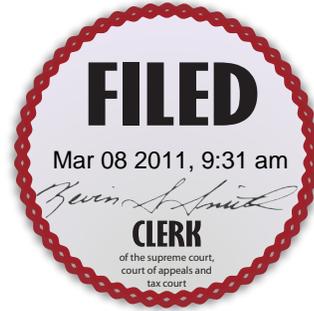


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**IN THE
COURT OF APPEALS OF INDIANA**

IN RE THE MATTER OF:)
J.C. (Minor Child In Need of Services),)
)
K.M. (Mother),)
)
J.C. (Father),)
)
Appellants-Respondents,)
)
vs.)
)
MARION COUNTY DEPARTMENT)
OF CHILD SERVICES,)
)
Appellee-Petitioner.)
)
AND)
)
CHILD ADVOCATES, INC.,)
)
Co-Appellee (Guardian Ad Litem).)

No. 49A02-1007-JC-878

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Gary Chavers, Judge Pro Tempore
The Honorable Diana Burleson, Magistrate
Cause No. 49D09-1003-JC-013206

March 8, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

K.M. (“Mother”) and J.C. (“Father”) appeal from the juvenile court’s determination that their minor child, J.C., is a child in need of services (“CHINS”). Mother and Father contend that the evidence is insufficient to support the CHINS determination. We conclude that the evidence is sufficient to support the CHINS determination. We also conclude that the juvenile court’s orders improperly reflect that J.C. was removed from the home during the underlying proceedings. We therefore affirm the CHINS determination and remand for corrections to these orders.

Facts and Procedural History

Mother and Father are the parents of J.C., born May 3, 2006. J.C. has a developmental disorder and chronic lung disease.

Mother and Father have a history with the Department of Child Services (“DCS”). In 2007, J.C. was found to be a CHINS. The participation decree in that case required the parents to complete a drug and alcohol assessment and submit to random drug testing. Petitioner’s Ex. 2. After Mother and Father completed some services, J.C. was reunified

with them, and the case was closed. In 2009, J.C. was removed from the home after another DCS investigation. The CHINS case was dismissed after a fact-finding hearing.

In February 2010, J.C. was in the intensive care unit at Riley Hospital for Children for treatment of RSV. Because Mother and Father did not have transportation to and from the hospital, housing was provided for them at the Ronald McDonald House.

In March 2010, Susan Jacobs of the Department of Child Services was assigned to investigate a report regarding J.C. Jacobs interviewed Mother and Father at the hospital about two separate incidents. In one incident, someone heard yelling and banging noises from Mother and Father's room at the Ronald McDonald House and called security. Father told Jacobs that security was called to a different room. Mother told Jacobs that security was called to their room, but they were only arguing and she was crying. In the other incident, Mother claimed that Father tripped her when she was getting off an elevator because she was going to tell security that she wanted his mother to leave the hospital. Father claimed that Mother "fell over her own two feet." Tr. p. 59. Mother also told Jacobs that Father had not physically hurt her since 2007.

Jacobs asked Mother and Father about their drug use. Father told Jacobs that he had multiple prescriptions. His drug screen came back clean. Mother said that she had a Vicodin prescription for back pain. She did not have a current prescription for Xanax, but she had taken some from an old prescription. She also said that in February, she took some pills her brother gave her. She did not know what the pills were, but she took them because she was stressed out. Mother did not mention marijuana during her first

interview with Jacobs, but after a drug screen came back positive for marijuana, she admitted she had smoked some because she was stressed out.

The DCS filed a petition alleging that J.C. is a CHINS. It stated in relevant part:

5. The child is a Child In Need of Services as defined in IC 31-34-1 in that, the child's physical or mental condition is seriously impaired or seriously endangered as a result of the inability, refusal, or neglect of a parent, guardian or custodian to supply the child with necessary food, clothing, shelter, medical care, education or supervision, and the child needs care, treatment or rehabilitation that the child is not receiving and is unlikely to be provided or accepted without the coercive intervention of the Court, as shown by the following, to wit:

A) On or about March 24, 2010, the Department of Child Services (DCS) determined, by its Family Case Manager (FCM) Susan Jacobs, the child to be a child in need of services because the child's parents, [Mother] and [Father], have failed to provide the child with a safe and appropriate living environment free from substance abuse. In February 2010, [Mother] tested positive for marijuana, benzodiazepines, and opiates. She is reportedly drug seeking and has a problem with abuse of pain medications. The child was hospitalized due to an infection, and [Mother] displayed concerning behavior which consisted of swaying and slurred speech. She also stated that she is stressed and overwhelmed and admitted to using marijuana as a result. Additionally, [Father] purposefully tripped [Mother] causing her to fall to the floor, and the couple has history with the DCS which includes a prior Child In Need of Services (CHINS) action. Due to the parents' failure to provide the child with a safe and appropriate living environment free from substance abuse, the coercive intervention of the Court is necessary to ensure the child's safety and well being.

Appellant's App. p. 33-34.

At a pretrial hearing, the DCS requested that Mother be removed from the home due to positive drug screens and lack of cooperation with home-based counseling. The juvenile court ordered Mother out of the home and authorized her to have supervised parenting time. At the fact-finding hearing, the court received testimony from the DCS investigator of the 2009 CHINS allegation, Mother, Father, Jacobs, and an intensive family preservation therapist at Adult and Child.

Chris Crowder testified that he investigated the 2009 CHINS allegation that was ultimately dismissed. Father told Crowder that Mother had called detectives because of a verbal altercation she had with Father about J.C.'s car seat. During the investigation, Mother told Crowder that she had not followed through on a protective order because she was scared of what Father would do. She also said she was getting counseling for her Vicodin addiction.

Regarding the two incidents at the hospital, Mother testified that she told Jacobs that security was called to a different room and that she "fell over [her] shoelace" at the elevator. Tr. p. 8. She testified that there had never been any domestic violence between her and Father.

Regarding her drug use, Mother testified that she takes prescription medication for her health issues. She has degenerative disc disease and a condition that requires her to get her bladder drained about twice a month. She also suffers from anxiety attacks. Two years before the fact-finding hearing, Mother had a "narcotics contract" with her doctor. The purpose of the contract was to ensure that Mother was not taking anything but her prescribed medications, which at the time were methadone and Xanax. When a drug screen showed Mother had taken Ativan, which she claimed she "accidentally" took instead of Xanax, *id.* at 11, her doctor refused to prescribe any more narcotics and instead referred her to a pain management center.

The DCS asked Mother about her prescription records at CVS and Walgreens, which showed that in the year before the fact-finding hearing, Mother had fifteen prescriptions for hydrocodone and two prescriptions for oxycodone, all prescribed by

different doctors. Mother testified that she had been going to the Methodist Hospital emergency room for her back pain and to get her bladder drained because her Medicaid coverage lapsed. She stated, “I didn’t go there to get prescriptions. They just wrote them for me.” *Id.* at 12.

Father testified that there had been no physical altercations between him and Mother since the 2007 CHINS case, when he learned how to appropriately deal with arguments between them. Father also testified that he loves Mother but that he would leave her in order to keep J.C. if he had to.

Jacobs testified about her interviews with Mother and Father, as noted above. She also said she found it “concerning” that Father felt Mother was “fine” to parent J.C. *Id.* at 67.

Tami Vance, an intensive family preservation therapist at Adult and Child, testified that she provided home-based counseling services to Mother, Father, and J.C. and had observed Mother and Father parenting J.C. about twelve to fourteen times. She testified that Mother and Father use appropriate parenting techniques, discipline properly, and are loving toward J.C. However, when Vance was asked why she would recommend services for Mother, she indicated that Mother’s parenting is inconsistent:

For [Mother], there’s been proof of positive drug screens, which is a concern, and because she’s expressed that she needs to talk to someone about some of her health concerns and hasn’t been willing to open up to me at this time, so I feel like it could be beneficial for her if she could get stable mentally and with the drug use that she would be able to parent appropriately. She wouldn’t have to be – kind of with the ups and downs, I guess you would say.

Id. at 81. Vance also testified that she felt it was unsafe for Mother to remain in the home because of her drug use and mental health issues. She had given the court her opinion to that effect just a week before the fact-finding hearing:

Q What was your opinion?

A That I felt it was unsafe for [Mother] to be in the home when she's currently under the influence of drugs and that I feel we should be able to leave [J.C.] in the home with the grandmother and [Father] until she can show that she's getting the services that she needs.

Q Do you feel that [M]other's mental health issues as you perceive them create any kind of safety concerns for [J.C.]?

A Yes.

Q Why?

A Because I feel that she's very volatile at this point. She's very guarded, very upset.

Q Do you believe that your services are still necessary for this family?

A Yes.

Id. at 87.

After the DCS concluded its case, Father moved for involuntary dismissal under Indiana Trial Rule 41(B), which the juvenile court denied. At the end of the hearing, the juvenile court found J.C. to be a CHINS. The court explained that its primary reason was Mother's drug use:

A lot of things that I've heard . . . are very encouraging about the family and what's going on, but after hearing the evidence, I'm going to find that DCS has met their burden of proof and I am going to find [J.C.] to be a child in need of services. I want to clarify, though, a few things. As far as [Mother] goes, and most of this is about [Mother]. I mean, we can all admit that the testimony about [Father], there wasn't that much that was concerning.

* * * * *

I think at a certain point, you've got a huge decision to make about your drug use, about the management of your pain and management of your pain medication, and that's what we're here to work on. Also, the contract from the doctor that you were not to use any other prescriptions, that's what's leading me to that. That prior statement is that you broke that and that specific doctor was not going to prescribe you any more medications, so

you moved on. Also, there was a statement . . . that you said that you were scared of [Father]. Again, that was awhile back and if I were taking any – just one of these comments or one of these pieces of evidence by themselves, it may not add up to a CHINS, but I just want you to understand that I have to take it all into consideration. Also, neither one of you could remember that drug services were recommended in the last case – I think a drug assessment and random screens – and that’s concerning given the allegations in this case, [Mother], about your drug use.

Id. at 138, 140. The juvenile court’s order on the fact-finding hearing stated:

Based on the history of drug use; the prior CHINS cases; issues and concerns of domestic violence; and [Father]’s willingness to try and make his relationship with [Mother] work out, knowing that [Mother] has issues with drug abuse, the Court now finds that [J.C.] is a child in need of services that he is not receiving and is unlikely to be provided or accepted without the coercive intervention of the court.

Appellant’s App. p. 68-69.

Mother and Father now appeal.

Discussion and Decision

Mother and Father contend that the evidence is insufficient to support the juvenile court’s determination that J.C. is a CHINS. Father also contends that the juvenile court’s orders improperly reflect that J.C. was removed from the home during the underlying proceedings.

I. Sufficiency of the Evidence to Support the CHINS Determination

Mother and Father contend that the evidence is insufficient to support the juvenile court’s determination that J.C. is a CHINS.

The DCS has the burden of proving by a preponderance of the evidence that a child is in need of services. *In re T.S.*, 881 N.E.2d 1110, 1112 (Ind. Ct. App. 2008). Upon review of a juvenile court’s CHINS determination, we consider only the evidence

most favorable to the judgment and the reasonable inferences therefrom. *Id.* We neither reweigh the evidence nor reassess the credibility of the witnesses. *Id.* Here, the juvenile court made findings of fact and conclusions of law in adjudicating J.C. a CHINS. Where a juvenile court enters specific findings and conclusions thereon, we apply a two-tiered standard of review. *Bester v. Lake Cnty. Office of Family & Children*, 839 N.E.2d 143, 147 (Ind. 2005). First, we determine whether the evidence supports the findings, and second, we determine whether the findings support the judgment. *Id.* We will set aside the juvenile court's judgment only if it is clearly erroneous. *Id.*

The DCS alleged that J.C. is a CHINS pursuant to Indiana Code section 31-34-1-1, which provides:

A child is a child in need of services if before the child becomes eighteen (18) years of age:

- (1) the child's physical or mental condition is seriously impaired or seriously endangered as a result of the inability, refusal, or neglect of the child's parent, guardian, or custodian to supply the child with necessary food, clothing, shelter, medical care, education, or supervision; and
- (2) the child needs care, treatment, or rehabilitation that:
 - (A) the child is not receiving; and
 - (B) is unlikely to be provided or accepted without the coercive intervention of the court.

The CHINS statutes, however, do not require that a court wait until a tragedy occurs to intervene. *Roark v. Roark*, 551 N.E.2d 865, 872 (Ind. Ct. App. 1990). Rather, a child is a CHINS when he or she is endangered by parental action or inaction. *Id.* The purpose of a CHINS adjudication is not to punish the parents, but to protect children. *In re N.E.*, 919 N.E.2d 102, 106 (Ind. 2010).

On appeal, Mother and Father argue that the DCS failed to meet its burden of proving that: (1) J.C.'s physical or mental condition is seriously impaired or seriously endangered as a result of the inability, refusal, or neglect of Mother or Father to supply J.C. with necessary food, clothing shelter, medical care, education, or supervision and (2) J.C. needs care, treatment, or rehabilitation that he is not receiving and is unlikely to be provided or accepted without the coercive intervention of the court.

The juvenile court pointed out that its primary reason for determining that J.C. was a CHINS was Mother's drug use. Mother and Father focus on the fact that no evidence was presented to show that Mother ever abused drugs in J.C.'s presence. Both rely on *Perrine v. Marion County Office of Child Services*, 866 N.E.2d 269 (Ind. Ct. App. 2007). In *Perrine*, a mother was arrested after a routine probation sweep revealed paraphernalia commonly used for methamphetamine consumption in a houseguest's bag. *Id.* at 271. The mother admitted that she had used methamphetamine a few days before her arrest. *Id.* at 272. The DCS filed a petition alleging that the mother's daughter was a CHINS based on her failure to provide her daughter with a home free from drug use and neglect. *Id.* The juvenile court determined that the daughter was a CHINS. *Id.* at 273. This Court reversed that determination on appeal, holding that "a single admitted use of methamphetamine, outside the presence of the child and without more, is insufficient to support a CHINS determination." *Id.* at 277.

In arriving at that conclusion, we examined our Supreme Court's opinion in *White v. State*, 547 N.E.2d 831 (Ind. 1989). In *White*, our Supreme Court found sufficient evidence to sustain a defendant's convictions for neglect of a dependent where he

repeatedly exposed his minor child to illegal drug use. *Id.* at 836. The Court stated that “the knowing exposure of a dependent to an environment of illegal drug use poses an actual and appreciable danger to that dependent and thereby constitutes neglect regarding the endangerment requirement of the offense.” *Id.*

Here, the evidence most favorable to the juvenile’s court’s judgment shows that Mother has a serious problem with drug abuse. When she violated her doctor’s “narcotics contract” by taking a drug that was not prescribed to her, her doctor refused to prescribe any more narcotics and instead referred her to a pain management center. Within one year, she obtained fifteen prescriptions for hydrocodone and two prescriptions from oxycodone, all prescribed by different doctors. Because she was “stressed out,” she smoked marijuana and took pills when she did not even know what they contained. This evidence is sufficient to raise a reasonable inference that Mother exposed J.C. to her rampant abuse of drugs and thereby seriously impaired or endangered J.C.’s physical or mental condition by neglecting to provide J.C. with necessary supervision.

Further, Jacobs testified that she was troubled by Father’s opinion that Mother was “fine” to parent J.C. And Vance opined that it was “unsafe” for Mother to be in the home but that if Mother controlled her drug use, she “would be able to parent appropriately.” This evidence is sufficient to establish that J.C. needs care that he is not receiving and is unlikely to be provided or accepted without the coercive intervention of the court.

Nonetheless, Mother argues that she took prescription medication only to the extent necessary to treat her medical conditions and Father highlights Vance’s testimony

that Mother and Father use appropriate parenting techniques, discipline properly, and are loving toward J.C. These are impermissible requests to reweigh the evidence.

Father also argues that there were changed circumstances at the time of the fact-finding hearing because Mother was out of the home and Father would not allow her back in the home while she continued to abuse drugs. The fact that Father testified as to what he would do if Mother continued to abuse drugs is mere speculation. Father's argument also fails to bear in mind that Mother did not leave the home until she was ordered to do so by the juvenile court. Moreover, although the evidence may show that Father appropriately parented J.C., the conduct of Mother is enough for J.C. to be adjudicated a CHINS. *See N.E.*, 919 N.E.2d at 106.

Mother also argues that, under the doctrine of res judicata, the juvenile court improperly considered the 2009 CHINS case that was ultimately dismissed after the fact-finding hearing. We need not address the merits of this contention, however, for we conclude that the evidence is sufficient to sustain the CHINS determination even without considering the 2009 allegations.

Finally, we acknowledge, as did the trial court, that the alleged domestic violence issues alone may not have been enough to sustain the CHINS determination. Here, however, Mother's drug abuse by itself is sufficient to sustain the juvenile's court's determination that J.C. is a CHINS.

II. Juvenile Court's Orders

Father also contends that the juvenile court's orders improperly reflect that J.C. was removed from the home during the underlying proceedings.

It is undisputed that J.C. remained in the home during the pendency of the underlying proceedings. The juvenile court's orders, however, show that the court erroneously indicated that removal of J.C. was necessary. For example, the court indicated in the initial hearing order that "it is in the best interest of the child to be removed from the home environment and remaining in the home would be contrary to the health and welfare of the child," Appellant's App. p. 52-53, even though it also stated that it was in J.C.'s best interest for him to be placed in the home upon release from the hospital, *id.* at 53, 54. The court also indicated in its dispositional order, "The Court finds that it is contrary to the health and welfare of the children [sic] to be returned home" *Id.* at 29. Our review of the juvenile court's initial, pre-trial, fact-finding, and dispositional hearing orders show that they are riddled with language indicating that J.C. was removed from the home. We therefore remand for correction of these and any other orders.

Affirmed and remanded for corrections to orders consistent with this opinion.

BAKER, J., and BARNES, J., concur.