

## MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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## IN THE COURT OF APPEALS OF INDIANA

In the Matter of:  
A.B. (Minor Child),  
Child in Need of Services  
and  
B.B. (Mother)  
*Appellant-Respondent,*

v.

Indiana Department of Child  
Services,  
*Appellee-Petitioner.*

June 29, 2022

Court of Appeals Case No.  
21A-JC-2605

Appeal from the Decatur Circuit  
Court

The Honorable Timothy B. Day,  
Judge

Trial Court Cause No.  
16C01-2106-JC-117

**Bailey, Judge.**

## Case Summary

- [1] B.B. (“Mother”) challenges the sufficiency of the evidence supporting the order adjudicating her child, A.B. (“Child”), a Child in Need of Services (“CHINS”).
- [2] After *sua sponte* addressing the procedural posture of the case—which involves an untimely Notice of Appeal that subjects this matter to potential dismissal—we elect to reach the merits. We ultimately affirm the CHINS adjudication.

## Facts and Procedural History

- [3] In May 2021, the Indiana Department of Child Services (“DCS”) received a report that Child had been sexually abused by Mother’s boyfriend (“Boyfriend”). The following month, DCS filed a CHINS petition alleging that Child was a CHINS.<sup>1</sup> The court appointed a guardian ad litem (the “GAL”).
- [4] At a fact-finding hearing on the petition, there was evidence that Child’s father had primary physical custody of Child, with Mother exercising parenting time. Child—five years old at the time—testified at the hearing, alleging that Boyfriend had taken a shower with her and “touched [her] private[.]” Tr. Vol. 2 at 139. Child specified that Boyfriend had touched the “front one.” *Id.* Child testified that the touching took place in the shower at Mother’s house, when Boyfriend was not wearing clothes. When asked if she wanted to be around

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<sup>1</sup> Child’s father admitted Child was a CHINS. He does not actively participate on appeal.

Boyfriend, Child said: “No, never.” *Id.* at 144. At one point when asked what happened, Child said: “But my mom doesn’t believe me is why.” *Id.* at 138.

[5] DCS also presented evidence that Mother asked a DCS employee about allowing Child to remain in the home during the proceedings while requiring that Boyfriend leave the home. In response to Mother’s inquiry, the employee expressed her understanding that, at some point in the past, a protective order had been in place prohibiting Boyfriend from being around Child, and Mother had not followed that prior protective order. In the conversation, Mother “acknowledged that there was a protective order in the past, and that during that time, she had allowed [Boyfriend] to be around [Child].” *Id.* at 153.

[6] At some point, Mother told the GAL “[t]hat she doesn’t believe the allegations are true.” *Id.* at 170. Mother testified that she does not believe Child was harmed by Boyfriend “[b]ecause [Mother] never left the home without [her] kids.” *Id.* at 176. As to Boyfriend, there was evidence that he faced a felony charge related to the allegation of sexual abuse underlying the CHINS matter.

[7] The trial court orally adjudicated Child a CHINS. In doing so, the trial court made the following remark: “Based on what I have seen and heard, I think something’s happened to this child. I think it’s inappropriate. I think it’s sexual in nature.” *Id.* at 209. The court rejected evidence that Child had been coached or inconsistent in her allegations, noting: “I think this child was very specific as to where it happened, as to who did it and what was done.” *Id.* at 210. The court also addressed Mother’s argument that DCS had failed to show that Child

needed services, noting that Boyfriend had been around Child when he was not supposed to be around Child. The court stated that it “ha[s] no guarantee that this man’s not going to be around this child,” *id.* at 211, and could not “predict what [Boyfriend] is going to do if he has access to this child, whether it’s going to become physical harm” or “this child’s going to disappear,” *id.* at 210.

[8] Following the hearing, on October 26, 2021, the trial court issued a written order adjudicating Child a CHINS, with accompanying *sua sponte* findings and conclusions. Thereafter, Mother filed her Notice of Appeal in November 2021. The trial court clerk filed the Notice of Completion of Clerk’s Record on December 1, 2021. Shortly thereafter, the court entered a dispositional order.

## Discussion and Decision

### Premature Notice of Appeal

[9] Mother filed her Notice of Appeal after the trial court entered a CHINS adjudication but before the court issued a dispositional order, which is the final judgment in a CHINS matter.<sup>2</sup> *See In re D.J. v. Ind. Dep’t of Child Servs.*, 68 N.E.3d 574, 578 (Ind. 2017) (noting that “a CHINS determination, by itself, is not a final judgment”). Under these circumstances, the Notice of Appeal is

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<sup>2</sup> In reciting the procedural history, Mother cites to a document drawn from Indiana’s MyCase system. That document contains the following disclosure: “This is not the official court record. Official court records of court proceedings may only be obtained directly from the court maintaining a particular record.” App. Vol. 2 at 2. We discourage this citation practice and remind counsel that “the Chronological Case Summary is the official record of the court.” *Akehurst v. State*, 115 N.E.3d 515, 517 n.1 (Ind. Ct. App. 2018).

premature. *Id.* And although the timing of the Notice of Appeal “is not fatal to appellate jurisdiction,” *id.* at 576, when the Notice of Appeal is premature, that procedural irregularity can lead to other irregularities that impact jurisdiction.

[10] Indeed, as synthesized by our Supreme Court, the Indiana Rules of Appellate Procedure contain “two prerequisites” for jurisdiction: “(i) the trial court must have entered an appealable order, and (ii) the trial clerk must have entered the notice of completion of clerk’s record on the CCS.” *Id.* at 578. Simply put, if either requirement is unsatisfied, an appellate court cannot acquire jurisdiction.

[11] As to the case at hand, we conclude that this Court has acquired appellate jurisdiction because (a) the trial court eventually entered an appealable order and (b) our record shows the entry of the notice of completion of clerk’s record. Nevertheless, although we have jurisdiction, we note that the Notice of Appeal was untimely. *See id.* (explaining that an untimely Notice of Appeal is one that is “belated or premature”).<sup>3</sup> Under Indiana Appellate Rule 9(A)(5), “[u]nless the Notice of Appeal is timely filed, the right to appeal shall be forfeited.”<sup>4</sup>

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<sup>3</sup> Mother accurately recounts the timeline but does not otherwise address the timing of the Notice of Appeal. *See Br. of Appellant* at 6 (“On December 10, 2021, the trial court clerk noted entry of the final dispositional order in the chronological case summary. . . . On November 24, 2021, Mother filed her notice of appeal.”).

<sup>4</sup> This rule provides an exception that applies only in post-conviction matters.

[12] Because the Notice of Appeal was untimely, Mother has forfeited this appeal. Nonetheless, we are authorized to “disregard the forfeiture and resolve the merits.” *In re D.J.*, 68 N.E.3d at 579. We ultimately elect to reach the merits.<sup>5</sup>

## Sufficiency of the Evidence

[13] As to the merits, the trial court adjudicated Child a CHINS under Indiana Code Section 31-34-1-1, which provides as follows:

A child is a [CHINS] if before the child becomes eighteen (18) years of age:

(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:

(A) when the parent, guardian, or custodian is financially able to do so; or

(B) due to the failure, refusal, or inability of the parent, guardian, or custodian to seek financial or other reasonable means to do so; and

(2) the child needs care, treatment, or rehabilitation that:

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<sup>5</sup> Although we have chosen to reach the merits of this case, we caution against filing an untimely appeal. Indeed, we remind counsel that “it is never error for an appellate court to dismiss an untimely appeal[.]” *Id.*

(A) the child is not receiving; and

(B) is unlikely to be provided or accepted without the coercive intervention of the court.

Our Supreme Court has synthesized this statutory language, explaining that a CHINS adjudication requires proof of “three basic elements: that the parent’s actions or inactions have seriously endangered the child, that the child’s needs are unmet, and (perhaps most critically) that those needs are unlikely to be met without State coercion.” *In re S.D.*, 2 N.E.3d 1283, 1287 (Ind. 2014).

[14] DCS must prove by a preponderance of the evidence that a child is a CHINS. Ind. Code § 31-34-12-3; *In re Eq. W.*, 124 N.E.3d 1201, 1208 (Ind. 2019). Here, the CHINS order included special findings—but neither party requested findings and “no statute expressly requires formal findings in a CHINS fact-finding order.” *In re S.D.*, 2 N.E.3d at 1287. The instant findings are therefore *sua sponte* findings that control only the issues they cover, with a general-judgment standard controlling any “issues . . . not covered by such findings.” Ind. Trial Rule 52(D). Where a general-judgment standard applies, we affirm if the judgment can be sustained on any legal theory supported by the evidence. *Yanoff v. Muncy*, 688 N.E.2d 1259, 1262 (Ind. 1997). As to matters covered by the findings, we will not “set aside the findings or judgment unless clearly erroneous.” T.R. 52(A). Under this standard, we will affirm if the evidence supports the findings and the findings support the judgment. *Steele-Giri v. Steele*, 51 N.E.3d 119, 123 (Ind. 2016). Moreover, in conducting our appellate review,

we will not reweigh evidence, *id.* at 124, and we must give “due regard” to the opportunity of the trial court to judge the credibility of witnesses, T.R. 52(A).

[15] In adjudicating Child a CHINS, the trial court determined that Child had been neglected in that she had been sexually abused by Boyfriend at Mother’s home. The court also determined that, without the coercive intervention of the court, Child would not be protected against contact with Boyfriend. As the court put it: “I can’t predict what [Boyfriend] is going to do if he has access to this child, whether it’s going to become physical harm, this child’s going to disappear, or whether he just—or anybody is going to try to suggest to this child this [abuse] didn’t happen when all appearances are that it did.” *Id.* The foregoing determinations are supported by (1) Child’s testimony indicating that she had been sexually abused by Boyfriend and (2) evidence that Mother had allowed Boyfriend to be around Child when he was not supposed to be.

[16] In challenging the sufficiency of the evidence, Mother invites us to reweigh the evidence of sexual abuse. Indeed, Mother focuses on alleged inconsistency in Child’s statements. Mother characterizes Child’s statements as “equivocal and contradictory” and “not sufficient to support the . . . CHINS determination.” Br. of Appellant at 19. Mother also asserts that “there was no physical evidence to corroborate the allegation” with no “evidence that . . . DCS even sought to obtain a physical examination.” *Id.* at 18-19. Furthermore, Mother argues that there was no evidence that she “knew or should have known that [her] boyfriend was a threat[.]” *Id.* at 19.



[17] We reject Mother's invitations to reweigh the evidence that Child was sexually abused. Next, we observe that the CHINS statute does not require (a) physical evidence or a physical exam corroborating a Child witness's testimony or (b) actual or constructive parental knowledge that the abuser posed a threat. *See* I.C. § 31-34-1-1. At bottom, DCS was obligated to prove by a preponderance of the evidence that Child was a CHINS. DCS presented evidence that Child was not only sexually abused by Boyfriend but also that Mother would not reliably prevent Boyfriend from again accessing Child. All in all, we conclude that the evidence is sufficient to support the determination that Child is a CHINS.

[18] Affirmed.

Najam, J., and Bradford, C.J., concur.