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ATTORNEY FOR APPELLANT:

JILL M. ACKLIN
Westfield, Indiana

ATTORNEYS FOR APPELLEE:

PATRICK M. RHODES
Indiana Dept of Child Services
Indianapolis, Indiana

ROBERT J. HENKE
DCS Central Administration
Indianapolis, Indiana

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IN THE COURT OF APPEALS OF INDIANA

IN THE MATTER OF: D.R., Minor Child, A CHILD IN NEED OF SERVICES,	)	
and	)	
J.R. (Father),	)	
Appellant-Respondent,	)	
vs.	)	Cause No. 49A02-1012-JC-1450
THE INDIANA 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 Julianne Cartmel, Magistrate
Cause No. 49D09-1002-JC-4672

August 10, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Judge

Appellant-respondent J.R. (Father) appeals the trial court's determination that D.R. is a Child in Need of Services (CHINS).[1] Specifically, Father maintains that the trial court's findings do not support the judgment that D.R. is a CHINS. Concluding there was sufficient evidence to support the trial court's judgment, we affirm.

FACTS

Father and E.D. (Mother) are the parents of D.R., who was born February 16, 2009. On February 1, 2010, when D.R. was still less than one-year old, Father's home was searched by Officer Matthew Jennings of the Indianapolis Metropolitan Police Department as a part of a "probation sweep."[2] At the time, Father was on probation for residential entry, and had not complied with the terms of his probation, which is what gave rise to the search. During the course of the search, Officer Jennings recovered a red

[1] E.D., D.R.'s mother filed a separate appeal, which we hand down contemporaneously under cause number 49A02-1012-JC-001416. All facts and arguments referenced herein refer to Father only.

[2] The trial record indicates that probation sweeps are generally performed when a probationer either violates their probation or commits some other infraction. Father had admitted to being in violation of his probation, which led to the sweep.

"bong" next to Father's dresser; a blue box, containing a fake cigarette known as a "hitter," commonly used for marijuana; a drug scale; and a black bag, containing two and one-half yellow pills and a pink pill.[3] Tr. p. 6. Officer Jennings also found D.R. in a second bedroom. In that bedroom, Officer Jennings discovered a handgun resting on a shelf in the closet only a few feet off the ground. Father's possession of this handgun was in violation of a condition of his probation, which prohibited him from possessing a firearm. Father was arrested as a result of the probation sweep. D.R. was removed from Father's home and sent to live temporarily with his maternal grandfather.

On February 2, 2010, Marion County Department of Child Services (DCS) filed a CHINS petition on behalf of D.R., wherein it alleged:

> 5. The child is a [CHINS] as defined in IC 31-34-1 in that: the child's physical or mental condition is seriously impaired or seriously endangered as a result of the inability, refusal, or neglect of a parent . . . to supply the child with necessary food, clothing, shelter, medical care, education or supervision; and the child needs care, treatment or rehabilitation that the child is not receiving and is unlikely to be provided or accepted without the coercive intervention of the [trial court], as shown by the following, to wit:
>
> A) On or about February 2, 2010, the Department of Child Services (DCS) determined, by its Family Case Manager (FCM) Heidi Otto, the child to be a [CHINS] because the child's parents . . . have failed to provide the child with a safe and appropriate living environment free from substance abuse. A substantial amount of marijuana, a scale, and other drug paraphernalia was found in the home. There was also a handgun in the child's bedroom, and [Mother] was in possession of Hydrocodone and Vicodin and did not have a prescription for them. Both parents were arrested as a result of the incident leaving no one with legal responsibility to care for the child. Therefore, the coercive intervention of the [trial court] is necessary to ensure the child's safety and well being.

[3]These pills were later determined to be Hydrocodone and Vicodin.

Appellant's App. p. 27-28 (parts omitted). The trial court granted DCS's petition, finding probable cause that D.R. was a CHINS. The trial court also appointed a guardian at litem on behalf of D.R.

On February 5, 2010, DCS became actively involved with both Father and D.R. Yanna McGraw was assigned as the Family Case Manager. McGraw recommended several services that were to be completed by Father, including home-based counseling, random drug screening, drug and alcohol assessment and treatment, and a psychological evaluation. On February 8, 2010, Father pleaded guilty to possession of drug paraphernalia, a class A misdemeanor, and received a suspended sentence.

At the April 6, 2010, initial hearing, Father denied all allegations in the CHINS petition. Id. at 82. The trial court found that removal of D.R. was necessary because of unsanitary conditions in the home. The trial court set the matter for mediation on April 28, 2010, and scheduled a pre-trial conference for May 18, 2010.

On May 18, 2010, Father advised the trial court that no agreement could be reached and, therefore, requested a fact-finding hearing. The trial court set a fact-finding hearing for July 19, 2010. Additionally, the trial court granted authorization for Father to have increased parenting time, including temporary in-home trial visitation. Id. at 89. D.R. was eventually placed with the parents again on June 10, 2010, on a temporary trial visitation in accordance with McGraw's recommendation.

At the fact-finding hearing on July 19, 2010, several witnesses were called to testify regarding the CHINS determination. Officer Jennings testified about his involvement during the probationary sweep. Chrystal Whitis, the home-based counselor, testified about her interaction with the parents during her home visits. Whitis testified regarding Father's participation in substance abuse classes and stated that her recommendation was based on the presence of drugs while the child was home, and Father's admitted drug abuse history. At the hearing, it was determined that Father had missed three classes that he had been ordered to attend. Ultimately, Whitis acknowledged that while Father was progressing somewhat with the required services, she was unwilling to foreclose the need for continuing the CHINS matter.

McGraw testified that based on the facts that both Mother and Father were arrested, leaving no one to care for D.R., and the subsequent charges against Mother and Father, both a CHINS determination and the recommended services put in place were necessary to protect D.R. Tr. p. 59. McGraw further testified that Father has failed to complete the recommended services that would allow her to conclude the CHINS case.

On October, 28, 2010, the trial court entered findings of fact and conclusions of law that determined D.R. was a CHINS. More particularly, the trial court determined that a probation sweep was conducted on Father's home, where D.R. lived, and during the search, law enforcement found a substantial amount of marijuana and drug paraphernalia, which was contrary to State law and in violation of Father's conditions of probation. Appellant's App. p. 130. In further violation of the conditions of probation, Father

possessed a handgun. Id. As noted above, that firearm was located only a few feet off of the ground in D.R.'s bedroom. Id. Father and Mother were arrested as result of the probation sweep, which left no lawful custodian to care for D.R. Id. Father has admitted to an ongoing history of substance abuse. Id. at 131. Although Father was initially unwilling to complete the substance abuse assessment per the recommended services, he later agreed to do so because it was a part of his probation. Id. However, Father had not completed the substance abuse program and had missed multiple sessions. Id.

Furthermore, the trial court summarized Father's extensive criminal background and history of non-compliance finding that:

> 14. [Father] has a history of non-compliance; specifically, he was required to complete drugs screens as a term of his probation. [Father] was on probation at the time of the probation sweep as a result of a conviction for Residential Entry . . . and had missed multiple drug screens and failed to [adhere to the requirements of his probation]. [Father] also f[a]iled to complete his [c]ourt ordered anger management under his criminal probation rules, and as of the date of the fact-finding, had failed to even begin those classes. Additionally, [Father] has missed multiple sessions of the substance abuse treatment that he eventually enrolled in after filing of the instant CHINS petition.
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> 19. Because [Father is] reluctant and/or unwilling to complete services recommended to address the needs of [D.R.]; because Father has violated the terms of his probation by possessing a handgun, stored in [D.R.'s] bedroom, with the child present; because Father has continued to miss substance abuse treatment after a delay in enrolling; because Father has a history of violated [c]ourt ordered programming as he has under his open criminal probation matter; the coercive intervention of the [trial court] is necessary to ensure that parents complete services necessary to provide a safe environment for [D.R.].

Id. at 131-32 (parts omitted). The trial court went on to conclude as a matter of law:

> 3. [D.R.] is a [CHINS] as defined in I.C. 31-34-1 in that his physical or mental condition is seriously impaired or seriously endangered as a result of the inability, refusal or neglect of his parent . . . to provide [D.R.] with necessary [f]ood, clothing, shelter, medical care, education or supervision.
> 4. [D.R.] is a [CHINS] because while the child was present, illegal drugs and paraphernalia were found in the home of [Father] . . . where [D.R.] resides, in violation of State law and in violation of [Father's] criminal probation terms; a[n] unsecured handgun was found in the bedroom of [D.R.], contrary to an existing [c]ourt order prohibiting the firearm to be in [Father's] residence; [Father] violated his [c]ourt ordered probationary terms by failing to report to multiple drug screens and failing to enroll in anger control classes, failing to attend all scheduled substance abuse classes; at the time of the fact-finding, failing to complete substance abuse classes . . . therefore, the coercive intervention of the [c]ourt is necessary to ensure that parents complete services necessary to ensure that [D.R.] is safe in his parents' care.

Id. at 133 (parts omitted).

On November 9, 2010, the trial court held the dispositional hearing. DCS filed its parental participation petitions and their pre-dispositional report, wherein DCS recommended that parents complete the services as recommended by McGraw. The trial court incorporated the pre-dispositional report into its findings and issued its dispositional order and parental participation decrees. The trial court continued placement of D.R. out of Father's home for the safety of the child because none of the services had been completed. The trial court ordered Father to participate and complete the recommended services as indicated in the parental participation decree. The trial court noted that Father agreed and acknowledged the rational basis for the order of and the need for a successful completion of those services. The trial court concluded that it was contrary to the health

and welfare of the child to be returned home. On December 10, 2010, Father appealed the trial court's adjudication of D.R. as a CHINS.

DISCUSSION AND DECISION

Father maintains that the trial court's conclusions of law are erroneous. Specifically, Father asserts that the uncontroverted evidence in the record indicates that D.R. is "healthy, well-adjusted and thriving in the care" of Father, which therefore renders the trial court's finding that D.R. is a CHINS clearly erroneous. Appellant's Br. p. 7.

The Due Process Clause of the Fourteenth Amendment protects the freedom of personal choice in family life matters. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974). Our Courts have interpreted this protection as inclusive of a parent's "'fundamental right to raise [their] child without undue interference by the state.'" E.P. v. Marion Cnty. Office of Family & Children, 653 N.E.2d 1026, 1031 (Ind. Ct. App. 1995) (quoting Wardship of Nahrwold v. Dep't of Pub. Welfare, 427 N.E.2d 474, 477 (Ind. Ct. App. 1981)). However, because the State has a compelling interest in protecting the welfare of the child, and a parent's right to raise his or her child is not absolute, the State may intervene in the parent-child relationship when the child is subjected to parental neglect, abuse, or abandonment. E.P., 653 N.E.2d at 1032.

The determination of whether a child is a CHINS is controlled by Indiana Code section 31-34-1-1, which states;

> Sec. 1. A child is a [CHINS] 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 . . . to supply the child with necessary food, clothing, shelter, medical care, education, or supervision; and
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> (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.

Our Supreme Court has interpreted this statute to require that the State prove the following elements by a preponderance of the evidence: (1) the child is under the age of 18; (2) one or more particular set(s) of circumstances set forth in the statute exists; and (3) the care, treatment, or rehabilitation needed to address those circumstances is unlikely to be provided or accepted without the coercive intervention of the court. In re N.E., 919 N.E.2d 102, 105 (Ind. 2010).

Where the trial court has issued findings of fact and conclusions of law, we apply a two-tiered standard of review and will not reverse the findings of the trial court unless clearly erroneous. In re A.C., 905 N.E.2d 456, 461 (Ind. Ct. App. 2009). However, where a party, as in this case, challenges only the judgment as contrary to law and does not challenge the factual findings, we direct our attention to the findings to determine whether they support the judgment. Smith v. Miller Builders, Inc., 741 N.E.2d 731, 734 (Ind. Ct. App. 2000). Findings are clearly erroneous when the record is devoid of any facts to support them either directly or by implication. In re A.C., 905 N.E.2d at 461. A judgment is clearly erroneous if it relies on an incorrect legal standard. Id.

We acknowledge the trial court's unique position to assess witness credibility and adjudicate the admissibility of evidence, and, therefore, do not reweigh the evidence nor judge the credibility of the witnesses. Id. While we defer substantially to a trial court's findings of fact, we give no deference to its conclusions of law. Id.

Father is correct that Whitis and McGraw testified that Father appears to be progressing and that conditions are improving. However, while Father's ability to care for D.R. is important and relevant to the determination of whether D.R. is a CHINS, we also evaluate a parent's habitual patterns of conduct. In re W.B., 772 N.E.2d 522, 530 (Ind. Ct. App. 2002). Here, Father has repeatedly succumbed to the use and abuse of illegal substances. Even worse, at least some of this abuse has occurred in D.R.'s presence. Father's conduct demonstrates a refusal to adhere to the conditions of his probation, whether it is skipping multiple drug screenings, failing to enroll in mandated anger control classes and substance abuse classes, or by possessing an unlicensed handgun that was found only a few feet away from D.R. In short, the evidence establishes that Father's extensive and habitual patterns of conduct endanger the health and well-being of D.R.

Finally, it was determined that Father had missed at least three substance abuse classes that he had been ordered to attend. Indeed, Father had been assigned to attend and complete these classes in light of his continued substance abuse problems and substantial shortcomings as a parent. Given these circumstances, we cannot conclude that the trial court's decision to adjudicate D.R. as a CHINS was clearly erroneous.

The judgment of the trial court is affirmed.

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