Delinquency

6/29/11

In **A.B. v. State**, 949 N.E.2d 1204 (Ind. 2011), the Court reversed the trial court's order which declared that three juvenile delinquency statutes are unconstitutional. The Court also held that the Department of Child Services (DCS) requirement that the delinquent child be placed in Indiana rather than being placed out of state in Arizona was arbitrary and capricious. The Court further held that DCS shall pay for the child's placement in Arizona. The child, then age fifteen, was apprehended by the police in November 2008 and detained at the Juvenile Justice Center. The child was found to be a delinquent child based on his admission of committing criminal mischief, a Class B misdemeanor, and was continued in detention at the Juvenile Justice Center. In February 2009, the trial court entered its dispositional order placing the child on strict and indefinite probation at the Madison Center Residential Facility at the Juvenile Justice Center. The child fled from his placement in November 2009, was apprehended in December 2009, and placed in secure detention. On February 2, 2010, the trial court conducted a hearing on the child's placement. The child, his counsel, his mother, his probation officer, and the Juvenile Justice Center director attended the hearing. DCS received notice, but no DCS representative was present at the hearing. The probation department recommended that the child complete the Rite of Passage Program at Canyon State Academy in Arizona (ROP). Factors noted by the probation department in support of its recommendation included: (1) the child was struggling in his placement at the Juvenile Justice Center and dealing with many issues, including new therapists and staff turnovers; (2) the ROP placement would allow the child to learn vocational and independent living skills, complete his education, and transition to obtaining employment and exploring secondary education opportunities; (3) the child would not return to his mother; (4) although the child's custodian had participated in his treatment, the child's mother had not been participating; (5) the probation department did not have current address information for the mother; (6) after the child completed ROP, the child would transition to independent living and his participation in family therapy would be unnecessary; (7) the child's family could participate in video conferencing, and ROP would fly the family to Arizona at no cost to the family. The ROP program had a per diem of $171.70, a warranty period during which they provide aftercare services, many other services, and an 88% success rate. DCS's alternate placement recommendations were received just before the February 2 court hearing, and consisted of four placements in Indiana. The four Indiana placements provided fewer services than ROP, did not provide a warranty for every placement, and the per diem for the Indiana placements was generally higher than the per diem for ROP with the exception of White's Institute, which had a lower per diem for one type of placement and a higher per diem for another type of placement.

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Testimony at the hearing was that, although both the family and child would prefer to stay closer, they supported the move to ROP. DCS submitted that the four Indiana facilities are comparable to and can address the same issues as ROP. DCS believed the extreme distance to ROP would hinder the child's reunification with his family. Reunification was not the goal for the probation department; instead the goal for the child, who would become eighteen years old in May 2011, was to learn to live independently. The distance from ROP to Indiana may be beneficial, providing a new start for the child who has a history of fleeing from previous placements. The trial court entered its order of modification placing the child in ROP in Arizona. The trial court also found that IC 31-37-17-1.4 [DCS review of probation department's services and placement recommendations statute], IC 31-37-18-9(a) and (b) [delinquency dispositional statute], and IC 31-40-1-2(f) [DCS payment for out-of-state placement] violate the separation of powers between the executive and administrative branch and the courts, and are unconstitutional infringements on the judicial power and authority of a juvenile court to make decisions concerning the out-of-state placement of children. The trial court further found IC 31-40-1-2(f) unconstitutional under Article 4, Section 19 of the Indiana Constitution, which limits legislative acts to one subject.

The Court opined that DCS may appeal under Appellate Rule 4(A)(1)(b). Id. at 1211. DCS appealed under Indiana Rule of Appellate Procedure 4(A)(1)(b), which states that the Indiana Supreme Court shall have mandatory and exclusive jurisdiction over "appeals of Final Judgments declaring a state or federal statute unconstitutional in whole or in part." The child contended that the only proper appeal was under Indiana Appellate Rule 14.1, "Expedited Appeal for Payment of Placement and/or Services" which governs IC 31-34-4-7(f), IC 31-34-19-6.1(f), IC 31-37-5-8(g), and IC 31-37-18-9(d). The Court observed that IC 31-34-4-7(f) and IC 31-34-19-6.1(f) apply only to CHINS cases and that IC 31-37-5-8(g) applies only to services and programs provided prior to entry of a delinquency dispositional decree. Id. IC 31-37-18-9(d), the only statute applicable to the child's case, allows DCS to appeal the juvenile court's decree under any available procedure provided by the Indiana Rules of Appellate Procedures. Id.

The Court found that IC 31-40-1-2(f) relates to appropriations and the state budget and does not violate Article 4, Section 19 of the Indiana Constitution limiting acts to one subject. Id. at 1212. IC 31-40-1-2(f) was amended in the 2009 First Special Session of the 116th General Assembly. The amendment provided that DCS is not responsible for the payment of any costs or expenses for housing or services for a child placed by a juvenile court in a home or facility located outside Indiana, if the placement is not recommended or approved by the DCS director or the director's designee.

The Court concluded that IC 31-37-18-9 [delinquency dispositional statute], IC 31-37-17-1.4 (DCS review of probation department's services and placement recommendations statute], and IC31-40-1-2(f) [DCS payment of out-of-state placements statute] do not violate the "separation of powers" provision of the Indiana Constitution. Id. at 1214. The Court noted that the powers of the Government are divided into the Legislative, the Executive,

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including the Administrative, and the Judicial, and Article 3 section 1 of the Indiana Constitution provides that "no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided." Id. at 1212. The Court said that these statutes do not violate the separation of powers provision, and observed that the statutes still provide an avenue for judicial review of placement, do not usurp the powers of the trial court or the judiciary, and do not impermissibly shift those powers to the executive branch. Id. The Court opined that the statutes do not limit a judge's power to place a child where the judge determines is in the child's best interest, but instead, deal with how DCS funds each child's placement. Id. at 1212-13. The Court also stated that, "[t]o the extent that DCS can veto a juvenile court's out of state placement determination by withholding funds, DCS is moving very close to usurping the judiciary's authority when it comes to dealing with the lives of children." Id. at 1213. The Court said that IC 31-37-18-9(a) does not mandate that the judiciary concur with the DCS dispositional report; and, although it delineates specific findings for the juvenile court to make in its dispositional decree, the legislature is not directing the judiciary what to find. Id. The Court further found that IC 31-37-18-9(b) does not violate the separation of powers provision, because it outlines the procedure to be used when the juvenile court does not concur with DCS. Id. IC 31-37-18-9(b) directs the juvenile court to make written findings if it disagrees with DCS and to preserve a complete record should DCS choose to appeal. Id. at 1213-14. The Court said that the language of IC 31-37-17-1.4, which describes tasks and duties of DCS and probation officers in preparing recommendations in predispositional reports, does not usurp the power of the juvenile court judge to ultimately make the decisions in his or her courtroom. Id. at 1214. Finally, the Court concluded that the out-of-state placement statute does not prevent the juvenile court from placing a child outside the state of Indiana, noting that: (1) the DCS director or the director's designee could approve the placement and thus be responsible for placement; or (2) the juvenile court judge could pay for the placement from the county's funds or could order the child's parents or guardians to pay for the placement outside Indiana. Id.

The Court found that the DCS action in denying out of state placement was arbitrary and capricious and agreed with the trial court's determination that DCS is responsible for the payment of the child's placement at ROP in Arizona. Id. at 1220. The Court reviewed IC 31-34-19-6.1, which applies to CHINS dispositions, and reiterated the standard of review for appeals brought under Appellate Rule 14.1 as delineated in In Re T.S., 906 N.E.2d 801 (Ind. 2009). In T.S., the Court found that the statute creates a "presumption of correctness" for DCS, meaning any contrary disposition by the juvenile court must be supported by a preponderance of the evidence. T.S. at 804. A.B. at 1216. The Court adhered to the standard of review for appeals brought under Appellate Rule 14.1, but said that this standard gives insufficient deference to disapproving decisions made by the DCS director under IC 31-40-1-2(f). A.B. at 1216. The Court opined that the appropriate review standard for a DCS director's disapproving decision on out-of-state placement is provided by the standards of Indiana's Administrative Orders and Procedures Act (AOPA), IC 4-25.1. Id. The Court does not believe that it is necessary to hold that disapproving decisions made by the DCS director under IC 31-40-1-2(f) are subject to AOPA, but said that AOPA standards will be applied in appellate review of those

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decisions. Id. at 1217. The Court noted that IC 4-21.5-5-14(d) of the AOPA specifies five instances under which judicial relief should be granted due to prejudice by an agency action: if the agency action is (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right: (4) without observance of procedure required by law; or (5) unsupported by substantial evidence. Id. Quoting City of Indianapolis v. Woods, 703 N.E.2d 1087, 1091 (Ind. Ct. App. 1998), the Court defined an arbitrary and capricious decision as one which is "patently unreasonable" and is "made without consideration of the facts and in total disregard of the circumstances and lacks any basis which might lead a reasonable person to the same conclusion." A.B. at 1217. Citing and analogizing to State ex rel Smitherman v. Davis, 151 N.E.2d 495, 498 (Ind. 1958), the Court noted that the law is well settled "that all discretionary acts of public officials, which directly and substantially affect the lives and property of the public, are subject to judicial review where the action of such official is…arbitrary and capricious." A.B. at 1218. The Court found the statutes relating to juvenile delinquency void of any hard-and-fast rule that does not allow for out-of-state placement. Id. The Court held that the power of recommending or approving the probation department's recommendation for placement shall be done not for the benefit of DCS, but for the benefit of the child. Id.

The Court found that DCS's refusal to approve the ROP placement was unreasonable and contrary to the evidence in this case that would have led a reasonable person to determine ROP was the best placement for the child. Id. at 1220. The Court observed that it appears as if the overriding factor—perhaps the only factor considered by DCS in not approving ROP as a placement—was that it was in Arizona and not in Indiana. Id. at 1220. The Court noted the following in support of its determination that DCS's refusal to approve ROP is arbitrary and capricious: (1) ROP is less expensive than the Indiana options; (2) *the child's and family's willingness to go to ROP* (emphasis in opinion); (3) the plan for the child is independent living. Id. The Court concluded that if DCS wants to disapprove and thereby not pay for out-of-state placement pursuant to statute, such decision is subject to appellate review on an arbitrary and capricious showing. Id. The Court opined that any party may take an appeal to the Court of Appeals, and if the Court of Appeals determines DCS arbitrarily and capriciously refused to approve the judicial officer's placement decisions, DCS will be responsible for payment as if it would have approved the recommendation. Id.

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