

Children's Law Center of Indiana



CHINS

1/16/15

In **K.B. v. Indiana Dept. of Child Services**, 24 N.E.3d 997 (Ind. Ct. App. 2015), the Court affirmed the trial court's order adjudicating Father's two children to be CHINS. *Id.* at 999. Father and Mother were divorced and they shared physical and legal custody of the children. The older child was born on September 13, 2001, and the younger child was born on April 10, 2005. Father and the children lived with his girlfriend (Girlfriend) and her daughter (Girlfriend's Daughter), who was nine years old when DCS began working on the report of abuse or neglect involving all three children. On September 2, 2012, the Lawrence County Police Department received a call that Father and Girlfriend had a domestic fight in the presence of the three children. Two police officers were sent to the residence to investigate. Girlfriend was the only person present in the home. Father had left, and his children had been picked up by Mother's boyfriend. As the officers approached the residence, they observed that Girlfriend's Daughter was seated in the back seat of her grandfather's vehicle and was crying. One of the officers noticed a broken window in the house. The officers knocked several times before Girlfriend answered the door. As Girlfriend was narrating the night's events, one of the officers noticed that Girlfriend seemed nervous, could not stand still, jumped from subject to subject, and "her jaw muscles kept flexing." The next day, Father returned to the residence, worked things out with Girlfriend, and they resolved that it was safe to bring the children home. On the morning of September 3, 2012, DCS received a report of the domestic dispute between Father and Girlfriend. DCS family case manager Nowakowski (FCM Nowakowski), accompanied by a law enforcement officer, visited Father's and Girlfriend's home. There was a lengthy delay before the door was answered. Father and Girlfriend came out, stood on the front porch, and denied FCM Nowakowski access to their home. FCM Nowakowski observed that Father and Girlfriend seemed impaired, were "pacing back and forth, couldn't stand still, [and] appeared very paranoid," and had enlarged pupils and their eyes were blood shot. When questioned on the domestic episode, Father recounted that he had gotten into a heated argument with Girlfriend, Girlfriend had unintentionally broken a window, and they had arranged for the removal of all three children from their home. FCM Nowakowski requested Father and Girlfriend to take a drug screen, but both declined. When FCM Nowakowski insisted that she needed to see the children, she was denied permission. After further pressing, Father summoned Girlfriend's Daughter to the front porch and bombarded her with questions such as "[A]re you taken care of [?]; [A]re you fed?", to which Girlfriend's Daughter responded in short, affirmative answers. On seeing how frightened Girlfriend's Daughter appeared to be and fearing for her safety, FCM Nowakowski decided not to pursue her questioning and arranged for a family team meeting the next day at 4:00 p.m.

Prior to the scheduled family team meeting, FCM Nowakowski, without approval from Father or Girlfriend, visited all three children at their schools for a private meeting. She first questioned Girlfriend's Daughter, who admitted that bad things were happening in her home, Girlfriend had told her that she had used cocaine and had recently used drugs, Father's children were present during the domestic violence incident, they were crying, and that was how they reacted when Father and Girlfriend fought. Girlfriend's Daughter stated that she was scared during the incident, and that she called her paternal grandfather to pick her up. When FCM Nowakowski questioned Father's older child, he stated that he felt safe at home and did not think Father or Girlfriend were using any drugs. Father's younger child told FCM Nowakowski that she could not disclose the things that happened inside her home. Later that day, Father and Girlfriend canceled the 4:00 p.m. meeting.

On September 13, 2012, Father and Girlfriend reached an agreement with DCS to enter into an Informal Adjustment, which required Father and Girlfriend to allow DCS visits and supervision, to maintain a stable home for their children, to participate in home-based counseling, and to submit to random drug screens. After the trial court approved the Informal Adjustment, FCM Nowakowski transferred the case to FCM Lane. Father's and Girlfriend's participation with the Informal Adjustment was sporadic. They failed to participate in home-based counseling, keep in contact with DCS, take drug screens, or allow DCS to visit with the children. On November 9, 2012, the trial court authorized DCS to file CHINS petitions for the children. Even after the CHINS petitions were filed, Father's and Girlfriend's involvement with the services remained meager. In January 2013, DCS sought the trial court's intervention to compel Father and Girlfriend to present the children for DCS supervision and a court order was issued compelling Father and Girlfriend to allow FCM Lane to visit with the family once per month. In January 2013, DCS filed an emergency motion to compel and a motion for rule to show cause, averring that FCM Lane had been unsuccessful in scheduling home visits and that Father had not disclosed where the family lived. The trial court issued an order requiring Father and Girlfriend to allow FCM Lane or any other DCS worker to visit with the children at home or at school, but, even with a contempt order in place, Father and Girlfriend did not comply with the DCS scheduled visits. On July 3, 2013, the CHINS petition filed on behalf of Girlfriend's Daughter was dismissed because Girlfriend lost physical and legal custody of her daughter in her divorce case.

A bifurcated factfinding hearing on Father's two children was held on October 22, 2013 and November 19, 2013. On January 31, 2014, the trial court issued an order finding that the children were CHINS pursuant to IC 31-34-1-1 because their emotional or physical being was impaired and endangered due to unaddressed substance abuse and domestic violence between Father and Girlfriend; and (2) Father and Girlfriend had failed to provide care, treatment, and supervision without the coercive intervention of the court. On March 27, 2014, following a dispositional hearing, the trial court issued a decree granting DCS wardship over the children and requiring Father and Girlfriend to allow DCS visits with the children, to maintain a stable home, to formulate a protection plan to protect the children from abuse or neglect, to refrain from using illegal drugs, to participate in home-based counseling, to submit to random drug screens, and to refrain from domestic violence. Father appealed. In addressing its standard of review, the Court noted that: (1) DCS bears the burden of proving that a child is a CHINS by a preponderance of

the evidence; (2) in reviewing a CHINS determination, the Court does not reweigh evidence or assess witness credibility; (3) the Court considers only the evidence in favor of the trial court's judgment, along with any reasonable inferences derived therefrom; (4) a CHINS adjudication may not be based on conditions that no longer exist; (5) the trial court should also consider the parents' situation at the time the case is heard. Id. at 1001 (multiple citations omitted).

The Court concluded the trial court's decision that the children's physical or mental health was seriously endangered due to their exposure to domestic violence was not erroneous. Id. at 1004. The Court, quoting In Re N.E., 919 N.E.2d at 106 (Ind. 2010), noted that the purpose of the CHINS adjudication is to "protect the children, not punish the parents." K.B. at 1002. The Court observed that, when it is in the child's best interest, the State may exert the *parens patriae* power and intervene to safeguard the child's welfare, but trial courts must balance the child's needs against the due process rights of parents. N.E. at 106. K.B. at 1002. The Court noted the trial court's findings which included: (1) the children had witnessed domestic violence in the home of Father and Girlfriend, which continued due to urgent pleas that it stop; (2) Father and Girlfriend were observed by a trained law enforcement personnel and trained DCS personnel to be under the influence a least of one unknown intoxicating substance on the night of the physical violence and again two days later; (3) Father and Girlfriend continued to deny there had been domestic violence in their home and continued to deny any substance abuse problems; (4) Father and Girlfriend utterly flouted the court approved informal adjustment in which they had agreed to participate. K.B. at 1002. Father argued that the children's psychological evaluations did not reveal that the children experienced any emotional trauma from the domestic violence and that he and Girlfriend had followed their own safety plan which ensured the removal of the children from their home until Father determined that it was safe for the children to return home. The Court, citing In Re N.E., 919 N.E.2d 102, 106 (Ind. 2010), noted that a child's exposure to domestic violence can support a CHINS finding. K.B. at 1004. Citing In Re R.P. 949 N.E.2d 395, 401 (Ind. Ct. App. 2011), the Court observed that the CHINS statute does not require the juvenile court and DCS to wait until a child is physically or emotionally harmed to intervene, rather, a child may be determined to be a CHINS if his or her physical or mental condition is endangered. K.B. at 1004. The Court noted the following evidence: (1) the children were old enough to comprehend the violence; (2) Girlfriend's Daughter told FCM Nowakowski that the children were present during the violence and the children were crying; (3) indicating that the violence was repetitive, Girlfriend's Daughter stated that this was how the children reacted *when* Father and Girlfriend fought; (4) although DCS referred Father and Girlfriend to a counselor for couples therapy and substance abuse counseling, Father and Girlfriend did not complete the counseling; (5) according to the counselor, Father and Girlfriend still had unmet needs at the time the services were terminated. Id. at 1003. The Court said that, in light of the fact that Father and Girlfriend disregarded the provisions of their Informal Adjustment, there was no surety that the violence would not recur. Id. at 1004.

The Court opined the trial court's conclusion that Father and Girlfriend struggled with substance abuse was not erroneous. Id. at 1004. Father argued that, although DCS suspected he and Girlfriend were using drugs, no drug test was assigned; therefore, the court's conclusion that they were using drugs was based on speculations. The Court disagreed, citing Father's and Girlfriend's refusal to submit to random drug testing pursuant to the Informal Adjustment. Id.

The Court found the testimony of the police officer, Girlfriend's Daughter, and FCM Nowakowski independently supported the conclusion that Father and Girlfriend had a possible drug problem that needed to be addressed. *Id.* The Court specifically noted: (1) the police officer testified that Girlfriend seemed nervous, could not stand still, jumped from subject to subject, "her jaw muscles kept flexing," and these movements were similar to a person who had been using illegal drugs; (2) Girlfriend's Daughter testified Girlfriend told her she had used cocaine; (3) Girlfriend admitted she had a past drug problem; (4) FCM Nowakowski testified that Father and Girlfriend were pacing back and forth, could not stand still, seemed very paranoid, had enlarged pupils, and their eyes were bloodshot. *Id.*

The Court said the trial court's conclusion that the coercive intervention of the court was necessary was not clearly erroneous. *Id.* at 1007. Father also challenged the necessity of the trial court's coercive intervention. Quoting *In Re S.D.*, 2 N.E.3d 1283, 1286 (Ind. 2014), the Court observed that "[t]he intrusion of a CHINS judgment must be reserved for families who *cannot* meet [the child's] needs without coercion – not those who merely have *difficulty* doing so." *K.B.* at 1004. The Court noted that a CHINS adjudication under IC 31-34-1-1 requires three basic elements: that the parents' actions or inactions have seriously endangered the child, that the child's needs are unmet, and, perhaps most critically, that those needs are unlikely to be met in the future. *Id.* at 1005. Quoting *In Re A.H.*, 913 N.E.2d 303, 306 (Ind. Ct. App. 2009), the Court said that the CHINS statute is intended to protect children who are "endangered by parental action or inaction"; and a court need not "wait until a tragedy occurs to intervene." *K.B.* at 1005.

Although Father claimed that no family is obligated to participate in an Informal Adjustment without consenting, the Court said that Father was incorrect. *Id.* The Court noted that an informal adjustment is an agreement between DCS and a family where the family agrees to participate in services in an effort to prevent the children from being formally declared CHINS. *Id.* The Court, citing IC 31-34-8-1, said that, in contemplating whether to approve an entry of an informal adjustment, a trial court has to find the intake officer has probable cause to believe that the child is a child in need of services. *Id.* The Court observed that the Informal Adjustment required Father and Girlfriend to follow through with certain services, but they did not do so, even after the CHINS petition was filed, and with a contempt order in place instructing them to allow the DCS workers to visit the children at home or at school. *Id.*

The Court also disagreed with Father's claim that the court's intervention was unnecessary since the children were performing well in school, were well-adjusted, appropriately clothed, nourished, and had a place to sleep. *Id.* at 1006. With regard to the children's school attendance, the Court noted the following evidence: (1) while in Father's and Girlfriend's care, the children missed more than 10% of their school days in the 2011-2012 school year; (2) the court appointed special advocate was concerned that Father and Girlfriend were unable to get up and get the children off to school, while caused her to suspect a possible drug impairment; (3) in the fall semester of 2013, and shortly before the factfinding hearing, the children lived with their maternal grandmother and their school attendance and grades had been excellent. *Id.* In response to Father's claim that the children had a place to sleep, the Court said the record was barren that the children had a stable home. *Id.* Among the evidence noted by the Court was: (1) Father testified that, after losing his home in October, 2012, and prior to the CHINS proceedings, the family moved in with his father; (2) Father also testified that, at times, the family resided in a

friend's garage and sometimes the family rented a motel room; (3) Father and Girlfriend were evasive about their address with the DCS case manager; (4) the court appointed special advocate was also uncertain where the family lived, and, out of nine visits she scheduled, she succeeded in meeting the family on only two occasions, once when the children were residing with their maternal grandfather. Id.

The Court, citing In Re S.D., 2 N.E.3d 1283, 1290 (Ind. 2014), noted that a CHINS finding should consider the family's condition not just when the case is filed, but also when it is heard. K.B. at 1006. The Court found that, in light of the evidence, Father's lack of cooperation with DCS highlighted his inability or refusal to properly care for the children. Id. at 1007.

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