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IN THE
COURT OF APPEALS OF INDIANA

In the Matter of:

K.V. and A.V. (Minor Children),
Children in Need of Services,

and

A.W. and S.W.,
Appellants-Respondents,

v.

Indiana Department of Child
Services,
Appellee-Petitioner.

January 13, 2023

Court of Appeals Case No.
22A-JC-987

Appeal from the Howard Circuit
Court

The Honorable Lynn Murray,
Judge

Trial Court Cause Nos.
34C01-1801-JC-24
34C01-1811-JC-463
34C01-2203-JP-51
34C01-2203-JP-52

Robb, Judge.

Case Summary and Issues

- [1] A.W. and S.W. (“Foster Parents”) were the foster parents of K.V. and A.V. (“Children”) until the Indiana Department of Child Services (“DCS”) removed the Children from Foster Parents’ home and entered an order terminating the foster placement. Foster Parents filed a motion to correct error, a motion to intervene in the child in need of services (“CHINS”) proceedings, and a motion to establish custody of the Children. The juvenile court denied Foster Parents’ motion to correct error and motion to intervene. Further, the juvenile court stayed any custody determination until the completion of the CHINS proceedings.
- [2] Foster Parents now appeal raising one issue for our review, which we expand and restate as: (1) whether the juvenile court abused its discretion by denying Foster Parents’ motion to correct error; (2) whether the juvenile court abused its discretion by denying Foster Parents’ motion to intervene; and (3) whether the juvenile court abused its discretion by staying custody proceedings filed by Foster Parents.
- [3] Concluding the juvenile court did not abuse its discretion by denying Foster Parents’ motion to correct error, denying Foster Parents’ motion to intervene, or staying Foster Parents’ custody proceeding, we affirm.

Facts and Procedural History

- [4] The Children were born in 2017 and 2018. In 2018, the Children were adjudicated CHINS and placed in Foster Parents' home as a foster placement. In August 2020, the parental rights of the Children's biological parents were terminated.
- [5] On January 15, 2021, Foster Parents petitioned to adopt the Children. However, in November 2021, Foster Parents rejected the amount the State offered in adoption assistance. On December 15, 2021, DCS visited Foster Parents' home and was concerned regarding the home's condition. Foster Care Case Manager ("FCCM") Whitney Sutherlin testified there had been ongoing concerns with the home conditions, but December 15 was the worst she had seen the home. *See* Transcript of Evidence, Volume II at 38. Sutherlin described the home as "very unsanitary, untidy [and i]n disarray." *Id.* at 37. Further, pills were found on the floor.
- [6] DCS and Foster Parents agreed to temporarily place the Children in a Respite Care home with another foster family for two or three weeks so that Foster Parents could have time to clean and organize their home. However, after three weeks, DCS determined that "[s]ince being placed in the Respite Care home, Children have made measurable improvements in sleeping through the night, potty training, and bathing and hygiene[.]" Appellant's Appendix, Volume IV at 233. On January 7, 2022, DCS filed a petition to modify the dispositional decree and permanently place the Children with the new foster family. Foster

Parents filed an objection to DCS's petition, and the juvenile court held a hearing.

[7] At the hearing, Foster Parents presented recent photographs of their home showing that since the Children's removal they had maintained a clean home. *See Exhibits, Volume III at 21-34.* Further, S.W. testified that she had been experiencing symptoms of depression and had been dealing with a shoulder injury. S.W. blamed these extenuating circumstances for the state of the home on December 15 and testified that she now believed she was in a position to maintain everything. However, Family Case Manager ("FCM") Jennifer Burton and Court Appointed Special Advocate ("CASA") Jill Newby testified they believed a change of placement was in the best interest of the Children. Following the hearing, the juvenile court entered an order terminating the Children's foster placement with Foster Parents and authorized the new foster family to be the permanent placement going forward.

[8] On March 16, 2022, Foster Parents filed a motion to correct error arguing the juvenile court's decision regarding the Children's placement was error. That same day the Foster Parents filed a motion to intervene in the CHINS proceedings. The Foster Parents also filed a motion to establish custody of the Children. The juvenile court denied Foster Parents' motion to correct error and motion to intervene; however, the juvenile court stayed Foster Parents' custody

petition while the CHINS matters were pending. Foster Parents now appeal.¹
Additional facts will be provided as necessary.

Discussion and Decision

I. Motion to Correct Error²

A. Standard of Review

[9] Foster Parents appeal the juvenile court’s denial of their motion to correct error. Generally, the juvenile court has discretion to grant or deny a motion to correct error, and we reverse the court’s decision only for an abuse of discretion. *Alvarez v. State*, 147 N.E.3d 374, 377 (Ind. Ct. App. 2020), *trans. denied*. An abuse of discretion occurs when the juvenile court’s decision is against the logic and effect of the facts and circumstances before it or if the court has misinterpreted the law. *Id.* However, where the issues raised in the motion are questions of law, such as the interpretation of a statute, the standard of review is *de novo*. *See Boyer v. Smith*, 42 N.E.3d 505, 508 (Ind. 2015); *Johnson v. State*, 36 N.E.3d 1130, 1133 (Ind. Ct. App. 2015), *trans. denied*.

¹ This court consolidated the CHINS and custody matters into one interlocutory appeal. *See* Appellant’s App., Vol. VI at 126-28.

² Foster Parents also argue that the juvenile court abused its discretion by failing to hold a hearing or reconsider the Children’s foster placement after being presented with newly discovered evidence. Foster Parents filed an affidavit claiming their circumstances had substantially changed since the court’s order terminating the foster placement. However, the material in the affidavit was already considered by the juvenile court, i.e., S.W.’s mental health, shoulder injury, and the re-organization and decluttering of the home.

B. Reasonable Effort to Reunify the Family³

[10] Foster Parents argue that DCS was statutorily required to make a reasonable effort to reunify the Children with them and failed to do so. Pursuant to Indiana Code section 31-34-21-5.5(b)(2), DCS “shall make reasonable efforts to preserve and reunify families . . . [i]f a child has been removed from the child’s home [and] to make it possible for the child to return safely to the child’s home as soon as possible.”

[11] Indiana Code section 31-34-21-5.5(c) seemingly contemplates a child’s reunification with “a parent, guardian, or custodian[.]” And Indiana Code section 31-9-2-31(b) defines custodian, in relevant part, as “a license applicant or licensee of . . . a foster home” or “an individual who has or intends to have direct contact, on a regular and continuing basis, with a child for whom the individual provides care and supervision.” Further, “family” includes an individual who “has or previously had an established legal relationship . . . as a foster parent[.]” Ind. Code § 31-9-2-44.5(a)(6)(D). However, Indiana Code section 31-34-23-6 states the requirements for DCS regarding the change of a child’s out-of-home placement. Pursuant to Indiana Code section 31-34-23-6(a),

³ DCS argues that Foster Parents waived this argument by failing to raise the issue to the juvenile court. Foster Parents argue that at the hearing objecting to the removal of the Children they presented the juvenile court with a copy of the reunification statute and asked to be reunified with the Children. *See* Tr., Vol. II at 75; Ex., Vol. III at 44. Further, Foster Parents did ask DCS during the cross examination of FCM Burton whether there would have been “an attempt to reunify” the Children with Foster Parents if this had been a typical CHINS case. Tr., Vol. II at 22. We conclude the issue was sufficiently before the juvenile court to survive waiver. *See Moriarity v. Ind. Dep’t of Nat. Res.*, 113 N.E.3d 614, 623 (Ind. 2019) (noting that Indiana’s appellate courts prefer to resolve cases on their merits).

prior to changing a child's out-of-home placement, DCS must file a motion requesting a change in placement.⁴ DCS must give notice to all persons affected and if such a person files an objection to the change, the juvenile court shall hold a hearing wherein DCS is required to show that the change in out-of-home placement is in the best interest of the child. Ind. Code § 31-34-23-6(c),(f)&(g).

[12] Indiana Code section 31-34-23-6 contains no provision that either reunification or a grace period for the improvement of circumstances that prompted the change is required prior to DCS initiating a change in the out-of-home placement of a child. *See Perry-Worth Concerned Citizens v. Bd. Of Comm'rs of Boone Cnty.*, 723 N.E.2d 457, 459 (Ind. Ct. App. 2000) (stating a court may not read into a statute that which is not the expressed intent of the legislature), *trans. denied*. Further, 465 I.A.C. 2-1.5-3 gives DCS the discretion to reevaluate a foster parent's ability to meet competency requirements at any time, suggesting that the removal of a child from a foster placement to a more appropriate placement can occur at any time DCS finds it necessary.

[13] Therefore, we conclude that a reasonable effort to reunify was not required and DCS was only required to show that the continued removal of the Children from the Foster Parents' home and subsequent placement in the new foster

⁴ DCS is required to file this motion when the child has been in a foster family home or the care of a relative for at least one year. Ind. Code § 31-34-23-6(a).

home was in the Children’s best interest.⁵ Here, the Children were removed from the Foster Parents’ home due to the home being “very unsanitary, untidy [and i]n disarray” and pills being left out on the floor. Tr., Vol. II at 37.

However, this was not the first time DCS had concerns about the placement. FCCM Sutherlin testified there had been ongoing concerns about the home conditions.⁶ After the Children were removed from Foster Parents’ home for three weeks, DCS determined that “[s]ince being placed in the Respite Care home, Children have made measurable improvements in sleeping through the night, potty training, and bathing and hygiene[.]” Appellant’s App., Vol. IV at 233. Further, both FCM Burton and CASA Newby testified that a change of placement was in the best interest of the Children.

[14] Accordingly, we conclude that DCS showed that the change of foster placement was in the Children’s best interest. Therefore, the juvenile court did not abuse its discretion by denying Foster Parents’ motion to correct error.

⁵ Further, even if DCS was required to make reasonable efforts to reunify the Children with Foster Parents, given the circumstances we conclude that DCS’s effort were reasonable. “What constitutes ‘reasonable efforts’ will vary by case[.]” *In re T.W.*, 135 N.E.3d 607, 615 (Ind. Ct. App. 2019), *trans. denied*. “In determining the extent to which reasonable efforts to reunify or preserve a family are appropriate under this chapter, the child’s health and safety are of paramount concern.” Ind. Code § 31-34-21-5.5; *see In re Adoption of N.W.R.*, 971 N.E.2d 110, 115 (Ind. Ct. App. 2012) (“[T]he paramount interest in . . . CHINS cases is the best interests of the child.”).

⁶ There was also an incident where K.V. left the home without anyone knowing and was found by law enforcement in a nearby park. *See* Tr., Vol. II at 66-67; Appellant’s App., Vol. IV at 162.

C. Future Concerns

[15] Foster Parents also argue the juvenile court abused its discretion because it based its order on “future concerns rather than present facts.” Brief of Appellant at 32. Specifically, Foster Parents contend the juvenile court’s order “was based upon assumptions that the house would deteriorate if [the Children] were returned to the family.” *Id.* at 33. The only case law Foster Parents cite to support this contention is *Matter of L.N.*, which holds that “future concerns rather than present facts are not enough to support a CHINS determination. Rather, in order to prove that Child is a CHINS, DCS was required to present evidence that Parents’ actions or inactions have seriously endangered Child.” 118 N.E.3d 43, 49 (Ind. Ct. App. 2019) (internal citation omitted). However, *Matter of L.N.* does not hold that future concerns are inappropriate to consider when ruling on a change of foster placement. And the juvenile court did not base its determination solely on future concerns.

[16] The juvenile court did find that “[t]here is no convincing evidence that the [Foster Parents] would be up to maintaining the home above minimal standards for cleanliness and suitability long term once the [C]hildren would be returned to their care.” Appealed Order (Change of Placement) at 9. However, the juvenile court also found the following:

The evidence also shows that the children have benefitted by the structure, routine, and stability provided to them by their current foster placement. Jill Newby, the children’s CASA since 2018, has seen the children multiple times since their change in placement. Ms. Newby observed the positive changes in the

children’s behaviors first hand, and found them to be “unbelievable”. She observed that the children had already bonded to the current foster parents. CASA Newby recommended that it was in the best interests of the children for their placement to remain in the current foster home and for the children not to be returned to the [Foster Parents’] care.

Id. at 9-10. Therefore, the juvenile court’s order was not based solely on “future concerns” as Foster Parents claim. Accordingly, the juvenile court did not abuse its discretion.

II. Motion to Intervene

[17] Generally, the grant or denial of a motion to intervene is within the discretion of the juvenile court and we will reverse only for an abuse of that discretion. *Granite State Ins. Co. v. Lodholtz*, 981 N.E.2d 563, 566 (Ind. Ct. App. 2012), *trans. denied*. An abuse of discretion occurs when the juvenile court’s decision is clearly against the logic and effect of the facts and circumstances before it. *Id.* However, where the issues raised in the motion are questions of law, such as the interpretation of a statute, the standard of review is *de novo*. *See Boyer*, 42 N.E.3d at 508; *Johnson*, 36 N.E.3d at 1133.

[18] Foster Parents argue that the juvenile court “is abusing its discretion because it declines to allow [them] to participate in any future CHINS proceedings[.]” Br. of Appellant at 30. On March 16, 2022, Foster Parents filed a motion to intervene and a “motion to receive their statutory required notice and their right to participate in all case reviews and permanency hearings[.]” Appellant’s App.,

Vol. V at 76. Specifically, Foster Parents contend that they are entitled to intervene pursuant to Indiana Code section 31-34-21-4. We disagree.

[19] Under Indiana Code section 31-34-21-4(a)(6), any person who DCS “knows has had a significant or caretaking relationship to the child” shall be provided notice of a periodic case review, including “a case review that is a permanency hearing[.]” Further, the court shall provide such a person “an opportunity to be heard and to make any recommendations to the court[.]” Ind. Code § 31-34-21-4(d). Foster Parents argue that this entitles them to participate in the CHINS proceeding. However, Foster Parents conflate the participation provided for under Indiana Code section 31-34-21-4(d) with intervening as a party to the CHINS proceeding. *See* Ind. Code § 31-34-21-4.5.

[20] Indiana Code section 31-34-21-4(d) provides that the right to be heard and to make recommendations includes: (1) the right to submit a written statement that may be made a part of the court record; and (2) the right to present oral testimony to the court and cross examine any of the witnesses at the hearing.⁷ Contrary to Foster Parents’ contention, it does not entitle Foster Parents an unqualified right to participate in all future CHINS proceedings or to intervene as a party. Instead, the correct statutory mechanism for intervention is Indiana Code section 31-34-21-4.5. Pursuant to Indiana Code section 31-34-21-4.5, a

⁷ Foster Parents do not argue that they have been precluded from exercising these rights during a periodic case review. Rather, their only argument is that the statute entitles them to intervene in future CHINS proceedings.

“person who has been a foster parent . . . *may* petition the court to request intervention as a party to a proceeding as set forth in IC 31-32-2.5.” (Emphasis added.) Indiana Code section 31-32-2.5-1 states that such an intervention may occur “during any stage of a child in need of services proceeding[.]” The juvenile court shall grant a petition to intervene if it determines “that intervention by the petitioner is in the best interests of the child.” Ind. Code § 31-32-2.5-3.

[21] Here, Foster Parents fail to demonstrate that their intervention is in the best interest of the Children. Accordingly, we conclude that the juvenile court did not err by denying Foster Parents’ motion to intervene.

III. Motion to Establish Custody

[22] Pursuant to Indiana Code section 31-17-2-3(2), a custody action may be commenced by “a person other than a parent by filing a petition seeking a determination of custody of the child.” Foster Parents filed a motion to establish custody of the Children which was stayed by the juvenile court. Foster Parents argue this was error.

[23] It is not disputed that child custody falls within the general class of proceedings within the circuit court’s jurisdiction. *In re Custody of M.B.*, 51 N.E.3d 230, 234 (Ind. 2016). Yet, having jurisdiction does not automatically mean that it would be appropriate for the circuit court to *exercise* that jurisdiction. *Id.* at 235. In *M.B.*, a custody action was filed in the Posey Circuit Court while a CHINS proceeding was pending in the Posey County Juvenile Court. Our supreme

court held that a third party, who seeks to commence an independent child custody action may do so, “but if a CHINS case is pending when the custody action is filed and no exception . . . is applicable, the circuit court should abstain from exercising its jurisdiction and stay any proceedings on the custody action until final disposition of the CHINS proceeding.” *Id.* at 236.

[24] Foster Parents attempt to differentiate the present case from *M.B.* because their motion to establish custody was filed in the same court as the CHINS proceeding.⁸ However, *M.B.* does not suggest that it would be appropriate for a CHINS proceeding and custody action to proceed simultaneously even if they are filed with the same court. First, *M.B.* states that a stay would only be unnecessary under statutory exceptions that provide for specific cases to continue in other courts. None of the statutory exceptions are present here. Second, *M.B.* makes clear that a third party being allowed to file the custody action, and have it stayed, while a CHINS case is proceeding, is merely a matter of practical convenience and states:

In some circumstances, it may be best for the parties and the court for the custody action to at least be filed. For example, if a third party would like to obtain custody of a child that has been found a CHINS, that party would not have to undergo the burden of monitoring the CHINS docket daily to assess when

⁸ Foster Parents also attempt to differentiate *M.B.* from this case by pointing out that here, unlike in *M.B.*, the parental rights of the Children’s biological parents have been terminated. However, the parental rights status of the parents in *M.B.* is not provided as a consideration for the *M.B.* court’s decision. Foster Parents highlight this factual difference but fail to convince this court that such a difference would pull this case outside of *M.B.*’s purview.

they will be permitted to file their custody action. Rather, the parties may file their action and immediately proceed once the CHINS proceeding has concluded.

Id.

[25] Accordingly, we conclude that the juvenile court did not err by staying Foster Parents' motion to establish custody until the Children's CHINS proceeding is concluded.

Conclusion

[26] We conclude that the juvenile court did not abuse its discretion by denying Foster Parents' motion to correct error, denying Foster Parents' motion to intervene, or staying Foster Parents' custody proceeding. Accordingly, we affirm.

[27] Affirmed.

Mathias, J., and Foley, J., concur.