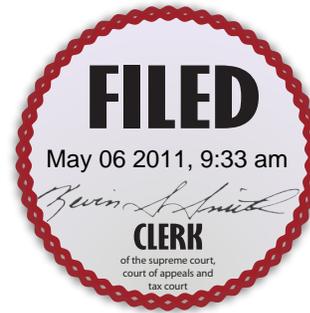


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

A.F. and R.B.,)
)
Appellants-Respondents,)
)
vs.) No. 20A03-1010-JC-521
)
INDIANA DEPARTMENT OF CHILD SERVICES,)
)
Appellee-Plaintiff.)

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
The Honorable Deborah A. Domine, Magistrate
Cause Nos. 20C01-1007-JC-157 and 20C01-1007-JC-158

May 6, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

R.B. (“Father”) and A.F. (“Mother”) (collectively “the parents”) appeal the trial court’s adjudication of their twin infants, O.F. and G.F. (collectively “the children”), as children in need of services (“CHINS”). The parents present the following issues for our review:

1. Whether the trial court violated the parents’ rights to due process when it permitted a witness to testify telephonically over their objections.
2. Whether the evidence was sufficient to support the trial court’s adjudication of the children as CHINS.

We affirm.

FACTS AND PROCEDURAL HISTORY

Mother gave birth to the twins on October 9, 2009. Father and Mother are not now and have never been married. On July 21, 2010, someone reported to the Indiana Department of Child Services (“DCS”) that O.F. had bruises on her face, a hemorrhage in her left eye, and a scratch on top of her head. The report also claimed that Father had threatened to “drown” the children and that he had tried to rape Mother, to break Mother’s wrist, and to stab Mother with a “metal piece of the bed.” Transcript at 62.

In an effort to substantiate that report, Erin Shriver, an assessment worker for DCS, interviewed Mother. Mother told Shriver that she was “not sure where [O.F.’s] injuries came from.” *Id.* at 64. Further,

[Mother] did not notice [the injuries to O.F.] until they were pointed out to her later on the day of July the 4th. [Mother] stated that on the 5th she had got[ten] into a big fight with [Father], and he tried to rape [Mother] and stab her with a metal piece of the bed.

[Mother] stated that since [Father]’s been in the home since April he has raped [Mother] multiple times. . . . [S]he stated two weeks prior to this incident she saw a red handprint on [O.F.]’s face, and she asked [Father] if he [had] slapped her. He said, [“Y]eah, sorry.[”] And she stated that since [Father] has left the home [O.F.] was much happier, not crying as much, and she thinks that [O.F.] was scared of [Father].

Id.

On July 7, 2010, Mother obtained an order of protection against Father, but she “dropped” the order on July 23 with the goal of resuming contact with Father. Id. at 65. On that date, DCS took the children into protective custody “because [Mother] had dropped the protection order against [Father] and didn’t really show any indication that she was going to be able to keep him away from the children.” Id. at 67. DCS placed the children with their maternal grandmother.

On July 26, DCS filed a petition alleging that the children are CHINS. Following a protective custody hearing on July 27, the trial court ordered that the children remain in the care of their grandmother. Following an initial hearing on the CHINS petition on August 3 and an evidentiary hearing on August 23, the trial court adjudicated both children to be CHINS and issued parental participation orders for both parents. This appeal ensued.

Issue One: Due Process

Father and Mother contend that their rights to due process were violated when the trial court permitted one of O.F.’s treating physicians to testify telephonically at the CHINS hearing over their objections. In particular, the parents maintain that because the physician, Dr. Hicks, was not physically present, they were denied the opportunity to cross-examine him regarding certain photographs. We cannot agree.

The Due Process Clause of the United States Constitution prohibits state action that deprives a person of life, liberty, or property without a fair proceeding. Thompson v. Clark County Div. of Family & Children, 791 N.E.2d 792, 794-95 (Ind. Ct. App. 2003), trans. denied. Here, the parents contend that they were denied a fair proceeding when they were precluded from handing Dr. Hicks photographs on cross-examination and questioning him regarding those photographs. But the parents ignore the fact that DCS had filed its motion for telephonic testimony on August 17, which gave the parents several days to send the photographs to Dr. Hicks for his use during the hearing on August 23. Indeed, the parents did not even move for a continuance when the trial court permitted the telephonic testimony over their objection. Had they moved for and obtained a continuance, they could have sent the photographs to Dr. Hicks by e-mail, facsimile, or mail. See, e.g., O'Connell v. State, 742 N.E.2d 943, 948 (Ind. 2001) (stating proper response when a defendant is confronted with a surprise witness at trial is to move for a continuance; failure to do so may result in waiver of any alleged error). For that matter, the parents could have asked for a short recess in order to scan the photographs and attach them to an e-mail to Dr. Hicks.

Moreover, on appeal, the parents do not explain what the photographs they had intended to show to Dr. Hicks depicted or how they were relevant to their cross-examination. In other words, the parents have not demonstrated how they were prejudiced as a result of the telephonic testimony. The parents cannot prevail on their claim that their cross-examination of Dr. Hicks was hindered such that they were denied a fair hearing.

Issue Two: Sufficiency of the Evidence

The parents next contend that the evidence does not support the trial court's determination that the children are CHINS. The DCS had the burden to prove by a preponderance of the evidence that the children are CHINS. See In re C.B., 865 N.E.2d 1068, 1073 (Ind. Ct. App. 2007), trans. denied. Indiana Code Section 31-34-1-1 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 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.

Further, Indiana Code Section 31-34-12-4 provides:

A rebuttable presumption is raised that the child is a child in need of services because of an act or omission of the child's parent, guardian, or custodian if the state introduces competent evidence of probative value that:

(1) the child has been injured;

(2) at the time the child was injured, the parent, guardian, or custodian:

(A) had the care, custody, or control of the child; or

(B) had legal responsibility for the care, custody, or control of the child; and

(3) the injury would not ordinarily be sustained except for the act or omission of a parent, guardian, or custodian.

The trial court here entered findings of fact and conclusions thereon. When reviewing such findings and conclusions, case law states that we first determine whether the evidence supports the findings, and second, whether the findings support the judgment. In re T.H., 856 N.E.2d 1247, 1250 (Ind. Ct. App. 2006). In practical terms, however, we may look first to determine whether the judgment is supported by the findings. Id. We will reverse a judgment only if it is clearly erroneous. Id. A judgment is clearly erroneous if it is unsupported by the findings of fact and conclusions entered on those findings. Id.

The parents first contend that the trial court's finding number six does not support the court's conclusion that the children's physical or mental conditions were seriously endangered. Finding number six reads as follows:

[Father] denied any physical abuse against his children. He suggested the children's mother lied because she was mad at him. He admitted, however, that when caring for the babies, both he and the children's mother would baby proof the living room and leave them in the room alone for an hour or two, and suggested that may be how the injuries occurred.

Appellants' App. at 13-14. The parents maintain that "[h]aving children in a child-proof room, with a gate, while the parents are in the house and checking on them, does not rise to a level of seriously endangering the children's physical condition by neglecting to provide them with necessary supervision." Brief of Appellants at 7. While that finding, considered in isolation, may not be sufficient to support the trial court's determination that the children are CHINS, the findings and conclusions, taken as a whole, do support that determination.

DCS presented evidence, and the trial court found, that Father had threatened to kill the children. And DCS presented evidence that Father had slapped O.F. and had raped Mother multiple times and threatened to stab her. Dr. Hicks testified, and the trial court found, that the injuries O.F. sustained on or about July 4 were more likely than not the result of non-accidental trauma. Erin Shriver testified that Mother had told her that Father “was the one taking care of the babies” at the time O.F. had sustained those injuries. Transcript at 69. And DCS presented evidence that O.F. was afraid of Father. There was no evidence that Mother intended to keep the children from Father despite his violent conduct and threats to fatally harm the children.

The parents maintain that while the evidence might be sufficient to show that the children are CHINS under Indiana Code Section 31-34-1-2, which pertains to physical injury sustained by a child, DCS’s petition alleged that the children are CHINS under Indiana Code Section 31-34-1-1, which does not have an express physical injury element. But this court has held that evidence of physical injury to a child can also sustain a CHINS determination made under Section 31-34-1-1. In In re C.B., the evidence showed that the child had sustained multiple injuries after being “beaten” on “several occasions.” 865 N.E.2d at 1073. We held:

While it is not certain whether Mother inflicted these injuries upon [the child], there is no question that [the child] suffered this harm while under Mother’s care and custody. See I.C. § 31-34-12-4 [rebuttable presumption that child is a CHINS where child injured due to act or omission of parent]. Moreover, given the multiplicity of C.B.’s injuries, the record suggests that Mother was slow to seek medical treatment for him. Therefore, we find that the [DCS] not only presented sufficient evidence, but overwhelming evidence that C.B.’s physical well-being is seriously endangered and that he needs care and treatment he is not receiving from Mother. See I.C. § 31-

34-1-1. Consequently, we conclude that the trial court appropriately adjudicated [the child] as a CHINS.

Id.

Here, the evidence shows that O.F. sustained injuries while under the parents' care, that Mother did not immediately notice O.F.'s injuries, and that Mother, despite her belief that O.F. was afraid of Father, had no intention of keeping the children away from Father. In addition, Dr. Hicks testified that "twin siblings of patients who suffer abusive head injuries seem to be at significantly higher risk to also have non-accidental or abusive injuries." Transcript at 36. DCS also presented evidence that Father had threatened to drown the children. Despite the evidence of Father's pattern of domestic abuse and threats, Mother "dropped" the order of protection she had obtained against Father. We hold that the evidence shows that the children's physical or mental conditions are seriously impaired or seriously endangered as a result of the inability, refusal, or neglect of the parents and that the children need care that they are not receiving and that they are unlikely to receive without court intervention. And we hold that DCS presented sufficient evidence to support the trial court's conclusion that the children are CHINS.

Affirmed.

ROBB, C.J., and CRONE, J., concur.