

Children's Law Center of Indiana



CHINS

2/4/14

In ***In Re Des.B.***, 2 N.E. 3d 828 (Ind. Ct. App 2014), the Court affirmed the trial court's CHINS adjudication of Mother's two children, who were under the age of three years. In November of 2012, a DCS family case manager was assigned to investigate a report that Mother was using drugs in and selling drugs from her home, where the children resided. At their first meeting, Mother told the case manager that she did not use drugs and that she had violent relationships with the children's fathers. At a follow up meeting on December 6, Mother told the case manager that she had used cocaine three days before the first meetings, and that she intended to move to Florida with her children in order to get away from the situation between herself and her children's fathers. In January of 2013, the case manager attempted to follow up with Mother at her residence, but the caseworker found that no one was living there. The case manager later contacted Mother, who twice declined to tell the case manager where the children were located. Mother eventually brought the children to the Child Advocacy Center. On February 4, 2013 DCS filed a CHINS petition based on Mother's cocaine use and her refusal to disclose the children's location. On February 5, 2013, Mother took a drug test and tested positive for alcohol and marijuana. On February 26, 2013, Mother agreed to undergo a substance abuse disorder assessment with social worker and clinical addition counselor (Counselor). Counselor's written assessment included the following: (1) Mother uses cocaine one to two times per week and smokes marijuana daily; (2) Mother has used illicit substances while at work as an exotic dancer because she needs more energy to work at night; (3) Mother has used illicit substances at parties, with friends, and when alone; (4) Mother has an open criminal case for possession of marijuana. Counselor concluded that Mother's substance abuse was "pathological" and diagnosed Mother with major depressive disorder, cannabis dependence, and cocaine abuse. Counselor recommended that Mother attend intensive outpatient treatment, submit to regular drug screening for accountability, complete a parenting assessment, and receive psychoeducation on parenting, child development, and child safety. The trial court held a factfinding hearing on March 18 and April 8, 2013 during which: (1) Counselor testified and her Assessment was admitted into evidence despite Mother's objection; (2) an analyst from a California lab testified via telephone, over Mother's objection, that he had analyzed Mother's February 5 drug test and determined that she had used alcohol and marijuana; and (3) a DCS family case manager testified about Mother's pattern of inappropriate and unsafe relationships that exposed the children to violence, the need to address the problem, and concerns that Mother might be incarcerated on the possession of marijuana and other pending charges. The trial court entered an order adjudicating the children to

be CHINS. Among the trial court's findings were: (1) Mother was convicted of Domestic Battery and Criminal Mischief resulting from a fight between her children's fathers, but incredibly could not remember specifics of this incident; (2) about three years ago, the father of Mother's older child tried to stab Mother and the child, who was then two months old, and had knocked Mother's teeth out; (3) Mother cooperated with the prosecution of her older child's father, and obtained a protective order, which is still in effect; (4) the older child's father has been released from prison and is in work release; (5) Mother was previously convicted of misdemeanor Operating a Vehicle while intoxicated on October 10, 2010, and was placed on probation for one year; (6) Mother pled guilty to possession of marijuana on March 5, 2013; (7) Mother works as an exotic dancer at a club where alcohol is readily available; (8) Mother is the mother of two very young children who need constant care, and she has admitted to daily use of drugs at work and socially. Mother appealed.

The Court found that Mother had not preserved the issue of whether trial court abused its discretion when it admitted Counselor's Assessment into evidence. *Id.* at 835. The Court said that, at the factfinding hearing, Mother objected to the admission of the Assessment on the grounds that it was based on hearsay and was cumulative of Counselor's testimony. *Id.* On appeal, Mother argued that the admission of the Assessment violated her privilege to protect confidential communications between her and Counselor, as provided by IC 25-23.6-6-1. The Court, quoting *Konopasek v. State*, 946 N.E. 2d 23, 27 (Ind. 2011), noted that "[f]ailure to object to the admission of evidence at trial normally results in waiver, and precludes appellate review..." and a party "may not argue one ground for an objection to the admission of evidence at trial and then raise new grounds on appeal." *Des.B.* at 834-35. The Court said that this "ensures that a trial judge is fully alerted to the legal issue being raised." *Konopasek* at 27. *Des.B.* at 835. The Court found that Mother had waived this issue. *Des.B.* at 835.

The Court found that any error in the trial court's admission of the California analyst's telephone testimony was harmless, and affirmed the admission of the evidence into the record. *Id.* at 835. Mother argued that the trial court abused its discretion when it permitted the analyst to testify by telephone without following the procedure outlined in Indiana Administrative Rule 14, and that this evidence prejudiced her because the analyst provided evidence of the only positive drug screen admitted. The Court observed that the analyst's testimony that Mother failed her February 5, 2013, drug screen by testing positive for alcohol and marijuana was merely cumulative of the evidence already before the trial court in Counselor's Assessment. *Id.* The Court said that, insofar as the analyst additionally testified about the procedures he used to secure and analyze the drug test, Mother had not argued that the additional information affected her substantial rights. *Id.*

The Court, holding that the trial court's findings support its judgment that "there is a substantial risk of endangering the children" and that the children are in need of care, treatment, or rehabilitation, affirmed the CHINS adjudication. *Id.* at 839. Mother contended that the trial court's CHINS adjudication was clearly erroneous, and also claimed that DCS failed to demonstrate that her drug use presented a substantial risk of harm to the children. The Court said that, although there was no evidence to suggest that Mother used drugs in the presence of the children, the Court did not find that fact dispositive. *Id.* at 837-38. The Court noted Counselor's testimony that (1) Mother's extensive drug use "could affect her ability to parent her

children's well-being and safety in the home"; (2) Mother's drug use had resulted in legal problems; (3) Mother used drugs daily; and (4) that Mother "would care for her kids daily as well." Id. at 838. The Court also observed that Mother's drug use was not the exclusive basis for the CHINS petition, and noted testimony on Mother's pattern of inappropriate and unsafe relationships that "expose[ed] those children to violence." Id. The Court also noted that the trial court found Mother's inability to recall specifics about one of the violent episodes incredible. Id. In response to Mother's assertion that there was no evidence to show that the coercive intervention of the court was necessary, the Court quoting In Re A.H., 913 N.E. 2d 303, 306 (Ind. Ct. App. 2009), said that the trial court is not required to "wait until a tragedy occurs to intervene." Des.B. at 838. The Court found Mother's assertions that she had completed all recommended services before the factfinding hearing and that her criminal history and violent relationships with her children's fathers were remote in time were contrary to the record most favorable to the judgment. Id. The Court held that the evidence supported the trial court's findings that Mother continued to have extensive problems with drugs and violent relationships with the children's fathers and that these problems are harmful to the children. Id. at 839.