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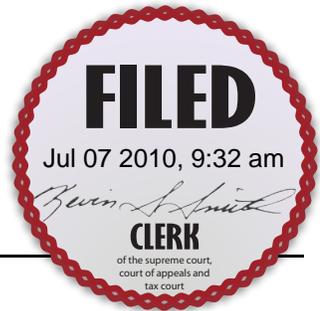
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COURT OF APPEALS OF INDIANA

IN RE: T.H. II, S. H., and M.H.,)
Alleged to be Children in Need of Services,)
)
T.H. and S.H.,)
)
Appellants-Respondents,)
)
vs.)
)
MONROE COUNTY DEPARTMENT OF)
CHILD SERVICES,)
)
Appellee-Petitioner.)

No. 53A01-0911-JV-548

APPEAL FROM THE MONROE CIRCUIT COURT
The Honorable Frances G. Hill, Judge
Cause Nos. 53C06-0810-JC-1103, -1104, -1105

July 7, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellants-respondents T.H. (Father) and S.H. (Mother) (collectively, the Parents) appeal the trial court's order determining their children T.H. II (T.H.), M.H., and S.H. (collectively, the Children) to be Children in Need of Services (CHINS) and ordering that the Children be removed from the Parents' home. The Parents argue that there is insufficient evidence supporting the CHINS determination, that even if there is sufficient evidence removal was unwarranted, and that the children's Court Appointed Special Advocate (CASA) had a conflict of interest such that the entire proceeding should be vacated. Finding sufficient evidence supporting the CHINS determination and the removal order, and finding no other error, we affirm.

FACTS

The Parents have three children, T.H., born on September 20, 2005; M.H., born on September 18, 2007; and S.H., born on August 12, 2008. Unfortunately, this family has been presented with a variety of challenges, including medical and developmental problems with the Children and financial struggles.

It appears that the Department of Child Services (DCS) first made contact with

this family in December 2005 when T.H. was only a few months old. The DCS completed a report of substantiated neglect of T.H. based on domestic violence between the Parents. The DCS referred T.H. to the First Steps Program, which he attended from April 2006 until April 2008 when he was discharged because the Parents declined to continue developmental therapy.

In May 2006, T.H. was diagnosed with Erb's Palsy, which is a condition that affects the nerves and muscles in T.H.'s right arm and limits his ability to use his right arm. Dr. William Didelot recommended therapy and wanted T.H. to return in six weeks. Because Dr. Didelot did not give Mother a specific date on which T.H. was to return, Mother did not schedule a return visit. However, T.H. was eventually scheduled for surgery in March 2009.

In October 2008, Hilary Webb, a home based case manager, began working with the family through a voluntary community partners program. Webb's first meeting with the family occurred on October 6, 2008 at a McDonald's restaurant where the family was having lunch in between doctors' appointments. At this meeting, Webb learned that the Parents had lost their public benefits, including Medicaid, because they had failed to attend scheduled appointments. Additionally, the Parents were being evicted from their home and were struggling to provide food and diapers for the Children. Indeed, the Parents did not have any formula for six-week-old S.H. This concerned Webb because S.H. had Delayed Gastric Emptying which prevented S.H. from gaining weight as expected. Webb left the meeting to purchase formula for S.H.

On October 14, 2008, Webb was visiting the family in their home when T.H. ran outside and started to play inside a vehicle. Father brought T.H. back into the house and explained to Webb that T.H. did this all the time and that he could not stop him.

Similarly, on October 20, 2008, Webb observed two instances where T.H. went outside unsupervised. After the second incident, when Webb instructed the Parents to bring T.H. back inside, the Parents became agitated with Webb and did not want to work with her unless she supplied them with diapers. However, once the Parents had a sufficient supply of diapers, they would not meet with Webb until they again needed additional diapers. Shortly thereafter, on October 28, 2008, the DCS filed a CHINS petition, and the Children immediately received DCS services while remaining in the Parents' home.

Despite DCS involvement, there continued to be instances of inadequate care and supervision. On December 7, 2008, Mother briefly left T.H. alone with S.H., and T.H. pulled S.H. off of the couch and threw her on the floor. Mother called 911, and S.H. was taken to the hospital where it was determined that she had not been injured.

In January 2009, Dr. Debra McDaniel, the Children's pediatrician, referred T.H. to the Children's Therapy Clinic to receive therapy on his right arm and for a developmental evaluation. Dr. McDaniel believed the developmental evaluation was necessary because at three years old, T.H. had limited speech, was not yet toilet trained, and was still drinking from a bottle. Five different appointments were scheduled, but the Parents failed to appear at any of them. Mother believed that the evaluation was unnecessary

because T.H. was scheduled to have surgery on his right arm in March 2009, and she was unable to appreciate the difference between the developmental evaluation and T.H.'s treatment and surgery for Erb's Palsy.

Also in January 2009, Dr. McDaniel referred M.H. to the First Steps Program for a developmental evaluation to address delays in his walking and speech. Likewise, Dr. McDaniel referred S.H. to the First Steps Program to evaluate any possible developmental delays related to her inability to gain weight. The Parents declined to have a developmental evaluation performed on either M.H. or S.H. because they believed that it was unnecessary.

On January 7, 2009, the juvenile court conducted an initial hearing and ordered that the Children remain "in home CHINS." Appellants' App. p. 31. On March 5, 2009, the juvenile court conducted a pretrial conference where the DCS verbally requested an emergency removal of the Children from the Parents. The attorney for each parent was present at the hearing, but the Parents were not present. The juvenile court determined that probable cause existed and verbally ordered that the Children be removed and placed in foster care. The Children were removed on March 6, 2009.

A hearing was held on March 10, 2009, and the Parents filed a written motion for the immediate discharge of the Children from foster care. The juvenile court entered findings of fact and conclusions of law and ordered that the Children remain in foster care.

A fact finding hearing was conducted on June 10, 2009, and on June 24, 2009.

The juvenile court took the matter under advisement and on July 7, 2009, it entered findings of fact and conclusions of law and adjudicated the Children as CHINS.

A dispositional and review hearing was held on August 20, 2009 and on October 14, 2009. On October 20, 2009, the juvenile court ordered that the Children continue in foster care and that the Parents participate in services. The Parents now appeal.

DISCUSSION AND DECISION

I. Sufficiency of the Evidence

A. Standard of Review

The Parents argue that there was insufficient evidence to support the CHINS determinations.¹ 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

¹ We note that Father and Mother have filed separate briefs, but because the arguments presented by them are the same, we will address them together.

- (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 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 Dept. 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.

B. T.H.

The Parents argue that there was insufficient evidence to support the CHINS determination as to T.H. Specifically, the Parents challenge several factual findings, including findings three, six, and seven.

Finding three states, in part, that T.H.

has thrown the other children off of couches and he turned over the car seat when [S.H.] was in it. Mother reported that [T.H.] once threw [S.H.] across the room and Mother was so concerned she took [S.H.] to the hospital.

Appellants' App. p. 59. The Parents argue that "[a]lthough the evidence does show two incidents involving T.H. pushing a sibling off of the couch, it does not support a finding of a separate incident where T.H. threw S.H. across the room resulting in a hospital visit for S.H." Father's Br. p. 15; Mother's Br. p. 16. Put another way, the Parents argue that the incident involving T.H. throwing S.H. across the room was part of the same incident in which T.H. pulled her off of the couch.

Webb testified that T.H. was aggressive towards his siblings. Webb recalled that around December 7, 2008, Mother called her because "[S.H.] had been hospitalized after [T.H.] had thrown her off the couch. . . . and through [sic] her across the room onto the wood floor." Tr. p. 150-51. Webb also recounted that sometime around January 18, 2009, Father told her that T.H. had thrown M.H. off the couch. On January 20, 2009, Webb witnessed T.H. trying to pull S.H. off the couch by her leg. Webb also stated that on one occasion, T.H. overturned the car seat that S.H. was in and that the Parents were unaware that S.H. was upside down in her car seat.

Jackie Gerth, a DCS case manager, testified that almost every time she visited the home, M.H. and S.H. were in the playpen or car seat. The Parents told Gerth that they cannot let M.H. or S.H. out of the playpen or car seat because T.H. will hurt them. In light of Webb's and Gerth's testimony, we cannot say that finding three is unsupported

by the evidence.

The Parents also challenge finding six, which states that T.H. likes to play with Father's tools and that these tools "present a danger because [T.H.] could harm himself or the other children." Appellants' App. p. 59. The Parents point out that Father testified that he placed the tools up on a shelf where the Children could no longer reach them. Indeed, in finding six, the juvenile court acknowledged that "Father reports that the tool box has been placed out of the reach of the children." Id. Therefore, we cannot agree that finding six is not supported by the evidence. Moreover, it is within juvenile court's discretion to assess witness credibility. Accordingly, even if the juvenile court had found that Father's testimony was unbelievable, we would not second guess that determination.

The Parents also challenge finding seven, stating that during supervised visits, T.H. "escaped to the basement which contains a pile of metal that could be dangerous to a child." Id. The Parents point out that "[a]lthough [Father] and [Mother] previously had a problem with T.H. sneaking into that area unsupervised, they have since modified the door such that T.H. is unable to access the basement." Father's Br. p. 16; Mother's Br. p. 16.

Gerth testified that on three separate occasions, she witnessed T.H. go into the basement unsupervised even though the Parents had insisted that he never goes into basement. The first time T.H. went into the basement, the Parents retrieved him immediately; however, the second time, Gerth found him, and the third time, the Parents had to discuss which one of them was going to go after T.H. Likewise, Webb testified

that she had witnessed T.H. go into the basement unsupervised.

Even assuming solely for argument's sake that T.H. no longer has access to the basement, the above testimony indicates that on several occasions, T.H. was in the basement unsupervised. Accordingly, we cannot say that finding seven is not supported by the evidence. Moreover, the Parents' effort in highlighting contrary testimony or pointing to testimony that reflects favorably upon them is merely a request that we reweigh the evidence, which we will not do.

C. M.H.

The Parents argue that there was insufficient evidence to support the juvenile court's conclusion that M.H. is a CHINS. Specifically, the Parents argue that the trial court's conclusion that M.H.'s developmental needs would not be met without the coercive intervention of the court is not supported by the evidence.

Although M.H. did not suffer from severe health issues and/or developmental delays like his siblings, Gerth testified that M.H. "was making no real attempts at forming words that I observed. Usually by eighteen months you definitely have some words that are fairly clear, um, mom, dad, uh, something that obviously that [sic] means bottle. . . . I did not hear those from him." Tr. p. 232-33. Additionally, Gerth testified that M.H. was referred to First Steps in November 2008, but that the Parents declined services at that time. M.H. was again referred to First Steps in January 2009 because of developmental delays. Mother informed the DCS that she had scheduled an appointment; however, when Gerth contacted First Steps to confirm, they told her that Mother had not

scheduled an appointment for M.H. In light of the Parents' history of not utilizing services to address M.H.'s developmental delays, we cannot say that the juvenile court's conclusion that the coercive intervention of the court is necessary was clearly erroneous.

Moreover, we note that M.H.'s developmental delays were not the juvenile court's only concern, inasmuch as it concluded that:

The evidence shows that the children are seriously endangered because the parents do not supervise them in a manner that provides for their physical and mental safety. The parents do not currently have the skills to consistently provide the parenting judgment, control, and discipline necessary for the safety of these active and medically needy children.

Appellants' App. p. 60. As discussed above, the evidence indicated that T.H. exhibited aggression and hostility towards his siblings. Accordingly, the evidence is sufficient to support the juvenile court's CHINS adjudication as to M.H.

S.H.

The Parents argue that there was insufficient evidence to support the juvenile court's conclusion that S.H. is a CHINS. Specifically, the Parents contend that despite S.H.'s past gastrointestinal issues, "S.H. had more than doubled her weight by March 2009, the month she was removed from her home." Father's Br. p. 12; Mother's Br. p. 12. Moreover, the Parents maintain that "no evidence was presented to show S.H.'s risk for developmental delays due to her past failure to thrive except a referral to assess for possible delays." Id.

Webb testified that during her first visit with the family, the Parents did not have formula or diapers for S.H. even though it had been several hours since S.H. had been

fed. At this point, S.H. had already been hospitalized twice for failure to gain weight. Indeed, S.H. was hospitalized on that day because she had not gained weight. Even more telling, during their first meeting, the Parents stated to Webb that they did not understand why S.H.'s condition was life threatening and that she "doesn't need to get fat, I don't want to have a fat baby." Tr. p. 181.

Webb also stated that she had made a schedule for the Parents and set multiple timers and alarms to help the Parents remember to feed S.H. on time. Nevertheless, the Parents either failed to understand the schedule and timer system or would ignore it. Additionally, the Parents informed Webb that they were not feeding S.H. at night because "they were too tired to get up in the middle of the night." Id. at 143. Similarly, in January 2009, six different alarms were installed in the home to remind the Parents to feed S.H. on time; however, the Parents could not understand how to use the alarms and could not recite S.H.'s feeding schedule.

Gerth testified that she had visited S.H. while she was hospitalized at Riley Children's Hospital in December 2008. Mother was unable to recite the basic feeding schedule which consisted of a feeding every four hours. In addition, Mother would frequently omit nighttime feedings even though the feeding schedule was posted on the wall by S.H.'s crib.

Sandra Fritz, a service provider with First Steps, testified that S.H. "has two services written in her plan. One is Occupational Therapy. The other is Developmental Therapy which would work with the fine motor [issues]." Id. at 125. Fritz explained that

the purpose of occupational therapy was to address feeding concerns, including transitioning S.H. to table food.

Under these circumstances, we cannot agree with the Parents that there was insufficient evidence to support the juvenile court's determination that S.H. is a CHINS. And the Parents' attempt to direct our attention to contrary evidence is simply a request that we reweigh the evidence, which, as stated above, we will not do.

II. Removal

The Parents argue that even if the evidence was sufficient to support the CHINS determinations, removal was not the appropriate remedy. In support of this argument, the Parents contend that the juvenile court's decision was based on its belief that "the parents might not follow through on services for the children if not ordered to do so by the court" and that the "proper remedy was to order the parents to follow through on services, maintaining jurisdiction as a safeguard." Father's Br. p. 17-18; Mother's Br. p. 18-19.

The juvenile court determined that

Mother and Father have a mixed history with utilizing service providers. At times they have utilized services providers, and at other times they have refused, avoided, or not followed through with referral for services. The parents testified that they have benefited from and have made helpful changes in caring for their children as a result of the services provided to them, and they have alternately testified that the services were not needed ([M.H.] doesn't have speech and social skills deficits and doesn't need services) or that services are no longer needed. Based upon this inconsistent history the Court has reason to believe that the parents would not follow through with services for the children if not court ordered.

Appellants' App. p. 60.

Gerth testified that Dr. McDaniel had referred T.H. to the Children's Therapy Clinic to address his developmental delays. At least three appointments were scheduled in January 2009 and one in February 2009, but the Parents failed to show for any of them. And, as discussed above, Gerth testified that M.H. was referred to First Steps in November 2008, but that the Parents declined services at that time. M.H. was again referred to First Steps in January 2009 because of developmental delays. Mother informed the DCS that she had scheduled an appointment; however, when Gerth contacted First Steps to confirm, they told her that Mother had not scheduled an appointment for M.H. Moreover, Gerth stated that S.H. was referred to First Steps to address possible developmental delays related to her previous failure to gain weight, and the Parents failed to follow through on this referral.

Webb testified that after she told the Parents that T.H. had gone outside and that one of them needed to get him, they became angry with her and did not want to work with her. Webb worked out a system in which she would "reward them with diapers" every time they met with her. Tr. p. 148. However, when the Parents had an adequate supply of diapers, they would refuse to meet with her until they needed more diapers. This cycle continued from October 2008 until February 2009, when the situation escalated to the point where the Parents "refused all parent aide services or refused to let [Webb] in the home," for a period of about two and one-half weeks. *Id.* at 148-49. In light of this evidence, we cannot conclude that the juvenile court erred when it determined that based on the Parents' inconsistent history of utilizing services, it had

reason to believe that they would not follow through with services unless they were court-ordered.

Moreover, the Parents' failure to follow through with services was not the juvenile court's only concern. As discussed above, T.H. had a history of pulling his siblings off of the couch, and on one of these occasions, he threw S.H. across the floor. In addition, T.H. and M.H. liked to play with Father's tools and were permitted to do so even though the Parents had been warned about the possible dangers. Furthermore, T.H. was permitted to go into the basement unsupervised and was able to go outside without the Parents realizing it. Perhaps most compelling, the Parents had told Webb on several occasions that "you can't expect us to, to handle all three kids." Id. at 155.

Under these circumstances, we cannot say that the juvenile court erred when it ordered that the Children be removed from the home, inasmuch as an order requiring the Parents to participate in services while the Children remained in the home would not address their inadequate supervision. Consequently, this argument fails.

That being said, we note that the juvenile court determined that:

Mother and Father are truly concerned about the welfare of their children and love them. . . . The children have an important relationship with the parents. The parents have attended all the parenting time that has been made available to them. The parents have been actively involved during parenting time.

Appellants' App. p. 58. Additionally, we recognize that this family has been presented with difficult circumstances, some of which are beyond their control. We commend the Parents for their active involvement and encourage them to fully utilize the services

provided to them and the Children by the DCS.

III. CASA

The Parents argue that we should vacate all proceedings influenced by the CASA because she had a conflict of interest. Specifically, prior to the CASA's involvement in the instant case, she served as a CASA in a proceeding to terminate Father's parental rights to his son from a previous marriage.

When the State alleges children to be CHINS, the children are entitled to a CASA or a guardian ad litem (GAL). Ind. Code § 31-34-10-3. The role of the CASA is to "represent and protect the best interests of a child." Ind. Code § 31-32-3-6. In this role, the CASA "may research, examine, advocate, facilitate, and monitor a child's situation." Ind. Code § 31-9-2-28.

As an initial matter, the CASA argues that the Parents waived their argument that the proceedings in which she was involved should be vacated because the Parents failed to object to her continued service or to request her removal in the trial court. Generally, an issue cannot be raised for the first time on appeal. McBride v. Monroe County Office of Family & Children, 798 N.E.2d 185, 194 (Ind. Ct. App. 2003).

Here, the CASA was assigned to this case on or around February 23, 2009. And although Father expressed "concerns" about the CASA's prior involvement, he did not object to her assignment to the case herein. Tr. p. 72. Additionally, when the juvenile court asked Mother and Father whether they objected to the CASA observing a supervised visit, both responded "No." Id. at 73. Moreover, neither Mother nor Father

objected when the CASA was called to testify at the factfinding hearing. Under these circumstances, we conclude that the Parents have waived this issue on appeal.

Waiver notwithstanding, we cannot agree with the Parents that the CASA had an impermissible conflict of interest. Indiana Code section 31-32-3-2 addresses persons who are ineligible to serve as a CASA, stating that the “court may not appoint a party to the proceedings, an employee of a party to the proceedings, or a representative of a party to the proceedings.”

Here, the Parents do not allege that the CASA was a party, an employee of a party, or a representative of a party to the proceedings. Moreover, although additional restrictions on the eligibility of a CASA may vary from county to county, the Parents do not allege that Monroe County has adopted a policy that excluded the CASA herein.² And even assuming solely for arguments sake that the CASA has a disqualifying conflict of interest, as discussed above, there is ample evidence in the record to support the juvenile court’s decision. Accordingly, this argument fails.

The judgment of the juvenile court is affirmed.

DARDEN, J., and CRONE, J., concur.

² The Parents do point to a policy in Owen County which excludes a CASA who has had prior involvement with a family from serving as a CASA in proceedings involving the same family. However, inasmuch as the case herein originated in Monroe County, we do not find Owen County’s CASA policy relevant.