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IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF:	)	
Z.S.,	)	
	)	
CHILD IN NEED OF SERVICES,	)	
	)	
T.M. (Mother),	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 49A02-0811-JV-1036
	)	
MARION COUNTY DEPARTMENT OF CHILD SERVICES,	)	
	)	
Appellee-Petitioner,	)	
	)	
AND	)	
	)	
CHILD ADVOCATES, INC.,	)	
	)	
Co-Appellee (Guardian Ad Litem).	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Gary Chavers, Judge Pro Tempore
The Honorable Larry Bradley, Magistrate
Cause No. 49D09-0801-JC-2470

August 4, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

T.M. ("Mother") appeals from the juvenile court's determination that her minor child, Z.S., is a Child in Need of Services ("CHINS"). Specifically, she contends that the evidence is insufficient to support the CHINS determination and that the court committed reversible error by granting a motion filed by the Indiana Department of Child Services ("IDCS") to quash Mother's subpoena of the IDCS Director. Concluding that the evidence is sufficient to support the CHINS determination and that the juvenile court did not abuse its discretion by granting the motion to quash, we affirm the judgment of the juvenile court.

Facts and Procedural History

C.S. ("Father")[1] and Mother, who live together in Marion County, are the parents of Z.S., who was born on January 15, 2008. When Mother and Z.S. were in the hospital after Z.S. was born, nurses observed that Mother had to be instructed repeatedly as to how to feed Z.S. and how to change a diaper. The nurses also observed that Mother did

[1] Father is not a party to this appeal. Therefore, we focus our attention on the facts pertinent to Mother's appeal.

not take any initiative to start caring for Z.S. when he started to cry. Petitioner's Ex. 13 p. 92-93. On January 18, 2008, the Marion County Department of Child Services ("MCDCS") filed a petition in the Marion County juvenile court alleging that Z.S. was a CHINS, and Z.S. was removed from Mother's care. Appellant's App. p. 24-26.

At the time Z.S. was born, his parents were already involved with the MCDCS in a CHINS case regarding Z.S.'s older brother, N.S., who had previously been removed from the home and placed in foster care. As for N.S., he was born on March 28, 2006. The petition alleging that N.S. was a CHINS was filed on June 20, 2007, because N.S. had been diagnosed as a failure to thrive child. Petitioner's Ex. 8 p. 25-27. N.S. was so malnourished that his doctor believed he had possible brain damage as a result. Petitioner's Ex. 13 p. 93B. Additionally, N.S. had blood under his fingernails and scabs because he had been scratching at his skin. Tr. p. 38. It was initially believed that N.S. suffered from eczema, but it was eventually determined that N.S.'s skin was dying as a result of the malnourishment. *Id.* at 463. When he was fourteen months old, he could not crawl or support himself. Petitioner's Ex. 13 p. 93A-93B. His spine curved the wrong way because of the amount of time N.S. had been left in a car seat. *Id.* at 93B. The back of his head was flat. Tr. p. 39. N.S. had been dressed in dirty clothes which were so small that his legs would be drawn in an upward position. *Id.* at 38. Mother did not bathe N.S. or cut his nails regularly. *Id.* Also, Suzanne Maxsom Shircliff, a therapist with First Steps, observed visits between Mother and N.S. and noticed that there was not a strong attachment between N.S. and Mother. She opined that the weakness of the attachment was due to Mother's emotional neglect of N.S. *Id.* at 79-80, 89-90. The

Marion County juvenile court found N.S. a CHINS in October 2007. At disposition, the court attempted to remedy the conditions which led to the removal of N.S. by ordering the parents to complete a parenting assessment, parenting classes, and home-based counseling and to follow through on all recommendations by the counselors. Mother was also ordered to undergo a psychological evaluation which included an IQ test, and Father was ordered to undergo a drug and alcohol assessment. N.S. now requires occupational, developmental, physical, behavioral, speech, and nutrition therapies. *Id.* at 303.

Before Z.S. was born, several of the service providers associated with the case involving N.S., including a MCDCS case manager and the foster care case manager, concluded that Mother had not made enough progress with N.S. to safely place infant Z.S. with Mother. *Id.* at 384. The service providers were concerned that Mother would not be able to care for Z.S. without direction. Additionally, Mother continues to deny any role in N.S.'s problems, leading to concern that what happened to N.S. could also happen to Z.S. *Id.* at 33, 94, 357-58. Z.S. now receives physical and occupational therapies. *Id.* at 313.

Various additional individuals associated with Z.S.'s case expressed concern about Mother's ability to care for the children. On March 17, 2008, Dr. Mary Papandria, a clinical psychologist, completed an assessment of Mother. Dr. Papandria determined that Mother has significant cognitive impairment[2] and dependent personality features. *Id.* at 253. As a result, Dr. Papandria recommended that visitation with Z.S. and N.S. be supervised until Mother consistently shows acceptable problem solving and stress

[2] As a result of this disability, Mother's primary source of income is Social Security disability benefits.

management skills. Also in March, Father, who has two previous convictions for Class C felony child molesting, completed a comprehensive risk evaluation with Dr. Jim Dalton, a psychologist who assesses adults for the risk of acting out sexually. *Id.* at 166. In the evaluation, Father falsely asserted that he had only one previous child molesting conviction and that he had completed sex offender treatment. As a result, Dr. Dalton could not recommend unsupervised visitation until Father had completed both treatment and a second evaluation. Mother does not believe that Father committed these crimes, and Mother and Father still live together. Also, Father has been incarcerated at least twice for failure to pay child support.

Throughout the proceedings involving N.S. and Z.S., Mother participated in two home-based counseling programs: St. Vincent New Hope and Adult & Child. Mother participated in the St. Vincent New Hope program from November 2007 through April 2008, when MCDCS did not provide a re-referral. The home-based counselors would sometimes suggest to Mother that she check Z.S.'s diaper, burp him, or investigate further when Z.S. became fussy but felt that Mother generally interacted appropriately with Z.S. St. Vincent New Hope was concerned about Father's history and never recommended case closure, although the service providers associated with the case reported less concerns about Z.S. than about N.S. and believed that Z.S. could be returned to the home for temporary trial visits. Mother and Father began home-based counseling through the Adult & Child program in May 2008. Adult & Child reported that Mother needed direction on a "pretty consistent basis" to change Z.S.'s diaper, to burp him, to verbally interact with him, to occasionally put him down, and to feed him. *Id.* at 321.

Because Mother did not fully understand why N.S. was removed from her care, providers were concerned that the same thing that happened to him could happen to Z.S. *Id.* at 300, 323. Mother told one counselor that she would not take Z.S. to the doctor if he was ill because of the risk that he would be taken from her. *Id.* at 357. As a result of the providers' observations and Mother's lack of training to perform other tasks like preparing a bottle, bathing the child, and taking a temperature, Adult & Child could not recommend unsupervised visitation.

The juvenile court heard evidence on the CHINS petition over several days in June and July, 2008. At the conclusion of MCDCS's case, Mother's attorney moved for judgment on the evidence, which the juvenile court denied. The court also heard argument regarding MCDCS's motion to quash Mother's subpoena for IDCS Director James Payne, and the trial court granted MCDCS's motion to quash. After the hearings, the trial court issued its findings of fact and conclusions of law, in which the court concluded that Z.S. is a CHINS. The trial court's order determining that Z.S. is a CHINS reads, in part, as follows:

> 20. Mother's cognitive limitations and lack of parenting skills significantly impair her ability to safely and appropriately parent. Father has a pattern of being unavailable to provide adequate support for Mother, and has not addressed his history of child molestation with proper treatment. In addition, neither parent has taken responsibility for either of their children being removed by DCS, and they have been unsuccessful in home based counseling with [N.S.]. As a result, [Z.S.] is a child in need of services. [Z.S.] needs care, treatment, and rehabilitation that will not [be] provided without the coercive intervention of the Court.

Appellant's App. p. 130. Thereafter, the juvenile court held a dispositional hearing and ordered that Z.S. remain in foster care. *Id.* at 19. Mother now appeals.

Discussion and Decision

Mother contends that the evidence is insufficient to support the juvenile court's determination that Z.S. is a CHINS. Mother also contends that the trial court erred by quashing her subpoena for the IDCS Director.

I. Sufficiency of the Evidence to Support CHINS Determination

First, Mother contends that the evidence is insufficient to support the juvenile court's determination that Z.S. is a CHINS. The DCS has the burden of proving by a preponderance of the evidence that a child is in need of services. *In re T.S.*, 881 N.E.2d 1110, 1112 (Ind. Ct. App. 2008). When we review the juvenile court's CHINS determination, we consider only the evidence most favorable to the judgment and the reasonable inferences therefrom. *Id*. We will neither reweigh the evidence nor reassess the credibility of the witnesses. *Id*. Here, at Mother and Father's request, the juvenile court made specific findings and conclusions of law in its order adjudicating Z.S. to be a CHINS. Appellant's App. p. 128-31. Where a juvenile court enters specific findings and conclusions thereon, we apply a two-tiered standard of review. *Bester v. Lake County Office of Family & Children*, 839 N.E.2d 143, 147 (Ind. 2005). First, we determine whether the evidence supports the findings, and second, we examine whether the findings support the judgment. *Id*. We will set aside the court's judgment only if it is clearly erroneous. *Id*.

MCDCS alleged that Z.S. is a CHINS pursuant to Indiana Code § 31-34-1-1, which governs a CHINS determination and provides:

> 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 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:
>
> (A) the child is not receiving; and
>
> (B) is unlikely to be provided or accepted without the coercive intervention of the court.

The CHINS statute, however, does not require that a court wait until a tragedy occurs to intervene. *Roark v. Roark*, 551 N.E.2d 865, 872 (Ind. Ct. App. 1990). Rather, a child is a CHINS when he or she is endangered by parental action or inaction. *Id*. 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), *trans. denied*.

On appeal, Mother argues that the MCDCS failed to prove by a preponderance of the evidence that Z.S. is a CHINS because it failed to prove that Z.S. needs care, treatment, or rehabilitation that he is not receiving. Mother also argues that MCDCS failed to prove that the coercive intervention of the court is required. We disagree on both counts.

First, the evidence supports the trial court's determination that Z.S. needs care, treatment, or rehabilitation in addition to that which he is currently receiving. The evidence shows that none of the service providers associated with the case recommended case closure and Z.S.'s return to Mother. Rather, all the providers associated with the case agreed that Mother needed additional services in order to learn how to care for Z.S. appropriately. There were still concerns about Mother's ability to take care of Z.S., such

as Mother's inability to purchase formula and prepare bottles, bathe Z.S., and take a temperature. In the several days that Z.S. was in Mother's care, Mother needed help feeding Z.S. and changing his diaper, and she required prompting to investigate why Z.S. was crying. Petitioner's Ex. 13 p. 92-93.[3] As a result of this evidence, the court made factual findings that Mother exhibited a lack of parenting skills at the hospital after Z.S. was born, including feeding and nurturing skills, that Mother continued to be inconsistent in applying parenting skills in visits with the home-based counselors, that the service providers associated with the case felt that Mother needed additional services to appropriately parent Z.S., and that Mother's lack of parenting skills significantly impair her ability to safely and appropriately parent Z.S. These findings support the trial court's conclusion that Z.S. needs further care, treatment, and rehabilitation.

Second, the evidence supports the trial court's determination that Z.S. is in need of care or treatment that would not be provided without the coercive intervention of the court. Mother argues on appeal that the court's intervention is not required because the evidence shows that she independently and voluntarily secured Social Security disability income and various other benefits and that she enrolled N.S. in physical and occupational therapy with First Steps before MCDCS ever became involved with the family.

[3] Mother argues that the trial court abused its discretion by admitting the portion of this exhibit detailing the notes regarding Mother's interaction with Z.S. because the document does not indicate that the person who made the notes was the same person who observed the events described therein. We review a trial court's determination as to the admissibility of evidence for an abuse of discretion. *Smith v. State*, 754 N.E.2d 502, 504 (Ind. 2001). Indiana Rule of Evidence 803(6), which governs the hearsay exception for records of regularly conducted business activity, does not require that an individual with personal knowledge make the recording, but provides that the evidence may be admissible if the record was made from information transmitted by a person with knowledge. The Affidavit of Custodian of Business Records states that the "St. Vincent records were made from information transmitted by a person with knowledge of those matters." Petitioner's Ex. 13 p. 41. Thus, Mother's argument in this regard fails.

However, she did not voluntarily and independently seek enough assistance to prevent N.S. from being diagnosed as a failure to thrive child. Several service providers reported that Mother took no responsibility for her role in N.S.'s condition, which included dying skin, a flat head, a misshapen spine, weakness, lack of emotional attachment, and malnutrition so serious it could possibly cause brain damage. These providers expressed concern that the same could happen to Z.S. Indeed, at the hospital right after Z.S. was born, nurses observed that Mother needed repeated instruction on how to feed Z.S. and change a diaper. Petitioner's Ex. 13 p. 92-93. Although Mother investigated services with First Steps before MCDCS involvement, it was not until November 2007, when she was ordered to do so by the juvenile court that adjudicated N.S. a CHINS, that Mother began receiving any services from St. Vincent New Hope and Adult & Child and not until March 2008 from Healthy Families. Additionally, Mother believes that Father is not a danger even though he has been convicted for child molesting twice (including for molesting a male step-child, Tr. p. 197), failed to complete treatment, and lives in the home. In accordance with this evidence, the trial court made factual findings that Mother exhibited a lack of parenting skills at the hospital after Z.S. was born, that Mother continued to be inconsistent in applying parenting skills during home-based counseling sessions, that Z.S. could be placed in danger as a result of Mother's belief that Father is innocent and Father's failure to be honest with his evaluator and to seek treatment. These findings are supported by the evidence, and they support the trial court's conclusion that, even though Mother has previously sought some assistance on her own, the coercive

intervention of the court is required to ensure that Z.S. receives the care and treatment that he needs and that Z.S. does not suffer the same neglect as N.S.

The trial court's conclusions that Z.S. needs care, treatment, or rehabilitation that he is not currently receiving that will not be provided without the coercive intervention of the court are not clearly erroneous. The evidence is sufficient to support the trial court's determination that Z.S. is a CHINS.

II. Quash of Subpoena

Next, Mother contends that the trial court improperly granted MCDCS's motion to quash her subpoena calling on IDCS Director Payne to testify at the fact-finding hearing scheduled for July 24, 2008. On July 22, 2008, Mother served a subpoena and a subpoena *duces tecum* on Director Payne, ordering him to appear before the court on July 24 and bring all correspondence related to N.S's and Z.S.'s cases. DCS responded with a motion to quash the subpoena, alleging that Mother did not give advance notice of her intent to call Director Payne as a witness despite several opportunities to do so and that Mother had not indicated what relevant information Director Payne could provide as to Z.S.'s case. In her response, Mother alleged that there was newly discovered evidence that demonstrated the relevance of Director Payne's testimony; namely, an April 2008 email from Joseph Combs, a MCDCS supervisor, informing his staff that Director Payne had ordered the MCDCS to set N.S.'s case for permanency and directed the legal department to postpone an upcoming hearing for a length of time sufficient for the DCS to set it for a permanency hearing. The juvenile court heard argument on the motion. Mother argued that the email, combined with the hearing testimony of Brian Jensen, a

DCS employee under the supervision of Combs, demonstrated that Director Payne had taken an unusually rare personal interest in the case and that his testimony "is certainly of value for the Court to understand DCS' motives." Tr. p. 650. Mother implied that, because DCS ended the St. Vincent New Hope contract just as Mother began making progress, DCS was not following the policy of reunification and preservation of families in N.S.'s particular case. DCS counsel asserted that Mother had possessed the email since N.S.'s previous placement and jurisdiction review hearing but never had given advance notice of her intent to call Director Payne as a witness. The court granted the motion to quash because Director Payne's testimony regarding N.S.'s permanency plan had no relevance to a determination as to whether Z.S. was a CHINS and Mother waited until right before the hearing to issue the subpoena.

As a general matter, the decision to admit or exclude evidence is within a trial court's sound discretion and is afforded great deference on appeal. *Southtown Props., Inc. v. City of Fort Wayne ex rel. Dep't of Redev.*, 840 N.E.2d 393, 399 (Ind. Ct. App. 2006), *trans. denied*. A trial court's decision to exclude evidence constitutes an abuse of discretion if it is clearly against the logic and effect of the facts and circumstances before the court or if it misinterprets the law. *Id*. Additionally, erroneously excluded evidence requires reversal only if it relates to a material matter or substantially affects the rights of the parties. *Turner v. Bd. of Aviation Comm'rs*, 743 N.E.2d 1153, 1165 (Ind. Ct. App. 2001), *trans. denied*.

The court may properly quash a subpoena[4] on immateriality, irrelevancy or inadmissibility grounds. *In re Adoption of L.C.*, 650 N.E.2d 726, 732 (Ind. Ct. App. 1995), *reh'g denied*, *trans. denied*. However, our Court has previously warned that the "procedure for separating admissible from inadmissible testimony must not be the quashing of all testimony." *Newton v. Yates*, 170 Ind. App. 486, 353 N.E.2d 485, 494 (1976).

In this case, the issue below was whether Z.S. is a CHINS. Evidence regarding Mother's treatment of N.S. was relevant to the case involving Z.S. in light of witness testimony that Mother had not recognized responsibility for her role in N.S.'s health issues and that Z.S. was in danger of receiving the same treatment from Mother. But evidence regarding DCS's permanency plan for N.S. and Director Payne's role in those decisions had no bearing on the question before the trial court: whether Z.S. was endangered as a result of Mother's inability to care for him and needed care that he was not receiving and was unlikely to be obtained without the court's intervention. Director Payne's testimony regarding the permanency plan for N.S. would have been irrelevant to the court's determination of whether Z.S. is a CHINS. Therefore, the court did not abuse its discretion by quashing the subpoena. Further, Mother waited until two days before the hearing to issue her subpoena. In sum, we cannot say that the trial court abused its discretion by quashing Mother's subpoena.

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[4] *In re Adoption of L.C.* addresses the court's authority to quash a subpoena ordering a witness to attend a hearing, also called a subpoena *ad testificandum*. Indiana Trial Rule 45(B) provides authority for a trial court to quash a subpoena *duces tecum*, which orders a witness to provide specified documents, records, or things. *Newton*, 353 N.E.2d at 493; *see also* Black's Law Dictionary 1467 (8th ed. 2004) (defining subpoena *ad testificandum* and subpoena *duces tecum*). Mother's argument addresses the trial court's motion to quash as to the subpoena ordering Director Payne to appear at the fact-finding hearing.

Affirmed.

BAILEY, J., and BRADFORD, J., concur.