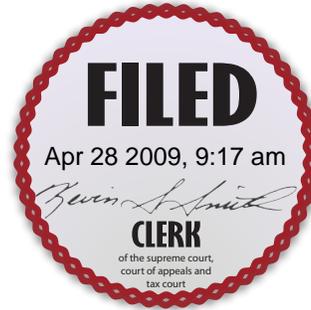


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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IN THE MATTER OF D.W., et al, )  
 )  
A.W. )  
 )  
Appellant, )  
 )  
vs. )  
 )  
MARION COUNTY DEPARTMENT OF CHILD )  
SERVICES and CHILD ADVOCATES, INC. )  
 )  
Appellees. )

No. 49A02-0808-JV-764

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Marilyn Moores, Judge  
The Honorable Beth Jansen, Magistrate  
Cause No. 49D09-0710-JC-43279  
49D09-0710-JC-43280  
49D09-0710-JC-43281  
49D09-0710-JC-43282

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**April 28, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**FRIEDLANDER, Judge**

A.W. (Mother) appeals the trial court's order finding her children to be Children in Need of Services (CHINS). Mother presents two issues for our review, one of which we find to be dispositive: Is the evidence presented by the Marion County Department of Child Services (MCDCS) sufficient to support the juvenile court's CHINS determination?

We reverse.

Mother has four children: D.W., born May 10, 1992; Da.W., born May 23, 1995; De.W., born April 2, 2001; and C.W., born February 26, 2007. Mother has been involved with the MCDCS on three previous occasions. In May 2003, Mother and the MCDCS entered into an informal adjustment agreement and the CHINS action was closed after Mother successfully completed services. A second CHINS petition was filed on December 7, 2004. The DCS moved to dismiss this CHINS petition on March 3, 2005, which the trial court granted, because Mother agreed to participate in services through a service referral agreement. A third CHINS petition was filed on October 12, 2006 when Mother was arrested, leaving no one with legal responsibility to care for her children. This third petition was dismissed upon Mother's report to the court that she had alternative arrangements for the children to live with their maternal grandfather in the event she was incarcerated again. The instant CHINS petition, alleging that all four of Mother's children were CHINS, was filed on October 11, 2007. The court heard evidence on the CHINS petition beginning on February 7, 2008 and continuing on March 13, 2008, May 15, 2008, and June 10, 2008. The relevant facts follow.

In September 2007, Lucita Exom-Pope, an investigative family casemanager (FCM) with the MCDCS, became involved with Mother and her children. At that time, Mother and

her children were living at the Julian Center when another adult female resident was alleged to have made a sexual pass at D.W. Mother reported the incident to employees of the Julian Center and a report was made to the MCDCS. As part of her investigation into the incident, FCM Exom-Pope required Mother to bring all four children to the MCDCS office. After meeting with Mother and the children, FCM Exom-Pope did not have any concerns about Mother or about the children being endangered in her care. FCM Exom-Pope found Mother to be a concerned and involved parent. FCM Exom-Pope thus closed the investigation.

Shortly thereafter, on October 9, 2007, D.W. was picked up at school by police for fighting. Because the police could not locate Mother, who was at a job-training program, D.W. was placed at the Guardian's Home. A report sent to the MCDCS set forth these facts and further indicated that Mother had an open warrant. FCM Exom-Pope contacted Mother the following morning and informed her of D.W.'s whereabouts<sup>1</sup> and told her that, after she provided certified documentation that she did not have an outstanding warrant, she could pick up D.W. from the Guardian's Home. Mother expressed her awareness of the warrant, but claimed the matter had been resolved.<sup>2</sup> FCM Exom-Pope placed Mother on hold to confirm with a supervisor that she was providing Mother with accurate information, but when she returned to the phone, Mother had hung up. FCM Exom-Pope repeatedly tried to re-establish telephone contact with Mother by calling the Julian Center, but to no avail.

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<sup>1</sup> Mother learned of D.W.'s placement in the Guardian's Home the night before when, after making numerous phone calls trying to locate D.W., she contacted the police to report him missing.

<sup>2</sup> The warrant was issued as a result of a notice of probation violation filed against Mother on September 28, 2007. Mother was on probation for a 2006 trespassing conviction. The basis of the alleged probation violation was that Mother failed to contact her intake officer to register for probation.

Mother had left the Julian Center to attend a computer class that was part of her job-training program. Eventually FCM Exom-Pope left a message for Mother at 3:00 p.m. informing Mother that if she did not hear from her by 4:30 p.m. that Mother would have to go to court the following day.

That afternoon, FCM Exom-Pope learned from staff at the Julian Center that two of Mother's children had been released early from school and had been in the Julian Center lobby for more than an hour.<sup>3</sup> Because Mother was not present at the Center, the staff did not know what to do with the children. Before Exom-Pope could arrange for the children to be picked up and taken to the Guardian's Home, someone picked up the children.<sup>4</sup> Mother, by her own choice, never returned to the Julian Center as a resident. Mother did not leave a forwarding address. Eventually, the Julian Center staff removed Mother's belongings from the shelter.

Based on her investigation, FCM Exom-Pope had concerns about the safety of all four of Mother's children due to Mother's prior involvement with the MCDCS, Mother's prior and current criminal issues, Mother's failure to contact the MCDCS regarding D.W., Mother's failure to provide documentation that the warrant for her arrest had been resolved as Mother claimed, and the fact that Mother left the Julian Center without contacting anyone or leaving forwarding information so that the welfare of the three children still in her custody

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<sup>3</sup> The children had a waiver day at school by which they were released early.

<sup>4</sup> Mother had made arrangements for a friend of hers to pick up the children and bring them to the location where she was taking job-training classes.

could be determined. FCM Exom-Pope's concerns were the basis for the instant CHINS petition.

An initial hearing on the CHINS petition was held on October 11, 2007. Mother did not attend the October 11 hearing. After the hearing, FCM Exom-Pope tried to locate Mother by contacting area shelters, speaking with D.W., and checking with schools to determine whether Mother's school-aged children had been enrolled, but her efforts proved unsuccessful. Despite leaving messages at numerous places asking Mother to call, Mother never contacted FCM Exom-Pope.

Additional hearings in this matter were held on October 17, 2007 and October 31, 2007. The MCDCS mailed a summons and rights form for the October 17 hearing to Mother's last known address at the Julian Center, but the documents were returned to sender as undeliverable. Mother did not appear at the October 17 hearing. Shortly after the October 17 hearing, Mother's case was reassigned to FCM Jamie Walker. FCM Walker continued efforts to locate Mother by contacting area shelters, checking hospitals, jails, correction departments, and staying in contact with FCM Exom-Pope. Because FCM Walker was unsuccessful in her attempts to locate Mother, she was unable to provide Mother with notice of the October 31 hearing. Mother thus did not appear at this hearing.

Following the October 31 hearing, FCM Walker continued to contact shelters and schools in an effort to locate Mother. On or about November 13, 2007, FCM Walker located Da.W. and De.W. at schools in Indianapolis and then located Mother and C.W. at the Day Spring Center, a shelter in Indianapolis. The MCDCS detained Da.W., De.W., and C.W. and

ultimately placed the children in foster homes.<sup>5</sup> Mother was arrested on her outstanding warrant and remained in jail until December 7, 2007. It appears that Mother's detention in jail resolved the matter of the probation violation. While in jail, Mother was served with notice that the next hearing in the CHINS matter was set for January 10, 2008.

Upon her release from jail, Mother repeatedly contacted FCM Walker via telephone. Mother also faxed a letter to FCM Walker, along with copies of a police report, in order to provide FCM Walker with information regarding the allegations in the CHINS petition. In that letter, Mother also requested FCM Walker's assistance in getting her children home through an "in-home trial" before the scheduled court date. Mother's request was refused. *Transcript* at 170.

Mother appeared at the January 10, 2008 hearing. As of that date, Mother had not been permitted to visit her children, nor had the MCDCS referred her for any services. At that hearing, FCM Walker made a referral for Mother for supervised visitation. Even after the referral was made, however, Mother was not permitted to visit with her children for several weeks. Also at the January hearing, the court ordered the MCDCS to refer Mother for home-based counseling. The MCDCS complied with the court's order and referred mother for home-based counseling with Just Harmony Counseling Service, through which case-worker Regina Johnson was assigned to Mother's case.

At the May 15 hearing, Johnson testified that she had been working with Mother for two months, over the course of which Johnson met with Mother seven times with the visits

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<sup>5</sup> Da.W. and De.W. were placed together in a foster home and C.W. was placed in a separate foster home.

lasting anywhere from half an hour to two hours. Due to scheduling conflicts with Mother's and the foster parents' schedules and Johnson's limited availability, Johnson was only able to observe Mother with three of her four children on one occasion, which occurred on April 11, 2008.<sup>6</sup> Johnson testified that Mother "was appropriate with her children", but also noted that Mother interacted with the two oldest children more than the younger child that was present at the session. *Transcript* at 103. Johnson also testified that with Mother's full-time employment, Mother has "ample income . . . to take care of herself and children." *Id.* at 110.

Johnson further noted that Mother had been a resident of the Julian Center. Because the Julian Center is a shelter for victims of domestic violence, Johnson cited her concern that Mother may have a history of domestic violence. Johnson was unsure of such history, however, based on her interactions with Mother. Johnson informed the court that she wanted to discuss domestic violence issues with Mother, and if she determined that those issues were present, Mother would need to address them in order to make sure the home environment was safe for the children. Johnson wanted to address other topics with Mother such as the children's schooling and why Mother had previously been involved with MDCDCS.

Despite the opportunities to interact with Mother, Johnson would not make a recommendation concerning placement of the children in Mother's care or additional services that needed to be offered to the family because of the limited opportunity she had to observe Mother with her children and Mother's lack of cooperation. Johnson explained that she

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D.W. was released from Guardian's Home and placed in a third foster home.

<sup>6</sup> C.W. was not present during this visitation session because his foster parent "got confused about the visit." *Transcript* at 103.

informed Mother she needed to observe her with her children before she could make a recommendation, but that Mother chose to continue her visits with her children at the Children's Bureau rather than at Just Harmony. Johnson explained that she could not observe visits at the Children's Bureau. Mother explained that she uses public transportation and the day and time of the visits at the Children's Bureau were more convenient. Indeed, it took several weeks to arrange the one visitation at Just Harmony that Johnson was able to observe.

Because of the difficulties scheduling visitation with Johnson and the convenience of visitation at the Children's Bureau, FCM Walker made a second referral for home-based counseling sometime between the May 15 and June 10 hearings. At the June 10 hearing, FCM Walker advised the court that she had been informed, but could not confirm, that this second referral for home-based counseling was going to be closed due to non-compliance by Mother. No further details were given.

Also at the June 10 hearing, FCM Walker testified that Mother did not keep regular weekly contact with her and that Mother often communicated with her through the home-based counselor. FCM Walker would receive regular calls from Mother if Mother believed there to be a problem she thought FCM Walker needed to address, such as missed visits by her children or problems with care the children were receiving in their respective foster homes. FCM Walker also noted stark differences in the way Mother interacted with her from one instance to another. Specifically, FCM Walker noted that Mother would be happy and pleased with her during some phone conversations and be short with her during other phone

conversations. FCM Walker expressed concerns about Mother's inconsistency in maintaining communication and believed that Mother may have mental health issues given the dramatic shifts in her attitude in her communications with FCM Walker. FCM Walker waited until the June 10 hearing to suggest that Mother undergo a mental health assessment to determine if Mother has mental health issues that need to be addressed. FCM Walker asserted that her concerns related to Mother's ability to care for her children in terms of getting the children to school consistently<sup>7</sup> and maintaining employment and stable housing. FCM Walker further noted that with court intervention, Mother could receive free services.

The record further reveals that prior to the March 13, 2008 hearing, Mother obtained full-time employment with Herff Jones and got her own apartment. As of the last hearing before the court (June 10), Mother had been employed for five months and had maintained her residence for four months. With regard to Mother's living arrangements, the MCDCS did not evaluate Mother's home until the court ordered it to do so at the March 13 hearing. Thereafter, on March 22, FCM Walker visited Mother's home and observed that at that time, Mother did not have enough beds and that the water had not been turned on. By the May 15 hearing, Mother had obtained sufficient beds and the water and heat were on at her apartment. Mother knew what schools her children would attend and had made arrangements for childcare. The MCDCS's own witness testified that with her income, Mother had ample means to support herself and her children. There is also no suggestion in the record that Mother is not participating in supervised visitation as directed by the MCDCS.

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<sup>7</sup> There is no suggestion in the record that while in Mother's care, the children were not in school on a

Following the final hearing on the CHINS petition, the parties each filed proposed findings of fact and conclusions of law. On July 30, 2008, the court signed the proposed findings and conclusions submitted by the MCDCS. On July 31, 2008, the court held a hearing and issued its determination that all four of Mother's children were CHINS. A dispositional hearing was held on August 14, 2008 and a dispositional order was entered on that date. Mother now appeals the CHINS determination.

Because the trial court entered findings of fact and conclusions thereon, our standard of review is two-tiered. *In re V.C.*, 867 N.E.2d 167 (Ind. Ct. App. 2007). We first determine whether the evidence supports the findings, and then we determine whether the findings support the conclusions. *Id.* We will reverse only if the evidence does not support the findings or the findings do not support the judgment. *Id.* In our review, we consider only the evidence favorable to the trial court's judgment, and we do not reweigh the evidence or reassess the credibility of the witnesses. *Id.*

At the outset, we observe that "[t]he Fourteenth Amendment to the United States Constitution protects the traditional right of parents to establish a home and raise their children." *Bester v. Lake County Office of Family & Children*, 839 N.E.2d 143, 147 (Ind. 2005). "A parent's interest in the care, custody, and control of his or her children is 'perhaps the oldest of the fundamental liberty interests.'" *Id.* (quoting *Troxel v. Granville*, 530 U.S. 57 (2000)). "Indeed the parent-child relationship is 'one of the most valued relationships in our

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consistent basis.

culture.’’ *Id.* (quoting *Neal v. DeKalb County Div. of Family & Children*, 796 N.E.2d 280 (Ind. 2003)).

Here, Mother appeals the determination by the court that her four children are CHINS. We begin by noting that CHINS statutes do not require that a court wait until a tragedy occurs to intervene. *Roark v. Roark*, 551 N.E.2d 865 (Ind. Ct. App. 1990). Rather, a child is a CHINS when he or she is endangered by parental action or inaction. *Id.* Further, as with parental rights terminations, the purpose of a CHINS adjudication is not to punish parents but to protect their children. *In re A.I.*, 825 N.E.2d 798 (Ind. Ct. App. 2005), *trans. denied*.

A child under eighteen years old is a CHINS if:

(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 the child:

(A) is not receiving; and

(B) is unlikely to be provided or accepted without the coercive intervention of the court.

Ind. Code Ann. § 31-34-1-1 (West, Premise through 2008 2nd Regular Sess.). The MCDCS has the burden of proving by a preponderance of the evidence that the children are CHINS. *See* I.C. § 31-34-12-3 (West, Premise through 2008 2nd Regular Sess.).

In the CHINS petition, the MCDCS alleged as follows:

5. The children are Children In Need of Services as defined in IC 31-34-1 in that: one or more of the children’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 one or more of the children with

necessary food, clothing, shelter, medical care, education or supervision; and the children need care, treatment or rehabilitation that the children are not receiving and are unlikely to be provided or accepted without the coercive intervention of the Court, as shown by the following, to wit:

(A) On or about October 9, 2007, the Marion County Department of Child Services (MCDCS) determined, by its Family Casemanager (FCM) Lucita Exom-Pope, these children to be children in need of services because their Mother . . . has failed to provide the child [sic] with a safe and stable home environment and has abandoned [D.W.] at the Marion County Children's Guardian Home. [Mother] has failed to maintain communication with FCM Exom-Pope regarding [D.W.] and there is no one available to provide for the child. During the investigation, [Mother] fled from a local shelter with the three youngest children and her whereabouts are unknown. [Mother] has an open warrant stemming from a probation violation, is homeless, and therefore cannot provide her children with basic necessities. At this time, the children are endangered in the care of [Mother] and the children and family are in need of services.

*Appendix* at 64. Mother argues that the court's finding that the MCDCS proved these allegations is not supported by sufficient evidence.

In determining the children to be CHINS, the court concluded that Mother failed to provide a safe and stable home environment for the children and Mother failed to provide the children with necessary food, clothing, shelter, medical care, supervision, or education. The court's conclusions in this regard are based on the court's findings that there was no one to care for the children from November 13 to December 7, 2007 when Mother was incarcerated on a probation violation, that Mother did not communicate with the MCDCS about D.W., who had been placed at the Guardian's Home, or take any effort to regain custody of D.W. for a period of five weeks, leaving no one with legal responsibility to care for him, that Mother fled with three of her children and their whereabouts were unknown for that same five-week period, and that Mother had lived in several places since October 2007. Each of

the court's conclusions stem from the circumstances that existed at and shortly after the CHINS petition was filed. Noticeably absent from the trial court's findings and conclusions is any consideration of the circumstances as they have changed throughout the at-least four-month period prior to and as they existed at the final fact-finding hearing on June 10. We have previously held that, as with termination of parental rights cases, the court should not only consider Mother's situation at the time the petition was filed, but also her situation at the time the case was heard by the court. *See In re C.S.*, 863 N.E.2d 413 (Ind. Ct. App. 2007) (citing *Matter of D.T.*, 547 N.E.2d 278 (Ind. Ct. App. 1989), *trans. denied*), *trans. denied*.

Here, the fact-finding hearings on the CHINS petition spanned several months, concluding eight months after the petition was filed. We acknowledge that the delay from October to December was due to Mother's disappearance with three of her children for a five-week period and her subsequent three-week detention. Mother was released from detention on December 7, 2007. Upon her release, Mother sought to regain custody of her children. Since her release, Mother has been present at all hearings, has regularly attended her visitation with her children, has noted her dissatisfaction when not all of her children are present for her visitation, and has repeatedly expressed concern over each of her children's well-being in foster care. The record also reveals that at the time of the final hearing, Mother had maintained full-time employment for five months and had lived in an apartment for over four months, thus negating several of the MCDCS's concerns with regard to Mother's ability to maintain employment and a stable home.

While we agree that Mother exhibited poor judgment in disappearing for a five-week period with three of her children and failing to contact the MCDCS about D.W., the record is replete with indications that Mother is a concerned and appropriate parent and that her situation at the time of the CHINS determination was markedly different than the circumstances in which she found herself in October 2007 when the MCDCS filed the CHINS petition. Indeed, we note the MCDCS's own witness testified that Mother was appropriate with her children and that Mother was capable of providing for herself and her children. Further, Mother presented on her behalf testimony of two witness from the Julian Center, both of whom testified that they had no concerns about Mother's parenting or the safety of the children while in her care while Mother was a resident at the Center.<sup>8</sup> Other than generalized concern about Mother's mental health, which has not been substantiated, there was no evidence tending to indicate that, at the time of the CHINS determination, the children's mental or physical well-being would be seriously impaired or endangered in Mother's care or that Mother could not provide necessities for the children. Further, that Mother, as a single parent, might benefit from free services is not, by itself, justification for coercive intervention of the court. As aptly noted by Mother, she "does not need to prove that her parenting decision[s] were perfect", but rather, the MCDCS has the burden of proving by a preponderance of the evidence that the children's physical or mental condition

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<sup>8</sup> Michol Walker, a family advocate for the Julian Center assigned to Mother and her children for the two months she resided at the Julian Center, testified that Mother worked hard, participated in case management services and groups, as well as job training and placement services. Walker further testified that Mother was "committed to" and "concerned about [the] well being" of her children, specifically noting that Mother made sure her children did their homework and participated in programs offered by the Julian Center. *Transcript* at 214.

is seriously impaired or endangered as a result of Mother's inability, refusal, or neglect to supply them with the necessary food, clothing, shelter, medical care, education, or supervision. *Appellant's Brief* at 15. Based on the record, including the time up to the last fact-finding hearing in June, the MCDCS has not met its burden. We therefore conclude the evidence is insufficient to support the trial court's CHINS determination as to Mother's four children.

Judgment reversed.

MAY, J., and BRADFORD, J., concur.