Termination of the Parent-Child Relationship Primer 2014

A Guide for Termination Court Proceedings

By:

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Kids' Voice of Indiana

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About the Agency

Kids' Voice of Indiana

Kids' Voice of Indiana is a 501(c)3 organization which has been committed for more than twenty-five years to promoting, protecting, and preserving the rights and best interest of children across the state of Indiana through three Programs, the Derelle Watson-Duvall Children's Law Center of Indiana, the Bette J. Dick GAL for Kids Program, and the Supervised Parent-Child Visitation Program.

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Guide To

The Termination of the Parent-Child Relationship

Table of Contents

II. Introduction

The purpose of the Termination of the Parent-Child Relationship Primer 2014 is to provide information on statutes and case law for Indiana Judges and attorneys who occasionally practice in termination cases or who practice in other areas of law that are impacted by termination law. More detailed information on Termination law is given in the CHINS Deskbook 2001 by Frances G. Hill and Derelle Watson-Duvall and the 2009 Cumulative Supplement by Saundria Bordone and Derelle Watson-Duvall. These two extensive research books are available free of charge on the Kids' Voice of Indiana website, **www.KidsVoiceIN.org**. Additional case law updates and legal articles on termination law are frequently added to our website.

The Termination of the Parent-Child Relationship Primer 2014 provides legal information, but is not a substitute for legal advice about a specific situation. The Termination Primer does not create an attorney-client relationship with the reader. Readers of the Termination Primer should not commence or fail to bring any legal proceedings based on the contents of the Termination of the Parent-Child Relationship Primer 2014.

The Termination of the Parent-Child Relationship Primer 2014 includes information on legislation which is effective as of July 1, 2014. Case law citations are current through Volume 8 of the North Eastern Reporter third.

II. Voluntary Termination of the Parent-Child Relationship Statutes and Case Law

Voluntary termination of the parent-child relationship is a separate and distinct court proceeding that is governed by the juvenile court procedural statutes at **IC 31-32-1**, **IC 31-32-4** through **IC 31-32-10**, and **IC 31-32-12** through **IC 31-32-15**, and the CHINS and delinquency statutes. **IC 31-35-1-2**. Probate court has concurrent original jurisdiction with juvenile court on proceedings to voluntarily terminate the parent-child relationship. **IC 31-30-1-5**. **IC 31-35-1-3**. The child need not be an adjudicated CHINS for a voluntary termination proceeding to take place.

The voluntary termination process begins with the parent's written consent to voluntary termination. The parent's written consent should be notarized or signed in the presence of a person who is authorized by law to take acknowledgments. **IC 31-35-1-6(a)**. The person who accepts the parent's consent must be careful not to say or do anything to coerce the parent to consent. If the parent is represented by an attorney, the parent's attorney should be notified before the parent signs the consent to voluntary termination. **See In Re A.M.H.**, 732 N.E.2d 1284 (Ind. Ct. App. 2000), in which the Court affirmed the trial court's dismissal of DCS's petition for voluntary termination of the parent-child relationship. The DCS case manager, knowing that Mother was represented by counsel, provided voluntary termination forms to Mother and obtained her signature on the forms without first notifying Mother's counsel. The Court could not say that the trial court erred in deciding that Mother was denied due process of law. Id. at 1286.

IC 31-35-1-12 states that parents must be advised of the following before signing the consent to voluntary termination of the parent-child relationship:

(1) their consent is permanent and cannot be revoked or set aside unless it was obtained by fraud or duress, or unless the parent is incompetent;

(2) when the court terminates the parent-child relationship:
  (A) all rights, powers, privileges, immunities, duties, and obligations, including any rights to custody, control, parenting time, or support pertaining to the relationship, are permanently terminated; and,
  (B) their consent to the child's adoption is not required;

(3) the parents have a right to the:
  (A) care;
  (B) custody; and
  (C) control;

of their child as long as the parents fulfill their parental obligations;

(4) the parents have a right to a judicial determination of any alleged failure to fulfill their parental obligations in a proceeding to adjudicate their child a delinquent child or a child in need of services;

(5) the parents have a right to assistance in fulfilling their parental obligations after a court has determined that they are not doing so;

(6) proceedings to terminate the parent-child relationship against the will of the parents can be initiated only after:

(A) the child has been adjudicated a delinquent child or a child in need of services and the child has been removed from their custody following the adjudication; or

(B) a parent has been convicted and imprisoned for an offense listed in **IC 31-35-3-4** (or has been convicted and imprisoned for an offense listed in **IC 31-6-5-4.2(a)** before its repeal), the child has been removed from the custody of the parents under a dispositional decree, and the child has been removed from the custody of the parents for six (6) months under a court order;

(7) the parents are entitled to representation by counsel, provided by the state if necessary, throughout any proceedings to terminate the parent-child relationship against the will of the parents; and

(8) the parents will receive notice of the hearing, unless notice has been waived under **IC 31-35-1-5(b)**, at which the court will decide if their consent was voluntary, and the parents may appear at the hearing and allege that their consent was not voluntary; and

(9) the parents' consent cannot be based upon a promise regarding the child's adoption or contact of any type with the child after the parents voluntarily relinquish their parental rights of the child after entry of an order under this chapter terminating the parent-child relationship.

Subsection 9, effective July 1 2012, was added to **IC 31-35-1-12** in 2012 legislation.

Competent parents who are under the age of eighteen may consent to voluntary termination without the approval of the court or the parents' guardians. **IC 31-35-1-9(b)**. The child's mother may not consent to termination before the child's birth. **IC 31-35-1-6(d)**. The child's birth father may consent to termination in writing in the presence of a Notary Public before the child's birth. **IC 31-35-1-6(c)(4)**. The father's pre-birth consent must contain an acknowledgment that consent is irrevocable and that he will not receive notice of adoption or termination proceedings. **IC 31-35-1-6(c)(4)**. If the father consents to termination before the child's birth as described at **IC 31-35-1-6(c)(4)** or denies paternity before or after the child's birth in a notarized writing, the father may not challenge or contest the child's

adoption or termination of the parent-child relationship. **IC 31-35-1-6(c)**. The notarized writing must contain an acknowledgment that the father's denial of paternity is irrevocable, and that the father will not receive notice of adoption or termination proceedings.

After the parent signs the consent to voluntary termination, the second step is the filing of a petition to terminate the parent-child relationship. Only DCS or a licensed child placing agency can file a petition for the voluntary termination of the parent-child relationship. **IC 31-35-1-4(a)**. A parent cannot file his or her own petition for voluntary termination of the parent-child relationship. A voluntary termination petition may be filed in the juvenile or probate court. **IC 31-35-1-3**. A voluntary termination petition may be filed for a child who is not a Child in Need of Services.

IC 31-35-1-4(b) states the voluntary termination petition must:

(1) be entitled "In the Matter of the Termination of the Parent-Child Relationship of _____, a child, and _____, the child's parent (or parents)"; and

(2) allege that:
   A. the parents are the child's natural or adoptive parents;
   B. the parents, including the alleged or adjudicated father if the child was born out of wedlock;
      i. knowingly and voluntarily consent to the termination of the parent-child relationship; or
      ii. are not required to consent to the termination of the parent-child relationship under section 6(c) of this chapter;
   C. termination is in the child's best interest; and
   D. the petitioner has developed a satisfactory plan of care and treatment for the child.

After the voluntary termination petition has been filed, the court will schedule a hearing date. The parent shall be notified of the hearing date by mail at least ten days before the hearing or by in person delivery at least three days before the hearing. **IC 31-35-1-5(a)**. **IC 31-32-9-1(b), (c).** The parent can waive the right to receive notice of the hearing on the voluntary termination petition by signing a notarized document which states that the waiver cannot be revoked and that the parent will not receive notice of the termination or adoption proceedings. **IC 31-35-1-5(b)**.

At the court hearing on the voluntary termination petition, **IC 31-35-1-8** states that the court must advise the parents of their constitutional and other legal rights and the consequences of voluntary termination, as listed in **IC 31-35-1-12**. The court will hear evidence and

determine whether the parents' consent to voluntary termination is knowing and voluntary. **IC 31-35-1-6(a)** states that parents must give their consents to termination in open court unless the court makes findings of fact upon the regard that:

(1) The parents gave their consent in writing before a person authorized by law to take acknowledgments; and
(2) The parents were:
    (A) advised in accordance with section 12 of this chapter; and
    (B) advised that if they choose to appear in open court, the only issue before the court is whether their consent was voluntary.

IC 31-35-1-6(b) provides that if:
(1) the court finds the conditions under subsection (a)(1) and (a)(2) have been met; and
(2) a parent appears in open court;

a court may consider only the issue of whether the parents' consent was voluntary.

In **Neal v. DeKalb Cty. Div. of Fam. & Children**, 796 N.E.2d 280, 285 (Ind. 2003), the Indiana Supreme Court held that a parent's written consent to voluntary termination is invalid unless the parent either:

(1) appears at the court hearing and acknowledges the parent's consent to termination; or

(2) consented to termination in writing before a person authorized by law to take acknowledgments; and

(3) was advised of the legal rights listed at **IC 31-35-1-12**; and

(4) was advised that if the parent chooses to appear in open court the court may consider only the issue of whether the parent's consent was voluntary.

If the parent does not attend the court hearing on the voluntary termination petition, the court must inquire about the reasons why the parent did not attend. **IC 31-35-1-7(a)**. The court may require a probation officer to investigate to determine whether there is any evidence of fraud or duress and to establish that the parent was competent to consent to termination. **IC 31-35-1-7(a)**. The court ordered investigation must be entered on the record under oath by the person responsible for making the investigation. **IC 31-35-1-7(b)**. **IC 31-35-1-7(c)** states that if there is any competent evidence of probative value that: (1) fraud or duress was present when the written consent was given; or (2) a parent was incompetent, the court shall dismiss the petition or continue the proceeding. **IC 31-35-1-**

7(d) states that the court may issue any appropriate order for the care of the child pending the outcome of the case.

At the voluntary termination hearing, **IC 31-35-1-10** requires the court to determine that:

1. termination of the parent-child relationship is in the child's best interest; and

2. the petitioner (DCS or licensed child placing agency) has developed a satisfactory plan of care and treatment for the child.

If the court determines that all the allegations in the termination petition are true, the court shall order the parent's rights legally terminated. **IC 31-35-1-10(a)**. In **In Re M.R.**, 728 N.E.2d 204, 209 (Ind. Ct. App. 2000), the Court concluded that where the parent voluntarily consents to termination, the State is relieved of its burden to prove the allegations of the petition by the clear and convincing standard of proof. After the court orders parental rights terminated, the parent does not have the right to request custody of the child, or to request parenting time with the child. The parent is not required to pay ongoing child support, but the parent is still required to pay any child support arrearage. The parent's consent to the child's adoption is not needed.

IC 31-35-1-11(a) allows the court to enter a default judgment against the unavailable parent and terminate rights as to both parents if one parent has made a valid consent to termination and the other parent:
A. is required to consent to termination;
B. cannot be located, after a good faith effort has been made to do so; and
C. has been served with notice of the hearing in the most effective means possible.

Case law on voluntary termination of the parent-child relationship includes **In Re K.L.**, 922 N.E.2d 102, 109 (Ind. Ct. App. 2010) (Court concluded that Father's voluntary termination was vitiated by misrepresentations made by DCS that the child would be adopted by Aunt and Uncle; therefore, Father's petition to set aside judgment terminating his parental rights should have been granted); **In Re M.B.**, 921 N.E.2d 494, 500 (Ind. 2009) (Court held that, unless all provisions of Indiana's open adoption statutes (**IC 31-19-16**) are satisfied, the voluntary termination of parental rights may not be conditioned upon post-adoption contact privileges); and **Youngblood v. Jefferson County DFC**, 838 N.E.2d 1164, 1172 (Ind. Ct. App. 2005) (Court found that trial court did not abuse its discretion by denying Mother's motion to set aside her voluntary termination in that Mother failed to show that her consent to terminate parental rights was executed under fraud or duress or while she was incompetent).

III. Involuntary Termination of the Parent-Child Relationship Statutes, Jurisdiction, Standing, Standard and Burden of Proof, Service and Notice, Timeline for Hearing, and Effect of Judgment

A. Statutes

Indiana law includes two involuntary termination statutes, **IC 31-35-2** and **IC 31-35-3**, the first of which is general and the second of which addresses parents who have been convicted of specific criminal offenses against child victims. **IC 31-35-2-4** lists what the general termination petition must state and what must be proven:

(a) A petition to terminate the parent-child relationship involving a delinquent child or a child in need of services may be signed and filed with the juvenile or probate court by any of the following:

(1) The attorney for the department [DCS].

(2) The child's court appointed special advocate.

(3) The child's guardian ad litem.

(b) The petition must meet the following requirements:

(1) The petition must be entitled "In the Matter of the Termination of the Parent-Child Relationship of _____, a child, and _____, the child's parent (or parents)".

(2) The petition must allege:

(A) that one (1) of the following is true:

(i) The child has been removed from the parent for at least six (6) months under a dispositional decree.

(ii) A court has entered a finding under IC 31-34-21-5.6 that reasonable efforts for family preservation or reunification are not required, including a description of the court's finding, the date of the finding, and the manner in which the finding was made.

(iii) The child has been removed from the parent and has been under the supervision of a local office or probation department for at least fifteen (15) months of the most recent twenty-two (22) months, beginning with the date the child is removed from the home as a result of the child being alleged to be a child in need of services or a delinquent child;

(B) that one (1) of the following is true:

(i) There is a reasonable probability that the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied.

(ii) There is a reasonable probability that the continuation of the parent-child relationship poses a threat to the well-being of the child.

(iii) The child has, on two (2) separate occasions, been adjudicated a child in need of services;

(C) that termination is in the best interests of the child; and

(D) that there is a satisfactory plan for the care and treatment of the child.

(3) If the department intends to file a motion to dismiss under section 4.5 of this chapter, the petition must indicate whether at least one (1) of the factors listed in section 4.5(d)(1) through 4.5(d)(3) of this chapter applies and specify each factor that would apply as the basis for filing a motion to dismiss the petition.

IC 31-3-2-4(b)(iii) was amended effective July 1, 2012, and the amendment is reflected above.

The specific termination statutes for parents convicted of criminal offenses, **IC 31-35-3-4** and **IC 31-35-3-5**, list what the petition must state and what must be proven:

If:

(1) an individual is convicted of the offense of:

(A) murder (IC 35-42-1-1);

(B) causing suicide (IC 35-42-1-2);

(C) voluntary manslaughter (IC 35-42-1-3);

(D) involuntary manslaughter (IC 35-42-1-4);

(E) rape (IC 35-42-4-1);

(F) criminal deviate conduct (IC 35-42-4-2) (repealed);

(G) child molesting (IC 35-42-4-3);

(H) child exploitation (IC 35-42-4-4);

(I) sexual misconduct with a minor (IC 35-42-4-9); or

(J) incest (IC 35-46-1-3); and

(2) the victim of the offense:

(A) was less than sixteen (16) years of age at the time of the offense; and

(B) is:

(i) the individual's biological or adoptive child; or

(ii) the child of a spouse of the individual who has

committed the offense; the attorney for the department, the child's guardian ad litem, or the court appointed special advocate may file a petition with the juvenile or probate court to terminate the parent-child relationship of the individual who has committed the offense with the victim of the offense, the victim's siblings, or any biological or adoptive child of that individual. **IC 31-35-3-4**.

The verified petition filed under section 4 of this chapter must:

(1) be entitled "In the Matter of the Termination of the Parent-Child Relationship of _____, a child, and _____, the parent (or parents)"; and

(2) allege:

(A) that the victim of an offense listed in section 4(1) of this chapter is:

(i) the subject of the petition;

(ii) the biological or adoptive sibling of the subject of the petition; or

(iii) the child of a spouse of the individual whose parent-child relationship is sought to be terminated under this article;

(B) that the individual whose parent-child relationship is sought to be terminated under this article was convicted;

(C) that the child has been removed:

(i) from the parent under a dispositional decree; and

(ii) from the parent's custody for at least six (6) months under a court order;

(D) that one (1) of the following is true:

(i) There is a reasonable probability that the conditions that resulted in the child's removal or the reasons for placement outside the parent's home will not be remedied.

(ii) There is a reasonable probability that continuation of the parent-child relationship poses a threat to the well-being of the child.

(iii) The child has, on two (2) separate occasions, been adjudicated a child in need of services;

(E) that termination is in the best interests of the child; and

(F) that there is a satisfactory plan for the care and treatment of the child. **IC 31-35-3-5.**

IC 31-35-3-8 provides that a showing that an individual has been convicted of an offense described in **IC 31-35-3-4(1)** is prima facie evidence that there is a reasonable probability that: (1) the conditions that resulted in the removal of the child from the parent under a court order will not be remedied; or (2) continuation of the parent-child relationship poses a threat to the well-being of the child.

B. Jurisdiction

The juvenile court and the probate court have concurrent original jurisdiction in all cases involving termination of the parent-child relationship. **IC 31-30-1-5(2)**; **IC 31-35-2-3**; **IC 31-35-3-3**. The provisions of the federal Indian Child Welfare Act (ICWA), 42 U.S.C.A. 1901 et. seq., must be followed if the child is either a member of an Indian tribe or is eligible for membership in an Indiana tribe and is the biological child of a member of an Indian tribe. The Indian tribe may elect to assume jurisdiction over the child. **See In Re**

S.L.H.S., 885 N.E.2d 603 (Ind. Ct. App. 2008) (despite efforts by Father and DCS to track down child's alleged Indian status, no tribal membership for child was identified; therefore, ICWA did not apply and termination judgment was affirmed); **Matter of D.S.**, 577 N.E.2d 572 (Ind. 1991) (state court termination order reversed and remanded due to failure to follow jurisdictional and evidentiary standards of ICWA.)

C. Standing

An involuntary termination petition filed under **IC 31-35-2** or **IC 31-35-3** may be filed only by the DCS attorney, the child's Guardian ad Litem, or the child's Court Appointed Special Advocate. **IC 31-35-2-4(a)**; **IC 31-35-3-4**. Upon the filing of the petition, the DCS attorney shall represent the interests of the state in all subsequent proceedings. **IC 31-35-2-5**; **IC 31-35-3-6**.

D. Standard and Burden of Proof

The standard of proof for involuntary termination of the parent-child relationship cases is clear and convincing evidence. **In Re E.M.**, 4 N.E.3d 636, 642 (Ind. 2014); **IC 31-34-12-2**; **In Re G.Y.**, 904 N.E.2d 1257, 1261 (Ind. 2009); **Bester v. Lake County Office of Family**, 839 N.E.2d 143, 148 (Ind. 2005). The burden of proving each and every element set forth in the involuntary termination statutes is on DCS. **See In Re D.K.**, 968 N.E.2d 792, 797-98 (Ind. Ct. App. 2012). **See also In Re C.M.**, 960 N.E.2d 169, 175 (Ind. Ct. App. 2011) in which the Court opined that Mother was not required to produce evidence in order to withstand the termination petition. On rehearing, **In Re C.M.**, 963 N.E.2d 528, 529 (Ind. Ct. App. 2012), the Court clarified that it was incumbent upon DCS to put forth evidence of lack of remedial measures or evidence of that which poses a threat to the child. The Court said there may well be no evidence of "changed" conditions, but there must be evidence of "current" conditions. Termination cases are governed by the procedures prescribed for CHINS cases, but termination proceedings are separate and distinct from CHINS cases. **IC 31-35-2-2**; **IC 31-35-3-2**. **See also Hite v. Vanderburg Cty Office Fam & Chil.**, 845 N.E.2d 175, 182 (Ind. Ct. App. 2006). In **State Ex Rel. Gosnell v. Cass Cir.**, 577 N.E.2d 957, 958 (Ind. 1991), the Court said that a termination petition is "of much greater magnitude" than the underlying CHINS action. The termination petition must be filed as a separate proceeding with new service on parents. Termination proceedings are civil proceedings, and the Indiana Rules of Trial Procedure apply. **IC 31-32-1-3**.

E. Service and Notice

IC 31-35-2-2 provides that the CHINS procedural statutes on service and notice at **IC 31-32-9-1** and **2** apply to termination cases. **IC 31-32-9-1** provides that parents shall be given personal service at least three days before the hearing, and ten days before the hearing if service is by mail. Due to the magnitude of the involuntary termination proceeding, it is preferable to comply with Ind. Trial Rule 6 (C) on service. T.R. 6 (C) allows the party twenty days to respond after service of the prior pleading. Note that the juvenile code does not specifically require a responsive pleading in a termination case.

Service of the involuntary termination petition on the parent should be accomplished by the best possible form of service since the consequences of these cases are so significant. The recommended means of service are personal delivery of the summons and petition to the parent or certified mail with a return receipt signed by the parent. If DCS is unable to obtain personal service on the parent, the next best form of service is to leave a copy of the petition and summons at the parent's last known address. If this form of service is used, Ind. Trial Rule 4.1(B) requires a follow-up mailing of a summons by regular mail to the same address. Case law indicates that service upon a defendant's "former residence" is insufficient to confer personal jurisdiction under T.R. 4.1(B). **See Hill v. Ramey**, 744 N.E.2d 509 (Ind. Ct. App. 2001) (leaving a copy of protective order at home of Father's parents where he had resided was insufficient to confer jurisdiction because Father had moved to another residence); **Mills v. Coil**, 647 N.E.2d 679, 681 (Ind. Ct. App. 1995) (service upon a defendant's former residence is insufficient to confer personal jurisdiction). Parents who are institutionalized or incarcerated should receive service via the superintendent of the institution as outlined in Ind. Trial Rule 4.3. A written confirmation of service from the superintendent, including the superintendent's information regarding whether the person has been allowed an opportunity to retain counsel, should be requested along with a copy of the summons signed by the parent.

Publication service is the least desirable form of service, to be used only when the parent cannot be located despite diligent efforts. **See Abell v. Clark Cty. Dept. of Public Welfare**, 407 N.E.2d 1209, 1211 (Ind. Ct. App. 1980), in which the Court reversed and remanded the termination judgment because service of process by publication was not constitutionally sufficient to inform Mother under the circumstances, as to the pending termination proceedings. In **Abell**, Mother had filed a motion for relief from judgment and a motion to correct errors accompanied by her affidavit that the welfare department had knowledge of her whereabouts because Mother had been sent checks from the welfare department prior to the filing of the termination petition by the welfare department.

In addition to serving the parent with the termination petition and summons, DCS must also send notice of the date of the termination hearing(s) to the parent at least ten days before the hearing(s) pursuant to **IC 31-35-2-6.5**. **See In Re H.K.** 971 N.E.2d 100, 104 (Ind. Ct. App. 2012) (termination judgment was remanded with instructions that trial court conduct hearing to determine whether statutory notice requirements were met and, if requirements were not met, whether this procedural irregularity violated Mother's due process rights); **In Re E.E.**, 853 N.E.2d 1037, 1042-43 (Ind. Ct. App. 2006) (Court affirmed termination judgment despite alleged Father's argument that notice was ambiguous since it included two trial dates, a "first choice" setting and a "second choice" setting); and **D.A. v. Monroe County Dept. of Child Serv.**, 869 N.E.2d 501, 511 n.12, 512 (Ind. Ct. App. 2007) (Court reversed and remanded trial court's termination judgment, noting that case manager did not specifically testify that she sent notice to Father at least ten days prior to the hearing as required by **IC 31-35-2-6.5** and finding it was entirely unclear whether Father had timely notice or any notice of the termination hearing).

F. Timeline for Hearing

IC 31-35-2-6(a) states that whenever a hearing is requested on a termination petition filed under this chapter, the court shall commence a hearing on the petition not more than 90 days after the petition is filed, and complete a hearing on the petition not more than 180 days after the petition is filed. **IC 31-35-2-6(b)**, added effective July 1, 2012, states that, if a hearing is not held within the time period set forth in subsection (a), upon filing a motion with the court by a party, the court shall dismiss the termination petition without prejudice. **IC 31-35-3-7(a)** and **(b)**, the statute on timeliness for hearing termination petitions when a parent has been convicted of a specific criminal offense, states that the person filing the petition shall request that the court set the petition for a hearing, and that whenever a hearing is requested, the court shall commence the hearing not more than 90 days after the petition is filed. **IC 31-35-3-7(c)**, added effective July 1, 2012, states that if a hearing is not held within the time set forth in subsection (b), upon filing a motion with the court by a party, the court shall dismiss the petition without prejudice.

G. Effect of Judgment

If the termination petition is granted, **IC 31-35-6-4** provides that:

(a) If the juvenile or probate court terminates the parent-child relationship;
   (1) all rights, powers, privileges, immunities, duties, and obligations, including any rights to custody, control, visitation, or support, pertaining to that relationship, are permanently terminated; and
   (2) the parent's consent to the child's adoption is not required.

(b) Any support obligations that accrued before the termination are not affected. However, the support payments shall be made under the juvenile or probate court's order.

If a termination judgment is entered, the child continues as a CHINS, subject to the review hearing requirements. DCS and the Guardian ad Litem or Court Appointed Special Advocate will seek a permanent option for the child.

The court has the authority under **IC 31-35-6-1** to refer the case to the probate court for adoption proceedings or to order any dispositional alternatives available under **IC 31-34-20-1**. If the juvenile court refers a post-termination case to the probate court for adoption, the juvenile court shall review the child's case once every six months until a petition for adoption is filed. **IC 31-35-6-1(b)**. When the case is referred to the court with probate jurisdiction for adoption proceedings, the Guardian ad Litem or Court Appointed Special Advocate shall comply with the following requirements from **IC 31-35-6-2**:

(1) Provide DCS with information regarding the best interests of the child.
(2) Review the adoption plan as prepared by DCS as to the best interests of the child.
(3) Report to the court with juvenile jurisdiction and, if requested, to the court having probate jurisdiction, regarding the plan and the plan's appropriateness in relationship to the best interests of the child.

Indiana case law has clarified that when a parent's rights to the child have been terminated, the child's grandparents also lose their status as grandparents. **See In Re G.R.**, 863 N.E.2d 323 (Ind. Ct. App. 2007), in which the Court concluded that, because Mother's rights were terminated prior to the filing of maternal grandmother's and step-grandfather's petition for placement under the CHINS case, the maternal grandmother was no longer the child's grandparent and the trial court was not required to consider her for placement of the child under **IC 31-34-4-2(a)** or any other CHINS statute. Id. at 328. **See also In Re Adoption of Z.D.,** 878 N.E.2d 495 (Ind. Ct. App. 2007), in which Father's parental rights had been terminated; then, paternal grandmother filed a petition to adopt the child in Benton County and notice of the petition was served on the Tippecanoe County Department of Family and Children (TCDFC). The foster parent filed a petition to adopt the child in Tippecanoe Circuit Court, but the paternal grandmother did not receive notice of the petition. The foster parent's petition for adoption in Tippecanoe County was granted; therefore, the paternal grandmother's petition for adoption in Benton County was dismissed. The paternal grandmother then filed a motion to correct error and a motion to intervene in the foster parent's adoption proceeding in Tippecanoe Circuit Court, which were denied. The Court of

Appeals affirmed the foster parent's adoption, holding, inter alia, that: (1) neither the Tippecanoe Circuit Court nor the TCDFC was required to provide the paternal grandmother with notice of the foster parent's adoption petition; (2) because Father's parental rights had been terminated, any of the paternal grandmother's derivative due process rights with respect to visitation, custody, or adoption were effectively extinguished by the time paternal grandmother filed her adoption petition; (3) after the termination, the paternal grandmother had neither standing to petition to adopt in Benton County, nor to intervene in the Tippecanoe Circuit Court adoption. Id. at 498. The Court opined that TCDFC was acting in the child's best interests when it refused to consent to the paternal grandmother's adoption because Father was a convicted child molester, yet the paternal grandmother indicated that she would allow Father to maintain contact with the child. Id. at 498-99.

IV. Involuntary Termination of the Parent-Child Relationship Procedural and Evidentiary Issues

A. Procedural Issues

IC 31-32-2-5 and **IC 31-32-4-1** provide that a parent in an involuntary termination proceeding is entitled to be represented by counsel. If the parent in a termination proceeding does not have an attorney who may represent the parent without a conflict of interest, and the parent has not lawfully waived the parent's right to counsel, the court shall appoint counsel for the parent at the initial hearing or at any earlier time. **IC 31-32-4-3(a)**. A parent who is entitled to representation by counsel may waive that right if the parent does so knowingly and voluntarily. **IC 31-32-5-5**. In **Keen v. Marion Cty. D. of Public Welfare**, 523 N.E.2d 452 (Ind. Ct. App. 1988), the Court found that Mother had voluntarily waived her right to court appointed counsel. In **Matter of A.N.J.,** 690 N.E.2d 716, 720 (Ind. Ct. App. 1997), the Court ruled it was not error to fail to appoint counsel for Father when he did not appear at the termination hearing (despite notice) to be advised of his rights.

In **Lawson v. Marion County OFC**, 835 N.E.2d 577 (Ind. Ct. App. 2005), the Court reversed and remanded the trial court's termination of Father's parental rights because Father's attorney was excused from the termination hearing before the conclusion of the hearing. Id. at 581. The attorney believed that OFC would be offering no additional evidence against Father. Id. The Court observed that the parenting assessment, presented after Father's attorney had left the hearing, was "a significant portion of the evidence against Father", and "the only direct evidence showing that Father should not be reunified with [the child]." Id. The Court said that the risk of error created by entering judgment after conducting a hearing where evidence against a parent is presented without his attorney present is substantial. Id. at 580. The facts of **Lawson** show that Father had not appeared at

the final hearing, despite having been notified of the date. Id. at 578. In **D.A. v. Monroe County Dept. of Child Serv.**, 869 N.E.2d 501 (Ind. Ct. App. 2007), the Court reversed the entry of judgment terminating Father's parental rights and remanded the case to the trial court with instructions to hold a proper final termination hearing. Id. at 512. Father had appeared at the initial termination hearing and requested pauper counsel, so the trial court appointed an attorney to represent father. The attorney entered an appearance on Father's behalf, but Father did not meet with his attorney. The attorney then moved to withdraw her appearance, citing lack of cooperation by Father, but did not send a copy of the motion to withdraw to Father. The trial court set the hearing on the motion to withdraw appearance for the same date as the final termination hearing, but the record did not reflect that the trial court sent notice of the motion to withdraw appearance hearing to Father. The trial court allowed Father's attorney to withdraw her appearance the day before the termination hearing, at a hearing on DCS's motion for substance abuse treatment records release, which Father did not attend. Father also did not attend the termination hearing on the following day, but successfully argued on appeal that the trial court had abused its discretion by granting his attorney's motion to withdraw her appearance. Id. at 509. The Court opined that Father's rights had been prejudiced by the attorney's failure to comply with the Monroe County local rule on motions to withdraw appearances because the attorney had neither informed Father of the final hearing date nor of her motion to withdraw. Id. **See also K.S. v. Marion County Dept. Child Services**, 917 N.E.2d 158, 165 (Ind. Ct. App. 2009), in which the Court opined that the trial court had abused its discretion when it granted Mother's attorney's oral motion to withdraw her appearance at the commencement of the termination hearing in violation of the Marion County local rule.

The Indiana Supreme Court addressed the issue of joint representation of two parents by a single lawyer in **Baker v. County Office of Family & Children**, 810 N.E.2d 1035 (Ind. 2004), an involuntary termination of parental rights case. In Baker, the parents, who were not married to each other, claimed that the trial court did not adequately inquire about their decision to go forward with representation by the same lawyer. The Court opined that the parents' joint representation did not result in a conflict of interest. Id. at 1042. The Court further said: (1) the parents preserved the same interests, namely maintaining parental rights over their child; (2) there was no solid evidence showing their interest were "adverse and hostile"; (3) the parents were not presenting evidence against one another; (4) neither parent stood to gain significantly by separate representation; (5) nothing suggested that representation by a single lawyer led to a fundamentally unfair hearing. Id. The **Baker** Court opined that where parents whose rights were terminated at trial claim on appeal that their lawyer underperformed, the focus of the inquiry is whether it appears that the parents received a fundamentally fair trial whose facts demonstrate an accurate determination. The question is not whether the lawyer might have objected to this or that, but whether the

lawyer's overall performance was so defective that the Appellate Court cannot say with confidence that the conditions leading to removal are unlikely to be remedied and that termination is in the child's best interest. Id. at 1041. In **In Re E.D.**, 902 N.E.2d 316 (Ind. Ct. App. 2009), the Court opined that the trial court did not deny Mother's due process rights to assist counsel in her defense. Id. at 323. The Court observed that the due process safeguards afforded a defendant in a criminal trial are not applicable to a parent in a civil termination proceeding. Id. at 322. In **In Re J.G.**., 911 N.E.2d 36 (Ind. Ct. App. 2009), the Court reversed and remanded the trial court's order that DCS pay the fees of Mother's court-appointed attorney, and found that, notwithstanding a recent revision of the relevant statutes, the General Assembly did not intend for DCS to bear the burden of court appointed legal services for parents in termination proceedings and that the county should continue to be responsible for these costs. Id. at 42.

A Guardian ad Litem or Court Appointed Special Advocate must be appointed to represent the child on any petition for involuntary termination in which the parent objects to the termination. **IC 31-35-2-7(a)**. The Guardian ad Litem or Court Appointed Special Advocate who was appointed for the child in the CHINS case may be reappointed to represent the best interests of the child in the termination proceedings. **IC 31-35-2-7(b)**. Appellate Courts have found that failure to appoint a Guardian ad Litem or Court Appointed Special Advocate to represent the child's best interests in an involuntary termination case is reversible error. **See Jolley v. Posey County DPW**, 624 N.E.2d 23 (Ind. Ct. App. 1993); **Matter of S.L.**, 599 N.E.2d 227 (Ind. Ct. App. 1992). The termination statute for parents who have been convicted of a specific criminal offense, **IC 31-35-3**, is silent on the appointment of a Guardian ad Litem or Court Appointed Special Advocate, but it is strongly recommended that a Guardian ad Litem or Court Appointed Special Advocate be appointed for termination petitions filed pursuant to **IC 31-35-3**. In **In Re A.L.H.**, 774 N.E. 2d 896 (Ind. Ct. App. 2002), Mother appealed the trial court's judgment terminating her parental rights. She argued, inter alia, that the trial court's failure to appoint a Guardian ad Litem for the child at the beginning of the CHINS case violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The Court was unpersuaded by her argument, noting that, at the time of the CHINS proceeding in this case, **IC 31-6-4-13.6(c)**, recodified at **IC 31-34-10-3**, gave the trial court discretion to determine whether a Guardian ad Litem or Court Appointed Special Advocate was required. The Court found that Mother had not provided evidence showing how the trial court abused its discretion by refusing the appointment of a Guardian ad Litem or Court Appointed Special Advocate and that Mother had not shown how the result of the proceedings would have been different if the Guardian ad Litem or Court Appointed Special Advocate had been appointed. Id. at 901. The Court opined that, because the Guardian ad Litem or Court Appointed Special Advocate is appointed to protect the interests of the child, Mother could not claim prejudice

by the trial court's refusal to appoint a Guardian ad Litem or Court Appointed Special Advocate in the CHINS proceedings. Id. The Court noted that the trial court had appointed not only a Court Appointed Special Advocate, but had also appointed counsel for Mother when the termination petition was filed. Id. In **D.T. v. Indiana Dept. of Child Services**, 981 N.E.2d 1221 (Ind. Ct. App. 2013), Father was fifteen years old when the CHINS petition was filed on his newborn child, who was placed in foster care. A public defender was appointed to represent Father at the initial CHINS hearing. Father's parental rights were terminated eighteen months after his child was adjudicated a CHINS. In his appeal of the termination judgment, Father claimed that his due process rights had been violated because the trial court failed to appoint a Guardian ad Litem for him in the CHINS case. Father contended that a Guardian ad Litem would have insisted that the obligations imposed on Father by the court be tailored to a minor, and would have understood the importance of the choices made at the CHINS hearings. Because Father had not raised the issue of appointment of a Guardian ad Litem at trial, the Court addressed this issue on appeal to determine whether it qualified as fundamental error. Id. at 1225. The Court observed that the appointment of a Guardian ad Litem for Father was discretionary under IC 31-32-3-11, and the trial court was not required to appoint a Guardian ad Litem for Father. Id. at 1226. The Court affirmed the termination order, finding that there was no fundamental error, and that Father's due process rights were not violated when the trial court failed to appoint a Guardian ad Litem for him. Id.

In light of parents' constitutional rights to raise their children, as protected by the Fourteenth Amendment to the United States Constitution, due process considerations are very important in termination proceedings. In **Bester v. Lake County Office of Family & Children**, 839 N.E.2d 143, 147 (Ind. 2005), the Indiana Supreme Court observed that a parent's interest in the care, custody, and control of his child is arguably one of the oldest of our fundamental liberty interests. In **Hite v. Vanderburgh County Office of Family & Children**, 845 N.E.2d 175, 181 (Ind. Ct. App. 2006), the Court said that when the State seeks to terminate a parent-child relationship, it must do so in a manner that meets the constitutional requirements of the due process clause. In **In Re J.S.O.**, 938 N.E.2d 271, 274 (Ind. Ct. App. 2010), the Court opined that the nature of process due in a termination proceeding turns on a balancing of the "three distinct factors" specified in **Matthews v. Eldridge**, 424 U.S. 319, 335, 96 S. Ct. 893, 903 (1976): (1) the private interests affected by the proceeding; (2) the risk of error created by the State's chosen procedure; and (3) the countervailing governmental interest supporting use of the challenged procedure. The Indiana Supreme and Appellate Courts have consistently applied the **Matthews v. Eldridge** standard in reviewing parents' due process claims in termination cases. Termination case law on due process includes **In Re I.P.**, 5 N.E.3d 750, 752 (Ind. 2014) and **In Re S.B.**, 5 N.E.3d 1152, 1154 (Ind. 2014) (Supreme Court reversed termination orders because

replacement magistrate, who had not heard the evidence, reported findings and conclusions to the trial judge based solely on his review of record, and trial judge ordered termination of parents' rights); **In Re G.P.**, 4 N.E.3d 1158, 1169 (Ind. 2014) (Supreme Court vacated termination judgment because Mother was denied statutory right to counsel during CHINS proceeding which flowed directly into termination proceeding); **S.L. v. Indiana Dept. of Child Services**, 997 N.E.2d 1114, 1121 (Ind. Ct. App. 2013) (incarcerated Father's due process rights not violated because federal authorities did not permit him to attend termination hearings; he received transcript of State's evidence and had two months to review it and communicate with his counsel); **In Re D.P.**, 994 N.E.2d 1228, 1223 (Ind. Ct. App. 2013) (Father's due process rights were violated because replacement magistrate who reviewed record but did not preside over evidentiary hearing could not properly resolve questions of credibility and weight of evidence); **In Re S.S.**, 990 N.E.2d 978, 985-86 (Ind. Ct. App. 2013) (Mother was not denied due process by trial court's denial of her motion for continuance); **In Re C.G.**, 954 N.E.2d 910, 922-23 (Ind. 2011) (whether or not an incarcerated parent is permitted to attend a termination hearing is within the sound discretion of the trial judge; a blanket order prohibiting transporting a prisoner to a termination hearing is fraught with danger); **In Re A.B.**, 922 N.E.2d 740, 746 (Ind. Ct. App. 2010) (termination judgment reversed where Mother, who arrived late to the termination hearing, was not permitted to enter the courtroom or to participate in hearing); and **In Re E.D.**, 902 N.E.2d 316, 320-23 (Ind. Ct. App. 2009) (Court concluded that under the facts of this case, trial court did not deny Mother due process when it denied her request for continuance.)

The Indiana Supreme and Appellate Courts have also reviewed procedural safeguards for parents in the underlying CHINS cases, and, on occasion, have reversed termination judgments based on procedural errors in CHINS cases. In **In Re G.P.**, 4 N.E.3d 1158, 1169 (Ind. 2014), the Indiana Supreme Court found that Mother's due process right to counsel in the CHINS case had been violated and vacated the trial court's judgment terminating her parental rights. Id. at 1168. At a CHINS review hearing, Mother requested court appointed counsel to represent her. The trial court found that Mother was indigent and was entitled to court appointed counsel, but court appointed counsel did not actually represent Mother at the hearing or at any of the subsequent CHINS hearings, including the permanency hearing. The Court found that Mother had been denied her due process right to counsel during the course of the CHINS proceeding and that the CHINS proceeding flowed directly into an action to terminate her parental rights. Id. at 1168. In **A.P. v. PCOFC**, 734 N.E.2d 1107, 1118 (Ind. Ct. App. 2000), the Court found that the record was replete with procedural irregularities throughout the CHINS and termination proceedings that were plain, numerous, and substantial; therefore, the Court was compelled to reverse the termination judgment on procedural due process grounds. Among the errors noted by the Court were the filing of an

unsigned and unverified CHINS petition, no issuance of an original or modified dispositional decree containing the requisite written findings, a failure to provide parents with copies of the case plan and its modifications, no holding of a permanency hearing to examine whether the parents' procedural rights were being safeguarded, non-compliance with the protective order statute, a failure to ensure that the parents were present at all hearings, and a termination petition that did not contain the necessary allegations. Id. at 1119. In **In Re J.S.O.**, 938 N.E.2d 271, 277 (Ind. Ct. App. 2010), the Court concluded that the trial court's order terminating paternity affiant Father's parental rights violated his due process rights because of failure to name him as a party to the CHINS case and failure to follow other CHINS statutory mandates as to Father. **But see In Re C.G.**, 954 N.E.2d 910, 918-19 (Ind. 2011), in which the Court held that DCS's failure to locate incarcerated Mother and the case manager's misrepresentation on the Affidavit of Diligent Inquiry in the CHINS case did not violate Mother's due process rights in the termination proceeding. The Court also found that the delay by DCS in advising Mother of her rights and serving her with the CHINS petition upon locating her was a very poor practice model, but reversal of the termination judgment was not warranted. Id. at 920.

IC 31-35-2-8 was amended effective July 1, 2012, adding subsection (c). The statute now states:

(a) Except as provided in section 4.5(d) of this chapter, if the court finds that the allegations in a petition described in section 4 of this chapter are true, the court shall terminate the parent-child relationship.
(b) If the court does not find that the allegations in the petition are true, the court shall dismiss the petition.
(c) The court shall enter findings of fact that support the entry of the conclusions required by subsections (a) and (b).

The corresponding statute for termination on parents convicted of specific crimes, **IC 31-35-3-9**, states:

(a) If the court finds that the allegations in a petition described in section 4 of this chapter are true, the court shall terminate the parent-child relationship.
(b) If the court does not find that the allegations in the petition are true, the court shall dismiss the petition.

Although IC 31-35-3-9 does not include a statutory requirement that trial courts enter findings of fact and conclusions of law in termination cases filed pursuant to **IC 31-35-3,** findings and conclusions must be made in all involuntary termination cases to comply with case law and to facilitate appellate review. **See In Re A.K.**, 924 N.E.2d 212, 220 (Ind. Ct. App. 2010), in which the Court held that, in termination of parental rights proceedings, trial

courts must enter findings of fact that support the entry of the conclusions called for by Indiana statute and the common law. **See also Parks v. Delaware County Dep't of Child Servs.**, 862 N.E.2d 1275, 1278 (Ind. Ct. App. 2007), which states that termination of parental rights is such a serious matter that Appellate Courts must be convinced the trial court based its judgment on proper considerations and **A.F. v. MCOFC**, 762 N.E.2d 1244, 1249 (Ind. Ct. App. 2002), in which the Court affirmed the trial court's termination judgment despite Father's appellate argument that because the trial court adopted OFC's findings of fact in their entirety and without revision, the findings were not the product of a disinterested mind and were improperly used to support the termination decision. The Court opined that the verbatim adoption of OFC's findings of fact and conclusions of law was not, in and of itself, improper. Id.

B. Evidentiary Issues

Hearsay is not admissible in the termination hearing unless it fits within a recognized hearsay exception under the Indiana Evidence Rules or the Child Hearsay Exception at **IC 31-35-4**. The Child Hearsay Exception at **IC 31-35-4** applies to termination petitions filed pursuant to **IC 31-35-2** and **IC 31-35-3**. It provides that a child's out-of-court statement may be admissible if a hearing is held and the court makes a finding that the statement is reliable and a finding that the child is unavailable to testify because (1) the child is incapable of understanding the nature and obligation of the oath (i.e. not competent to testify); (2) testifying would create a substantial likelihood of emotional or mental harm to the child; or (3) the child cannot be present for medical reasons. To qualify for admissibility under the Child Hearsay Exception, the statute also requires that the child must have made the statement when the child was less than fourteen years of age, or less than eighteen years of age if the child has impairment of intellectual functioning or adaptive behavior. **IC 31-35-4-2**. In **Matter of Relationship of M.B.**, 638 N.E.2d 804 (Ind. Ct. App. 1994), the welfare department filed a petition for a hearing to determine the admissibility of statements the children made to a counselor and a foster parent. The statements were admitted into evidence in the termination hearing. On appeal, the parents claimed the admission was error because (1) the children were not present in the courtroom; and (2) the affidavit that the children would suffer harm if required to testify was insufficient. The Court ruled that the actual presence of the children was not required in the hearing because they were at all times available to testify, and the Court noted that the legislature had recently deleted the requirement that the children must be present for the hearing to determine admissibility. Id. at 809 n.2. Also, the Court ruled that the affidavit of the psychologist satisfied the statutory requirement of "certification" of harm even though the affidavit was based in part on hearsay information from the children's counselor. Id. at 809-10. The record showed that the psychologist examined the children for an hour, in addition to reviewing the counselor's notes, and the psychologist's affidavit showed a substantial likelihood of mental or

emotional harm to the children. Id. at 810. The Court said that the evidence satisfied the "clear and convincing standard" required for admissibility in termination cases under the Child Hearsay Exception statute. Id.

Two CHINS cases discuss the procedure for child hearsay in CHINS cases at IC 31-34-13-1 through 4. The language in the statutes regarding the child hearsay exception is the same for termination cases as for CHINS cases. In **In Re J.Q.**, 836 N.E.2d 961, 965-66 (Ind. Ct. App. 2006), the Court reversed the CHINS adjudication due to lack of sufficient evidence. The child hearsay testimony was held inadmissible because: (1) there was not adequate notice to Mother that a psychiatrist recommended the child not testify due to likely emotional harm; (2) the statute requires a separate hearing to determine the admissibility of child hearsay statements; and (3) the child hearsay hearing cannot be merged with the CHINS factfinding. In **Townsley v. Marion County Dept. of Child**, 848 N.E.2d 684, 689 (Ind. Ct. App. 2006), the CHINS adjudication was reversed due to the trial court's failure to comply with the requirements of IC 31-34-13-3 regarding child hearsay. The trial court: (1) did not hold a separate hearing to determine the admissibility of the child's hearsay statements; and (2) made a broad determination of the statements' reliability in spite of arguable inconsistencies, which undermined the Appellate Court's confidence in the CHINS determination.

IC 31-35-5-1 through **7** specify the conditions under which a competent child (under fourteen years of age, but up to eighteen years of age if the child has impairment of intellectual functioning or adaptive behavior) can testify by court ordered videotape or closed circuit television instead of testifying in the courtroom. **See S.M. v. Elkhart Cty. Off. of Fam. and Chil.**, 706 N.E.2d 596, 600 (Ind. Ct. App. 1999) (although office of family and children filed motion for Mother to wait outside courtroom while children testified and Mother's attorney did not object to this procedure during hearing, Court found this procedure constituted error because the only method for children to testify outside presence of parents is by closed circuit television or videotape in compliance with statutory procedures at **IC 31-35-5-2** and **3)**.

Although the prohibition against hearsay prevents a Guardian ad Litem or Court Appointed Special Advocate from testifying to the exact statements of the child, the Court said in **Matter of Adoption of D.V.H.**, 604 N.E.2d 634 (Ind. Ct. App. 1991), a consolidated termination and adoption case, that the Guardian ad Litem may be allowed to summarize in the termination hearing the desires and state of mind expressed by the child without restating the exact language of the child. Id. at 639. Neither statutes nor case law allow for the admission into evidence of a Guardian ad Litem or Court Appointed Special Advocate for a termination hearing if the report contains inadmissible hearsay and a party objects.

Case law has clarified that the statutory abrogation of privileges at **IC 31-34-12-6** applies to termination cases and case law has extended the statute beyond the specific privileged relationships enumerated therein. Case law provides that the following privileged relationships are not a bar to testimony in termination cases; physician-patient privilege, **Shaw v. Shelby County DPW**, 612 N.E.2d 557, 558 (Ind. 1993); clinical social worker-patient privilege, **Stone v. Daviess Co. Div. Child Serv.**, 656 N.E 2d 824, 831 (Ind. Ct. App. 1995); psychologist-patient privilege, **Ross v. Delaware County Dept. of Welfare**, 661 N.E.2d 1269, 1271 (Ind. Ct. App. 1996).

Although certain privileged communications with professionals may not be grounds for excluding information in termination proceedings, mental health confidentiality laws may still be an issue. These laws provide that mental health records are confidential and protected. However, the laws generally provide that the child's mental health records can be obtained by the child's parents or guardian, DCS, or the Guardian ad Litem or Court Appointed Special Advocate. The mental health records of a parent or adult caretaker for the child may be discovered if the parent or caretaker consents to disclosure in a written "release of information" form. The records may be obtained without consent through a hearing process in which the party seeking the records shows good cause for the disclosure of the information. **See IC 16-39-3**.

In **Doe v. Daviess County**, 669 N.E.2d 192 (Ind. Ct. App. 1996), the Court of Appeals ruled that medical records and testimony of health care providers on Mother's alcoholism and drug addiction were admissible in compliance with federal hearing requirements. Id. at 196. Drug and alcohol records may be disclosed without the patient's consent, after a hearing, if good cause is show upon the record. Id. To determine good cause the court must apply a balancing test which weighs the public interest and the need for disclosure against the possible injury to the patient or program. Id.

In **Carter v. KCOFC**, 761 N.E.2d 431 (Ind. Ct. App. 2001), Mother appealed the trial court's termination judgment, alleging that the court erred by admitting her mental health, drug and alcohol records into evidence despite her objection. Mother contended that the trial court's admission of the records violated her federal privilege pursuant to 42 U.S.C.A. 290dd-2 and 42 C.F.R. § 2.64. 42 U.S.C.A. 290dd-2 provides that substance abuse education and treatment records shall be confidential. However, the contents of the records may be disclosed, regardless of whether the patient consents, if authorized by an appropriate order of a court of competent jurisdiction after application showing good cause therefore, including the need to avert a substantial risk of death or serious bodily injury. In assessing good cause the court's duty is to apply a balancing test which weighs the public interest and

the need for disclosure against the possible injury to the patient or the program. The Court noted the following procedures for ordering disclosure of privileged medical records, for noncriminal purposes, as codified at 42 C.F.R. § 2.64:

> First, any person having a "legally recognized interest" in the disclosure of patient records must apply for an order authorizing the disclosure. 42 C.F.R. § 2.64(a). The application must use a fictitious name to refer to the patient and may not contain any patient identifying information. Id. Next, the court must give the patient and the person or entity holding the records adequate notice and an opportunity to file a written response to the application. 42 C.F.R. § 2.64(b)(1)-(2). The court must further conduct a hearing in chambers or "in some manner which ensures that patient identifying information is not disclosed to anyone other than a party to the proceeding, the patient, or the person holding the record." 42 C.F.R. § 2.64(c)

Id. at 438.

Before addressing whether the trial court violated Mother's federal privilege, the Carter Court observed that the medical documents had been filed by OFC with the trial court during the CHINS proceeding and prior to the filing of the termination petition. Id. at 437. Because the medical records were generated as part of the child's dispositional plan, the Court questioned whether the federal privilege applied. Id. The Court held that Mother had waived the federal privilege at the CHINS proceeding. Id. at 438. The Court opined that, even assuming that the federal privilege applied to the medical records, the OFC was entitled to offer into evidence "the CHINS petition, the predispositional report, the parental participation order, the modification report or any other document or order containing written findings, which was required to be created during the [CHINS] proceedings." Id. Waiver notwithstanding the Court concluded that the trial court had not followed the procedural requirements of 42 C.F.R. § 2.64 with respect to the medical records. Id. The Court opined that the court's need to serve the interests of the child with regard to the child's relationship to the parents clearly outweighed any confidentiality to which Mother may have been entitled, particularly where the whole process was part of the effort to bring her to a place where she could retain her relationship to her child. Id. at 438-39. The Court found that any technical noncompliance with the federal regulations was harmless. Id. at 439. **See also In Re Invol. Termn. of Par. Child Rel. A.H.**, 832 N.E.2d 563 (Ind. Ct. App. 2005), in which the Court opined that even though the trial court may not have followed the precise procedures set forth in Title 42 regarding the admissibility of Father's medical records in the termination case, the interests of the children outweighed the confidentiality to which Father might have been entitled. Id. at 569. The Court concluded that the trial

court's noncompliance with the federal regulations governing the disclosure of Father's records was harmless in this instance. Id.

Records from service providers frequently contain relevant information for termination cases. The Indiana Supreme court discussed the admissibility of business records in **In Re Relationship of E.T.**, 808 N.E.2d 639 (Ind. 2004). The Court discussed the admissibility of reports compiled by SCAN, Inc. regarding court-ordered services provided to the parents. SCAN, Inc. is a non-profit corporation whose mission is to "prevent child abuse and neglect through direct service, education, coordination and advocacy." Id. at 641. The trial court's original dispositional decree required parents to enroll in SCAN, Inc.'s Parents and Partners Program, which included home visits and supervised visitation. Reports from SCAN were admitted into evidence at the termination trial over the parents' objection, and the parents' rights were terminated. The Indiana Supreme Court held that the reports compiled by SCAN, which described home visits and supervised visitation, did not qualify as business records; therefore, they were not admissible as an exception to the hearsay rule. Id. at 641. The Court held that the SCAN reports did not quality as business records because: (1) not all the information contained in the records was the result of first-hand observations; (2) the reports contained conclusory lay opinions; and (3) nothing in the record supported the view that the reports were prepared for the systematic conduct of SCAN, Inc. as a non-profit corporation. Id. at 643-45. An exhaustive list of Indiana cases which held that evidence was admissible under the business records exception to the hearsay rule is included in this opinion at page 654 n.4. The Court affirmed the Court of Appeals opinion, **In re E.T.**, at 787 N.E.2d 483 (Ind. Ct. App. 2003), which determined that the evidence to support the termination judgment was sufficient even absent the questioned SCAN records. Id. at 646. **See also B.H. v. Indiana Dept. of Child Services**, 989 N.E.2d 355, 362-63 (Ind. Ct. App. 2013), in which the Court found that the trial court's admission into evidence of the DCS caseworker's progress reports, which included counseling records, treatment plans, parenting-time observations, and other parenting-assessment documents, was improper but harmless because the termination judgment was supported by substantial independent evidence. Id. at 363. The Court also found that the caseworker's testimony on Mother's participation in services and compliance with the case plan, which was based on the caseworker's information from service providers, was brief and cumulative; therefore, the trial court's admission of the caseworker's testimony was harmless error. Id.

Termination proceedings are based on the underlying CHINS proceedings. At the termination hearing, DCS will offer into evidence certified copies of the CHINS detention orders, CHINS petition, CHINS admission or the court's judgment from the fact-finding hearing, predispositional and progress reports, dispositional and modification orders, review hearing findings and orders, and parental participation petitions and orders. **See Tipton v.**

Marion County DPW, 629 N.E.2d 1262, 1266 (Ind. Ct. App. 1994) (Court was critical of welfare department's failure to admit CHINS petitions, orders and reports into evidence at termination hearing); **Adams v. Office of Fam. & Children**, 659 N.E.2d 202, 205 (Ind. Ct. App. 1995) (office of family and children admitted CHINS petition, CHINS order, predispositional report, and dispositional order in termination case.) The trial court may be requested to take judicial notice of the court's records in the CHINS case. Ind. Evidence Rule 201, Judicial Notice, was modified at (b) Kinds of Laws, effective January 1, 2010, to add "records of a court of this state." As of January 1, 2014, Evid. R. 201(b) provides:

> (b) Kinds of Laws That May Be Judicially Noticed. A court may judicially notice a law, which includes: (1) The decisional, constitutional, and public statutory law; (2) rules of court; (3) published regulations of governmental agencies; (4) codified ordinances of municipalities; (5) records of a court of this state; and (6) laws of other governmental subdivisions of the United States or any state, territory or other jurisdiction of the United States.

In **In Re D.K.**, 968 N.E.2d 792 (Ind. Ct. App. 2012), the Court discussed how Ind. Evidence Rule 201 applies to termination cases. The Court stated that termination cases are similar to post-conviction relief cases, in that they both must refer to and rely heavily on records in different but related proceedings. Id. at 796. The Court held that if a trial court takes judicial notice of records of another court proceeding in deciding a case, there must be an effort made to include the other court's records in the record of the proceeding currently in front of the trial court. Id. at 796. The Court also determined that if a party to an appeal wishes to use the "other" records in making an argument before the Appellate Court, it must include those parts in an appendix submitted to the Appellate Court, as discussed in Indiana Appellate Rule 50. Id. at 797.

V. Selected Cases on Required Elements

There are many published opinions of the Indiana Supreme and Appellate Courts on involuntary termination of the parent-child relationship cases. Most of these opinions address multiple issues. Following are selected termination cases on the statutorily required elements of the termination petition. The selected cases include Indiana Supreme Court opinions and more recent opinions of the Indiana Court of Appeals. An effort has been made to select cases for discussion that have a variety of opinions on each element. For a more complete case law discussion, see the CHINS Deskbook 2001 and the 2009 Cumulative Supplement, which may be accessed at www.KidsVoiceIN.org, a free, educational website.

Removal from Parent Under Dispositional Decree

IC 31-35-2-4(b)(2)(A) states that the petition must allege that one of the following is true:

(i) The child has been removed from the parent for at least six (6) months under a dispositional decree.

(ii) A court has entered a finding under **IC 31-34-21-5.6** that reasonable efforts for family preservation or reunification are not required, including a description of the court's finding, the date of the finding, and the manner in which the finding was made.

(iii) The child has been removed from the parent and has been under the supervision of a local office [of DCS] or probation department for at least fifteen (15) months of the most recent twenty-two (22) months, beginning with the date the child is removed from the home as a result of the child being alleged to be a child in need of services or a delinquent child.

In **Matter of Robinson**, 538 N.E.2d 1385, 1387 (Ind. 1989), the Court found that the absence of a specific removal order was not error, if the record clearly reflected that the children had been removed from Father's care. The Court stated that the children had been removed from Father's custody for two years, so the use of the exact language was not necessary.

In **Matter of Miedl**, 425 N.E.2d 137, 140 (Ind. 1981), the Court held that the six months removal requirement had been met despite the children's three month trial placement with Mother one month prior to the filing of the termination petition. The children had resided in foster care under welfare department supervision and custody for a period of one year preceding the termination judgment. The Court emphasized that the "temporary, unofficial" placement with Mother, during which she was not given court-ordered custody of the children, did not break the chain of events such that a new six-month period must be completed to fulfill the requirements of the law.

In **In Re N.Q.**, 996 N.E. 2d 385, 395 (Ind. Ct. App. 2013), the Court observed that the timing requirements for filing termination petitions are in place for a reason, namely to ensure that parents have an adequate opportunity to make the corrections necessary to keep their family unit intact.

In **In Re B.F.**, 976 N.E. 2d 65, 67 (Ind. Ct. App. 2012), the Court reversed the termination judgment concluding that the trial court had committed fundamental error in terminating

Parents' rights because the statutory time requirements of removal of the children from Parents' custody for six months had not been met before the termination petition was filed. The termination petition was filed less than four months after the entry of the dispositional decree.

In **In Re Q.M.**, 974 N.E. 2d 1021, 1025 (Ind. Ct. App. 2012), the Court opined that the trial court committed reversible error in granting the termination petition, which had been filed before the dispositional order formally removing the children from Father's custody was issued. The Court reversed the termination judgment.

In **In Re K.E.**, 963 N.E.2d 599, 601-02 (Ind. Ct. App. 2012), the Court reversed the trial court's termination judgment, concluding that the trial court committed reversible error in granting the termination petition because DCS failed to comply with the six month removal under a dispositional decree requirement. DCS had filed the termination petition five months and seventeen days after the child was removed from parents under a dispositional order.

In **In Re D.D.**, 962 N.E.2d 70, 75 (Ind. Ct. App. 2011), the Court opined that DCS had failed to satisfy the six month statutory mandate and the trial court had committed reversible error in granting the termination petition. The three children had been removed from Mother's custody on an emergency basis in November 2006, but the trial court did not enter its dispositional order formally removing the children from Mother's care and custody until April 15, 2010. The termination petitions were filed on April 19, 2010.

In **In Re A.B.**, 924 N.E.2d 666, 672 (Ind. Ct. App. 2010), Father was aware of the CHINS proceeding, but declined to accept service of process, and failed to attend several CHINS hearings, including the dispositional hearing. Father was defaulted on the CHINS adjudication and first appeared at court for the permanency hearing. The Court found that there was sufficient evidence to support the trial court's finding that the child was removed from Father's care for at least six months under a dispositional decree, stating, "we cannot permit Father to avoid the impact of the…default dispositional order, which resulted from Father's willful neglect of the CHINS proceeding."

In **In Re G.H.**, 906 N.E.2d 248, 252 (Ind. Ct. App. 2009), the Court affirmed the trial court's termination judgment. The Court found that DCS succeeded in presenting clear and convincing evidence that the child had been removed from Mother's care for fifteen of the twenty-two months prior to the filing of the termination petition and for six months following the dispositional decree, although proof of only one of these two time periods would suffice. The Court was not persuaded by Mother's argument that the time the child

spent living with her grandmother and Father should not count in calculating the time of removal from Mother.

In **In Re M.M.**, 733 N.E.2d 6, 12 (Ind. Ct. App. 2000), the Court acknowledged the unusual situation in which fourteen-year-old Mother (who was herself a CHINS) had been placed in foster care with her CHINS infant. In that case the court had placed the child and Mother together in several different foster home placements, but in the six months prior to the filing of the termination petition, Mother had not been with the child due to her running away from the foster placement and her multiple placements in detention, residential care, and in the Indiana Girls School. The Court stated that the "removal" requirement of the termination statute applies to a dispositional decree "which authorizes an out-of home" placement. The Court noted that Mother had never provided the child with a home from which the child be removed, and the child had always been under the supervision of foster parents and the office of family and children. The Court noted that the child had resided in court ordered foster care without Mother for more than six months, and the Court ruled that the statutory criteria for six months removal had been met.

Reasonable Probability that Conditions that Resulted in Child's Removal or Reasons for Placement Outside Home of Parents will not be Remedied

IC 31-35-2-4(b)(2)(B) states that the petition must allege that one of the following is true:

(i) There is a reasonable probability that the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied.
(ii) There is a reasonable probability that the continuation of the parent-child relationship poses a threat to the well-being of the child.
(iii) The child has, on two (2) separate occasions, been adjudicated a child in need of services

In **In Re D.W.**, 969 N.E.2d 89 (Ind. Ct. App. 2012), the Court concluded that the trial court properly terminated Father's parental rights to his four children. Father argued that the trial court erred in terminating his parental rights because the court found that the conditions that resulted in the children's removal from his custody would not be remedied, but did not find that the reasons for placement outside the home of the parents would not be remedied. Father claimed that he did not cause the conditions that resulted in the children's removal, arguing that the three oldest children were removed from Mother's custody while Father

was incarcerated, and the youngest child was removed as a result of Mother's use of narcotics during pregnancy. Father asserted that the trial court erred in terminating his rights because he was not at fault for the children's removal from the home. Father argued that the requirements of **IC 31-35-2-4(b)(2)(B)(i)** are disjunctive; a trial court may find that either "[t]here [was] a reasonable probability that the conditions that resulted in the child's removal *or* the reasons for placement outside the home of the parents [would] not be remedied," and that a finding of one is independent of the other (emphasis in opinion). Stating that Father's argument that **IC 31-35-2-4(b)(2)(B)(i)** can be read in the disjunctive was an issue of first impression, the Court relied on case law on statutory interpretation. The Court said that, if a statute is susceptible to multiple interpretations, the Court must try to ascertain the legislature's intent and interpret the statute so as to accomplish that intent. Id. at 94. The Court presumes that the legislature intended the statutory language to be applied in a logical manner consistent with the underlying goals and policy of the statute. Id. at 95. The Court concluded that a finding that one part of the subsection (i) has been fulfilled is equivalent to a finding that subsection (i) as a whole has been fulfilled. Id. The Court said that, in support of this interpretation, **IC 31-35-2-4(b)(2)(B)** states that DCS must show that *one* of the following is true: subsection (i), subsection (ii), or subsection (iii) (emphasis in opinion). Id. The Court noted that, although subsection (i) has two parts, the legislature does not refer to the two parts individually as being sufficient to fulfill **IC 31-35-2-4(b)(2)(B)**, but refers to subsection (i) as a complete entity. Id. The Court opined that, if the legislature had intended the contents of subsection (i) to constitute two separate elements, it would have separated **IC 31-35-2-4(b)(2)(B)** into four separate subsections rather than three. Id.

In **In Re E.M.**, 4 N.E.3d 636, 644-46 (Ind. 2014), the Supreme Court affirmed the trial court's order terminating Father's parental rights to his two children, who had been removed from home for nearly three and one half years due to Father's domestic violence against Mother. The Court opined that the trial court's findings supported its judgment that there was clear and convincing evidence of a reasonable probability that Father would fail to remedy the domestic violence that led to the children's removal. The Court also noted that: (1) Father's violence towards Mother had also "abused" the children, whose older half siblings had developed PTSD as a result of the violence; (2) Father denied all services offered and failed to attend most of the CHINS hearing; (3) Father continued to deny his issues with domestic violence; (4) Father failed to complete any counseling or therapy.

In **S.L.v. Indiana Dept. of Child Services**, 997 N.E. 2d 1114, 1125 (Ind. Ct. App. 2013), the Court concluded that there was clear and convincing evidence to support the trial court's determination that there was a reasonable probability that the conditions resulting in the children's removal or reasons for placement outside the home would not be remedied. Among the evidence noted by the Court in support of the trial court's determination was

Mother's drug use during the proceedings, Mother's ongoing relationship with Father despite her concerns that he had molested their older child and posed a threat to the two children in this case; both parents were incarcerated and had made no progress in services; and Father had a history of repeated incarcerations and was a convicted child molester. Id. at 1124-25.

In **In Re N.Q.**, 996 N.E. 2d 385, 395-96 (Ind. Ct. App. 2013), the Court reversed the termination judgment, finding that it was error for the trial court to issue its order which did not adequately consider the evidence presented by Parents of their current conditions, including their new income, their ability to keep current on their bills, and their ability to maintain a clean residence. The Court said that the termination statue does not simply focus on the initial basis for a child's removal, "but also those bases resulting in the continued placement outside the home." Id. at 392

In **K.T.K v. Indiana Department of Child Services**, 989 N.E. 2d 1225, 1232-34 (Ind. 2013), the Supreme Court determined that the State had met its burden to show that the conditions that resulted in the children's removal or the reasons for placement outside Mother's home would not be remedied. The Court first examined evidence on the conditions which resulted in removal, including Mother's serious substance abuse issues that rendered her incapable of providing the necessary care and supervision that her three children required, as well as Mother's incarcerations and history of criminal behavior. Among the evidence which showed clearly and convincingly that the conditions which led to the children's removal would not be remedied, the Court noted: (1) testimony from the case manager that "history is a good indicator of the future"; (2) testimony from a psychologist evaluator that Mother's previous risky lifestyle predisposed her to returning to that lifestyle if she became stressed; and (3) testimony from a second psychologist evaluator that Mother's likelihood of re-offending was based on her ability to remain clean and sober.

In **B.H. v. Indiana Dept. of Child Services**, 989 N.E. 2d 355, 365-66 (Ind. Ct. App. 2013), the Court affirmed the termination judgment, finding that there was clear and convincing evidence to support the trial court's determination that there was a reasonable probability that the conditions leading to the children's removal and continued placement outside Mother's care would not be remedied. Among the evidence noted by the Court in support of the trial court's determination was that Mother: (1) failed to participate in or benefit from the services offered to her; (2) did not demonstrate an understanding of the children's needs required to parent them properly; (3) viewed the children's needs as secondary to her own and indicated no interest in working or supporting herself financially; (4) had moved twelve times since the children's removal, and paid for only one of those residence; (5) was not likely to benefit from services because of her low cognitive functioning and emotional immaturity.

In **In Re J.C.**, 994 N.E. 2d 278, 291 (Ind. Ct. App. 2013), the Court affirmed the judgment which terminated Mother's parental rights and concluded that the conditions that resulted in the children's removal were not likely to be remedied. The Court cited the trial court's finding that "Mother's series of criminal acts, arrest, incarceration, participation in reunification services, and subsequent relapses, demonstrates that the conditions that resulted in the children's removal or the reasons for placement outside the home will not be remedied." Id. at 289. The Court said that this finding summarized the other more specific findings which were all supported by evidence.

In **A.D.S. v. Indiana Dept. of Child Services**, 987 N.E. 2d 1150, 1157-58 (Ind. Ct. App. 2013), the Court affirmed the termination judgment and was satisfied that clear and convincing evidence supported the trial court's findings and conclusion that there was a reasonable probability that the reasons for the children's placement outside the home would not be remedied. Among the evidence noted by the Court was Mother's long history of cocaine abuse for which she had undergone inpatient treatments twice but had relapsed both times; Mother's domestic violence issues, including convictions for criminal recklessness and domestic violence; and that Mother's past cocaine usage and instability had resulted in the involuntary termination of her rights to two other children and the voluntary relinquishment of her rights to a third child.

In **In Re Ma.J.**, 972 N.E. 2d 394, 403-04 (Ind. Ct. App. 2012), the Court reversed the termination judgment and determined that DCS failed to meet its statutory burden of proving that the conditions resulting in the children's removal or the reasons for placement outside of Mother's home would not be remedied. The Court opined that although a parent's habitual patterns are relevant, termination cannot be based solely on conditions that existed in the past, but no longer exist. The Court said that, by the time the termination hearing concluded, Mother had undisputedly made significant progress in each area of concern. The Court noted evidence that Mother was in compliance with the rigorous terms of the drug court program, was progressing in treatment, had provided thirty random drug screens, all of which were negative for illicit and prescription drugs, and there had been no incidents of violence since the children's removal.

In **In Re D.K.**, 968 N.E.2d 792, 798-99 (Ind. Ct. App. 2012), the Court affirmed the termination judgment and opined that the trial court's finding that there was a reasonable probability that the conditions leading to the child's removal would not be remedied was not clearly erroneous. The Court noted that the child's initial removal from Mother's care was neglect due to the child being left with an inappropriate caregiver without appropriate food and clothing when Mother was on the verge of eviction. The Court noted the following evidence in support of the finding: (1) Mother never completed any of the CHINS dispositional order requirements; (2) Mother never completed a parenting class, despite

being given multiple opportunities to do so; (3) Mother failed to maintain a stable residence, living in eight places during the two years of the CHINS proceeding; (4) Mother squandered her opportunity to reunite with the child while living at the group home by violating the home rules related to alcohol possession and having boyfriends spend the night; (5) Mother demonstrated a lack of interest in the child by declining assistance in arranging to live with him while she was residing in Louisville.

In **In Re. I.A.**, 934 N.E.2d 1127, 1134-35 (Ind. Ct. App. 2010), the Court reversed the trial court's judgment which had terminated Father's parental rights. The child, along with his six siblings, had been removed from Mother's sole custody and care due to lack of supervision. The Court opined that the conditions which resulted in the child's removal, namely lack of supervision, cannot be attributed to Father. The Court said that, in order to determine whether the conditions which led to placement of the child outside the home of Father were not likely to be remedied, the trial court must: (1) determine what conditions led to DCS placing and then retaining the child in foster care rather than placing him with Father; and (2) then determine whether there was a reasonable probability that those conditions will not be remedied. The Court found nothing in the termination order or the record indicating the conditions that led DCS to place and continue the child in foster care rather than place him with Father so the Court concluded that DCS failed to demonstrate by clear and convincing evidence that there was a reasonable probability that the reasons for placement outside the home of the parents will not be remedied.

In **In Re M.W.**, 942 N.E.2d 154, 160-61 (Ind. Ct. App. 2011), the Court reversed the trial court's order which terminated Mother's parental rights. The Court observed that DCS had purportedly given Mother a second chance with an amended dispositional/parental participation plan and, due to circumstances beyond her control, i.e., suffering a severe stroke; Mother had been unable to take advantage of that second chance. The Court noted that: (1) Mother had made some progress in stabilizing her life by moving into a shelter and receiving Social Security disability payments; and (2) Mother's ability to establish a stable and appropriate life and properly parent the child can be observed and determined within a relatively short period of time. The Court concluded that DCS failed to carry its burden of establishing, by clear and convincing evidence, a reasonable probability that conditions resulting in the child's removal from Mother would not be remedied.

In **In Re A.B.**, 924 N.E.2d 666, 671 (Ind. Ct. App. 2010), the Court found there was sufficient evidence to support the trial court's termination judgment, and affirmed the judgment. The Court stated that the sole condition that led to the child's removal was Mother's use of cocaine shortly before the child's birth, resulting in the child's positive cocaine test. The Court could not say that the trial court's finding that the conditions that led to the child's removal would not be remedied, noting that: (1) Mother was twice

referred to participate in a drug and alcohol abuse assessment, but she failed to follow through both times; (2) Mother twice began submitting to random drug screens but both times she quit participating in them shortly thereafter; (3) there was some indirect evidence that Mother did in fact test positive for cocaine usage after the child was born, when Mother attempted to give an implausible explanation for why there was cocaine in her system.

In **In Re I.A.**, 903 N.E.2d 146, 154-56 (Ind. Ct. App. 2009), the Court affirmed the trial court's order terminating Mother's parent-child relationship with her youngest child. The Court concluded that there was sufficient evidence to support the trial court's determination that there was a reasonable probability that the reasons for the child's placement outside Mother's home would not be remedied. The Court noted: (1) Mother had not availed herself of the training needed to provide for the child's special medical needs; (2) Mother had made no real effort to lean about the child's medical conditions or needs and was unsure of the child's diagnoses at birth; (3) Mother refused when doctors asked her to give a blood sample to help diagnosis of the child; (4) Mother was unaware of the names of the child's doctors, the child's medicines, or his therapies; (5) Mother blamed the child's foster parents for her ignorance; (6) Mother had been indifferent to the child's needs; and (7) Mother abused drugs throughout the entire pregnancy.

In **C.T. v. Marion Cty. Dept. of Child Services,** 896 N.E.2d 571, 582-85 (Ind. Ct. App. 2008), the Court concluded that clear and convincing evidence supported the trial court's findings and ultimate determination that there was a reasonable probability the conditions resulting in the child's removal and continued placement outside Mother's and Father's care would not be remedied. Regarding Mother's claim that MCDCS had not met its burden of proof, the Court noted that, (1) contrary to Mother's contention, the caseworker testified that she had referred Mother to participate in a drug and alcohol assessment, but Mother had not participated; (2) each of Mother's claims of changed conditions were either based on Mother's self-serving testimony or contradicted by other evidence including her own testimony; and (3) Mother's own witness, Mother's support group leader from Gallahue Community Mental Health, testified that Mother continued to have "limited insight" into her mental illness despite her regular participation in the support group, the witness was not "therapeutically treating" Mother's mental health issues, the support group did not address Mother's "symptomology," Mother had not taken responsibility for what happened with her children but instead insisted she did not know why MCDCS removed the children, the witness was concerned with the way Mother had been using sleep as a coping skill, the witness felt Mother was "at risk of relapse, using drugs[,]" and the witness had recommended Mother participate in a substance abuse program on several occasions, but Mother had failed to do so. The Court held that, although it acknowledged and applauded Mother's efforts to change her life since she was released from prison, the trial court was within its discretion to judge her credibility and to weigh her testimony of changed

conditions against the significant evidence demonstrating (1) her habitual pattern of conduct in failing to address her parenting and mental health deficiencies, (2) her long-standing addiction to illegal drugs, and (3) her past and present inability to provide a safe, stable, and nurturing home environment for the child. The Court observed that Father (1) was incarcerated and therefore unavailable to parent the child when the child was initially removed from Mother's care in December 2006; (2) had a significant criminal history including twenty-one convictions, which resulted in his being unavailable throughout the majority of the CHINS proceedings because of being in and out of prison; (3) failed in two prior CHINS proceedings to avail himself of court-ordered reunification services, and his failure to do so ultimately resulted in the termination of his parental rights to the child's siblings; (4) had, by the time of the termination hearing here, failed to complete any of the dispositional goals specified in the pre-dispositional report and was once again incarcerated; and (5) consequently remained unavailable to parent the child.

In **Moore v. Jasper County Dept.,** 894 N.E.2d 218, 228-29 (Ind. Ct. App. 2008), the Court found that DCS had failed to carry its burden of establishing, by clear and convincing evidence, that there was a reasonable probability the conditions leading to the twins' removal from Mother's care would not be remedied or that continuation of the parent-child relationship posed a threat to the twins' well-being. The Court gave three reasons for its holding: (1) the majority of the trial court's findings indicated its decision to terminate Mother's parental rights was improperly based on her parental inadequacies as they existed at the time of the twins' removal, as opposed to Mother's abilities and circumstances as they existed at the time of the termination hearing, as is required by the termination statutes; (2) by all accounts, including the trial court's own termination order, Mother had made significant strides in accomplishing the majority of the dispositional goals put in place by DCS; and (3) the Guardian ad Litem strongly objected to the termination of Mother's parental rights. In this regard, the Court noted: (1) the trial court's termination order acknowledged, and the evidence indicated, that by the time of the termination hearing, Mother was married, was enrolled in school to become a licensed practical nurse, had obtained her driver's license, had regained custody of two of her older children, had re-enrolled in counseling, and was living in a four-bedroom home that was reported to be "clean and very appropriate;" (2) Mother's husband was gainfully employed as a welder making about $50,000 annually and was willing to continue to financially support Mother and her children while Mother attended school; (3) the twins would be eligible for health coverage through the husband's employer were Mother to regain custody, and; (4) the Guardian ad Litem testified that this was a "unique case," that he believed Mother was a "changed person," that Mother's marriage had provided her with "an opportunity of stability … that [Mother had] never been afforded previously[,]" and that termination of Mother's parental rights would be "detrimental" to the twins' well-being.

In **In Re A.P.**, 882 N.E.2d 799, 807-08 (Ind. Ct. App. 2008), the Court affirmed the trial court's determination that the conditions that resulted in the child's removal would not be remedied. The Court observed that the CHINS petition explained with regard to Father that his whereabouts were unknown and that he had not come forward and demonstrated the ability or willingness to appropriately parent the child and that conditions at the time of the hearing showed that he was unable or unwilling to appropriately parent the child just as when the CHINS removal had originally occurred. The Court noted that between the time of the filing of the CHINS petition and the termination hearing: (1) Father completed some services, but failed to complete others such as an outpatient program for his alcohol use; (2) Father visited the child only three times; (3) Father failed to keep his case manager updated about his address; (4) Father left the country nine months after the child's removal and had not demonstrated his willingness or ability to parent his daughter before that point; (5) there was no evidence that Father planned to return to the U.S.; (6) if Father did return, he might face jail time for pending battery charges; and (7) Father offered no plan for the child's care should his parental rights not be terminated.

In **A.J. v. Marion County Office of Family**, 881 N.E.2d 706, 715-16 (Ind. Ct. App. 2008), the Court affirmed the trial court's termination judgment. The Court observed that the following evidence supported the determination that the reasons for removal and continued placement outside Mother's care would not be remedied: (1) Mother had about thirteen months after she learned of the children's removal from Grandmother to complete services; (2) during this time, Mother tested positive for THC during her drug and alcohol assessment and was discharged from her first attempt at Intensive Outpatient Program (IOP) for lack of participation in June 2006, but did not re-initiate services until November 2006; and (3) the children were originally removed from Mother in 2003 because she had failed to provide them with a stable, drug-free living environment, and at the time of the final hearing in April 2007, notwithstanding her recent progress in combating her drug addiction, Mother still had to complete seven weeks with the IOP aftercare program, as well as complete home-based counseling which could not begin unless or until Mother successfully completed the IOP. Further, the Court was unconvinced by Father's argument that he should not be held responsible for the removal of his child from Mother's custody and care because he did not have custody of the child. The Court noted that Father had admitted that his child was removed from him because he had not successfully demonstrated to DCS the ability or willingness to appropriately parent her and because he had not established paternity of her, and the evidence most favorable to the judgment revealed: (1) although Father admitted paternity of the child, he failed to legally establish paternity; (2) at the time of the termination hearing, Father had failed to maintain regular contact with DCS caseworkers, participate in any parenting classes, and pay any of the court-ordered support for the child; (3) Father failed to participate in any of the court-ordered drug treatment services, including an IOP drug treatment program, drug counseling, and random drug screens; and (4) during

his drug assessment, Father admitted to having used marijuana for about seventeen years and that he had previously participated in drug treatment programs during which he had stayed clean for about six months and then started using marijuana again.

In **In Re R.J.**, 829 N.E.2d 1032, 1039 (Ind. Ct. App. 2005), the Court opined that the trial court's conclusions that the conditions resulting in the child's placement outside the home will not be remedied were clearly erroneous. The Court said that there was not clear and convincing evidence to support the trial court's findings that Father failed to provide safe and adequate housing or that he failed to provide a safe plan for the child's care while at work. The Court was not persuaded by OFC's assertion that had Father been serious about parenting the child, the case would not have lasted four years. Id. at 1038. The Court noted that Father had established paternity, obtained steady employment, completed parenting classes, substance abuse counseling, and psychological counseling, and maintained regular visitation with the child, and there was no indication of Father's unwillingness to cooperate with OFC or failure to promptly complete any of the OFC's programs. Id.

Reasonable Probability that Continuation of the Parent-Child Relationship Poses Threat to Well-Being of Child

In **Bester v. Lake County Office of Family**, 839 N.E.2d 143, 150-53 (Ind. 2005), the Court found that there was nothing in the record that showed that Father was currently involved in a gang, and Father proved that he had not used any illegal drugs since the birth of his son. Since before the termination hearing, Father had been employed full-time, and all of Father's random drug tests were negative for drugs and alcohol. For at least three years, Father conducted himself in a manner consistent with assuring that his son would be exposed to a healthy drug free environment. Father also visited his child on a regular basis and the evidence showed that Father's and child's relationship was loving, caring and happy. The Court also found that refusal by the Illinois authorities to approve placement of the child with Father in Illinois was not relevant to the question of whether continuation of the parent-child relationship posed a threat to the child's well being. The Court concluded that Father's past criminal history did not demonstrate that the continuation of the parent-child relationship between Father and child posed a threat to the child's well being. The Court stated that the OFC had not demonstrated by clear and convincing evidence that because of Father's past criminal history, the child's emotional and physical development were threatened by Father's custody.

In **In Re D.B.**, 942 N.E.2d 867, 874 (Ind. Ct. App. 2011), the Court opined that the juvenile court's conclusion that continuation of the parent-child relationship posed a threat to the

child's well-being was not supported by the evidence. The Court noted the following testimony by the case manager: (1) Father had a "cooperative" attitude and "hadn't done anything to…harm [the child], in the sense of …physical, mental abuse, emotional abuse…"; (2) she thought that Father could properly parent the child; (3) she did not believe Father's relationship with the child posed a threat to the child or her well-being; (4) her recommendation for termination was based solely on Father's lack of a consistent source of income and housing and that he has not been consistent with services. The therapist described Father as nice, patient, kind, open to learning and being told things, and never negative or aggressive.

In **In Re I.A.**, 934 N.E.2d 1127, 1336 (Ind. Ct. App. 2010), the Court concluded that DCS failed to prove by clear and convincing evidence that there is a reasonable probability that by continuing the parent-child relationship, the emotional or physical well-being of the child is thereby threatened. The trial court had determined that continuation of the relationship posed a threat to the child's well-being because Father had "not bonded" with the child. Id. at 1135. The Court was not convinced that all reasonable efforts had been employed in this case to unite Father and the child, noting: (1) a case plan for reunification was never developed for Father indicating what was expected of him; (2) other than a parent aide, no services were provided to assist Father in developing effective parenting skills; (3) nothing in the record demonstrated that the exercise of visitation twice a week for an hour and a half over a six month period with a two-year-old child was sufficient time under the circumstances to establish a bond; (4) Father never cancelled or missed a single visit; (5) the DCS case manager did not explain why continuing the parent-child relationship between Father and the child posed a threat to the child's well-being. Id. at 1135-36.

In **In Re A.K.**, 924 N.E.2d 212 (Ind. Ct. App. 2010), the Court stated that sufficient evidence supported the conclusion that continuation of the parent-child relationship between the child and Mother posed a threat to the child's well-being. Id. at 221. The Court noted the following evidence in support of this conclusion: (1) Mother is unable to remain drug free, manage her mental illness, and maintain stable housing; (2) Mother's lack of communication with DCS and inability to meet the case plan requirements which would have allowed her visitation with the child demonstrated Mother's lack of interest in maintaining a relationship with the child. Id. The Court also stated that DCS presented clear and convincing evidence that continuation of the parent-child relationship between the child and Father posed a threat to the child's well-being. Id. at 224. The Court noted the following evidence, inter alia, which supported the trial court's threat to well-being conclusion: (1) The DCS caseworker testified that Father did not complete a domestic violence class or an additional parenting class as ordered by the court; (2) both the Court Appointed Special Advocate and family consultant stated that the child had indicated she was afraid of Father; (3) the child's behavior problems escalate after visitation with Father,

the child acts aggressively, has nightmares, does not sleep well, and urinates in odd places; (5) the therapist testified that if reunification efforts continued between Father and child, it would be a "major interruption" in the child's cognitive and emotional progress; (6) the child's developmental delays and poor hygiene on the date she was taken into DCS custody suggest that Father did not know how to properly care for her and Father still had not demonstrated that he had the knowledge to properly care for the child. Id. at 223-24.

In **In Re H.T.**, 901 N.E.2d 1118, 1120-22 (Ind. Ct. App. 2009), the Court found that, inasmuch as there was no need for the extreme measure of permanently terminating Father's right to be a parent to his daughter, the trial court clearly erred in concluding that the State had proven that the child's well-being was threatened by her Father's involvement in her life. The Court held that the trial court erred in concluding that Father's efforts were "too late." On August 29, 2003, about four months before the child's birth, Father was incarcerated after violating the terms of his probation. Prior to his incarceration, Father had been in a relationship with the child's mother, and he had attended birthing classes with her. While Father was incarcerated, Mother began a relationship with another man and they had a child, born October 15, 2005. Father called from prison roughly once a week and spoke with his child. While he was in prison, (1) Father learned he could obtain an early release if he participated in certain programs; (2) he participated in these programs with the intention of being released and fathering his daughter; (3) he earned a BA from Ball State University and the attendant three-year deduction in his sentence; and (4) he completed a substance abuse program and parenting classes. The Court noted: (1) the child was not in a temporary arrangement pending termination and continuation of the CHINS wardship would have no negative impact; (2) the primary concern expressed by DCS and the Guardian ad Litem that the child will not have a relationship with her step-sister, appeared to be unfounded due to Father's testimony that the child could see her sister as much as she wanted; (3) as to the concern of DCS, the Guardian Ad Litem, and the trial court that the child had not had a face-to-face meeting with Father, there had been contact with Father before removal, and the lack of post-removal contact while Father was incarcerated was due to the inaction of others; (4) the trial court had found that Father was willing and able to complete any services and become the child's custodial parent. Id. at 1122.

In **In Re Term. of Parent-Child Relat. of A.B.**, 888 N.E.2d 231, 239 (Ind. Ct. App. 2008), the Court opined that the trial court's determination that continuation of the parent-child relationships between Mother, Father, and the child posed a threat to the child's well-being was not supported by clear and convincing evidence. The Court noted that the record showed: (1) following the child's removal from their care [due to medical neglect], Parents immediately complied with all court orders; (2) the caseworker testified that Parents had regular visitations with the child, there had been no problems, and, before relocating to Pennsylvania, Parents completed parenting classes, participated with counseling, and did

basically whatever the trial court had asked of them; (3) all drug screens for Parents were negative; and (4) when the environment at the paternal grandparents' home became too chaotic and dangerous for the children, the parents moved to Pennsylvania where they had requested and obtained employment transfers and where arrangements had been made for the family to rent a four-bedroom home owned by Mother's uncle. At the time of the termination hearing, according to the Court, Parents were continuing to improve their economic and residential circumstances while living in Pennsylvania: (1) Father who had an Associate Degree, was employed at Arby's and was being considered for promotion into a management position; (2) Mother had recently changed jobs in order to earn a higher salary; (3) Mother had received a certificate from the children's school thanking her for volunteering 123.75 hours in the classroom; (4) the child's older siblings, who were living with Parents, were enrolled in and succeeding academically at school and participated in the Head Start program, had medical coverage through Medicaid, and voluntarily attended summer school classes; (5) Mother's uncle had recently agreed to sell Parents the house they were renting from him; and (6) the paternal grandfather, who was retired, had divorced the paternal grandmother, was residing in the Pennsylvania family home, and was helping to care for the children when Parents were at work. Id. at 238. The Court observed that, at the time of the termination hearing, (1) the family was living in a four-bedroom home in Pennsylvania that had passed city inspection; (2) the child's surgery had been postponed indefinitely until the child was older; (3) the "Child Care Abuse History" background checks performed by Pennsylvania indicated a "clean background" for Parents; (4) Parents testified that they would make sure the child received all the medical care she needed, including any surgery she might need in the future, and that the child's medical expenses would be covered by Medicaid until she turned eighteen years old; and (5) when questioned whether he "believed that [the child] would be in some form of danger, if she were to live with her biological mother and father[,]", the Guardian ad Litem responded, "No." Id. at 238-39.

In **In Re A.B.**, 887 N.E.2d 158, 167 (Ind. Ct. App. 2008), the Court opined that the trial court's finding that continuation of the parent-child relationship posed a threat to the child's well-being was supported by clear and convincing evidence. The child had been hospitalized at the age of six years by Mother because of the child's out-of-control and aggressive behavior. The Courted noted: (1) the psychologist's testimony as to how Mother struggled to meet her own personal and emotional needs; (2) specific examples of the child's repeatedly experiencing significant regression after spending unsupervised time at home with Mother; (3) testimony of the treatment facility's therapist as to Mother's difficulty managing her emotions so as not to affect the child; and (4) testimony of the Guardian ad Litem that there had been tension between Mother and the child not just based on the child's negative behavior and that she felt the child "would continue to struggle greatly if she [were] returned to" Mother's care. Id. at 165-67. The Court also opined that

termination is proper where the child's emotional and physical development is threatened, and the trial court need not wait until the child is irreversibly harmed. Id. at 167.

In **In Re S.L.H.S.**, 885 N.E.2d 603, 616-17 (Ind. Ct. App. 2008), the Court affirmed the trial court's termination of Father's parental rights and held that the evidence supported the trial court's finding that Father's history with his other children indicated a threat to the well-being of the child in this case. In doing so the Court noted that (1) Father had a history of substantiated sexual abuse with his former step-daughter; (2) his niece testified that he had repeatedly molested her as a child; (3) the case manager testified regarding a substantiated case of medical neglect involving two of Father's children living in Florida; and (4) other evidence revealed that Father had serious psychological issues which, if left untreated, could interfere with his ability to provide a safe home environment for the child, including the testimony of a clinical psychologist who performed two psychological evaluations of Father as well as the case manager's testimony that he felt reunification posed a continuing threat to the child's safety and well being because of Father's "unaddressed sexual molestation issues and those unaddressed psychological issues" and, at the time of the termination hearing, Father had not been involved in counseling other than one or two sessions.

Termination is in the Child's Best Interest

IC 31-35-2-4(b)(C) requires that the termination petition state: (C) termination is in the best interests of the child.

In **In Re E.M.**, 4 N.E.3d 636, 649 (Ind. 2014), the Supreme Court affirmed the trial court's order terminating Father's parental rights to his two children. The Court opined that children cannot wait indefinitely for their parents to work toward preservation and reunification. The Court quoted **K.T.K. v. Indiana Dept. of Child Services**, 989 N.E.2d 1225, 1236 (Ind. 2013), which states that trial courts "need not wait until the child is irreversibly harmed such that the child's physical, mental, and social development is permanently impaired before terminating the parent-child relationship." **E.M.** at 648. The Court noted that the following evidence supported the trial court's determination that termination was in the children's best interests: (1) the children had waited nearly three and one half years to have a permanent home; (2) Father had not bonded with the children: (3) Father was still in no position to provide a home for the children: (4) Father's failure to make progress on his domestic violence issues did not bode well for his ability to do so in any reasonable amount of additional time.

In **K.T.K. v. Indiana Dept. of Child Services**, 989 N.E. 2d 1225, 1236 (Ind. 2013), the Supreme Court affirmed the judgment terminating Mother's rights to her three children and did not find error in the trial court's conclusion that termination was in the children's best interests. Among the evidence in support of the conclusion that termination was in the children's best interests, the Court noted: (1) the children had been placed in five different living environments over a period of sixteen months and had been separated at times; (2) a psychologist evaluator testified that the children's best interests would be served by allowing them to remain in the care of their foster parents; (3) the Guardian ad Litem testified that termination was in the children's best interests due to concerns over the length of time that it had taken for Mother to commit to a path of recovery from drug use; (4) the family case manager recommended termination because the children needed a drug free environment and permanency which would be satisfied by adoption by their foster parents.

In **In Re C.G.**, 954 N.E.2d 910, 925 (Ind. 2011), the Supreme Court found that the evidence supported the trial court's findings that termination was in Child's best interests. The Court stated that there was sufficient evidence to support the findings that: (1) a diligent inquiry to find and serve Mother was made to no avail; (2) to the best of Mother's knowledge she would be serving ten years of incarceration; (3) Child's therapeutic needs are being served; and (4) Child is bonded to her foster family and the goal is for Child to be granted a permanent home in a loving and stable environment. Id. at 924-95.

In **In Re G.Y.**, 904 N.E.2d 1257, 1258 (Ind. 2009), the Court reversed the termination judgment and held that the State did not present clear and convincing evidence to demonstrate that Mother's parental rights should be terminated. The Court reached this result after examining four reasons the trial court gave for concluding that termination of Mother's parental rights was in the child's best interests: (A) Mother will remain unavailable to parent because her pattern of criminal activity makes it likely that she will reoffend upon release; (B) to provide Mother additional time to be released from jail and try to remedy conditions would only necessitate the child being put on a shelf instead of providing paramount permanency; (C) the child has a closer relationship with his foster parents than he does with his mother; and (D) the child's general need for permanency and stability. Id. at 1262. The Court found that none of these reasons sufficiently strong reason, either alone or in conjunction with the trial court's other reasons, to warrant a conclusion by clear and convincing evidence that termination of Mother's parental rights was in the child's best interests. Id. at 1265-66. The Court, noted among other things, that (1) all of Mother's criminal history consisted of offenses committed before the child's conception in 2003, and for the first 20 months of his life, the record gives no indication Mother was anything but a fit parent; (2) after her incarceration, Mother agreed her son was a CHINS; (3) the trial court ordered her to participate in treatment services and, despite the physical impossibility of completing some of the requirements, the record shows Mother took positive steps and

made a good-faith effort to better herself as a person and parent; (4) at the time of the termination hearing, Mother had completed an eight-week drug rehabilitation program and was on a waiting list for phase II of the program; (5) Mother testified that participants in the drug rehabilitation program had their own individual counselors as well as attended large group classes and that even though she had a history of drug use, she had not used cocaine since 2003; (5) Mother also completed a 15-week parenting class and actively participated in "an inmate to work mate program through Arrowmarks" which results in an apprenticeship certification and job placement after release from prison; (6) Mother was also in the midst of her second semester working towards an associate's degree, which when completed in May 2008 would result in her release date being moved up to May or June 2009; and (7) Mother had started a culinary arts certification program. Id. at 1262-64.

In **In Re J.C.**, 994 N.E. 2d 278, 286 (Ind. Ct. App. 2013), the Court affirmed the termination judgment and said that the trial court's conclusion that termination was in the children's best interest was supported by its findings. Among the findings noted by the Court were: (1) Mother's drug use and criminal activity had resulted in the children's removal more that once; (2) Mother was incarcerated at the time of termination hearing with a release date in the early part of the next year; (3) Mother faced revocation of her probation for an earlier charge based on drug-related criminal activity.

In **A.D.S. v. Indiana Dept of Child Services**, 987 N.E. 2d 1150, 1159 (Ind. Ct. App. 2013), the Court concluded that the totality of the evidence supported the trial court's determination that termination of Mother's parental rights was in the children's best interests. The Court noted that the family case manager and the Guardian ad Litem supported termination of Mother's rights and adoption by the children's current caregivers, Mother's issues with substance abuse and domestic violence had not been remedied and posed a risk to the children's safety if they were returned to her care, and permanency is a central consideration in determining the best interests of a child.

In **In Re A.P.**, 981 N.E. 2d 75, 83-84 (Ind. Ct. App. 2012), the Court could not conclude that the trial court had erred in determining that termination of Mother's parental rights was in the children's best interests. The Court noted the findings that termination was in the children's best interests due to Mother's continued drug use over a period of four years, beginning with the prior CHINS proceeding, Mother's failure to complete drug treatment and her lack of progress with home-based counseling, and her failure to pay court ordered child support to grandparents, who were caring for the children. The Court also could not say that the trial court erred in giving credence to the Guardian ad Litem's and family case manager's professional opinions that termination of Father's parental rights was in the children's best interests.

In **H.G. v. Indiana Dept. of Child Services**, 959 N.E.2d 272, 289 (Ind. Ct. App. 2011), the Court stated that the evidence did not support the trial court's conclusion that termination is in the children's best interest. The Court noted that Mother and Father of one of the children were incarcerated but had been cooperative and involved in the children's cases, had taken advantage of opportunities for improvement while in prison, had made every effort to obtain an early release, had a bond with the children, and their abilities to parent can be quickly assessed upon release. Id. at 291-92. The Court also noted that neither DCS nor the trial court took into account the obstacles which the Father of the other two children faced in finding a full-time job such as health problems, lack of reliable transportation, and a sluggish economy. Id. at 292. The Father of the other two children was employed full-time at the time of the termination hearing, and the Court observed that he now had better prospects for finding appropriate housing. Id.

In **In Re H.L.**, 915 N.E.2d 145, 150 (Ind. Ct. App. 2009), the Court opined that DCS presented clear and convincing evidence from which the juvenile court could conclude that termination of Father's parental rights was in the best interests of the child. The Court noted the following: (1) Father, who was incarcerated, had not asserted that he would be able to provide a home for the child at any time within the next several years; (2) there was no evidence that Father was taking steps to further his education, acquire job skills, or secure employment after his release; (3) there was no indication that Father had family members able or willing to assist him by providing care for the child. The Court also observed that there was no evidence that Father had requested assistance with understanding or meeting the child's extraordinary medical needs, which were due to her diagnosis of cystic fibrosis.

In **In Re A.D.W.**, 907 N.E.2d 533, 540 (Ind. Ct. App. 2008), the Court opined that the evidence was sufficient to support the trial court's finding that termination of parental rights was in the children's best interest. The Court noted that: (1) the trial court concluded that termination was in the children's best interest because "[t]he child[ren] need [ ] stability, permanency, and a safe environment, none of which can be provided by the mother;" (2) the DCS family case manager testified that both children were comfortable and relaxed living with their aunt and uncle and that she believed that termination of Mother's parental rights was in the best interest of the children in that the children's grades had improved since being placed with their aunt and uncle and the children had stability for the first time in their lives; and (3) the children's therapist testified that she believed it would be harmful to the children to continue the parent-child relationship and that the children had been doing better since having more stability in their lives and they would continue to improve with stability. The Court concluded that the recommendations by the DCS case manager and the children's therapist, coupled with the evidence of Mother's extensive drug use, her failure to complete court-ordered services, and testimony that the children were thriving in their current home

was sufficient to support a finding that termination of parental rights was in the children's best interest.

In **In Re J.S.**, 906 N.E.2d 226, 237 (Ind. Ct. App. 2009), the Court concluded that there was sufficient evidence to support the trial court's findings and ultimate determination that termination was in the child's best interests. The Court noted: (1) the severity of the child's initial injuries [multiple fractures, including fractures to the 6th and 7th ribs, the left tibia, and a hairline skull fracture]; (2) parents' failure to offer an explanation as to how the child sustained these injuries; (3) both parents' failure to complete or to benefit from the many services available to them; and (4) the testimony of the family case manager and the Court Appointed Special Advocate recommending termination of parental rights.

In **In Re I.A.**, 903 N.E.2d 146, 155-56 (Ind. Ct. App. 2009), the Court concluded that the evidence was sufficient to support the trial court's determination that termination of Mother's parental rights was in the best interests of Mother's youngest child. The trial court had not terminated Mother's parental rights to four of her older children. The Court distinguished the youngest child's circumstances, noting that he had numerous medical problems and had never been in Mother's care. Citing **In Re M.M.**, 733 N.E.2d 6, 13 (Ind. Ct. App. 2000), and **In Re A.I.**, 825 N.E.2d 798, 811 (Ind. Ct. App. 2005), the Court noted it had previously held that the recommendation of the case manager and child advocate to terminate parental rights, in addition to evidence that the conditions resulting in removal will not be remedied, is sufficient to show by clear and convincing evidence that termination is in the child's best interests. **In Re I.A.** at 155. The Court observed that, at the time of the termination hearing, (1) the child was approximately four months shy of his second birthday and had never been in Mother's care or with his siblings on a day-to-day basis; (2) the child had formed a strong bond with foster parents who were responsible for taking him to his doctor and therapy appointments; (3) both the DCS family case manager and the Guardian ad Litem testified that termination was in the child's best interests. Id. at 156.

In **In Re M.S.,** 898 N.E.2d 307, 308, 311-314 (Ind. Ct. App. 2008), the Court reversed and remanded the trial court's order terminating Mother's parent-child relationship with her oldest child because there was insufficient evidence that termination was in the child's best interests. The Court concluded that termination of Mother's parental rights at this time is, at best premature, in that everyone agreed that, for now, the child should continue to reside in a facility so that he can receive full-time medical and behavioral care, and no one can predict when, or even whether, the child will become stabilized, or what will be best for him when and if he does become stabilized. The Court opined that, to say that Mother's parental rights must be terminated merely because her child has special needs and she needs help to manage his behavior would send a sobering message to all of the parents in Indiana with children who need ongoing medical or psychological assistance - in effect saying that if you

have a child that is difficult and you do seek help for that child, your reward is the child is removed, never to return. Id. at 314.

In **C.T. v. Marion Cty. Dept. of Child Services**, 896 N.E.2d 571, 586 (Ind. Ct. App. 2008), the Court could not conclude that the trial court erred in its determination that termination of both Mother's and Father's parental rights was in the child's best interests. The Court opined that: (1) in determining what is in the best interests of the child, the trial court is required to look beyond the factors identified by MCDCS and to look to the totality of the evidence; (2) in doing so, the trial court must subordinate the interests of the parent to those of the children; and (3) previously, the Court has determined that the recommendations of the caseworker and Court Appointed Special Advocate that parental rights be terminated support a finding that termination was in the child's best interest. Id. at 585-86. The Court noted: (1) the caseworker's testimony that termination was in the child's best interest, the child was placed with his two siblings in a pre-adoptive foster home where he was bonded and doing well; (2) the Court Appointed Special Advocate's testimony that the child's foster mother was very attentive to the child and that his needs were being met; and (3) the Court Appointed Special Advocate was in agreement with the MCDCS's permanency plan that the child be adopted by his current foster parents. Id. at 586. The Court based its opinion on the totality of the evidence, including: (1) Mother's failure to remedy the conditions resulting in the child's removal; (2) Father's chronic and current incarceration; and (3) both parents' prior history with MCDCS, coupled with the caseworker's and Court Appointed Special Advocate's recommendations for termination and adoption. Id.

In **In Re L.B.**, 889 N.E.2d 326, 340-41 (Ind. Ct. App. 2008), the Court opined that the evidence was sufficient to support the juvenile court's determination that termination of Father's parental rights is in the children's best interests. This evidence included testimony of the Guardian ad Litem and the case manager, evidence of Father's current drug use, Father's failure to complete court-ordered services, and the fact that the children were happy and bonded with the foster parents, and doing well in the pre-adoptive foster homes. Id. at 340. In this regard, (1) the Guardian ad Litem testified that she believed it was in the children's best interests to proceed with termination given the time that had elapsed and lack of participation in services by the parents, and that she had visited with all the children in their current placements and agreed with MCDCS's permanency plan for the children to be adopted by their current foster parents; and (2) the current case manager testified that termination was in the children's best interests, that the children were doing very well in their placements and were bonded, and that he could not recommend returning the children to Father because of his lack of participation in services and continued drug use. Id.

In **In Re Term. of Parent-Child Relat. of A.B.**, 888 N.E.2d 231, 232 (Ind. Ct. App. 2008), the Court reversed the trial court's judgment terminating Mother's and Father's parental

rights, concluding that the judgment was clearly erroneous. The Court said that, although the Guardian ad Litem and the DCS caseworker both recommended termination of parental rights because they believed it was in the child's best interests to be adopted by her foster mother, this alone may not serve as a basis for termination of parental rights. Id. at 239. Citing **In Re Miedl**, 425 N.E.2d 137, 141 (Ind. 1981), the Court opined that a parent's rights to his or her children may not be terminated solely because a better place to live exits elsewhere. **A.B.** at 239.

In **Rowlett v. Vanderburgh County OFC**, 841 N.E.2d 615, 622 (Ind. Ct. App. 2006), the Court concluded that the record did not support a finding that termination at this point in time was in the best interests of the children. The Court noted that Father had maintained a relationship with his children while incarcerated: (1) Father sent the children letters; (2) the children sent him pictures they had drawn; and (3) he telephoned them and the children were happy to talk to him, telling him that they loved him and asking when he was coming home. To OFC's argument that termination of Father's rights was in the best interests of the children because only then could they be adopted by the maternal grandmother and step-grandfather and be given a permanent home, the Court responded that, despite the importance of a stable environment in the matter of raising children, this in and of itself was not a valid basis for terminating the relationship between the natural parent and the children. Id. at 623. The Court held that under the circumstances where the children had been in the maternal grandmother's care for nearly three years and where the plans were that, upon termination of Father's rights, they would continue under her care, there was little harm in extending the CHINS wardship until such time as Father had a chance to prove himself a fit parent for the children. Id.

There is a Satisfactory Plan for the Care and Treatment of the Child

IC 31-35-2-4(b)(2)(D) requires that the termination petition state:

> (D) there is a satisfactory plan for the care and treatment of the child.

In **In Re Miedl**, 425 N.E.2d 137, 141 (Ind. 1981), the Supreme Court affirmed the trial court's judgment which terminated Mother's parental rights. The Court opined that it was certainly not the intent of the Legislature that the future plans for the children would be detailed in the evidence so that the court could choose the "best" alternative for the children. Id. at 140-41. The Court said that it is obvious the Legislature intended that the Welfare

Department would point out in a general sense to the trial court the direction of its plan. Id. at 141. The Court observed that the Welfare Department indicated its future plan was to place the children for permanent adoption and the trial court gave the order for that to be done. Id. The Court said that it would be impossible for the Welfare Department to find and select a proposed adoptive home prior to the termination judgment. Id.

In **In Re J.C.**, 994 N.E. 2d 278, 290-91 (Ind. Ct. App. 2013), the Court affirmed the trial court's order terminating Mother's parental rights to her three children despite Mother's argument that DCS's plan for the care and treatment, namely adoption by Paternal Grandmother, was unsatisfactory. Mother was concerned that, if Grandmother was permitted to adopt, Grandmother might alienate the children from Mother while allowing a relationship with the Father. The Court responded that its standard of review and the controlling law compelled the Court to hold that the evidence supported the finding of an adequate plan for the children's future care as a necessary element of termination; such finding is not tantamount to affirmation that adoption by Grandmother would be in the child's best interest.

In **H.G. v. Indiana Dept. of Child Services**, 959 N.E.2d 272, 294 (Ind. Ct. App. 2011), the Court reversed the termination judgment, and stated that a child's placement may be relevant in termination cases, especially where, as in this case, DCS relies heavily on a child's need for permanency. The facts of the case included that the three children, ages fourteen, eleven, and nine at the time of the termination hearing, had been placed together in a foster home that had been identified as the adoptive home for the children prior to the termination hearing. Id. at 279. Ten days after the termination hearing, DCS removed the children from the foster/adoptive home due to two licensing complaints. Id. at 287. The children also told the family case manager that they would rather be moved to a new foster home than be adopted by the current foster parents. Id. at 288. The Court acknowledged that adoption has been held to be a satisfactory plan even in cases where a potential adoptive family has not been identified, citing **Lang v. Starke County Office of Family & Children**, 861 N.E.2d 366, 375 (Ind. Ct. App. 2007). **H.G.** at 294. The Court further said that this case highlights how such a plan is not necessarily in a child's best interests. Id. The Court opined that DCS must prove both that its plan is satisfactory and that termination is in the child's best interests. Id. The Court observed that "[a]though it is true that DCS is not required to *prove* anything concerning the adequacy of the children's placement, that it is not the same as saying that the children's placement is *never relevant* to the facts that it must prove." Id.

In **In Re B.M.**, 913 N.E.2d 1283, 1287 (Ind. Ct. App. 2009), the Court, affirming the trial court's termination order, opined that the trial court did not err by failing to consider the child's placement with Father's sister in Illinois as an alternative to terminating Father's

parental rights. The Court said that, contrary to Father's contention, the provision at **IC 31-34-6-2** requiring DCS to consider placing a CHINS with an appropriate family member before considering any other placement, did not apply because this was a termination of parental rights proceeding rather than a CHINS proceeding. Id. The Court noted that, (1) as set forth in **IC 31-35-2-4(b)(2)(D)**, DCS is only required to establish that "there is a satisfactory plan for the care and treatment of the child" in termination proceedings; (2) adoption is a "satisfactory plan" for the care and treatment of a child under the termination of parental rights statute; and (3) here, the child had been living with his godparents for about a year and DCS' plan for the child was adoption. Id. The Court said that, because DCS established a plan for the child's adoption, Father's argument failed. Id.

In **In Re L.B.**, 889 N.E.2d 326, 341-42 (Ind. Ct. App. 2008), the Court affirmed the trial court's termination judgment, and, in light of the evidence, could not conclude that the plan set forth by DCS for the adoption of the children was unsatisfactory. Citing **In Re D.D.**, 804 N.E.2d 258 (Ind. Ct. App. 2004), the Court said that the trial court must find there is a satisfactory plan for the care and treatment of the child, but the plan need not be detailed, so long as it offers a general sense of the direction in which the child will be going after termination. **L.B.** at 341. The Court noted the case manager's testimony that: (1) the DCS plan for the care and treatment of the children is adoption by their current foster parents; and (2) Father's two children are placed in therapeutic care together and all five children were doing very well in their current placements. Id.

In **In Re S.L.H.S.**, 885 N.E.2d 603, 618 (Ind. Ct. App. 2008), the Court opined that the evidence supported the trial court's finding that DCS had a satisfactory plan for the care and treatment of the child. The Court held that the plan need not be detailed, so long as it offers a general sense of the direction in which the child will be going after the parent-child relationship is terminated, and, here, DCS' plan that the child be adopted was satisfactory. The Court noted that, inasmuch as Father failed to show that the child was an "Indian child," contrary to Father's contention, the trial court was not bound by the Indian Child Welfare Act in determining the proper placement of the child. Id.

In **A.J. v. Marion County Office of Family**, 881 N.E.2d 706, 719 (Ind. Ct. App. 2008), the Court affirmed the termination judgment. Mother argued that the plan was unsatisfactory, that the seven children would be in three different homes, and that there was no evidence reunification with Mother would be harmful. The Court opined that, in light of the evidence, the Court could not conclude that the DCS plan for adoption of the seven children in three different homes was unsatisfactory. The caseworker testified that (1) the plan for the care and treatment of the children was adoption; (2) all seven children were currently in pre-adoptive homes and were doing well; (3) the three older boys were placed in a pre-adoptive home together, the next youngest child was placed in a separate home because she

was struggling with some of her siblings, and the three youngest children were placed together in a third pre-adoptive foster home.

In **Lang v. Starke Cty. Office of Fam. Children**, 861 N.E.2d 366, 375 (Ind. Ct. App 2007), the Court held the trial court's finding that there was a satisfactory plan was supported by the evidence and was not clearly erroneous. The Court noted the testimony of the DCS family case manager and the Court Appointed Special Advocate that the plan was adoption or independent living. Id. at 374-75. The Court found that: (1) attempting to find suitable parents to adopt the children was clearly a satisfactory plan; (2) the fact that there was not a specific family in place to adopt the children did not make the plan unsatisfactory; and (3) continuing the independent living situation, in which two of the children were currently enrolled, was an acceptable plan as it gave a general sense of the direction of the treatment and care that the two children would receive. Id. at 375.

VI. Selected Cases on Specific Subject Areas

Following are some selected termination cases on specific subject areas. The selected cases include opinions of the Indiana Supreme Court, recent opinions of the Indiana Court of Appeals, and some older Appellate opinions. Cases have been selected which offer a variety of opinions on each subject area. For a more complete case law discussion, see the **CHINS Deskbook 2001** and the **2009 Cumulative Supplement**, which may be accessed at **www.KidsVoiceIN.org**, a free, educational website.

Criminal Activity and Incarceration

In **K.T.K. v. Indiana Dept. of Child Services**, 989 N.E. 2d 1225 (Ind. 2013), the Supreme Court affirmed the judgment terminating Mother's parental rights. Id. at 1236. The Court noted the evidence of Mother's criminal behavior, including her recent incarcerations for charges of theft, receiving stolen property and public intoxication and her criminal history, which included operating while intoxicated convictions, multiple traffic citations, probation violations, and consumption by a minor. The Court said that the evidence of the psychologist evaluator supported the trial court's finding that Mother "has a 'criminal mentality' that manifests itself in disregard for the law." Id. at 1233. The Court said the record reflected that Mother's habitual pattern of exposing the children to her criminal behavior detrimentally impacted the children's psychological, emotional, and physical development.

In **In Re C.G.**, 954 N.E.2d 910 (Ind. 2011), the Supreme Court affirmed the trial court's order which terminated the parental rights of incarcerated Mother. Id. at 911. Mother had left the child with a male friend in Indianapolis, traveled to Utah to visit family, and was arrested on federal charges and incarcerated in the Henderson County, Kentucky Jail awaiting trial. The Court opined that DCS had no reason to suspect that Mother would be in federal custody in Kentucky, and that if any error existed in DCS locating Mother, it did not substantially increase the risk of error in the termination proceeding. Id. at 918. The Court, citing **State of West Virginia ex rel Jeanette H.**, 529 S.E.2d 856, 877 (W. Va. 2000), adopted a policy that whether or not an incarcerated parent is permitted to attend a termination of parental rights hearing is within the sound discretion of the trial judge. **C.G.** at 922. The Court observed that there is no absolute right to be present at a termination hearing. Id. at 921. The Court noted the following procedural safeguards undertaken by the trial court in this case: (1) Mother participated in both days of the termination hearing telephonically, with interpreters in the courtroom translating the proceeding into Spanish; (2) the courtroom was cleared out to provide Mother an opportunity to privately speak to her counsel; (3) the trial was bifurcated, giving Mother the opportunity to review the testimony presented by DCS with her counsel; (4) counsel had ample opportunity to confer with Mother, having been on the case for over six months. Id. The Court also noted the potential significant cost of transporting Mother from Henderson, Kentucky to Indianapolis for this hearing, and said that its analysis may have been different had Mother been across town in the Marion County Jail. Id. The Court also said that videoconferencing equipment can be used in termination proceedings, subject to the provisions of Indiana Administrative Rule 14. Id. at 923 n.4. The Court further noted that the evidence that Mother would be serving ten years of incarceration supported the trial court's findings that termination was in the child's best interests. Id. at 924-925.

In **In Re J.M.**, 908 N.E.2d 191 (Ind. 2009), the Supreme Court affirmed the trial court's denial of DCS's petition to terminate the parental rights of Mother and Father who were incarcerated on dealing in methamphetamine charges. Id. at 196. The Court observed that the parents' release dates were relevant and important because their incarceration was the condition that resulted in the child's removal. Id. at 194-95. The Court also noted the evidence which supported the trial court's conclusions that: (1) parents had fully cooperated with the services required of them while incarcerated; (2) parents had a relationship with the child prior to their imprisonment and attempted to keep the child in the care of relatives prior to their convictions; and (3) parents' "ability to establish a stable and appropriate life upon release can be observed and determined within a relatively quick period of time. Thus the child's need of permanency is not severely prejudiced." Id. at 195-96. The Court noted the following: (1) its review of the record showed that Mother and Father had taken steps to provide permanency for the child upon their release; (2) in addition to completing all of the available required self-improvement programs ordered by the court's dispositional decree,

Father testified at the termination hearing, that after his release, "I have a job waiting for me ... working excavation, running heavy machines;" (3) Father had secured a home where Mother and the child could reside with him; (4) Father's "Motion to Supplement the Record," which is supported by exhibits, states in relevant part that prior to his release from incarceration, Father had "obtained housing at Melrose Apartments and he currently reside [sic] at this housing complex in a clean and appropriate two bedroom apartment," "[o]n November 10, 2008, Father began employment with Benny's Floor Coverings in Greencastle, Indiana as an installer where he works 40 to 45 hours per week and has a $10.00 per hour rate of pay," and "[i]mmediately upon his release from Plainfield Correction Facility he purchased a 1981 Dodge Ram truck for transportation, registered the vehicle with BMV and obtained auto insurance through Progressive Southeastern Insurance Company;" (5) Mother testified at the termination hearing that she was "right on track" to complete her bachelor's degree in May 2008, which would push her release date up to April 2009; (6) Mother's physical presence at oral argument was evidence that she had completed her bachelor's degree and had been released; (7) Mother testified at the termination hearing that she had completed a 16-month "community transition program ... where we are offered a lot of different programs to help prepare us for re-entry into society;" and (8) Mother's testimony that she had not lined up a job or housing after her release is offset by evidence that Father has a stable job and appropriate housing for her and the child. Id. The Court further said that, although this is the second case that it had decided in recent weeks in which it held that the involuntary termination of the parental rights of incarcerated parents was not warranted, the close proximity of the cases was coincidence and not a reflection of the outcome of such cases. Id. at 192.

In **In Re G.Y.**, 904 N.E.2d 1257 (Ind. 2009), the Supreme Court reversed the trial court's termination of Mother's parent-child relationship with her child, which had been affirmed by the Court of Appeals. Id. at 1266. The Court held that the State did not present clear and convincing evidence to demonstrate that Mother's parental rights should be terminated. Id. at 1258. The Court reached this result after examining four reasons the trial court gave for concluding that termination of Mother's parental rights was in the child's best interests: (A) Mother will remain unavailable to parent because her pattern of criminal activity makes it likely that she will reoffend upon release; (B) to provide Mother additional time to be released from jail and try to remedy conditions would only necessitate the child being put on a shelf instead of providing paramount permanency; (C) the child has a closer relationship with his foster parents than he does with his mother; and (D) the child's general need for permanency and stability. Id. at 1262-66. The Court found that none of these reasons was a sufficiently strong reason, either alone or in conjunction with the trial court's other reasons, to warrant a conclusion by clear and convincing evidence that termination of Mother's parental rights was in the child's best interests. Id. Among the evidence cited by the Court in support of its determination was: (1) all of Mother's criminal history consisted of offenses

committed before the child's conception in 2003; (2) the record gave no indication that Mother was anything but a fit parent for the first twenty months of the child's life; (3) at the time of the termination hearing, Mother had completed a drug rehabilitation program and a parenting class and was working on her associate's degree which would result in an earlier release date; (4) Mother and the child had been visiting once per month for two to four hours for at least one year and their interaction was appropriate. Id. at 1262-64.

In **Bester v. Lake County Office of Family**, 839 N.E.2d 143 (Ind. 2005), the Supreme Court reversed the trial court's termination of parental rights order, rejecting the court's conclusion (among others) that Father's criminal record supported a finding that continuation of the parent-child relationship threatened the child's well-being. Id. at 152-53. The Court noted evidence that Father's criminal history included five arrests and two convictions for possession of marijuana and one arrest for possession of controlled substances. Id. 152. The Court found that the arrests and convictions did not demonstrate by clear and convincing evidence that Father's criminal history threatened the child's well-being when balanced against evidence that Father no longer had gang involvement, Father was employed full time, Father testified he had not used drugs since the child was born, Father tested negative for drugs on random tests, and the trial court made no finding that Father was currently or for the past three years had been involved with drugs. Id.

In **Matter of Danforth**, 542 N.E.2d 1330 (Ind. 1989), the facts showed that the children visited Father in prison and thereafter Father attempted to stay in touch through letters and cards sent through the caseworker. The termination petition was filed shortly after Father's release from prison, and granted after a hearing. The Indiana Supreme Court set aside the Court of Appeals opinion at 512 N.E.2d 228 and affirmed the juvenile court's judgment of termination, listing the following evidence as sufficient to support the judgment: (1) Father had recently been released from five years of incarceration; (2) Father had "repeatedly" committed armed robberies and one burglary; (3) Father had left the children in the getaway vehicle while he perpetrated a robbery; (4) Father told his wife he would kill her and the caseworker when released from prison; (5) the children had not been under the care of Father for six and a half years; and (7) Father's visits upset the children. The Supreme Court accepted Judge Buchanan's analysis of the situation in his dissent to the Court of Appeals opinion:

> The trial court must evaluate the parent's habitual patterns of conduct to determine whether there is a reasonable probability of future deprivation of the children. (citation omitted). The trial court need not wait until the children are irreversibly influenced such that their physical, mental and social growth is permanently impaired before terminating the parent-child relationship…Surely we need not wait for bleeding victims before we find

> sufficient evidence of the likelihood of Danforth's [Father's] future conviction.

Id. at 1331.

In **S.L. v. Indiana Dept. of Child Services**, 997 N.E. 2d 1114 (Ind. Ct. App. 2013), the Court affirmed the trial court's judgment terminating Mother's and Father's parental rights. Id. at 1125. Among the evidence noted by the Court in support of the trial court's findings and determination was: (1) Mother was incarcerated at the time of the termination hearing and awaiting trial on drug charges; (2) Father was incarcerated at the time of the termination hearing; (3) Father made no progress in services because of his incarceration; (4) Father's history, particularly his repeated incarceration, was proof of his instability; (5) Father is a convicted child molester. Id. at 1124-25.

In **In Re J.C.**, 994 N.E. 2d 278 (Ind. Ct. App. 2013), the Court affirmed the trial court's order terminating Mother's parental rights. Id. at 291. The Court noted the following findings in support of the judgment: (1) the two oldest children were removed from Mother's custody when she was arrested for theft and operating a motor vehicle while intoxicated; (2) the two oldest children were removed for the second time when Mother was arrested for multiple counts of neglect of a dependent and public intoxication, and the children were with Mother while she was committing these acts; (3) a CHINS case was filed on Mother's third child who was born while Mother was serving her sentence on a work release program; (4) all three children were removed later when Mother was arrested and incarcerated due to resumed drug-related and criminal behavior, including a physical assault by Mother on her fiancé in the children's presence; (5) Mother received an executed sentence to the Department of Correction with an earliest possible release date of January 2013; (6) Mother remained incarcerated as of the date of the termination hearing, had pending violations of probation and might receive additional executed time; (7) Mother was unable to fulfill her parental obligations due to incarcerations from multiple drug-related incidents. Id. at 284-86.

In **In Re Ma.J.**, 972 N.E. 2d 394 (Ind. Ct. App. 2012), the Court reversed the trial court's order terminating Mother's parental rights to her twin daughters. Id. at 404. During the CHINS proceeding, Mother was charged with theft and conspiracy to commit theft, welfare fraud, and receiving stolen property, obstruction of justice, and assisting a criminal. When Mother was released from jail, DCS declined to offer her additional services, but she entered the drug court program. Mother remained compliant with the drug court program. The Court opined that, while Mother's behavior prior to her incarceration was relevant, the trial court should ultimately determine her fitness at the time of the termination hearing. Id. at 402-03. The Court noted that Mother had made significant progress in the eight months before the termination hearing in that she was progressing in treatment, attending two

weekly support meetings, meeting regularly with her NA and AA sponsor, providing thirty random negative drug screens, and avoiding any new relationships with men. Id. at 403.

In **H.G. v. Indiana Dept. of Child Services**, 959 N.E.2d 272 (Ind. Ct. App. 2011), the Court reversed and remanded the trial court's termination order. Id. at 275. At the time of the termination hearing on March 1, 2011, Mother of the three children, ages fourteen, eleven, and nine, was incarcerated at Rockville Correctional Facility and her earliest release date was July 13, 2013. Father of the oldest child was incarcerated at Branchville Correctional Facility and his earliest release date was December 17, 2013. The Court concluded that the evidence did not support the trial court's conclusion that termination is in children's best interests. Id. at 289. The Court found this case to be similar to **In Re G.Y.**, 904 N.E.2d 1257 (Ind. 2009) and **In Re J.M.**, 908 N.E.2d 191 (Ind. 2009), where the Supreme Court held that a child's need for permanency did not justify terminating parental rights. **H.G.** at 290. The Court said that both **G.Y.** and **J.M.** make it clear that, contrary to DCS's argument, the court is not prohibited from considering the possibility of a parent's early release, nor should it disregard a parent's voluntary efforts while in prison. Id. The Court noted that, like the parents in **J.M.** and **G.Y.**, Mother and Father have been cooperative and involved in their child(ren)'s cases, have taken advantage of opportunities for improvement while in prison, have made every effort to obtain an early release, have a bond with their child(ren), and their abilities to parent can be quickly assessed upon release. **H.G.** at 291-92.

In **In Re M.W.**, 943 N.E.2d 848 (Ind. Ct. App. 2011), the Court reversed the trial court's order which had terminated Father's parental rights, finding that, given Father's cooperation with the Amended Plan offered by DCS and his scheduled release from incarceration soon after the termination hearing, the trial court's findings were not supported by clear and convincing evidence. Id. at 856. The Court noted that: (1) Father was incarcerated shortly after the child's removal; (2) Father spent half of the twenty months between the child's removal and the termination hearing incarcerated; (3) Father was due to be released shortly after the termination was ordered; (4) despite incarceration, Father complied with almost all of the requirements of the Amended Plan; (5) Father was bonded with the child and was appropriate during visitations; (6) Father completed anger management classes, was evaluated for domestic violence counseling, submitted to random drug screens, obtained a drug and alcohol assessment and followed all recommendations, and completed a psychological evaluation and followed all recommendations; (7) when not incarcerated Father was either employed or actively seeking employment; (8) Father had resolved all of his criminal matters except for completing his final sentence; and (9) prior to his incarceration, Father had been accepted as a student at Ivy Tech and had been attempting to file an action to establish paternity and custody of the child. Id. at 855.

In **In Re H.L.**, 915 N.E.2d 145 (Ind. Ct. App. 2009), the Court affirmed the trial court's termination of incarcerated Father's parental rights, finding that DCS had established by clear and convincing evidence the requisite elements to support the termination judgment. Id. at 150. Father was incarcerated when the child was born and remained incarcerated throughout the CHINS process. The Court distinguished this case from **In Re G.Y.**, 904 N.E.2d 1257 (Ind. 2009), relied upon by Father, noting that: (1) Father had not asserted that he was able to provide a home for the child at any time within the next several years; (2) there was no evidence that Father was taking steps to further his education, acquire job skills, or secure employment to commence after his release from incarceration; and (3) there was no indication that Father had family members able or willing to assist him by providing care for the child. H.L. at 150.

In **C.T. v. Marion Cty. Dept. of Child Services,** 896 N.E.2d 571 (Ind. Ct. App. 2008), the Court upheld the trial court's denial of a request by Father's counsel to continue the June 27, 2007 termination hearing until Father's release from prison which was scheduled to occur in April 2008, and affirmed the termination of Father's parental rights. Id. at 588. The Court opined that individuals who pursue criminal activity run the risk of being denied the opportunity to develop positive and meaningful relationships with their children; and observed that Father (1) was incarcerated and therefore unavailable to parent the child when the child was initially removed from Mother's care in December 2006; (2) has a significant criminal history including twenty-one convictions, which resulted in his being unavailable throughout the majority of the CHINS proceedings because of being in and out of prison; (3) failed in two prior CHINS proceedings to avail himself of court-ordered reunification services, and his failure to do so ultimately resulted in the termination of his parental rights to the child's siblings; (4) had, by the time of the termination hearing here, failed to complete any of the dispositional goals specified in the pre-dispositional report and was once again incarcerated; and (5) consequently remained unavailable to parent the child. Id. at 584-85.

In **Castro v. Office of Family and Children**, 842 N.E.2d 367 (Ind. Ct. App. 2006), the Court opined that there was sufficient evidence to support the trial court's order terminating incarcerated Father's parental rights. Id. at 375. The Court opined that, despite Father's remarkably good record during incarceration, which included obtaining college degrees and participation in anger management, parenting classes, and other services, the following evidence supported termination: (1) Father had been incarcerated since prior to the nine-year-old child's birth; (2) Father had never been a part of the child's life and had seen her only when she was an infant; (3) Father was serving a forty year sentence for criminal deviate conduct and burglary; and (4) it would be sheer speculation to conclude that Father's sentence would be modified and that he would have the ability to support and care for the child. Id. at 373-75.

In **Rowlett v. Office of Family and Children**, 841 N.E.2d 615 (Ind. Ct. App. 2006), the Court reversed the trial court's judgment which terminated Father's parental rights. Id. at 624. Father did not live in the home when the children were removed from Mother. Father established paternity, admitted the CHINS allegations, and was granted supervised visitation, and was then incarcerated for three years for multiple convictions related to methamphetamines. The Court found that, given Father's positive strides toward parenting while incarcerated and commitment to continue personal improvement programs and services, OFC did not establish by clear and convincing evidence that the conditions which resulted in the removal of the children would not be remedied. Id. at 622. The Court noted the following significant considerations in reaching its conclusion: (1) Father's criminal history, substance abuse, child neglect, and unstable housing and employment mostly occurred before the CHINS judgment; (2) Father did not deny his substance abuse problem but he testified he had not used substances since he was incarcerated; (3) Father's habitual pattern of neglect with the children (including transience and filthy and dangerous living conditions) prior to the CHINS case, "does not accurately reflect his status and ability to care for his children as of the time of the termination hearing" since Father was currently in a Therapeutic Community within prison and had completed significant services and had made arrangements for employment and housing upon release from incarceration. Id. at 620-22. Evidence that Father maintained a relationship with the children through letters and telephone calls and the children loved him, and that there was little harm in extending the CHINS wardship because the children were thriving in care with the grandmother, did not support a finding that termination was in the best interests of the children. Id. at 622-23.

Parent's Mental Disability and Low Intelligence

In **Egly v. Blackford County DPW**, 592 N.E.2d 1232 (Ind. 1992), the Supreme Court vacated the Court of Appeals opinion at 572 N.E.2d 312 and affirmed the trial court's decision terminating the parent-child relationship. Id. at 1235. Mother had an IQ of 57 and Father had an IQ of 73, and caseworkers providing services to the parents concluded that the parents lacked the capacity to comprehend and retain the parenting information provided. Id. at 1233. The parents argued that their parental rights had been terminated because of their intellect. The Court opined that mental retardation of the parents, standing alone, is not proper ground for terminating parental rights. Id. at 1234. The Court quoted **In Re Wardship of B.C.**, 441 N.E.2d 208, 211 (Ind. 1982), for the principle that where parents are incapable of or unwilling to fulfill their legal obligations in caring for their children, then mental illness may be considered. **Egly** at 1234.

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. Id. at 366. Among the evidence noted by the Court in support of the termination judgment was the expert social worker's assessment of Mother, which indicated that Mother was not likely to benefit from the services being offered to her due to her low cognitive functioning and emotional immaturity.

In **T.B. v. Indiana Department of Child Services**, 971 N.E.2d 104 (Ind. Ct. App. 2012), the Court affirmed the trial court's judgment which had terminated the parental rights of Mother whose cognitive functioning is in the low to well-below average range of functioning. Id. at 105. Mother's sole argument on appeal was that mentally retarded parents should be immune from losing their parental rights. Mother compared involuntary termination proceedings to criminal proceedings and asked the Court to assume that the result of a termination proceeding is actually a penalty to the parent, rather than a decision made in the best interests of the child. Mother posited that such a penalty violates the prohibition against cruel and unusual punishment found in Article 1, Section 15 of the United States Constitution because the ultimate result is to make the child "legally dead" to the parent. Mother asked the Court to adopt a prohibition against the practice of terminating the parental rights of a parent who is mentally retarded. Citing **Egly v. Blackford County DPW**, 592 N.E.2d 1232, 1234 (Ind. 1992), the Court responded that, contrary to Mother's argument, the Indiana Supreme Court has made clear that the "purpose of terminating parental rights is not to punish parents, but to protect the children." **T.B.** at 110. The Court, quoting **Egly** at 1234, observed that it is well-settled that "mental retardation, standing alone, is not a proper ground for termination of parental rights." **T.B.** at 110. The Court further said that it therefore stands to reason that the converse should also be true, that mental retardation, standing alone, is not a proper ground for automatically *prohibiting* the termination of parental rights (emphasis in opinion). Id. The Court declined "Mother's invitation to depart from the clear and unambiguous language of Indiana's termination statute in order to judicially legislate an exception whereby mentally handicapped parents are immune from involuntary termination proceedings." Id. The Court opined that the trial court's unchallenged findings clearly and convincingly supported its ultimate decision to terminate Mother's parental rights and found no error. Id.

In **In Re A.S.**, 905 N.E.2d 47 (Ind. Ct. App. 2009), the Court held that there was clear and convincing evidence to support the termination of Mother's rights, and that Mother's mental deficits did not preclude this result. Id. at 51. On appeal, rather than challenging whether DCS had met the burden of proof for termination of Mother's parental rights, Mother likened the termination of her parental rights to Indiana's prohibition on the execution of mentally retarded criminal defendants, and contended that she could not be subject to termination of her parental rights because of her low intellectual capacity. The Court found

this association misplaced and inapposite in that Indiana courts have repeatedly stated that termination proceedings are not designed to punish the parent, but rather to protect the best interests of the child. Id. The Court held that, regardless of Mother's mental deficits, she was unwilling to participate in the programs offered to her and was unwilling or unable to maintain suitable employment and housing, even with the help and resources of family members and programs. Id. The Court acknowledged that the Indiana Supreme Court has recognized that mental retardation, standing alone, is not a proper ground for terminating parental rights, but pointed out that, here, rather than basing the termination on mental retardation, the trial court relied on Mother's failure to remedy the conditions that resulted in removal of her children and her ongoing threat to their well-being. Id. at 50. According to the Court, the trial court found that Mother displayed a continuing lack of stability, a neglect of the children's medical needs, and a lack of progress in participating in services offered, and, although there might be some link between Mother's mental deficits and her failures to participate in offered services, her mental deficits did not excuse those failures or allow her to keep her children regardless of the danger to their health and well-being. Id.

In **In Re J.T.**, 742 N.E.2d 509 (Ind. Ct. App. 2001), Mother had a borderline IQ of 79 and suffered from adult attention deficit disorder. The Court affirmed the termination judgment on the following evidence: (1) Mother did not understand basic child care concepts of child development and nutrition; (2) Mother lacked capacity to understand, appreciate, and provide a safe environment for the child; (3) Mother's tendency to be impatient, impulsive, intolerant, immature, and highly motivated by her feelings interfered with her ability to parent; and (4) Mother's prognosis for change was slow because she did not believe she had problems and therefore was not likely to benefit from help. Id. at 512-13. In rejecting Mother's claim that her parental rights were terminated because of her low IQ and attention deficit disorder, the Court noted that Mother's rights were terminated because of her persistent inability to provide the child with care and ensure his safety. Id. at 514. Mother's intellectual level was not the basis of the termination, but an explanation for why Mother, in spite of the services offered to her, was unable to understand the supervision and safety needs of the child and to develop the necessary safe parenting practices. Id.

In **Stone v. Daviess Co. Div. of Child Serv.**, 656 N.E.2d 824 (Ind. Ct. App. 1995), Mother had cognitive and personality deficiencies, a dependent personality, and an IQ of 67; Father had an IQ of 71. Both parents participated in services provided by OFC, including parenting classes, homemaker services, visitation, and family and individual counseling, but made little progress in solving their parenting problems. Id. at 828-29. On appeal of the termination judgment, the Court found the evidence was sufficient to support the termination judgment based on the facts from the CHINS case stated above and the following evidence: (1) Father's belief that hitting and use of a belt were acceptable and his unwillingness to consider different means of discipline; (2) the testimony of the clinical

social worker that the parents denied psychological or parenting skills problems; (3) the opinion of the social worker that the children would be at high risk of regression if returned to the home; (4) the testimony of the caseworker regarding the parents continued denial of problems or need to change; (5) the testimony of the homemaker regarding lack of progress on safety and cleanliness issues in the home; and (7) testimony regarding emotional and psychological harm suffered by the children in parents' custody. Id. The parents alleged that OFC had violated the Americans with Disabilities Act (ADA) by failing to provide rehabilitation and reunification serves based upon their special needs. The Court found that compliance with ADA was not an issue in the termination case because Indiana's termination statute does not require the State to prove that services were offered to assist parents to fulfill their parental obligations. Id. at 830. Although ADA compliance was not relevant to the termination case, the Court chose to discuss the application of the ADA to CHINS proceedings, noting that once an agency opts to provide services during the CHINS proceeding to assist parents in developing parental skills, the agency must reasonably accommodate the parents' disabilities in compliance with the ADA. Id.

Parent's Mental Illness

In **In Re Wardship of B.C.**, 441 N.E.2d 208 (Ind. 1982), the Indiana Supreme Court vacated the Court of Appeals opinion at 433 N.E.2d 19 and affirmed the trial court's order terminating the mentally ill Mother's parental rights. Mother had given her twenty-month-old child to a couple whom she did not know while in a department store parking lot. Mother had been provided counseling, medication, hospitalization, and assistance in finding a stable home and employment, but Mother failed to take the medications, cooperate with the group home placement for herself, or visit the child. The Court stated, "[w]e find no reason to reverse the trial court on the mere claim that some medical program might exist which might possibly cure the mother." Id. at 211.

In **In Re G.H.,** 906 N.E.2d 248 (Ind. Ct. App. 2009), the Court affirmed the trial court's order terminating the parent-child relationship of Mother with her daughter. Id. at 254. The Court quoted the trial court's extensive findings regarding Mother's mental health, and summarized some of its own reasons as follows: (1) Mother may have a sincere desire to be reunited with the child, but she has been unable to make choices to support the child's well-being; (2) throughout DCS' involvement, Mother has demonstrated several troubling patterns of conduct, including her failure to regularly take medication to treat her bi-polar disorder, her inconsistent exercise of visitation with the child, her non-compliance with individual and group counseling, and her "blackout episodes," during which she exhibits

violent behavior and has no memory of it; and (3) these patterns contribute to Mother's continuing inability to provide a safe and stable environment for the child. Id.

In **In Re A.J.**, 877 N.E.2d 805 (Ind. Ct. App. 2007), the Court affirmed the termination judgment, finding that it was supported by sufficient evidence. Id. at 816-17. The CHINS petition alleged, inter alia, that Mother was hospitalized in the psychiatric unit and needed mental health treatment. The Court noted the following evidence on Mother's mental health issues in support of the trial court's judgment: (1) Mother suffered from mental health issues, which were not likely to be remedied; thus the risk of future neglect and endangerment of the three children would also not likely be remedied; (2) Mother testified that she believed she did not have a mental health problem; (3) Mother admitted that she had not participated in any psychological evaluation for nine months, and despite multiple recommendations by her therapists and case managers, she had not participated in any follow up counseling nor taken any medications for her mental health issues; (4) the social worker who conducted Mother's psychosexual assessment had concerns about Mother's mental health issues and her inability to progress in therapy; (5) Mother's most recent case manager witnessed behaviors consistent with the social worker's concerns, including extreme belligerence, defensiveness, irrational thinking, and screaming at the case manager. Id. at 816.

In **In Re Invol. Termn. of Par. Child Rel. A.H.**, 832 N.E.2d 563 (Ind. Ct. App. 2005), the Court ruled that the evidence was sufficient on the elements in the termination case, focusing primarily on the father's mental health impairment. Id. at 571. The facts of the opinion include a listing of the father's mental health disorders of intermittent explosive disorder, anti-social personality disorder and avoidant personality disorder and Guardian ad Litem testimony that father would not be able to adequately and safely parent his children because of his disorders, did not have the ability to benefit from services, and was not able to control his behavior. Id. at 566. The psychologist testified that the father expressed threatening, intense, and unwarranted anger and it would be difficult for anyone with the father's symptoms and disorders to parent normal children, not to mention children with special needs. Id. at 567. The Court concluded that the evidence of the father's mental health impairment, together with his habitual pattern of conduct and inability to maintain a stable living environment for children, clearly demonstrated that termination was in the best interests of the children and that father posed a threat to the well-being of the children. Id. at 571.

Sexual Abuse

In **In Re A.J.**, 877 N.E.2d 805 (Ind. Ct. App. 2007), the Court opined, inter alia, that the evidence supported the trial court's order terminating Father's parental rights. Id. at 816. The three children were removed from parents in part because there was a concern that the children had been sexually abused by Father. The Court found that the record clearly supported the trial court's findings that one of the children had been sexually molested by Father and that Mother had failed to protect her from these molestations. Id. In support of the sufficiency of the evidence for the termination judgment, the Court noted: (1) the child's testimony regarding the abuse she suffered while in the care of her parents was both detailed and credible; (2) the child's testimony was substantiated by the testimony of her therapist and a psychologist who evaluated the child; (3) at the time of the termination hearing, Father still had not admitted to sexually molesting the child; (4) Father had not completed *any* of the services recommended by DCS, including the sexual offender classes, which were necessary for reunification (emphasis in opinion). Id. The Court also concluded that the trial court did not error in allowing the expert in sexual abuse treatment to testify to his recommendations, which were based on part on parents' polygraph results. Id. at 814. The Court noted that the polygraph results were not specifically reported, and DCS laid a proper foundation demonstrating that the use of polygraph examinations for the purposes of assessment and treatment is reasonably relied upon by experts in the field of sexual abuse treatment. Id.

In **In Re W.B.**, 772 N.E.2d 522 (Ind. Ct. App. 2002), the Court found that the improper admission of hearsay evidence did not warrant reversal of the trial court's termination judgment because sufficient findings remained to support the trial court's conclusion. Id. at 535. The parents claimed that the trial court improperly accepted as true the older siblings' hearsay statements to their therapists which alleged sexual abuse and physical abuse by the parents. The trial court stated that the allegations of abuse were an exception to the hearsay rule under Ind. Evidence Rule 803(4) because the statements were relied upon by the therapist to determine a course of treatment. The Court found the record devoid of any evidence that the children, in making these statements, were "motivated to provide truthful information in order to promote diagnosis and treatment" as required by McClain v. State, 675 N.E.2d 329, 331 (Ind. 1996). **W.B.** at 533. The Court noted that the therapist's testimony clearly portrayed the older siblings as mentally and emotionally incompetent, and no doubt totally unaware of the therapist's professional purpose. Id. The Court agreed that it was wrong of the trial court, to the extent it did so, to rely on the substance of the therapist's statements as proof of the matters stated. Id.

In **Ramsey v. Madison County Dept. of Family**, 707 N.E.2d 814 (Ind. Ct. App. 1999), the Court ruled that prima facie evidence of the father's conviction for sexually molesting the child, together with evidence that the child feared being abused by the father, and exhibited behavioral and emotional problems including encopresis, running away, setting fires, and sexual acting out, was sufficient to support the termination judgment. Id. at 817.

In **Adams v. Office of Fam. & Children**, 659 N.E.2d 202 (Ind. Ct. App. 1995), the Court opined that parents were collaterally estopped from arguing in the termination case that Father had not sexually molested his daughters. Id. at 206. The Court opined that the proper forum for this argument was an appeal from the dispositional order. Id. The trial court had found in the CHINS proceeding that Father had molested his daughters. The Court noted that the parents were parties in the CHINS and disposition hearings, and the parents had a full and fair opportunity to litigate the issue of whether Father had molested his daughters. Id. The Court found that the state proved the statutory elements of the termination case, and noted the following evidence from the record: (1) the children were removed from parents' home because father had sexually molested the two oldest daughters and there was a reasonable probability that the abuse would continue if the children were returned to the parents' home; (2) the parents did not satisfactorily complete their required counseling and services; (3) numerous experts testified that the children would still be vulnerable to sexual abuse if returned to the parents' home. Id. at 206-07.

Physical Abuse, Unreasonable Corporal Punishment, and Failure to Protect

In **In Re E.M.**, 4 N.E.3d 636 (Ind. 2014), the Supreme Court affirmed the trial court's order terminating Father's parental rights to his two children. The Court found that it was reasonable for the trial court to find that Father's violence towards Mother had also "abused" the children, who were in early infancy and barely one year old at the time of removal. Id. at 644. The Court opined that the trial court was within its discretion to make the abuse finding based on the Post Traumatic Stress Disorder diagnoses of the children's older half-siblings and the young children's even greater vulnerability to psychological harm. Id. at 645.

In **Matter of Robinson**, 538 N.E.2d 1385 (Ind. 1989), the Supreme Court affirmed the termination judgment, and noted the following evidence: (1) Father had visited the children only one time since their removal in 1981; (2) Father had "failed to make any efforts to reestablish himself with the children"; (3) Father had been convicted of abuse of two of the girls and they were terrified of him; (4) one of the girls was still in psychiatric care and her recovery was questionable; (5) Father had not complied with the disposition order;

(6) Father had been under psychiatric care and had been uncooperative and disruptive in partial hospitalization and residential programs; and (7) Father had resisted all efforts by the welfare department toward rehabilitation. Id. at 1388.

In **In Re J.S.**, 906 N.E.2d 226 (Ind. Ct. App. 2009), the two-month-old child had been hospitalized with multiple fractures, including fractures to the 6th and 7th ribs, the left tibia, and a hairline skull fracture with bleeding behind the facture, and a CHINS petition was filed. Id at 229. The Court found that the trial court 's subsequent termination judgment was supported by sufficient evidence. Id. at 237. The Court noted that the finding that there was a reasonable probability the conditions justifying removal and continued placement in foster care would not be remedied was supported by specific evidence including that (1) the child was removed from Parents' care at two months of age because he received several serious fractures, including a skull fracture with bleeding beneath the fracture, while in Parents' care; (2) there was no explanation as to the cause of the injuries, but the medical diagnosis report indicated that all of the injuries happened within 24 to 48 hours of admission and were "non-accidental;" (3) although Parents did participate in and even complete some of the court-ordered services, their participation was sporadic, often volatile, and ultimately unsuccessful; (4) the case manager testified that the results of the court-ordered psychological evaluations had raised more concerns about Parents' ability to appropriately care for the child, that she had a "somewhat pessimistic view" of their ability to parent without "intensive training, role modeling [and] community supports," that Parents were unable to apply the techniques they had learned in their parenting classes during their visits with the child, and she had not observed any decrease in Parents' fighting and arguing during their visits; and (5) the visitation supervisor testified that there was no improvement in Parents' parenting styles from the beginning visits to recent visits and Parents' relationship was very volatile in that they argued during at least fifty percent of their visits with the child. Id. at 232-34. The Court observed that, although Parents did participate in some services, including parenting classes and visitation with the child, simply going through the motions of receiving services alone is not sufficient if the services do not result in the needed change, or only result in temporary change. Id. at 234.

In **Lang v. Starke Cty. Office of Fam. Children**, 861 N.E.2d 366 (Ind. Ct. App. 2007), the Court affirmed the trial court's termination judgment, concluding that clear and convincing evidence existed to support the trial court's order. Id. at 370. The CHINS petition was filed due to an incident where Father hit one of his three children with a belt, leaving bruises and marks and affecting her ability to walk. Father was convicted of a class D felony battery resulting in bodily injury. The Court held that the trial court's finding that there was a reasonable probability that the conditions that led to the children's removal would not be remedied was supported by the evidence and was not clearly erroneous. Id. at 373. The Court noted the following evidence in support of its conclusion: (1) Father clearly had a

lengthy history of using unreasonable corporal punishment; (2) besides the incident for which Father was convicted, the battery victim testified that Father had done similar things to her sisters and that he had thrown her into a dresser; (3) Father had not shown the ability to differentiate between reasonable and unreasonable corporal punishment or that he had changed his views on what corporal punishment would be reasonable; (4) Father continued to defend his actions surrounding the battery incident for which he was convicted. Id. at 372-73.

In **McBride v. County Off. Of Family & Children**, 798 N.E.2d 185 (Ind. Ct. App. 2003), the children were removed from Mother's care and adjudicated CHINS because she was living with Father, who had been convicted of cruelty to the children in Georgia. There had also been new incidents of domestic violence between Mother and Father in the presence of one of the children. The Court affirmed the trial court's subsequent termination order and concluded that OFC proved by clear and convincing evidence that the conditions which led to the children's removal would not be remedied. Id. at 202-03. The Court noted the following evidence concerning Mother's failure to protect the children which supported its conclusion: (1) although OFC repeatedly recommended that Mother have no contact with Father to protect both her and the children's interests, Mother refused the recommendations and maintained contact with Father; (2) Mother attended only four counseling sessions and stopped attending domestic violence counseling; (3) the OFC caseworker testified that she did not see that the pattern of Mother going back to an abuser was going to change; (4) the psychologist evaluator testified that Mother had been placing her needs before the needs of the children; (5) the children's Court Appointed Special Advocate testified that for the last seven and one-half years Mother had been making decisions which endangered her children and the Court Appointed Special Advocate did not see this endangerment changing after four removals and multiple evaluations and services. Id. at 202.

In **Everhart v. Scott County Office of Family**, 779 N.E.2d 1223 (Ind. Ct. App. 2002), the Court affirmed the trial court's termination judgment, finding that there was sufficient evidence to sustain it. Id. at 1235. The CHINS adjudication was due to Father's arrest for physical abuse of his two-month-old child, during which the child suffered two skull fractures and permanent injuries requiring future surgeries. The Court observed that the trial court's findings relating to the reasonable probability that the continuation of the parent-child relationship posed a threat to the children were not clearly erroneous. Id. at 134-35. The Court noted the following evidence in support of this finding: (1) while the two episodes of abuse during a two-week period do not show a long history of abuse, they do show a series of uncontrollable, violent conduct; (2) Father admitted that when the baby was crying, he picked her up by her head and squeezed her head; (3) Father admitted to throwing the child and striking her on the head; (4) Father demonstrated a lack of interest in the well-being of the children while he was incarcerated; (5) Father was sentenced to fourteen years

of incarceration, although he asserted that he would be out of prison in seven years, counting good time and other available credits; (6) Father indicated his willingness to move to Georgia for treatment and to not see the children again. Id. at 1234.

In **In Re Children: T.C. and Parents: PC**, 630 N.E.2d 1368 (Ind. Ct. App. 1994), Mother admitted in the CHINS case that she struck her five-year-old child with a belt causing welts on his buttocks and face, she lacked financial means to support the child, and the child attended kindergarten sporadically. A later born child was removed a few days after the birth based on the caseworker's assessment that Mother would be unable to care for him. A termination petition was filed and granted for both children. The Court reversed the termination judgment. Id. at 1375. As to the termination of the younger child, the Court found that basing that child's removal from the home on a single incident of abuse which occurred with a sibling two years previously did not warrant termination. Id. at 1374. The Court stated that the "vague reference to the possibility of inappropriate conduct with [younger child] is not clear and convincing evidence of the factors" in the termination statute. Id. As to the older child the Court ruled that the one incident of unreasonable punishment, combined with the record in this case, did not support a termination order. Id. The Court noted that only unreasonable corporal punishment is proscribed by statute. Id.

Drug Use

In **K.T.K. v. Indiana Dept. of Child Services**, 989 N.E.2d 1225 (Ind. 2013), the Supreme Court affirmed the trial court's judgment terminating Mother's parental rights. Id. at 1234. The Court noted the following evidence on Mother's drug abuse problem and her response to treatment: (1) the children we replace din foster care due to Mother's serious substance abuse issues, which rendered her incapable of providing the necessary care and supervision that the children required; (2) just days prior to the children's removal, Mother was seen passed out in a vehicle, with her youngest child, age four months, and required assistance getting out; (3) Mother admitted to having snorted hydrocodone and Xanax at that time which contributed to the children's removal; (4) Mother began taking illegal drugs at the age of fifteen, had battled an addiction to prescription drugs for approximately seven years, but had abused other illegal substances throughout the children's lives; (5) Mother told the psychologist evaluator that she had tried various illicit substances throughout her young adult years, such ahs has, LSD, ecstasy, cocaine, crack cocaine, and heroin and began using heroin on a regular basis around the age of 26 and last had heroin in 2010; (6) DCS case managers testified that in August 2009 Mother's drug screen tested positive for oxycodone, in October 2009 Mother's drug screens tested positive for hydrocodone, oxycodone, cocaine, and benzodinine, and in November 2009, Mother's drug screens revealed the

presence of morphine and marijuana in addition to the aforementioned drugs. Id. at 1232. The Court noted that Mother's own expert witness, a psychologist, acknowledged that "the process of getting clean takes some time, more than a few months. [And] [d]iagnostic systems require a full year of sobriety or non-use to assign full remission status." Id. at 1234.

In **Bester v. Lake County Office of Family**, 839 N.E.2d 143 (Ind. 2005), the Supreme Court reversed the termination of parental rights judgment, rejecting the trial court's conclusion, inter alia, that Father's record of crimes and drug abuse supported a finding that continuation of the parent-child relationship threatened the child's well being. Id. at 152. The Court noted the evidence of Father's criminal history, including five arrests and two convictions for possession of marijuana and an arrest for possession of controlled substances. Id. The Court found that Father's criminal history did not demonstrate by clear and convincing evidence that continuation of the relationship threatened the child's well-being when balanced against evidence that Father no longer had gang involvement, was employed full time, testified he had not used drugs since the child was born, the record showed negative drug tests for Father, and the trial court made no finding that Father had been involved with drugs in the past three years or was currently involved with drugs. Id.

In **S.L. v. Indiana Dept. of Child Services**, 997 N.E.2d 1114 (Ind. Ct. App. 2013), the Court affirmed the trial court's order terminating Mother's and Father's parental rights. Id. at 1125. Mother used drugs, particularly marijuana, throughout the termination proceedings, despite being ordered not to do so, and testified at one of the termination hearings that she did not know whether she would stop smoking marijuana. Mother argued on appeal that her marijuana use was not a sufficient reason for terminating her parental rights, and cited the legalization of recreational marijuana use in support of her claim. The Court observed that Mother failed to acknowledge that recreational marijuana use is not legal in Indiana, and, more importantly, that one of the prerequisites for reunification with her children was that she not use marijuana. Id. at 1124. Mother also argued that, at the time of the last hearing on the termination petition, she finally understood that using marijuana was illegal and that she had recently tested negative for all substances. The Court responded that, by that time, Mother was incarcerated and her access to illegal substances was limited. Id.

In **In Re J.C.**, 994 N.E.2d 278 (Ind. Ct. App. 2013), the Court found DCS had presented sufficient evidence that the conditions that resulted in the children's removal were not likely to be remedied and affirmed the trial court's termination order. Id. at 291. In support of the trial court's conclusions, the Court noted evidence that Mother had been arrested and incarcerated for multiple drug crimes, Mother had assaulted her fiancé in the children's presence because he refused to provide her with excess amounts of a controlled substance which he had been delegated to dispense to Mother in appropriate amounts, and that none of

the services, including home-based therapy, individual counseling, substance abuse treatment, and after-care programs, have had any lasting effect or prevented the next round of substance abuse, arrest, and incarceration. Id. at 285-86.

In **A.D.S. v. Indiana Dept. of Child Services**, 987 N.E.2d 1150 (Ind. Ct. App. 2013), the Court affirmed the termination order, finding that there was sufficient evidence to support it. Id. at 1159. Mother's two children, then ages two months old and two years old, were removed from her custody due to her failure to address her mental health and substance abuse issues. The Court noted the following findings on Mother's long struggle with substance abuse and her failure to complete rehabilitation services: (1) Mother had a long history of cocaine abuse; (2) Mother had undergone inpatient treatments twice, but relapsed both times; (3) Mother's past cocaine usage and instability resulted in termination of her rights to two other children and her voluntary relinquishment of her rights to a third child; (4) Mother testified to last using cocaine five months before the termination trial; (5) Mother self-referred to a drug treatment program, but due to "inconsistent urine screens and court ordered swabs, concerns of a substituted urine sample, and the lax procedures" at the program, Mother was referred to an additional substance abuse assessment at a different agency which she failed to complete. Id. at 1157.

In **In Re A.P.**, 981 N.E.2d 75 (Ind. Ct. App. 2012), the Court affirmed the termination order and found that they trial court did not abuse its discretion in concluding that Mother's continued relationship with the children posed a threat to their well-being. Id. at 82. The Court noted the following evidence in support of the trial court's findings: (1) Mother submitted to fifty-three drug screens between February 1, 2010, and March 28, 2011, of which six were positive for methamphetamine, one was positive for THC, and forty-nine were positive for prescription controlled substances; (2) the court inferred from the fluctuations in levels of prescription drugs that Mother was abusing the drugs; (3) Mother's counselor was not convinced that Mother "was successful with his services." Id.

In **In Re D.W.**, 969 N.E.2d 89 (Ind. Ct. App. 2012), the Court affirmed the trial court's termination judgment. Id. at 97. The facts of the case show that Father: (1) completed a substance abuse assessment, but failed to show up for any of the intensive outpatient group sessions that met twice per week; (2) during two years of CHINS proceedings, complied with submitting to random drug screens and tested negative for drugs during only three months; (3) at other times did not call in for drug screens or tested positive for drugs, including heroin, marijuana, alcohol, and opiates; (4) lost his employment due to drugs and remained unemployed; (5) never completed home-based services due to missed appointments; (6) failed to participate in substance abuse therapy; (7) attended court-ordered counseling only sporadically and did not show motivation; and (8) admitted that he had still been using drugs at the time of the first day of the termination hearing. Id. at 92-93. The

Court concluded that the trial court had sufficient findings to support its conclusion in that Father consistently failed to take advantage of services provided and ordered by the court, consistently failed to stay clean of drugs, and although Father testified that he had not used drugs in a month, his sobriety was "tenuous" in light of his history. Id. at 97.

In **In Re A.B.**, 924 N.E.2d 666 (Ind. Ct. App. 2010), the Court affirmed the trial court's termination judgment, and found, inter alia, that there was sufficient evidence to support the trial court's findings with respect to Mother. Id. at 671. The child tested positive for cocaine at birth. Mother challenged the trial court's finding that the conditions that led to the child's removal from her care will not be remedied, nothing the lack of documentary evidence that she ever failed any drug test. The Court stated that the sole condition that led to the child's removal was Mother's drug use shortly before the child's birth, leading to the child's positive cocaine test. Id. at 670. The Court noted that the trial court found that Mother had "failed to address her substance abuse issues…" Id. at 671. The Court could not say this finding is clearly erroneous because: (1) Mother was twice referred to participate in a drug and alcohol abuse assessment, but she failed to follow through both times; (2) Mother twice began submitting to random drug screens but both times she quit participating in them shortly thereafter; (3) there is some indirect evidence that Mother did in fact test positive for cocaine usage after the child was born, when Mother attempted to give an implausible explanation for why there was cocaine in her system. Id. The Court opined that this evidence makes it reasonable to reach the conclusion that her drug abuse issue was not remedied. Id. The Court stated, "[a] parent whose drug use led to a child's removal cannot be permitted to refuse to subject to drug testing, then later claim the DCS has failed to prove that the drug use has continued. Mother cannot and should not prevail with such a circular and cynical argument." Id.

In **In Re A.D.W.,** 907 N.E.2d 533 (Ind. Ct. App. 2009), the two children were removed from the home following Mother's stay in a hospital emergency room for a panic attack, during which she tested positive for methamphetamines, benzodiazepine, and cocaine. In affirming the termination, the Court concluded that, among other things, Mother's extensive drug use; her failure to complete court-ordered services, including her failure to cooperate with the drug treatment facility personnel and failure to complete the drug treatment program; and her testing positive recently for morphine, hydrocodone, hydromorphone, and alpha-hydroxy alprzolam was sufficient to support the termination of Mother's parental rights. Id. at 539.

In **Prince v. Department of Child Services**, 861 N.E.2d 1223 (Ind. Ct. App. 2007), the children had been adjudicated CHINS on two separate occasions because of Mother's drug and alcohol abuse and leaving the children unattended. The Court affirmed the termination order despite Mother's insufficiency of the evidence challenge. Id. at 1224. Mother argued

that the evidence that she had begun drug treatment two months after the filing of the termination petition and that she had been sober for nine months at the trial should have compelled the court to conclude that the circumstances resulting in the children's removal had changed. The Court was not persuaded, noting that the trial court's decision did not undermine the rehabilitative focus of the CHINS statutory scheme; rather it reinforced that the time for parents to rehabilitate themselves is during the CHINS process, prior to the filing of the termination petition. Id. at 1230. The Court opined that the termination statutes do not require the court to give a parent additional time to meet obligations under a Parent Participation Plan. Id. The Court noted that Mother had been court ordered to treatment by a criminal court as a condition of continued probation and that her failure to comply would have resulted in imprisonment. Id. The Court also rejected the suggestion that the responsibility for Mother's failure to achieve and maintain sobriety in a timely fashion belonged to either the trial court or DCS. Id. at 1231. The Court stated that the responsibility to make positive changes must stay on the parent, and, if the parent feels the services ordered by the court are inadequate to facilitate the changes required for reunification, then the onus is on the parent to request additional assistance from the court or DCS. Id.

In **In Re A.I.**, 825 N.E.2d 798 (Ind. Ct. App. 2005), the Court affirmed the termination judgment and found that there was "little doubt that the parties' serious substance abuse addictions detrimentally affected or greatly endangered" the child. Id. at 811, 817. Among the substance abuse evidence, the Court noted the following: (1) Mother checked herself into substance abuse treatment three times, but left each time before completing the program; (2) Mother had abused Klonopin, morphine, Oxycontin, and Lortab and used marijuana, cocaine, alcohol and methamphetamine; (3) a substance abuse facility staff person believed that Mother's dependence was at a very high level, that Mother needed intensive treatment, and that Mother would die if she did not quit substance abuse; (4) Mother had ingested 25-30 Lortabs on one of the days of the termination trial; (5) the parents tested positive for drug use in random tests. Id. at 810-11.

In **In Re D.L.**, 814 N.E.2d 1022 (Ind. Ct. App. 2004), the Court affirmed the judgment terminating Mother's parental rights to her younger child and reversed and remanded the trial court's judgment that Mother's parental rights regarding her older child should not be terminated. Id. at 1024. The remand instructed the trial court to enter an order terminating Mother's rights to the older child. The Court opined that OFC proved by clear and convincing evidence that the conditions resulting in removal would not be remedied, and the trial court's finding on this point was not clearly erroneous. Id. at 1028. The Court noted the following evidence in support of its conclusion: (1) Mother had missed scheduled sessions of her drug treatment programs and tested positive for drugs; (2) Mother tested positive for cocaine just a month before the termination hearing after the children had been

removed from her for almost two and one-half years; (3) Mother testified that she relapses every two months; (4) despite Mother's professed desire to be reunited with her children, she has yet to kick her drug habit. Id.

Failure to Cooperate with Services

In **In Re E.M.**, 4 N.E.3d 636 (Ind. 2014), the Supreme Court affirmed the trial court's order terminating Father's parental rights. Id. at 649. The Court held that the trial court's findings that Father "denied all services offered" was proper, noting the following: (1) Father was hostile and verbally abusive to service providers; (2) Father denied that any domestic violence had occurred even though police had identified him as the aggressor in an incident where he bit Mother's face and Mother stabbed him; (3) Father failed to appear for all but the first two CHINS hearings; (4) Father attended only two domestic violence counseling sessions and only one visit with the children after they were removed from home. Id. at 644-45.

In **K.T.K. v. Indiana Dept. of Child Services**, 989 N.E.2d 1225 (Ind. 2013), the Supreme Court found that the evidence clearly and convincingly showed that there was a reasonable probability that the conditions which resulted in the children's removal or the reasons for placement outside Mother's home would not be remedied. Id. at 1234. The Court noted the following evidence, inter alia: (1) after the children's removal, DCS referred Mother to Community Mental Health Center for substance assessment, treatment, and monitoring but Mother did not show up for that appointment; (2) Mother failed to participate in the recommended parenting classes at that time; (3) between the children's removal in October 2009 and her incarceration in January 2010, Mother knew that the children were wards of the State, yet she inconsistently participated in DCS' services and failed to cooperate with or to return phone calls from the guardian ad litem; (4) when Mother was released from prison in July 2010, she told the case manager that she was willing to complete the available services, but Mother began drinking again two weeks after her release, which led to her second incarceration that year. Id. at 1233.

In **B.H. v. Indiana Dept. of Child Services**, 989 N.E.2d 355 (Ind. Ct. App. 2013), 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 that the conditions leading to the children's removal and continued placement outside Mother's care would not be remedied. Id. at 366. The Court noted the following evidence, inter alia: (1) Mother failed to fully participate in or benefit from the wide variety of services offered; (2) even when given a second chance by the trial court's denial of an earlier termination petition, Mother's

participation and compliance did not improve; (3) Mother made little to no progress in areas of concern and did not demonstrate an understanding of the children's needs required to parent them appropriately; (4) a social worker who conducted Mother's parenting assessment testified that the children were at risk of being abused if returned to Mother's care, and that Mother was not likely to benefit from the services being offered to her because of her low cognitive functioning and emotional immaturity; (5) Mother refused to participate in individual counseling and missed nearly half of her intensive parenting-skills course. Id. at 365.

In **A.D.S. v. Indiana Dept. of Child Services**, 987 N.E.2d 1150 (Ind. Ct. App. 2013), the Court affirmed the termination judgment, finding that there was sufficient evidence to support it. Id. at 1159. The Court was satisfied that clear and convincing evidence supported the trial court's findings, and that the findings supported the conclusion that there was a reasonable probability that the reasons for the children's placement outside Mother's home would not be remedied. Id. at 1158. The Court noted the following evidence, inter alia, in support of the trial court's conclusions and judgment: (1) Mother had failed to adequately complete a substance abuse assessment; (2) Mother had relapsed twice after undergoing inpatient treatments; (3) Mother had failed to complete her court-ordered domestic violence classes. Id. at 1157-58.

In **In Re D.K.**, 968 N.E.2d 792 (Ind. Ct. App. 2012), the Court affirmed the termination judgment and held that there was clear and convincing evidence that the conditions that led to the child's removal and continued placement outside Mother's care would not be remedied, as over a two year period, Mother never completed any of the recommendations or requirements set forth in the CHINS dispositional order. Id. at 798. The Court noted that: (1) Mother never completed a parenting class, despite many opportunities; (2) Mother failed to maintain a stable residence, and lived in no fewer than eight places over two years, and Mother even testified that she didn't "stay in one place."; (3) Mother wasted her opportunity to be reunited with the child in the group home, and instead, chose to violate the group home's rules, resulting in her expulsion from the home; (4) Mother continued to display a lack of interest in the child by declining DCS's interstate assistance in getting the child to live with Mother while she was in Louisville. Id. at 798-99.

In **In Re D.B.**, 942 N.E.2d 867 (Ind. Ct. App. 2011), the Court reversed the juvenile court's judgment terminating Father's parental rights. Id. at 875. The child and her five siblings were taken into custody by DCS when Mother was arrested. Father was located and began visiting the child but did not get involved in services because Mother was "on track" with regaining custody of the child. Upon learning of Mother's subsequent arrest and incarceration, Father began participating in parenting classes, individual and family counseling, home-based services, and substance abuse classes in order to gain custody of the

child. After first testing positive for marijuana, Father completed six months of clean random drug screens following his successful completion of the substance abuse classes. The child was placed in Father's care, but his utilities were cut off so he and the child temporarily moved in with extended family members in Illinois because it was warm there. Father lied to caseworkers, allowing them to believe that he and the child still lived in his apartment in Indiana DCS removed the child from Father's custody because Father informed the child's therapist that he planned to take the child to his family's home in Illinois. An interstate compact placement agreement was sought by DCS but ultimately denied by Illinois. The Court opined that a thorough review of the record revealed that the trial court's finding that Father had tested positive for marijuana *throughout the case* is not supported by clear and convincing evidence, in that: (1) although Father tested positive for marijuana at the beginning of the CHINS case, he did not test positive on any subsequent drug screens throughout the remaining two years of the underlying proceedings; (2) Father successfully completed a substance abuse program and thereafter submitted to six consecutive months of drug screens; (3) the LCDCS case manager explained that there were some "initial issues" with marijuana, but Father thereafter "tested clean" for six months and LCDCS "dismissed" that service; (4) Father confirmed that he had not used marijuana since he tested positive. Id. at 873. The Court also opined that the juvenile court's findings that Father "did not participate in individual counseling" and was "sporadic with his visitation" are also not supported by the evidence, in that: (1) the record reveals Father successfully completed parenting classes and consistently participated in individual counseling for over a year until LCDCS cancelled this service due to Father's relocation to Illinois; (2) the family case manager admitted Father had missed only six scheduled visits out of forty-one scheduled visits throughout the entire case; (3) Father acknowledged missing several scheduled visits, but explained his missed visits were due to rescheduling requests by the visitation office, transportation problems, and Father's work commitments. Id. at 873-74. The Court said that the law makes abundantly clear that termination of a parent-child relationship is an extreme measure to be used only as a last resort when all other reasonable efforts have failed. Given the circumstances, the Court did not believe this case has reached the "last resort" stage. Id. at 875.

In **In Re A.K.**, 924 N.E.2d 212 (Ind. Ct. App. 2010), the Court concluded that clear and convincing evidence supported the trial court's judgment terminating Mother's and Father's rights to the child. Id. at 224. The Court observed that the child's developmental delay and poor hygiene when she was taken into DCS custody suggests that Father did not know how to properly care for the child. Id. at 223. The Court also noted the following evidence concerning Father that supported the termination judgment: (1) Father tested positive for marijuana and failed to take two random drug screens; (2) Father's refusal to participate in A.A. or N.A. reflected poorly on his stated goal of reunification with the child; (3) the DCS caseworker testified that Father did not complete a domestic violence class or an additional

parenting class as ordered by the court. Id. at 222-23. The Court noted that Father had actively participated in family therapy and visitation with the child, but the child feared Father and her behavioral problems escalated after visitation with Father. Id. at 223-24. The Court observed that Father still had not demonstrated that he had the knowledge to properly care for the child. Id. at 224.

Visitation Issues

In **In Re D.B.**, 942 N.E.2d 867 (Ind. Ct. App. 2011), the Court reversed the juvenile court's judgment terminating Father's parental rights and remanded the case for further proceedings under the CHINS orders. Id. at 875. The Court found that the juvenile court's determination that continuation of the parent-child relationship posed a threat to the child's well-being was without evidentiary support. Id. at 874. The Court noted the following evidence on Father's visitation with the child: (1) Father had missed only six out of forty-one scheduled visits; (2) Father explained that his missed visits were oftentimes due to a request by the office to change his regularly-scheduled Thursday visits to some other date which Father could not accommodate due to his work schedule with the temporary agency; (3) Saturday visits took place in a different office, which was not on the public bus route and Father lacked a car since he had given the family car to his wife when they separated; (4) Father wanted to see the child in December and had a gift for her, but was told the Christmas visit would have to wait until the following week when Father's work commitment made it impossible to switch to a different date as requested by the office. Id. at 873-74.

In **In Re A.K.**, 924 N.E.2d 212 (Ind. Ct. App. 2010), the Court affirmed the trial court's termination judgment. Id. at 224. The Court concluded that DCS presented clear and convincing evidence that continuation of the parent-child relationship between Father and the child posed a threat to the child's well-being. Id. On the issue of Father's visitation with the child, the Court noted the following evidence in support of the judgment: (1) Father actively participated in visitation and had been trying to find ways to connect with the child through toys; (2) the therapist observed that the child was excited to see Father, appropriately physically affectionate toward Father, and had commented on her love for Father; (3) the Court Appointed Special Advocate and family consultant testified that the child had indicated that she was afraid of Father; (4) the therapist opined that the child was secure in her attachment to her foster family and was struggling with the idea of reunification with Father; (5) the child's behavioral problems escalated after she has had visitation with Father; (6) the child's level of anxiety had increased as visitation with Father continued; (7) the foster mother testified that, after visitation with Father, the child acted

aggressively, had nightmares, did not sleep well, and urinated in odd places; (8) the child's therapist testified that she asked for Father's visitation to be decreased because of the child's "continual acting out around the visits." Id. at 223.

In **Lang v. Starke Cty. Office of Fam. Children**, 861 N.E.2d 366 (Ind. Ct. App. 2007), the Court affirmed the judgment terminating the father's parental rights. Id. at 379. Father had not visited the children for over two years because he refused to comply with DCS conditions of not using corporal punishment and not discussing termination proceedings with the children. The Court noted that Father's inaction regarding visitation reflected his lack of commitment to preserve his relationship with his children and the fact that Father would rather not see his children than to see them with imposed conditions spoke volumes of his commitment to remedying the problems that led to the children's removal. Id. at 373.

In **In Re E.S.**, 762 N.E.2d 1287 (Ind. Ct. App. 2002), the Court reversed the trial court's termination order because there was insufficient evidence to support it. Id. at 1288. DFC did not provide Mother with any services, but Mother sought assistance on her own. She attended parenting classes, at which her instructor reported that she excelled. Mother also regularly attended counseling. In addition, the trial court had terminated Mother's visitation with the child due to the child's deteriorating behavior following visits, but visitation was never resumed. The Court noted Mother's assertion that the child changed foster homes, was put on psychotropic medication, and changed therapists and therapy methods after Mother's visitation was terminated. Id. at 1291. The Court said, given that visitation was never resumed after the changes in the child's life, there was insufficient evidence to prove that maintenance of the parent-child relationship posed a threat to the child's well-being. Id. at 1292.

Parent-Child Bonding Issues

In **In Re E.M.**, 4 N.E.3d 636 (Ind. 2014), the Supreme Court affirmed the trial court's order terminating Father's parental rights to his two children, who had been removed from home for nearly three and one half years. Id. at 649. The children were in early infancy and barely one year old at the time of the removal, and Father visited them only once after their removal. The Court recognized that Father's incarceration had played a substantial role in the lengthy delay and his failure to bond with the children, but said that incarceration alone cannot justify "tolling" a child welfare case. Id. at 649. The Court noted that Father had nearly a year before his incarceration to engage in services and bond with the children, but failed to do so. Id.

In **In Re S.S.**, 990 N.E.2d 978 (Ind. Ct. App. 2013), the Court affirmed the juvenile court's termination judgment, concluding that under the facts and circumstances of this case, the court did not deny Mother due process of law when it denied her motion for continuance. Id. at 985-86. Among the evidence in support of this conclusion was that: (1) Mother had voluntarily left her three children and had not seen them for ten months; and (2) the guardian ad litem testified that he "would be floored if there was...any bond whatsoever based upon the absence of the parent." Id. at 985.

In **In Re I.A.**, 934 N.E.2d 1127 (Ind. 2010), the Court reversed the trial court's judgment which had terminated Father's parental rights. Id. at 1136. The Court concluded that DCS had failed to prove by clear and convincing evidence that there was a reasonable probability that by continuing the parent-child relationship, the emotional or physical well-being of the child was thereby threatened. Id. at 1136. As an alternative ground for terminating Father's parental rights, the trial court determined that continuance of the relationship posed a threat to the child's well-being because Father had "not bonded" with the child. Id. at 1135. The Court observed that the trial court and DCS apparently are referring to what they perceive as insufficient emotional attachment and interaction between Father and child. Id. The Court noted that the record certainly demonstrated that Father's parenting skills are lacking, but a case plan for reunification was never developed for Father indicating what was expected of him. Id. The Court also noted that, other than a parent aide, no services were provided to assist Father in developing effective parenting skills. Id. at 1135-36. The Court saw "little harm in extending the CHINS wardship until such time as Father has a chance to prove himself a fit parent for his child." Id. at 1136.

In **In Re R.H.,** 892 N.E.2d 144 (Ind. Ct. App. 2008), the Court reversed and remanded the trial court's termination of Father's parental rights with respect to his son. Id. at 145. The Court held that, although evidence of Father's lackluster efforts to communicate and visit with his son, Father's refusal to relocate to Indiana from Alaska, and his son's strong bond with his grandparents with whom he had lived since August 2004, would be relevant to a determination of custody and/or guardianship, it was insufficient on its own to support the radical act of severing the parent-child relationship. Id. at 151. The Court opined that the termination order essentially rested on three conclusions: (1) Father had not made a sufficient effort to communicate and bond with his son; (2) Father had refused to move to Indiana; and (3) it would be traumatic to the child to have to leave his grandparents, to whom he is strongly bonded, to live with Father, with whom he is not bonded. Id. at 150. The Court observed that, (1) Father completed all court-ordered services; (2) there were successful outcomes to those services in that his psychological evaluation revealed no problems, he completed two multi-week parenting classes, his residence was found to be a suitable place for his son to live, and he was found to have a suitable support system in Alaska consisting of his father and stepmother; (3) Father attended all hearings either in

person or telephonically; and (4) Father stayed in touch with his son's case managers and Guardian ad Litem. Id. Accordingly, the Court found that the trial court's findings and conclusions did not support a decision to terminate Father's parental rights, and remanded the case, leaving the trial court with the option of holding a hearing to determine issues of custody and guardianship. Id. at 151.

In **Castro v. Office of Family and Children**, 842 N.E.2d 367 (Ind. Ct. App. 2006), the Court affirmed the termination judgment regarding incarcerated Father who was serving a forty year sentence for criminal deviate conduct and burglary. Id. at 378. The trial court's findings included that Father had held the child once while Father was in jail, had ten visits with the child between her birth and the time she was eighteen months old, and had written four letters which had been conveyed to the child through her therapist. Id. at 371. The Court cited **Matter of A.C.B.**, 598 N.E.2d 570, 572 (Ind. Ct. App. 1992), stating the Court recognized that "[i]ndividuals who pursue criminal activity run the risk of being denied the opportunity to develop positive and meaningful relationships with their children." **Castro** at 374.

In **In Re D.L.**, 814 N.E.2d 1022 (Ind. Ct. App. 2004), the Court concluded that the trial court's denial of the termination petition regarding Mother's older child was clearly erroneous and reversed and remanded the case with instructions to enter a termination order regarding the older child. Id. at 1030. The Court noted that the older child was bonded to Mother and the foster parents. Id. at 1029. The younger child was bonded to the foster parents who desired to adopt both children. Id. The Court deemed the bonding of the older child to the mother was inconsequential, as it was likely the result of the age difference between the two children. Id. at 1030.

In **In Re Involuntary Term. of Parent-Child Rel.**, 755 N.E.2d 1090 (Ind. Ct. App. 2001), the Court did not find an abuse of discretion by the trial court in denying Mother's request for a stay of the termination order. The Court noted the following evidence: (1) Mother never had nor attempted to have a relationship with the children; (2) Mother consistently missed visitation with the children; (3) Mother did not inquire of the foster mother concerning the children's progress; (4) the children had bonded to the foster mother and to each other. Id. at 1098.

Housing, Hygiene, Safety, and Stability

In **Bester v. Lake County Office of Family**, 839 N.E.2d 143 (Ind. 2005), the Supreme Court reversed the trial court's judgment terminating Father's parental rights. Id. at 153.

The Court opined that the trial court's finding that Father has neither established himself as independent nor obtained his own residence provided little guidance concerning whether these facts demonstrated that child's well-being would be threatened by Father's custody. Id. at 150. The Court reviewed the evidence regarding Father's living arrangements over the relevant period and found that the trial court's findings revealed no causal connection between Father's living arrangements and any adverse impact those arrangements might have on child. Noting the trial court had not concluded that Father was unable or unwilling to provide child with an adequate home or that the homes of his relatives where he had lived were unsuitable for child, the Court stated, "the trial court's criticism was that Father did not have 'his own residence.'" Id. at 150-51. The Court concluded that the evidence offered on Father's housing did not support a reasonable inference that Father's living arrangements and his alleged lack of independence pose or have ever posed a threat to the well-being of his child. Id. at 151.

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. Id. at 366. The reasons for the children's removal included that Mother and the children had been living in a cluttered, dirty house with trash, food, animal feces, and soiled diapers throughout and Mother's subsequent eviction had resulted in nowhere for her and the children to live. Affirming the trial court's 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, the Court noted: (1) Mother had moved twelve times since the children's removal and she paid for only one of those residences; (2) at the time of the termination hearing, Mother was unemployed and financially supported by her parents; (3) at the time of the termination hearing, Mother was living with her brother and sister in a two-bedroom apartment and Mother testified that the children could not live there. Id. at 365-66.

In **In Re D.K.**, 968 N.E.2d 792 (Ind. Ct. App. 2012), the Court held that there was sufficient clear and convincing evidence to support the termination of Mother's parental rights. Id. at 799. The Court noted, inter alia, that Mother lived in no fewer than eight places over a period of two years, and Mother even testified that she did not "stay in one place." Id. at 798-99. The Court said that Mother's evidence that she had obtained a new apartment and put a down payment on the rent was not, by itself, sufficient evidence to reverse the trial court's judgment. Id. at 799. Since a parent's habitual conduct must be considered in determining whether to terminate parental rights, a last minute change in conditions does not necessarily trump evidence of years of a pattern of behavior. Id. The Court noted that Mother was highly unstable for two years, and this was her habitual pattern; there was no guarantee that her last minute improvement would last any longer than any of her previous living situations, especially given her current unemployment. Id.

In **Stewart v. Randolph County OFC**, 804 N.E.2d 1207 (Ind. Ct. App. 2004), the OFC arranged therapy, counseling, parenting classes, and other services to assist Mother and her children. Mother "had difficulty implementing what she learned" through services provided to her. Id. at 1212. OFC also helped provide transportation to various appointments, and the OFC homemaker made a schedule showing Mother how to keep her house clean, but Mother still missed appointments and failed to keep the house clean on a consistent basis. Id. at 1214. The Court found that the evidence supported the trial court's determination that all reasonable efforts had been made to avoid termination. Id.

In **In Re R.S.**, 774 N.E.2d 927 (Ind. Ct. App. 2002), the children were removed from Mother's home after the OFC caseworker determined that the residence was without electricity, running water or food. One of the children, age ten years, had contracted gonorrhea after sexual involvement with another child. The children were infested with lice, frequently absent from school, and lacked hygienic or social skills. The maternal aunt had provided a home for Mother and children "off and on." The Court opined that Mother was "historically unable to provide adequate housing and supervision for her children." Id. at 931. The Court found that the trial court's conclusions that the conditions leading to removal would probably not be remedied and that termination was in the children's best interests were supported by clear and convincing evidence. Id.

Child's Need for Permanence

In **In Re E.M.**, 4 N.E.3d 636 (Ind. 2014), the Supreme Court affirmed the trial court's order terminating Father's parental rights to his two children. Id. at 649. The older child was barely a year old and the younger child was in early infancy when they were removed by DCS. They had been removed for nearly three and one half years at the time of the termination trial. The Court opined that, while permanency is important in every termination case, it was particularly urgent in this case, as reflected in the trial court's pointed finding that "[t]he children cannot wait three years for a parent to comply " with services. Id. at 648. The Court held that it was not clearly erroneous for the trial court to conclude that, after three and a half years, Father's efforts came too late, and that the children needed permanency even more than they needed a final effort at family preservation. Id. at 649.

In **K.T.K. v. Indiana Dept. of Child Services**, 989 N.E.2d 1225 (Ind. 2013), the Supreme Court affirmed the trial court's judgment terminating Mother's parental rights and noted the trial court's conclusion that the children's need for permanency was paramount. Id. at 1235. The Court observed that since the children were adjudicated wards of DCS, they had been placed in five different living environments during a period of sixteen months, and at times

had been separated. The Court noted the following evidence on permanency: (1) testimony of the children's therapist that the uncertainty of their placement and future had been troublesome to them; (2) testimony of the psychologist that the children's best interests would be served by allowed them to remain in Foster Parents' care; (3) testimony of the case manager and the guardian ad litem that the children needed a permanent home; (4) confirmation by the case manger that children's need for permanency would be satisfied because Foster Parents had expressed a desire and willingness to adopt the children. Id.

In **In Re J.M.**, 908 N.E.2d 191 (Ind. 2009), the Supreme Court affirmed the trial court's denial of the State's petition to terminate the parental rights of parents who were both incarcerated at the time of the termination hearing, finding that the trial court's judgment was not clearly erroneous. Id. at 196. The Court observed that the evidence from the record supported the trial court's conclusion that Mother's and Father's "ability to establish a stable and appropriate life upon release can be observed and determined within a relatively quick period of time. Thus, the child's need of permanency is not severely prejudiced." Id.

In **In Re G.Y.**, 904 N.E.2d 1257 (Ind. 2009), the Supreme Court reversed the trial court's order terminating incarcerated Mother's parental rights. Id. at 1266. The Court noted the trial court's reason that termination was in the child's best interests because of his general need for "permanency" and "stability", based on the testimony of the State's caseworker and the child's Guardian ad Litem. Id. at 1265. The Court further noted the Guardian ad Litem's recommendation that there be some future agreement that would allow the child to have contact with his birth mother, based on the Guardian ad Litem's observation that the child and Mother had a bond and their interaction was generated on both sides. Id. The Court said that: (1) permanency is a central consideration in determining the best interests of a child; (2) in this case the child is under the age of five and Mother's release from prison is imminent; (3) given the highly positive reports about the quality of the placement, the Court was unable to conclude that continuation of the CHINS foster care arrangement here will have much, if any, negative impact on the child's well-being. Id. The Court did not find the child's need for immediate permanency through adoption to be a sufficiently strong reason, either alone or in conjunction with the court's other reasons, to warrant a conclusion that termination of Mother's parental rights was in the child's best interests. Id. at 1265-66.

In **H.G. v. Indiana Dept. of Child Services**, 959 N.E.2d 272 (Ind. Ct. App. 2011), the Court reversed the trial court's termination judgment, finding that DCS failed to prove that termination was in the children's best interests. Id. at 294. On the subject of permanency, the Court noted the testimony of the case manager and Court Appointed Special Advocate that the children needed permanency, but said that the mere invocation of words like "stability" or "permanency" does not suffice to terminate parental rights. Id. at 293. The facts of the case show that Mother and Father of the oldest child were still incarcerated at

the time of the termination hearing and Father of the two youngest children had only recently obtained full-time employment. The Court noted that in this case, each parent still has work to do before reunification would be possible, but they have shown willingness to continue working toward reunification and they clearly have a bond with the children. Id. The Court noted that the parents have all had issues with drug use and run-ins with the law, but they have each made significant efforts at self-improvement. Id. The Court opined that because no adoptive family had been identified and the children were placed in a new foster home shortly after the termination hearing, there appeared to be little harm in allowing the parents to continue to work toward reunification. Id. The Court opined that this was especially true in the oldest child's case, as he had expressed in unwillingness to be adopted. Id.

In **A.J. v. Marion County Office of Family**, 881 N.E.2d 706 (Ind. Ct. App. 2008), in affirming the trial court's finding that termination of Mother's parental rights was in the children's best interests, the Court addressed the trial court's finding that the children needed permanency and stability the parents were unable to provide. Id. at 718. The Court held that this finding was supported by the testimony of the children's DCS caseworker and Guardian ad Litem. Id. The Guardian ad Litem testified that she thought (1) the behavioral problems, as well as some of the other problems, would be rectified if there was a permanency with these children; (2) the children needed to be somewhere they knew they were going to stay and feel comfortable; and (3) the parents had not been engaged with the children, had not been visiting them, and had not moved forward on reunification over this long period of time. Id. The caseworker testified (1) termination was in the children's best interests because they needed a permanent home; (2) the children needed stability and a "forever family;" and (3) the children had waited a long time in hopes of the parents completing services or for some form of reunification and that had not happened. Id. Both the Guardian ad Litem and caseworker testified that they had visited the children in their pre-adoptive foster homes and the children were doing well; and that the foster parents were committed to adoption, engaged in the children's lives, and were addressing the children's emotional needs. Id.

In **McBride v. County Off. Of Family & Children**, 798 N.E.2d 185 (Ind. Ct. App. 2003), the Court affirmed the termination of parental rights on evidence, inter alia, that the children needed permanency. Both the Court Appointed Special Advocate and DCS caseworker testified that permanency was needed. Id. at 203. The children had been removed from their parents three times and had been in and out of the system for at least 75 percent of their lives. The three children had lived in nine foster homes and one shelter. Id. at 193.

Child's Desires and Fears

In **K.T.K. v. Indiana Dept. of Child Services**, 989 N.E.2d 1225 (Ind. 2013), the Supreme Court affirmed the trial court's order terminating Mother's rights to her three children, ages ten, seven, and two years of age at the time of the order. Id. at 1236. The Court said that there was ample evidence to support the trial court's finding that the children's emotional and physical development would be threatened by returning them to Mother's custody. Id. Among the evidence the Court noted was that the ten-year-old child had written to the trial court in which he: (1) begged the court to allow the children to remain with Foster Parents (2) recounted instances in which he observed Mother snorting drugs in the bathroom and then he "had to pick the lock and get in there"; and (3) stated that he knew Mother smoked marijuana, and that Mother didn't take care of him. Id. The Court also noted that the seven-year-old child told a psychologist evaluator that: (1) she did not feel safe with Mother because Mother drank beer; and (2) recalled an incident when she fell into a fire pit when she believed that Mother was supposed to be watching her. Id.

In **In Re N.Q.**, 996 N.E.2d 385 (Ind. Ct. App. 2013), the Court reversed the trial court's termination order and remanded for a hearing which fully considers the parents' current circumstances as well as their habitual patterns of conduct. Id. at 396. The Court said that the crux of DCS's presentation of evidence was that the children, who were ages six, seven, eight, and twelve at the time, did not want to leave their foster parents and be returned to their parents' care. Id. at 395. Quoting In Re D.B., 942 N.E.2d 867, 875(Ind. Ct. App. 2011), the Court said that, although the children are thriving in a loving pre-adoptive foster home, "a parent's constitutional right to raise his or her own child may not be terminated solely because there is a better home available for the child." N.Q. at 395.

In **Lang v. Starke Cty. Office of Fam. Children**, 861 N.E.2d 366 (Ind. Ct. App. 2007), the Court affirmed the termination order, holding that the finding that termination was in the children's best interests was supported by the evidence and was not clearly erroneous. Id. at 374. Among the evidence noted by the Court was the testimony of DCS caseworkers and the Court Appointed Special Advocate that termination was in the children's best interest because the children did not wish to return home due to their fear of their father and that termination would ease the children's anxiety about the possibility of returning home in the future. Id.

In **Ramsey v. Madison County Dept. of Family**, 707 N.E.2d 814 (Ind. Ct. App. 1999), the Court affirmed the trial court's termination judgment. Id. at 818. In response to Father's

claim that OFC had not presented clear and convincing evidence, the Court noted: (1) Father was convicted of child molesting and incest, and the child, age seven at the time of the offenses, was the victim of these crimes; (2) due to Father's conviction and because the child victim was under the age of sixteen, there was prima facie evidence that the conditions that resulted in the child's removal from Father would not be remedied and continuation of the parent-child relationship posed a threat to the child's well-being; (3) there was evidence that the child feared being abused by Father again; (4) the child exhibited behavioral and emotional problems and would require counseling indefinitely; (5) Father had sent the child letters and pictures despite the court no contact order. Id. at 817.

In **Matter of A.N.J.**, 690 N.E.2d 716 (Ind. Ct. App. 1997), the Court affirmed the trial court's judgment terminating Father's parental rights. Id. at 722. Among the evidence which the Court cited in support of the trial court's finding that there was a reasonable probability that the conditions resulting in the children's removal would not be remedied was the Guardian ad Litem's testimony that the children had bonded with their foster family and had no interest in living with Father. Id. at 721.

In **Stone v. Daviess Co. Div. Child Serv.**, 656 N.E.2d 824 (Ind. Ct. App. 1995), the Court was not persuaded by Father's argument that it was error to terminate the parent-child relationship against the wishes of one of the children. Id. at 832. The facts showed that the thirteen-year-old child had been deposed with his parents present when he was eleven years old. The child stated in the deposition that he did not want the parent-child relationship to be terminated. Analogizing termination proceedings to custody proceedings pursuant to IC 31-1-11.5-21(a) (recodified at IC 31-17-2-8), the Court noted that the child's wishes in a custody dispute are merely one of the six factors enumerated by statute that the trial court must consider in making a best interests determination. Id. The Court concluded that other evidence that the child had bonded with the foster parents and wanted to stay with them, coupled with the circumstances of the child's deposition, could have reasonably led the trial court to afford little or no weight to the child's stated wishes. Id. The two Court Appointed Special Advocates and the Guardian ad Litem did not raise any issue regarding the child's wishes, and all three recommended termination. Id. The Court found that the representation by the Court Appointed Special Advocates and Guardian ad Litem was sufficient to protect the rights of the children. Id.

Child's Special Needs

In **In Re S.S.**, 990 N.E.2d 978 (Ind. Ct. App. 2013), the Court concluded that, under the facts and circumstances of the case, the juvenile court did not deny Mother due process of law when it denied her motion for a continuance of the termination hearing. Id. at 985-86. The Court affirmed the order terminating Mother's parental rights to her three children. Id. at 986. The Court noted that, at the time of the DCS assessment, (1) the oldest child, age four, was aggressive and non-verbal; (2) the middle child, age two, had untreated ringworm and significant bruising on his face due to being bitten by the oldest child; (3) Mother had been overmedicating the oldest child with seizure medication, there was no prescription for a refill, and there were only a few days left of the medication; and (4) the youngest child, age eight months, needed to be fed through a G-tube, Mother was unable to pass G-tube training and unable to feed him, and he failed to gain weight under her care. Id. at 980-81. In support of the juvenile court's judgment, the Court noted evidence that, after the CHINS adjudication, although the children had very bad teeth, Mother brought candy and sugary drinks to her visits to bribe them into behaving. Id. at 985. The Court further noted evidence that Mother disobeyed repeated instructions to feed the youngest child slowly through his G-tube during visits and could not feed him without assistance. Id. at 983. The Court also found the following evidence on the children's improvement since their removal from Mother "most compelling": (1) the oldest child had been properly diagnosed and medicated and was "like a completely different child"; (2) the middle child had some developmental delays but was working with a therapist and doing well; (3) the youngest child weighed twenty-four pounds and was "pretty healthy." Id. at 985.

In **In Re H.L.**, 915 N.E.2d 145 (Ind. Ct. App. 2009), the Court affirmed the termination judgment, concluding that DCS had established by clear and convincing evidence the requisite elements to support the termination of Father's parental rights. Id. at 150. The child had been diagnosed as suffering from cystic fibrosis, had been treated for pneumonia, and had experienced multiple hospitalizations for "failure to thrive" while in Mother's care before the CHINS petition was filed. The Court noted the following evidence on the child's medical needs which supported the trial court's finding that termination was in the child's best interests: (1) the child required extraordinary medical care and supervision in seclusion; (2) the child's visitors must be strictly limited and carefully screened for recent exposure to illnesses; (3) the child required twice-daily "breathing treatments", a feeding tube, and a strict regimen of medications; (4) the child must be regularly examined by a liver specialist, a pulmonologist, and a gastroenterologist. Id.

In **In Re M.S.,** 898 N.E.2d 307 (Ind. Ct. App. 2008), the Court reversed and remanded the trial court's order terminating Mother's parent-child relationship with her oldest child, because there was insufficient evidence that termination was in the child's best interests. Id. at 314. The child had severe behavioral difficulties, including Pervasive Personality Disorder, which is "autistic-like but it is not as severe. And autism is lack of social skills, behavioral difficulty." Id. at 309. People who suffer from this disorder require a very structured environment and a substantial commitment to childcare and supervision by a caregiver. Id. The disorder is controlled with behavior management and medication. Id. The Court emphasized (1) that the problem here is not Mother's parenting skills or her love for her children, and she has not been reluctant to comply with DCS' suggested service, but instead, the problem is the child's special needs; and (2) rather than taking the radical action of severing the parent-child bond prematurely, DCS and the courts should be focused on helping the child to become stabilized and reevaluating his best interests, when and if stabilization occurs. Id. at 314. In arriving at its conclusion, the Court closely reviewed the record, viewed the evidence most favorable to the judgment, and noted: (1) everyone who testified agreed that Mother loves her children and did everything that was asked of her; (2) DCS witnesses testified that the reason for DCS' intervention was the child's, rather than Mother's, behavior, and the heart of the family's struggle was not Mother's parenting skills, but the child's special needs; (3) the Center's social worker testified that the child required a lot of structure and, a lot of times, he required one-on-one staff attention, especially when he was getting agitated; (4) DCS argues that the child would be best served in the long run by perhaps adoption as an only child in a very specialized set of circumstances, but DCS' own witnesses testified that the child will need to remain a resident of the Center until he is stabilized; (5) the status of the child's relationship with Mother affects neither his ability to remain in the Center nor the fact that he continues to need specialized behavioral and medical assistance, and DCS will be paying for the child's stay at the Center regardless of whether the parental relationship is terminated; (6) at the time of the termination hearing, the child was not stabilized, he was taking numerous prescription medications, and his psychiatrist and personnel at the Center were still experimenting with dosage levels, and trying to determine whether they could wean him off of some of the drugs altogether; (7) DCS argued that termination was appropriate because the child may never be able to live in a home with other children, but DCS' witnesses acknowledged that there is no way for anyone to know what the child and Mother will be able to handle once the child is stabilized, and that DCS' plans for the child are similarly unknown, in large part because no one knows when the child will be released from the Center. Id. at 311-14.

In **In Re A.B.**, 887 N.E.2d 158 (Ind. Ct. App. 2008), the Court affirmed the termination of Mother's parental rights to her child whom, prior to the filing of the CHINS petition in this matter, Mother had hospitalized at the age of about six years because of the child's out-of-control and aggressive behavior. Id. at 170. On appeal of the termination, the Court found,

as a matter of first impression, that IC 31-34-1-16 does not preclude the initiation of termination proceedings where, although prior to initiation of CHINS proceedings Mother had voluntarily placed the child in residential treatment, termination proceedings were not initiated solely because Mother was unable to provide the care the child required. Id. at 163-64. The Court stated that it left unanswered, perhaps for the Legislature or DCS, the question of how the State would provide long-term care for a CHINS where, under the statute, parental rights could not be terminated, but where the parents, through no fault of their own, were unable and permanently incapable of becoming able to care for their special needs child. Id. at 164 n.2. In making this finding, the Court noted, among other things: (1) DCS' involvement with Mother and the child stemmed from a referral DCS received while the child was residing at the residential treatment facility; (2) the referral alleged that the then six-year-old child had participated in inappropriate sexual conduct with her eleven-year-old brother; (3) following a preliminary inquiry, the trial court ordered that the child be deemed a CHINS and, thereafter, removed the child from Mother's care and custody and ordered the child be continued in placement at the residential treatment facility until she could be "placed in an appropriate Residential Treatment Program;" (4) for about four years following the CHINS determination, DCS attempted reunification by offering numerous services to the family including individual and family counseling, residential treatment, home based services, psychological evaluations, and visitation; and (5) nevertheless, Mother was unable to provide the child with the care and treatment she required. Id. at 163.

The A.B. Court also held that the trial court's findings that continuation of the parent-child relationship posed a threat to the child's well-being were supported by clear and convincing evidence. Id. at 167. Regarding the threat to the child's well being, the Court noted: (1) the psychologist's testimony as to how Mother struggled to meet her own personal and emotional needs; (2) specific examples of the child's repeatedly experiencing significant regression after spending unsupervised time at home with Mother; (3) testimony of the treatment facility's therapist as to Mother's difficulty managing her emotions so as not to affect the child; and (4) testimony of the Guardian ad Litem that there had been tension between Mother and the child not just based on the child's negative behavior and that she felt the child "would continue to struggle greatly if she [were] returned to" Mother's care. Id. at 166-67.

Parent's Physical Illness/Condition

In **In Re M.W.**, 942 N.E.2d 154 (Ind. Ct. App. 2011), the Court reversed the trial court's termination of Mother's parental rights. Id. at 161. DCS had filed a termination petition, and the trial court, having heard one day of evidence, noted that DCS had not met its burden

of showing by clear and convincing evidence that the parents' rights should be terminated. Id. at 156. Shortly thereafter the parties filed an amended disposition/parental participation plan. Id. at 157. The Amended Plan provided in part that DCS agreed to continue the termination case and gave the parents one last chance to strictly comply with the court orders. Shortly thereafter, Mother suffered bleeding in her brain and a severe stroke, was hospitalized and placed in a rehabilitation facility for two and a half months, and then spent two months in a nursing home. Mother was partially paralyzed on her right side and used a walker, but was expected to make a full recovery within six to twelve months. The trial court held another hearing on the termination petition about seven months after Mother's stroke, and terminated Mother's parental rights. The Court observed that DCS purportedly gave Mother a second chance with the Amended Plan, and due to circumstances beyond her control, Mother had been unable to take advantage of that second chance due to her severe stroke. Id. at 160. The Court noted that Mother had moved into a shelter where she could reside with the child, was receiving Social Security disability payments, and was expected to fully recover from the stroke. Id. The Court likened Mother's situation to that of the incarcerated parents in **In Re J.M.**, 908 N.E.2d 191 (Ind. 2009), and opined that Mother's ability to establish a stable and appropriate life and properly parent the child can be observed and determined within a relatively short period of time. Id. at 160-61.

In **R.W., Sr. v. Marion Cty Dept. Child Serv.**, 892 N.E.2d 239 (Ind. Ct. App. 2008), the Court affirmed the juvenile court's termination judgment. Id. at 250. The three-year-old child had been found by police wandering around the alley behind the family home, naked and unsupervised, which resulted in the filing of the CHINS petition. Among the issues was Mother's inability to hear, exacerbated by her failure to maintain health coverage and keep appointments necessary to obtain hearing aids and by her refusal to learn sign language. The Court found that the juvenile court's determination that the reasons for the children's placement outside of the parents' home would not be remedied was supported by clear and convincing evidence and thus was not clearly erroneous. Id. at 249. The Court also noted that a thorough review of the record revealed that the juvenile court did not in any way base its determination to terminate Mother's parental rights upon the mere fact that Mother had a hearing disability. Id. The Court opined that the juvenile court properly considered Mother's refusal to take readily available steps to bridge the communication gap that seriously hindered her ability to care for her children. Id.

In **In Re D.Q.**, 745 N.E.2d 904 (Ind. Ct. App. 2001), the Court affirmed the trial court's denial of the termination petition with regard to Mother. Id. at 911. After the children had been removed due to neglect, Mother was diagnosed with Graves ' disease, and placed on medication. The evidence showed that the symptoms associated with Mother's Graves ' disease could have accounted for some of her negligent behaviors and history of irresponsibility, including her careless child-rearing practices. Many of the symptoms of the

disease had lessened, some had disappeared, and many improved to a greater degree by the time of the termination hearing. The trial court concluded that termination of parental rights would be inappropriate if the reasons for removal were based on a medical or physical condition that could be remedied by the administration of prescription drugs or other therapies. Id. at 910. The Court could not conclude that the trial court's determination of failure to prove termination requirements by clear and convincing evidence was contrary to law. Id. at 911.

Child's Improvement in Foster Care and Potential Adoption by Foster Parents

In **K.T.K. v. Indiana Dept. of Child Services**, 989 N.E.2d 1225 (Ind. 2013), the Supreme Court concluded that the evidence supported the trial court's finding that Mother was not able to provide for her three children and that termination was in the children's best interest, and affirmed the trial court's judgment which terminated Mother's parental rights. Id. at 1236. Among the evidence noted by the Court in support of the trial court's finding was: (1) a psychologist evaluator testified that the children were more bonded with Foster Parents than would normally be expected for the placement time period of about nine months; (2) the evaluator stated that the children's best interests would be served by allowing them to remain in Foster Parents' care; (3) the children's home-based therapist testified that the children were doing better since being placed in Foster Parents' home; (4) the therapist explained that the children were beginning to sense attachment, peace, and security with Foster Parents; (5) the case manager testified that Foster Parents had expressed a desire and willingness to adopt the children. Id. at 1235.

In **In Re N.Q.**, 996 N.E.2d 385 (Ind. Ct. App. 2013), the Court reversed and remanded the trial court's termination order, finding that there was insufficient evidence to support it. Id. at 387. The Court's review of the record revealed that the crux of DCS's presentation of evidence was that the four children, ages six, seven, eight, and twelve years, did not want to leave their foster parents and be returned to the care of their birth parents. Id. at 395. The Court said that, although DCS demonstrated that the children are thriving in a loving pre-adoptive foster home, "a parent's constitutional right to raise his or her own child may not be terminated solely because there is a better home available for the child", quoting **In Re D.B.**, 942 N.E.2d 867, 875 (Ind. Ct. App. 2011). **N.Q.** at 395.

In **B.H. v. Indiana Dept. of Child Services**, 989 N.E.2d 355 (Ind. Ct. App. 2013), the Court opined that there was clear and convincing evidence to support the trial court's determination that there was a reasonable probability that the conditions leading to the children's removal and continued placement outside Mother's care would not be remedied,

and affirmed the termination judgment. Id. at 366. Among the evidence noted by the Court was that: (1) when first placed in foster care, the older child, age twenty-eight months, 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, both children were violent and sometimes attacked each other if left alone; (3) at the time of the termination hearing, both children were thriving in foster care despite being diagnosed with post-traumatic stress disorder and attachment issues; (4) the foster parents wanted to adopt the children; (5) at the time of the termination hearing, the children were doing well in school and received counseling and developmental services. Id. at 358.

In **A.D.S. v. Indiana Dept. of Child Services**, 987 N.E.2d 1150 (Ind. Ct. App. 2013), the Court concluded that the totality of the evidence supported the trial court's determination that termination of Mother's parental rights was in the two children's best interests. Id. at 1159. The Court noted that the children had improved while residing with their current pre-adoptive caretakers, with whom the children were bonded and attached. Id. The Court observed that termination, allowing for a subsequent adoption, would provide the children with the opportunity to be adopted into a safe, stable, consistent and permanent environment where all their needs will continue to be met, and where they can grow. Id.

In **R.W., Sr. v. Marion Cty Dept. Child Serv.,** 892 N.E.2d 239 (Ind. Ct. App. 2008) found the evidence sufficient to support the determination that termination of Father's parental rights was in the child's best interests. Id. at 250. In doing so, the Court noted, among other things, that the child was happy, bonded with his pre-adoptive relative foster parent, and doing well in his foster home where he had spent more than one-half of his life. Id.

In **In Re Involuntary Term. Paren. of S.P.H.**, 806 N.E.2d 874 (Ind. Ct. App. 2004), the evidence showed that the two children had made significant progress and improvement in behavior since being placed in foster care. The children had been in foster care for fifteen months, and Father was not scheduled to be released from incarceration for another two or three years. The OFC had investigated placement with family members but based on Mother's drug use and easy access to the relative's home, the trial court properly found that such placement was not suitable. Id. at 882.

In **R.G. v. MCOFC**, 647 N.E.2d 326 (Ind. Ct. App. 1995), the Court affirmed the trial court's termination judgment. Id at 330. The child was born prematurely and was on a sleep apnea monitor and oxygen support from age six weeks through eighteen months. The Court noted the following evidence, inter alia, in support of the trial court's conclusion that termination was in the child's best interests: (1) the child had bonded with foster parents, with whom he had resided since the age of two weeks; (2) foster parents have provided a stable home for the child and planned to continue the child's therapy and medical

appointments with his developmental pediatrician; (3) foster parents had expressed a desire to adopt the child. Id at 329-30.

In **S.E.S. v. Grant County Dept. of Welfare**, 582 N.E.2d 886 (Ind. Ct. App. 1991), adopted and incorporated at 594 N.E.2d 447 (Ind. 1992), the Court rejected Mother's argument that termination was not in the best interest of the children because the children exhibited the same behavioral problems in foster care that they exhibited while in her custody. The Court noted evidence that the children had improved in foster care, though they still had many problems at the time of the hearing, and the children had regressed after visits with Mother. The Court noted that a child's "enormous progress" in foster care, and other situations, could be factors in termination, but each case has unique facts and there is no exclusive list of factors which must be present for a determination that termination of the parent-child relationship is in the child's best interest. Id. at 889.

VII. Appeals of Involuntary Termination Judgments

IC 31-32-15-1, which applies to termination proceedings, provides that appeals may be taken as provided by law. **IC 31-35-2-2** [terminations]; **IC 31-35-3-2** [terminations for individuals convicted of crimes]. Parties to the termination appeal include the Guardian ad Litem and Court Appointed Special Advocate. **See In Re Involuntary Term. of Parent-Child Rel.**, 755 N.E.2d 109, 1099 (Ind. Ct. App. 2001), in which the Court found that there is both statutory authority, **IC 31-35-2-7**, which states that if a parent objects to termination, the court shall appoint a Guardian ad Litem or Court Appointed Special Advocate, or both, for the child, and an Appellate Rule (Appellate Rule 17(A)) allowing the Guardian ad Litem or Court Appointed Special Advocate to be a proper party to a termination appeal. A putative or alleged father is also a party to a termination appeal. **See In Re Parent-Child Relationship of S.M.**, 840 N.E.2d 865, 872 (Ind. Ct. App. 2006). **See also IC 31-9-2-88(b)**, amended in 2011 to provide that "parent" for purposes of **IC 31-35-2** [involuntary termination statutes] includes an alleged father. The Indiana Rules of Appellate Procedure apply to termination appeals, and must be strictly followed. In **In Re D.L.**, 952 N.E.2d 209, 213 (Ind. Ct. App. 2011), the Court opined that parents had forfeited their right to appeal because they did not file a Timely Notice of Appeal. **See also Termination of Parent-Child Rel. v. DCS**., 4 N.E.3d 814, 819 (Ind. Ct. App. 2014), in which the Court concluded that, because Mother's Notice of Appeal was not timely filed, Mother had forfeited her right to appeal the termination order, and Mother's Appeal was dismissed. The Court urged the Indiana Supreme Court to consider allowing belated appeals for parents in termination cases. Id. at 820 n.1.

In **Parent-Child Rel. of I.B. v. Indiana Child Services**, 933 N.E.2d 1264, 1267 (Ind. 2010), the Court held that Indiana statutes dictate that the parents' right to counsel continues through all stages of the proceeding to terminate the parent-child relationship, including appeal. The Court also opined that, if a parent's lawyer in an involuntary termination proceeding is unable to locate the client despite due diligence and cannot get clear instructions from the client with respect to an appeal, the lawyer should not file a notice of appeal. Id. at 1270. The Court looked to the Rules of Professional Conduct to provide general guidance on this question, noting that: (1) Prof. Cond. R. 1.2 requires lawyers to abide by the client's decision as to the objectives to be pursued; (2) Prof. Cond. R. 1.3 requires a lawyer to act with reasonable diligence and promptness in representing a client; (3) Prof. Cond. R. 1.4(a) and comments 2-5 require the lawyer to maintain reasonable communication between the lawyer and the client so the client can participate effectively in the representation; (4) Prof. Cond. R. 1.4(b) requires the lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Id. at 1268-69. The Court opined that to sanction an appeal as a matter of course would not further the objective of bringing permanency to the child through the prompt resolution of termination proceedings. Id. at 1270.

In **Bester v. Lake County Office of Family**, 839 N.E.2d 143, 147 (Ind. 2005), the Court reiterated that when reviewing the termination of parental rights, the Court does not reweigh the evidence or judge witness credibility, citing **Doe v. Daviess County**, 669 N.E.2d 192, 194 (Ind. Ct. App. 1996). The Court noted that a trial court's judgment will be set aside only if it is clearly erroneous. The Court opined that the OFC has the burden of proving the termination allegations outlined at **IC 31-35-2-4(b)(2)** by clear and convincing evidence, citing **In Re R.J.**, 829 N.E.2d 1032, 1035 (Ind. Ct. App. 2005). The **Bester** Court also quoted **Egly v. Blackford County Dep't of Pub Welfare**, 592 N.E.2d 1232, 133-34 (Ind. 1992), in which the Court opined that clear and convincing evidence need not reveal that the continued custody of the parents is wholly inadequate for the child's very survival; rather, it is sufficient to show by clear and convincing evidence that the child's emotional and physical development are threatened by the respondent parent's custody. **Bester** at 148. In **In Re E.M.**, 4 N.E.3d 636, 641-42 (Ind. 2014), the Supreme Court explained that it is precisely because the judge or magistrate presiding at a termination hearing has a superior vantage point for assessing witness credibility and weighing evidence that the Court gives great deference to a trial court's decision to terminate a parent's rights.

A party may waive allegations of due process violation by failing to raise the due process issues during the CHINS or termination proceedings. It is well established law that the Appellate Courts may consider a party's constitutional claim waived when it is raised for the first time on appeal. **See D.T. v. Indiana Dept. of Child Services**, 981 N.E.2d 1221, 1225-26 (Ind. Ct. App. 2013) (minor Father had not requested appointment of Guardian ad Litem

to represent his best interests during CHINS process on his child; on Father's appeal of subsequent termination order, Court found that there was no fundamental error and Father's due process rights had not been violated when court failed to appoint Guardian ad Litem for him); **In Re Involuntary Term. Paren. of S.P.H.**, 806 N.E.2d 874, 977-78 (Ind. Ct. App. 2004) (incarcerated Father's allegations of failure to receive notices of CHINS hearings, failure to negotiate with him before filing case plan and lack of transportation to CHINS hearings were waived on appeal due to counsel's failure to address them at the termination hearing); **McBride v. County Off. Of Family & Children**, 798 N.E.2d 185, 194-95 (Ind. Ct. App. 2003) (Mother had counsel for CHINS and termination proceedings, but failed to object to any alleged deficiencies in the CHINS process during the CHINS proceedings nor to argue them during the termination proceedings, so her constitutional challenge was waived). A party may also waive an issue on appeal by failing to present cogent argument in the appellate brief. **See Bergman v. Knox County OFC**, 750 N.E.2d 809, 810-811 (Ind. Ct. App. 2001) (Mother contended trial court erred in admission of litigation-oriented documents over her hearsay objections but provided only an incomplete statement to shore up her claim; hence, issue was waived.)

IC 31-35-6-3 states that an appeal of a court's termination decision does not prevent the court, in the court's discretion, from referring the matter for adoption proceedings while the appeal is pending. **But see IC 31-19-11-6**, which was amended effective July 1, 2014, to provide that the adoption court may not hear and grant a petition for adoption of a child if: (1) the parent-child relationship between the child and a parent has been terminated; and one or more of the following apply with respect to the termination: (A) the time for filing an appeal (including a request for transfer or certiorari) has not elapsed (B) an appeal is pending (C) an appellate court is considering a request for transfer or certiorari.

Sometimes birth parents request a stay of the termination judgment pending the appeal. In **In Re Adoption of C.B.M.**, 992 N.E.2d 669 (Ind. 2013), the Supreme Court concluded that the adoption of two children by their foster parents must be set aside because it was based on an order terminating Natural Mother's parental rights which the Court of Appeals had reversed. Id. at 694-95. The Supreme Court also declined to hold that Natural Mother was required to file a stay of the trial court's termination judgment in order to preserve a meaningful appellate remedy for her parental rights. Id. at 693. Finally the Supreme Court opined that granting an adoption pending the termination appeal is a *discretionary* decision of the trial court, and the Court encouraged trial courts to exercise that authority with an abundance of caution (emphasis in opinion). Id. at 696. In **In Re Invol. Term. of Parent-Child Rel.**, 755 N.E.2d 1090 (Ind. Ct. App. 2001), Mother appealed the trial court's judgment terminating the parent-child relationship and also appealed the trial court's denial of her motion to stay the termination order pending appeal. The children's foster mother desired to adopt them and the children had bonded to her. Mother argued that the trial court

had abused its discretion in denying her motion for a stay. Mother contended the following: (1) the children would better served by continuing them in foster care until the appeals process was completed instead of allowing adoption proceedings to begin immediately; (2) the stay would not prejudice anyone because if the termination order were overturned the adoption would also be overturned; and (3) denial of the stay could damage the relationship between the children and their parents. The Court stated that it applies an abuse of discretion standard in reviewing a motion to stay proceedings. Citing **Matter of R.R.**, 587 N.E.2d 1341, 1343 (Ind. Ct. App. 1992), the Court noted that an abuse of discretion is found when the trial court's action is clearly erroneous, against the logic and effect of the facts before it and the inferences which may be drawn from it. **Invol. Term**. at 1098. The Court found that the trial court had not abused its discretion by denying the stay and thus immediately creating a stable environment for the children. Id. The Court noted the following evidence: (1) Mother offered only general arguments as to why the trial court's denial of her request for a stay was an abuse of discretion; (2) Mother never had a relationship with her children nor did she attempt to have one; (3) Mother did not inquire of the children's foster mother concerning the children; (4) the foster mother had created a safe and stable environment for the children and the children had bonded to each other and to the foster mother. Id.

After the time period for an appeal of the termination judgment has passed, a party could file a Trial Rule 60(B) motion for relief from judgment. In **K.E. v. MCOFC**, 812 N.E.2d 177 (Ind. Ct. App. 2004), *trans. denied*, Birth Mother filed a pro se motion to set aside the court's judgment terminating the parent-child relationship two years after the entry of the judgment. At the time of Birth Mother's filing, the children had been adopted for almost one year along with two of their siblings who were the subjects of separate termination proceedings. Although Birth Mother's motion to set aside did not specifically mention Ind. Trial Rule 60(B), the Court considered her claim under T.R. 60(B)(8). Birth Mother had been present and was represented by counsel on the dates of the termination hearing; the termination judgment was issued seven days after the conclusion of the termination hearing. At the time of the hearing on her motion Birth Mother was incarcerated and hoped to be released in five months. She testified that she was unaware that she had thirty days to appeal the trial court's judgment and that she wanted to reintroduce herself into her children's lives upon her release from incarceration. Birth Mother was unaware of the children's current circumstances and did not know whether the children wanted contact with her. The Court affirmed the trial court's order denying Birth Mother's motion to set aside, finding Birth Mother's two-year delay in challenging the termination judgment did not meet the requirements of T.R. 60(B)(8) that the "motion shall be filed within a reasonable time" and must allege a "a meritorious claim or defense." Id. at 180. The Court opined that the Marion County OFC's interest in the children's placement in a stable home environment coupled with society's interest in the finality of litigation involving such placement counseled in favor of denying Birth Mother's motion to set aside. Id.