

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In the Matter of:

H.W. and E.W. (Minor
Children),

And

M.L. (Mother),

Appellant-Respondent,

v.

Indiana Department of Child
Services,

Appellee-Petitioner.

July 14, 2023

Court of Appeals Case No.
22A-JC-1323

Appeal from the Floyd Circuit
Court

The Honorable Bradley Jacobs,
Special Judge

Trial Court Cause Nos.
22C01-2203-JC-165 &
22C01-2203-JC-166

Memorandum Decision by Judge Riley.

Chief Judge Altice and Judge Pyle concur.

Riley, Judge.

[1] Appellant-Respondent, M.L. (Mother), appeals the trial court’s interlocutory order granting the petition of Appellee-Petitioner, Indiana Department of Child Services (DCS), for the emergency detention of minor children, E.L.¹ and H.W. (collectively, Children).

[2] We affirm.

ISSUES

[3] Mother presents this court with one issue, which we expand and restate as the following three issues:

- (1) Whether Mother’s interlocutory appeal is moot;
- (2) Whether DCS violated Indiana Professional Conduct Rule 3.5(b) or Indiana Trial Rule 65(B) when it did not include an attorney in the proceedings leading to Children’s emergency detention; and
- (3) Whether Mother’s due process rights were violated by DCS seeking the emergency detention of Children without notice to an attorney.

¹ This child is referred to as E.W. in the trial court caption but is referred to as E.L. in the record.

FACTS AND PROCEDURAL HISTORY

[4] E.L., born September 24, 2012, and H.W., born December 26, 2019, are Mother's biological children. Eric Word (Word) is Mother's husband and the biological father of H.W.² At the time of the events which form the basis of this appeal, Word was subject to a no-contact order as to Mother. On March 15, 2022, DCS received a report that E.L. was not at school the previous day, that E.L. had been late for school that day, that E.L. was not sick, and that E.L. had told the person reporting to DCS that Word was yelling at Mother and that Mother had sent E.L. to a friend's house for safety. On March 17, 2022, DCS family case manager Amanda Lanham (FCM Lanham) went to Mother's home in New Albany, Indiana, to investigate.³ Mother and E.L. arrived home shortly after FCM Lanham had arrived. Mother informed FCM Lanham that H.W. was being cared for inside the home by a babysitter who was never seen.

[5] After speaking to E.L., observing the condition of the interior of the living room of the home through the open door, and observing Mother's behavior, FCM Lanham left Mother's home, and DCS orally requested an emergency custody order (ECO) for Children based on concerns of substance use, the lack of a

² Neither Word nor E.L.'s father participates in this appeal.

³ DCS' oral request for the ECO which did not include Attorney Travis, the hearing later in the day on March 17, 2022, that did include Attorney Travis, and the first fifty-nine minutes of the March 21, 2022, initial/detention hearing were not recorded. Facts concerning what occurred in this matter on March 17, 2022, are partially taken from a Statement of the Evidence certified by the trial court on January 12, 2023, pursuant to Appellate Rule 31. The Statement of the Evidence is based on Attorney Travis' recollections of what occurred, as DCS did not participate in the certification process by submitting its own proposed Statement of the Evidence.

sober caregiver, the condition of the living room, and concerns of domestic violence. Neither Mother nor any attorney representing Mother was present when DCS made its oral ECO request. The trial court granted the ECO, finding that an emergency existed requiring immediate action by the court and that Children did “not have a safe, sober, and suitable, and/or drug-free legal caregiver to provide [for their] reasonable needs in a safe and healthy manner that [did] not expose [them] to a substantial risk of neglect and/or abuse.” (Appellant’s App. Vol. II, p. 41). After having procured the ECO, FCM Lanham returned to Mother’s residence and removed Children from Mother’s care. Word was discovered at Mother’s home, and he was taken into custody.

[6] Later in the day on March 17, 2022, attorney S. Coy Travis (Attorney Travis), who knew Mother through representing her in other matters, procured a hearing on the ECO which DCS also attended. Attorney Travis informed the trial court that

prior to DCS seeking removal, he was aware that DCS assessment workers had been at [Mother’s] home and was aware of the high likelihood that DCS would seek removal. [Attorney Travis] further [informed] the trial court that he demanded to both the Family Case Manager and a DCS attorney that he be included in any discussion with a judicial officer about any removal of [C]hildren. [Attorney Travis informed] the trial court that DCS nevertheless sought an ECO without notifying him even though he had demanded notification and even though he was actually in the building.

(Appellant’s App. Vol. II, pp. 146-47). Mother objected to the ECO on the grounds that DCS had failed to comply with the requirements of [Indiana Trial](#)

[Rule 65](#). After hearing argument, the trial court denied Mother's objection and continued Children's detention.

[7] On March 21, 2022, DCS filed its petition seeking to have Children adjudicated as children in need of services (CHINS), and Attorney Travis was appointed Mother's public defender. Also on March 21, 2022, the trial court held a combined initial/detention hearing which Mother and Attorney Travis attended. The trial court heard Mother's objections to Children's removal and continued Children's detention. On April 20, 2022, Mother moved the trial court to certify the ECO for interlocutory appeal, and, on May 11, 2022, the trial court granted Mother's motion. On June 2, 2022, the trial court ordered Children back to Mother's care after Mother successfully petitioned for their return. However, on June 21, 2022, the trial court granted DCS' emergency request to again remove Children from Mother's care, and also on June 21, 2022, the trial court held a detention hearing which Mother and Attorney Travis attended. Mother admitted at the detention hearing that she has substance abuse, housing instability, and parenting skills issues. On July 7, 2022, Children were adjudicated as CHINS. On July 8, 2022, this court accepted jurisdiction over the instant interlocutory appeal.

[8] Mother now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Mootness*

[9] As it is a threshold issue, we first address DCS' contention that Mother's appeal is moot. "An issue is moot when no effective relief can be rendered to the parties before the court." *Matter of A.C.*, 198 N.E.3d 1, 9 (Ind. Ct. App. 2022), *trans. denied*. We agree with the State that Mother's claims are moot because they are based on the trial court's March 17, 2022, grant of the ECO detaining Children, an order which was superseded by the trial court's June 2, 2022, order returning Children to Mother's care. Thus, any subsequent detention of Children was not based on the March 17, 2022, ECO, and there is no relief which we may grant Mother pertaining to the March 17, 2022, ECO.

[10] However, we have long recognized that we may address a moot case on the merits if the case involves an issue of "great public interest." *In re F.S.*, 53 N.E.3d 582, 590 (Ind. Ct. App. 2016). These are typically cases that contain issues that are likely to recur. *Id.* Mother contends that it is also pertinent that we consider whether the case presents an issue which is likely to continue to evade review, but our supreme court has rejected that criterion. *Matter of Lawrence*, 579 N.E.2d 32, 37 n.2 (Ind. 1991).

[11] The essential question before us is whether Mother had a right to have an attorney present when DCS sought the ECO detaining Children, when that attorney had informed DCS he wished to be present and he was in the courthouse when DCS sought the order. As the United States Supreme Court

and the Indiana Supreme Court have held, parents' right to raise their children is "perhaps the oldest of the fundamental liberty interests." *Matter of Bi.B.*, 69 N.E.3d 464, 466-67 (Ind. 2017) (quoting *Bester v. Lake Cnty. Office of Family & Children*, 839 N.E.2d 143, 147 (Ind. 2005), in turn quoting *Troxel v. Granville*, 120 S.Ct. 2054, 2060 (2000)). In addition, the State's interests "in protecting a child's welfare are substantial." *In re I.P.*, 5 N.E.3d 750, 752 (Ind. 2014). The CHINS statute affords the parents of a child alleged to be abused or neglected a number of legal rights when the child is detained by DCS or when DCS has filed a CHINS petition, including the right to be represented by an attorney at each court proceeding on a petition alleging that the child is a CHINS. *In re G.P.*, 4 N.E.3d 1158, 1162 (Ind. 2014) (citing Indiana Code section 31-34-4-6(2)(A)). Mother's claims entail allegations of violations of an Indiana Professional Conduct Rule, an Indiana Trial Rule, and due process protections. Given the weighty interests involved, we conclude that Mother's case presents us with issues of "great public interest." *In re F.S.*, 53 N.E.3d at 590.

[12] We also conclude that Mother presents us with issues which are likely to recur. In *Matter of Jordan*, 616 N.E.2d 388, 391 (Ind. Ct. App. 1993), a mother whose child had been detained by local welfare authorities claimed on appeal that the constitutional requirement of due process mandated that a detention hearing be held within forty-eight hours, rather than the seventy-two hours then dictated by the detention statute. In electing to address the mother's claim even though the ensuing CHINS petition had been dismissed rendering the issue moot, this court noted "that many children will face detention hearings which may

comply with, or exceed, the time limits prescribed by the seventy-two hour detention statute” and that the child involved was “still a minor, and the [welfare authority] could conceivably file a subsequent CHINS petition which would result in a similar alleged constitutional violation.” *Id.* at 392. Likewise, it is a certainty that DCS will continue to seek ECOs, and Children are still minors, so there is a possibility that this same circumstance may arise in the future regarding this family. As such, we elect to address the merits of Mother’s claims, despite their mootness.

II. *Indiana Professional Conduct Rule 3.5(b) and Indiana Trial Rule 65(B)*

[13] Mother claims that on March 17, 2022, DCS violated Indiana Professional Conduct Rule 3.5(b) and Indiana Trial Rule 65(B) when it failed to honor Attorney Travis’ demand that he be included in any ECO proceedings. Inasmuch as these arguments involve the interpretation of statutes and the Indiana Trial Rules, those are matters which we review de novo. *State v. Int’l Bus. Machines Corp.*, 964 N.E.2d 206, 209 (Ind. 2012). We address each of these alleged violations in turn.

[14] Professional Conduct Rule 3.5(b) provides that

[a] lawyer shall not . . . communicate ex parte with [a judge, juror, prospective juror or other official] during the proceeding unless authorized to do so by law or court order[.]

(Emphasis added). Mother claims that DCS engaged in improper ex parte communications with the trial court when it obtained the ECO without

ensuring that Attorney Travis was included in the proceeding, as he ostensibly requested.⁴ However, DCS is authorized by statute to seek the “immediate removal” of a child through a court order without notice to the parents or a hearing, if such action is necessary to protect the child from further abuse or neglect. Ind. Code § 31-33-8-8(a). In addition, Indiana Code section 31-32-13-7 permits a juvenile court to issue an emergency order without a hearing if the court determines after a review of the record or consideration of sworn testimony or affidavit that an emergency exists. Mother does not address these statutory provisions in her argument. We find no violation of Indiana Professional Conduct Rule 3.5(b) by DCS when it procured the March 17, 2022, ECO because DCS’ actions were authorized by law.

[15] As to Mother’s argument that DCS also violated Trial Rule 65(B) (“Temporary Restraining Order—Notice—Hearing—Duration”), we observe that the Rule provides in relevant part as follows:

A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if:

- (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition; and

⁴ We observe that the Statement of the Evidence is bereft of details about how Attorney Travis came to know that DCS had been at Mother’s home that morning, who Attorney Travis contacted at DCS with his demand to be included in any ECO proceedings, and when that demand was made. In her April 20, 2022, motion seeking to have the ECO certified for interlocutory appeal, Mother asserted that Attorney Travis had also made a demand to the staff of the Floyd Circuit Court that he be included in any ECO proceedings. Mother did not include that assertion in the Statement of the Evidence, nor does she repeat that assertion on appeal.

(2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons supporting his claim that notice should not be required.

However, DCS did not apply for a restraining order in this case, so Trial Rule 65(B) is, on its face, not applicable to this case. In arguing that Rule 65(B) does apply to ECOs, Mother relies on *N.W. v. Madison County Department of Public Welfare*, 493 N.E.2d 1256 (Ind. Ct. App. 1986), in which a mother whose children had been removed by the county Department of Public Welfare through the grant of a petition for an ex parte emergency detention order claimed that she was entitled to receive notice and an opportunity to be heard prior to the grant of the petition. *Id.* at 1257. N.W. argued that Rule 65(B) applied to her case because emergency detentions are in the nature of preliminary relief and, thus, that she should have been granted notice and a hearing before the detention order was granted. *Id.* at 1259. This court did not address N.W.'s contention, observing that "[t]he argument merely seeks to cloud the central issue, which is whether the emergency detention of [the children] was in accordance with established procedures. We conclude that it was." *Id.* Thus, *N.W.* provides no precedential support for Mother's position.

[16] Neither can we find support for Mother's argument in *In re Price*, 899 N.E.2d 645 (Ind. 2009), as she contends. *Price* was an attorney disciplinary case

wherein attorney Price represented a father in a paternity proceeding and requested an emergency order granting his client custody of the child without providing a certification pursuant to Trial Rule 65(B) of his efforts to give the mother notice or certification of the reasons why such notice to mother should not be required. *Id.* at 645. Our supreme court concluded that Price had violated Indiana Trial Rule 65(B) and Indiana Professional Conduct Rule 3.5(b). However, *Price* involved private litigants in a paternity proceeding, not DCS exercising its authority under Indiana Code section 31-33-8-8(a). Mother provides us with no decisions from any Indiana court holding that Indiana Trial Rule 65(B) applies to DCS' application for ECOs under Indiana Code section 31-33-8-8(a). We conclude that DCS did not violate Indiana Trial Rule 65(B) in this case.

III. *Due Process*

[17] Mother argues that her right to due process was violated by DCS' procurement of the ECO without Attorney Travis' involvement. This contention is absent from the summary of the arguments offered by Attorney Travis at the March 17, 2022, hearing he did attend, as set forth in the Statement of the Evidence. However, Mother raised this argument in her April 13, 2022, Objection to DCS['] Motion for Change of Placement and Counter-Motion for Release of Detention, and DCS does not claim that the argument is waived, so we will address it.

[18] “Due process requires ‘the opportunity to be heard at a meaningful time and in a meaningful manner.’” *In re K.D.*, 962 N.E.2d 1249, 1257 (Ind. 2012) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). The right to due process applies to all stages of a CHINS proceeding. *Id.* The due process afforded in a CHINS proceeding turns on the balancing of the factors identified in *Mathews*, namely, “(1) the private interests affected by the proceeding; (2) the risk of error created by the State’s chosen procedure; and (3) the countervailing governmental interest supporting use of the challenged procedure.” *Id.* Our supreme court has recognized that

[t]he private interest affected by the proceeding is substantial—a parent’s interest in the care, custody, and control of his or her child. And the State’s interest in protecting the welfare of a child is also substantial. Because the State and the parent have substantial interests affected by the proceeding, we focus on the risk of error created by DCS’s actions and the trial court’s actions.

In re G.P., 954 N.E.2d at 917-23 (Ind. 2011). Accordingly, we will focus our analysis on whether DCS’ act of procuring the ECO without Attorney Travis’ involvement created a risk of error in the court’s determination that an emergency existed warranting Children’s detention. Mother’s claim that her right to due process rights has been violated is a matter of law which we will review de novo. *See Morton v. Ivacic*, 898 N.E.2d 1196, 1199 (Ind. 2008).

[19] Here, as previously noted, DCS had authority pursuant to Indiana Code section 31-33-8-8(a) to seek a court order for Children’s immediate removal, and the

trial court had the authority under Indiana Code section 31-32-13-7 to issue an emergency order without a hearing. Thus, neither statute expressly provides that a parent has the right to notice of the hearing or a right to be present, either in person or through an attorney. These statutes reflect the Legislature's intent to provide DCS with the ability to act quickly to protect a child, even though the particular circumstances of a case may not render DCS' immediate removal of a child without a court order appropriate. Nevertheless, in this case, later in the day on March 17, 2022, the same day that the ECO was issued, Attorney Travis was present at a hearing in the trial court during which he objected to the issuing of the ECO on Mother's behalf.⁵ The trial court continued Children's detention outside Mother's home, and on March 21, 2022, the trial court held a formal detention hearing within forty-eight hours, excluding weekends and holidays, of the issuing of the emergency order, as required by Indiana Code section 31-34-5-1 and which Mother and Attorney Travis attended. Thus, Mother was afforded the due process provided to her by the Indiana CHINS statutes. Mother does not address the *Mathews* factors, nor does she specifically explain how DCS' chosen procedure in this case created a risk of error in Children's removal. This court has already concluded that the removal of children pursuant to an ex parte emergency detention order does not violate due process protections, even without considering Indiana Code section 31-33-8-8(a). *See N.W.*, 493 N.E.2d at 1258-60 (rejecting N.W's argument that the ex

⁵ The record does not reflect that Attorney Travis had been formally hired by Mother to represent her at this stage of the proceedings, and he was not appointed as a public defender in this matter until March 21, 2022.

parte emergency order at issue “denied due process and constituted an unreasonable and impermissible restriction of the parent-child relationship[,]” where N.W. had an opportunity to be heard at a hearing four days after the emergency detention and at the detention hearing). Mother requests that we reconsider *N.W.* in light of arguments offered for the first time in her reply brief, which is not permitted. *See French v. State*, 778 N.E.2d 816 (Ind. 2002) (holding that issues raised for the first time in a reply brief are waived). Accordingly, we find no violation of Mother’s due process rights.

CONCLUSION

[20] Based on the foregoing, we hold, pursuant to our authority to consider moot cases that present issues that are of great public interest, that DCS did not obtain the ECO in violation of Indiana Professional Conduct Rule 3.5(b) or Indiana Trial Rule 65(B) and that the trial court’s grant of DCS’ oral petition for the ECO did not violate Mother’s right to due process.

[21] Affirmed.

[22] Altice, C.J. and Pyle, J. concur