

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:

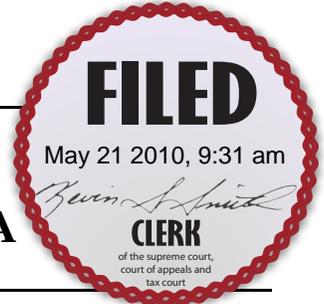
RICHARD L. WILLIAMS
Fort Wayne, Indiana

ATTORNEYS FOR APPELLEE:

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

SHERRY A. HARTZLER
Indiana Department of Child Services
Allen County Office
Fort Wayne, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**



IN THE MATTER OF:)
T.J.H.,)
)
M.H.,)
)
Appellant-Respondent,)
)
vs.)
)
INDIANA DEPARTMENT OF CHILD)
SERVICES,)
)
Appellee-Petitioner.)

No. 02A05-0911-JV-640

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable William J. Briggs, Senior Judge
Cause No. 02D07-0810-JC-735

May 21, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION
KIRSCH, Judge

M. H. (“Father”) appeals the trial court’s determination that T.J.H. is a Child In Need of Services (“a CHINS”). Father raises the following restated issue for our review: whether the trial court erred by admitting child hearsay statements in evidence and, if so, is the remaining evidence sufficient to support the trial court’s determination that T.J.H. is a CHINS.

We affirm.

FACTS AND PROCEDURAL HISTORY

T.J.H. was born on January 24, 2002 to Father and C.A. In late 2008, the Department of Child Services (“DCS”) filed a verified petition alleging that T.J.H. was a CHINS. A second amended verified petition was filed by DCS as to T.J.H. on December 23, 2008, alleging that T.J.H. resided in the same household as her sibling, C.H., who was a victim of a sex offense perpetrated by Father. The fact-finding hearings on the petition were held during late February through March 2009.

Prior to the first fact-finding hearing, DCS filed a petition for child hearsay regarding out-of-court statements made by T.J.H. and C.H. One of the statements by T.J.H. referred to physical abuse during discipline by Father, while other statements were in reference to allegations of sexual abuse by Father and other family members. C.H.’s statements primarily were in reference to allegations of sexual abuse by Father and other family members. Father and DCS stipulated that C.H. and T.J.H. were unavailable because testifying in court would create a substantial likelihood of emotional or mental harm to the children. However, the parties did not stipulate to the time, content, and circumstances of the video, and the

reliability of any hearsay statement made by T.J.H. or C.H. was to be determined by the court. At the conclusion of the hearings, the trial court issued findings of fact and conclusions thereon finding the child hearsay statements reliable and adjudicating T.J.H. a CHINS. Father now appeals.

DISCUSSION AND DECISION

Father argues that the trial court erred by admitting the out-of-court statements and video interviews of T.J.H. and C.H. Indiana Code section 31-34-13-2 provides in relevant part, “[a] statement or videotape that is made by a child who at the time of the statement or videotape is less than fourteen years of age, concerns an act that is a material element in determining whether a child is a child in need of services, and is not otherwise admissible in evidence under statute or court rule is admissible in evidence” in a CHINS proceeding if certain requirements are met. Those other requirements are, in relevant part, that after notice and a hearing, the court finds that the time, content, and circumstances of the statement or videotape provide sufficient indications of reliability and the child is found by the court to be unavailable as a witness because a psychiatrist, physician, or psychologist has certified that the child’s participation in the proceeding creates a substantial likelihood of emotional or mental harm to the child. Ind. Code § 31-34-13-3.

Father does not dispute that the children are unavailable for purposes of that statute. Instead, Father argues that there are insufficient indications of reliability for the admission of the hearsay statements because the interviewers did not explicitly ask T.J.H. or C.H., who

were six years old and four years old respectively at the time of the interviews, if they knew the difference between a truth and a lie.

The cases cited by Father in support of his argument that the children must be asked whether they understand the difference between the truth and a lie interpret the statute in criminal law matters involving the admissibility of statements by a protected person. *See* Ind. Code § 35-37-4-6; *Carpenter v. State*, 786 N.E.2d 696 (Ind. 2003); *Pierce v. State*, 677 N.E.2d 39 (Ind. 1997). Because there is a separate statutory provision in CHINS proceedings, we decline Father’s invitation to apply the reasoning of the cited cases, which were analyzed under the criminal statute.

We must, however, acknowledge our holding in *In re J.Q.*, 836 N.E.2d 961 (Ind. Ct. App. 2005). In that case, we interpreted Indiana Code section 31-34-13-3 to “require some separation of the child hearsay determination and the CHINS determination in order to give effect to the statute’s notice and hearing requirements.” 836 N.E.2d at 965. We held that it was error for the trial court to merge its decisions regarding the admissibility of the child’s statements and the CHINS determination into one fact-finding hearing. *Id.*

In the present case, there was no separation of the child hearsay determination and the CHINS determination. Accordingly, it was error for the trial court to merge those decisions. The child hearsay statements were admitted in the hearing, which was held over the course of several days, at the conclusion of which the parties filed separate proposed findings of fact on the issue of the admissibility of the child hearsay statements and on the issue of the CHINS determination.

A child is a CHINS when he or she is endangered by parental action or inaction. *Roark v. Roark*, 551 N.E.2d 865, 872 (Ind. Ct. App. 1990). The purpose of a CHINS adjudication is not to punish the parents, but to protect the children. *In re A.I.*, 825 N.E.2d 798, 805 (Ind. Ct. App. 2005). With that in mind, we are reluctant to elevate form over substance here. Despite the flaws in procedure, there is independent corroborative evidence to support the trial court's decision to admit T.J.H.'s statements to a DCS intake worker, Carrie Stine ("Stine"), about her fear of discipline at the hands of Father.

T.J.H. told Stine that she did not feel safe at home when Father spanked her, because he used belts, extension cords, or fly swatters to spank her on her buttocks and thighs. T.J.H. then showed Stine a linear mark on her thigh, about two to three inches in length, from being spanked by Father with an extension cord. Stine took photographs of the mark, and the photographs were admitted in evidence without objection. Without resolving whether the statements of T.J.H. were adequately reliable, Stine's testimony and the photographs are sufficient evidence upon which to sustain the trial court's determination that T.J.H. is a CHINS. When we review the sufficiency of evidence, we consider only the evidence and reasonable inferences therefrom that are most favorable to the judgment. *In re A.H.*, 751 N.E.2d 690, 695 (Ind. Ct. App. 2001). We neither reweigh the evidence nor reassess the credibility of the witnesses. *Id.* DCS was required to prove that T.J.H. was a CHINS by a preponderance of the evidence. *Id.* We find that the DCS met that burden.

Stine observed and photographed a linear mark on T.J.H.'s thigh, about two to three inches in length, from. Stine confirmed that T.J.H. was living with Father at the time of the

interview. Even in the absence of a finding that T.J.H.'s statements that the abuse was the result being spanked by Father with an extension cord was reliable, this evidence demonstrated that T.J.H. was at the very least endangered by parental inaction and was sufficient to establish that T.J.H. was a CHINS.

In *J.Q.* and in *Townsley v. Marion County Department of Child Services*, 848 N.E.2d 684 (Ind. Ct. App. 2006), we remanded the causes to the trial court because the merger of the child hearsay determination and the CHINS determination undermined our confidence in the CHINS determination. Such is not the case here.

Affirmed.

FRIEDLANDER, J., and ROBB, J., concur.