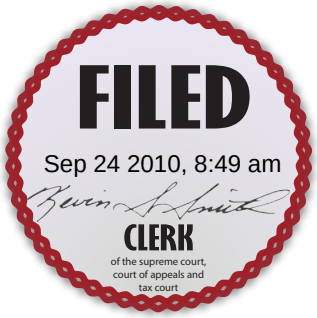

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IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF: B.M., CHILD ALLEGED TO BE IN NEED OF SERVICES,

INDIANA DEPARTMENT OF CHILD SERVICES,

Appellant/Petitioner

and

CHILD ADVOCATES, INC

Appellant (Guardian Ad Litem),

vs.	)	No. 49A04-1002-JC-96
	)	
Me.M. and P.M.,	)	
	)	
Appellees/Respondents.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Marilyn A. Moores, Judge
The Honorable Diana J. Burleson, Magistrate
Cause No. 49D09-0908-JC-37522

September 24, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Petitioner Indiana Department of Child Services ("IDCS") and Appellant Child Advocates, Inc. ("Guardian Ad Litem") appeal the juvenile court's determination that the evidence was insufficient to prove that B.M. is a Child in Need of Services ("CHINS"). Concluding that the IDCS failed to prove by a preponderance of the evidence that B.M. is a CHINS, we affirm.

FACTS AND PROCEDURAL HISTORY

B.M. is the minor child of Me.M. ("Mother") and P.M. ("Father"). Mother and Father were also the parents of another minor child, M.M. On August 8, 2009, Mother, Father, B.M., and M.M. went canoeing on the Driftwood River in Bartholomew County. The family was on the river from mid-morning until approximately 7:00 p.m. As the family was nearing the end of their canoe trip, their canoe became stuck in a log jam[1] and was overturned.

[1] A log jam is a tangle of logs, tree limbs, and other debris that forms in a river. Boats or anything floating in a river can be sucked under a log jam or become tangled in the branches and logs. Tr. pp. 240-41.

Mother and Father were able to locate B.M. and pull her to safety. Tragically, Mother and Father were not able to locate M.M. Her body was recovered three days later.

Immediately following the incident, law enforcement officials obtained statements from Mother and Father, as well as numerous witnesses who had encountered the family during the course of their canoe trip. Father agreed to take a certified chemical test for alcohol, the results of which indicated that at approximately 9:00 p.m., Father's blood alcohol content ("BAC") was .11%. After learning of M.M.'s death, IDCS officials initiated a child fatality investigation. During the course of its investigation, IDCS became concerned for B.M.'s safety and removed B.M. from her parent's care.

On August 12, 2009, IDCS filed a petition alleging that B.M. was a CHINS. The juvenile court held a fact-finding hearing on IDCS's petition on December 3, and 7, 2009. During this fact-finding hearing, the juvenile court heard substantial evidence relating to the family's canoe trip on August 8, 2009. The juvenile court heard conflicting evidence regarding whether B.M. and M.M. were wearing life jackets during the canoe trip. The juvenile court also heard conflicting evidence relating to the level of attention and care with which Mother and Father provided the children during the canoe trip. The juvenile court also heard substantial evidence depicting Mother and Father as caring parents who always adequately cared and provided for their children. On January 29, 2010, the juvenile court issued an order finding that B.M. is not a CHINS. IDCS now appeals.

DISCUSSION AND DECISION

IDCS contends that the juvenile court erroneously determined that it failed to prove that B.M. is a CHINS. Indiana Code section 31-34-1-1 (2009) 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 the child:
>
> (A) is not receiving; and
>
> (B) is unlikely to be provided or accepted without the coercive intervention of the court.

IDCS bore the burden of proving by a preponderance of the evidence that B.M. is a CHINS. *In re M.W.*, 869 N.E.2d 1267, 1270 (Ind. Ct. App. 2007). When reviewing the sufficiency of the evidence, we consider only the evidence most favorable to the judgment and the reasonable inferences flowing therefrom. *Id*. We will not reweigh the evidence or judge the credibility of the witnesses. *Id*.

Where, as here, a party who has the burden of proof at trial appeals, the party appeals from a negative judgment and will prevail only if it establishes that the judgment is contrary to law. *Helmuth v. Distance Learning Sys. Ind., Inc.*, 837 N.E.2d 1085, 1089 (Ind. Ct. App. 2005). A judgment is contrary to law when the evidence is without conflict and all reasonable inferences to be drawn from the evidence lead to only one conclusion but the juvenile court reached a different conclusion. *Id*.

I. Whether the Evidence was Sufficient to Support the Findings of the Juvenile Court

On appeal, IDCS challenges a number of the juvenile court's findings.[2] Where, as here, the juvenile court enters specific findings of fact and conclusions thereon, we engage in a two-tier standard of review. *Hallberg v. Hendricks County Office of Family and Children*, 662 N.E.2d 639, 643 (Ind. Ct. App. 1996). We must first determine whether the evidence supports the findings and second, whether the findings support the judgment. *Id*. The judgment will be reversed only if it is clearly erroneous, and the judgment is clearly erroneous only when it is unsupported by the findings of fact and conclusions thereon. *Id*.

IDCS argues that the evidence presented at the CHINS fact-finding hearing was insufficient to support the juvenile court's findings number six, seven, ten, twelve, thirteen, fourteen, sixteen, seventeen, and nineteen. These findings provide as follows:

> 6. The children were seen wearing life jackets by three witnesses at various points of the canoe trip. The children also used other flotation devices such as arm floaties and seat cushions that float. [Mother] told DNR 1st Sergeant Jeff Barker that the children were wearing life jackets that day.
> 7. [Father] had been drinking that day and his Blood Alcohol Content registered .11% two to three hours after the incident. However, other canoeists who spoke with him and observed him throughout the day did not observe any indication of the influence or manifestation of alcohol on either [] parent during river stops on sandbars or while operating the canoe. There was no evidence that [Father] was dependent on or abusing alcohol prior to August 8, 2009.
>
> *** * * ***
>
> 10. According to the Family Case Manager, [B.M.]'s teacher and a home based counselor, [B.M.] is a normal, physically and mentally healthy, well-adjusted five year old who shows no deficiencies in home environment, education, food, clothing, and shelter.[3]

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[2] To the extent that IDCS suggests that the order issued by the juvenile court is insufficient merely because it does not delineate its findings of fact from its conclusions thereon, we note that an order containing a detailed analysis of each issue is sufficient to enable appellate review even if the order does not specify findings or conclusions. *See Herman v. State*, 526 N.E.2d 1183, 1184 (Ind. 1988).

[3] To the extent that IDCS claims that this finding is inaccurate because the purported home-based counselor did not provide traditional home-based services but rather home-based bereavement services, we

* * * *

12. Vicky Hogue, who is [Mother]'s sister, is close to the family and has been supervising some of the visits between [Father] and [B.M.]. At one time the visits were four to five times a week, but were reduced when home based counseling began. When asked about [Father]'s parenting ability, she responded "That little girl [B.M.] loves her daddy."[4]

13. [Father], on his own initiative, began attending Alcoholics Anonymous on August 13, 2009, and has proof of attendance up to the date of the factfinding.

14. [Mother and Father] sought and completed grief counseling on their own initiative through St. Francis. That counseling included Caterpillar, which is a class specializing in providing grief counseling to children.[5]

* * * *

16. There were references by witnesses to an incident in California in the early 90's involving the "suspicious death" of another one of [Father]'s children, but no evidence was presented.

17. None of the witnesses had any concerns about [Mother]'s parenting ability. She is described as loving, patient, kind, and attentive to her children's needs. FCM Silver listed [Mother]'s strengths as being available for [B.M.], providing for her needs, empathetic, compassionate, able to communicate effectively, having support from family, employed, and a loving person. Ms. Butler, the home based counselor, had no concerns with how [Mother] raises her child and does not think there is anything [Mother] could do that she has not been doing.

* * * *

19. Without evidence of the prior cases, the court is unable to determine whether [Father]'s prior acts support the showing of "[i]ntent, guilty knowledge, the absence of mistake or accident, identification, the existence of a common scheme or plan, or other similar purposes" as listed in I.C. 31-34-

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conclude that the counselor was accurately described as a home-based counselor because she was providing counseling services to B.M. in the family's home.

[4] To the extent that IDCS claims that Ms. Hogue's answer that "That little girl loves her daddy" was nonresponsive to the stated question regarding whether she had any issue or problems with Father during his supervised visitation, we note that Ms. Hogue's answer only appears nonresponsive because it was taken out of context. Ms. Hogue's full answer was "Oh no. That little girl loves her daddy." Tr. p. 494.

[5] To the extent that IDCS claims that the evidence is insufficient to support this finding because all evidence relating to this finding is hearsay that was improperly admitted during the CHINS fact-finding hearing, we note that Petitioner's Exhibit 20, which was proffered by IDCS, contained evidence that Mother and Father sought and completed grief counseling on their own initiative through St. Francis. Thus, any challenge to this evidence would amount to invited error, and as such, is not subject to review by this court. *See Batterman v. Bender*, 809 N.E.2d 410, 412 (Ind. Ct. App. 2004) (providing that a party may not take advantage of an error that it invites, and as a result, invited error is not subject to review by this court).

> 12-5. The court is therefore, unable to establish a "pattern of neglect" as alleged by DCS.[6]

Co-Appellant's App. pp. 18-20.

In challenging each of these findings, IDCS merely attacks the credibility of the witnesses providing the questioned testimony or points to conflicting evidence in the record. Upon review, however, we conclude that the evidence most favorable to the judgment and the reasonable inferences flowing therefrom show that each of the above-stated challenged finding is supported by ample evidence in the record. IDCS's challenge to the sufficiency of the evidence supporting each of the above-stated findings amounts to nothing more than an invitation for this court to reweigh the evidence and to re-evaluate the credibility of the witnesses, which we will not do. *See In re M.W.*, 869 N.E.2d at 1270 (providing that this court will not reweigh the evidence or judge the credibility of the witnesses on appeal). In light of our conclusion that each of the challenged findings were supported by ample evidence in the record, we further conclude that the challenged findings, when considered with the additional findings of the juvenile court that were not challenged on appeal by IDCS, are sufficient to support the juvenile court's determination that IDCS failed to prove by a preponderance of the evidence that B.M. is a CHINS.

II. Whether the Juvenile Court Erroneously Permitted Mother and Father to Invoke the Fifth Amendment During the CHINS Fact-Finding Hearing

[6] To the extent that IDCS argues that finding nineteen somehow indicates that the juvenile court erroneously concluded that it cannot find B.M. to be a CHINS unless IDCS proved a pattern of neglect, we conclude that finding nineteen indicates only that based on the evidence presented at trial, the court was unable to find a so-called "pattern of neglect" as alleged by IDCS.

The Fifth Amendment to the United States Constitution provides, in relevant part, that: "No person shall be … compelled in any criminal case to be a witness against himself." "The Fifth Amendment's protection 'applies only when the accused is compelled to make a *testimonial* communication that is incriminating.'" *Baltimore City Dep't of Soc. Servs. v. Bouknight*, 493 U.S. 549, 554 (1990) (quoting *Fisher v. United States*, 425 U.S. 391, 408 (1976)) (emphasis in original). The U.S. Supreme Court "has long held that the privilege against self-incrimination not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Allen v. Illinois*, 478 U.S. 364, 368 (1986) (quotations omitted).

On appeal, IDCS argues that the juvenile court erroneously permitted Mother and Father to invoke their Fifth Amendment rights against self-incrimination during the CHINS fact-finding hearing. More specifically, IDCS claims that the juvenile court erroneously permitted Mother and Father to invoke their Fifth Amendment rights against self-incrimination because CHINS proceedings are civil proceedings which do not necessarily provide the parties with the full protections afforded to defendants in criminal proceedings, and the questions asked by IDCS were directly related to the ongoing CHINS proceeding. Appellant's App. p. 20. In support of its claim, IDCS argues that this court's opinion in *Hastings v. State*, 560 N.E.2d 664 (Ind. Ct. App. 1990), stands for the proposition that the

Fifth Amendment rights against self-incrimination are not available in CHINS proceedings pursuant to the United State's Supreme Court's holding in *Bouknight*. Appellant's Br. p. 19.

In *Bouknight*, the Supreme Court considered whether a mother, who was the custodian of a child pursuant to a court order in an ongoing CHINS proceeding, could invoke the Fifth Amendment privilege against self-incrimination to resist an order of the juvenile court to produce the child. 493 U.S. at 551. The mother argued that she was entitled to the benefit of the privilege because the act of production would amount to testimony regarding her control over and possession of the child. *Id*. at 555. The Supreme Court rejected mother's argument, holding that while the act of production may incriminate the custodian, orders to produce children who are the subject of CHINS proceedings cannot be characterized as efforts to gain some testimonial component of the act of production. *Id*. at 561. The Supreme Court further held that under the circumstances at issue in that case, mother could not invoke the Fifth Amendment privilege against self-incrimination to resist the juvenile court's order to produce the child. *Id*. Contrary to IDCS's claim that the Supreme Court's holding provides that Fifth Amendment rights do not apply to CHINS proceedings, we conclude that *Bouknight* merely provides that the parent's Fifth Amendment right against self-incrimination was not violated by the trial court's order requiring the parent to produce the child to the court in connection with the ongoing CHINS proceedings because, under the facts before the Court, the act of producing the child did not amount to "testimonial communication." *See Bouknight*, 493 U.S. at 544 (providing that the Fifth Amendment right against self-incrimination only applies to testimonial communications).

In *Hastings*, this court considered whether the mother's statement to the IDCS case manager was compelled and subsequently used against her in criminal proceedings in violation of her Fifth Amendment right against self-incrimination. 560 N.E.2d at 666. The statement in question acknowledged mother's concern for her child's safety while in the care of her boyfriend. *Id*. The court noted that mother's statement was given after she had been notified that her failure to cooperate with the case manager could result in the termination of her parental rights. *Id*. at 669. This court concluded that "[g]iven this great mental pressure, we must conclude that [mother's] capacity for self-determination was 'critically impaired,' and the State failed to prove beyond a reasonable doubt that [her] statement constituted a voluntary confession." *Id*. Accordingly, this court further concluded that mother's statement was subsequently used against her in criminal proceedings in violation of her Fifth Amendment right against self-incrimination. *Id*. at 671. In light of the court's conclusion that the use of statements given by mother to the IDCS case manager during the course of the ongoing CHINS proceedings in subsequent criminal proceedings violated mother's Fifth Amendment right against self-incrimination, we reject IDCS's claim that *Hastings* somehow stands for the general proposition that the Fifth Amendment right against self-incrimination does not apply to CHINS cases.

Here, Mother and Father invoked their Fifth Amendment rights against self-incrimination when called to testify during the CHINS fact-finding hearing. IDCS attempted to ask Mother and Father about the care that they provided to their children on August 8, 2009. IDCS acknowledged that authorities in Bartholomew County were still considering

bringing criminal neglect charges against Mother and Father and acknowledged that it did not have the authority to grant Mother and Father immunity from prosecution for any potential future criminal charges relating to the events of that day.

Again, the privilege against self-incrimination permits a person to refuse to testify against himself during civil proceedings where the answers might incriminate him in future criminal proceedings. *See Allen*, 478 U.S. at 368. Considering that at the time of the CHINS fact-finding hearing in the instant matter, Mother and Father still faced possible future criminal prosecution relating to the same events which IDCS attempted to question Mother and Father about, we conclude that the juvenile court properly allowed Mother and Father to invoke their Fifth Amendment rights against self-incrimination. Furthermore, to the extent that IDCS argues that the juvenile court failed to make "reasonable inferences" from Mother and Father's invocation of the Fifth Amendment, we conclude that IDCS's argument amounts to a request for this court to reweigh the evidence and the inferences flowing therefrom, which again, we will not do. *See In re M.W.*, 869 N.E.2d at 1270. Having concluded that the juvenile court properly allowed Mother and Father to invoke their Fifth Amendment rights against self-incrimination during the CHINS fact-finding hearing, we further conclude that we need not consider IDCS's claim that the juvenile court committed reversible error by denying it the opportunity to make an offer of proof relating to Mother's and Father's potential testimony during said hearing.

In sum, we conclude that the evidence was sufficient to support the juvenile court's findings of fact and conclusions thereon and the juvenile court properly allowed Mother and Father to invoke their Fifth Amendment rights against self-incrimination.

The judgment of the juvenile court is affirmed.

DARDEN, J., and BROWN, J., concur.