

IN THE
SUPREME COURT OF INDIANA

NO.

IN THE MATTER OF:)
A.T.L., A.I.F., and AS.F., (Minor Children))
)
And)
)
A.F., (Mother))
Appellant/Respondent,)
) Trial Court Case No.: 02D08-2008-JC-297
) 02D08-2008-JC-298
) 02D08-2008-JC-299
vs.)
) Appeal No. 20A-JC-2409
INDIANA DEPARTMENT OF CHILD)
SERVICES) The Honorable Judge Charles Pratt
Appellee/Petitioner,)

APPELLANT'S PETITION TO TRANSFER

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QUESTION PRESENTED ON TRANSFER

Appellant, Alexis Fincher (hereinafter “Mother”), contends that there was insufficient evidence presented to support the trial court’s determination that A.L., A.F., or A.F. were Children in Need of Services (“CHINS”). First, the evidence failed to prove neglect on the part of Mother, as defined by I.C. § 31-34-1-1. Second, the evidence presented failed to show that Mother needed the court’s coercive intervention to resolve allegations raised by the Department of Child Services (“DCS”).

Regarding neglect, there was no evidence presented that confirms that Mother could not supply the necessary food, clothing, shelter, medical care, education, or supervision to her children. DCS’s entire case revolved around alleged neglect from years prior to their involvement in this matter. Further, there was no indication that any future neglect was imminent. DCS failed to prove by a preponderance of the evidence that the coercive intervention of the court was required, and ultimately, the facts presented to the trial court do not support a finding of CHINS. As such, the trial court’s judgment was clearly erroneous.

In consideration of the need for consistency at the trial court level – as well as the need for consistency of appellate review—the particular question presented on transfer in this case is of significant importance to Indiana’s Judiciary, its’ Bar, and its’ citizenry, and as such, warrants transfer of this case to the Indiana Supreme Court.

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BACKGROUND AND PRIOR TREATMENT OF ISSUE ON TRANSFER

This Petition to Transfer concerns a review of the trial court's finding that A.L., A.F., and A.F. were CHINS.

On August 2, 2020, A.L. executed a plan, several weeks in the making, to have her absent father of sixteen (16) years, D.L., pick her up from her grandmother's home at 4714 Winter Street in Fort Wayne, Indiana, without telling Mother, who had been her sole caregiver and provider for her entire life. Transcript, Volume II, pages 19, 30-34, 145-46 and 168 (Transcript, Volume II, hereinafter usually referred to as "Tr."). D. L. physically pulled A.L. from Mother's home with the intention to keep A.L. in his care. (Tr., pp. 154-55). The struggle caused A.L. some bruising around her neck. (Tr., p. 20). Mother called the police to report a kidnapping and Officers Eash and Hullinger of the Fort Wayne Police Department arrived on scene. (Tr., pp. 155, 51, 62).

Officer Eash, who is a trained crisis intervention officer, met with A.L. because he had overheard D.L. say that A.L. had expressed some suicidal ideations. (Tr., p. 51). After talking to A.L., Officer Eash discovered that A.L. did not have any suicidal ideations that day but had one approximately five (5) weeks ago when A.L. stared at a knife intently and could not stop thinking about hurting herself. (Tr., pp. 53-55). Officer Eash considered this a plan for suicide and therefore felt it necessary to admit A.L. into Parkview Behavioral Health ("PBH"). (Tr., pp. 53-54). On his way to transport A.L. to PBH, A.L. only expressed concern that she betrayed her mother and feared that she would disown her, but she made no mention of any further self-harm. (Tr., p. 22, 57).

Officer Hullinger observations of the scene were that the home at 4714 Winter Street was "clean and orderly" and a "stable environment." (Tr., pp. 65-66, 70). He had

no concerns with the home environment. (Tr., p. 70.). He remembered A.F. mentioning that the family may move back to Chicago when school resumed but was unsure of the exact date when that would happen. (Tr., p. 71-74).

PBH evaluated A.L. and determined that she should be admitted for further treatment. (Tr., p. 104). After some initial reluctance, Mother completed the appropriate paperwork to have her admitted. (Tr., pp., 57, 103, 156). Mother learned from a nurse at PBH that it is PBH's policy that A.L. would only be discharged after a family therapy session where a plan for release would be discussed. (Tr., pp., 105, 124, 160). Mother attended the first family therapy on August 3, 2020, and a second family therapy session was scheduled for August 6, 2020. (Tr., p. 158). Mother understood the second family therapy session to be the final session required before discharge. (Tr., p. 160). Mother attended the second family therapy on August 6, 2020, but A.L. was not discharged. (Tr., p. 161).

A third family therapy session was scheduled for August 10, 2020, at 3:30 p.m. (Tr., p. 161-63). On August 10, 2020, Mother was experiencing COVID-19 symptoms and called PBH in the morning to reschedule the family therapy session when she felt better. (Tr., pp. 163-64). Mother's symptoms finally subsided on August 12, 2020, and she called PBH to reschedule the final family therapy session. (Tr., p. 164). On this call, Mother learned that A.L. was up for discharge. (Tr., p. 166). PBH attempted to contact Mother but could not get ahold of her so they decided to discharge her to DCS who had determined to remove A.L. from Mother's home due to abandonment. (Tr., p. 105, 126). Mother did miss a call from PBH on August 12, 2020, because she was under a lot of medication, sleeping and recovering from her COVID-

19 symptoms, but she returned their call. (Tr., pp. 163-66). In fact, Mother called PBH again on August 13, 2020 and learned that A.L. had still not been discharged. (Tr., p., 166). A.F. informed PBH that she would be there before 7:00 p.m. that day to pick A.L. up pursuant to PBH policy. (Tr., p., 167). However, when Mother arrived at 5:34 p.m., A.L. had already been discharged to DCS without the third family therapy session ever taking place. (Tr., pp. 106, 168).

DCS investigated this case from August 2, 2020, through September 2020. (Tr., p. 108). As part of their investigation, DCS interviewed A.L. and her two half-siblings A.F. and A.F. (Tr., pp. 109-14). A.L. reported that, for over the last four (4) to five (5) years, her and her siblings did not have a stable place to live while in Chicago, Illinois; specifically, that they would go back and forth between Chicago and her grandmother's home in Fort Wayne. (Tr., p. 15). While staying in Fort Wayne, they had a safe, stable home, but when they were in Chicago, they would live on the streets, or stay in hotels, trains, or restaurants where she did not feel safe. (Tr., pp. 15, 44-48). She stated that she did not attend school consistently while in Chicago and that her absence affected her grades. (Tr., pp. 16-17). Though an exact date could never be determined, A.L. reported two (2) incidents while staying on a train where she was molested by a stranger and witnessed a suicide by someone stepping in front of a train. (Tr., p. 111, 126). She said that she has been depressed since she was ten (10) years old but admitted that she never told anyone about it except for a few close confidants. (Tr., p. 35, 169). She also never reported her family's homelessness to anyone. (Tr., p. 32).

A.L. admitted that while in Fort Wayne, her and her siblings were provided with the necessary food, clothing, shelter, medical care, education, and supervision. (Tr.,

pp. 44-45). DCS investigation concurred with that assessment. (Tr., pp. 123-26). The family moved to Fort Wayne in March of 2020 due to COVID and had no definite plans to return to Chicago. (Tr., p. 26, 48, 109). She stated that she was on a path to college and had good enough grades to be admitted. (Tr., p. 29). She also stated that she would only feel unsafe if they ever moved back to Chicago. (Tr., pp. 47-48).

Mother denied that her or her children ever experienced any homelessness. (Tr., p. 149). Mother admitted that she struggled financially at times but that was mainly due to her education and work experience being in marketing, which is susceptible to the highs and lows of the economy and because both fathers were significantly behind on their child support. (Tr., pp. 142-147). Mother also testified that she was raising three (3) children on her own because neither father helped with any of the child rearing. (Tr., pp. 137, 143). Neither father sought to avail themselves of the courts to enforce their visitation rights. (Tr., p. 138).

Mother admitted her financial difficulties would cause her to live with friends for periods of times, but she assured that the children always had a bedroom and their educational and medical needs were met. (Tr., pp. 150, 180-83). Mother believes that her children were being coerced by their fathers to say the things they said or were confusing the overnight trips back to Fort Wayne to visit family or stays in hotels for work as homelessness. (Tr. pp., 147-49). Leading up to the incident on August 2, 2020, A.L. had been punished for being disrespectful to Mother and for being lazy with her remote learning. (Tr. p. 152). A.L. admitted that she was tired of her mother's strictness. (Tr. p. 47). Mother's plan was to stay at the 4714 Winter Street address in

Fort Wayne until her and her children had the necessary things to be successful in Chicago. (Tr. p. 50).

A Fact-Finding Hearing was conducted over the course of three (3) half (½) day hearings, on October 8, 26, 29, 2020 in which the trial heard evidence from the respective parties. (Tr., p. 2). After the third day of trial, the parties concluded the presentation of evidence and the trial court took the matter under advisement. (App., Vol. II, p. 180). On December 1, 2020, the trial court issued its Order on the Fact-Finding Hearing, finding that the children were CHINS as defined by I.C. § 31-34-1-1. Appendix, Volume II, page 181 (Appendix, Volume II, hereinafter referred to as “App.”). Specifically, the trial court determined by a preponderance of the evidence that the allegations—as previously enumerated—against Mother in paragraphs numbers 1-7, 9, 10, 11, and 19 to be true. (App., p. 181). Further, the trial court held that all other allegations against Mother were not sustained by a preponderance of the evidence. (App., p. 181).

Thereafter, on December 31, 2020, the undersigned filed a Notice of Appeal on behalf of Mother. (App., pp. 194-196). The clerk then filed her Notice of Completion of Transcript on March 9, 2021. (App., pp. 124-25). The record of proceedings was prepared, consisting of two (2) volumes of the Trial Transcript: Volume One (1) is the Table of Contents and Volume Two (2), consisting of two-hundred and twenty-five (225) pages, and four (4) volumes of the Appellant’s Appendix: Volume One (1) is the Table of Contents, Volumes Two (2) and Three (3), consisting of two-hundred and fifty (250) pages, and Volume Four (4) consisting of one-hundred and twenty-seven (127) pages.

A Brief of the Appellant was filed on behalf of Mother on April 8, 2021. The State of Indiana filed their Brief of the Appellee on May 10, 2021. On appeal, the Indiana Court of Appeals affirmed the trial court's sentence in an Opinion dated July 26, 2021.

ARGUMENT

I. Standard of Review

DCS carries the burden to prove that a child is CHINS by a preponderance of the evidence. *In re: Des.B.*, 2 N.E.3d 828, 835-36 (Ind.Ct.App. 2014). A reviewing court must not reweigh evidence or assess witness credibility when reviewing a CHINS determination. *In re: K.D.*, 962 N.E.2d 1249, 1253 (Ind. 2012). Instead, on appeal, only evidence in favor of the trial court's judgment is considered, along with any reasonable inferences derived therefrom. *Id.*

Moreover, in cases where the trial court enters findings of facts and conclusions of law, there is a two-tiered stand of review that must be applied. *Id.* First, the reviewing court looks to whether the evidence supports the factual findings, and second, they consider whether those findings support the trial court's judgment. *Id.* A finding or judgment will not be set aside unless they are clearly erroneous. *In re: Des.B.*, 2 N.E.3d at 836.

Factual findings are clearly erroneous where there are no facts in the record to support them either directly or by inference. *Id.* "A judgment is clearly erroneous if it relies on an incorrect legal standard." *Id.* Substantial deference is accorded to the trial court's findings of fact, but not its conclusions of law. *Id.* If there are issues that are not covered under the court's findings, they must be reviewed under the general judgment standard, "under which a judgment will be affirmed if it can be sustained on any legal theory supported by the evidence." *In re: S.D.*, 2 N.E.3d at 1287.

II. **There was insufficient evidence presented to support the trial court's determination that A.L., A.F., or A.F. were Children in Need of Services, as defined by I.C. 31-34-1-1.**

The Fourteenth Amendment to the United States Constitution protects the "fundamental right to family integrity" against unwarranted government intrusion. *In re: T.H.*, 856 N.E.2d 1247, 1250 (Ind.Ct.App. 2006). This protection incorporates parents' fundamental right to "direct the care, custody and control of their children." *In re: V.H.*, 967 N.E.2d 1066, 1071 (Ind.Ct.App. 2012). However, this right is not absolute; acting under its *parens patriae* power, the State may interfere with parental autonomy when it is "necessary to protect the health and safety of the children." *Id.* at 1072.

In a CHINS proceeding, the Department bears the burden of proving the statutory elements by a preponderance of the evidence. *In re: K.D.*, 962 N.E.2d at 1253. Thus, here, because the Department alleged CHINS under the neglect portion of the statute, the Department was required to prove each element of I.C. § 31-34-1-1 by a preponderance of the evidence. I.C. § 31-34-1-1 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 the 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.

I.C. § 31-34-1-1.

Thus, this statute requires “three basic elements: that the parent's actions or inactions have seriously endangered the child, that the child's needs are unmet, and ... that those needs are unlikely to be met without State coercion.” *In re S.D.*, 2 N.E.3d at 1287. The third element guards against unwarranted State interference in family life, reserving that intrusion for families where parents lack the *ability* to provide for their children, not merely where they encounter *difficulty* in meeting a child's needs. *In re D.J.*, 68 N.E.3d at 580 (quotations omitted, emphasis in original). When determining CHINS status under section 31-34-1-1, particularly the “coercive intervention” element, courts should consider the family's condition not just when the case was filed, but also when it is heard. *Id.* “Doing so avoids punishing parents for past mistakes when they have already corrected them.” *Id.* at 581.

On August 2, 2020, A.L. executed a plan, several weeks in the making, to have her absent father of sixteen (16) years, D.L., pick her up from her grandmother's home at 4714 Winter Street in Fort Wayne, Indiana, without telling her Mother, who had been her sole caregiver and provider for her entire life. (Tr., pp. 19, 30-34, 145-46, 168). D. L. then physically pulled A.L. from Mother's residence with the intention to keep A.L. in his care. (Tr., pp. 154-55). The struggle caused A.L. some bruising around her neck. (Tr., p. 20). Mother reported kidnapping to the Fort Wayne Police Department. (Tr., pp. 155, 51, 62).

Officer Eash, who is a trained crisis intervention officer, met with A.L. because he had overheard D.L. say that A.L. had expressed some suicidal ideations. (Tr., p. 51). After talking to A.L., Officer Eash discovered that A.L. did not have any suicidal

ideations that day; however, approximately five (5) weeks ago A.L. did when she stared at a knife intently and could not stop thinking about hurting herself. (Tr., pp. 53-55). Officer Eash considered this a plan for suicide and therefore felt it necessary to admit A.L. into PBH. (Tr., pp., 53-54). On his way to transport A.L. to Parkview, A.L. only expressed concern that she betrayed her mother and feared that she would disown her, but she made no mention of any further self-harm. (Tr., p. 22, 57).

Officer Hullinger observations of the scene were that the home at 4714 Winter Street was “clean and orderly” and a “stable environment.” (Tr., pp. 65-66, 70). He had no concerns with the home environment. (Tr., p. 70.). He remembered Mother mentioning that the family may move back to Chicago when school resumed but was unsure of the exact date when that would happen. (Tr., p. 71-74).

PBH evaluated A.L. and determined that she should be admitted for further treatment. (Tr., p. 104). After some initial reluctance, Mother completed the appropriate paperwork to have her admitted. (Tr., pp. 57, 103, 156). Mother learned from a nurse at PBH that it is PBH’s policy that A.L. would only be discharged after a family therapy session were a plan for release would be discussed. (Tr., pp. 105, 124, 160). Mother attended the first family therapy on August 3, 2020, and then another family therapy session was scheduled for August 6, 2020, which she understood to be the last. (Tr., pp. 158, 160). However, after the second family therapy session, on August 6, 2020, A.L. was not discharged. (Tr., p. 161). Instead, a third family therapy session was scheduled for August 10 at 3:30 p.m. (Tr., p. 161-63). On August 10, 2020, Mother was experiencing COVID-19 symptoms and called PBH in the morning to reschedule the third family therapy session. (Tr., pp., 163-64). Her symptoms finally subsided on

August 12, 2020, and she called PBH to reschedule the final family therapy session. (Tr., p. 164). On this call, Mother learned that A.L. was up for discharge. (Tr., p. 166). Apparently, PBH attempted to contact Mother but could not get ahold of her so they decided to discharge her to DCS who had determined to remove A.L. from Mother's home due to abandonment. (Tr., p. 105, 126). Mother did miss a call from PBH on August 12, 2020, because she was under a lot of medication, sleeping and recovering from her COVID-19 symptoms. (Tr., pp. 163-66). However, Mother returned PBH's phone call. (Tr., pp. 163-66). In fact, Mother called PBH again on August 13, 2020, and learned that A.L. was still not discharged. (Tr., p. 166). Mother informed PBH that she would be there before 7:00 p.m. that day to pick A.L. up pursuant to PBH policy. (Tr., p., 167). However, when Mother arrived to PBH at 5:34 p.m., A.L. had already been discharged to DCS without the third family therapy session ever even taking place. (Tr., pp. 106, 168).

DCS investigated this case from August 2, 2020, through September 2020. (Tr., p. 108). As part of their investigation, DCS interviewed A.L. and her two half-siblings A.F. and A.F. (Tr., pp. 109-14). A.L. reported that over the last four (4) to five (5) years her and her siblings did not have a stable place to live while living in Chicago, Illinois, and that they would go back and forth between Chicago and her grandmother's home in Fort Wayne. (Tr., p. 15). While staying in Fort Wayne, the children had a safe, stable home, but they stated while they were in Chicago, they would live on the streets, or stay in hotels, trains, or restaurants where she did not feel safe. (Tr., pp. 15, 44-48). A.L. stated that she did not attend school consistently while in Chicago and that her absence affected her grades. (Tr., pp. 16-17). Though an exact date could never be determined,

A.L. reported two (2) incidents while staying on a train where she was molested by a stranger and witnessed a suicide by someone stepping in front of a train. (Tr., p. 111, 126). A.L. testified that she has been depressed since she was ten (10) years old but admitted that she never told anyone about it except for a few close confidants. (Tr., p. 35, 169). Similarly, A.L. never reported her family's homelessness to anyone. (Tr., p. 32).

A.L. admitted that while in Fort Wayne, her and her siblings were provided with the necessary food, clothing, shelter, medical care, education, and supervision. (Tr., pp. 44-45). DCS's investigation concurred with that assessment. (Tr., pp. 123-26). A.L. stated that she was on a path to college and had good enough grades to be admitted. (Tr., p. 29). She also stated that she would only feel unsafe if they ever moved back to Chicago. (Tr., pp. 47-48). At the time of the Fact-Finding Hearing, the family was living in Fort Wayne due to COVID-19 and had no definite plans of returning to Chicago. (Tr., p. 26, 48, 109).

Mother denied that her or her children ever experienced any homelessness. (Tr., p. 149). Mother did admit that she struggled financially, at times, but that was mainly due to her education and work experience being in marketing, which is susceptible to the highs and lows of the economy, and because both fathers were significantly behind in their child support. (Tr., pp. 142-147). Mother was raising three (3) children on her own because neither father helped with any of the child-rearing. (Tr., pp. 137, 143). Notably, neither Father sought to avail themselves of the courts to enforce their visitation rights. (Tr., p. 138). Her financial difficulties would cause her to live with friends for periods of times, but regardless, the children always had a bedroom and

always had their educational and medical needs met. (Tr., pp. 150, 180-83). Mother believed that her children were being coerced by their fathers to say the things they said or were confusing the overnight trips back to Fort Wayne to visit family or stays in hotels for work as homelessness. (Tr. pp., 147-49). Leading up to the incident on August 2, 2020, A.L. had been punished for being disrespectful to Mother and for being lazy with her remote learning. (Tr. p. 152). A.L. admitted that she was tired of her mother's strictness. (Tr. p. 47). Ultimately, Mother testified that her intention was to stay in Fort Wayne until she and her children had the necessary things to be successful in Chicago. (Tr. p. 50).

To attempt to prove neglect, as defined by I.C. § 31-34-1-1, DCS centered its case around the alleged abuse and neglect that occurred in Chicago over five (5) months prior to their involvement. However, when evaluating the facts against the elements contained within I.C. § 31-34-1-1, DCS did not prove by a preponderance of the evidence that Mother were not supplying the children with the necessary food, clothing, medical care, education or supervision.

No witness disputed that the children were being provided the necessary food, clothing, medical care, education or supervision while they were living at 4714 Winter Street in Fort Wayne. No witness disputed that there was no time frame for the children to return to Chicago. Rather, what was disputed was whether there was any abuse or neglect occurring while living in Chicago. Certainly, Mother disputes A.L.'s account of the families living situation in Chicago, and this Court should have reasons to doubt A.L.'s story of that time because of her admitted motivation to no longer wanting to deal with her mother's strictness. Notably, no evidence was ever presented at trial that

during DCS's involvement, beginning on August 2, 2020 until the conclusion of the Fact-Finding Hearing on October 29, 2020, there was any abuse or neglect on the part of Mother. All the allegations—save one (1)—against Mother that were found by a preponderance of the evidence by the trial court happened years in the past, and there was no indication that Mother or her children would find themselves in a similar situation (if believed) any time in the near future. The only allegation that happened relatively recently is that A.L. "reported she was scared to be released to her mother's care and expressed suicidal ideation if she were to be released to her mother," which was not even introduced as evidence at trial. (App., p. 181). Rather, the evidence clearly showed that A.L.'s only suicidal ideation was five (5) weeks prior to the August 2, 2020, incident, and that her only concern about going home was that she betrayed her mother and she feared that her mother would disown her—not that she would cause herself any harm. (Tr., p. 22, 57).

Therefore, there are no facts in the record to support the Court's finding of CHINS, either directly or by inference. Finding CHINS in this case merely serves to punish Mother for past struggles she endured, in large part due to her having to raise her three (3) children on her own without the financial or physical support of their fathers. It also serves to encourage parents in custody disputes to use DCS as a vehicle for kidnapping their children to circumvent the costs of litigating custody issues.

CONCLUSION

The Defendant-Appellant, Alexis Fincher, respectfully requests the Indiana Supreme Court accept transfer to correct the aforementioned errors herein by reversing and vacating the trial court's finding that A.L., A.F., and A.F. are a Children in Need of Services and for all other just and proper relief.

Respectfully submitted.

/s/ Nicholas F. Wallace
Nicholas F. Wallace

VERIFIED STATEMENT OF WORD COUNT

I hereby certify pursuant to Indiana Appellant Rule 44(E) that this Appellant's Petition to Transfer contains fewer than 4,200 words and thus complies with the word limit established in Indiana Appellate Rule 44.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 25th day of August, 2021, I electronically filed the foregoing with the Clerk of the Indiana Court of Appeals using the Efile.incourts.gov system. I also certify that on the 25th day of August, 2021, the following persons were electronically served with the foregoing document, via the Efile.incourts.gov system addressed as follows:

Theodore Rokita, Deputy Attorney General
Indiana Attorney General's Office
Indiana Government Center South, 5th Floor
302 West Washington Street
Indianapolis, Indiana 46204

and that on the 25th day of August, 2021, the undersigned mailed a copy of the foregoing to the Appellant, Alexis D. Fincher, 4714 Winter Street, Fort Wayne, IN 46806, by depositing same in the United States mail first class postage prepaid.

/s/ Nicholas F. Wallace
Nicholas F. Wallace

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