

Children's Law Center of Indiana



NOTE: Indiana Supreme Court granted transfer in June 2009.

CHINS

03/19/2009

In ***In Re N.E.***, 903 N.E.2d 80 (Ind. Ct. App. 2009), the Court, reversed the trial court's determination that the child is a CHINS and remanded for the trial court to determine whether Father is willing and able to appropriately parent the child, since the child is a CHINS with respect to Mother. The child, born January 24, 2004, is one of Mother's four children, each of whom has a separate father. On December 12, 2007, Marion County DCS (DCS) filed a petition alleging that all of Mother's children were CHINS and stating that "it is believed that none of the alleged fathers has established paternity for their respective children, and none of them have come forward to demonstrate the ability or willingness to appropriately parent their children." During the proceedings, Father's paternity as to the child was established by genetic testing. Father denied that the child was a CHINS, asserting that the child was in the care of him and the paternal grandmother, ninety-five percent of the time. The trial court initially placed the child in the care of Father and Paternal Grandmother, but later moved her foster care. The trial court ultimately found the child (and her siblings) to be CHINS. Father appealed regarding the child. Additional facts are presented below.

Inasmuch as, here, DCS has not alleged the child to be a CHINS with respect to Father, the Court remanded for the trial court to determine whether Father is willing and able to appropriately parent the child since she is a CHINS with respect to Mother. *Id.* at 89. The Court agreed with Father that the trial court did not make sufficient written findings and conclusions to comply with the requirements of IC 31-34-19-10, even though the trial court had expressly adopted the "Pre-Dispositional Report of the Division of Family and Children and incorporate[d] same as the findings of the Court," in that, (1) DCS made no allegation that Father knew of the acts or omissions by Mother which resulted in the CHINS proceeding; (2) even considering the Dispositional Report as a part of the trial court's findings, there are no findings directed at Father; and (3) although DCS did bring concerns about the suitability of Father's home for a placement of the child while the CHINS proceedings were taking place, none of the trial court's findings addressed these concerns previously brought to light by DCS. The Court found, however, that other errors precluded it from simply remanding for findings without further discussion. *Id.* at 85-86.

The Court cited *Stanley v. Illinois*, 405 U.S. 645, 650 (1997) for its holding that "since married fathers or mothers could not have their children taken without 'notice, hearing, and proof of ... unfitness as a parent,' it was a violation of equal protection and due process to take children from unwed fathers without such procedures," and observed that here (1) because of the lack of findings as to the extent of Father's care giving for the child, it is not known exactly how similar this situation is to *Stanley*; (2) the record is laced with evidence that Father was a primary

caregiver, but DCS put on evidence attempting to refute that fact; (3) it is not for the Court to weigh the evidence; (4) Father was permitted to present evidence; (5) DCS made no allegations impugning Father's parenting directly; and (6) the trial court made no findings with respect to Father. N.E. at 86-87. The Court noted that (1) either IC 31-41-1-1 or 2 could have been used to pursue a CHINS determination of the child and her siblings, but both require a finding that there is "care, treatment, or rehabilitation that ... is unlikely to be provided or accepted without the coercive intervention of the court;" (2) at first blush, it seems that if a child was not a CHINS with respect to either of its parents, the coercive intervention of the court would not be necessary because that parent would be providing or accepting the necessary care, treatment, or rehabilitation on the child's behalf; and (3) in In Re C.S., 863 N.E.2d 413, 418 (Ind. Ct. App. 2007), without discussion of how or why the analysis could be split to look at each parent individually, the court held that a child was not a CHINS with respect its father where the child had been found to be a CHINS with respect to its mother, but there was no allegation and no evidence that the father was responsible for the circumstance which led to the CHINS determination. N.E. at 87. The Court further noted that IC 31-34-9-7 provides that the child's parent, among others, is a party to the proceedings "and have all rights of parties under the Indiana Rules of Trial Procedure;" (2) although Father did not know he had been established legally as the parent of the child at the early stages of the CHINS proceedings, once the trial court was presented with the court order establishing paternity, Father was a party to the proceeding; (3) as such, when the trial court determined that the child was a CHINS, it impugned the parenting abilities of Father without specific allegations or specific findings of fact; and (4) in all CHINS proceedings, DCS must present specific allegations in a CHINS petition including a concise statement of the facts upon which the allegations are based and the date and location at which the alleged facts occurred (IC 31-34-9-3) and DCS bears the burden of proving that a child is CHINS by a preponderance of the evidence (IC 31-34-12-3). Id. at 88. The Court found that (1) where DCS has alleged specific facts that would require removal of a child from the care of a custodial parent, it would be irresponsible of the trial court to release the child alleged to be a CHINS to a non-custodial parent without making a preliminary determination that the parent is willing and able to appropriately parent the child; (2) this should be a flexible determination keeping in mind the constitutional protection against the State's undue intrusion into the parent child relationship; (3) here, Father has appeared before the court seeking to demonstrate his ability and willingness to appropriately parent the child; (4) without allegations from DCS alleging that Father has been negligent, deficient, or worse in his duties as a parent, the trial court's findings with respect to Father should be directed solely at his willingness and ability to appropriately parent the child; and (5) this the trial court has not yet done. Id. at 89.

Once a non-custodial parent demonstrates that he or she is willing and able to parent to the child alleged to be a CHINS, due process requires that DCS present allegations directed at that parent, which, if proved, would meet the requirements for a CHINS determination under IC 31-34-1 if DCS thinks it is appropriate for the court to intervene in that parent-child relations. This would require an amendment of the existing petition or the filing of a new one. Thereafter, DCS must prove those allegations by a preponderance of the evidence and the trial court must make specific findings based on the record concluding that the child is a CHINS. Id.

Vaidik, J., dissented with separate opinion.