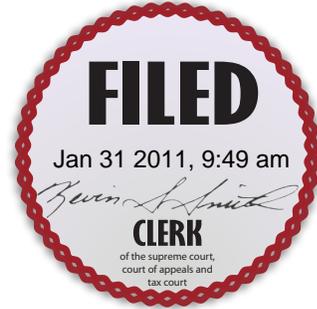


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

KIMBERLY A. JACKSON
Indianapolis, Indiana

DONNA LEWIS
DCS Marion County Office
Indianapolis, Indiana

ROBERT J. HENKE
DCS Central Administration
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF A.C. and E.C.,)
Minor Children,)
)
D.B., Alleged Father of A.C.,)
)
Appellant-Respondent,)
)
vs.)
)
INDIANA DEPARTMENT OF CHILD)
SERVICES,)
)
Appellee-Petitioner,)
)
CHILD ADVOCATES, INC.,)
)
Co-Appellee/Guardian Ad Litem.)

No. 49A05-1002-JC-154

APPEAL FROM THE MARION SUPERIOR COURT

The Honorable Marilyn A. Moores, Judge

The Honorable Julie Cartmel, Magistrate

Cause Nos. 49D09-0909-JC-42316, 49D09-0909-JC-42317

January 31, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

D.B. appeals the adjudication of A.C. as a child in need of services (CHINS). He raises multiple issues, which we consolidate and restate as:

1. Whether the trial court had personal jurisdiction over D.B.;
2. Whether the trial court violated D.B.'s due process rights;
3. Whether the trial court erred in finding A.C. to be a CHINS; and
4. Whether the trial court erred when ordering D.B. to establish paternity of E.C.

We affirm, but remand for the court to remove reference to E.C. from the order that D.B. establish paternity.

FACTS AND PROCEDURAL HISTORY

A.C. was born to B.C. (Mother) on October 19, 2007. The identity of A.C.'s father was not established at that time. After Mother died in September 2009, the Department of Child Services (DCS) alleged A.C. was a CHINS. The court placed A.C. in the temporary custody of Mother's parents.

At the time of Mother's death, D.B., whom DCS alleged to be the father of A.C., was incarcerated. DCS sent a copy of the CHINS petition, summons, parental rights form, and an incarcerated parent survey to him in prison. He returned the parental rights form and the incarcerated parent survey, and he requested the appointment of counsel to represent his interests during the CHINS hearing.

The CHINS hearing was scheduled for December 11, 2009. D.B.'s counsel requested a continuance because she had been unable to speak with D.B. The court granted the continuance and reset the hearing for January 5, 2010. Counsel still had not spoken with

D.B. by the date of the rescheduled hearing, so she requested another continuance. The court denied this continuance, held the hearing, and found A.C. to be a CHINS.

DISCUSSION AND DECISION

1. Personal Jurisdiction

D.B. contends the juvenile court did not have personal jurisdiction over him. Lack of personal jurisdiction is an affirmative defense that must be raised at the trial court level. *See* Indiana Trial Rule 8(C); *Shafer by Shafer v. Lieurance*, 659 N.E.2d 229, 231 (Ind. Ct. App. 1995) (affirmative defense of lack of personal jurisdiction is waived if not asserted in a motion filed before the responsive pleading or in the responsive pleading itself).

There is no evidence D.B. asserted below that the juvenile court lacked personal jurisdiction over him. Rather, when he received the complaint and attached paperwork, D.B. completed and returned the parental rights form and the incarcerated parent survey, indicating thereon that he preferred his brother help care for A.C., and he requested the court appoint counsel to assist him at the CHINS hearing. Thus, D.B. submitted to the jurisdiction of the trial court, and the issue is waived for appellate consideration. *See Willis v. Westerfield*, 839 N.E.2d 1179, 1185 (Ind. 2006) (affirmative defense is waived if not pleaded at trial court level).

2. Due Process

D.B. argues he was denied due process because he was not permitted to attend A.C.'s CHINS hearing. In 2006, the Executive Committee of the Marion Superior Court issued an "Order Prohibiting Transportation of Incarcerated Adults to the Marion County Juvenile

Center,” which states in relevant part, “incarcerated adults [are] prohibited from [being] transport[ed] to the Marion County Juvenile Center, effective immediately. This Order does not apply to transportation of the incarcerated adults to court facilities other than the Marion County Juvenile Center.” (App. at 129) (emphasis in original omitted). D.B. claims this order denies him due process, as he was not permitted to be physically present during the proceedings.

While a person involved in a CHINS proceeding has a right to be heard and present at the proceeding, Ind. Code § 31-34-21-4(b), an incarcerated parent has no absolute right to be physically present. *In re Involuntary Termination of Parental Rights of S.P.H.*, 806 N.E.2d 874, 878 (Ind. Ct. App. 2004). The decision whether to permit an incarcerated person to attend a CHINS hearing rests within the sound discretion of the trial court. *In re S.P.H.*, 806 N.E.2d at 878. D.B. could have been present at the hearing without being physically in the courtroom, as incarcerated individuals involved in civil proceedings are able to appear by telephone, web-camera, or counsel. *Hill v. Duckworth*, 679 N.E.2d 938, 940 n.1 (Ind. Ct. App. 1997). D.B. does not allege he requested permission to be present via alternate means,¹ and thus we conclude his due process rights were not violated by the Marion County order. *See id.* (inmate not denied right to appear in civil proceeding when he did not to take advantage of alternatives to appearing physically).

D.B. also contends his due process rights were violated because the hearing proceeded

¹ D.B. admits he did not file a request for transport, and asserts “the filing of any motion to transport would be futile.” (Br. of Appellant at 23.)

after D.B.'s counsel indicated she had not been able to contact him to prepare for the hearing.

We cannot agree, as the record indicates D.B. is responsible for the lack of communication between himself and his counsel. *See, e.g., Hape v. State*, 903 N.E.2d 977, 997 (Ind. Ct. App. 2009) (“A party may not invite error, then later argue that the error supports reversal, because error invited by the complaining party is not reversible error.”), *trans. denied*.

The first hearing was scheduled for December 11, 2009. D.B.'s counsel requested and was granted a continuance because she had been unable to confer with her client. Counsel indicated she had attempted to call D.B., had called his counselor, and had sent a letter to him, but she had not received any response.

The rescheduled hearing was held January 5, 2010. D.B.'s counsel again asked for a continuance due to her inability to contact D.B. She discussed her attempts to contact D.B. and his failure to respond to her numerous attempts at communication. D.B. has not provided any explanation for his failure to respond, and the record suggests he could have responded if he had wanted to do so, as he returned the incarcerated parent survey to DCS earlier in the CHINS proceedings. Under the doctrine of invited error, a party may not take advantage of an error that he commits, invites, or which is the natural consequence of his own neglect or misconduct. *Breining v. Harkness*, 872 N.E.2d 155, 159 (Ind. Ct. App. 2007). As the record suggests D.B. is responsible for the lack of communication with counsel, we cannot find the error in the trial court's decision to proceed with the CHINS hearing after having already granted D.B. one continuance for the same reason.

3. CHINS Determination

When a juvenile court enters findings of fact and conclusions of law in a CHINS decision, we apply a two-tiered standard of review. *Parmeter v. Cass County DCS*, 878 N.E.2d 444, 450 (Ind. Ct. App. 2007), *reh'g denied*. We first consider whether the evidence supports the findings and then whether the findings support the judgment. *Id.* We may not set aside the findings or judgment unless they are clearly erroneous. Findings are clearly erroneous when the record contains no facts to support them either directly or by inference, and a judgment is clearly erroneous if it relies on an incorrect legal standard. *Id.* We give due regard to the juvenile court's ability to assess witness credibility and do not reweigh the evidence; we instead consider the evidence most favorable to the judgment with all reasonable inferences drawn in favor of the judgment. *Id.* We defer substantially to findings of fact, but not to conclusions of law. *Id.*

A CHINS proceeding is civil in nature, and therefore the State must prove by a preponderance of the evidence that a child is a CHINS as defined by the juvenile code. *In re N.E. v. IDCS*, 919 N.E.2d 102, 105 (Ind. 2010) (citing Ind. Code § 31-34-12-3). Indiana Code ch. 31-34-1 specifies a number of different circumstances under which a child may be adjudicated a CHINS. Generally, the State must prove: (1) the child is under eighteen years old; (2) one or more particular set or sets of circumstances set forth in Ind. Code §§ 31-34-1-1 through 11 exist;² and (3) the care, treatment, or rehabilitation needed to address those

² These circumstances include: inability, refusal, or neglect of parent, guardian or custodian to supply child with necessary food, clothing, shelter, medical care, education or supervision, Ind. Code § 31-34-1-1; act or omission of parent, guardian or custodian seriously endangering child's physical or mental health, Ind. Code §

circumstances is unlikely to be provided or accepted without the coercive intervention of the court. *In re N.E.*, 919 N.E.2d at 105.

A. Determination of Paternity Prior to CHINS Adjudication

D.B. argues there is not sufficient evidence A.C. is a CHINS because “there was no evidence of D.B.’s paternity of A.C.” (Br. of Appellant at 9.) He asserts “DCS could not meet its burden of proving A.C. is a child is [sic] in need of services when it has not even identified the parent of A.C.” (*Id.*) We disagree.

A CHINS adjudication “focuses on the condition of the child.” *In re N.E.*, 919 N.E.2d at 105. The purpose of finding a child to be a CHINS is to provide proper services for the benefit of the child, not to punish the parent. *Id.* at 106. It is not apparent why delaying a CHINS adjudication until after establishment of paternity would serve the legislature’s intent to provide services to children in need, especially when a child’s only known parent has died without naming a legal guardian for the child. *See id.* at 105 (juvenile court is required only to determine whether the statutory elements for adjudication of a child as a CHINS exist, not to place blame on either parent or determine collateral matters to the child’s well-being).

B. Naming of Alleged Father in Dispositional Decree

31-34-1-2; the child is a victim of a sex offense or living in the same household as a sex offender who committed an offense against another child victim who is a member of the household, Ind. Code § 31-34-1-3; a parent, guardian, or custodian is allowing the child’s participation in an obscene performance, Ind. Code § 31-34-1-4; a parent, guardian, or custodian is allowing the child to commit a sex offense, Ind. Code § 31-34-1-5; the child is substantially endangering his own or another’s health, Ind. Code § 31-34-1-6; a parent, guardian, or custodian is failing to participate in school disciplinary proceedings, Ind. Code § 31-34-1-7; the child is missing, Ind. Code § 31-34-1-8; the child is disabled and deprived of necessary nutrition, medical, or surgical intervention, Ind. Code § 31-38-1-9; the child is born with fetal alcohol syndrome with a controlled substance or legend drug in the child’s body, Ind. Code § 31-34-1-10; and the child is injured or at risk because of the use of alcohol, controlled substance, or legend drug by child’s mother during pregnancy, Ind. Code § 31-34-1-11.

D.B. contends he should not have been named in the dispositional decree regarding A.C. because his paternity had not been established. We disagree. We have held that paternity need not be established prior to the termination of parental rights, *In Matter of A.C.B.*, 598 N.E.2d 570, 572 (Ind. Ct. App. 1992), a proceeding with much more serious implications for the rights of a parent than a CHINS adjudication. See *In re N.E.*, 919 N.E.2d at 105 (“CHINS proceedings are ‘distinct from’ involuntary termination proceedings.”); see also § 31-34-19-10(a)(3)(B) (the initial goal of a CHINS adjudication is reunification with one or both parents). Therefore, if an alleged father’s parental rights can be terminated prior to an official determination that he is the father, we see no reason why an alleged father’s child cannot be determined a CHINS given the distinctions between the proceedings.

In the instant case, A.C.’s maternal grandmother identified D.B. as A.C.’s father. The predispositional report indicates D.B. completed an “incarcerated parent questionnaire” and requested his brother assist in the care of A.C. He requested and was provided counsel for the CHINS hearing. D.B. cannot now, after the juvenile court made a ruling he has found unfavorable, claim he should not be part of these proceedings.³ See *Breining*, 872 N.E.2d at 159.

C. Sufficiency of Juvenile Court’s Findings

D.B. also argues A.C. was improperly adjudicated a CHINS because the juvenile court

³ Neither do we find merit in D.B.’s assertion there could be long-term negative consequences of a CHINS adjudication that inaccurately lists him as an alleged father. If paternity testing reveals D.B. is not the father of A.C., the trial court can enter an order dismissing D.B. from the action, and D. B. could use that order in the future to demonstrate A.C. was not his child.

did not “reveal the basis for finding A.C. to be a child in need of services.” (Br. of Appellant at 6.) He contends only general findings were made regarding A.C., and the order reveals “almost nothing about A.C., D.B., the reasons for this litigation, or the basis for the trial court’s removal of the child.” (*Id.* at 10.) We disagree.

In a CHINS proceeding, Ind. Code § 31-34-19-10 requires:

- (a) The juvenile court shall accompany the court’s dispositional decree with written findings and conclusions upon the record concerning the following:
 - (1) The needs of the child for care, treatment, rehabilitation, or placement
 - (2) The need for participation by the parent, guardian, or custodian in the plan of care for the child
 - (3) Efforts made, if the child is a child in need of services to:
 - (A) prevent the child’s removal from; or
 - (B) reunite the child with the child’s parent, guardian, or custodian in accordance with federal law.
 - (4) Family services that were offered and provided to:
 - (A) a child in need of services; or
 - (B) the child’s parent, guardian, or custodian; in accordance with federal law.
 - (5) The court’s reasons for the disposition
- (b) The juvenile court may incorporate a finding or conclusion from a predispositional report as a written finding or conclusion upon the record in the court’s dispositional decree.

In its order dated February 9, 2010, the trial court noted A.C.’s mother was deceased, A.C. was currently in “relative care,” and A.C. was unable to return home because “it is contrary to [her] health and welfare.” (App. at 120.) It incorporated the “reports and information from the Office of Family and Children, service providers and other sources,” (*id.*), into its order pursuant to Ind. Code § 31-34-19-10. The predispositional report noted D.B. was incarcerated and it recommended A.C. continue her current placement with her

maternal grandparents. In light of the facts in this case -- the mother is dead and no father has been identified -- the findings satisfy Ind. Code § 31-34-19-10.

D. Sufficiency of Evidence

The “acts or omission of one parent can cause a condition that creates the need for court intervention.” *In re N.E.*, 919 N.E.2d at 105. Therefore, the death of A.C.’s mother, the only person with legal custody of A.C., was enough to sustain a CHINS adjudication because there existed no one with legal custody to provide the child with the necessities of life. *See* Ind. Code § 31-34-1-1 (child is a CHINS when parent is unable to supply child with necessary food, clothing, shelter, medical care, education, and supervision).

4. Reference in Order to Another Child

The final order directed D.B. to establish whether he is the father of not only A.C., but also E.C., who is A.C.’s half-brother. The CHINS petition alleged D.B. was the father of A.C., but alleged another man, S.W., was the father of E.C. S.W. established his paternity of E.C. prior to the CHINS hearing. DCS agrees the order that D.B. establish paternity as to E.C. “was in error.” (Br. of Appellee at 14.) Thus, we remand to the juvenile court to change the order to require D.B. establish paternity of A.C. only.

CONCLUSION

D.B. submitted to the jurisdiction of the court and has not demonstrated the court violated his right to due process. There was sufficient evidence A.C. was a CHINS, and the findings support that determination. However, we remand to the juvenile court for correction of the order that D.B. establish his paternity of E.C.

Affirmed and remanded.

ROBB., C.J., and VAIDIK, J., concur.