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**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF T. F.,)
)
Appellant-Respondent,)
)
vs.)
)
INDIANA DEPARTMENT OF CHILD)
SERVICES,)
)
Appellee-Petitioner.)

No. 82A01-0810-JV-496

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Brett J. Niemeier, Judge
Cause No. 82D01-0601-JC-00018

April 28, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-respondent, the mother of T.F. (Mother), appeals the juvenile court's determination that T.F. was a Child in Need of Services (CHINS). Specifically, Mother argues that the juvenile court erred in permitting the appellee-petitioner, Indiana Department of Child Services (DCS), to amend the CHINS petition to conform to the evidence that was presented at the final hearing. Mother also claims that the evidence was insufficient to support the determination that T.F. is a CHINS. Finding no error, we affirm the judgment of the juvenile court.

FACTS

On January 27, 2006, DCS filed CHINS petitions as to all four of Mother's minor children, including her daughter, T.F., who was born on June 4, 2004. The DCS filed the petitions two days after Dr. Michael Kelley—an emergency room physician at Deaconess Hospital in Vanderburgh County—had examined T.F. A teacher at Head Start contacted DCS after observing bruises on T.F.'s forehead and face and noticing that her arm was swollen from the shoulder down to the fingers. The petition as to T.F. alleged the following:

Count I: said child has a previous fracture to her left clavicle and proximal humerus that was never treated; Count II: said child had injuries that were reported to be inconsistent with the explanation of the injury according to Deaconess Emergency Room, therefore placing said child in an environment dangerous to said child's health, safety, and well-being; said child needs care, treatment or rehabilitation that the child is not receiving or that is unlikely to be provided or accepted without the coercive intervention of the court.

Appellee's App. p. 9.

On May 2, 2006, the parties met at Dr. David Schultz's office to take his non-stenographic deposition. Dr. Schultz occasionally treated the children when their grandparents brought them to his office. At that deposition, Dr. Schultz testified that he had not seen T.F. on January 18, 2006, but that his nurse practitioner, Amy Reising, had examined her. After learning that Reising was available for questioning, Mother's counsel had a subpoena prepared and faxed to Dr. Schultz's office. Thereafter, counsel for both parties agreed to take Reising's non-stenographic deposition. The DCS asserted that "the testimony of the unlisted witness Amy Reising 'surprised' the counsel for the [DCS]," which necessitated the amending of the CHINS petition. Appellee's App. p. 89. As a result, DCS filed an amended CHINS petition with regard to T.F. on May 4, 2006, which alleged that

Count I: said child has a previous fracture to her left clavicle and proximal humerus that was never treated; Count II: said child had injuries that were reported to be inconsistent with the explanation of the injury according to . . . [the hospital] Emergency Room, therefore placing said child in an environment dangerous to said child's health, safety, and well-being; Count III: said child had significant bruising; said child needs care, treatment or rehabilitation that the child is not receiving or that is unlikely to be provided or accepted without the coercive intervention of the court.

Appellant's App. p. 47 (emphasis added). In its brief in support of the amendment, DCS asserted that "the Amended Pleading conforms to the evidence that will be presented at trial." Appellee's App. p. 90.

Hearings on the petition were conducted on May 9, 2006, May 23, 2006, June 7, 2006, and June 15, 2006. DCS presented the testimony of two radiologists—Dr. Wendy Hanafee and Dr. Daniel Whitehead. Dr. Hanafee established a timeline for the injury to

T.F.'s arm through the examination of x-rays. Dr. Whitehead testified that the primary injury was to T.F.'s proximal humerus bone. He also discussed the general nature and frequency of that type of injury, and testified that the particular injury could have gone unnoticed as it does not appear on an x-ray until healing begins, which is anywhere from five days to two weeks after the injury.

Dana Crowe, the supervisor and lead teacher at the Community Action Program in Evansville, testified that she saw significant bruises on T.F. beginning on August 1, 2005. Crowe documented the bruising or injuries on a monthly basis until January 24, 2006. As noted above, Dr. Michael Kelley examined T.F. on January 25, 2006. Although Mother stated that T.F.'s six-year-old sister inflicted the injuries, Dr. Kelley did not believe that a young child could have caused the bruising and trauma to the elbow.

Dr. Schultz testified in a deposition that was conducted on May 2, 2006, that T.F. saw the nurse practitioner on January 18, 2006, and that he had personally examined T.F. on July 18, 2005, for stomach problems and a respiratory infection. Dr. Schultz stated in his deposition that the only other time that he had seen T.F. was on April 25, 2005. The purpose of that visit was for a "well child" checkup. Tr. p. 258. However, Dr. Schultz later testified in court that he had, in fact, examined T.F. on January 18, 2006, because he "ran into the room after the visit." Tr. p. 368. Dr. Schultz also testified concerning T.F.'s injuries as he examined a number of photographs. A witness from the Community Action Program of Evansville testified that Mother had asked him for suggestions and advice in "dealing with the girls." Tr. p. 119-27. Although Mother followed some of the advice that was given, she did not contact other resources that had been suggested.

At the conclusion of the DCS's presentation of the evidence, Mother moved for a judgment on the evidence as to count I, which alleged that Mother never sought treatment for T.F.'s injuries. The trial court granted the motion, dismissed that count, and the trial resumed.

Mother presented the testimony of Dr. Karen Neely, who testified that she had been the children's family physician for nearly four years. Dr. Neely testified that she had "not suspected" Mother of abusing or neglecting any of the children. Additionally, Dr. Schultz testified about the indicators of child abuse, and determined that "bruising alone" cannot be sufficient to make such a determination. *Id.* at 376. In essence, the radiologists and an emergency room physician testified that T.F.'s injuries were consistent with physical abuse, but T.F.'s family doctor stated that she did not suspect child abuse.

Following the presentation of the evidence, the juvenile court took the matter under advisement and subsequently found T.F. to be a CHINS, but not her siblings. Mother appealed that determination, claiming that she was entitled to a reversal because "no specific findings of fact or conclusions of law were given by the court in its ruling." Appellant's Br. p. 6. We reversed and remanded the case with instructions that the juvenile court issue findings of fact and conclusions of law. In the Matter of T.F., v. Vanderburgh County Dep't of Child Servs., No. 82A04-0612-JV-729 (Ind. Ct. App. July 18, 2007). More specifically, we observed that

Because there was conflicting testimony from medical professionals as to whether T.F.'s bruising and clavicle injury demonstrated that she was physically abused either by a parent or her sibling, it [is] difficult for our

court to determine whether or not a mistake has been made in adjudicating T.F. as a CHINS.

Id., slip op. at 4.

Following remand, the juvenile court issued forty-three findings of fact and conclusions of law. The findings provide in part that

8. Dr. Hanafee compared an X-ray taken of [T.F.] on February 20, 2006 to X-rays taken on January 18 and 25th, 2006, and found that it showed development of periosteal calcification and periosteal reaction along the distal left clavicular margin signifying calcification from the healing of subperiosteal hematomas, periosteal stripping, and fractures. Dr. Hanafee observed progressive calcification from January 25, 2006 concerning the same injury.

9. The body's response to a bone injury is to develop calcification along the fracture margins and injured periosteum, which on young children is the outside covering of the bone as it further heals.

11. A torsional kind of injury will rip a bit of the periosteum, which will bleed underneath, and then calcify.

12. In the type of injury suffered by [T.F.], the fracture will not be seen until it starts to heal.

13. [T.F.'s] injury is indicative of a tortional kind of injury.

22. On January 10, 2006, Stephanie Brewster[, a family case manager at Community Action Program of Evansville,] told [Mother] when she met at the Enterprise zone that the Headstart teachers were concerned about the constant bruising on [T.F.] She told her that if this continues or worsens, they would call [Child Protective Services].

23. In this January 10th conversation, [Mother] advised Stephanie Brewster that the children were still fighting. Subsequent to the phone conversation, [T.F.] missed school. Previously, she had missed up to a month. During this absence period, she missed a week. [T.F.] was absent from Headstart approximately January 13, 2006 through January 24, 2006.

26. On January 24, 2006, Stephanie Brewster was called by the lead teacher. Stephanie Brewster observed that [T.F.] had a large bruise under

her chin, and her left arm was swollen from the shoulder down to her fingers. There was a knot on her forehead and a bruise on the side of her face. The teacher called Child Protective Services.

...

29. Dana Crowe testified to some of the bruising that she had observed. On or about July 20, 2005, [T.F.] had bruises above her right eye and on the right side of her back. [Mother] told Dana that she had fallen between the couch and the table. On or about August 1, 2005, she had two small circle bruises on her right cheek and one on the left side of her neck that was reddish purple, oval, and one and [one] half inches long with scratches surrounding it. On or about August 22, 23, or 24, 2005, there were small bruises on her right cheek. On or about September 12, 2005, there was a small bite around her right eye. On or about October 10, 2005 on her cheek, ear, and neck [sic]. On or about October 13, 2005, she had a busted lip. On or about December 14, 2005, she had a bruise on the left side of her forehead, which her mother stated was from the girls running around in a circle in the house when she slipped and fell into a doorway. On or about January 2, 2005, she [had] a bruise on the left side of her jaw bone. On or about January 6, 2006, she had a bruise on her forehead, jaw bone, and right above that on her cheek, which her mother stated was from going down the stairs too fast with her sisters. On or about January 9, 2006, she had a bright red bruise and a horizontal line underneath her left eye. On or about January 24, 2006, she had bruising on her lower back, a small round bruise on her right side upper chest, two . . . round bruises on the left side between her shoulder and her neck. She had three . . . round bruises like an arch shape, a round bluish bruise on the left side of her eye, above her right eye, there was a large round bruise, on her right cheek, a small round bruise above her nose, on her forehead was a bruise, on her neck, there was a bruise, on her neck, there was a bruise circling her neck with scratches on each side, and on her left arm there were some small round bruises and it was very swollen.

...

32. At the supervised visits conducted by the service provider since [T.F.] and her siblings were removed, the children did not show any aggression towards each other. There were no fights. The children played well together. Initially, [T.F.] did not want to be held by her custodian, [T.C.], and would cry. She also cried if he talked with her. The visits began on January 27, 2006. By February 14, 2006, she began to interact with him. [T.F.] did not have this period of negative reaction with her mother.

33. The investigator of the [DCS], who took the photographs on January 24, 2006, which were admitted exhibits in this case, testified to seeing two small round bruises on [T.F.'s] back, a small bruise on the left should[er]

blade, two small round bruises on the upper right chest, bruise[s] on the left side of the eye, bruises on each side of the neck, and a swollen arm.

34. The mother told the investigator on February 6, 2006, that she had been at work. She did not see [T.F.'s] bruising or broken arm until the next morning, because [T.F.] was already asleep. As to the bruises around the eye, [T.F.] had hit the coffee table a few days previously. Custodian [T.C.] told the investigator that [T.] had hit [T.F.] with a Dora doll.

35. The emergency room physician observed that [T.F.] was exceptionally clingy to the foster mother. He ran several tests to determine the extent of any injuries. He did not believe that the injuries were consistent to those which would be caused by a doll. The emergency room physician would have reported the injuries to CPS if it had not already been done, because of the fracture and bruising of various ages.

36. On January 18, 2006, [Mother] took T.F. to see Dr. Schultz. [T.F.] saw the nurse practitioner, but she was not seen by Dr. Schultz. There was no bruising. [T.F.'s] arm had edema and swelling with tenderness in the left shoulder. [T.F.] was crying.

37. On January 15, 2006, a relative caretaker noticed bruising while babysitting and was told that it was from [T.] hitting [T.F.] with a Dora doll. She had actually seen the bruising the day before. She thought it had faded by January 16th or 17th. [T.F.] favored her arm that day.

...

42. The bruising on [T.F.] is excessive from what ordinary children receive and is due to an act or omission on the part of the parent or custodian.

43. The clavicle injury was not from the Dora doll and instead from an adult excessively twisting the child's arm.

CONCLUSIONS OF LAW

5. The Court now finds by a preponderance of the evidence that the allegations of the petition in Counts 2 AND 3 are true and . . . [T.F.] is a [CHINS]. The Court further finds:

- a. That [DCS] could not provide reasonable efforts prior to the removal of the child because of the immediacy of the situation.

- b. That pursuant to I.C. 31-34-1-2, the physical or mental health of [T.F.] was seriously endangered due to the act or admission of her parent or custodian.
- c. That the child has needs, care, and treatment, or rehabilitation that the child is not receiving and is unlikely to be provided or accepted without the coercive intervention of the court.

6. Whether a reasonable probability exists that the conditions justifying removal will not be remedied depends not only on the parent's ability to meet the needs of the child at the time of the termination hearing, but also on the parent's habitual patterns of conduct showing the probability of future detrimental behavior.

...

8. A Court may declare a child a [CHINS] if the parent fails to take action to stop abusive treatment of the child by another.

Appellant's App. p. 37-38. Mother now appeals.

DISCUSSION AND DECISION

I. Amended CHINS Petition

Mother argues that the trial court erred in permitting DCS to amend the CHINS petition. More specifically, Mother argues that the amendment resulted in prejudice to the "entire family, . . . and they suffered irreparable harm by the [DCS's] undue delay."

Appellant's Br. p. 6.

In resolving this issue, we initially observe that permission to amend pleadings is within the trial court's discretion. Huff v. Traveler's Indem. Co., 363 N.E.2d 985, 989 (Ind. 1977). And we review the trial court's decision to allow an amended pleading under the abuse of discretion standard. Id. Pursuant to Indiana Trial Rule 15(B):

(B) When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had

been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment, but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Mother asserts that DCS should not have been permitted to amend the petition because the addition of Count III is unclear as to what is actually being alleged. Although the petition asserts that T.F. “has significant bruising,” Mother maintains that this count fails to allege a source of those injuries. Appellant’s App. p. 9. Moreover, Mother points out that the allegation does not state when, how, or where the bruising occurred. As a result, Mother argues that she was unable to “adequately prepare a defense or subpoena witnesses without knowing exactly what is being alleged.” Appellant’s Br. p. 9.

Additionally, Mother asserts that DCS failed to adequately and diligently investigate the matter, and it is being rewarded for its undue delay in pursuing the matter. Mother points out that by the time the DCS filed the amendment, the children had been removed from their home for nearly four months. As a result, Mother maintains that “justice would have required a denial of the amendment.” Appellant’s Br. p. 11.

Notwithstanding these assertions, although Mother claimed that the DCS’s actions were inappropriate because it had failed to comply with the discovery order, the record

demonstrates that she offered photographs at the hearing on May 23, 2006, showing various bruises on T.F.'s body that counsel for DCS had never seen. Tr. p. 302. Mother then sought to blame DCS for having amended its petition to comply with the evidence. In our view, had DCS's amendment of the petition prejudiced her, she should have objected rather than introducing the exhibits showing T.F.'s bruising. As a result, Mother cannot now successfully complain, because her exhibits and defense served as the basis for the amendment by DCS.

Finally, we note that Mother did not object to the CHINS petition on the grounds that she was not afforded adequate notice of the allegations or was precluded from preparing an adequate defense. Thus, the issue is waived. See Linton v. Davis, 887 N.E.2d 960, 968 (Ind. Ct. App. 2008) (holding that the failure to make a timely objection waives the error for review).

II. Sufficiency of the Evidence

Mother argues that the CHINS determination must be set aside because the evidence was insufficient to support that determination. In essence, Mother contends that the evidence demonstrated that it was one of T.F.'s siblings, rather than Mother, who caused the injuries.

Although we have recognized that the right to raise one's children without undue interference from the State is protected by the Fourteenth Amendment to the United States Constitution, a parent's constitutionally protected right to raise his or her child is not without limitation. E.P. v. Marion County Office of Family & Children, 653 N.E.2d 1026, 1031-32 (Ind. Ct. App. 1995). Specifically, "[t]he state has a compelling interest in

protecting the welfare of the child by intervening in the parent-child relationship when parental neglect, abuse, or abandonment are at issue.” Id. at 1032.

A child is a [CHINS] if before the child becomes eighteen (18) years of age:

- (1) the child’s physical or mental health is seriously endangered due to injury by the act or omission of the child’s parent, guardian, or custodian; 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.

Ind. Code § 31-34-1-2. DCS has the burden of proving by a preponderance of evidence that a child is a CHINS. I.C. § 31-34-12-3.

In reviewing a trial court’s judgment, we will not reweigh the evidence or judge the credibility of the witnesses. Rather, we will consider the evidence and reasonable inferences that are most favorable to the judgment. In re D.D., 804 N.E.2d 258, 265 (Ind. Ct. App. 2004). Furthermore, it is the function of the trier of fact to resolve conflicts in testimony. Jones v. State, 701 N.E.2d 863, 867 (Ind. Ct. App. 1998). Moreover, any inconsistencies in a witness’s testimony are generally for the fact-finder to evaluate. Beckham v. State, 531 N.E.2d 475, 476 (Ind. 1988).

We also note that when considering the evidence supporting a CHINS determination when the juvenile court made findings of fact and conclusions of law, we apply a two-tiered standard of review and may not set aside the findings of judgment unless they are clearly erroneous. Parmeter v. Cass County Dep’t. of Child Servs., 878 N.E.2d 444, 450 (Ind. Ct. App. 2007). We first consider whether the evidence supports

the factual findings and then whether the findings support the judgment. Id. 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, instead considering the evidence most favorable to the judgment with all reasonable inferences drawn in favor of the judgment. Id. While we defer substantially to findings of fact, we do not do so to conclusions of law. Id.

In this case, Mother directs us to the testimony of the various physicians who treated T.F., and were unable to agree as to the cause or seriousness of the injuries. Tr. p. 98, 104, 224-26, 257. Based on this seemingly conflicting testimony, Mother claims that the evidence did not support the conclusion that T.F. needed the care and treatment that she is not receiving and is unlikely to be provided without coercive intervention of the courts.

Notwithstanding Mother's arguments, the evidence most favorable to the judgment established that T.F. suffered bruising and a broken left clavicle that was twisted at the shoulder joint. Tr. p. 99. The injuries were painful, and Dr. Kelley—the hospital emergency room physician—testified that T.F.'s injuries were not the type that are typically caused by another child. Id. at 221. At the hearing, the following exchange occurred between DCS's counsel and Dr. Kelley:

Q. Were [T.F.'s] injuries significant enough to you would have reported them to CPS?

A. Yes, correct.

Q. And why would you . . . what was the significance of these injuries? Why would you have done that?

A. It wasn't isolated. You know, the fact that I have bruising about the body, the fact that I have, uh, evidence of old fractures, the fact that I have evidence of a new injury with a swelling around the left elbow. Um, that . . . is not consistent with the . . . routine rough and tumble things that little [children] are gonna do, especially at . . . one year of age.

. . .

A. I would find it hard to relate a six or seven year old with a doll causing a fracture like the old fracture that we saw. But I think to me, the more disturbing question is, we're not dealing with just an isolated injury. When I see bruising and then the trauma to the elbow, I mean, . . . this is evidence to me of ongoing trauma.

Id. at 221-23.

Notwithstanding the evidence cited above and assuming solely for the sake of argument that the injuries were inflicted by one of T.F.'s siblings—which was Mother's defense at trial—the harm occurred when the child was under her supervision. Thus, Mother did not act to ensure T.F.'s safety. Moreover, even though Mother may have requested assistance from various government agencies, the evidence established that she did not follow up with referrals or seek any treatment to resolve the alleged issues with her children. Id. at 117-18.

Although the evidence supports the notion that there was a reasonable explanation for some of T.F.'s injuries, there was no reasonable explanation for the frequency or severity of the injuries. Moreover, even if there was sibling rivalry among the children, no witness had observed that the fighting was excessive to the point of serious injury. Id. at 154, 174, 328-29. In essence, the fact that Mother's defense was that one of T.F.'s smaller siblings inflicted the harm on T.F. and that such behavior was allegedly out of

Mother's control, supports the determination that Mother needs help and will not accept it without court intervention. As a result, Mother's challenges to the sufficiency of the evidence fail, and we conclude that the evidence was sufficient to support the CHINS determination.

The judgment of the juvenile court is affirmed.

MAY, J., and BARNES, J., concur.