in its motion that there was no good cause why the trial court should continue jurisdiction. The trial court granted the dismissal on April 24, 2013. Mother appealed the dismissal, claiming that the trial court's out-of-state placement of the child with Father was erroneous and that DCS' request for dismissal violated IC 31-34-21-5.5 by failing to make reasonable efforts to preserve the family.

**The Court opined that the evidence supported the continued out-of-state placement of the child with Father and the decision to place the child with Father and eventually dismiss the CHINS proceedings was not error.** *Id.* at 1041. Mother cited IC 31-34-20-1, which regulates the out-of-state placement of a child in CHINS proceedings, and provides in pertinent part:

- (b) A juvenile court may not place a child in a home or facility that is located outside Indiana unless:
- (1) the placement is recommended or approved by the director of the department or the director's designee; or
  - (2) the juvenile court makes written findings based on clear and convincing evidence that:
    - (A) the out-of-state placement is appropriate because there is not a comparable facility with adequate services located in Indiana; or
    - (B) the location of the home or facility is within a distance not greater than fifty (50) miles from the county of residence of the child.

*Id.* at 1040. The Court observed that the child's placement with Father in Washington was not recommended or approved by the director of DCS and was more than fifty miles from the child's previous residence, so the trial court must have found "based on clear and convincing evidence that... the out-of-state placement is appropriate because there is not a comparable facility with adequate services located in Indiana..." *Id.* The Court recognized that the child was not placed in an out-of-state facility arbitrarily chosen by the trial court, but was placed with Father. *Id.* The Court quoted *In Re Guardianship of B.H.*, 770 N.E. 2d 283, 285 (Ind. 2002), which states, "Indiana law has long recognized that 'natural parents are entitled to the custody of their minor children except when they are unsuitable persons to be entrusted with their care, control, and education.'" *M.S.* at 1040. The Court opined that this presumption in favor of natural parents lent strong support to the trial court's decision to place the child with Father. *Id.* The Court said that placement of a child with a parent is a unique situation, and no facility – inside or outside of Indiana – is equal to it. *Id.* at 1041. The Court said that the child's previous living situation was

with a foster family, and Father was willing and able to take custody of the child. Id. The Court noted Mother's argument that Father had not seen the child for four years and that the trial court had no independent knowledge of the condition of Father's home at the time of placement, and opined that a more cautious approach would be preferable when placing a child out-of-state in this scenario. Id.

**The Court opined that DCS's reunification efforts were reasonable and concluded that DCS did not violate IC 31-34-21-5.5.** Id. at 1041. Mother argued that DCS neglected its duty under IC 31-34-21-5.5 "to make reasonable efforts to reunify or preserve a family." The Court noted that, in seeking that end, IC 31-34-21-5.5 (a) provides that "the child's health and safety are of paramount concern." Id. The Court said that the child's health and safety were served by his placement with Father, as evidenced by the CFSF report stating same. Id. The Court also said that the child's placement with Father was familial reunification of sorts, albeit not of the kind Mother would have preferred. Id.

In her concurring opinion, Judge Brown cited IC 31-34-21-11, which provides that "[w]hen the juvenile court finds that the objectives of the dispositional decree have been met, the court shall discharge the child and the child's parent guardian, or custodian." Id. at 1042. She noted that the court's April 4, 2013 dispositional decree regarding Father had ordered him to perform a number of actions, and that in the nineteen days between the entry of the decree and the filing of the motion to dismiss, there was no time to have the scheduled case review hearing and no showing whatsoever of Father's compliance with any of the terms of the decree. Id. Judge Brown observed that Mother had testified that Father had been an absent parent and was "a stranger" to the child. Id. Judge Brown believed that the child would have been better served if the court had denied the motion to dismiss and ordered that DCS continue with services for a period of time to monitor Father's parenting and compliance with the terms of the decree. Id. at 1042-43.