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IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF: D.T., A Child in Need of Services,	)	
D.V., Father,	)	
Appellant-Respondent,	)	
vs.	)	No. 49A05-0811-JV-642
INDIANA DEPARTMENT OF CHILD SERVICES,	)	
Appellee-Petitioner,	)	
and	)	
CHILD ADVOCATES, INC.,	)	
Co-Appellee-Guardian ad litem.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Geoffrey Gaither, Magistrate
The Honorable Marilyn A. Moores, Judge
Cause No. 49D09-0802-JC-7289

May 28, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

D.V. ("Father") appeals the determination his son, D.T., is a child in need of services ("CHINS"). Because the trial court's findings do not support its judgment, we reverse.

FACTS AND PROCEDURAL HISTORY

Father and T.T. ("Mother") were dating when Mother became pregnant. Father knew Mother was using illegal drugs. Father was incarcerated in October of 2007 for a probation violation. When D.T. was born on January 4, 2008, Mother tested positive for cocaine and Xanax. The Marion County Department of Child Services ("DCS") offered services to Mother, and she agreed.

On February 15, 2008, DCS alleged D.T. was a CHINS. The court authorized the filing of the CHINS petition and, after a hearing that same day, found sufficient evidence supporting the allegation. As to Father, the petition alleged:

> D.V. is the alleged father of the child and he is incarcerated. [Father] has not contacted MCDCS regarding the health, safety, and welfare of the child or come forward to demonstrate the ability or willingness to appropriately parent the child at this time.

(App. at 27.) The court removed D.T. from Mother's care, made him a ward of the DCS, and placed him with T.T.'s mother.

Father received a summons of the CHINS proceedings and notice of his rights on March 3, 2008. He requested the court appoint counsel, which the court did. Father was released from incarceration on May 2, 2008, and began two years on parole. He found a job at Wal-Mart, visited D.T. in his placement with T.T.'s mother, and brought clothing and diapers to D.T. Father did not contact DCS.

On July 8, 2008, Father's public defender appeared for a pretrial conference without Father. On July 22nd, Father failed to appear for a fact-finding hearing, but his counsel appeared and requested a DNA test be ordered to prove Father's paternity. On September 2nd, Father failed to appear at a second scheduled fact-finding hearing, and his attorney requested additional time to complete the DNA testing. At that hearing, DCS learned Father's home address.

After a hearing as to Father, the court found D.T. was a CHINS as to Father in an order that included the following findings and conclusions:

> [Father] 3-18-60 dob
> Soc Sec [deleted]
> Lives at [home address] for 15-20 years
> He lives there by himself
> Has one child [D.T.] dob 1-4-08
> DV was not present for his birth
> DV was incarcerated at Wabash Valley
> Started in October of 07
> Released in May of 08
> DV is still on parole
> Must do weekly urine drops
> DV was convicted for cocaine dealing in 1996

DV has a drug conviction for possession of cocaine in 1993 or 1994
DV may have had others
Mother of child is [T.T.]
They are no longer boy/girl friend as of October 07
DV was aware of her drug use while together
DV felt that there was nothing he could do
DV is working at Wal-Mart as of last week
Location on [deleted]
Stocking trucks and loading
Previous was working with his father (Paternal grandfather)
DV was doing home renovating
DV is aware of the circumstances of DT's birth
DV knew that DT tested positive for drugs
He is pretty sure that it is true
He thought the child tested positive for xanex [sic] and cocaine and maybe alcohol
DV was incarcerated at his birth, so he could not help him or her
DV has seen DT quite a few times since he has been out of jail
He has purchased clothes, diapers and other items
DV wants full custody because [T.T.] is not doing the right things
DV has his mother and sister who are willing to help watch DT if he gets custody
DV has some baby furniture but not everything
DV became aware of the DCS involvement while incarcerated
Received a letter
DV has never talked to a case manager
He has only received one letter while incarcerated
Probably a summons and right
DCS is aware of where DV lives
A letter has come to his home
DV did not contact DCS upon his release from jail
He felt that since he could go over and visit whenever he wanted, and that was good enough
DT has a primary care physician
DV is available to take him to appointments
DV has no problems following DCS rules
TT has a new boyfriend

The Court orders continued placement and wardship.

The Court finds that reasonable efforts have been offered and available to prevent or eliminate the need for removal from the home. After reviewing the reports and information from the Office of Family and Children, service providers and other sources, which the Court now

> incorporates into this order (see Court file), the Court also finds that the services offered and available have either not been effective or been completed that would allow the return home of the child without Court intervention.
>
> The Court finds that it is contrary to the health and welfare of the child to be returned home and that reasonable efforts have been made to finalize a permanency plan for the child.
>
> The Court orders the child to be a ward of the Marion County Office Of [sic] Family and Children. The Court orders that the responsibility for placement and care of the child is ordered to the Marion County Office of Family and Children, with placement at: continued in foster care.
>
> The Court now orders the child removed from the care of the father, [D.V.] pursuant to this Dispositional Order.

(Appellant's App. at 20-24.)

DISCUSSION AND DECISION

The evidence and findings do not support the determination D.T. is a CHINS as to Father.

> 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 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.

Ind. Code § 31-34-1-1. DCS is required to prove these elements by a preponderance of the evidence. Ind. Code § 31-34-12-3.

When a trial court enters findings and conclusions supporting the determination a child is a CHINS, we determine first whether the evidence supports the findings and then whether the findings support the judgment. *In re C.B.*, 865 N.E.2d 1068, 1073 (Ind. Ct.

App. 2007), *trans. denied* 878 N.E.2d 205 (Ind. 2007). We may reverse only if the judgment is unsupported by the findings or conclusions. *Id.* As we conduct our review, we may not reweigh the evidence or reassess the credibility of the witnesses. *In re J.V., D.V., D.V., & A.V.*, 875 N.E.2d 395, 402 (Ind. Ct. App. 2007), *reh'g denied*, *trans. denied* 891 N.E.2d 45 (Ind. 2008). Rather we consider only the evidence favorable to the trial court's judgment. *Id.*

The parties first dispute whether the trial court could admit evidence regarding Father's criminal history and consider it when determining whether D.T. is a CHINS. The trial court was not required to ignore evidence regarding Father's criminal history,[1] as it was relevant. *See In re J.L.V., Jr.*, 667 N.E.2d 186, 190 (Ind. Ct. App. 1996) ("[A] parent's past, present, and future ability to provide sufficient care for his or her child forms the basis for a CHINS adjudication and . . . the parent's character is an integral part of assessing that ability."). Nevertheless, we agree with Father that his past convictions "do not, [sic] necessarily dictate the Father's present circumstances, which must also be considered." (Appellant's Br. at 9.) *See, e.g.*, *Bester v. Lake County Office of Family & Children*, 839 N.E.2d 143, 152 (Ind. 2005) (despite father's criminal history, court must evaluate his ability to parent at the time of the hearing).

In CHINS cases, "as in termination of parental rights cases, we do not believe it is

[1] Father's criminal history includes four convictions of drug offenses. On May 22, 1991, Father was found guilty of Class B felony dealing in cocaine or narcotic drug and sentenced to ten years, suspended, with three years on probation. In 1996, Father was convicted of Class D felony possession of cocaine or a schedule I or schedule II drug and sentenced to twenty days executed, 345 days suspended, and 345 days of probation. On December 11, 1996, Father was convicted of Class B felony dealing in cocaine or narcotic drug and sentenced to six years executed, fourteen years suspended, and two years probation. On December 12, 2001, Father was convicted of Class D felony possession of cocaine or a schedule I or II controlled substance and received a sentence of 180 days executed.

[father's] situation at the time the petition was filed that is the only factor relevant to the trial court's determination. Rather, the trial court should also consider his situation at the time the case was heard by the court." *In re C.S., L.S., and M.S.*, 863 N.E.2d 413, 418 (Ind. Ct. App. 2007), *trans. denied* 869 N.E.2d 461 (Ind. 2007). *See also In re D.T.*, 547 N.E.2d 278, 284 (Ind. Ct. App. 1989) ("an adjudication that a child is dependent and neglected may not be based solely on conditions which existed in the distant past, but exist no longer"), *reh'g denied*, *trans. denied*.

The crux of the disagreement between Father and DCS is about the inference that may be drawn from Father's failure to contact DCS on his release from prison in May. The State asserts "father's failure to come forward and seek the care and placement of his child proves not only his inability, but unwillingness, to furnish D.T. with necessities, including food, clothing, shelter, medical care, education, and supervision on a full time basis." (Appellee's Br. at 8.) However, in those same months, DCS did not contact Father to assess his interest or ability to care for D.T. Neither had Father been ordered to contact DCS. *See Bester*, 839 N.E.2d at 149 (father "cannot now be criticized for not doing that which he was never asked to do"). During those intervening months, according to the trial court's findings, Father was obtaining employment, visiting D.T., providing diapers and clothing, obtaining furniture for D.T., maintaining his home of fifteen to twenty years, and arranging for assistance with childcare from his mother and sister. Under these circumstances, Father's failure to contact DCS, without more, does not prove unwillingness or inability to provide for D.T. *See, e.g., In re C.S.*, 863 N.E.2d at 419 (although father had not established paternity by the time of the CHINS hearing,

he had indicated his desire to do so and had taken affirmative steps toward that goal).

The court's ultimate findings were: (1) "reasonable efforts have been offered and available to prevent or eliminate the need for removal from the home"; (2) "the services offered and available have either not been effective or been completed that would allow the return home of the child"; and (3) "it is contrary to the health and welfare of the child to be returned home." (App. at 24.) The first two ultimate findings are completely unsupported by the evidence or basic findings, as DCS did not make any effort to contact Father, much less offer him any services. As for the third, the only basic findings in support are that Father has a criminal history and that Father failed to contact DCS; those are simply insufficient to support a finding D.T.'s health and welfare were endangered by Father's home. *See In re C.S.*, 863 N.E.2d at 419 (reversing CHINS where DCS presented no evidence to show child's mental or physical condition would be impaired or endangered by placement with father and presented no evidence to demonstrate father would need coercive intervention of the court to appropriately care for the child). Accordingly, we reverse.

Reversed.

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