**Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.**

ATTORNEY FOR APPELLANT:

**AMY KAROZOS**
Indianapolis, Indiana

ATTORNEY FOR APPELLEE MARION COUNTY DEP'T OF CHILD SERVICES:

**CHELYNNE LILE**
Indianapolis, Indiana

FILED
Dec 11 2009, 9:18 am
CLERK
of the supreme court, court of appeals and tax court

# IN THE COURT OF APPEALS OF INDIANA

| | | |
|---|---|---|
| IN THE MATTER OF: | ) | |
| T.B., N.B., and J.B., | ) | |
| CHILDREN IN NEED OF SERVICES | ) | |
| | ) | |
| T.M., Mother, | ) | |
| | ) | |
| Appellant/Respondent, | ) | |
| | ) | |
| vs. | ) | No. 49A05-0904-JV-222 |
| | ) | |
| MARION COUNTY DEPARTMENT OF | ) | |
| CHILD SERVICES, | ) | |
| | ) | |
| Appellee/Petitioner, | ) | |
| | ) | |
| and | ) | |
| | ) | |
| CHILD ADVOCATES, INC., | ) | |
| | ) | |
| Appellee/Guardian ad Litem | ) | |

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Marilyn A. Moores, Judge
The Honorable Beth L. Jansen, Magistrate
Cause Nos. 49D09-0812-JC-54440, 49D09-0812-JC-54441, and 49D09-0812-JC-54442

**December 11, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**CRONE, Judge**

## Case Summary

T.M. ("Mother") appeals the juvenile court's dispositional order declaring that three of her children, T.B., N.B., and J.B., are children in need of services ("CHINS"). We affirm in part, reverse in part, and remand.

## Issues

Mother raises two issues for review:

I. Did the Marion County Department of Child Services ("DCS") present sufficient evidence to support the juvenile court's determination that her children were CHINS?

II. Did the juvenile court err in ordering placement of the children as "temporary trial in-home visit" where the children had never been physically removed from Mother's home?

## Facts and Procedural History

On Friday, November 14, 2008, Mother left for work at 9:30 p.m., leaving unsupervised her three youngest children, T.B., N.B., and J.B., then ages nine, six, and four respectively. Two days prior, she had contacted the children's father, J.B. ("Father"), and notified him that she would be leaving town for the weekend for undisclosed reasons. She asked Father to watch the children during the upcoming weekend and, although his work schedule prevented him from watching them Friday night or Saturday during the day, Father agreed to try to find a babysitter. He was unsuccessful, and notified Mother as such on Friday. Nevertheless, after her Friday night bartending shift, Mother spent the remainder of the weekend with her boyfriend. Late Friday night, Father went to Mother's home to see if

the children were there, but no one answered the door. He returned on Saturday morning, and again, no one answered the door.

Meanwhile, the children had stayed alone in the home overnight, with nine-year-old T.B. in charge. Despite Mother's instructions for T.B. to call her in the event of an emergency, there was no telephone service in the house at the time. The children unsuccessfully tried to find some cereal on Saturday morning, so they did not eat breakfast. They found ingredients to make sandwiches for lunch, but they could not find any food to eat for dinner. Around 7:00 p.m. on Saturday, they went to the neighbor's house and called Father, who arrived at the house shortly thereafter, accompanied by Indianapolis Metropolitan Police. By that time, the children's fourteen-year-old half brother, G.M., had arrived for his regular weekend visit with Mother.[1] Father took T.B., N.B., and J.B. to his home for the remainder of the weekend, and G.M. stayed alone at Mother's house until his father came to retrieve him on Sunday afternoon. Mother neither stopped by the house nor called Father to check on the children's well-being until late Sunday afternoon. She phoned G.M. on Saturday evening, and he told her that Father had just left with the children. G.M. did not see Mother at all during that weekend.

On November 18, 2008, DCS received a report from Indianapolis Metropolitan Police that T.B., N.B., and J.B. had been left unsupervised for a twenty-four-hour period from the evening of November 14 to the evening of November 15, 2008. As a result, DCS

[1] Mother's oldest child G.M. lives with his father on weekdays and stays with Mother on weekends. He is the not subject of either the CHINS order or this appeal.

commenced an investigation of the family. When DCS caseworker Jason Jones visited Mother's home on November 24, 2008, Mother stated that this was the first time she was made aware that the children had spent twenty-four hours alone. Although Mother allowed Jones to speak with the children, she refused his request to speak with them alone. As a result of Jones's visit, DCS offered the family an informal adjustment, which Mother refused to sign.[2] On December 2, 2008, DCS filed a petition alleging that T.B., N.B., and J.B. were CHINS. Later in December, DCS caseworker Karen Wilkerson took over the case, but Mother refused DCS services. At all times during the pendency of this case, the children resided with Mother and were never physically removed from her home.

On January 23, 2009, T.B. and N.B. came home from school to an empty house. When Mother returned home at 6:00 p.m., she dropped off J.B. and left again. The children were afraid and called Father, who picked them up at Mother's home at about 9:00 p.m.

On February 23 and March 3, 2009, the juvenile court held a factfinding hearing. On April 6, 2009, the juvenile court entered a dispositional order finding T.B., N.B., and J.B. to be CHINS, making them wards of DCS, and ordering temporary trial in-home visitation. Mother now appeals. Additional facts will be provided as necessary.

## Discussion and Decision

### *I. Sufficiency of Evidence*

Mother contends that the evidence is insufficient to support the juvenile court's CHINS determination. When reviewing the sufficiency of evidence, we give due regard to

[2] The record indicates that Father agreed to the informal adjustment. Appellant's App. at 68.

the juvenile court's ability to assess the credibility of witnesses. *Parmeter v. Cass County Dep't of Child Servs.*, 878 N.E.2d 444, 450 (Ind. Ct. App. 2007). Thus, we neither reweigh evidence nor judge witness credibility. *Slater v. Marion County Dep't of Child Servs.*, 865 N.E.2d 1043, 1046 (Ind. Ct. App 2007). Rather, we consider the evidence and reasonable inferences most favorable to the judgment. *In re D.H.*, 859 N.E.2d 737, 741 (Ind. Ct. App. 2007). Here, the juvenile court entered findings of fact and conclusions thereon. Thus, we apply a two-tiered standard of review and will not set aside the findings or judgment unless they are clearly erroneous. *Parmeter*, 878 N.E.2d at 450. First, we consider whether the evidence supports the factual findings. *Id*. Then, we consider whether the findings support the judgment. *Id*. "Findings are clearly erroneous only when the record contains no facts to support them either directly or indirectly." *Id*. (citation and quotation marks omitted). A judgment is clearly erroneous if it relies on an incorrect legal standard. *Id*.

The Fourteenth Amendment to the United States Constitution provides parents with the right to establish a home and raise children. *In re A.I.*, 825 N.E.2d 798, 804 (Ind. Ct. App. 2005), *trans. denied*. However, these protected parental rights are not absolute and must be subordinate to the children's well-being and best interests. *Id*. at 804-05. Further, as with parental rights terminations, the purpose of a CHINS adjudication is not to punish the parents, but to protect the children. *Id*. at 805.

The DCS has the burden of proving by a preponderance of evidence that a child is a CHINS. Ind. Code § 31-34-12-3. A child is a CHINS if, before the child becomes eighteen 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.

Ind. Code § 31-34-1-1 (emphasis added).

The juvenile court concluded that Mother's failure to provide adequate supervision without coercive intervention endangered her children. The record indicates that she left her nine-, six-, and four-year-old children home alone for a twenty-four-hour period. Moreover, she left them home alone for shorter periods of time on other occasions. Mother argues that nine-year-old T.B. was mature enough to be left in charge.[3] No bright line rule exists as to the appropriate age a child must achieve in order to be left at home without parental supervision. As a result, we must consider the facts and circumstances that would support a finding that the parent's inadequate supervision seriously endangered the child's physical or mental condition. Such facts would include the age and relative maturity of the child as well as the length and frequency of the parent's absences.

[3] Mother asserts that T.B. had taken safe sitter training. At the CHINS hearing, fourteen-year-old half-brother G.M. had a certification card to prove he had completed safe sitter training. However, no such certification card was mentioned to support her assertion regarding T.B.

In the criminal context, in *Scruggs v. State*, 883 N.E.2d 189, 191 (Ind. Ct. App. 2008), *trans. denied*, we declined to impose a hard and fast rule that leaving a seven-year-old home alone for three hours constitutes criminal neglect. In that case, the mother left the child home alone during the morning to run an errand. When she returned, he was gone. Shortly thereafter, she discovered that he was with her boyfriend's uncle and appeared to be fine. We held that the State had failed to prove beyond a reasonable doubt that the mother was aware of a high probability of actual and appreciable danger as required by the criminal statute, finding that "[t]here is admittedly a fine line between properly exercising the police power to protect dependents and improperly subjecting every mistake a parent may make in raising his or her child to prosecutorial [or DCS] scrutiny." *Id*. at 191 (citation and quotation marks omitted). We noted, however, that "law enforcement officials need not await actual loss of life, limb or property, but may intervene where conduct is sufficient to warrant belief that a harmful consequence will ensue." *Id*. (citation and quotation marks omitted). *Scruggs* involved an isolated incident lasting three hours. Here, the record indicates a pattern of leaving the children home alone for periods ranging from a couple hours to twenty-four hours. Moreover, Mother was not charged with criminal neglect and its enhanced standard of proof; rather, the DCS sought to establish by a preponderance of evidence the statutory requirements for a CHINS determination.

Like the criminal neglect statute, the CHINS statute 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*. Children have been found to be CHINS in cases where parents have left them unsupervised. *See e.g., In re Involuntary Termination of Parent-Child Relationship of Kay.L.*, 867 N.E.2d 236, 238 (Ind. Ct. App. 2007) (children ages eleven, four, and two found to be CHINS where mother left them while she went out partying and did not come home); *Stewart v. Randolph County Office of Family & Children*, 804 N.E.2d 1207, 1209 (Ind. Ct. App. 2004) (children ages seven, five and three repeatedly left unattended in apartment were determined to be CHINS), *trans. denied*.

Here, Mother asked Father to watch the children for the weekend. He told her that he was unavailable due to his work schedule and that she needed to rearrange her plans. Instead, she left the children home alone on a Friday night and did not tell T.B. when she would be back. After she completed her Friday night bartending shift, she spent the remainder of the weekend with her boyfriend. She neither went by the house to check on the children nor called Father to verify that he had picked them up. Instead, she repeatedly testified that she "assumed" he would come and get them. Tr. at 6, 12. To the extent she argues that she called Father but that his voice mailbox was full, we note Father's testimony that he did not received any "missed call" notifications on his cell phone.

The record indicates that, despite Mother's standing instruction that T.B. should call her in case of an emergency, she did not have phone service in the house at the time. Furthermore, there was very little food that T.B. could prepare, and when the children had gone without breakfast or dinner, they finally went to a neighbor's house to call Father. Moreover, the police reported to DCS that when they went to the home on Saturday evening,

November 15, there was no heat downstairs. Appellant's App. at 98. In addition, G.M.'s arrival at the home on Saturday evening indicates that Mother had failed to tell him that she would not be there for his regularly scheduled weekend visit with her. When she phoned G.M. on Saturday night, and he told her the children had just left with Father, she did not call Father to ask for an explanation.

Mother argues in her brief that this was a one-time occurrence which cannot support a CHINS determination. Appellant's Br. at 17. We disagree. Mother demonstrated a pattern of leaving the children unsupervised. T.B. testified that Mother has left him in charge of his siblings before and that "sometimes" she tells him where she is going. Tr. at 32. Mother herself testified about her pattern of leaving the children at home alone: "I've left my children maybe an hour, a[n] hour and a half before and he's picked them up, we've never had a problem. So I was assuming that was what happened this time." *Id*. at 6. Despite the November incident and DCS's ensuing investigation and CHINS petition, Mother once again left the three children alone on January 23, 2009. That day, T.B. and N.B. came home from school to an empty house. Later, around 6:00 p.m., she returned home, dropped off J.B. with her siblings, and left for work. At 9:00 p.m., the children were afraid and called Father, who again came to pick them up.

Notably, DCS caseworker Jones testified that in the late 1990s, Mother had a prior DCS "substantiation" for neglect of G.M. *Id*. at 46. We have held that "evidence of a parent's prior involvement with the [DCS], including the filing of previous CHINS petitions … is helpful in demonstrating negative habitual patterns of conduct to determine parental

fitness and the best interests of the children." *A.F. v. Marion County Office of Family & Children*, 762 N.E.2d 1244, 1252 (Ind. Ct. App. 2002), *trans. denied*. The record indicates that Mother had a pattern of failing to provide adequate supervision for her children and, in the case of the November weekend, she left her three youngest children, age nine and under, alone for twenty-four hours in a home with no phone service and no heat downstairs.

Finally, Mother demonstrated an uncooperative attitude that made it unlikely that the children would get help absent coercive intervention by the court. We have held that a parent's lack of cooperation in DCS services is probative in highlighting her inability or refusal to care for the children. *In re A.C.*, 905 N.E.2d 456, 462 (Ind. Ct. App. 2009). Here, Mother repeatedly refused to cooperate with DCS in taking advantage of the services afforded her, and DCS recommended anger management as part of her counseling. Tr. at 97. Moreover, Mother's hostile attitude toward Father during the proceedings communicated the strong message that she did not want the children to spend time with him except on her own terms and at her own convenience, and that when schedules conflicted and communication broke down regarding supervision of the children, she was free to assume that he would be the one to make adjustments. During the dispositional hearings, the juvenile court had to admonish her: "[Mother], you're gonna need to reduce your, your, your audible indications of your frustration and your disbelief …. Suck it up and be quiet." *Id*. at 25. Thus, the evidence supports the need for coercive intervention by the court.

In sum, we are mindful of the plight of single parents who must procure childcare in order to work outside the home. However, Mother's pattern of leaving the children

unsupervised, both for work and for pleasure, while assuming that Father would adjust his schedule, led to the children being unsupervised for twenty-four hours in a home that lacked telephone service and was not fully heated. Even after DCS initiated the CHINS proceedings, Mother left her children alone and frightened on at least one other occasion. Thus, her failure to adequately supervise the children seriously endangered their physical and mental condition. As such, the probative evidence and inferences support the juvenile court's determination that T.B., N.B., and J.B. are CHINS. Accordingly, we affirm the CHINS determination.

### *II. Temporary Trial In-Home Visitation*

Mother next asserts that the juvenile court erred in ordering placement of the children as "temporary trial in-home visit." Appellant's App. at 17. At the final hearing, the juvenile court ordered that the children be made wards of DCS. Appellant's App. at 17. As such, the court had the authority to order that the children be physically removed and placed elsewhere. However, the record clearly indicates, and DCS admits, that T.B., N.B., and J.B. have resided with Mother throughout the pendency of the CHINS proceedings and have never been physically removed from her home. Moreover, the record does not reflect any oversight on the part of the juvenile court in allowing them to reside with Mother. Instead, the record indicates that the court intentionally allowed the children to reside with Mother, subject to her not leaving them at home alone and her participation in services. However, on its face the "temporary trial in-home visit" placement is ambiguous, and to the extent such language might prove important in calculating the amount of time that the children had been removed

from the home for purposes of any future termination proceedings,[4] it must be corrected to reflect the reality of the children's placement. As such, we reverse and remand with instructions to clarify this portion of the order. In all other respects, we affirm.

Affirmed in part, reversed in part, and remanded.

RILEY, J., and VAIDIK, J., concur.

---

[4] *See* Ind. Code § 31-35-2-4(b)(2)(A) (stating that child must have been removed from parent for at least six months or under county supervision for at least fifteen of the most recent twenty-two months before petition for termination may be filed).