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ATTORNEY FOR APPELLANT:

LILABERDIA BATTIES
Batties & Associates
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

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

ROBERT J. HENKE
DCS Central Administration
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF: D.R., Minor Child,)
CHILD IN NEED OF SERVICES,)
)
and)
)
E.D. (Mother),)
)
Appellant-Respondent,)
)
vs.)
)
THE INDIANA DEPARTMENT OF CHILD)
SERVICES,)
)
Appellee-Petitioner,)
)
and)
)
CHILD ADVOCATES INC.,)
)
Co-Appellee-Guardian Ad Litem,)

Cause No. 49A02-1012-JC-1416

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 24, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Judge

Appellant-respondent E.D.¹ (Mother) appeals the trial court's determination that D.R. was a child in need of services (CHINS). Specifically, Mother maintains that the Marion County Department of Child Services (DCS) failed to provide sufficient evidence that D.R. is a CHINS. Concluding that sufficient evidence exists to support the trial court's determination, we affirm.

FACTS

Mother and J.R (Father) are the parents of D.R., who was born on 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 part of a "probation sweep."² At the time, Father was on probation, which in part, gave rise to the search. During the course of the probation sweep, Officer

¹ J.R. (Father) filed a separate appeal, which we hand down contemporaneously under cause number: 49A02-1012-JC-1450. All facts and arguments contained herein reference only Mother.

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 lead to the sweep.

Jennings recovered a red “bong” next to Mother’s dresser; a blue box, containing a fake cigarette known as a “hitter,” commonly used for marijuana; a drug scale; a black bag, containing two and one-half yellow pills and a pink pill;³ and a bag of marijuana on Mother’s person. Tr. p. 6. Amidst the sweep of Mother’s home, Officer Jennings found D.R. in a second bedroom. A handgun was on a shelf in the bedroom closet only a few feet off of the ground. Mother was arrested as a result of the recovery of drugs and paraphernalia from the sweep. D.R. was removed from the home and sent to live temporarily with maternal grandfather.

On February 2, 2010, DCS requested continued custody of D.R. and petitioned the trial court alleging D.R. was a CHINS, wherein DCS alleged that:

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.

³These pills were later identified as Hydrocodone and Vicodin.

Therefore, the coercive intervention of the [trial court] is necessary to ensure the child's safety and well being.

Appellant's App. p. 23-24 (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 ad litem on behalf of D.R.

On February 10, 2010, Mother filed a motion for "Immediate Placement and Praecipe for Earlier Hearing." Id. at 45. Mother sought the immediate return of her child from the trial court's initial placement with maternal grandfather. However, the trial court denied Mother's motion and set a hearing for March 9, 2010. Id. at 63.

At the initial hearing on March 9, 2010, Mother denied all allegations; however, the trial court found that it was "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." Id. at 76. On April 6, 2010, the trial court issued its order from the pre-trial hearing, wherein the trial court admonished Mother for diluted drug screens and ordered her to take a drug screen following the hearing. Id. at 83. The trial court further found that "the services offered and available have either not been effective or been completed that would allow the return home of the child without [the trial court's] intervention." Id. at 84. The trial court set the matter for mediation for April 28, 2010, and a subsequent pre-trial conference for May 18, 2010.

On May 3, 2010, Mother pleaded guilty to possession of a controlled substance and was placed on probation. At the pre-trial conference on May 18, 2010, Mother

advised the trial court that no agreement could be reached and requested a fact-finding hearing, which the trial court set for July 19, 2010. Additionally, the trial court granted, at the request of DCS, authorization for Mother to have increased parenting time, including temporary in-home trial visitation. Id. at 87. D.R. was eventually placed back with parents on June 10, 2010, on a temporary trial visitation per the support and advisement of DCS.

On July 19, 2010, the trial court held a fact-finding hearing during which several witnesses were called to testify regarding the CHINS determination. Officer Jennings testified about his involvement during the investigative sweep. Chrystal Whitis, the home-based counselor, testified about her involvement and interactions with the parents during her home visits. Whitis recommended that Mother undergo a psychological examination. Whitis testified that she was concerned that, “because of the behavior [she has] seen and the history that [Mother] has told [her] about . . . dealing with anxiety . . .” Mother might act on sudden emotions or impulses if she did not receive treatment. Tr. p. 24. Whitis pointed to incidents where Mother would experience dramatic mood shifts, triggered by innocent recommendations, even on the part of Father. In one instance, Whitis recalled Mother going from “calm” to “extremely angry” because of Father’s suggestion that she undergo a psychological evaluation. Id. at 37. Whitis also testified that at times Mother’s anger would cause her to act irrationally and serve as an impediment to accomplishing anything else. Id. at 39. Though Whitis acknowledged Mother’s progress in the assigned services, Mother had not completed the substance

abuse classes, and Whitis could not recommend that the CHINS matter be closed. Id. at 22, 30.

Yanna McGraw, the family case manager, was also called to testify at the hearing. She testified that D.R. was a CHINS because the parents' incarceration left the child without a caretaker, and the parents failed to complete the recommended services by the time of the hearing. Id. at 59. McGraw also noted the basis for many of the recommended services and assessments were directly related to Mother and Father's criminal history and substance abuse problems. As a result, McGraw could not recommend closure of the CHINS matter.

On October 28, 2010, the trial court entered findings of fact and conclusions of law, and determined that D.R. was a CHINS. The trial court's findings indicated that a probation sweep was conducted on Mother's home, where D.R. lived, and during the search, law enforcement found a substantial amount of marijuana on Mother's person and other drugs and drug paraphernalia scattered throughout the house. Appellant's App. p. 128. Mother admitted to law enforcement that the pills belonged to her; however, she did not have a valid prescription for them. Id. As a result of the search, Mother was arrested, which left no lawful custodian to care for D.R. Id. Mother later pleaded guilty to possession of a controlled substance. Id. The trial court further found that Mother was recommended to undergo a psychological evaluation due to her inappropriate and erratic behaviors. Id. at 129. Mother admitted to her difficulty in controlling her sporadic impulses and conceded to the benefit of a psychological evaluation for her and the safety

of her son. Id. Yet, after a referral was made for Mother to undergo the mental health assessment, Mother refused and failed to attend the assessment. Id. at 129-30. She informed the trial court that she no longer believed it to be necessary for her to undergo treatment. Id. at 130. The trial court also specifically cited:

17. [Whitis] testified that she had concerns that [Mother's] mental health state may have been an underlying factor in the issues that precipitated the filing of this CHINS matter, and that should [Mother] fail to address any issues as necessary following an assessment, there is a substantial risk of endangering [D.R.] if he remains in her care.

Id. The trial court went on to conclude as a matter of law that:

[D.R.] is a [CHINS] because while the child was present, illegal drugs and paraphernalia were found in the home of . . . [Mother] where [D.R.] resides, in violation of State law . . . a[n] unsecured handgun was found in the bedroom of [D.R.] . . . [Mother] failed to follow through with mental health assessment and any recommended treatment; therefore, the coercive intervention of the [trial court] is necessary to ensure that parents complete services necessary to ensure that [D.R.] is safe in parents' care.

Id. at 131.

On November 9, 2010, the trial court held the dispositional hearing. DCS filed its parental participation petitions and its 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. At the date of the dispositional hearing, Mother had not completed the recommended services but was expected to have completed them soon. On December 9, 2010, Mother appealed the CHINS adjudication.

DISCUSSION AND DECISION

Mother argues that DCS did not prove by a preponderance of the evidence that D.R. was a CHINS. 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, this right is not absolute as the State has a compelling interest in protecting the welfare of the child and 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;

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
- (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 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). We first determine whether the evidence supports the factual findings and then whether the factual findings support the judgment. Id. Findings are clearly erroneous when the record is devoid of any facts to support them either directly or by implication. Id. 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 do not defer to its conclusions of law. Id.

Mother's argument essentially directs our attention to two previous cases in which this Court reversed a CHINS determination. First, Mother analogizes the findings of this case to our decision in Perrine v. Marion Cnty. Office of Child Servs., 866 N.E.2d 269 (Ind. Ct. App. 2007), for the proposition that single instances of drug use and brief periods of incarceration are insufficient to find that a child is a CHINS. Secondly, Mother attaches our holding from Perrine to the holding of In re T.H., 856 N.E.2d 1247

(Ind. Ct. App. 2006), which Mother believes supports her position that “neither an improperly stored gun, nor a parent’s refusal to participate in all services recommended by DCS was enough to warrant a CHINS case.” Appellant’s Br. p. 14. Standing alone, each of these claims may not be sufficient to support a CHINS determination. However, when the evidence is viewed in its entirety, and all inferences are drawn in support of the judgment, Mother’s argument must fail.

Unlike in Perrine, where the mother’s drug use was at a friend’s house and remote to the child, the presence of drugs here are in the very living quarters of D.R. and scattered throughout Mother’s home. The trial court also cited to the unsanitary living conditions that precluded D.R.’s return to Mother’s home. Appellant’s App. p. 80. The record before us demonstrates a significant history of drug use by Mother and Father, who both live in the same home with D.R. Ex. 1; Ex. 4. D.R. has been subjected to his parent’s drug use as drugs and drug paraphernalia were found throughout the child’s home. Tr. p. 6 Mother has elected to follow a criminal path alongside Father, and without any regard for D.R.’s well-being. Moreover, the testimony of Whitis indicates that Mother has a tendency to become easily angered and act irrationally, which in Whitis’s opinion, further endangers D.R.’s well-being. Id. at 27-28. Mother has refused to participate in some of the recommended services, specifically a psychological evaluation, and has resisted other services recommended by McGraw. Id. at 22-24; 29. The services in which Mother has failed to complete were recommended on the grounds and observations that Whitis and McGraw believed to endanger D.R.’s well-being. Thus,

in order to address these substantial parental shortcomings that endanger D.R.'s well-being, these services were recommended and need to be completed before D.R. can safely transition back into Mother's custody.

In sum, when considering Mother's failure to complete the court-ordered services, coupled with the evidence of repeated drug use, resistance to treatment, and her propensity to act irrationally and engage in criminal pursuits, we cannot say that the trial court erred in concluding that the coercive intervention of the trial court is necessary to ensure that Mother receives those recommended services. Thus, we hold that the evidence was sufficient to conclude that D.R. is a CHINS.

The trial court's judgment is affirmed.

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