

Children's Law Center of Indiana



CHINS

12/28/2007

In **Parmeter v. Cass Cty Dept. of Child Serv.**, 878 N.E.2d 444 (Ind. Ct. App. 2007), the Court affirmed in part and remanded with instructions the trial court's adjudication of the children of Mother to be CHINS. Sometime after twin children, a son and daughter, were born, Mother and Father separated. Their divorce decree was final in the fall of 2006. On June 7, 2006, Cass County Department of Child Services (DCS) investigated a report that naked photographs had been taken of the son. On June 8, DCS filed petitions for authorization to file petitions alleging the twins to be CHINS. Upon authorization, DCS filed the CHINS petitions and requested the immediate detention of the children, which was granted June 8, following a detention hearing. The fact-finding hearing was set and continued twice, but commenced on October 16, only to be again continued on October 17 on Mother's motion and because of "technical difficulties." The trial court resumed the fact-finding hearing on November 17 and on November 28, 2006 entered its order finding the children to be CHINS. After a review hearing on December 4, 2006, the trial court continued the children's placement with Father. Thereafter, Mother filed objections and motions to set aside the CHINS determination. On December 29, the GAL filed her report to which Mother objected, alleging that the GAL had a conflict of interest because the GAL had become the law partner of Father's attorney. GAL moved to withdraw appearance on the ground that her plan to move her practice into the offices of Father's attorney created the appearance of a conflict of interest. The GAL also responded to Mother's objection, clarifying that the GAL had not become the law partner of Father's counsel, but was assuming the law practice of another attorney, whose files were located in the office of Father's counsel and that her plans to share office space with Father's counsel were not discussed or finalized prior to the filing of the GAL report. The dispositional hearing was held on February 26, 2007. On March 13, 2007, the trial court issued its Dispositional Decree. Mother Appealed.

Trial court did not err when it held the fact-finding and dispositional hearings beyond the statutory deadlines, because "shall" as used in IC 31-34-11-1 and IC 31-34-19-1 is directory and not mandatory. *Id.* at 452. Mother alleged that the trial court was without jurisdiction over the CHINS cases because it did not hold the fact-finding or dispositional hearings within the time limits set forth in IC 31-34-11-1 and IC 31-34-19-1. The Court noted that (1) both statutes used "shall" regarding the time limits set forth; (2) the trial court did not meet either deadline; (3) a statute containing the term "shall" generally connotes a mandatory as opposed to a discretionary import; (4) however, "shall" may be construed as directory instead of mandatory to prevent the defeat of the legislative intent; and (5) the term "shall" is directory when the statute fails to specify adverse consequences, the provision does not go to the essence of the statutory purpose, and a mandatory construction would thwart the

legislative purpose. Here, the Court observed, (1) the statutes use “shall” when setting the deadline for holding fact-finding and dispositional hearings; (2) neither statute specifies any adverse consequences for the failure to comply with the time limit; (3) IC 31-34-11-1 provides for the extension of the time limit when all parties consent; (4) holding the hearings within the statutory time limits does not go to the purpose of the CHINS statutes; and (5) a mandatory construction would thwart the legislative purposes of the CHINS statutes by requiring dismissal of CHINS cases where continuances of the fact-finding or dispositional hearings are needed for legitimate reasons, such as the unavailability of parties or witnesses or the congestion of the court calendar, merely because one party is being a stalwart. Thus, the Court concluded that “shall” as used in IC 31-34-11-1 and IC 31-34-19-1 is directory and not mandatory. Id. at 447-48.

Mother did not show that she was prejudiced by the continuance of the fact-finding hearing that was granted under Indiana Trial Rule 53.3. Trial rules take precedence over the statutory time limitations at issue here. Id. at 452.

Trial court did not abuse its discretion when it denied Mother’s motion to dismiss the CHINS petitions on the ground that she was not permitted to complete her testimony at the detention hearing. Id. at 450. During the detention hearing, the trial court interrupted Mother’s testimony regarding the help she obtained for her children. But, at that hearing, the court determined only the need for the children’s placement outside of Mother’s home, not the merits of allegations in the CHINS petitions. The reason for the children’s detention was Mother’s behavior toward the children and the fact that she had taken naked photographs of her son. Id. at 450, 452.

Trial court did not abuse its discretion when it denied Mother’s motion to strike the GAL report because Mother did not show that the GAL had a conflict of interest when she wrote and filed the report. Id. at 452-53. Mother contended that the trial court should have struck the December 29, 2006, GAL report but cited no authority in support of her contention. Thus, this argument was waived. See Appellate Rule 46(A)(8)(a). Waiver notwithstanding, the Court concluded that it could not agree with Mother. Mother contended that GAL had a conflict of interest in that a newspaper article announced that Father’s attorney had been named city attorney and the GAL had been named the deputy city attorney. The GAL’s response indicated that, only in the last two weeks of December did the GAL and the former law partner of Father’s attorney negotiate the GAL’s assumption of the files of the former law partner. The GAL denied any conflict of interest, but withdrew as GAL because of the appearance of a conflict created by the move of her practice into the offices of Father’s attorney, which was agreed upon only in late December. Id. at 452.

The trial court’s findings do not support the judgment, in that the trial court’s one properly found factual finding, without more was not sufficient to support the CHINS determinations. Thus, the Court remanded for the trial court to make proper findings and conclusions in support of its judgment. Id. at 453. The Court observed that when, as here, a court’s findings indicate only that the testimony or evidence was this or the other, they are not findings of fact. Instead according to the Court a finding of fact must indicate, not that what someone said is true, but what is determined to be true, because that is the trier of fact’s duty. Id. at 451.