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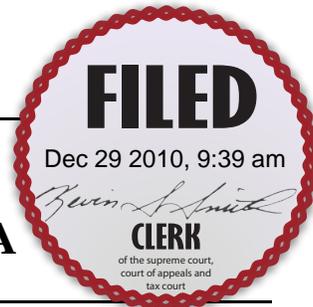
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**IN THE  
COURT OF APPEALS OF INDIANA**

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IN THE MATTER OF M.M., )  
Minor Child Alleged to be In Need )  
of Services, )  
)  
S.H., )  
)  
)  
Appellant-Respondent, )  
)  
)  
vs. )  
)  
)  
THE INDIANA DEPARTMENT OF )  
CHILD SERVICES, )  
)  
)  
Appellee-Petitioner. )

No. 85A02-1006-JC-776

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APPEAL FROM THE WABASH CIRCUIT COURT  
The Honorable Robert R. McCallen, III, Judge  
Cause No. 85C01-0911-JC-41

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**December 29, 2010**

## MEMORANDUM DECISION - NOT FOR PUBLICATION

**ROBB, Judge**

### Case Summary and Issues

S.H. (“Mother”) appeals the trial court’s determination that her minor daughter, M.M., is a child in need of services (“CHINS”). Mother raises two issues: 1) whether the trial court erred in admitting a DVD interview of M.M. in the CHINS determination hearing, and 2) whether sufficient evidence supports the trial court’s determination that M.M. is a CHINS. Concluding the trial court did not err in admitting the DVD interview and sufficient evidence supports the CHINS determination, we affirm.

### Facts and Procedural History

M.M. was born in 2001. From at least as early as January 2006, M.M. has resided with T.H., her step-father, in addition to Mother and her two brothers; her biological father is deceased. In November 2009, following a program at her school designed to detect and prevent child abuse and molestation, M.M. confided in a Department of Child Services (“DCS”) case manager that T.H. had touched her inappropriately. M.M. was then taken to a child advocacy center, where an interview was taken and recorded on a DVD. M.M. described her molestation by T.H. and was taken into DCS custody, and then a CHINS petition was filed and a CHINS determination hearing scheduled.

In February 2010, the trial court held a preliminary hearing regarding DCS’s petition to introduce the recorded interview as evidence at the CHINS determination hearing. In support of its petition, DCS attached an affidavit by Dr. Arthur Kupersmith, Ph.D., a

psychologist and health service provider in psychology, in which he stated “due to the substantial likelihood of emotional and mental harm to the child, . . . the child should not testify and should be considered unavailable for such purposes.” Appellant’s Appendix at 17. The trial court ruled in favor of DCS, allowing the DVD to be admitted into evidence at the CHINS determination hearing.

The DVD was so admitted – without Mother’s objection – at the CHINS determination hearing. The trial court then entered the following findings, determining M.M. to be a CHINS:

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A. The child (a minor) is a child in need of services because: Her physical and/ or [sic] mental condition is seriously endangered due to injury by act or omission of her parent and/or step parent and she needs care, treatment, and/or rehabilitation that she is not receiving, and that is unlikely to be provided or accepted without the coercive intervention of the Court.

Further, the child is a victim of a sex offense and she needs care, treatment, and/or rehabilitation that she is not receiving, and that is unlikely to be provided or accepted without the coercive intervention of the Court.

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. . . The allegations include several incidents over the course of four (4) years. The child alleges that on some occasions she was clothed, naked or partially clothed, as was [T.H.]. The allegations include touching of her butt, vagina and breast area, penetration, and oral sex. The incidents occurred at multiple locations throughout the family home and in a family van. . . . [M.M.] was able to provide details, to-wit: What happened (touching, penetration, rubbing, oral sex); and where (basement, living room, bathroom and van . . .). She stated she wanted to come forward earlier, then chose not to follow through because of threats made by [T.H.].

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Following the allegations, Mother has continued to reside in the home with her other two (2) sons and [T.H.]. Mother does not believe the allegations against her husband. Mother told the family case manager she would do whatever it takes to get her child back, yet she has not followed through on their specific recommendation for counseling, both for she and the child. She likewise was not honest when she told the family case manager that she had not seen the

DVD recording of the interview with her child prior to a family team meeting in February, 2010, when, in fact, she had.

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Id. at 20-21.

Mother now appeals.

### Discussion and Decision

#### I. Admission of Evidence

##### A. Standard of Review

The admission of evidence rests within the sound discretion of the trial court and is reviewed for an abuse of discretion. In re Involuntary Termination of Parent Child Relationship of A.H., 832 N.E.2d 563, 567 (Ind. Ct. App. 2005). An abuse of discretion occurs when the trial court's decision is "clearly against the logic and effect of the facts and circumstances before the court." D.A. v. Monroe County Dep't of Child Servs., 869 N.E.2d 501, 507 (Ind. Ct. App. 2007).

##### B. Admission of M.M.'s DVD Recorded Interview

Indiana Code section 31-34-13-3 provides for admission into evidence of a videotaped child interview in a CHINS determination proceeding if the interviewed child is "found by the [trial] court to be unavailable as a witness because . . . a . . . psychologist has certified that the child's participation in the proceeding creates a substantial likelihood of emotional or mental harm to the child[.]" Ind. Code § 31-34-13-3(2)(C)(i).

Mother argues the trial court erred in finding M.M. unavailable and admitting the DVD as evidence at the CHINS determination hearing based on Dr. Kupersmith's affidavit

statement there was a substantial likelihood of mental and emotional harm if M.M. testified. Dr. Kupersmith's affidavit served as the basis for the trial court's finding that M.M. was "unavailable" so as to excuse her live testimony and admit into evidence the DVD recording of her interview, which was otherwise inadmissible hearsay evidence. See id. Mother takes issue with admitting the DVD into evidence "solely on the affidavit of the doctor," which, she argues, simply tracks the statutory language while lacking factual detail, and without requiring the doctor's availability for cross examination. Appellant's Brief at 5.

First, we address her constitutional claim of a lack of due process because Dr. Kupersmith was not made available for cross examination. See Ind. Code § 31-32-2-3 (stating a parent is entitled to cross examine witnesses at proceedings to determine whether a child is a CHINS). Mother did not seek to cross examine Dr. Kupersmith or object to admission of his affidavit at the preliminary hearing. Nor did she seek to cross examine or object on this ground during the CHINS determination proceeding. Therefore, she waived this argument on appeal. See Smith v. Marion County Dep't of Public Welfare, 635 N.E.2d 1144, 1148 (Ind. Ct. App. 1994) (stating a party may not raise an issue for the first time on appeal in a CHINS proceeding), trans. denied; McBride v. Marion County Office of Family & Children, 798 N.E.2d 185, 194 (Ind. Ct. App. 2003) ("It is well established . . . that a party on appeal may waive a constitutional claim.").

To the extent Mother argues her opposing admission of the DVD at the preliminary hearing constitutes an objection validly raised for purposes of avoiding waiver of the issue on appeal, we disagree and find this case similar to Perez v. Bakel, 862 N.E.2d 289 (Ind. Ct.

App. 2007). In Perez, we concluded a party waived for appellate review a trial court's admission into evidence of an expert's videotaped testimony by not objecting to its admission at trial. Id. at 295. There we addressed the possibility the appellant considered his pretrial motion in limine, which was denied after a hearing, as an objection sufficient to avoid waiver of the issue on appeal. We concluded the motion in limine was insufficient to avoid waiver because "it is well-settled that in order to preserve error in the denial of a pre-trial motion in limine, the appealing party must object to the admission of the evidence at the time it is offered." Id. (citation omitted). Here, Mother's position at the preliminary hearing, generally challenging admission of the DVD into evidence at the CHINS determination hearing, is comparable to the Perez appellant's motion in limine. Similarly, Mother's unsuccessful challenge in a pretrial hearing as to whether the recording should be admitted into evidence did not preserve the issue for appeal absent a contemporaneous objection to admission of the DVD into evidence at the CHINS determination hearing.

Mother further argues statutory language indicates the General Assembly "anticipates" a physician will be present for possible cross examination, presumably even if not called for cross examination. This argument implicates statutory interpretation and the following guiding principles:

In such interpretation, the express language of the statute and the rules of statutory interpretation apply. We will examine the statute as a whole, and avoid excessive reliance on a strict literal meaning or the selective reading of words. Where the language of the statute is clear and unambiguous, there is nothing to construe. However, where the language is susceptible to more than one reasonable interpretation, the statute must be construed to give effect to the legislature's intent. The legislature is presumed to have intended the language used in the statute to be applied logically and not to bring about an

absurd or unjust result. Thus, we must keep in mind the objective and purpose of the law as well as the effect and repercussions of such a construction.

In re J.J., 912 N.E.2d 909, 910 (Ind. Ct. App. 2009) (quoting Nash v. State, 881 N.E.2d 1060, 1063 (Ind. Ct. App. 2008), trans. denied).

Reviewing Indiana Code sections 31-32-2-3 and 31-34-13-3(2)(C)(i), we conclude that although they do not explicitly address this issue, they are clear and unambiguous, and do not require a physician's presence for cross examination without a party actually seeking to cross examine the physician. We add that the statute requires a physician to "certif[y]" the child's participation creates a substantial likelihood of harm, Ind. Code § 31-34-13-3(2)(C)(i), which likely contemplates submission of an affidavit without necessarily requiring live testimony. See Levy Co., Inc. v. State Bd. of Tax Comm'rs, 173 Ind. App. 667, 671-72, 365 N.E.2d 796, 799-800 (1977) (holding that the word "certify," at least as used in the tax exemption statute at issue, requires a writing) (quotation omitted).

Mother also waived her argument the trial court should not have admitted the DVD into evidence because Dr. Kupersmith's affidavit simply tracks pertinent statutory language and lacks meaningful substantive detail. Mother did not raise this argument at the preliminary hearing or the CHINS determination hearing, raises it for the first time on appeal, and it is therefore precluded from our review. See Smith, 635 N.E.2d at 1148.

Mother waived for appellate review any argument the trial court erred in admitting into evidence the DVD recording of M.M.'s interview.

## II. Sufficiency of the Evidence

### A. Standard of Review

DCS has the burden of proving by a preponderance of the evidence that a child is a CHINS. See Ind. Code § 31-34-12-3; In re M.W., 869 N.E.2d 1267, 1270 (Ind. Ct. App. 2007). Upon review of the sufficiency of the evidence, “we consider only the evidence most favorable to the judgment and the reasonable inferences flowing therefrom.” M.W., 869 N.E.2d at 1270. We will not reweigh the evidence or assess the credibility of witnesses. Id.

### B. Evidence Admitted

A child is a CHINS if he or she is a victim of a sex offense and “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 § 31-34-1-3(a).

Because the DVD was properly admitted at the CHINS determination hearing, and we consider only the evidence most favorable to the judgment and the reasonable inferences flowing therefrom, M.W., 869 N.E.2d at 1270, we may look to whether the DVD contains evidence sufficient to support the trial court’s determination that M.M. is a CHINS. As the trial court pointed out and described in its findings, the DVD interview reveals M.M.’s allegations of sexual abuse.

In addition, the DCS case manager who conducted the interview testified to the general substance of the interview, in particular, M.M.’s allegations of inappropriate touching by T.H. Further, Mother testified she, at least partly, disbelieves M.M.’s allegations. Mother also testified she would not participate in the counseling recommended

by DCS, although she stated would seek her own counseling for her and her family. We defer to the trial court's assessment of her credibility and weighing of the evidence, including its apparent finding that Mother was not credible in stating she would seek family counseling or otherwise provide M.M. with necessary care, treatment, or rehabilitation without the coercive intervention of the trial court.

Mother's primary argument as to insufficiency of the evidence is that she did not know of the alleged molestation and because M.M. was taken from her physical custody, she was not given the opportunity to provide M.M. with necessary care, treatment, or rehabilitation. Therefore, according to Mother, the trial court could not have concluded Mother was unlikely to provide such if M.M. were returned to her custody. However, as mentioned above, the trial court, evaluating Mother's credibility and weighing all of the evidence, apparently concluded she was unlikely to provide such care. We will not reweigh evidence or assess the credibility of witnesses, and we consider only the evidence most favorable to the judgment and the reasonable inferences flowing therefrom. M.W., 869 N.E.2d at 1270. Accordingly, we conclude the evidence is sufficient to support the trial court's determination that M.M. is a CHINS.

#### Conclusion

Mother waived her argument that the DVD should not have been admitted into evidence by not challenging the physician's affidavit at the preliminary hearing and not objecting to the DVD's admission at the CHINS determination hearing. With the DVD admitted into evidence, evidence that M.M. is a victim of a sex offense, is in need of care that

she is not receiving and is unlikely to receive, is sufficient to support the trial court's CHINS determination, and we therefore affirm.

Affirmed.

RILEY, J., and BROWN, J., concur.