

MEMORANDUM DECISION

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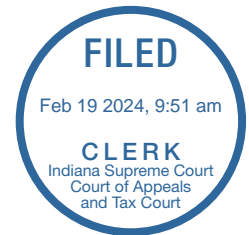


IN THE
Court of Appeals of Indiana

In the Matter of L.K. (Minor Child), Child in Need of Services
H.G. (Mother),
Appellant-Respondent

v.

Indiana Department of Child Services,
Appellee-Petitioner



February 19, 2024

Court of Appeals Case No.
23A-JC-1249

Appeal from the Madison Circuit Court

The Honorable Stephen J. Koester, Judge
The Honorable Thomas Grey Augustine Chandler, Magistrate

Trial Court Cause No.
48C02-2208-JC-258

Memorandum Decision by Judge Weissmann
Chief Judge Altice and Judge Kenworthy concur.

Weissmann, Judge.

[1] H.G. (Mother) appeals the trial court’s determination that her infant daughter, L.K. (Child), was a child in need of services (CHINS). The Indiana Department of Child Services (DCS) alleged that Mother neglected and endangered Child by using tetrahydrocannabinol (THC) while she was pregnant and afterward. But DCS presented no evidence that Mother was ever impaired by any substance while caring for Child or failed to meet Child’s needs. We therefore reverse the CHINS determination.

Facts

[2] Mother has four children, with Child being the youngest. The three oldest children each were removed from Mother’s home based on allegations of Mother’s substance abuse. One by one, each child was found to be a CHINS and placed in foster or relative care. Mother’s parental rights as to her oldest child were terminated in April 2022. At the time of the Child’s CHINS proceedings, DCS had petitioned to terminate Mother’s parental rights as to her second and third children due to Mother’s THC use and her failure to comply with the services to which DCS had referred her.

- [3] While pregnant with Child during the summer of 2022, Mother lived with Child’s father, J.K. (Father). As part of the CHINS proceedings relating to her other children, Mother underwent several drug screens before and shortly after Child’s July 8, 2022, birth, showing either: (1) no drug use; or (2) THC use.
- [4] But Child’s umbilical cord blood tested positive for THC, prompting a DCS investigator to speak to Mother and Father about their admitted THC use. The investigator also looked into a report that Mother had missed two medical appointments in the week following Child’s birth aimed at addressing a possible irregular heartbeat and weight concerns. Although both Mother and Father tested positive for THC, DCS did not immediately intervene. Instead, nearly two months after Child’s birth, DCS petitioned to find Child to be a CHINS. DCS alleged two bases for the CHINS finding: (1) Child was neglected; and (2) Child had been born with THC in her umbilical cord blood.
- [5] During Mother’s initial hearing on the CHINS petition, the trial court confirmed with DCS that the matter of the medical appointments and the concerns over Child’s health had been resolved. Tr. Vol. II, p. 12.¹ Child at first

¹Despite DCS’s abandonment of this claim at the CHINS initial hearing, DCS attempted at the CHINS factfinding hearing to present evidence regarding the alleged missed medical appointments. Tr. Vol. II, p. 79. After preliminary questioning showed the witness lacked personal knowledge of the matter, Mother objected on hearsay grounds, and DCS opted to restate the question by proceeding to inquire about Child’s umbilical cord results. *Id.* at 80. Thereafter, the trial court repeatedly indicated that the DCS witnesses could only testify to matters within their personal knowledge. *Id.* at 93, 95, 106.

Later, during Mother’s cross-examination of another DCS witness, the witness responded that “[i]n the beginning there was missed appointments.” *Id.* at 109. However, the witness acknowledged that such information came from an unspecified third party who had not been subpoenaed to testify at the hearing. *Id.*

remained in Mother's home after the CHINS filing. Two months later, DCS removed Child when Mother refused to take a drug test and DCS learned that Mother and Father were no longer living together. After a detention hearing, the trial court approved Child's continued detention and for the first time in this proceeding ordered Mother to submit to random drug screens.

[6] Child was placed in foster care, where she has remained. Mother missed 17 of 34 scheduled visits with Child while the CHINS petition was pending. At the factfinding hearing, a DCS family case manager supervisor (FCMS) testified that all of Child's needs were met by Mother before Child's removal. The FCMS further testified that DCS removed Child from Mother's home because it feared that Mother would engage in future substance abuse other than THC while caring for Child. But the FCMS acknowledged that DCS had no evidence suggesting Mother was using any drugs other than THC.

[7] Mother refused nearly all the drug screens requested by DCS because she thought they would be positive for THC. But Mother tested negative for drugs in a DCS-referred drug screen shortly after the CHINS filing. She testified that her employment-related drug test conducted before the factfinding hearing also was negative.

Aside from that vague reference, DCS did not present during the factfinding hearing any testimony or other evidence as to any missed medical appointments. The only evidence of medical treatment was testimony showing that Child needed no medical treatment when she was placed in foster care.

- [8] Mother further testified at the factfinding hearing that approximately twice daily, she either smokes or consumes what she believes are legal THC products that she purchases at gas stations or smoke shops. She testified that her use of THC had never prevented her from caring for Child appropriately. Mother also testified that she had never tested positive for any drug other than THC, and DCS presented no evidence refuting Mother's statement. Mother, who had been living in the same home for three years and was employed, also denied smoking THC in Child's presence or being impaired at any time. DCS offered no evidence of Mother's impairment nor did DCS present evidence to show any alleged impairment endangered Child.
- [9] Father did not appear for his separate factfinding hearing, but his counsel did. DCS presented one witness: a family case manager. She testified that Father had admitted to unspecified substance abuse at unspecified times, had signed a consent to Child's adoption, and had not been in contact with the family case manager for several months.
- [10] After conclusion of both factfinding hearings, the trial court found Child to be a CHINS based on the neglect allegation but made no finding regarding the THC in Child's umbilical cord blood. After a dispositional hearing, the trial court

ordered Mother, among other things, to undergo random drug testing and not use “illegal” substances. Dispositional Order, p. 3. Mother appeals.²

Discussion and Decision

- [11] Mother claims DCS failed to prove Child is a CHINS. When reviewing a CHINS determination, “[w]e neither reweigh the evidence nor judge the credibility of the witnesses.” *In re K.D.*, 962 N.E.2d 1249, 1253 (Ind. 2012). We will reverse the trial court’s decision “only upon a showing that the decision . . . was clearly erroneous.” *Id.*
- [12] Although DCS alleged Child was a CHINS under two separate statutes, the juvenile court found that Child was a CHINS only under the neglect statute, Indiana Code § 31-34-1-1. That statute provides:

A child is a child in need of services 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

² Mother’s appointed appellate counsel timely filed a notice of appeal but mistakenly listed Father, who is not appealing the CHINS judgment, as the appellant. Months later, after the transcript was filed, Mother’s counsel apparently discovered his mistake. But instead of filing a belated notice of appeal listing Mother as the appellant, Mother’s counsel filed an amended notice of appeal, which was more than 60 days late. See Ind. Appellate Rule 9(A) (“A party initiates an appeal by filing a Notice of Appeal with the Clerk . . . within thirty (30) days after the entry of a Final Judgment is noted in the Chronological Case Summary.”).

Mother’s counsel also did not mention the CHINS factfinding order in the Appellant’s Brief or include that critical document in Appellant’s Appendix. He challenges the dispositional order as if it were the factfinding order. DCS, however, does not challenge the appeal as untimely or point to the other appellate defects as warranting waiver or dismissal. We urge Mother’s appellate counsel to undergo further training before accepting any new appointments in CHINS appeals.

child with necessary food, clothing, shelter, medical care, education, or supervision; and

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

(A) the child is not receiving; and

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

Ind. Code § 31-34-1-1.

[13] The neglect statute imposes “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). Mother argues that DCS failed to prove all three elements by a preponderance of the evidence, as required by Indiana Code §§ 31-34-1-1 and 31-34-12-3. We agree.

No Serious Endangerment

[14] The record contains no evidence that Child was seriously endangered. DCS did not intervene in Mother’s care of Child until nearly two months after Child’s birth, although it knew Mother was using THC. When the FCMS visited Mother’s home shortly before the CHINS filing, the FCMS found Mother’s home appropriate and had no concerns about Mother’s interaction with Child.

[15] At Mother’s factfinding hearing, DCS presented no evidence on how the THC in Child’s umbilical cord blood endangered or impacted Child. DCS also

presented no evidence that in Child's presence, Mother had ever smoked THC or been impaired by any drug.

[16] Mother testified that she smoked or consumed THC that she bought at gas stations and smoke shops. She also testified that she limited her smoking of the THC products to times when her sister was caring for Child. However, Mother appeared to testify that Mother would eat THC in "gummie" form while caring for Child. Tr. 145-46. As to Father, DCS merely presented evidence showing Father had admitted to "substance abuse" at an unspecified time and that he had signed a consent to Child's adoption. *Id.* at 164-65. DCS presented no evidence of any specific drug use or impairment by Father while caring for Child.

[17] This evidence is not enough to establish that Child was endangered. First, Mother's ingestion of THC while pregnant and THC in Child's umbilical cord at birth do not alone demonstrate that Child is seriously endangered. *See In re S.M.*, 45 N.E.3d 1252, 1255-56 (Ind. Ct. App. 2015) (finding evidence of serious endangerment insufficient in CHINS proceeding in which DCS presented no evidence of the impact on the child of being born with marijuana-positive meconium). Nor did Mother's history of THC use seriously endanger Child, given the absence of evidence that Mother had been impaired while Child was in her care. *See id.* at 1256; *Ad.M. v. Ind. Dep't of Child Servs.*, 103 N.E.3d 709, 714 (Ind. Ct. App. 2018) ("We must conclude that evidence of one parent's use of marijuana and evidence that marijuana has been found in the family home,

without more, does not demonstrate that a child has been seriously endangered,” given the lack of evidence of impact on the child).

- [18] DCS’s failure to present any evidence that Child was impacted by Mother’s use of THC is fatal to DCS’s claim that Child was endangered. Although DCS need not wait until a child is physically or emotionally harmed before intervening, the CHINS finding must be based on facts, not speculation. *See Ad.M.*, 103 N.E.3d at 715. Without proof of serious endangerment, the CHINS finding is erroneous.

No Unmet Needs and No Need for State Coercion

- [19] But even if Child were endangered, “[n]ot every endangered child is a child in need of services, permitting the State’s *parens patriae* intrusion into the ordinarily private sphere of the family.” *S.D.*, 2 N.E.3d at 1287.

- [20] The record reveals no evidence that Child had unmet needs or that State coercion was necessary to ensure Child’s needs were met. The FCMS conceded that Child, even before DCS’s intervention, “had everything . . . a baby would need” and had never been harmed while in her parents’ care. *Id.* at 108. DCS staff were merely concerned that Mother would use drugs other than THC and be impaired while caring for Child. Yet DCS offered no evidence that Mother (or Father, for that matter) had ever done so. As previously noted, a trial court may not base its CHINS determination on speculative concerns for the future. *A.R. v. Ind. Dep’t of Child Servs.*, 121 N.E.3d 598, 605 (Ind. Ct. App. 2019).

[21] “The purpose of the CHINS adjudication is to ‘protect the children, not punish parents.’” *K.D.*, 962 N.E.2d at 1255 (quoting *In re N.E.*, 919 N.E.2d 102, 106 (Ind. 2010)). Thus, the focus of a CHINS proceeding is on the condition of the child. *Id.* at 1256. As in *Ad.M.*, “DCS did not meet its burden to demonstrate that [Mother’s] actions or inactions have impacted, much less seriously endangered, [Child].” 103 N.E.3d at 715. DCS also did not establish Mother would not meet Child’s needs without State coercion. After all, DCS presented no evidence that Mother was not meeting Child’s needs before DCS’s involvement. *See S.M.*, 45 N.E.3d at 1255-56.

[22] As DCS did not prove that Child was a CHINS under Indiana Code § 31-34-1-1 as a result of neglect, we reverse the juvenile court’s judgment.³

Altice, C.J., and Kenworthy, J., concur.

ATTORNEY FOR APPELLANT

David W. Stone
Anderson, Indiana

ATTORNEY FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Abigail R. Recker
Deputy Attorney General
Indianapolis, Indiana

³ Given this disposition, we need not address the parties’ other claims.