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IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF M.S.	)	
	)	
JAYNE BOUDIA,	)	
	)	
Appellant-Respondent,	)	
	)	
and	)	
	)	
ROBERT SHOULDERS,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 49A02-0703-JV-276
	)	
MARION COUNTY DIVISION OF FAMILY AND CHILDREN,	)	
	)	
Appellee-Petitioner,	)	
	)	
and	)	
	)	
CHILD ADVOCATES, INC.,	)	
	)	
Appellee-Guardian ad Litem.	)	

APPEAL FROM THE MARION SUPERIOR COURT
JUVENILE DIVISION
The Honorable Marilyn Moores, Judge
Cause No. 49D09-0611-JC-46189

November 30, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellants-Respondents, Jayne Boudia (Mother) and Robert Shoulders (Father) separately appeal the trial court's Order adjudicating their minor child, M.S., to be a Child In Need Of Services (CHINS).

We reverse.

ISSUES

Mother raises one issue on appeal which we restate as follows: Whether Mother's one-time admitted use of cocaine is sufficient to support a CHINS determination.

Father raises one issue on appeal which we restate as follows: Whether the trial court's finding that M.S. is a CHINS as to Father is supported by sufficient evidence.

FACTS AND PROCEDURAL HISTORY

Mother gave birth to M.S. on November 8, 2006. M.S. was born healthy with a normal weight and size, requiring no medical intervention. Mother and Father are not married. After M.S.'s birth, Father signed a paternity affidavit in the hospital.

That same day, Robert Hardin (Hardin), a family caseworker with the Marion County Department of Child Services (DCS), received a report that Mother had tested positive for

cocaine at childbirth. When he interviewed Mother at the hospital, Mother admitted to a one-time cocaine use during her pregnancy. She clarified that after she and Father had an argument, she left the house with a friend to run errands. While doing so, she gave in to pressure from acquaintances and smoked cocaine. She returned to the house the next day. Mother elaborated that she had never smoked cocaine prior to that occasion and that cocaine use was not an on-going problem. Based on Hardin's interview with Mother, Hardin's supervisor determined that M.S. was a child in need of services. M.S. was removed from Mother's care on November 9, 2006. Upon learning of Mother's positive drug screen, Father encouraged her to voluntarily participate in counseling and attend Narcotics Anonymous (N.A.) meetings.

On November 14, 2006, the DCS filed its CHINS Petition alleging, in pertinent part:

> 5. The child is a [CHINS] as determined in [I.C. §] 31-34-1 *et seq*. in that: 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; the child was born with fetal alcohol syndrome or any amount, including a trace amount, of a legend drug or controlled substance in the child's body; and the child needs care, treatment or rehabilitation that the child is not receiving and is unlikely to be provided or accepted without the coercive intervention of the [c]ourt, to-wit:
>
> > A) . . . [Mother] uses illegal drugs and she and her baby, [M.S.], tested positive for cocaine at the time of the child's birth. [Mother] admitted to [Hardin] that she used cocaine during her pregnancy. Due to [Mother's] substance abuse and the danger cocaine use posed to the well being of her unborn child at the time of her use, the child is endangered in the care of [Mother] and the family is in need of services.
> >
> > B) [Father] is the alleged father of [M.S.]. [Father] has not established paternity for the child, lives in the same home as [Mother] and should

> have been aware of her cocaine use during pregnancy, has not contacted [DCS] regarding the health, safety or welfare of the child, and has not demonstrated an ability or willingness to appropriately parent the child at this time.

(Mother's App. pp. 24-25). On November 14, 2006, during the preliminary hearing, both Mother and Father denied the allegations. On January 24, 2007, the trial court conducted its fact-finding hearing. At the conclusion of the evidence, the trial court adjudicated M.S. to be a CHINS as to both parents and placed M.S. in the care of relatives. On February 28, 2007, at its disposition hearing, the trial court ordered M.S. removed as to both parents and continued her placement in relative care.

Mother and Father now appeal. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Both Mother and Father, separately, appeal the trial court's determination that their daughter is a CHINS.

I. *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, 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.

Additionally, DCS based its Petition on Ind. Code § 31-34-1-10(1)(B) which states, in pertinent part that:

> a child is a child in need of services if:
>
> (1) the child is born with: . . .
> (B) any amount, including a trace amount, of a controlled substance or legend drug in the child's body; and . . .
>
> (2) the child needs care, treatment or rehabilitation that:
> (A) the child is not receiving; or
> (B) is unlikely to be provided or accepted without the coercive intervention of the court.

DCS has the burden of proving its allegations by a preponderance of the evidence. *See* I.C. § 31-34-12-3. When making its determination, the trial court should not only consider the parents' circumstances at the time the petition was filed, but also their situation at the time the case was heard by the trial court. *See In re C.S.*, 863 N.E.2d 413, 418 (Ind. Ct. App. 2007), *trans. denied* (citing *Matter of D.T.*, 547 N.E.2d 278, 284 (Ind. Ct. App. 1989), *reh'g denied*, *trans. denied*). Reviewing the sufficiency of evidence, we consider only the evidence most favorably to the judgment and the reasonable inferences flowing therefrom. *Perrine v. Marion Co. Office of Child Services*, 866 N.E.2d 269, 273 (Ind. Ct. App. 2007). We will not reweigh the evidence or judge the credibility of the witnesses. *Id*.

II. *CHINS Finding with Regard to Mother*

In contesting the trial court's determination, Mother asserts two grounds of error. First, she argues that the trial court misinterpreted I.C. § 31-34-1-10(1)(B) by holding that a cocaine-positive birth constitutes a *per se* CHINS. Additionally, she contends that the DCS failed to proof by a preponderance of the evidence that M.S. is a CHINS.

Initially, we find that the trial court misconstrued the statute. During the January 24, 2007 fact-finding hearing, Mother's counsel moved for judgment on the evidence following DCS's presentation of its case-in-chief.

> [MOTHER'S COUNSEL]: I don't believe at this point that the [DCS] has met its burden of proof. I, I think it's wrong to just make it, seems like what's happened in this case based upon the testimony of [the DCS] is that there's just an automatic presumption that this child is in need of services. Simply because there's a [] positive cocaine test.
>
> [TRIAL COURT]: Well, that would be, that would be statutorily. If you look at paragraph 5 3134 sub. 1 indicat[es] that the child was born with [] a trace amount of alleged drug or controlled substance in the child's body that's [CHINS *per se*] but at this time I'm going to deny your, your motion for [] involuntary dismissal.

(Transcript p. 43). In order to find a child to be a CHINS, the plain statutory language clearly requires more than merely the presence of a controlled substance in the child's body at birth. Specifically, I.C. § 31-34-1-10 requires DCS to establish that the child is in need of care, treatment or rehabilitation in addition to the fact that the child is born with a controlled substance in her body. Accordingly, the trial court wrongly applied the statute as constituting a *per se* violation.

Next, we address Mother's argument that DCS failed to establish by a preponderance of the evidence that M.S. is a CHINS. In particular, Mother avers that no evidence was presented (1) proving that M.S. tested positive for a controlled substance at birth and (2) indicating that M.S. needed care, treatment or rehabilitation, unlikely to be provided without the coercive intervention of the court.

With regard to Mother's first claim, the record indicates that Hardin testified that at the time of his interview with Mother, "bab[y's] urine test may have been pending, I'm not

sure." (Tr. p. 34). No further testimony was presented concerning M.S.'s test results. In order to support its allegation, the DCS now relies on the disingenuous argument that "[Mother] does not dispute that [M.S.] tested positive for cocaine . . .. Thus, the first prong of I.C. [§] 31-34-1-10 has been satisfied." (DCS's Brief p. 7). We remind the DCS that they carry the burden of proving their claims. They clearly fail to meet this burden by merely relying on the absence of Mother's objection to their assertion. Rather, the DCS, like any plaintiff, has an affirmative duty to present the evidence underlying their arguments. *See* I.C. § 31-34-12-3. Based on the complete lack of evidence, we find that the DCS failed to establish M.S. was a CHINS.

Even assuming *arguendo*, the DCS satisfied the first prong of I.C. § 31-34-1-10, nevertheless, no sufficient evidence was presented to prove M.S. is in need of services as to Mother. Here, both Mother and Hardin testified that M.S. was born healthy. In this regard, Hardin stated that the "only medical finding that I can recall in this case was that the baby was not suffering any obvious signs of withdraw[al]." (Tr. p. 39). Furthermore, no evidence was introduced establishing that Mother is a drug addict or that the DCS offered classes to Mother. Instead, the record is replete with references that Mother is voluntarily enrolled in private services. With Father's support, Mother has sought out counseling and regularly attends N.A. meetings. She also voluntarily submits to drug screens with consistent negative results. Thus, the only evidence in the record underlying the DCS's Petition and the trial court's CHINS determination is Mother's admitted one-time cocaine usage.

In light of the totality of the circumstances before us, it is clear that M.S. is not in need of care, treatment or rehabilitation that is unlikely to be provided or accepted without the

coercive intervention of the trial court. *See* I.C. § 31-34-1-10(2)(B). Without any inducement, Mother has acknowledged her mistake and is now attempting to rebuild her family by undergoing the necessary services. Thus, we conclude that the evidence does not support the trial court's determination that M.S. is a CHINS with respect to Mother.

III. *CHINS Finding with Regard to Father*

The DCS's petition with regard to Father focuses on Father's failure to establish paternity and his purported unawareness as to Mother's drug use. As with Mother, the DCS filed its claim pursuant to I.C. § 31-34-1-10. With regard to the first statutory prong, *i.e.*, the child is born with a controlled substance in her body, the DCS relied on the same evidence it presented to establish its claim against Mother. Because we found this evidence to be insufficient to satisfy its burden of proof as to Mother, we make the same finding here.

However even assuming *arguendo*, the DCS satisfied its burden, again, no sufficient evidence was presented to prove beyond a preponderance M.S. is in need of services as to Father. Father testified that he had signed a paternity affidavit at the hospital and was informed that was all he needed to do to establish paternity of M.S. In signing the affidavit, Father affirmatively demonstrated that he was willing to take responsibility for M.S.'s needs. Father's failure to legally establish his paternity is not an indicator of Father's alleged parenting skills. *See In Re C.S.*, 863 N.E.2d at 419 (indicating an intention to establish paternity and taking steps towards that goal cannot be considered a "failure" to establish paternity, sufficient to support a CHINS determination).

Furthermore, the record is devoid of any evidence supporting DCS's argument that Father should have been aware of Mother's purported cocaine use during her pregnancy

because they live in the same house. At trial, Father stated that he had never seen Mother use drugs and had no reason to ever suspect she was using cocaine. In fact, he told the trial court that Mother first informed him of her one-time cocaine use after M.S. was born and DCS had become involved. With regard to drugs in an infant's body, we held in *In Re C.S.* that "there was no allegation and no evidence that [Father] was responsible for that circumstance and the CHINS determination as to [Father] cannot be supported on that basis." *Id*. at 418. Likewise, we find no evidence here.

Even though Father's first reaction upon learning of Mother's positive drug test was to leave the hospital, the record reveals that he returned the same evening and discussed the problem with Mother. He urged and supported her to voluntarily seek counseling, which he paid for, and attend N.A. meetings in an attempt to keep the family together.

DCS, in its brief, relies heavily on the fact that Father works 14 to 16 hours a day, six days a week thereby missing some scheduled visitations with M.S. and a parenting assessment. DCS uses this evidence to claim Father is indifferent and detached from recognizing any problems regarding M.S.'s care. However, Father is the sole provider for Mother and her three children, two of whom are by a different father. He works long hours, giving her the opportunity to be a stay-at-home-mom. Unlike DCS, we find that attempting to provide for a family does not, without more, lead to the inference of an indifferent parent.

In sum, Father is employed, has stable housing, and is a staunch supporter of Mother's counseling classes. Father has the ability to provide food, shelter and other necessities for M.S. There is no indication that M.S.'s physical or mental condition would be seriously impaired or endangered in his care. As DCS presented no testimony that would controvert

this evidence, we conclude that the trial court erred in finding M.S. a CHINS with respect to Father.

IV. *Concluding Remarks*

While we agree with DCS that Mother exhibited poor judgment, we rarely encounter a record that is littered with countless indications that Mother and Father are concerned parents, willing to do whatever it takes to secure the return of their infant daughter. Both parents were present at all hearings. During the initial hearing on November 14, 2006, Father and Mother exhibited serious apprehension about the foster parents caring for M.S. They questioned the trial court at length about the foster parents' background and the measures put in place to ensure M.S.'s safety. At the hearing, M.S.'s parents offered possible solutions of placing M.S. in a relative's care. The record clearly establishes that Mother and Father were willing to work with DCS and take all necessary classes to prove their parenting skills. In essence, this is a clear case of overzealousness on the part of the DCS.

CONCLUSION

Based on the foregoing, we conclude that the DCS failed to prove beyond a preponderance of the evidence that M.S. is a CHINS as to Mother and Father. Accordingly, we reverse the trial court's CHINS determination as to both parents.

Reversed.

SHARPNACK, J., concurs.

FRIEDLANDER, J., concurs in result with opinion.

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JAYNE BOUDIA and ROBERT SHOULDERS,	)	
Appellants-Respondents,	)	
vs.	)	No. 49A02-0703-JV-276
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Appellee-Petitioner,	)	
CHILD ADVOCATES, INC.,	)	
Appellee-Guardian ad Litem.	)	

FRIEDLANDER, Judge, **concurring in result**

I agree with the result reached by the majority, but cannot endorse the analysis leading to that conclusion. Two aspects of the opinion are of particular concern to me. First, I believe the Majority's opinion adopts a tone that is unduly harsh in commenting upon the DCS's actions and motivations in this case and, by extension, too critical of the trial court's performance as well. The Majority's analysis goes beyond merely explaining why the trial court's judgment must be reversed upon the ground that the DCS failed to prove its case.

Instead, the opinion strikes me as a too-thinly veiled criticism of the decision to pursue this CHINS action in the first place.

Which leads me to my second concern. To prevail below, the DCS bore the burden of proving certain elements, one of which was correctly the focus of the Majority's analysis, i.e., that M.S. needs care or treatment that the child is not receiving and is not likely to receive without the coercive intervention of the court. The trial court concluded the DCS carried its burden in that respect. The Majority disagrees, and correctly so. In so doing, however, the Majority's opinion goes beyond saying only that the DCS failed to prove, for instance, that Father knew of Mother's cocaine use. The Majority implies, if not explicitly states, that Father did *not* know about Mother's drug use. This is but one example of the second aspect of Majority's analysis to which I cannot subscribe, which in a nutshell is that the DCS not only failed to prove the requisite elements were present, but Mother and Father proved those elements were *not* present. This goes too far, and certainly goes beyond what is necessary to support reversal. Put another way, it is enough to say the DCS did not prove its case; we need not and should not go further and state or imply that Mother and Father proved the opposite propositions, whatever they were (e.g., Mother did *not* have a more significant drug problem), were true.

For the reasons set out above, I concur only in the result reached by the Majority.