

Children's Law Center of Indiana



CHINS

3/18/14

In **In Re A.G.**, 6 N.E.3d 952 (Ind. Ct. App. 2014), the Court affirmed the trial court's CHINS adjudication of Mother's two children. Mother gave birth to the older child on March 14, 2011 and to the younger child on February 18, 2013. A few months after his birth, the older child began suffering cyanotic episodes, which caused his skin to turn blue [due to a lack of oxygen in the blood], his eyes to roll back in his head, and his body to stiffen. Mother obtained medical treatment, and the older child was diagnosed with mild to moderate pulmonary hypertension, a condition common among his paternal relatives. Dr. Morera treated the older child's cyanotic episodes with medication, oxygen, and the implantation of a pacemaker. Dr. Morera referred the older child for a second opinion to physicians at Riley Hospital, but the Riley physicians could find no medical explanation for the child's cyanotic episodes. Dr. Morera then referred the older child to Kosair Children's Hospital for a third opinion from Dr. Johnsrude, a board certified pediatric cardiologist specializing in pediatric electro-physiology. Dr. Johnsrude observed the child during a one-week stay at Kosair and concluded that his pulmonary hypertension was mild and not severe enough to cause the cyanotic episodes. Dr. Johnsrude concluded that the child did not require a pacemaker and terminated the pacemaker's functioning. No one other than Mother had witnessed one of the older child's cyanotic episodes. Dr. Johnsrude found that there was no "pulmonary, neurological, gastrointestinal, or any other physiological explanation" for the episodes, and determined that witnessing or recording the onset of a spell while the older child was under his care at Kosair became the priority for diagnosis. Dr. Johnsrude kept the older child under observation and monitoring at Kosair. Mother requested that the monitors be removed so that she could bathe the child, and, when Mother was bathing him, a cyanotic episode occurred. No one else witnessed the onset of that episode. Dr. Johnsrude questioned Mother about the episode and suggested that installing video surveillance at Mother's home would be helpful in determining the cause of the cyanotic episodes when the child was released from Kosair Hospital, but Mother did not agree to the video monitoring.

Dr. Johnsrude consulted with other physicians at Kosair and members of the Pediatric Forensic Medicine Team at the University of Louisville, School of Medicine. All of the experts whom Dr. Johnsrude consulted felt the probability of Mother's involvement in inducing the child's cyanotic episodes was strong, and that Dr. Johnsrude should take further action to safeguard the child from Mother. Dr. Pfitzer, a board certified pediatrician specializing in child abuse, opined that the possibility that Mother induced the child's symptoms must be seriously considered, and stated the medical team strongly concluded *that if [the child] was placed in the care of his*

Mother, his death could result (emphasis in opinion). Accordingly, Dr. Pfitzer contacted DCS to express her concerns about the child's safety after his release from Kosair.

On September 4, 2012, DCS filed a petition alleging that the older child was a CHINS. DCS placed custody of the child with his father and permitted Mother to have supervised visitations with the child. At the request of the DCS family case manager, Dr. Suzanne Blix, a clinical psychiatrist, evaluated Mother for Factitious Disorder by Proxy, including a psychiatric evaluation of Mother, and a review of the older child's medical records and contacts between DCS and Mother. Dr. Blix concluded with 99% certainty that Mother suffered from Factitious Disorder by Proxy. Caretakers affected with this disorder "cause harm to their children for attention, and many times the affected children are subject to medical conditions which the caretaker will use as a vehicle for their attention seeking behavior." *Id.* at 955 n.1. Dr. Blix recommended that Mother not be permitted to be alone with the child and that visits be supervised by more than one person. Dr. Blix warned that Mother should be prohibited from holding or constraining the child, and that "any sibling would [also] be at risk of harm when in Mother's custody." *Id.* at 955. Dr. Blix considered the risk of failing to protect the child from Mother "life threatening." Since his removal from Mother's care on August 30, 2012, the older child had only one other cyanotic episode, which Dr. Morera believed had been caused by the child's pulmonary hypertension. On February 19, 2013, shortly after the younger child's birth, DCS filed a CHINS petition alleging the younger child was a CHINS, and DCS placed the younger child in foster care.

On April 15 and 24, 2013, the trial court conducted a factfinding hearing and adjudicated both children to be CHINS. The court ordered that the children should remain under the supervision, care, and custody of DCS. Among the trial court's conclusions were: (1) the older child's physical and mental condition is seriously impaired due to injury caused by Mother's acts or omissions pursuant to IC 31-34-1-2; (2) the children's physical or mental health is seriously endangered by the inability of the parents to provide them with necessary supervision pursuant to IC 31-34-1-1; (3) the weight of the evidence proves by preponderance that Mother is afflicted with Factitious Disorder by Proxy and is responsible for the older child's life threatening cyanotic episodes; (4) Mother's refusal to testify in the state's case in chief draws a negative inference that Mother was concerned about incriminating herself through her testimony, further indicative of Mother's guilt; (5) it is widely established in Indiana and United States case law that the Fifth Amendment does not forbid the trier of fact in a civil case from drawing negative inferences against parties in civil cases who refuse to testify. Mother appealed the CHINS adjudication, contending that the trial court erred when it drew a negative inference from her invocation of her Fifth Amendment right not to testify.

The Court affirmed the trial court's judgment finding the children to be CHINS. *Id.* at 958. The Court, citing Gash v. Kohm, 476 N.E.2d 910, 913 (Ind. Ct. App. 1985), noted the trial court's conclusion that the privilege against self-incrimination does not prohibit the trier of fact in a civil case from drawing adverse inferences from a witness' refusal to testify. A.G. at 957. The Court observed that Mother, who acknowledged the rule in Gast, urged the Court to hold that the rule should not apply in CHINS proceedings. Mother contended that her right to raise her children has a constitutional dimension which distinguishes a CHINS proceeding from other civil proceedings. The Court found that Mother had not supported her contention with cogent

argument based on public policy or constitutional law or with citations to the record. Id. The Court concluded that Mother's issue was therefore waived. Id. at 958. The Court observed that, waiver notwithstanding, Mother did not challenge the remainder of the trial court's findings and conclusions. Id. The Court opined that, even disregarding the trial court's negative inference, the trial court's findings supported the remaining conclusions and the conclusions supported the CHINS judgment. Id.