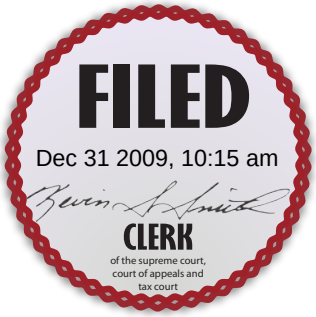


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# IN THE
# COURT OF APPEALS OF INDIANA

| | | |
|---|---|---|
| IN RE THE GUARDIANSHIP OF C.D., Minor Child, | ) | |
| C.W., Appellant, | ) | |
| vs. | ) | No. 06A01-0905-CV-260 |
| D.M., Appellee. | ) | |

APPEAL FROM THE BOONE SUPERIOR COURT
The Honorable Matthew C. Kincaid, Judge
Cause No. 06D01-0903-GU-015

**December 31, 2009**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**MATHIAS, Judge**

The Boone Superior Court granted D.M's petition for appointment of a guardian over her great-nephew, C.D., over the objection of C.D.'s mother, C.W. ("Mother"). Mother appeals and raises three issues, however, we address only the following dispositive issue: whether the trial court erred when it failed to appoint a guardian ad litem for C.D. Concluding that the trial court was required to appoint a guardian ad litem under Indiana Code section 29-3-2-3, we reverse and remand for further proceedings consistent with this opinion.

**Facts and Procedural History**

C.D. was born on July 9, 2008. Mother had completed her junior year of high school prior to C.D.'s birth. Shortly before C.D.'s birth, Mother moved in with C.D.'s father, D.D. ("Father"). Mother's and Father's relationship began when Mother was a sophomore in high school and Father was a senior in high school. Father was employed full-time when C.D. was born, and Mother remained in high school to complete her senior year. Mother continued to be a cheerleader during her senior year and worked part-time at a restaurant. At all relevant times, Father has been employed full-time by his family's business.

Mother and Father hired D.M., Father's aunt and C.D.'s great aunt, to care for C.D. while Father worked and Mother attended school, work, and cheerleading practice. Generally, C.D. was dropped off at D.M.'s home at 7:00 a.m. and D.M. returned C.D. to his parents' home at approximately 3:30 p.m.

On some date near November 1, 2008, Mother and Father ended their relationship. Mother moved back to her parents' home with C.D. Mother and C.D. did not have a

bedroom in Mother's parents' home and they often slept on the couch or floor. However, at some point a crib was purchased for C.D. and placed in Mother's three-year-old sister's room. Because Mother did not have a driver's license, many individuals assisted Mother in transporting C.D. to D.M.'s house for daycare including Father, Mother's mother, D.M., and D.M.'s mother. D.M. would return C.D. to Father or Mother in the afternoon or would keep him overnight.

At some point during January or February 2009, Mother began dating a boy who had been adjudicated a juvenile delinquent. Mother's parents objected to her relationship with the boy and told her that she could not live in their house if she continued to see him. Mother moved out of her parents' home and moved into a friend's home. Father and D.M. alleged that Mother was living with her boyfriend during this time. Within a few weeks, Mother ended the relationship and moved back into her parents' home.

Also, at approximately this same time, Mother was unable to care for C.D. because of increased cheerleading activities at school that coincided with the end of the basketball season. Mother asked Father to care for C.D. during that time, and Father agreed. However, Father took C.D. to D.M.'s home and asked D.M. to care for C.D. on a permanent basis. Father admitted that he did not tell Mother that he had essentially abandoned their child to D.M. Tr. p. 54.

On March 6, 2009, D.M. filed an Emergency Petition for Temporary Custody of C.D. and a Petition for Appointment of Guardian. The petition alleged that D.M. had physical custody of C.D. and D.M. believed that "harm may come to [C.D.] if the child is taken" from D.M. and returned to Mother because of Mother's "immature and

irresponsible behavior and lifestyle." Appellant's App. p. 7. On that same date, the trial court granted D.M.s' petition for temporary custody. After D.M. was granted temporary custody of C.D., she restricted Mother's visitation with C.D. to two to three hours per week during the weekend. Tr. pp. 27, 49.

The trial court held a hearing on D.M.'s guardianship petition on April 24, 2009. At the hearing, D.M. testified that after Mother's and Father's relationship ended on or about November 1, 2008, she continued to care for C.D. during the day and "sometimes" overnight. Tr. p. 7. D.M. stated that she would take C.D. to Father's home if she did not keep the baby overnight. D.M. testified that she never communicated with Mother concerning C.D.'s welfare, but only received phone calls from Mother's mother. D.M. also testified that from November 2008 to March 2009, Mother had C.D. only one overnight per week. Tr. p. 9. She stated that Father would see C.D. daily and Father also kept C.D. overnight. Father provided monetary or other support for C.D. and has paid C.D.'s medical bills.

D.M. testified that she needed to be C.D.'s guardian because of Mother's lifestyle. Specifically, D.M. stated that Mother has not made C.D. a priority in her life because she continued to be a cheerleader, went out on weekends with her friends, had moved in and out of her parents' home, and took a spring break trip to Florida. Tr. p. 17. Father expressed the same concerns. Tr. p. 41. Father and D.M. placed great emphasis on Mother's spring break trip to Florida as one of the reasons that Mother is not fit to care for C.D. The Florida trip occurred after D.M. was granted temporary custody of C.D. After D.M. was granted custody, she allowed Mother to exercise visitation with C.D.

only two to three hours per week during the weekend, and Mother's trip to Florida did not interfere with that visitation schedule.

D.M. admitted that she never discussed her concerns about Mother's lifestyle with her and never spoke to Mother's mother about her concerns. She also stated that during the time period when she was C.D.'s babysitter, C.D. was brought to her home with a diaper bag containing clean clothes and food. Tr. p. 24. D.M. testified that C.D. has always been a healthy child with normal development. However, C.D. has breathing problems that require him to take breathing treatments on occasion. Mother believes he may eventually be diagnosed with asthma. Tr. p. 88. D.M. is a cigarette smoker, and after she gained custody of C.D., he was hospitalized overnight because his oxygen level was low. Tr. p. 90. D.M. notified Mother, who came to the hospital. D.M. allowed Mother to see C.D., but would not allow her to stay with him overnight in his room. Id

On the date of the hearing, Mother had nearly completed her senior year of high school and was no longer cheerleading. Mother stated that after graduating, she planned to stay home with C.D. during the day and work at night when her mother was at home to take care of C.D. Tr. p. 79. She testified that she stopped seeing her boyfriend in March 2009 and that the boy was never around C.D. Tr. p. 80. Finally, none of the parties or witnesses in the guardianship proceedings alleged that C.D. has suffered any harm while in Mother's care, and all agree that he is a healthy child.

On May 4, 2009, the trial court issued findings of fact and conclusions of law granting D.M.'s petition for guardianship of C.D. The court concluded in pertinent part that "there is a need for an appointment of a guardian over" C.D. because Mother "lacks

the judgment, dedication, determination, interest, sense of responsibility and maturity to safely care for and raise such child[.]" Appellant's App. p. 37. Mother now appeals.

**Discussion and Decision**

Mother argues that the trial court committed reversible error by failing to appoint a guardian ad litem to represent and protect C.D.'s interests during the guardianship proceedings.[1] A guardian ad litem is "an attorney, volunteer, or an employee of a county program designated under IC 33-2.1-7-3.1" appointed by the court to:

> (1) represent and protect the best interests of a child; and
>
> (2) provide the child with services requested by the court, including:
>
> (A) researching;
> (B) examining;
> (C) advocating;
> (D) facilitating; and
> (E) monitoring;
>
> the child's situation.

Ind. Code § 31-9-2-50 (2008).

Indiana Code section 29-3-2-3 (1994 & Supp. 2009) provides that in guardianship proceedings, "the court ***shall*** appoint a guardian ad litem to represent the interests of the alleged incapacitated person or minor if the court determines that the alleged incapacitated person or minor is not represented or is not adequately represented by counsel." (Emphasis added). See also In re Guardianship of Hickman, 811 N.E.2d 843,

[1] D.M. argues that Mother waived this claim by failing to request the appointment of a guardian ad litem for C.D. We disagree. D.M.'s argument implies that Mother had the ability to waive C.D.'s right to representation. Because a guardian ad litem is appointed to represent a minor or incapacitated person's interests, the right to a guardian ad litem cannot be waived by another party to the guardianship proceedings.

852 (Ind. Ct. App. 2004), trans. denied ("A trial court is required to appoint a guardian ad litem to represent the interests of the person alleged to be incapacitated.").

In In re Adoption of B.C.S., 793 N.E.2d 1054, 1061 (Ind. Ct. App. 2003), the trial court did not appoint a guardian ad litem during adoption proceedings, and on appeal, B.C.S.'s great aunt and uncle argued that the trial court was required to appoint a guardian ad litem pursuant to Indiana Code section 29-3-2-3 and Trial Rule 17(C).[2] Id. However, a court appointed special advocate ("CASA") submitted a report during the adoption proceedings. Id. Our court noted that the CASA's statutorily defined role is nearly identical to that of a guardian ad litem's, stating "[e]ach represents and protects the best interests of the child by researching, examining, advocating, facilitating, and monitoring a child's situation." Id. Because the CASA's report was "essentially the same report that the court would have received" if it had appointed a guardian ad litem for the child, we concluded that the trial court's failure to appoint a guardian ad litem could not amount to reversible error. Id.

The same issue was raised in In re Adoption of L.C., 650 N.E.2d 726, 732 (Ind. Ct. App. 1995), trans. denied. Our court again concluded that failure to appoint a guardian ad litem did not amount to reversible error because "while the interests of L.C. were certainly affected by the outcome of the trial, the appointment of a guardian ad litem for L.C. could have had no bearing on the court's determination of whether the WCDSS had improperly withheld consent to the adoption." Id. We also noted that although L.C.'s Maryland court-appointed attorney did not represent L.C. in the Indiana

[2] Trial Rule 17 (C) provides, in pertinent part, "[i]f an infant or incompetent person is not represented, or is not adequately represented, the court shall appoint a guardian ad litem for him."

proceeding, the trial court heard testimony from the Maryland attorney, and the attorney testified that that her role was to represent L.C.'s best interests. Id. at 733.

Section 29-3-2-3 provides that "the court shall appoint a guardian ad litem[.]" The word shall is "construed as mandatory rather than discretionary unless it appears clear from the context or the purpose of the statute that the legislature intended a different meaning." Gabbard v. Dennis, 821 N.E.2d 441, 445 (Ind. Ct. App. 2005). From the plain language of section 29-3-2-3, we can only conclude that courts are required to appoint a guardian ad litem in guardianship proceedings. Furthermore, a trial court may, in its discretion, fail to appoint a guardian ad litem, *but only if* the minor's or incapacitated person's interests are adequately represented by an attorney or an individual acting in the same capacity as a guardian ad litem. Ind. Code § 29-3-2-3; see also Adoption of B.C.S., 793 N.E.2d at 1061.

In this case, C.D. was not represented by an attorney, and C.D. was not represented by any other individual acting in any capacity approximating that of a guardian ad litem. This defect is particularly troubling here because although the evidence suggests that Mother was not C.D.'s primary caregiver, there is also no evidence that Mother neglected or harmed C.D. while he was in her care.

Accordingly, we conclude that the trial court committed reversible error when it failed to appoint a guardian ad litem as required by Indiana Code section 29-3-2-3. On remand, we instruct the trial court to appoint a guardian ad litem and hold a new hearing on D.M.'s petition for guardianship over C.D.

Reversed and remanded for further proceedings consistent with this opinion.

BARNES, J., and BROWN, J., concur.