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**IN THE  
COURT OF APPEALS OF INDIANA**

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IN THE MATTER OF L.M., L.M., )  
and J.D., )

CHILDREN IN NEED OF SERVICES, )

N.D., (Mother), )

Appellant-Respondent, )

vs. )

MARION COUNTY DEPARTMENT )  
of CHILD SERVICES, )

Appellees-Petitioners, )

and )

CHILD ADVOCATES, INC., )

Co-Appellee (Guardian Ad Litem). )

No. 49A04-0911-JV-644

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Marilyn Moores, Judge  
The Honorable Beth Jansen, Magistrate  
Cause Nos. 49D09-0907-JC-35198

**July 6, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Judge**

Case Summary and Issues

L.M. (“Father”) and N.D. (“Mother”) appeal the juvenile court’s adjudication of their children, Le.M., L.M., Jr., and J.D., as children in need of services (“CHINS”). Father and Mother raise two issues for our review: 1) whether the juvenile court properly admitted testimony regarding statements Father and Mother made to a Department of Child Services (“DCS”) caseworker; and 2) whether the evidence is sufficient to support the juvenile court’s order declaring the children to be CHINS.<sup>1</sup> Concluding the juvenile court did not abuse its discretion in admitting the caseworker’s testimony but the CHINS determination is not supported by sufficient evidence, we reverse.

Facts and Procedural History

Father and Mother, who are unmarried, are the parents of three children, Le.M., born May 31, 2002, L.M., Jr., born July 15, 2004, and J.D., born February 6, 2007. On July 25,

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<sup>1</sup> Father and Mother are represented by separate counsel on appeal and filed separate briefs. Their issues and arguments are identical, however.

2009, Father and Mother had an altercation that resulted in a domestic violence call to police. Father and Mother were both arrested, and the children were taken into custody and placed in foster care. A report of child neglect was made to DCS. DCS caseworker Michelle Tackett investigated the report by visiting Father at the Marion County Jail. Tackett does not specifically recall giving Father a written advice of rights form, but testified that she “usually” does and so believes she “possibly did” in this case. Transcript at 7. Father told Tackett there was “some pulling and tussling going on” between him and Mother and that he got some scratches in the altercation. Id. at 10. Tackett also visited Mother in jail, and noticed several marks and scratches on Mother’s throat and neck. Mother told Tackett that Father choked her and that all three children were present during the altercation. Mother also told Tackett there had been domestic violence between her and Father approximately five to ten years ago. Tackett also discovered a report of an incident on July 4, 2009, where Mother accused Father of choking her.<sup>2</sup>

On July 28, 2009, DCS requested the juvenile court authorize the filing of a CHINS petition as to each of the children. That same day, the petitions were filed and an initial hearing was held at which the juvenile court appointed a guardian ad litem for the children, found removal and detention of the children was necessary, and also found there should be no parenting time because Father and Mother had not yet appeared in court. Father and

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<sup>2</sup> It appears Mother later retracted her allegations regarding the July 4 incident as there was evidence Father was out of town on that date. See Tr. at 29 (domestic violence counselor telling juvenile court after CHINS finding but while court was considering placement options that “[Mother] did say that she lied about initial reporting in July . . . On July the 4th, concerning a battery by [Father]. As I understand it, he was in Chicago on July the 4th.”).

Mother appeared at the continued initial hearing on August 11, 2009, and the juvenile court allowed supervised parenting time and, over objection by DCS, ordered the children placed in the custody of relatives.

At the fact-finding hearing on September 28, 2009, DCS called Tackett as a witness. Counsel for the parents<sup>3</sup> objected when Tackett began to testify to what the parents told her about the incident when she visited them in jail on the basis that Tackett did not first give them a written advice of rights form pursuant to Indiana Code section 31-34-4-6(b). The juvenile court overruled the objection and Tackett testified regarding her conversations with Father and Mother. DCS family case manager Akeyia Johnson testified that Father and Mother have voluntarily gotten involved in domestic violence and home-based counseling, that Mother has a job, and that prior to DCS intervention, the children were enrolled in a charter school. At the conclusion of the hearing, the juvenile court determined “DCS has shown by a preponderance of the evidence that there are domestic violence issues in the home [and] the children are children in need of services.” Tr. at 27. The juvenile court continued the children’s out-of-home placement. Father and Mother now appeal the CHINS determination.

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<sup>3</sup> Father and Mother were represented by separate counsel at the hearing. The transcript identifies only “The Court,” “DCS,” and “Counsel” as participating in the hearing, however. It is therefore difficult to

## Discussion and Decision

### I. Admission of Evidence

#### A. Standard of Review

We review the juvenile court's ruling on the admission of evidence for an abuse of discretion. In re J.V., 875 N.E.2d 395, 401 (Ind. Ct. App. 2007), trans. denied. An abuse of discretion occurs if the juvenile court's decision is clearly against the logic and effect of the facts and circumstances before it. Id. "The fact that evidence was erroneously admitted does not automatically require reversal, and we will reverse only if we conclude the admission affected a party's substantial rights." Id. (citation omitted).

#### B. Indiana Code section 31-34-4-6

Father and Mother contend the juvenile court erred in admitting evidence of their statements to Tackett because they were not informed of their legal rights as required by Indiana Code section 31-34-4-6 before talking to her. Section 31-34-4-6 provides:

(a) The department shall submit written information to a parent . . . of a child who is alleged to be abused or neglected regarding the following legal rights of the parent . . . :

(1) The right to have a detention hearing held by a court within forty-eight (48) hours after the child's removal from the home and to request return of the child at the hearing.

(2) The right to:

(A) be represented by an attorney;

(B) cross examine witnesses; and

(C) present evidence on the parent's . . . own behalf;

at each court proceeding on a petition alleging that the child is a child in need of services. The parent . . . has the right to be represented by a court appointed attorney under clause (A) upon the request of the parent . . . if the court finds that the parent . . . does not have sufficient financial means for obtaining representation as described in IC 34-10-1.

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discern whether one or both counsel made an objection to this line of inquiry.

- (3) The right not to make statements that incriminate the parent . . . and that an incriminating statement may be used during a court proceeding on a petition alleging that the child is a child in need of services.
  - (4) The right to request to have the case reviewed by the child protection team under IC 31-33-3-6.
  - (5) The right to be advised that after July 1, 1999, a petition to terminate the parent-child relationship must be filed whenever a child has been removed from the child's parent and has been under the supervision of the department for at least fifteen (15) months of the most recent twenty-two (22) months.
- (b) The department shall submit the written information under subsection (a) to the child's parent . . . at the time:
- (1) the child is taken into custody; or
  - (2) the department files a petition alleging that the child is a child in need of services;
- whichever occurs earlier.

When questioned, Tackett said she did not recall if she gave Father or Mother an advice of rights form “but I believe I possibly did. I usually do but I don’t recall exactly. . . . I don’t know for sure, no.” Tr. at 7-8. Tackett acknowledged her obligation to provide such a form: “I usually do [give the form] when I speak with [parents] but I don’t recall for sure. But I am required to when I speak with parents in these types of situations.” *Id.* at 11. The children had already been removed from the home at the time Tackett spoke with Father and Mother and therefore, pursuant to section 31-34-4-6(b)(1), the written advice of rights information should have been given to them at that time if it had not been already.

The juvenile court overruled the parents’ objection to Tackett’s testimony in part because “I am unwilling to equate a family case manager who is assigned to assess initial allegations of abuse and neglect . . . to essentially find them the equivalent of law enforcement.” Tr. at 13. The statute states “the department shall submit written information to a parent” regarding his or her legal rights. It is therefore clearly incumbent upon a

representative of DCS to ensure compliance with section 31-34-4-6.<sup>4</sup> The statute does not require any specific proof – for instance, a signature on the written form – that the advisements have been given, however. The only evidence regarding whether or not the advisements were given in this case is Tackett’s testimony that although she could not specifically recall whether she gave Father and Mother the form, she knew she was required to and she usually did. Evidence Rule 406 provides:

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

“Habit evidence is generally defined as ‘[e]vidence of one’s regular response to a repeated specific situation.’” Carlson v. Warren, 878 N.E.2d 844, 850 (Ind. Ct. App. 2007) (quoting Black’s Law Dictionary 597 (8th ed. 2004)). Tackett’s testimony regarding her “usual” way of handling the advice of rights form when interviewing parents and her uncontradicted testimony that she believes she did the same in this case is relevant under Rule 406 to prove she gave the advisement to Father and Mother. On this basis, we cannot say the trial court abused its discretion in admitting Tackett’s testimony about her conversations with Father and Mother.<sup>5</sup>

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<sup>4</sup> We also note that in Hastings v. State, 560 N.E.2d 664, 668 (Ind. Ct. App. 1990), trans. denied, we held, in a Fifth Amendment inquiry, that a DCS caseworker, although not given law enforcement status, is an agent of the State when investigating CHINS allegations.

<sup>5</sup> The parents also argue their Fifth Amendment right against self-incrimination is implicated by the alleged lack of advisement. A Fifth Amendment argument is not appropriate in a CHINS case, although it may be raised in a criminal case if charges were filed based on the incident about which Tackett spoke with the parents. See Hastings, 560 N.E.2d at 669 n.4 (construing United States Supreme Court case Baltimore Dep’t of Social Servs. v. Bouknight, 493 U.S. 549 (1990), to prevent parent from invoking Fifth Amendment right

## II. Sufficiency of the Evidence

### A. Standard of Review

Indiana Code section 31-34-1-1 provides that a child under eighteen years old is a CHINS if:

- (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.

DCS must prove the children are CHINS by a preponderance of the evidence. Ind. Code § 31-34-12-3. Where, as here, the juvenile court enters findings of fact and conclusions thereon, we apply a two-tiered standard of review. In re J.V., 875 N.E.2d at 403. First, we determine whether the evidence supports the findings, and second, we determine whether the findings support the judgment. Id. We will reverse only if, considering the evidence favorable to the juvenile court's judgment, the evidence does not support the findings or the findings do not support the judgment. Id.

### B. Evidence the Children are CHINS

DCS alleged the children were CHINS because the parents:

have failed to provide the child[ren] with a safe, stable, and appropriate living environment free from domestic violence. . . . Due to the domestic violence in the home, the parents' failure to protect the children from the same, and their

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during a CHINS proceeding itself while allowing the right to be invoked "to limit the admission into evidence of incriminating statements made during the CHINS investigation in a subsequent criminal proceeding"). We therefore do not address this issue in the context of this CHINS proceeding.

arrest and incarceration, the coercive intervention of the Court is necessary to ensure the children's safety and well being.

[Mother's] Appendix at 52. Both parents denied the allegations of the petition. The juvenile court found:

I find that there are issues of domestic violence. . . . I think the more challenging question for me is, is coercive intervention of this Court necessary when you've been voluntarily participating in services. . . . When I take into account, prior domestic violence and then charges dropped. When I take into account a, a vociferous denial of the existence of domestic violence, since you two are denying that there are domestic violence issues between you. I find that based upon those . . . coercive intervention of this Court is necessary.

Tr. at 27.

Father and Mother contend the evidence presented by DCS was insufficient to support the trial court's findings and show that the children's condition was seriously impaired or endangered or that the coercive intervention of the court was needed. The only evidence DCS presented to support the allegations of its petition was Tackett's testimony that Father and Mother had an altercation which left marks on both of them she was able to see when she interviewed them. Tackett further testified Mother told her the children were present during the altercation. Although Tackett testified to finding a report of a domestic violence incident approximately three weeks prior to the precipitating event, the juvenile court was later informed that not only did Mother recant the allegation and Father deny the incident, Father was out of town on the date in question. The only other domestic violence incident Tackett reported was Mother telling her there was an incident "five to ten years ago." *Id.* at 14. Father and Mother were incarcerated at the time of the initial hearing, but by the time of the fact-finding hearing, they were no longer incarcerated. They were both voluntarily attending

domestic violence counseling. Mother had a job and the children were enrolled in a charter school.

The testimony supporting a CHINS finding is simply that there was one incident of domestic violence between Father and Mother in which they both participated and for which they were both arrested and incarcerated for some relatively brief time. Although Tackett testified Mother told her the children were present during this incident, there was no testimony that the children witnessed the incident and the juvenile court made no finding the children were seriously endangered because of it. There was also no testimony that Father and Mother were charged with a crime as a result of the incident and face jail time in the future or that there have been any further incidents. See In re C.S., 863 N.E.2d 413, 418 (Ind. Ct. App. 2007) (“[A]s in termination of parental rights cases, we do not believe it is [parent’s] situation at the time the petition was filed that is the only factor relevant to the trial court’s determination. Rather, the trial court should consider his situation at the time the case was heard by the court.”), trans. denied, abrogated on other grounds, In re N.E., 919 N.E.2d 102 (Ind. 2010). The juvenile court found that Father and Mother “vociferously denied” the allegations of domestic violence between them, but the only evidence of record is that they denied the allegations of the CHINS petition and Father denied the July 4 incident. Denial of the allegations of the petition that the children were CHINS because of the incident is not tantamount to denying the incident occurred. Moreover, the July 4 incident was later shown not to have occurred at all, as Father was out of town on that date. Testimony that both parents were voluntarily participating in domestic violence counseling also belies a finding

that they are in denial about the existence of domestic violence. In short, we understand the juvenile court's desire to protect the children from a home where domestic violence is occurring and we agree that even one incident of domestic violence is one too many. However, we do not believe the evidence supports the trial court's finding that the parents are in denial about their domestic violence issues or that the one incident of domestic violence which is being voluntarily addressed by the parents seriously endangered the children's mental or physical health as of the time of the fact-finding hearing. Cf. In re N.E., 919 N.E.2d at 106 (holding child properly adjudicated CHINS based upon mother's failure to protect her and her siblings from "ongoing domestic violence" between herself and alleged father of child's sibling, where evidence showed "several incidents of domestic violence against [m]other" occurred in presence of the children). Accordingly, we conclude the juvenile court erred in determining the children were CHINS.

#### Conclusion

The juvenile court did not abuse its discretion in admitting evidence of Father's and Mother's statements to a DCS caseworker. The juvenile court's finding the children were CHINS, however, is not supported by sufficient evidence and is therefore reversed.

Reversed.

FRIEDLANDER, J. concurs.

KIRSCH, J. concurs in result as to Part I and concurs as to Part II.