**Termination of the Parent-Child Relationship**
5/30/13

In **B.H. v. Indiana Dept. of Child Services**, 989 N.E.2d 355 (Ind. Ct. App. 2013), the Court affirmed the trial court's judgment terminating Mother's parental rights to her two children. The children were born on June 30, 2006, and June 21, 2007. In October 2008, Miami County Office of the Indiana Department of Child Services (MCDCS) removed the children from Mother's care because her home was cluttered and dirty, with trash, food, animal feces, soiled diapers, and other items littered throughout. The children were returned to Mother's care after she entered into an agreement with MCDCS. In December 2008, the children were removed from Mother and placed in foster care because Mother was being evicted and had nowhere to live. A CHINS petition was filed, and Mother admitted the allegations in the CHINS petition. The children were adjudicated CHINS, and Mother was ordered to participate in reunification services, which included submitting to random drug screens, participating in home-based services, exercising parenting time with the children, securing independent housing, paying all rent and utilities, and working to further her education. At the status hearing in April 2009, the trial court noted that Mother's progress and participation in services was minimal at best. MCDCS filed its first petition to terminate Mother's parental rights in 2010, but, after a hearing, the trial court denied the petition and ordered additional services for Mother, including an intensive parenting-skills development course. In 2012, the children's permanency plan was changed to adoption, and MCDCS filed its second petition to terminate Mother's parental rights in February 2012.

The termination hearing was scheduled for August 2012. MCDCS presented evidence establishing that Mother: (1) was unable to provide the children with a safe and stable home environment because she failed to secure employment and stable housing or improve her parenting skills; (2) had moved twelve times since the children's removal, paying for only one of those residences herself; (3) was currently living with her brother and sister, and the children could not live with her at her current residence; (4) had poor attendance and lack of interest in the intensive parenting class she was ordered to attend, refused to participate in individual counseling, and showed a poor bond with the children during parenting time; (5) was being financially supported by her parents. Evidence was also presented that (1) when the children were placed in foster care, the older child, then twenty-eight months old, could say ten words and hid food, and the younger child, then sixteen months old, could not walk normally, could not drink out of a child's cup or chew food, and would go rigid when held; (2) when first placed in foster care, the children were violent and would sometimes attack each other if left alone; (3) the children were thriving in foster care despite being diagnosed with post-traumatic stress disorder and attachment issues; (4) the children were doing well in school and received counseling and


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developmental services; and (5) the foster parents wanted to adopt the children. The MCDCS caseworker reiterated Mother's lack of progress and the caseworker's written progress reports, which included Mother's counseling records, treatment plans, parenting time observations and parenting assessment documents were entered into evidence over the objection of Mother's counsel, and the trial court allowed the caseworker to summarize the reports' contents. Evidence from an expert witness social worker with a master's degree who had conducted parenting assessments for more than twenty-five years was admitted over Mother's objection. The social worker had assessed Mother's parenting skills through a number of individual tests, including the Child Abuse Potential Inventory (CAPI), an interview, and an observation of Mother's interaction with the children. The social worker testified, inter alia, that the children would be at risk from abuse by Mother or someone else without intervention or protection from Mother; Mother was unable to "be empathetically aware of the children's needs" and viewed the "needs of [the] children as secondary to her own needs;" and Mother had "made it clear she did not intend to get a job, that she was waiting for her boyfriend's [social security] to come in and once that happened she was going to marry him and live off his [social security]." The social worker described Mother's interaction with the children, recalling that Mother made no effort to have physical interaction with her sons, they did not approach her for physical affection, and Mother did not have a normal, healthy, close bond with the children. The social worker recommended terminating Mother's parental rights. The trial court entered its judgment terminating Mother's parental rights, and Mother appealed. On appeal, Mother challenged the social worker's qualification as an expert and the reliability of her testimony on Mother's CAPI results. Mother also challenged the admission of the MCDCS caseworker's progress reports and some of the caseworker's testimony. Mother also argued that there was insufficient evidence to support the trial court's termination judgment.

**The Court concluded that the trial court did not abuse its discretion in qualifying the social worker as an expert witness under Ind. Evidence Rule 702.** Id. at 362. Mother argued that IC 25-23.6-4-6 prohibited the trial court from qualifying the social worker as an expert, and that the social worker lacked the necessary expert qualifications under Evid. R. 702. Mother interpreted the Court's holding in Velazquez v. State, 944 N.E.2d 34 (Ind. Ct. App. 2011), *trans. denied*, to say that a social worker may only give factual testimony, but the Court disagreed with this argument. B.H. a 360. The Court noted that IC 25-23.6-4-6 prohibits a social worker from offering expert testimony, but the statute cannot prevent a trial court from qualifying a social worker as an expert witness. Id. Citing Humbert v. Smith, 664 N.E.2d 356, 357 (Ind. 1996), the Court said that when there is a conflict between a statute and a rule of evidence, the rule of evidence prevails over any statute. B.H. at 361. The Court looked to Evid. R. 702, which governs the admission of expert testimony, and provides that "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Id. at 360. The Court opined that, because IC 25-23.6-4-6 and Rule 702 are in conflict, Rule 702 controls, and to the extent Velazquez can be read to say otherwise, the Court would disagree. Id. The Court said that Rule 702 guides the admission of expert scientific testimony by requiring trial courts to be satisfied that expert opinions both assist the trier of fact of fact and are based on reliable principles, and that the "trial


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court's determination regarding the admissibility of expert testimony under Rule 702 is a matter within its broad discretion and will be reversed only for abuse of that discretion." B.H. at 361, quoting Person v. Shipley, 962 N.E.2d1192, 1994 (Ind. 2012).

The Court, citing Bennett v. Richmond, 960 N.E.2d 782, 786 (Ind. 2012) and Evid. R. 702(a), said that a witness is qualified as an expert "by knowledge, skill, experience, training, or education," and only one of these characteristics is necessary. B.H. at 361. The Court observed that: (1) the social worker has an undergraduate degree in psychology and a master's degree in social work; (2) she is a board-certified diplomate, which means that she is at the highest level of her profession and can make certain diagnoses without medical supervision; (3) she owns and operates Brighter Tomorrows, where she provides therapy and conducts parenting assessments; (4) she has conducted parenting assessments for more than twenty-five years and learned to administer them under the supervision of a psychologist; (5) she testified about the creation, function, acceptance of and widespread use of the CAPI in the psychiatric community. Id. The Court concluded that this amount of education, experience, and familiarity with parenting assessments, particularly CAPI, constituted sufficient knowledge and experience to qualify the social worker as an expert, and that her testimony would clearly assist the trier of fact in understanding the detailed, numeric CAPI results and how those results reflected on Mother's parenting abilities. Id. at 361-62.

**The Court concluded that the social worker's testimony was sufficient to establish the reliability of the Child Abuse Potential Inventory (CAPI).** Id. at 362. Mother argued that the trial court erred in allowing the social worker's expert testimony because there was no showing that CAPI is a test based on reliable scientific methodology or technique. The Court, citing Troxell v. State, 778 N.E.2d 811, 815 (Ind. 2002), said that under Evid. R. 702, no specific test is required to establish the reliability of a scientific process. B.H. at 362. The Court observed that trial courts may consider: (1) whether the technique has been or can be empirically tested; (2) whether the technique has been subjected to peer review and publication; (3) the known or potential rate of error, as well as the existence and maintenance of standards controlling the technique's operation; and (4) general acceptance within the relevant scientific community. Troxell at 815. B.H. at 362. Citing Bond v. State, 925 N.E.2d 773, 779 (Ind. Ct. App. 2010), the Court said that, although all of the above factors and others may be relevant, none is not by itself dispositive, and not all need to be present for a trial court to find that the preferred evidence rests upon reliable principles. B.H. at 362. The Court noted the following testimony from the social worker in support of its conclusion that the CAPI is reliable: (1) CAPI was created in 1977 at Northern Illinois University by Dr. Joel Millner; (2) CAPI is accepted and used widely in the psychiatric community and has been the subject of peer-review studies; (3) CAPI is a standardized test based on five "constructs," and it has been "administered over many...samples of people and then normed [,] and so there are different validity scales in the cap...that are used to make sure that we are getting an accurate result." Id.


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**The Court concluded that the trial court erred in admitting the progress reports through the MCDCS caseworker's testimony but the error was harmless.** Id. at 363. Mother claimed that the trial court erred by admitting the progress reports, which included Mother's counseling records, treatment plans, parenting-time observations and parenting-assessment documents, and by allowing the caseworker to testify about Mother's compliance and participation in services. Although MCDCS argued that the progress reports were not admitted for the truth of the matter, but rather "to show why [MC]DCS had filed for termination of Mother's parental rights," the Court opined that the probative value of these reports to show why termination was sought was substantially outweighed by the danger of unfair prejudice given their contents. Id. at 362-63. The Court quoted Ind. Evidence Rule 403 ("[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice..."). Id. at 363. The Court quoted In Re E.T., 808 N.E.2d 639, 646 (Ind. 2004), which states that "[t]he improper admission of evidence is harmless error when the judgment is supported by substantial independent evidence to satisfy the reviewing court that there is no substantial likelihood that the questioned evidence contributed to the judgment." B.H. at 363. The Court noted that the judgment terminating Mother's parental rights did not refer to the progress reports or their contents, and there was sufficient independent evidence to satisfy the judgment. Id. Mother also argued that the trial court erred by allowing the caseworker to testify about Mother's participation in services and overall compliance with the case plan because the caseworker's opinion was based on her information from service providers, which would be inadmissible hearsay. The Court found that the caseworker's testimony was brief and cumulative of other testimony on Mother's participation and compliance with services and therefore the court's admission of the caseworker's testimony was harmless error. Id.

**The Court found that there was clear and convincing evidence to support the trial court's findings and ultimate determination that there was a reasonable probability the conditions leading to the children's removal and continued placement outside Mother's care would not be remedied.** Id. at 366 . Among the evidence noted by the Court was that: (1) Mother failed to fully participate in or benefit from the services offered to her; (2) even when Mother was given a second chance because the 2010 termination petition was denied, her participation and compliance did not improve; (3) service providers detailed Mother's lack of progress in her ability to parent the children; (4) the expert social worker recommended terminating Mother's parental rights and testified that the children were at risk of being abused if returned to Mother's care; (5) Mother had moved twelve times since the children's removal and was living with her brother and sister in a two bedroom apartment in which the children could not reside at the time of the termination trial; (6) the children were thriving, both physically and emotionally, in their foster care placement. Id. at 365.


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