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IN THE  
COURT OF APPEALS OF INDIANA

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In the Matter of Z.D., a Child  
Alleged to be in Need of Services  
J.O. (Father),  
*Appellant-Respondent,*

v.

Indiana Department of Child  
Services,  
*Appellee-Petitioner*

September 28, 2022  
Court of Appeals Case No.  
22A-JC-875  
  
Appeal from the  
Marion Superior Court  
  
The Honorable  
Danielle Gaughan, Judge  
  
The Honorable  
Peter Haughan, Magistrate  
  
Trial Court Cause No.  
49D15-2111-JC-9464

**Vaidik, Judge.**

## Case Summary

- [1] J.O. (“Father”) appeals the trial court’s determination that his daughter is a child in need of services (CHINS). The fact-finding hearing that led to that determination was held virtually via Webex. Father, who was not yet represented by counsel, did not appear virtually but did go to the courthouse. Unfortunately, the bailiff did not notify the judge of Father’s presence until after the hearing had been adjourned, so the hearing happened without him. Father asked the court to hold a new fact-finding hearing, but the court refused. That was error. A parent who requests a contested CHINS fact-finding hearing has a constitutional right to that hearing, and while a parent can forfeit that right by failing to appear, that is not what happened here. We therefore reverse the CHINS determination and remand for a new fact-finding hearing.

## Facts and Procedural History

- [2] Father and K.D. (“Mother”) are the parents of Z.D. (“Child”), who was born in May 2017. On November 3, 2021, when Child and her half-siblings (Mother’s other children) were living with Mother, the Department of Child Services (DCS) filed a petition alleging that the children are CHINS. DCS claimed that Mother was abusing drugs and that “[Father’s] whereabouts are currently unknown” and he “cannot keep his child safe while in the care and custody of Mother.” Appellant’s App. Vol. II pp. 25-26. An initial hearing was held on November 4. Mother was present, but Father had not been served with a summons and was not present, so the hearing was continued until December 2.

On that date, Father still had not been served and was not present, so the hearing was continued until December 9. Father was served on December 3, but he did not appear on December 9. The court set another hearing for December 16. Father again failed to appear, and the court set the fact-finding hearing for February 24, 2022.

[3] On December 22, DCS's attorney sent Father the following letter about the upcoming fact-finding hearing:

Our Agency has requested that the Court default you in the court proceedings regarding [Z.D.].<sup>[1]</sup> If you fail to appear at the next court hearing you will be defaulted. The next hearing is before the Judge of the Marion Superior Court Court [sic], 2451 N. Keystone Avenue, Indianapolis, IN 46218 - 317-327-8392, for a(n) Fact Finding on 2/24/2022 at 10:30 AM.

If you fail to appear at the Fact Finding on 2/24/2022 at 10:30 AM, you will be defaulted and the Court may proceed to disposition on you, which means that the above-named child will be found a Child In Need Of Services as to you. The court may then order you to participate in services as recommended by the Department of Child Services.

If you have any questions regarding your child, please contact the FCM assigned to this case, Nya Carradine who can be reached at (317) 385-[\*\*\*\*] or via email at [\*\*\*\*]@dcs.in.gov.

THIS HEARING WILL OCCUR VIRTUALLY via Webex.  
Video attendance is preferred when possible, but telephonic

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<sup>1</sup> There is no indication in the record that DCS ever actually requested that Father be defaulted.

appearance is acceptable. Go to [www.webex.com](http://www.webex.com) to enter your meeting number and password or use the toll-free number to join by phone. Please join the hearing five (5) minutes before your hearing is scheduled to begin. You will be admitted to the hearing room once the Court is ready to begin. Use the following information to attend: Meeting number (access code): 129 182 3931. Meeting password: d15mycourt47MAG1 (31569268 from phones). Join by phone 1-844-992-4726 toll free.

You are currently not represented by an attorney and will need to appear in court or contact the court in writing if you wish to be appointed one. You may also hire an attorney at your own expense or choose to represent yourself. However, failure to appear at the hearing will cause the Court to proceed without you. If you would like a continuance of this hearing for more time to prepare, you would again need either need to appear at the hearing or contact the court. You may also reach out to me at 317-495-5035 if you have questions about the process but I represent the agency and am not your attorney.

Ex. 1. On February 16, eight days before the fact-finding hearing, DCS's attorney sent Father the letter again. *See* Ex. 2.

[4] The fact-finding hearing was held as scheduled on February 24 at 10:30 a.m. Mother appeared via Webex and admitted that Child is a CHINS. Father did not appear via Webex, and the court proceeded with the fact-finding as to him. DCS presented the limited information it had about Father through Family Case Manager Nya Carradine, who testified that: (1) she had been unable to make contact with Father; (2) she was not aware of Father doing anything to “demonstrate the ability or willingness” to parent Child; (3) she didn't know if Father had ever seen Child; (4) she didn't have any “indication” that Father is

capable of taking care of Child; and (5) she didn't know whether Father had stable housing or employment. Tr. pp. 41-45. Based on that evidence, the court found Child to be a CHINS and scheduled a dispositional hearing.

[5] After the fact-finding hearing ended, at around 10:50, “the bailiff notified the Court that [Father] had appeared in person.” Appellant’s App. Vol. II p. 135. The court then set another hearing for March 3 “to address [Father’s] portion of this matter.” *Id.* at 13. At that hearing, Father explained that he received the letter about the February 24 fact-finding hearing but went to the courthouse instead of appearing virtually because he read only the first part of the letter:

I looked at, honestly I just looked and seen appear in court on such and such date. I didn't read no more after that man because when it comes to my kids like- I wasn't- like all I am seeing is report to court. I didn't read nothing else. I just was trying to make sure I could get there[.]

Tr. p. 49. The trial court summarized Father’s position as follows:

Okay, so the fact that you didn't appear virtually wasn't through the fault of DCS and you did receive notice- you did receive that notice informing you to appear virtually but you didn't read the letter thoroughly and you showed up in person, after the hearing was set, so you were late for the hearing.

*Id.* The court confirmed its CHINS finding but appointed Father an attorney for the dispositional hearing.

[6] At the dispositional hearing, Father’s attorney objected to proceeding with disposition and asked the trial court to set a contested fact-finding hearing as to

Father and Child. The attorney said of Father, “He believes he is a fit an[d] appropriate father and has not had the opportunity for a fact-finding. Due to a misunderstanding about how to attend court when he actually showed up in person for the last hearing instead of by video.” *Id.* at 56-57. The court responded that Father “showed up late here at the juvenile center after the hearing was over.” *Id.* at 59-60. Father’s attorney disputed that characterization and requested that the court hold an evidentiary hearing to determine exactly what happened when Father went to the courthouse for the fact-finding hearing:

Your Honor, I read the order of the court from the time when my client showed up. I don’t think that was part of the evidence. I think if we are not going to afford the father a fact-finding hearing. I would request at least an evidentiary hearing on his appearance, because he did appear in person, at the juvenile court. I don’t think we have on the record what time. I am not sure the court wants to do that today[.]

*Id.* at 60. Father then stated that he arrived for the hearing at “like [10:38],” eight minutes after the hearing started and while it was still in progress. *Id.* The court responded, “Well what I can say is that the hearing was completed when the bailiff came to me and said that he had showed up. It was sometime after it.” *Id.* The court declined to hold an evidentiary hearing, denied Father’s request for a contested fact-finding hearing, reaffirmed the CHINS adjudication, and ordered Father to participate in the “Father’s Engagement” program.

[7] Father now appeals.

## Discussion and Decision

[8] Father first contends DCS did not present sufficient evidence about him at the fact-finding hearing to support the CHINS adjudication. We will reverse a CHINS determination only if it is clearly erroneous, that is, if our review of the record “leaves us firmly convinced that a mistake has been made.” *In re K.P.G.*, 99 N.E.3d 677, 681-82 (Ind. Ct. App. 2018), *trans. denied*. It is true that DCS presented little evidence about Father, but that was because he was not living with Child when the case started, he had not appeared at any of the previous hearings, and DCS had not otherwise been able to contact him. Given the lack of information about Father, and Mother’s drug issues and admission that Child is in need of services, we cannot fault the trial court for entering a CHINS finding at the end of the fact-finding hearing, when it believed Father had skipped the hearing.

[9] But that is not the end of our inquiry. Father also argues that **after** the hearing—once the trial court learned he had appeared at the courthouse—it erred by not “conducting an evidentiary hearing on Father’s attendance at the fact-finding hearing to determine if Father was entitled to a contested CHINS fact-finding hearing.” Appellant’s Br. p. 27. We conclude that no such evidentiary hearing is necessary. The record makes clear that the trial court should have granted Father a new fact-finding hearing.

[10] As an initial matter, we disagree with DCS that Father invited any error by failing to read the pre-hearing letter in its entirety. It is true that the letter said the hearing would “occur” virtually via Webex and provided instructions on how to appear virtually. But nothing in the letter indicated that Father was **required** to appear virtually or was prohibited from appearing in person. To the contrary, the first paragraph of the letter—the part Father read—said Father would be defaulted if he failed to “appear at the next court hearing” and then gave the physical location of the hearing (“2451 N. Keystone Avenue”), without mentioning virtual proceedings. There was no reason to include the physical address of the court if appearing in person wasn’t at least an option.

[11] Turning to Father’s attempt to attend the hearing in person, we first note that because a CHINS proceeding can interfere with the rights of parents in the upbringing of their children, a parent who requests a contested fact-finding hearing has a due-process right to that hearing, even if the other parent enters an admission. *In re K.D.*, 962 N.E.2d 1249 (Ind. 2012). A parent can forfeit that right by failing to appear, *id.* at 1257, but that is not what happened here. Father testified that he arrived at the courthouse at 10:38 a.m. on February 24—a few minutes late but while the fact-finding hearing was still in progress—and neither the trial court nor DCS disputed that assertion. The court emphasized that it was not told about Father’s presence until after the hearing ended, but that fact should not be held against Father. Nothing in the record suggests that Father was not present at the courthouse while the fact-finding hearing was being held.



On this record, Father's in-person appearance at the courthouse was sufficient to preserve his constitutional right to a contested fact-finding hearing.

[12] Courts and lawyers are well aware that many proceedings that used to be held in person are now being held remotely. Not all lay people are. There may come a time when that changes, but we aren't there yet. Until then, when a party's first appearance in a case is made in person when it should have been virtual, the court should be hesitant to treat that appearance as defiant or otherwise improper.

[13] For these reasons, the trial court should have granted Father's request to hold a new fact-finding hearing. We therefore reverse the CHINS adjudication and remand this matter to the trial court for such a hearing.

[14] Reversed and remanded.

Riley, J., and Bailey, J., concur.