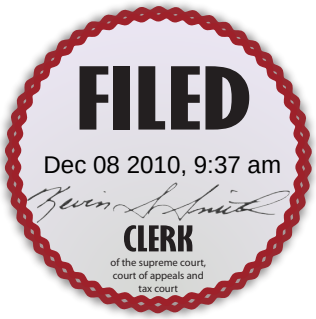

ATTORNEY FOR APPELLANT:

T. DEAN SWIHART
Fort Wayne, Indiana

ATTORNEYS FOR APPELLEE:

CHERRIE L.B. WELLS
Allen County Department of Child Services
Fort Wayne, Indiana

ROBERT J. HENKE
Indiana Department of Child Services
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

IN RE: THE MATTER OF B.J.N., A CHILD ALLEGED TO BE IN NEED OF SERVICES,	)	
K.S. and R.S. (Proposed Interveners)	)	
Appellants,	)	
vs.	)	No. 02A05-1005-JC-383
DEPARTMENT OF CHILD SERVICES of Allen County,	)	
Appellee.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Charles F. Pratt, Judge
The Honorable Lori K. Morgan, Magistrate
Cause No. 02D07-0805-JC-271

December 8, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

K.S. and R.S. appeal the trial court's denial of a motion to correct error following denial of their motion to intervene and motion to deny change of placement of B.J.N., a minor child. For our review, they raise the following three issues: 1) whether the trial court erred by denying their motion to intervene, 2) whether there is sufficient evidence to remove B.J.N. from the home of K.S. and R.S., and 3) whether the trial court erred by not referring the motion to correct error to the presiding trial judge. Concluding a challenge to denial of the motion to intervene has not been preserved for appeal, there was sufficient evidence to remove B.J.N. from the home of K.S. and R.S., and K.S. and R.S. have waived any challenge to the judicial authority of the magistrate who signed the order denying their motion to correct error, we affirm.

Facts and Procedural History

B.J.N., born in April 2008, was adjudicated to be a child in need of services ("CHINS") in June 2008. From February 2009, pursuant to a trial court order, B.J.N. has resided exclusively with her maternal grandmother, K.S., and step-grandfather, R.S. In April 2009, the trial court entered a permanency plan that included termination of parental rights and adoption of B.J.N. The case carried on with periodic review and the trial court's reevaluation of the circumstances with the comments of the Department of Child Services

("DCS"), a court-appointed special advocate ("CASA"), and each of the biological parents, separately represented by counsel. An October 2009 trial court order "authorize[d] [K.S.] to file custody pleadings. Said custody pleadings to be filed within 30 days." Appellant's Appendix at 74.

In April 2010, K.S. and R.S. filed a motion to intervene in the matter regarding placement of B.J.N., alleging their interest in the matter because their petition to adopt B.J.N. was pending, and their participation was necessary to provide complete relief among all parties and prevent inconsistent or conflicting court orders. They also moved to deny a change of B.J.N.'s placement that would remove her from their home.

Following K.S. and R.S. filing these motions, the trial court held in April 2010 a previously scheduled hearing regarding the progress of the permanency plan of B.J.N. At this hearing DCS recommended B.J.N. be placed with prospective adoptive parents who had been selected by B.J.N.'s biological parents, and the CASA recommended adoption by K.S. and R.S. K.S. and R.S. were present and represented by counsel, who argued against removing B.J.N. from their home. The trial court entered findings of fact regarding placement and an order, including the following:

> 1. [B.J.N.] has been removed from the [biological] parent's home for 15 out of the last 22 months.
> 2. The child is progressing well in said placement.
> 3. The goals of the placement have not been accomplished.
> 4. The present placement is appropriate.
> 5. The [DCS] recommends that the child be placed in the home of the prospective adoptive parents, [T.M.] and [T.B.]. [The] CASA recommends that the childbe [sic] continued in the home of relatives: [K.S.] and [R.S.].
> 6. After considering the recommendations of the parties and other interested individuals as required by statute, the Court accepts the recommendations of

> [DCS] as being in the best interest of the child. THE COURT NOW ORDERS the child be placed in the home of the prospective adoptive parents, [T.M. and T.B.]. The child shall be transitioned into the adoptive parents' home as deemed appropriate by DCS.
> ***
> ADDITIONAL FINDINGS AND ORDERS:
> A. [B.J.N.] has been injured on at least three (3) occasions where she had to be taken to the hospital and/or required medical care while in the care of [K.S. and R.S.]. The DCS has received a referral regarding a recent injury to the child that allegedly occurred while in [K.S. and R.S.]' care.
> B. [K.S. and R.S.] have had prior involvement in a CHINS proceeding . . . when [B.J.N.'s mother] . . . was a child.
> C. [T.M] and [T.B.] are licensed foster parents and have filed a Petition for Adoption . . . .
> D. Continuation of the child in the home of [K.S. and R.S.] is not in the child's best interests. Placement of [B.J.N.] in the home of [T.M] and [T.B.] is in the child's best interests.

Id. at 86-87.

K.S. and R.S. then filed a motion to stay enforcement of the order pending appeal and a motion to correct error, "request[ing] that th[e] motion be heard by the presiding judge." Id. at 89. The trial court, via the same magistrate who entered findings following the April 2010 hearing, denied the motions because K.S. and R.S. "have not been made parties to the proceeding." Id. at 94. K.S. and R.S. now appeal.

Discussion and Decision

I. Intervention

The procedural posture of the intervention issue in this case is similar to what we faced in Krieg v. Glassburn, 419 N.E.2d 1015 (Ind. Ct. App. 1981), superceded by statute on other grounds as stated in In re Guardianship of J.E.M., 870 N.E.2d 517, 519 (Ind. Ct. App. 2007). In Krieg, the maternal grandparents sought intervention because their rights to visit

their grandchildren would be adversely affected if an adoption was finalized. Accordingly, they appealed a trial court's denial of their motion to intervene in a divorce, custody, and adoption proceeding.

Similar to Krieg, as a threshold matter, we must determine whether the case is properly before us, addressing two issues. First, K.S. and R.S.'s motion to intervene and appellate brief do not refer to Indiana Trial Rule 24, regarding intervention, but refer exclusively to Indiana Trial Rules 17 and 19, which address parties and joinder, respectively. In particular, Rule 17 addresses who may sue or be sued and how to name parties to a lawsuit. Rule 19, more relevant to our discussion but still not quite on point, addresses the joinder in a suit of one needed for proper adjudication. Similar to Krieg, although the legal citation is technically incorrect, this error does not preclude our review because we favor substance over form. Id. (considering a pleading filed "Petition for Joinder" as a combined motion to intervene and petition for visitation); see Loftin v. Johnson, 216 Ind. 537, 542, 24 N.E.2d 916, 918 (1940) ("The form of the pleading . . . is not important; it is the substance that is controlling."). Consequently, we consider the motion to intervene by K.S. and R.S. under Trial Rule 24, governing intervention, and accompanying authority as appropriate.

Second, we must determine whether our review of the motion to intervene has been preserved for appeal. This is an issue for two reasons: the trial court did not explicitly deny or otherwise rule on the motion to intervene, and neither the notice of appeal nor the motion to correct error by K.S. and R.S. refers to the lack of ruling or otherwise refers to the motion to intervene.

We acknowledge the potential argument that the trial court implicitly denied the motion to intervene. K.S. and R.S. intended to intervene in the case prior to the trial court ordering adoption of B.J.N. by others because their own petition to adopt was pending. Hence, a reasonable argument may be made that the trial court's April 2010 ruling to begin transition of B.J.N. from the home of K.S. and R.S. to the home of the prospective adoptive parents, T.M. and T.B., in effect, implicitly denied their motion to intervene.

However, we dismiss this potential argument because for all practical purposes, K.S. and R.S. have already intervened. The trial court authorized their filing of custody pleadings in 2009. More importantly, at the April 2010 hearing K.S. and R.S. were present and represented by counsel, who contributed significant substantive argument on their behalf. The trial court's order to remove B.J.N. from their home (which they are appealing) was announced in open court at the close of this hearing. Therefore, although they technically lacked intervenor status, this did not prejudice their opportunity to appear and participate with counsel. Because it appears K.S. and R.S. were allowed to take part in the hearing as they intended, our review of this issue would not and could not affect the trial court's decision to transition B.J.N. out of their home.

Further, Trial Rule 24(C) states that a "determination upon a motion to intervene shall be interlocutory for all purposes unless made final . . . ." Accordingly, a denial of a motion to intervene may only be appealed under Appellate Rule 14, addressing interlocutory appeals. Because intervention is not included in the list of interlocutory appeals as of right in paragraph (A) of Rule 14, it can only be a discretionary interlocutory appeal under paragraph

(B), which allows the appeal to proceed if the "trial court certifies its order and the Court of Appeals accepts jurisdiction . . . ." App. R. 14(B). A discretionary interlocutory appeal requires the appealing party to "first seek and obtain certification from the trial court . . . ." Daimler Chrysler Corp. v. Yaeger, 838 N.E.2d 449, 450 (Ind. 2005).

K.S. and R.S. have not obtained the required certification. Their appellant's case summary indicates the trial court's orders are final, appealable orders. This is incorrect, and perhaps this assumption is where they began to proceed as if trial court certification was unnecessary. It is the unfortunate reality that CHINS cases often continue for an extended period of time, as long as the child remains in need of services. Here, the trial court ordered the beginning of transition out of the home of K.S. and R.S. and into the home of prospective adoptive parents. This was not final because it was only an order for transition, not permanent placement, and no adoption has been ordered or finalized. K.S. and R.S. also currently have a pending competing petition to adopt B.J.N. K.S. and R.S. have failed to obtain the required trial court certification, and therefore their appeal of an implicit denial of their motion to intervene is barred. Cf. Hallberg v. Hendricks County Office of Family & Children, 662 N.E.2d 639, 643 (Ind. Ct. App. 1996) (concluding determination that two children were CHINS and ordering full custody to one parent was a final, appealable order).

In addition, K.S. and R.S.'s motion to correct error did not refer to their motion to intervene, and thereby also failed to establish a final decision. In sum, we cannot review whether the trial court erred as to the motion to intervene by K.S. and R.S. because it has not been preserved for appeal.

II. Change of Placement

K.S. and R.S. next argue the trial court erred by removing B.J.N. from their home and placing her with T.M. and T.B. We disagree, and conclude the trial court's change of B.J.N.'s placement was not contrary to the evidence regarding the best interest of the child. See E.R. v. Marion County Office of Family & Children, 729 N.E.2d 1052, 1059-60 (Ind. Ct. App. 2000) (affirming a change of placement of multiple CHINS, stating the decision was not contrary to the evidence and was in the best interest of the children).

We acknowledge the apparent conflicting trial court findings that B.J.N. "is progressing well" in K.S. and R.S.'s home, "[t]he present placement [in K.S. and R.S.'s home] is appropriate," and "[t]he goals of the placement have not been accomplished." Appellant's App. at 86. However, we conclude the trial court's change of placement was proper, especially considering its findings that B.J.N. has been injured and required medical care on at least three occasions while in the custody of K.S. and R.S., and T.M. and T.B. are licensed foster parents. The trial court also heard testimony and concluded that "Continuation of the child in the home of [K.S. and R.S.] is not in the child's best interests. Placement of [B.J.N.] in the home of [T.M] and [T.B.] is in the child's best interests." Id. at 87. Given the clarity – unlike the relative confusion of some factual findings – of this conclusion, we decline an invitation to reassess the credibility of witnesses, reweigh evidence, and conclude otherwise. Therefore, sufficient evidence supports the trial court's decision, and we decline to reverse it.

III. Referral to Presiding Judge

K.S. and R.S. filed a motion to correct error based on the following: Christenson v. Struss, 855 N.E.2d 1029 (Ind. Ct. App. 2006), their status as intervenors, allegedly erroneous findings by the trial court, and pleas to reweigh particular alleged facts. Although the motion to correct error filed by K.S. and R.S. challenged the trial court's order to change the placement of B.J.N., which we addressed above, on appeal they raise the issue of whether the trial court erred in not referring their motion to correct error to the presiding judge.

We are somewhat perplexed by this request because the same magistrate who entered the findings with which they were alleging error did, in fact, rule on their motion to correct error. Upon review of the record and appellate brief, the error that K.S. and R.S. attempt to raise is not clear. Viewing the context of the case as a whole and in light of their reference to Christenson, we infer K.S. and R.S. may have intended to request that a judge review the motion to correct error instead of the magistrate who presided over the hearing and entered findings and the substantive order to remove B.J.N. from their home, which they are appealing.

At the outset, we disagree with the crux of their argument that a party may select which judicial official to decide a particular motion, including a motion to correct error. We acknowledge Christenson generally requires that a trial judge, not a magistrate, must enter an order to grant or deny a motion to correct error. Id. at 1034. However, we conclude K.S. and R.S. waived any challenge to the validity of the magistrate's denial of their motion to correct

error by failing to make a timely objection to the trial court, and raising the issue for the first time on appeal.

Our supreme court has held that defects in the authority of a court officer will be waived if not raised through a timely objection. See Floyd v. State, 650 N.E.2d 28, 33 (Ind. 1994) (holding "the failure of a defendant to object at the original trial to the jurisdiction of a court officer to enter a final appealable order operates as waiver of the issue both on appeal . . . and on collateral attack . . . ."). We have held that any such challenge must be raised at the time of the action by a judicial officer without the requisite authority, or at least before the time to correct such error has expired. See Atkinson v. City of Marion, 411 N.E.2d 622, 629 (Ind. Ct. App. 1980) (holding appellant waived an issue of judicial authority by raising the issue "for the first time at a point when the Board could no longer attempt to rectify the situation"). More recently, we concluded similarly that a party waived a challenge to a magistrate's authority to enter an order as to a motion to correct error because it did not raise the issue until long after the time for ruling on the motion to correct error had expired pursuant to Trial Rule 53.3(A). City of Indianapolis v. Hicks, 932 N.E.2d 227, 231 (Ind. Ct. App. 2010).

Trial Rule 53.3(A) allows a trial court forty-five days to rule on a motion to correct error if no hearing is held. Here, the magistrate ruled on K.S. and R.S.'s motion to correct error two days after it was filed, leaving forty-three days to raise this error and seek review and signature by a judicial officer with appropriate authority. Because K.S. and R.S. did not raise this issue during that time and do so for the first time on appeal, we conclude they have

waived any challenge to the magistrate's ruling on their motion to correct error.

Conclusion

K.S. and R.S. have not preserved for appeal their challenge to an implicit denial of their motion to intervene because it was not a final order and was not certified by the trial court as a permissive interlocutory appeal. In addition, the substantive decision by the trial court to begin transition of B.J.N. out of the home of K.S. and R.S. and into the home of prospective adoptive parents is supported by the evidence. Finally, any challenge to the judicial authority of the magistrate who signed the motion to correct error has been waived by not raising it prior to the expiration of the period to correct such error. Therefore, we affirm the trial court's orders.

Affirmed.

MAY, J., and VAIDIK, J., concur.