

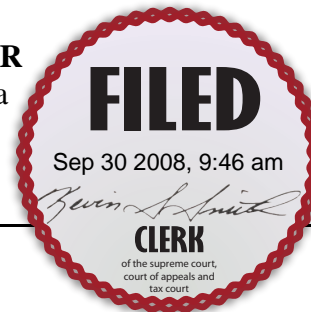
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**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF T.S. AND B.S.,)
CHILDREN ALLEGED TO BE CHILDREN)
IN NEED OF SERVICES,)
)
WARRICK COUNTY DEPARTMENT OF)
CHILD SERVICES,)
)
Appellant-Petitioner,)
)
vs.)
)
BRENDA SIMMONS,)
)
Appellee-Respondent.)

No. 87A01-0805-JV-233

APPEAL FROM THE WARRICK CIRCUIT COURT
The Honorable David O. Kelley, Judge
Cause Nos. 87C01-0708-JC-156, 87C01-0708-JC-157

September 30, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Petitioner Warrick County Department of Child Services (“WCDCS”) appeals the juvenile court’s determination that the evidence was insufficient to prove that T.S. and B.S. were Children in Need of Services (“CHINS”) with respect to their mother, Brenda Simmons. We affirm.

FACTS AND PROCEDURAL HISTORY

Brenda Simmons (“Mother”) and Ricky Simmons (“Father”) are the parents of two daughters, T.S., born July 19, 1995, and B.S., born January 20, 2000. T.S. and B.S. were removed from Mother’s care on August 8, 2007, following an allegation that Father molested a child who attended Mother’s daycare facility. Father subsequently admitted that he had also molested both T.S. and B.S.

On August 14, 2007, WCDCS filed verified petitions alleging that T.S. and B.S. were CHINS. With respect to Mother, the verified petitions alleged the following:

Pursuant to I.C. 31-34-1-1, said child’s physical or mental condition is seriously endangered as a result of the inability of the child’s mother to supply the child with necessary supervision, to wit: Said child’s mother has failed to protect the child from the father’s admittedly repeated sexual molestations after knowing that the father [faced] similar charges in 1999 in Madison County, Indiana, and that failure to properly supervise her child currently places said child in danger in the child’s home environment, wherefore the mother is unable to provide the child with the necessary supervision or to protect said child from harm;

And that the child needs care, treatment, or rehabilitation that the child is not receiving or that is unlikely to be provided or accepted without coercive intervention of the Court.

Appellant’s App. p. 24, 27. On February 12, 2008, following a fact-finding hearing, the juvenile court determined that WCDCS had failed to prove the allegations set forth above by

a preponderance of the evidence. On February 28, 2008, following a dispositional hearing, the children were returned to Mother's custody. This appeal follows.

DISCUSSION AND DECISION

WCDCS contends that the juvenile court erred in determining that it had failed to prove that, with respect to Mother, T.S. and B.S. were CHINS. Indiana Code section 31-34-1-1 (2007) 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.

WCDCS bore the burden of proving by a preponderance of the evidence that, with respect to Mother, the children were 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.*

After reviewing the record, it is apparent to us that the evidence most favorable to the juvenile court's judgment establishes that Mother did not have knowledge of Father's sexual abuse of the children prior to Father's arrest. The evidence establishes that Mother never saw Father touch the children in an inappropriate manner. The evidence also establishes that the children never informed Mother of Father's actions. Additionally, it was within the juvenile court's discretion to conclude that neither Mother's alleged lack of emotion upon learning of

Father's sexual abuse nor her subsequent comments based on hindsight that she should have suspected abuse demonstrated by a preponderance of the evidence that Mother knew or should have known of the abuse.

Furthermore, to the extent that WCDCS relies upon *In re A.H.*, 751 N.E.2d 690 (Ind. Ct. App. 2001), *trans. denied*, in which this court affirmed the juvenile court's determination that A.H. was a CHINS, we find such reliance to be misplaced. *A.H.* can easily be distinguished from the instant matter. In *A.H.* this court concluded that the mother had failed to protect her child from further sexual abuse because the evidence established that the child had specifically told her mother of the alleged sexual abuse by Father on more than one occasion prior to Father's arrest, but that Mother did not believe the child and therefore did nothing to protect her. *Id.* at 699. Contrary to the circumstances in *A.H.*, here the evidence most favorable to the juvenile court's judgment establishes that neither T.S. nor B.S. informed Mother of the sexual abuse by Father and also that Mother did not know of the sexual abuse by Father prior to Father's arrest. Therefore, because here, unlike in *A.H.*, Mother lacked knowledge of the sexual abuse prior to Father's arrest, we conclude that she did not fail to protect her children from continued sexual abuse for the purposes of a CHINS determination.

In light of the evidence most favorable to the juvenile court's judgment establishing that Mother did not have any knowledge of the sexual abuse perpetrated upon the children by Father, we conclude that the evidence was insufficient to support a finding that, with respect to Mother, the children were CHINS. To the extent that WCDCS introduces evidence

inconsistent with the determination made by the juvenile court, WCDCS is inviting us to reweigh the evidence on appeal, which we will not do. *See In re M.W.*, 869 N.E.2d at 1270.

The judgment of the trial court is affirmed.

RILEY, J., and BAILEY, J., concur.