

## 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

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In the Matter of: A.D. (Minor  
Child), Child in Need of  
Services, and

K.T. (Father),

*Appellant-Respondent,*

v.

Indiana Department of Child  
Services,

*Appellee-Petitioner.*

November 18, 2021

Court of Appeals Case No.  
21A-JC-696

Appeal from the Shelby Superior  
Court

The Honorable R. Kent Apsley,  
Judge

Trial Court Cause No.  
73D01-2010-JC-60

**Brown, Judge.**

- [1] K.T. (“Father”) appeals the juvenile court’s determination that A.D. (“Child”) is a child in need of services (“CHINS”). We affirm.

### *Facts and Procedural History*

- [2] Father and K.D. (“Mother”) are the parents of Child, who was born prematurely on September 18, 2020.<sup>1</sup> On October 6, 2020, Child’s meconium was tested, and the results were positive for THC. Before Child was discharged from the hospital, on October 16, 2020, the Department of Child Services (“DCS”) filed a CHINS petition alleging, in part, that Child tested positive for marijuana, Mother had five other children who had been removed from her care in other CHINS cases, and Father and Mother could not provide a safe, sober, and stable living situation for Child.<sup>2</sup> At the detention hearing held that same day, Father failed to appear and the juvenile court found probable cause that Child was a CHINS and ordered that Child be placed in foster care upon her release from the hospital. On November 2, 2020, the court held an initial hearing, at which it ordered DNA testing to be sure that Father was the biological father of Child because Mother was still married to another man at the time of Child’s birth. DNA results later confirmed Father was Child’s biological father. Father had been living with Mother during the latter part of the CHINS cases involving Mother’s five other children, and Child was

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<sup>1</sup> Mother does not participate in this appeal; however, Father and Mother continue to live together. We therefore include facts pertaining to Mother which are relevant to this appeal.

<sup>2</sup> Father is not the biological father of Mother’s five other children, and termination cases were filed in the CHINS cases involving Mother’s five other children.

Father's first child. Father asked that Child be placed with him, and the court set the matter for hearing.

[3] On November 23, 2020, the court held the scheduled placement hearing. DCS reported that Father had tested positive for THC on October 21 and November 2, 9, 16, and 18, and Mother had also continued to test positive for THC. DCS also reported that there were concerns about Mother having unsupervised contact with Child if Child was placed with Father and that the house had a mold problem. The court's order maintained Child's placement in foster care and stated that it would address the motion for placement at the next hearing. The order required Mother and Father to correct the mold problem and allow DCS and the health department to inspect the home and to continue submitting to drug screens.

[4] On December 21, 2020, the court held a fact-finding hearing. Dr. Anthony D'Amore, who was Child's pediatrician, testified that Child was born with THC in her system at a level of 400. Dr. D'Amore stated that a level of THC as low as fifty would cause "some symptoms following delivery" but "above 400 there's clinically almost like a mild narcotic or nicotine withdrawal with tremors and startles before feeding and some visual stimuli difficulty." Transcript Volume 2 at 57. Dr. D'Amore further testified that drug-exposed infants can later have "learning deficits, some social and emotional adaptive issues" as a result of the drug exposure. *Id.* at 58.

[5] Family Case Manager Kierstyn Macklin (“FCM Macklin”) testified that she had been working on the CHINS cases involving Mother’s five other children since May 2020 and had been working with Mother and Father shortly after Child’s birth in September. FCM Macklin testified, by the time “the report was called in, [she] had been to the home several times” and was able to speak with Father and Mother at their home on October 21 while Child was still in the hospital. *Id.* at 104. Mother and Father both admitted to marijuana use and allowed FCM Macklin to see “the main living[] areas of the home” but they did not want her to see “the rest of the home at that time due to it being a mess.” *Id.* at 105. Mother and Father told FCM Macklin that the house contained mold, but she did not see the mold because “it was in a part of the house they didn’t want me to see at that point.” *Id.* FCM Macklin indicated that she did not have safety concerns about the home at that time.

[6] James Polly, a licensed clinical social worker, also testified. Polly began working with Mother in August 2020 as her therapist because of the CHINS cases involving Mother’s other children, and he was also familiar with Father through Mother’s sessions. Polly testified that he did “virtual intake some time in November” with Father and had just started treating Father individually. *Id.* at 120. As to Father’s ability to care for Child, Polly stated “It’s really, I mean, it’s really hard to say but I don’t have any overreaching concerns, any concerns that are evidenced at this time. But I have just started working with him” and that Father “seems cooperative, and he has told me that he is definitely going to put the child first and follow the safety guidelines.” *Id.* at 121. The court asked

Polly, “as far as [Father’s] involvement it’s not simply, it’s not simply, um as part of [Mother’s] therapy, it’s not just as part of family therapy, you’re actually seeing him as well individually as the father” to which Polly replied “[y]es, sir. We’re just now doing that sir.” *Id.* Polly testified that Father had identified he suffered from “ADHD and other issues and anxiety and things,” and Polly opined that he would like to see Father involved in treatment for “at least 6 months” for those issues. *Id.* at 123.

[7] In response to whether using marijuana helped him with his untreated ADHD, Father stated “[k]inda sort of” and acknowledged that “there are other ways . . . that are more within the legal system” to help. *Id.* at 97. Father stated that he remediated the mold in the home “with some mold and mildew killer from CLR” and “went over it with 2 Kilz paint.” *Id.* at 99. He further testified that he was employed at O’Neal Steel as a second shift material handler and described himself as “pretty much just the product packager.” *Id.* at 100. When asked whether a positive test for marijuana could cause “any issue with [his] job and being able to operate, what is it cranes,” Father replied: “No. No, I have full confidence that I can get the job done and I hardly ever get an error.” *Id.* Father testified that the home had a crib and mattress, “quite a few diapers,” and wipes but did not yet have formula. *Id.* He further stated that he and Mother had a bumper seat, bouncy seats, bottles, clothes, and a car seat, and he felt he was “more than confident” he could care for Child. *Id.* at 101. Father also testified that he did not need court supervision or intervention to care for Child.

[8] The court asked to hear from Child’s Court Appointed Special Advocate (“CASA”), who stated that marijuana use for Mother and Father wasn’t “every once in a while, this is a habit. . . . a lifestyle choice.” *Id.* at 133. She was also concerned that “if both parents are admitting to using marijuana to deal with stress and anxiety, having a newborn regardless of being premature or having additional needs is going to cause any, any person stress.” *Id.* at 133. She stated Mother and Father “keep saying they’re going to stop but we continue to get screens back that are positive, screens back that are positive with higher levels. So, I don’t [] see any indication here from a consistency standpoint that they have made an effort to stop smoking marijuana.” *Id.* CASA also addressed concerns with visitation and acknowledged that the COVID-19 pandemic had been “an issue” but noted that Mother and Father had ended two visits early and declined to make up a missed visit. *Id.* CASA further stated that Mother and Father had said “they have supplies in the home” but were not providing them for visits.” *Id.* at 134.

[9] CASA also told the court that Child had a very rigorous feeding and sleep schedule, and she was concerned that if Father continued to use marijuana to relieve stress that he would not be able to respond to Child’s needs. She stated that Mother’s history of marijuana use had “affected her ability to parent” and Mother did not follow through with the doctor’s recommendations about how to help one of her other children who was sent to the hospital for “failure to thrive[.]” *Id.* at 134. CASA further stated that she would “like to see [Father] looking at services with Fatherhood Engagement . . . .” *Id.* at 137.

[10] At the close of the evidence, the court stated that it was “clearly established” that DCS had met its burden to show that Child was born with THC in her body. *Id.* at 138. As to whether the care, treatment, or rehabilitation Child needs but was not receiving or was unlikely to be receiving without the court’s intervention, the court noted that was “a little more difficult” and it stated as follows:

I acknowledge however and I think [CASA] brought that to light very clearly. [Child] was not born into a vacuum. She was born into a family. She was born into, you know, a mother, a father, with at least 5 other siblings and the Court would note that although throughout this case, up to this point that both Mom and Dad have repeatedly tested positive, continued to test positive for the use of controlled substances. They have begun engaging in counseling, that does look very prom (sic), it does look very positive for the court. I would note that [] counseling is being provided through the DCS by court order. It is essentially through the coercive intervention of the court in this matter; therefore the Court finds the State has also met it’s burden of proof as to that element as well.

*Id.* at 138-139. The court determined Child to be a CHINS and ordered a change of placement from foster care to Father. As to the change of the placement, the court told Father he needed “to decide really really fast where your priorities are in this case, you know, where marijuana stacks up against you child in this case,” and that if the court was “to believe everything you’ve told me in this case I’m never ever ever going to see another positive drug screen from you again.” *Id.* at 143.

[11] On December 23, 2020, the court issued its written order on the fact-finding hearing. The court returned Child to Father's care and ordered Father to abstain from the use of controlled substances and drugs unless prescribed by a physician, submit to random drug screens, continue with counseling, allow DCS or Child's CASA to enter the home to check on Child, keep all medical appointments for Child, and to follow the safety plan, which included that Mother's time with Child was unrestricted subject to her supervision by Father, grandmother, or another relative or adult approved by DCS.

[12] On January 25, 2021, the court held a dispositional hearing. FCM Macklin stated that Mother was "continuously testing positive for marijuana" but "had one screen that was negative on 12/29" and had "2 no shows on 1/5 and 1/8, and then not home no show on 1/21. So, she hasn't been consistent in completing her drug screens." *Id.* at 150. She stated that, since the fact-finding hearing, Father "has had 5 screens that have been positive for marijuana. And he was requested to take a drug screen last Thursday and it does not appear that he made it to our office to screen." *Id.* She also stated that DCS was requesting Child be removed from Father's care due to both Mother and Father continuing to test positive for drugs. The court continued the dispositional hearing to February 1, 2021.

[13] On January 28, 2021, CASA filed her report which was updated on March 10, 2021. After several continuances, the dispositional hearing resumed on March



15, 2021.<sup>3</sup> FCM Macklin testified that both Mother and Father were continuing to test positive for drugs even though Father was “supposed to be the sober care giver in the home” and noted that of twenty-six drug screens provided to Father he had provided only one negative screen. *Id.* at 168. She stated that DCS was asking for a placement change due to continued drug use and concerns regarding safe sleep. She acknowledged that Child was healthy, up to date on her medical appointments, and closely bonded with Mother and Father, and that Mother and Father had a safety plan for the care of Child when Father was at work.

[14] FCM Macklin also stated that “the home had trash built up in the kitchen, floors were not the cleanest, I was able to talk with the family and they were able to clean it up but . . . [i]t’ll go back and forth, in cleanliness.” *Id.* at 174. She stated that Mother and Father were “over a thousand dollars behind in rent” and that in the past the home had “cat feces on the floor” and “a lot of dog hair in the home.” *Id.* at 175. She further testified that at a child and family team meeting one week before the dispositional hearing Mother and Father each admitted they were still using marijuana.

[15] Polly, the therapist for Mother and Father, testified that Father was compliant and cooperative with his therapy and that both Mother and Father had anxiety related to the possibility of Child’s removal. Polly stated that he had been to

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<sup>3</sup> Father had filed a motion to remove CASA but withdrew that motion at the dispositional hearing.

the home and observed Mother and Father interact with Child and that he did not “have any concerns the parents are going to do anything to the child. I mean there’s concerns been brought to my attention but those aren’t in the area in which I’m working with them.” *Id.* at 190-191. Polly also explained that he had concerns about Father’s use of marijuana potentially causing him to lose his job and the impact of that on the family, the possible interaction between marijuana and Father’s prescribed anxiety medication, and Mother and Father making Child a priority over marijuana use.

[16] Father testified that he was receiving substance abuse treatment and was prescribed medication for his anxiety and depression, which he had been on for less than a week. He stated he was “doing everything I can to keep her in our home and to get us a better home because I know that . . . our current facility is not the safest place for my daughter.” *Id.* at 200. He also testified that since he began his prescribed anxiety and depression medication he had “not touched [marijuana] since.” *Id.* at 201. Father acknowledged that continued use of marijuana posed a risk to his employment.

[17] At the conclusion of the hearing, the court noted that Mother and Father needed to make Child their priority rather than marijuana but did not grant DCS’s request to change Child’s placement. On April 12, 2021, the court issued a dispositional order which required Mother and Father to participate in reunification services.

## *Discussion*

[18] Father argues that DCS failed to meet its burden that Child was a CHINS. He acknowledges that Child was born with THC in her body due to Mother’s use of marijuana during the pregnancy. He challenges the juvenile court’s conclusion that Child was a CHINS pursuant to Ind. Code § 31-34-1-10, which provides, in pertinent part, that “a child is a child in need of services if: (1) the child is born with: . . . any amount, including a trace amount, of a controlled substance, a legend drug, or a metabolite of a controlled substance or legend drug in the child’s body, including the child’s blood, urine, umbilical cord tissue, or meconium” 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.” Father contends that DCS failed to present evidence sufficient to show that Child’s need for care, treatment, or rehabilitation was unlikely to be provided without the coercive intervention of the court.

[19] The juvenile court entered findings of fact and conclusions thereon. As to the issues covered by the findings, we first consider whether the evidence supports the findings, and then whether the findings support the judgment. *In re S.D.*, 2 N.E.3d 1283, 1287 (Ind. 2014). We review the remaining issues under the general judgment standard and will affirm the judgment “if it can be sustained on any legal theory supported by the evidence.” *Id.* (quoting *Yanoff v. Muncy*, 688 N.E.2d 1259, 1262 (Ind. 1997)). When performing appellate review of 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).

Instead, “[w]e consider only the evidence that supports the trial court’s decision and reasonable inferences drawn therefrom.” *Id.*

[20] “[T]he purpose of a CHINS adjudication is to protect children, not punish parents.” *In re N.E.*, 919 N.E.2d 102, 106 (Ind. 2010). “[A] CHINS adjudication is not a determination of parental fault but is simply a determination that a child is in need of services and is unlikely to receive those services without the court’s intervention.” *In re L.C.*, 23 N.E.3d 37, 39 (Ind. Ct. App. 2015), *trans. denied*. Because a CHINS adjudication is civil in nature, DCS “must prove by a preponderance of the evidence that a child is a CHINS as defined by the juvenile code.” *Id.* The element of coercive intervention “guards against unwarranted State interference in family life, reserving that intrusion for families where parents lack the ability to provide for their children, not merely where they encounter difficulty in meeting a child’s needs.” *In re S.D.*, 2 N.E.3d at 1287 (quotation and alteration omitted). A CHINS finding “should consider the family’s condition not just when the case was filed, but also when it is heard.” *Id.* at 1290.

[21] Father does not challenge the juvenile court’s findings of fact, and the unchallenged findings stand as proven. *See In re B.R.*, 875 N.E.2d 369, 373 (Ind. Ct. App. 2007) (failure to challenge findings by the trial court resulted in waiver of the argument that the findings were clearly erroneous), *trans. denied*.

[22] The record reveals that, as a consequence of having THC in her body when she was born, Child could be facing “long-term neuro-cognitive effects” because drug-exposed infants can have “some learning deficits, some social and emotional adaptive issues.” Transcript Volume 2 at 58. Father tested positive for THC on October 21, as well as on November 2, 9, 16, and 18, 2020, prior to the November 23, 2020 hearing on Father’s request for a change of placement. After the hearing on Father’s request for a change of placement, the court issued its written order requiring Father to “continue to submit to random drug testing.” Appellant’s Appendix Volume 2 at 43. Father again tested positive for THC after the November 23, 2020, hearing. Father tested negative on a drug test administered on December 16, 2020; however, a drug test administered on December 21, 2020, the same date as the fact-finding hearing, returned positive for THC. Father continued to test positive for THC after the fact-finding hearing.

[23] Father began to work with his therapist for individual counseling in November 2020. Father’s therapist was familiar with Father because he was also the therapist to whom Mother was referred in the CHINS cases involving her other five children. Father’s therapist testified that Father indicated that he struggled with ADHD and other issues, including anxiety, and his therapist stated he felt Father would need at least six months of additional therapy to address the issues. The court also heard from CASA at the fact-finding hearing, who stated that Child had a very rigorous feeding and sleep schedule, and she was concerned that if Father continued to use marijuana to relieve stress that he

would not be able to respond to Child's needs for consistent sleeping and feeding.

[24] Moreover, by the time of the dispositional hearing, Father's therapist was also concerned about Father and Mother's ability to make Child a priority over marijuana, that Father's substance use could result in his job loss and impact the stability of the family, and that Father should not be self-medicating for anxiety. Father acknowledged that he was playing a "dangerous game" with his employment due to his positive tests for marijuana. *Id.* at 202. The court noted:

[I]t's astounding to me that something like marijuana is apparently at this point in time more important to you than your baby because I hear about this anxiety, I hear about removal and your choice is at least at this point is, "Well if it results in the removal of my baby, it results in the removal of my baby". So, that tells me the marijuana has been the priority and not the child. And that I have a hard time getting my head around. I hear an acknowledgment of what we need to do. I see some positive steps, but I also know that this case [did not] occur in a vacuum, you know, that there's a bigger picture, bigger picture here and I need . . . more than just lip service about what we intend to do. I'm hoping things are changing with your family, with your life that, that you're going maybe be able to make [Child] just the focus of what both of you do in this case. And it's my job to make sure that you do that.

*Id.* at 206.

[25] Father's argument that the evidence was insufficient to show that Child's needs for care, treatment, or rehabilitation were unlikely to be provided or accepted

without the coercive intervention of the court is a request to reweigh the evidence, which we cannot do. *See In re S.D.*, 2 N.E.3d at 1286. Based upon the record, the court's conclusion that DCS had met its burden to show that Child's needs for care, treatment, or rehabilitation were unlikely to be provided or accepted without the coercive intervention of the court was not clearly erroneous.

[26] Affirmed.

Najam, J., and Riley, J., concur.