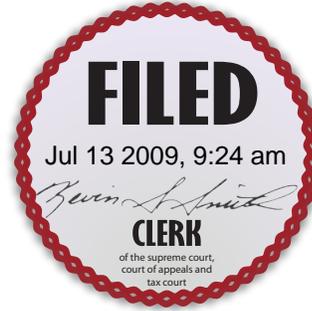


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF E.P., A CHILD)
ALLEGED TO BE A CHILD IN NEED)
OF SERVICES,)
)
B.B., Father,)
)
Appellant-Respondent,)
)
vs.)
)
INDIANA DEPARTMENT OF CHILD)
SERVICES, TIPPECANOE COUNTY,)
)
Appellee-Petitioner.)
)

No. 79A02-0812-JV-1154

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Loretta H. Rush, Judge
The Honorable Faith Graham, Magistrate
Cause No. 79D03-0810-JC-307

July 13, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

B.B. appeals the trial court's determination that his daughter, E.P., is a child in need of services (CHINS). Specifically, he contends that the trial court failed to make a finding that E.P.'s physical condition was seriously impaired or endangered and that the evidence is insufficient to support such a finding. Concluding that the trial court made a finding that E.P.'s physical condition was seriously impaired or endangered and that the Tippecanoe County Department of Child Services ("TCDCS") has proved by a preponderance of the evidence that E.P.'s physical condition was seriously impaired or endangered, we affirm.

Facts and Procedural History

E.P. was born on September 19, 2008, to A.P. ("Mother") and B.B. ("Father"), both of whom were minors at the time of E.P.'s birth. After E.P.'s birth, Mother and E.P. lived with Mother's mother, D.P. ("Grandmother").

Mother and Grandmother had a tumultuous relationship. In fact, at the time of the underlying hearing in this case, Mother was on juvenile probation "[f]or me and mother fighting continuously and having the police called." Tr. p. 22. On October 22, 2008, Mother and Grandmother started arguing over money Grandmother had spent on candles. After arguing for a while, Grandmother left the house to cool off. When Grandmother returned, she decided to remove both phones from the house to punish Mother. While Grandmother was trying to remove the phones, Mother, who was holding one-month-old E.P., grabbed for them. A neighbor, who was present at the time, removed E.P. from Mother's arms before Mother and Grandmother began "fighting" over the phones. *Id.* at

18. Mother eventually took the phone cords out of the wall, destroying them in the process.

Grandmother left the house again. When she returned, Mother, who in the meantime had placed E.P. on a queen-sized bed, was dumping Grandmother's fibromyalgia medication over a balcony outside. Grandmother rushed upstairs, and Mother began spitting on Grandmother. At this point, Grandmother "grabbed [Mother] around the neck and put her down on the bed and said, 'No more.'" *Id.* at 32. Grandmother then held Mother on the bed. E.P. was on the pillow end of the bed, about twelve inches from the edge, and Mother and Grandmother were "more towards the end of the bed." *Id.* Grandmother held Mother down for five minutes. During this time, they were "definitely struggling," and Mother and Grandmother grasped each other's hair. *Id.* There were "some violent acts occurring," and "[i]t was not pretty[.]" *Id.* The bed was "bouncing" during the commotion but "[n]ot to the point where [E.P.] was gaining air." *Id.* at 34. Two neighbors were there, and one neighbor later joined Grandmother in holding down Mother, which only escalated the situation. Toward the end of the struggle, the neighbor removed E.P. from the bed and took her into the living room.

After some prompting by the neighbors and worries about shaken baby syndrome, they took E.P. to the hospital for an examination. An MRI revealed no injuries to one-month-old E.P. Eventually, the police were contacted as well.

On October 27, 2008, the DCS filed a petition alleging that E.P. was a CHINS because her physical or mental condition was seriously impaired or seriously endangered as a result of the inability, refusal, or neglect of the child's parents, guardians, or

custodians to supply the child with necessary food, clothing, shelter, medical care, education, or supervision. A hearing was held on December 4, 2008, at which both Mother and Grandmother testified. The trial court entered an order on December 8, 2008, which provides in pertinent part:

Court FINDS herein that [E.P.]—DOB 9/19/2008 AGE 2 months is A child In Need Of Services (CHINS), as defined by Indiana law:

IC 31-34-1-1 in that her 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.

In That: It is in the best interest of the child to be removed from the home environment and remaining in the home would be contrary to the health and welfare of the child because: [A.P.], Mother, and D., Maternal Grandmother, argued throughout the day on October 22, 2008 including a physical confrontation while the child was in the Mother's arms and while the child was within the immediate area threatening the child's physical well-being. [B.B.], biological father, was aware that there was a history of physical altercations between Mother and Grandmother but had either been unable or unwilling to take action to protect the child.

Appellant's App. p. 9-10 (formatting altered). E.P. was placed with her paternal grandparents pending placement back with Mother, provided Mother was living with her father (maternal grandfather to E.P.) and not Grandmother. Father now appeals.

Discussion and Decision

Father raises two issues on appeal. First, he contends that the trial court failed to find that E.P.'s physical condition was seriously impaired or endangered, as required by Indiana Code § 31-34-1-1. Second, he contends that the evidence is insufficient to support such a finding.

I. CHINS Finding

Father first contends that “the trial court failed to hold that the child’s physical condition was *seriously* impaired or endangered.” Appellant’s Br. p. 12. Indiana Code § 31-34-1-1 governs a CHINS determination and 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.

(Emphasis added). Father argues that the trial court’s December 8, 2008, order accurately cites the language of this statute but fails to hold that the facts of this case meet that standard. We disagree with how Father reads and then divides the trial court’s order.

The trial court’s order begins:

Court FINDS herein that [E.P.]—DOB 9/19/2008 AGE 2 months is a child In Need Of Services (CHINS), as defined by Indiana law:
IC 31-34-1-1 in that *her* physical or mental condition is seriously impaired or seriously endangered

Appellant’s App. p. 9 (emphasis added). The trial court then recites the facts of the October 22, 2008, incident between Mother and Grandmother and how Father knew of the history between these two women but did nothing to protect his own daughter from them. Although the trial court was incorporating the statutory language into its order, it is clear that the trial court found that *E.P.*’s physical or mental condition was seriously

impaired or seriously endangered, even though its order lists the conclusion of law before the findings of fact. Father's argument thus fails.

II. Sufficiency of the Evidence

Father next contends that the evidence is insufficient to support the trial court's determination that E.P. is a CHINS. Specifically, Father argues that "no evidence or testimony was introduced . . . that [E.P.'s] physical condition was seriously endangered or seriously impaired on October 22, 2008[.]"¹ Appellant's Br. p. 11. The DCS has the burden of proving by a preponderance of the evidence that a child is in need of services. *In re T.S.*, 881 N.E.2d 1110, 1112 (Ind. Ct. App. 2008). When we review the trial court's CHINS determination, we consider only the evidence most favorable to the judgment and the reasonable inferences therefrom. *Id.* We will neither reweigh the evidence nor reassess the credibility of the witnesses. *Id.* Here, the trial court made findings of fact and conclusions of law in adjudicating E.P. a CHINS. Where a trial court enters specific findings and conclusions thereon, we apply a two-tiered standard of review. *Bester v. Lake County Office of Family & Children*, 839 N.E.2d 143, 147 (Ind. 2005). First, we determine whether the evidence supports the findings, and, second, we examine whether the findings support the judgment. *Id.* We will set aside the trial court's judgment only if it is clearly erroneous. *Id.*

On appeal, Father relies mainly on Mother's version of events, which are highly favorable to Mother. However, the evidence most favorable to the judgment reveals that Mother, while holding one-month-old E.P., approached Grandmother and grabbed for a

¹ We note that Father only challenges this element of the CHINS statute.

phone. Tr. p. 18. A neighbor removed E.P. from Mother's arms before the "fighting" began. *Id.* Then later on, Mother placed E.P. on the bed and threw Grandmother's medication over a balcony outside. This prompted Grandmother to come upstairs, at which point Mother began spitting at her. Grandmother then grabbed Mother around the neck and put her down on the bed and held her. E.P. was on the pillow end of the bed, about twelve inches from the edge, and Mother and Grandmother were closer to the foot end of the bed. Grandmother held Mother down five minutes. During this time, they were "definitely struggling." *Id.* at 32. Mother and Grandmother grasped each other's hair. There were "some violent acts occurring," and "[i]t was not pretty[.]" *Id.* The bed was "bouncing" during the commotion but "[n]ot to the point where [E.P.] was gaining air." *Id.* at 34. The neighbors were present, and one neighbor joined Grandmother in holding down Mother, which only made matters worse for Mother. Toward the end of the struggle, the neighbor removed E.P. from the bed and took her into the living room. Although an MRI revealed no injuries to one-month-old E.P., these facts reveal that her physical condition was seriously endangered. The TCDCS has proved by a preponderance of the evidence that E.P.'s physical condition is seriously impaired or seriously endangered as a result of the inability, refusal, or neglect of E.P.'s parents to supply her with necessary supervision. The trial court's CHINS determination is therefore not clearly erroneous.

Affirmed.

NAJAM, J., and FRIEDLANDER, J., concur.