

*Note: In the case title, an asterisk (\*) indicates an appellant and a double asterisk (\*\*) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2020-020

APRIL TERM, 2020

In re C.S. & L.S., Juveniles	}	APPEALED FROM:
(B.S., Father*)	}	
	}	Superior Court, Windham Unit,
	}	Family Division
	}	
	}	DOCKET NO. 96/97-8-19 Wmjb
		Trial Judge: Katherine A. Hayes

In the above-entitled cause, the Clerk will enter:

Father appeals the court’s decision adjudicating his children, C.S. and L.S., as children in need of care or supervision (CHINS). On appeal, he argues that the adjudication was in error because there was no evidence that there was a continuing risk of harm to the children. We reverse.

In August 2019, the State filed a petition alleging C.S. and L.S. were CHINS. The court gave custody of the children to the Department for Children and Families (DCF).

Following a contested hearing on the merits, the court found the following. Mother had a lengthy history of substance abuse. She had previously overdosed and had been to rehab many times. Father was aware of mother’s history and her many relapses. At the time, mother had been receiving monthly shots that made her sick if she tried to use opiates. Father was fully aware of mother’s treatments. Father testified that he brought mother to her monthly appointments to get the shot and sometimes grandmother brought mother. The trial court noted that mother testified that she always drove herself and did not resolve the discrepancy. Mother missed her shot in July 2019. Father was aware that Mother was due for a shot at the end of July and testified it just “slipped [his] mind.” The court did not find that father knew mother had missed the shot. Father was the custodial parent. On August 6, father went out of town for an overnight and left the children unsupervised with mother. During the night, mother overdosed and was rendered unconscious while caring for the children. One child discovered mother and called the grandmother, who contacted emergency services. When police arrived, they found mother passed out and administered Narcan to mother.

The court found that the children were at risk of harm and adjudicated them as CHINS. The court explained that the incident could be traumatizing to the children and put them at risk of emotional harm. The court further found that father acted irresponsibly in leaving the children with mother given that he was aware of mother’s ongoing addiction issues. Father appeals.

Among other possibilities, children are “in need of care or supervision” when they are “without proper parental care or subsistence, education, medical, or other care necessary for [their] well-being.” 33 V.S.A. § 5102(3)(B). The State must prove CHINS by a preponderance of the

evidence. In re L.M., 2014 VT 17, ¶ 19, 195 Vt. 637. “The issue before the family court at the merits stage of a CHINS proceeding is a determination of whether, at the time of the filing of the petition, the juvenile is a child in need of care and supervision.” Id. ¶ 20 (quotation and alteration omitted). In other words, whether “the child’s well-being is threatened.” Id. ¶ 21 (quotation omitted).

On appeal, father claims that the CHINS adjudication is in error because this was an isolated incident and there was no evidence or finding that the children were at continued risk of harm. Father contends that making a CHINS finding based on a single instance of a parent’s misjudgment is inconsistent with the statute, which focuses on protecting children’s welfare not punishing parents.

The focus of the CHINS statute is on the children’s welfare at the time the petition is filed. In re B.R., 2014 VT 37, ¶ 14, 196 Vt. 304. In evaluating a CHINS petition, the court may consider the circumstances leading up to the filing of the CHINS petition. In re L.M., 2014 VT 17, ¶ 20. The critical question, though, is whether at the time of the filing of the petition, the child was without proper parental care “such that the child’s well-being is threatened.” Id. ¶ 21; see also In re M.L., 2018 VT 32, ¶ 12 207 Vt. 128 (holding that child was not CHINS-C where, by time CHINS petition was filed, mother had admitted child to appropriate treatment program).

In some cases, a parent’s failure to protect a child from another, including another parent, can support a CHINS finding. See, e.g., In re J.W., 2016 VT 78, ¶ 24, 202 Vt. 424 (holding that mother’s failure to protect child from individual she believed to be dangerous supports CHINS determination); In re C.M., 157 Vt. 100, 103 (1991) (holding that where mother was aware of danger father posed to child but continued to permit father to care for child by himself from time to time, father’s abuse and mother’s failure-to-protect support the CHINS finding as matter of law).

But, in considering whether a parent’s failure to protect supports a CHINS determination, we have considered whether the parent’s judgment is indicative of an ongoing risk of harm to the child. For example, in In re T.R., 169 Vt. 574 (1999) (mem.), we considered a CHINS determination in a case in which a child reported that his mother’s boyfriend had hit him, the boyfriend denied the abuse and claimed the child had fallen on the ice, and the mother believed the child had fallen on the ice. The trial court credited the child’s report and concluded that because mother did not believe the child, he was at risk for continuing harm and accordingly CHINS. This Court reversed, concluding that the evidence in the case “does not adequately support the conclusion that T.R. faces an obvious risk of future harm caused by mother’s inability to protect him from her boyfriend’s abuse.” Id. at 623. The Court noted that the trial court did not find that mother fabricated a story to account for the injury; rather, the evidence was that mother was not present when her boyfriend hit T.R., mother had taken T.R. ice skating, and T.R. had fallen on the ice, hit his head, and gotten a mark on his head. Id. Moreover, this Court emphasized that the trial court made no finding that mother was aware the boyfriend posed a risk to T.R., or that boyfriend was likely to further abuse the child. Id.

The above cases illustrate that whether a child is CHINS because a custodial parent has entrusted the child to the care of another who neglects or abuses the child depends to a large extent on whether the custodial parent recognized, or should have recognized, the risk to the child, or whether there is evidence that the custodial parent would be likely to put the child at risk again. In this case, the critical questions are whether father knew or should have known that the children would be at risk if left in their mother’s care, or whether he is likely to entrust them to mother again before she is in recovery.

The court found that father, as the custodial parent, left the children for an overnight with mother, who had a long history of substance abuse, but who had been sober and consistently in treatment for at least seven months. In light of mother's extended period of recovery, we cannot agree that father's decision to leave the children in mother's care can support a CHINS determination unless he knew or should have known that mother's recovery was unstable. The court did not find that father was aware or should have been aware that mother had missed her late July shot. Nor did it find that he knew or had reason to know that mother was at risk of relapse. Given the lack of evidence showing that father knew mother had missed her most-recent shot, or was aware of any other information tending to show mother was currently using or at heightened risk of using substances that would impair her ability to care for the children, there is no basis to conclude that father's entrusting the children to mother was an act of parental neglect that establishes that the children were CHINS at the time of this petition.

Reversed.

BY THE COURT:

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Beth Robinson, Associate Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice