CHAPTER 11

INVOLUNTARY TERMINATION OF PARENT-CHILD RELATIONSHIP

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I. OVERVIEW

The legal process of involuntary termination of the parent-child relationship begins with the filing of a petition to terminate the rights of a parent to his/her child who has been previously adjudicated a Child in Need of Services. DCS or the child's guardian ad litem/court appointed special advocate may file the involuntary termination petition. The usual goal of the involuntary termination petition is to secure a permanent home for the child through adoption. Termination may also be appropriate for the child who is not a likely candidate for adoption if continuing the parent-child relationship would be physically or mentally harmful to the child. For example, termination of the rights of a neglectful or abusive parent ends the physical and emotional threat to the child posed by parental visitation or the potential for reunification with that parent. When parental rights have been terminated and adoption is not a viable alternative for a child, DCS will seek another permanent placement for the child such as modification of custody to the appropriate parent, appointment of a third party as the child's custodian, or appointing a legal guardian for the child. If an abusive or neglectful parent's rights have been terminated, that parent has no legal right to seek modification of the custody order or termination of the guardianship.

A petition for termination of the parent-child relationship can be filed when: (1) the child has been removed from the parent for six months under a CHINS dispositional decree; (2) has been removed from the parent and has been under the supervision of DCS or the county probation department for fifteen of the most recent twenty-two months; or (3) earlier if there has been a court ruling that reasonable efforts toward reunification are not required. IC 31-35-2-4(b)(2)(A)(i)-(iii). The filing of a termination petition when a child has been removed from the parent and under DCS or probation supervision for fifteen of the most recent twenty-two months, beginning with the date the child was removed from the home as a result of being alleged to be a CHINS or a delinquent, is mandatory. IC 31-35-2-4.5(a) and (b). In these mandatory situations, DCS or the child's guardian ad litem/court appointed special advocate may file a motion to dismiss the termination petition if termination of parental rights is not in the child's best interests, or the parents did not receive the services necessary for reunification. IC 31-35-2-4.5(d)(1) states that one of the reasons that termination of parental rights is not in the child's best interests may include the fact that the child is being cared for by a custodian who is a relative (as defined in IC 31-9-2-107(c)).

I. A. Basic Considerations and Concerns in Termination Law

In **Lassiter v. Department of Social Services**, 452 U.S. 18, 101 S.Ct. 2153 (1981), the United States Supreme Court opined that the purpose of termination of parental rights is not to punish parents but to protect children. See also **In Re R.A.**, 19 N.E.3d 133, 321 (Ind. Ct. App. 2014), t*rans. denied*. In **Matter of Robinson**, 538 N.E.2d 1385, 1386 (Ind. 1989), the Indiana Supreme Court reviewed the purposes of CHINS and termination proceedings and stated, "[t]he desired result would be to resolve the problems in the home which led to the children's distress and return them there. If this cannot be done, the alternative which serves the best interests of the child or children is terminating parental rights and placing the children where they will receive proper care and protection."

In **Egly v. Blackford County DPW**, 592 N.E.2d 1232 (Ind. 1992), the Indiana Supreme Court stated with regard to termination of the parent-child relationship:

> Although parental rights are of a constitutional dimension, the law allows for the termination of those rights when parents are unable or unwilling to meet their responsibilities as parents. This includes

> situations not only where the child is in immediate danger of losing his life, but also where the child's emotional and physical development are threatened.

Id. at 1234.

In **Bester v. Lake County Office of Family**, 839 N.E.2d 143, 147 (Ind. 2005), the Court observed that: (1) the Fourteenth Amendment to the United States Constitution protects the traditional rights of parents to establish a home and raise their children; (2) a parent's interest in the care, custody, and control of his or her children is "perhaps the oldest of the fundamental liberty interests", citing Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054 (2000); (3) parental rights are not absolute and must be subordinated to the child's interests in determining the proper disposition of a termination petition; (4) parental rights may be terminated when the parents are unable or unwilling to meet their responsibilities (multiple citations omitted).

In **In Re A.P.**, 882 N.E.2d 799, 805 (Ind. Ct. App. 2008), the Court stated that the involuntary termination of parental rights is the most extreme sanction a court can impose on a parent because termination severs all rights of a parent to his or her children. Therefore, termination is intended as a last resort, available only when all other reasonable efforts have failed. Recent termination decisions have reiterated this view. See **In Re O.G**, 65 N.E.3d 1080, 1096 (Ind. Ct. App 2016); **Termination of Parent-Child Relationship [of R.S.]**, 56 N.E.3d 625, 631 (Ind. 2016); and **In Re V.A.**, 51 N.E.3d 1140, 1151-52 (Ind. 2016).

In **C.A. v. Indiana Dept. of Child Services**, 15 N.E.3d 85, 94 (Ind. Ct. App. 2014), the Court clarified that, when determining whether the conditions that led to a child's removal will not be remedied, the trial court must judge a parent's fitness to care for her child at the time of the termination hearing, but must also evaluate a parent's habitual patterns of conduct to determine the probability of future neglect or deprivation of the child, citing In Re A.B., 924 N.E.2d 666, 670 (Ind. Ct. App. 2010).

In **In Re K.E.,** 39 N.E.3d 641, 646 (Ind. 2015), the Court opined that the relationship between a parent and child is one of the most valued within our culture, yet parental rights are not absolute, and the best interests of the child must prevail.

In **In Re R.J.**, 829 N.E.2d 1032, 1039 (Ind. Ct. Ap. 2005), the Court reversed the trial court's termination judgment, finding that, although there was a real possibility that the child might be "better off" if Father's rights were terminated and she was placed as OFC requested, parental rights could not and should not be terminated because some hypothetical circumstances might come true.

Courts have frequently reversed termination judgments when the due process rights of parents have not been sufficiently protected. In **In Re G.P.**, 4 N.E.3d 1158 (Ind. 2014), the Indiana Supreme Court vacated the trial court's termination judgment because Mother, who requested court appointed counsel at a review hearing in the CHINS proceeding and who was found by the court to be indigent, was not actually represented by court appointed counsel at CHINS review hearings or the CHINS permanency hearing. Id. at 1169. The Court found that Mother had been denied due process, and that the CHINS proceedings flowed directly into the termination of her parental rights. Id. at 1166-1168. In **In Parent-Child Rel. v. Indiana Child Services**, 933 N.E.2d 1264 (Ind. 2010), the Indiana Supreme Court held Indiana statutes dictate that the parents' right to counsel continues through all stages of the proceeding to terminate the parent-child relationship, including appeal. Id. at 1267. 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 Father's parental rights violated his due process rights because Father was not named as a party to the CHINS case and other CHINS statutory mandates regarding Father were not followed.

I. B. Role of Federal ASFA Law in State Termination Law

The Adoption and Safe Families Act (ASFA) of 1997 requires that states enact legislation and follow procedures to ensure that petitions for involuntary termination of the parent-child relationship are filed for children who have been removed from parents and under child welfare supervision for fifteen of the most recent twenty-two months. The filing of an involuntary termination petition is mandated under federal law after a judicial determination that the child is an abandoned infant or that the child's parent has committed one of the specified criminal offenses against the subject child or another of the parent's children. Id. Indiana statutes on mandatory termination petitions are discussed in this Chapter at IV.

See the following cases which affirmed state law regarding filing termination petitions for children who have been in foster care for fifteen of the most recent twenty-two months: **Castro v. Office of Family and Children**, 842 N.E.2d 367, 378 (Ind. Ct. App. 2006) (Indiana statute does not violate Due Process Clause of Fourteenth Amendment), *trans. denied*; **James v. Pike County**, 759 N.E.2d 1140, 1143 (Ind. Ct. App. 2001) (Indiana statute does not violate parent's fundamental right to maintain legal relationship with child).

I. C. Voluntary Placement of Children with Emotional, Behavioral, or Mental Disabilities

IC 31-34-1-16 provides for children with emotional, behavioral, or mental disabilities who are voluntarily placed by their parent, guardian, or custodian outside of the home in order to obtain special treatment or care that the parent, guardian, or custodian is unable to provide. The statute states that DCS may not initiate a termination proceeding or a transfer of legal custody, "solely because the parent, guardian, or custodian is unable to provide the treatment or care." It also states that "relinquishment of custody of a child…may not be made a condition for receipt of services or care delivered or funded by the department or the local office." The statute provides that when a child is voluntarily placed outside of the home DCS "may execute a voluntary placement agreement" which clarifies that legal custody of the child is not being transferred to DCS and specifies the legal status of the child and the rights and obligations of the child's parent, guardian, or custodian. The statute does not address payment for the child's placement.

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. Id. at 170. Prior to the filing of the CHINS petition, Mother had hospitalized the child because of the child's out-of-control and aggressive behavior. 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 (emphasis in opinion). Id. at 162. In making this finding, the Court noted, among other things: (1) DCS's involvement with Mother and the child stemmed from a referral DCS received while the child was residing at the residential treatment facility; (2) following a preliminary inquiry, the trial court adjudicated the child to be a CHINS, removed the child from Mother's care and custody, and ordered that the child be continued in placement at the residential treatment facility until she could be "placed in an appropriate Residential Treatment Program"; and (3) Mother was unable to provide the child with the care and treatment the child required. Id. at 163-64. According to the Court, termination proceedings were not initiated solely because Mother was unable to provide the care the child required, but also because of Mother's refusal to cooperate with service providers as well as her failure to participate in counseling to address her own mental issues, thereby making herself both

unable and unwilling to provide adequate care of the child. Id. 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 **In Re Involuntary Termin. of the Parent-Child Relationship [of B.R.]**, 875 N.E.2d 369 (Ind. Ct. App. 2007), *trans. denied,* the Court affirmed the trial court's termination of Mother's parent-child relationship with her adopted child. Id. at 375. Waiver notwithstanding, the Court found that IC 31-34-1-16 did not apply to this case because Mother did not place the child out of the house solely because she could not provide treatment for the child. Id. at 374-75. The Court held that IC 31-34-1-16 did not limit the State's power to request the termination of the parent-child relationship. Id. at 375. The child was diagnosed with Reactive Attachment Disorder, ADHD, and Conduct Disorder, and her behavior continually worsened until Mother admitted the child was a CHINS, and the child was placed in foster care. After a treatment facility determined the child to be ready, the child was returned to Mother's care. The reunification lasted only four and a half months, because the child soon began destroying property, fighting with other children, and threatening to set fires again. The child was returned to foster care. Mother visited the child infrequently, and contacts between Mother and the child seemed to trigger "uncontrollable" behavior by the child. Mother's visitation was eventually terminated by court order and the child flourished in foster care. Upon petition by DCS and hearing by the trial court, Mother's parental rights were terminated, and she appealed, alleging that the child was removed because of her financial limitations and that, under IC 31-34-1-16, moving to termination was completely inappropriate under those circumstances. The Court held that, taken together, Mother's various admissions to the effect that she could not care for the child and that she feared for the safety of her other children showed that Mother did not voluntarily place the child out of the house solely because she could not provide the child's treatment. Id.

II. JURISDICTION AND STANDING

II. A. 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. A termination petition is a separate and distinct legal proceeding and of "much greater magnitude" than the underlying CHINS action, and should be separately docketed from the CHINS action. **State ex Rel. Gosnell v. Cass Cir.,** 577 N. E. 2d 957, 958 (Ind. 1991). See Chapter 3 at II.D. for jurisdictional issues involving simultaneous CHINS, termination or adoption proceedings involving the same child.

Case law indicates that termination proceedings and an adoption can go forward simultaneously. In **In Re Infant Girl W.**, 845 N.E.2d 229, 240-41 (Ind. Ct. App. 2006), *trans. denied sub nom*. In Re Adoption of M.W., 851 N.E.2d 961 (Ind. 2006) (Dickson, J., dissenting), the Court affirmed the adoption order of Marion Superior Court, Probate Division against OFC's claim that subject matter jurisdiction of Morgan County Juvenile Court in the CHINS case involving the same child divested the Marion Probate Court of jurisdiction. The Court ruled that a simultaneous CHINS and/or TPR does not divest a probate court of its exclusive jurisdiction to hear an adoption petition involving the same subject child; the statutory opportunity for OFC to refuse to consent to adoption adequately ensures that the voice and concerns of the child's legal guardian will be heard. In **In Re Adoption of H.L.W., Jr.**, 931 N.E.2d 400, 407-08 (Ind. Ct. App. 2010), the Court held that the adoption consent statutes (IC 31-19-9) enabled the trial court to consider the adoption proceeding despite the pending CHINS action. But see IC 31-19-11-6, amended after the opinions in the above two cases, which states the court may not grant a petition for adoption of a child when the parent-child relationship has been terminated and one or more of the following apply 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.

In **Hite v. Vanderburgh Cty Office Fam. & Chil.**, 845 N.E.2d 175 (Ind. Ct. App. 2006), Father alleged the juvenile court lacked subject matter jurisdiction in the termination case because he was not given notice of the CHINS petition filed in the underlying case. The Court rejected Father's argument. Id. at 180. The Court stated that subject matter jurisdiction refers to the power of a court to hear and decide a particular class of cases, and the relevant inquiry is whether the kind of claim advanced by the petitioner falls within the general scope of authority conferred upon such court by the constitution or by statute. Id. at 179. The Court reviewed the procedural requirements that were followed in the case, including the written information from the intake officer, preparation of preliminary inquiry, the recommendation to the OFC attorney, the request for judicial authorization to file a CHINS petition, the judicial authorization, the trial court's finding of probable cause, and the filing of the CHINS petition. With respect to these various aspects of subject matter jurisdiction, the Court determined that: (1) the juvenile court had subject matter jurisdiction to hear the CHINS case under IC 31-30-1-1(2), which grants the juvenile court exclusive jurisdiction in cases in which a child is alleged to be a child in need of services; and (2) even though Father had not received notice of the CHINS case, the OFC had "followed the statutory procedures when filing the CHINS petition, and Mother was present and admitted the allegations." Id. at 180. The Court also noted case law that the juvenile court lacks subject matter jurisdiction if statutory jurisdictional prerequisites are not followed in the CHINS case. Id. See **Matter of Lemond**, 413 N.E.2d 228, 245 (Ind. 1980); **In Re Heaton**, 503 N.E.2d 410, 414 (Ind. Ct. App. 1986).

See Chapter 3 at III.B. for discussion of jurisdictional and procedural prerequisites.

II. B. Standing to File Involuntary Termination Action

An involuntary termination petition may be filed by the attorney for DCS, or the child's guardian ad litem/court appointed special advocate. See IC 31-35-2-4 and IC 31-35-3-4. Neither the parent nor the child has standing to file a termination of the parent-child relationship proceeding. See **Matter of Adoption of T.B.**, 622 N.E. 2d 921 (Ind.1993). An exception to this general rule is provided by IC 31-35-3.5, which allows the parent of a child conceived by an "act of rape" to file a termination petition. See this Chapter at III.G. for discussion of IC 31-35-3.5.

II. C. Indian Children

The provisions of the federal Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901 et seq., must be followed in termination of the parent-child relationship cases involving an Indian child. 25 U.S.C. 1903(4) defines "Indian child" as a child who is either (a) a member of an Indian tribe; or (b) eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe. On December 12. 2016, the U.S. Bureau of Indian Affairs (BIA) issued detailed federal regulations on the ICWA, which apply at detention, initial, factfinding, placement, voluntary and involuntary termination of the parent-child relationship, and adoption cases. See www.bia.org for details about the regulations. The first step is for the court to inquire whether there is "reason to know" that the child is an Indian child. Optimally, this question should have been raised by the court during the CHINS proceeding, but the question should be asked again before there is a termination trial. 25 CFR § 23.107 lists the following factors which indicate there is "reason to know" that the child is an Indian child: (1) anyone, including the child, tells the court the child is an Indian child or there is information indicating the child is an Indian child; (2) the domicile or residence of the child, Indian parent, or Indian custodian is on a reservation or in an Alaska native village; (3) the child is or has been a ward of the tribal court; (4) either parent or the child possesses identification indicating tribal membership. If there is no "reason to know" the child is an Indian child, the ICWA does not apply. 25 CFR § 23.107 states that if there is "reason to know" the child is an Indian child but there is not sufficient

evidence to determine that the child is an Indian child, then the court must confirm on the record that DCS or another party used due diligence to identify and verify whether the child is a member of a tribe or a biological parent is a member of an Indian tribe and the child is eligible for membership. The individual tribes have the final say on whether the child is a member of the tribe or a biological parent is a member of the tribe and the child is eligible for membership. BIA will assist DCS or the inquiring party in locating tribes and making inquiries on whether the child is a member or eligible for membership. Notice of the termination proceeding and the tribe's right of intervention must be sent to each tribe of which the child may be a member or eligible for membership by registered or certified mail, return receipt requested. 25 CFR § 23.111 states what must be included in the notice. A copy of the notice must also be sent to the BIA Regional Director, whose name and address may be found on the BIA website. 25 U.S.C. § 1911 provides that in any State court proceeding for a termination of parental rights proceeding for an Indian child who is not residing or domiciled on the child's tribal reservation, the State court, in the absence of good cause to the contrary, shall transfer the proceeding to the jurisdiction of the tribe upon the petition of either parent, the Indian custodian, or the tribe unless either parent objects or the tribe declines transfer. If the tribe declines transfer, the Indiana court must still comply with the ICWA standards in hearing and deciding the termination case. See **Matter of D.S.**, 577 N.E.2d 572, 575 (Ind. 1991), in which the Indiana Supreme Court found that in a termination of parental rights case for a Potawatomi Indian child, proceeding under state law, rather than federal law, which imposes a greater evidentiary standard of proof, was error. The Court reversed the trial court's order terminating the parental rights of the child's Potawatomi Indian mother and remanded for proceedings to be conducted consistent with the Court's opinion and the Indian Child Welfare Act. Id. at 576.

Among the requirements of the ICWA which are most relevant to involuntary termination of the parent-child relationship after required inquiries have been made and notice has been sent are: (1) in any case in which the court determines indigency, the Indian parent or Indian custodian shall have the right to court-appointed counsel in a termination proceeding (25 U.S.C. §1912(b)); (2) the party seeking termination shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have been unsuccessful (§25 U.S.C.§ 1912(d)); (3) evidence on termination must be supported beyond a reasonable doubt, including the testimony of qualified expert witnesses, that continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child (25 U.S.C. § 1912(f)); (4) the qualified expert witness must be qualified to testify as to the prevailing social and cultural standards of the child's Indian tribe, may be designated by the Tribe as being qualified to testify on these standards, and the court or any party may request assistance from the Tribe or the Bureau of Indian Affairs on locating qualified expert witnesses (25 CFR § 23.122); (5) the qualified expert witness may not be the social worker who is regularly assigned to the Indian child (25 CFR § 23.122).

In **In Re S.L.H.S.**, 885 N.E.2d 603 (Ind. Ct. App. 2008), the Court affirmed the trial court's termination of the parental rights of Father despite Father's contention that the trial court was without subject matter jurisdiction pursuant to the ICWA because Father was of Native American heritage. Id. at 618-19. The Court observed that (1) the power of state courts to conduct termination proceedings involving children of Indian ancestry may be subject to significant limitations under the ICWA; (2) the party who seeks to invoke a provision of the ICWA has the burden to show that the act applies in the proceeding; (3) the applicability of the ICWA depends on whether the proceedings to be transferred involve an "Indian child" within the definition utilized in 25 U.S.C. § 1903(4) which is "any unmarried person who is under the age of eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe"; and (4) in this case, despite Father's "tremendous efforts through hours of hard work attempting to track down his Native American heritage[,]" and the extensive efforts of DCS to track

down any possible tribal status for the child or either parent via multiple letters and telephone calls to various Indian organizations including the Bureau of Indian Affairs, no tribal status for the child or either of his parents had been identified. Id. at 612-14. In response to Father's contention that he could have produced such proof if the trial court had not denied his request to open his adoption records to obtain medical information, the Court noted that this asserted denial had been in a different cause, and, by failing to timely appeal the court's final judgment denying Father's petition in that cause, Father had waived any allegation of error stemming from that final judgment. Id. at 613-14.

In **Matter of Adoption of T.R.M.**, 525 N.E. 2d 298 (Ind. 1988), the Indiana Supreme Court affirmed the Porter Circuit Court's adoption judgment, which used the ICWA termination of parental rights standards. Id. at 316. Before the child's birth, Mother, a member of the Ogalala Sioux Tribe in South Dakota, requested that Adoptive Parents adopt her unborn child. Birth Mother gave the child to Adoptive Mother when the child was five days old. Adoptive Mother returned to Porter County, Indiana with the child. When Adoptive Parents filed their petition to adopt the child, the Ogalala Sioux Tribal Court moved to transfer the case to the tribal court in South Dakota. The Porter Circuit Court heard evidence on the jurisdictional matter and the adoption proceeding and granted the adoption. The Circuit Court found the evidence from qualified expert witnesses, which included a psychologist, a Juvenile Judge of the Rosebud tribe who visited the Pine Ridge Ogalala Sioux Tribe reservation at least monthly, and the Porter County Welfare Department social worker, supported beyond a reasonable doubt that removing the child from Adoptive Parents' home environment and placing her with her Ogalala Sioux Birth Mother would likely result in serious harm to the child. The Supreme Court considered the jurisdictional issues of the ICWA, noting that its purpose is to protect Indian children from improper removal from their existing Indian family units, and determined that the purpose of the ICWA could not be achieved by this case. Id. at 303. The Court noted that the child was abandoned to Adoptive Mother at the earliest practical moment after childbirth and initial hospital care, and said the Court could not discern how the subsequent adoption proceeding constituted a "breakup of the Indian family." Id. The Court also noted the facts favorable to the adoption judgment were plentiful, including Mother's poor parenting record, history of fifteen incarcerations and four suicide attempts, and her full awareness of the non-Indian culture consequences of adoption. Id. at 308. The Court also noted that child had resided in Indiana since the first week of her life, and to sever her from the family and culture she had known during all of her seven years of life could not be anything but devastating to the child's best interests. Id.

See Chapter 2 at III.C. and IV.C., Chapter 3 at II.G.5., Chapter 6 at I.E., and Chapter 10 at II.F. for additional information on the Indian Child Welfare Act.

III. INVOLUNTARY TERMINATION PETITION, NOTICE, DEFAULT JUDGMENT

III. A. Mandatory and Non-Mandatory Termination Petition

Prior to 1998, the involuntary termination statute provided that an involuntary termination petition could not be commenced until the child had been removed from parents' home for at least six months under a CHINS dispositional order. Pursuant to 1998 legislation, an involuntary termination petition may still be filed at the end of the six month period (non-mandatory petitions), but IC 31-35-2-4.5(a) and (b) added that an involuntary termination petition must be filed when an adjudicated child in need of services or a delinquent child has been removed from parents removed and under DCS or probation supervision for fifteen of the most recent twenty-two months or when the court has made a finding that reasonable efforts toward reunification are not required (mandatory petitions). Aside from the differences in the time requirements, the remaining elements of proof are the same for mandatory and non-mandatory termination petitions. See this Chapter at IV. for discussion of mandatory termination pleadings and motions to dismiss.

In **In Re E.E.S.**, 874 N.E.2d 376, 381-82 (Ind. Ct. App. 2007), *trans. denied*, despite arguments of Bartholomew County Office of Family and Children (BCOFC) that it was required by statute and federal law to file the termination petition, the Court reversed the trial court's termination of Mother's parental rights. Id. at 377. BCOFC had failed to uphold its end of the agreement with Mother that, in exchange for the parents' admitting to the allegations contained in the CHINS petitions, BCOFC would maintain and support the family bond until Mother was released from prison and had an opportunity to engage in services. BCOFC argued that it had no choice but to file the petition based on the requirement of IC 31-35-2-4.5 that a termination petition should be filed when a child has been removed from a parent and under OFC supervision for not less that fifteen months of the most recent twenty-two months. The Court responded that (1) BCOFC was presumed to have known of the statutory requirements when it entered into the agreement with Mother; (2) despite that statutory requirement, BCOFC entered into the agreement with Mother without putting any constraints on the agreement; (3) BCOFC could have complied with the statutory requirement and honored its agreement with Mother by requesting a continuance of the termination proceedings until Mother was released from prison; and (4) "BCOFC cannot avoid its agreement with [Mother] by feigning lack of control." Id. at 382.

Although the mandatory termination petition was not an issue on appeal, the facts of the following cases note that children had been removed from the parents' custody for at least fifteen months at the time the termination petitions were filed: **A.J. v. Marion County Office of Family**, 881 N.E.2d 706, 709-10 (Ind. Ct. App. 2008), *trans. denied*; **Involuntary Termination of the Parent-Child Relationship of B.R.**, 875 N.E.2d 369, 372 (Ind. Ct. App. 2007), *trans. denied*; **In Re Involuntary Termination of Parent-Child Relationship of Kay L.**, 867 N.E.2d 236, 238 (Ind. Ct. App. 2007); **In Re R.J.**, 829 N.E.2d 1032, 1034 (Ind. Ct. App. 2005); **In Re Involuntary Term. of Parent-Child Rel.**, 755 N.E.2d 1090, 1094 (Ind. Ct. App. 2001); **In Re D.J.**, 755 N.E.2d 679, 682 (Ind. Ct. App. 2001), *trans. denied*. The Court affirmed the constitutionality of the mandatory filing of a termination petition when the child has been in foster care for fifteen of the most recent twenty-two months in **Castro v. Office of Family and Children**, 842 N.E.2d 367, 377-79 (Ind. Ct. App. 2006), *trans. denied*, and **James v. Pike County**, 759 N.E.2d 1140, 1143 (Ind. Ct. App. 2001).

III. B. Required Elements for Involuntary Termination Petition

IC 31-35-2-4 states:

(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 [DCS] 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 31-35-2-4(c) states that at the time the petitioner files the termination petition with the juvenile or probate court, the petitioner shall also file a: (1) copy of the order approving the permanency plan under IC 31-34-21-7 for the child; or (2) permanency plan for the child as described by IC 31-34-21-7.5.

III. C. Involuntary Termination Petition When Parent Convicted of Crimes Against a Child

Special termination petitions may be used when a parent has been convicted of one of the enumerated crimes against a child. See IC 31-35-3-1 through 9. IC 31-35-3-8 provides that when a parent is convicted of a heinous crime against his/her biological or adopted child, the child's sibling, or the child of his/her spouse, and the child victim was less than sixteen years of age at the time of the offense, the criminal conviction is prima facie evidence in an involuntary termination case against the convicted parent as to the child victim or any other biological or adopted child of the convicted parent that the conditions that resulted in the removal of the child from the parent will not be remedied or that continuation of the parent-child relationship poses a threat to the wellbeing of the child. The heinous crimes which apply to these statute are: murder, causing suicide, voluntary manslaughter, involuntary manslaughter, rape, child molesting, child exploitation, sexual misconduct with a minor, and incest. See IC 31-35-3-4 for the enumerated crimes.

IC 31-35-3-5(a) states:

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(b) states that at the time the petitioner files the verified petition described in subsection (a) with the juvenile or probate court, the petitioner shall also file a: (1) copy of the order approving the permanency plan under IC 31-34-21-7 for the child; or (2) permanency plan for the child as described by IC 31-34-21-7.5. See Chapter 9 at III. for information on permanency plans and options.

IC 31-35-3-4 explains IC 31-35-3-5, stating:
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 [DCS], 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.

In **Ramsey v. Madison County Dept. Of Family and Children**, 707 N.E. 2d 814 (Ind. Ct. App. 1999), the child was adjudicated to be a CHINS due to molestation by Father. Father pled guilty to one count of child molestation and incest in a separate criminal proceeding, and he was sentenced to prison and ordered to have no contact with the child. A termination petition was filed under IC 31-35-3-4, alleging Father's conviction of one of the enumerated offenses. The termination petition was granted. In affirming the termination judgment on appeal, the Court noted that prima facie evidence means such evidence as is sufficient to establish a given fact and remains sufficient if not contradicted. Id. at 816. If the evidence is contradicted this merely creates a question that must be resolved by the trier of fact. Id. The Court rejected Father's attempt to contradict the evidence by alleging that he merely pled guilty to avoid a longer sentence and that he was now receiving anger management and parenting classes in prison. In addition to the prima facie evidence of Father's conviction, the Court noted the following evidence as supportive of the termination judgment: the child feared being abused by Father, and the child exhibited behavioral and emotional problems including encopresis, running away, setting fires, and sexual acting out, which indicated the child's emotional development was threatened. Id. at 817.

III. D. Petition Must Specify if There are Factors Requiring a Motion to Dismiss

IC 31-35-2-4(b)(3) provides that if DCS intends to file a motion to dismiss the termination petition pursuant to IC 31-35-2-4.5, the termination petition must indicate whether at least one of the factors listed in IC 31-35-2-4.5(d)(i) through (iii) applies. DCS must also specify each factor that would apply as the basis for filing a motion to dismiss the termination petition. IC 31-35-2-4.5(d) states that only DCS or the child's guardian ad litem/court appointed special advocate may file a motion to dismiss the termination petition. IC 31-35-2-4.5(d)(1) states that a compelling reason for not proceeding to a final determination of a termination petition may include that the child is being cared for by a custodian who is a relative (as defined in IC 31-9-2-107(c)). IC 31-9-2-107(c) states that "relative" means any of the following in relation to a child: a parent, a grandparent, a brother, a sister, a stepparent, a stepgrandparent, a stepbrother, a stepsister, a first cousin, an aunt, an uncle, or any other individual with whom a child has an established and significant relationship.

In **Everhart v. Scott County Office of Family**, 779 N.E.2d 1225 (Ind. Ct. App. 2002), *trans. denied*, the termination judgment was affirmed despite Father's challenge that the termination petition was invalid because it did not include any reference to the factors listed at IC 31-35-2-4.5 that would apply as the basis for filing a motion to dismiss. Id. at 1235. The Court differentiated between termination petitions filed because children have been removed from their parents for six months under a dispositional decree (IC 31-35-2-4(b)(2)(A)(i)) and termination petitions filed because the trial court has determined that reasonable efforts for family reunification are not required or when a child in need of services has been removed for fifteen of the most recent twenty-two months (IC 31-35-2-4(b)(2)(A)(ii) and (iii)). Id. at 1229. The Court concluded that the Everhart termination petition had been filed because the children had been removed from the parents for at least six months under a dispositional decree. Id. The Court opined that the grounds for dismissing a petition pursuant to IC 31-35-2-4.5 were not applicable and "no benefit or due process protection" would have been afforded to Father by restating the obvious, namely that IC 31-35-2-4.5 did not apply. Id. The Court opined that failure to include a statement regarding IC 31-35-2-4.5 in the petition did not render the petition void or defective. Id. The Court left for another day's decision the situation where a petition filed upon a ground to which IC 31-35-2-4.5 is applicable does not address the statutory requirement as to whether any IC 31-35-2-4.5(d) factors apply. Id. at 1229. n.3.

See also **In Re Involuntary Termination of Parent-Child Relationship of Kay L.**, 867 N.E.2d 236, 241 (Ind. Ct. App. 2007) (petition to terminate Mother's parental rights was valid even if DCS erroneously omitted from petition any reference to IC 31-35-2-4.5 grounds for dismissal; error was harmless because petition could not have been dismissed pursuant to IC 31-35-2-4.5 since there was a remaining, independent ground for termination; namely, that the children had been removed from Mother's care for at least six months under CHINS dispositional decree).

See this Chapter at IV.D. for the statutory reasons for filing motions to dismiss mandatory termination petitions.

III. E. Service of Process on Parents When Termination Petition Filed

The involuntary termination petition is separate from the underlying CHINS case and must be filed as a separate proceeding, with new service of process to the parents. See **State ex rel. Gosnell v. Cass Cir. Court**, 577 N.E. 2d 957, 958 (Ind. 1991) (termination is a separate proceeding from underlying CHINS case). IC 31-35-2-2 provides that the CHINS procedural statutes 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. IC 31-32-9-1(d) states that service of summons is not required if the person entitled to be served attends the hearing. Because of the due process rights afforded to parents by the Fourteenth Amendment to the

U.S. Constitution, especially in termination of parental rights cases, it is recommended that practitioners comply with Ind. Trial Rule 6(C), which gives parents twenty days to reply to the termination petition if served personally or twenty-three days to reply if served by certified mail. Service of process on parents when a termination petition has been filed is different from serving the ten day notice of the date and time of the hearing to parents which is required by IC 31-35-2-6.5. See this Chapter at V.C. for information on the ten day notice.

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 by the sheriff, certified mail with a return receipt signed by the parent, or service in court on the record. If the petitioner 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 **Norris v. Personal Finance**, 957 N.E.2d 1002, 1009 (Ind. Ct. App. 2011) (service by delivery to defendant's parents' address was not in compliance with T.R. 4.1 and was ineffective); **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 was 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. Diligent efforts can include asking the parent's relatives and friends about the parent's location, checking social media, welfare records, employment security records, and seeking information from the local jail, Armed Forces, the Department of Correction, and the Bureau of Motor Vehicles, if appropriate. See **In Re Adoption of L.D.**, 938 N.E.2d 666, 671(Ind. 2010) (adoption vacated because adoptive petitioners and their attorney failed to perform diligent search for Mother required by Due Process Clause; notice and service of process of adoption petition by publication was insufficient to confer personal jurisdiction over Mother); **Abell v. Clark Cty. Dept. of Public Welfare**, 407 N.E. 2d 1209 (Ind. Ct. App. 1980) (service by publication not proper because welfare department had access to Mother's address as she was recipient of welfare benefits). Strict compliance with the trial rules is required for notice by publication. See Chapter 3 at V.C. for detailed requirements for service by publication.

If the parent is represented by an attorney in the underlying CHINS case, a copy of the summons and termination petition should also be served on the attorney. In **In Re A.M.H.**, 732 N.E. 2d 1284 (Ind. Ct. App. 2000), a voluntary termination case, the Court affirmed the trial court's dismissal of the petition for voluntary termination because of the failure of the DCS caseworker to notify the attorney who was representing Mother in the CHINS case that the caseworker was obtaining a voluntary relinquishment of rights from Mother. Id. at 1285. The Court also broadly discussed the duty of a petitioning counsel to give notice of proceedings to defending counsel who is known to represent the client, although a lawsuit or an appearance may not yet have been filed in a particular matter. Id. at 1286. See **Smith v. Johnston**, 711 N.E.2d 1259, 1263 (Ind. 1999) (default judgment set aside for misconduct when

plaintiff's attorney filed suit and pursued default judgment without notifying attorneys whom she knew represented defendant in matter).

In **D.A. v. Monroe County Dept. of Child Serv.**, 869 N.E.2d 501, 502 (Ind. Ct. App. 2007), the Court reversed and remanded the termination of Father's parental rights because it was unclear whether Father had timely notice of the final termination hearing.

See Chapter 2 at IV.C. for discussion of Servicemembers Civil Relief Act, which requires specific procedures to protect rights of members of the United States armed forces in civil cases. These procedures would apply to termination proceedings.

III. F. Default Judgment and Judgment on Merits When Parent Does Not Appear

In **Thompson v. Clark County Div. of Family**, 791 N.E.2d 792 (Ind. Ct. App. 2003), *trans. denied*, the Court reversed the termination judgment and remanded the case to the trial court with instructions to hold a proper final termination hearing. Id. at 796. Mother had previously been granted six continuances of the final termination hearing. Just before the hearing was set to begin, Mother called the court and said she would be unable to attend the hearing because she had checked herself into an alcohol and drug rehabilitation facility. Mother's counsel requested a continuance, to which the court tentatively agreed upon verification that Mother was a patient at the facility. When the court reporter was told by the facility that Mother was not a patient there, the court denied Mother's continuance request and conducted the termination hearing in an expedited summary proceeding over the objection of Mother's attorney. No witnesses were called, but the attorneys for the DFC and Mother gave summaries of what their witnesses would have testified to had a full hearing been conducted. The attorneys also introduced exhibits without sponsoring witnesses or foundations. The trial court then terminated parental rights at the DFC request for a default judgment. The Court concluded that the challenged summary proceeding denied Mother's due process rights and violated her opportunity to cross-examine witnesses provided at IC 31-32-2-3(b). Id. The Court opined that Mother was not given the opportunity to be heard in a "meaningful manner." Id. The Court stated that the trial court could have conducted a hearing in Mother's absence where witnesses testified, cross-examination was conducted, and exhibits were properly admitted into evidence. Id.

The Court also discussed the term "default judgment" used by DFC and the trial court and stated that the case did not involve a true default judgment. Id. at 794 n.1. The Court quoted Young v. Elkhart County Office of Family, 704 N.E.2d 1065, 1068 (Ind. Ct. App. 1999), stating:

> Where an issue of fact exists between the parties, a default judgment is improper. The court may, however, proceed to hear evidence and, if a prima facie case is established, render the appropriate judgment. Such a judgment is a judgment on the merits.

Thompson at 794 n.1.

Practice Note: Practitioners are cautioned not to present evidence on termination petitions in summary proceedings even when parents do not appear at court.

In **Young v. Elkhart County Office of Family**, 704 N.E. 2d 1065 (Ind. Ct. App. 1999), the Court noted that default judgments are disfavored in Indiana. Id. at 1068. Mother did not appear for the termination hearing. The court granted the motion of Mother's counsel to withdraw due to lack of communication with her client, and the court stated its willingness to enter a default judgment. The hearing proceeded with regard to Father, and Mother's counsel did not participate. The court entered judgment terminating the parental rights of both parents. In reversing the default judgment against Mother on appeal, the Court noted that the requirements for a default judgment had not been

satisfied. Ind. Trial Rule 55(B) requires three days' notice of the default, and a default judgment is not proper when the defendant has filed a responsive pleading, even if the defendant fails to appear for trial. Id. at 1068. In this case there was no evidence that any party moved for default or that Mother was given the required notice of default, and the evidence showed that counsel had filed an appearance, a responsive pleading, and appeared with Mother at numerous hearings. Id. at 1069. Although the default judgment was error, the Court clarified that the trial court could have proceeded to take evidence and render a judgment if a prima facie case was established. Id. at 1068. The Court stated:

> A judgment entered in Ayer's [mother's] absence did not necessarily have to be a default. Had the ECOFC [Elkhart Office of Family and Children] presented any evidence to support the termination of her parental rights, the judgment, regardless of what the court called it, would actually have been a judgment on the merits, and that would have been a proper judgment.

Id. at 1069.

III. G. Termination of Parent-Child Relationship of Individual Who Committed Act of Rape

IC 31-35-3.5 allows termination of the parent-child relationship when the parent has been proven to have committed an "act of rape" resulting in the child's conception. Unlike other termination of parent-child relationship petitions, which must be filed by DCS or a licensed child placing agency for voluntary terminations or DCS or the child's guardian ad litem/court appointed special advocate for involuntary terminations, IC 31-35-3.5-3 provides that only a the parent who is the victim of an "act of rape" may file the termination petition. IC 31-35-3.5-2 grants the probate court concurrent jurisdiction with the juvenile court on termination proceedings under IC 31-35-3.5. IC 31-35-3.5-4 states that the parent who is the alleged victim of the act of rape has 180 days from the child's birth or, if the parent is under eighteen (18) years of age, two (2) years from the date the parent reaches the age of eighteen (18), in which to file a petition to terminate the alleged perpetrator's parental rights to the child in question. IC 31-35-3.5-5 lists the contents of the termination petition. In addition to the circumstances of the child's conception, the parent must also prove that termination of the relationship between the alleged perpetrator and the child is in the child's best interests. To establish a prima facie case, IC 31-35-3.5-6 states that the petitioning parent must show by clear and convincing evidence that the alleged perpetrator committed an "act of rape", as defined in IC 31-9-2-0.9, and that the child was conceived as a result of that act of rape. The definition of "act of rape" at IC 31-9-2-0.9 includes IC 35-42-4-1 [the criminal definition of rape] and IC 35-42-4-3(a) [the criminal definition of child molesting by sexual intercourse that is committed by using or threatening the use of deadly force or while armed with a deadly weapon; or results in serious bodily injury; or is facilitated by furnishing the victim with a drug or a controlled substance or knowing that the victim was furnished with the drug or controlled substance without the victim's knowledge]. Notably, IC 31-35-3.5 does not require that the perpetrator was convicted of rape or child molesting in a criminal proceeding. If the parent proves that the child was conceived by an "act of rape", IC 31-35-3.5-6(2) states that this is prima facie evidence that termination of the perpetrator's parental rights is in the child's best interests.

IC 31-35-3.5-7 states that the court must terminate the alleged perpetrator's parental rights if it determines by clear and convincing evidence that the allegations in the petition for termination are true, and that termination of the relationship is in the child's best interests. IC 31-35-3.5-8 states the court may appoint a guardian ad litem, court appointed special advocate, or both, for the child who is the subject of the termination petition as provided in IC 31-17-6-1 [dissolution states for appointing a guardian ad litem/court appointed special advocate]. IC 31-35-3.5-9 allows the court to issue an emergency custody order removing the child from the alleged perpetrator's custody. IC 31-35-3.5-10 states that the court receiving the termination petition must notify DCS of the petition, and if there is a CHINS petition pending for the child, DCS must notify the court in which the CHINS petition is pending. IC 31-35-3.5-11 states that the court hearing the petition for termination must stay the

termination proceeding until the CHINS court enters a dispositional decree. If a CHINS petition is pending, IC 31-35-3.5-12 states that the CHINS court must then give the court in which the termination petition is pending notice that the dispositional decree has been issued within ten (10) days of its issuance.

Practice Note: This statute could be used to facilitate the adoption of the child who was conceived as a result of an "act of rape" when the child's parent wishes to consent to the adoption. Notably, this statute does not require that the victim parent or the child conceived by an "act of rape" must be the subject of a CHINS petition.

IV. MANDATORY PETITION FOR TERMINATION OF PARENT-CHILD RELATIONSHIP

IV. A. When is a Termination Petition Mandated?

IC 31-35-2-4.5 lists the situations under which a petition for involuntary termination is mandated, who shall file the petition, and the conditions under which a motion to dismiss the petition shall be filed. IC 31-35-2-4.5(b) provides that a person described in IC 31-35-2-4(a) [DCS attorney or the child's guardian ad litem/special advocate] shall file a termination petition if: (1) the court has made a finding that reasonable efforts for family preservation or reunification are not required under IC 31-34-21-5.6.; or (2) the child has been placed in relative care, foster care, a child caring institution, or group home as directed by the court in a CHINS or delinquency proceeding and has been removed from the parent and has been under the supervision of DCS or county probation for not less than fifteen of the most recent twenty-two months, beginning with the date the child was removed from the home as a result of the child being alleged to be a child in need of services or a delinquent child. See Chapter 4 at VI.C. for detailed discussion on abandoned infants, prior termination cases, and parental criminal convictions that may qualify as reasonable efforts exceptions.

In **In Re E.E.S.**, 874 N.E.2d 376 (Ind. Ct. App. 2007), *trans. denied*, the Court reversed the trial court's termination of Mother's parental rights. Id. at 377. The termination judgment was reversed because Bartholomew County Office of Family and Children (BCOFC) had failed to uphold its end of the agreement with Mother that, in exchange for the parents' admitting to the allegations contained in the CHINS petitions, BCOFC would maintain and support the family bond until Mother was released from prison and had an opportunity to engage in services. Id. at 381. In its opinion, the Court acknowledged that (1) the circumstances that led to the removal of the children had not been remedied because Mother was still incarcerated, and the maternal grandparents were still unable to provide a proper environment for the children; (2) the facts demonstrated that termination of Mother's parental rights was in the best interests of the children; and (3) this was a case where the Court normally would affirm the termination judgment. Id. The Court stated that it disapproved of such agreements because they restricted the OFC from acting pursuant to the termination statutes or in the best interests of the children, but the Court could not "allow an OFC to ignore such an agreement when the parent's consideration for the agreement was, in essence, waiver of the right to due process at the CHINS proceeding." Id. at 382. BCOFC's argument that it had no choice but to file the petition was based on the requirement of IC 31-35-2-4.5 that a termination petition should be filed when a child has been removed from a parent and under OFC supervision for not less than fifteen months of the most recent twenty-two months. The Court responded that (1) BCOFC was presumed to have known of the statutory requirements when it entered into the agreement with Mother; (2) despite that statutory requirement, BCOFC entered into the agreement with Mother without putting any constraints on the agreement; (3) BCOFC could have complied with the statutory requirement and honored its agreement with Mother by requesting a continuance of the termination proceedings until Mother was released from prison; and (4) "BCOFC cannot avoid its agreement with [Mother] by feigning lack of control." Id.

See this Chapter at VIII.A.6. for case law on the issue of children's removal and placement under supervision by DCS or probation for fifteen of the most recent twenty-two months as an element of termination proceedings.

IV. B. Who Must File Mandatory Termination Petition?

IC 31-35-2-4.5(b)(1) provides that a person described in IC 31-35-2-4(a) [DCS attorney or the child's guardian ad litem/special advocate] shall file a termination petition for a child who fits within the categories listed in IC 31-35-2-4.5(a). The person who files the petition shall request that it be set for hearing. IC 31-35-2-4.5(b)(2).

IV. C. Department of Child Services Shall Be Joined in Mandatory Petition Brought by Guardian ad Litem/Court Appointed Special Advocate

IC 31-35-2-4.5(c) provides that DCS shall be joined as a party on a mandatory petition to terminate parental rights filed by a guardian ad litem/court appointed special advocate.

IV. D. Motion to Dismiss Mandatory Petition

If DCS intends to file a motion to dismiss the termination petition pursuant to IC 31-35-2-4(b)(3), the statutory factors for a motion to dismiss which apply to the case must be included in the termination petition. DCS must specify each factor that applies. IC 31-35-2-4.5(d) provides that DCS or the child's guardian ad litem/court appointed special advocate may file a motion to dismiss the termination petition if any of the circumstances paraphrased below apply:

- COMPELLING REASON NOT TO TERMINATE, (d)(1). A motion to dismiss shall be filed if the current case plan prepared by or under the supervision of DCS or the probation department has documented a compelling reason, based on facts and circumstances stated in the petition or motion, for concluding that filing or proceeding on a petition to terminate the parent-child relationship is "not in the best interests of the child." A compelling reason may include the fact that the child is being cared for by a custodian who is a relative (as defined by IC 31-9-2-107(c)). IC 31-9-2-107(c) defines "relative" as a parent, a grandparent, a brother, a sister, a stepparent, a stepgrandparent, a stepbrother, a stepsister, a first cousin, an uncle, an aunt, or any other individual with whom a child has an established and significant relationship.
- DCS OR PROBATION DEPARTMENT DID NOT PROVIDE SERVICES AND CASE PLAN OR PERMANENCY PLAN NOT EXPIRED, (d)(2). A motion to dismiss shall be filed if all of the following conditions exist: the reasonable efforts exception in IC 31-34-21-5.6 does not apply; DCS or the probation department did not provide services under the currently effective case plan, dispositional decree, or permanency plan to permit and facilitate safe return of the child to the home; and the period for completion of family services specified in the current case plan, decree, or permanency plan has not expired.
- DCS DID NOT PROVIDE SERVICES THAT ARE SUBSTANTIAL AND MATERIAL TO REUNIFICATION, (d)(3). A motion to dismiss shall be filed if all of the following conditions exist: (1) the reasonable efforts exception in IC 31-34-21-5.6 does not apply; (2) DCS did not provide services under the current case plan, permanency plan, or dispositional decree; and (3) the services that have not been provided are substantial and material in relation to implementation of a plan to permit safe return of the child to the child's home.

In **In Re Involuntary Termin. of Parent-Child [B.R.]**, 875 N.E.2d 369 (Ind. Ct. App. 2007), *trans. denied*, waiver notwithstanding, the Court found that IC 31-34-1-16 [voluntary placement of child with emotional, behavioral, or mental disability] did not apply to this case and, thus, did not limit the

State's power to request the termination of the parent-child relationship because Mother did not place the child out of the house solely because she could not provide treatment for the child. Id. at 373-75. Although Mother contended that the trial court's failure to dismiss the termination proceedings under IC 31-34-1-16 constituted fundamental error, the Court held that because IC 31-34-1-16 did not apply to this case, the trial court's failure to raise the statute was not fundamental error. Id. at 375. The child had been removed from Mother's custody for at least fifteen months at the time the termination petition was filed.

In **Everhart v. Scott County Office of Family**, 779 N.E.2d 1225 (Ind. Ct. App. 2002), *trans. denied*, the Court concluded that the grounds for dismissing a termination petition pursuant to IC 31-35-2-4.5 apply only to termination petitions that are mandated pursuant to IC 31-35-2-4(b)(2)(A)(ii) and (iii). Id. at 1229. The Court noted that mandatory petitions are those which must be filed because the trial court has determined that "reasonable efforts for family preservation or reunification with respect to a child in need of services are not required," or when a child in need of services has been placed in an out-of-home placement for not less than fifteen of the most recent twenty-two months. Id.

The facts of **James v. Pike County,** 759 N.E.2d 1140 (Ind. Ct. App. 2001), involve two children who were adjudicated CHINS and had been in placement with their maternal grandmother for seventeen months. The mandatory termination of parental rights petition was filed, and Mother filed a motion to dismiss, arguing that the State had no compelling reason to terminate her parental rights because the children were in placement with their grandmother. The trial court denied the motion. The Court affirmed the trial court's denial of the motion on the interlocutory appeal brought by Mother. Id. at 1144. The Court upheld the constitutionality of IC 31-35-2-4.5, and further ruled that the trial court is not mandated as a matter of law to dismiss a termination petition because the child is in placement with a relative. Id. at 1143-44.

In **In Re J.W.**, 779 N.E.2d 954 (Ind. Ct. App. 2002), *trans. denied*, the child was reunited with Father, and the parents' divorce decree allowed Mother only supervised visitation with the child. Mother's parental rights were involuntarily terminated, and she argued on appeal that IC 31-35-2-4.5 required dismissal of the termination petition because the child was in Father's custody. The Court was not persuaded, stating that the permissive language that a termination petition *may* be dismissed if the child is in relative custody does not *require* that the petition be dismissed (emphasis in opinion). Id. at 963.

In **M.H.C. v. Hill**, 750 N.E.2d 872 (Ind. Ct. App. 2001), Father contended that the petition to terminate his parental rights should have been dismissed as a matter of law because the child was placed with a relative. The Court was not persuaded by Father's argument, finding that (1) the termination petition alleged that the child had been removed from his parent for at least six months under a dispositional decree; therefore, no provision of IC 31-34-2-4.5 applied to Father; and (2) even if IC 31-34-2-4.5(a) could be construed to apply to Father, OFC was not required to dismiss the petition against him because the child was placed with a relative. Id. at 877-78. The statutory provision for dismissal requires documentation in the OFC case plan of a "compelling reason" to conclude that termination is not in the child's best interests. The compelling reason may include that the child is being cared for by a relative custodian. IC 31-35-2-4.5(d)(1). The statutory language is permissive, and the trial court found no compelling reason regarding the child and Father. As a result, the OFC was not required as a matter of law to dismiss the petition to terminate Father's parental rights under IC 31-34-2-4.5. Id. at 879.

IV. E. Who Shall File Motion to Dismiss?

IC 31-35-2-4.5(d) provides that a person described in section 4(a) of this chapter [the DCS attorney or the child's guardian ad litem/court appointed special advocate] may file a motion to dismiss the termination petition.

IV. F. Hearing on Motion to Dismiss

A hearing should be held on a motion to dismiss. See IC 31-35-2-6.5(b) (notice is required on the motion to dismiss hearing); IC 31-35-2-4.5(d) (court shall dismiss petition for termination if it "finds" that the allegations in the motion to dismiss are "established by a preponderance of the evidence"); **Phelps v. Sybinski**, 736 N.E. 2d 809, 815 (Ind. Ct. App. 2000) (Indiana law provides for judicial review of motion to dismiss mandatory petition for termination, rather than giving office of family and children discretion to avoid filing termination petitions in some cases). There are no time requirements for a hearing on the motion to dismiss.

IV. G. Standard for Granting Motion to Dismiss

If the motion to dismiss the termination petition is proven by a preponderance of the evidence, the court "shall dismiss the petition." IC 31-35-2-4.5(d).

IV. H. Constitutionality of Indiana Legislation Mandating Petitions For Involuntary Termination

In **Phelps v. Sybinsky**, 736 N.E.2d 809 (Ind. Ct. App. 2000), the parents of an autistic child brought a class action challenging the legality of the mandatory termination law at IC 31-35-2-4.5 for children who have been placed outside of their homes for fifteen of the last twenty-two months under the supervision of the office of family and children. The facts of the case showed that the child had been placed outside of his home for the requisite period of time. Even though the office of family and children recommended a permanency plan of long term foster care or institutional care with regular parental visitation as being in the best interest of the child, the office filed the termination petition as required by law. Id. at 812. In response to the petitioner's class action, the office of family and children filed a motion to dismiss the class action, which was granted after a hearing. The Court affirmed the dismissal and upheld the mandatory termination petition law against challenges that it violated federal law, as well as state and federal constitutional rights of due process and equal protection, and requirements for separation of powers. The Court began its opinion by stating that the federal 1997 Adoption and Safe Families Act, upon which the Indiana law is based:

> ...sought to ensure that children did not spend long periods of their childhoods in foster care or other settings designed to be temporary. The 1997 amendment included a provision designed to make adoption of these children more feasible.

Id. at 813. The Court then compared the federal law and Indiana law, and said that, although they take different approaches to the issue, both laws require a preliminary determination as to whether termination is in the best interest of the child. Id. at 814-815. Under federal law, the county attorney has the discretion to avoid filing a petition if he determines that termination is not in the best interest of the child. Under Indiana law, the county attorney must file every petition for children who fit into the time criteria, but the attorney is required to allege if the termination is contrary to the best interest of the child and the trial court is required to determine if dismissal of the termination petition would be in the best interests of the child. The Court noted that Indiana law does even more to safeguard the interests of children in foster care by requiring a judicial review of motions to dismiss, and the Indiana procedures do not violate federal law. Id. at 815. The Court also ruled that Indiana law does not violate due process or equal protection of the law, nor does it require attorneys to violate the Rules of Professional Conduct by filing frivolous actions. Id. at 816-18. The Court noted that the Indiana law does not require attorneys to bring frivolous actions because a judicial determination as to whether a termination petition is in the best interest of the child is not frivolous,

and Indiana law does not require an attorney to make a false statement in his pleadings because the petitioner must note any existing grounds for dismissal in the termination petition. Id. at 817.

The constitutionality of IC 31-35-2-4.5, the statute which mandates filing of a termination petition, was also affirmed in **Castro v. Office of Family and Children**, 842 N.E.2d 367, 378 (Ind. Ct. App. 2006), *trans. denied*, and **James v. Pike County**, 759 N.E.2d 1140, 1143 (Ind. Ct. App. 2001).

V. PROCEDURAL ISSUES

V. A. Parties to the Involuntary Termination Case

Given the general rule that termination cases follow the same procedures which are statutorily set for CHINS cases, the parties to the termination case are the same as those set out in IC 31-34-9-7: the child, the child's parent, guardian, or custodian, DCS, and the child's guardian ad litem/court appointed special advocate. IC 31-9-2-88(b) clarifies that "parent" means a biological or adoptive parent and, for CHINS and termination proceedings, "parent" includes an alleged father. IC 31-35-2-6.5(g) provides that a person entitled to the ten day notice of the termination hearing "does not become a party to a proceeding under this chapter as a result of the person's right to notice and the opportunity to be heard. A person, including a potential adoptive parent, could petition to intervene in the termination proceeding, and the trial court could grant the person's request. See this Chapter at V.C. for further information on the ten day notice required by IC 31-35-2-6.5.

In **In Re J.S.O.**, 938 N.E.2d 271 (Ind. Ct. App. 2010), the Court concluded that the trial court's termination order violated Father's due process rights. Id. at 277. Father, who had signed a paternity affidavit at the time of the child's birth in Oklahoma and whose name was listed on the child's birth certificate, was not listed on the CHINS petition, nor was he provided summons, notices of hearings, a case plan, or any other CHINS document. Near the time of the child's removal, Mother had informed the investigating DCS case manager of Father's name and that he was jailed in Lake County, Indiana. Although Father was made a party to the termination case, the Court reversed the trial court's termination order, stating that the Court could not ignore DCS's and the trial court's failure to follow numerous and substantial statutory mandates. Id.

V. B. Noncustodial Parents and Alleged Fathers

Alleged fathers, adjudicated fathers (either by paternity affidavit or a paternity court proceeding), and noncustodial parents should be named in the termination petition, receive service of process, be given the ten day notice, and have court appointed counsel if requested so that all parental ties may be terminated in the termination case, allowing the child to be legally placed for adoption. If an alleged father's parental rights have not been terminated, and if he is legally eligible to receive notice of an adoption petition pursuant to IC 31-19-4, he may file a motion to contest the adoption and a paternity proceeding, thereby possibly preventing or at least delaying the child's adoption. See Chapter 13 at VIII. for further information.

Case law reflects challenges by noncustodial parents to terminations of their parental rights on the basis that they were not provided needed reunification services or not otherwise given the opportunity to parent their children. See this Chapter below at VIII.B.3. for case law on noncustodial parents' appeals in termination cases when the child was not living with the noncustodial parent at time of the child's removal from home.

V. B. 1. Termination to Prevent Future Custody Modification

In **In Re J.W.**, 779 N.E.2d 954 (Ind. Ct. App. 2002), *trans. denied*, the Court affirmed the termination judgment, finding there was clear and convincing evidence that termination was in

the child's best interests. Id. at 964. While in Mother's care, the child was hospitalized after ingesting baby food contaminated with a prescription drug. After his removal from Mother's care, the child had no severe illnesses. Mother was diagnosed by a psychiatrist with probable Munchausen's syndrome by proxy, which is not typically treatable. The psychiatrist recommended supervised visitation for Mother and that Mother never have custody of the child. Father had divorced Mother and been reunited with the child, and the divorce court ordered supervised visitation for Mother. The Court agreed with DCS's argument that termination of Mother's rights was in the child's best interests to prevent Mother from regaining custody of the child in the future. Id. at 963. The Court also agreed with DCS's argument that keeping the child a ward of the state indefinitely was not in the best interests of the child, Father, or the state. Id.

V. B. 2. Voluntary Termination By One Parent While Involuntary Termination Pending As to Other Parent

In **In Re D.J.**, 755 N.E.2d 679 (Ind. Ct. App. 2001), *trans. denied,* the Court affirmed the trial court's judgment terminating Mother's parental rights to her two children. Id. at 685. Mother argued on appeal that the trial court erred in accepting Father's voluntary consent to the termination of his parental rights immediately prior to conducting the hearing on the petition to involuntarily terminate Mother's rights. Mother contended that this procedure deprived her of a fair and impartial hearing. The allegations against Father and Mother were identical and were set forth in the same termination petitions. The Court was not persuaded by Mother's argument of unfairness, finding that the DFC was required to present sufficient evidence to support termination of each parent's rights and the trial court's acceptance of Father's voluntary consent to termination did not constitute a "pre-judgment" of the merits of the petitions as they related to Mother, nor did Father's consent affect the outcome of the case. Id. at 684. The Court further stated:

> We recognize that this determination is made with the benefit of hindsight, a benefit which a trial court would not have at the time of accepting a voluntary consent to termination from one parent prior to a fact-finding hearing for the other, and therefore, we reiterate that we do not believe that this practice should be routinely used.

Id.

See the following termination cases in which the facts show that one parent had voluntarily terminated parental rights prior to the trial court's involuntary termination judgment regarding the other parent: **Hite v. Vanderburgh Cty Office Fam. & Chil.**, 845 N.E.2d 175, 177 (Ind. Ct. App. 2006); **Everhart v. Scott County Office of Family**, 779 N.E.2d 1225, 1227 (Ind. Ct. App. 2002), *trans. denied*; **In Re K.S.**, 750 N.E.2d 832, 836 (Ind. Ct. App. 2001); **In Re J.T.**, 742 N.E.2d 509, 514 (Ind. Ct. App. 2001), *trans. denied*.

Practice Note: Practitioners should ask the court to take a parent's consent to voluntary termination of the parent-child relationship under advisement until the evidence has been concluded on an involuntary termination petition regarding the other parent and a termination judgment has been made.

V. B. 3. Alleged Father

In **In Re Parent-Child Relationship of S.M.**, 840 N.E.2d 865 (Ind. Ct. App. 2006), the Court affirmed the termination of the parental rights of Putative Father (Father). Id. at 872. Four days after the child's birth, the child tested positive for cocaine, the identity of his father was unknown, and the child was removed from Mother's custody by the Marion County Department of Child Services. The CHINS petition was filed, and Father was named by Mother as a possible father of the child. Father was given notice of the CHINS proceeding by publication because his location

was unknown. Father did not appear at the dispositional hearing. The Court ordered the child removed from Father's care and continued the child's placement in the pre-adoptive home. DCS was directed to offer no services to Father until he appeared in court to demonstrate a desire and ability to care for the child. Father did not appear in court until the initial hearing on the termination petition, but had contact with the case manager during the CHINS proceeding. The termination petition was granted. Father appealed and the Court addressed two issues: (1) whether the evidence was sufficient to show there was a reasonable probability that the conditions resulting in the child's removal would not be remedied; and (2) Father's standing to appeal the termination judgment. On the issue of whether the conditions for removal would be remedied, the Court addressed Father's complaint that DCS was not diligent in providing services to him and arranging for services where he resided in Illinois. The Court noted that Father had not been ordered by the juvenile court to participate in any particular services in order to demonstrate his ability to parent, but DCS communicated with him and advised him of the following requirements: (1) establish paternity, (2) complete a parenting assessment, and (3) complete a drug and alcohol assessment or provide verification of assessment or treatment already completed in Illinois. The Court found that Father's failure for over one year to establish paternity and to pursue the other requirements, when he was provided necessary information to do so, was sufficient to support the trial court's finding that there was a reasonable probability that the conditions resulting in the child's removal would not be remedied. Id. at 870. The Court found no existing duty upon DCS in this case to coordinate services for an out-of-state putative father with out-of-state providers, and stated that Father was adequately informed of the steps he needed to take to show the court that his rights should not be terminated. Id. at 869. The Court also rejected Father's argument that the grounds for initial removal of the child from Mother (i.e. child born cocaine addicted) did not apply to him. Id. at 870. The Court said that it was not limited to this "narrow" consideration and could look to whether Father had taken steps to establish paternity and meet the requirements to demonstrate his fitness. Id. The Court also found that Father had standing to appeal the termination of parental rights judgment. Id. at 872. The Court held that, although the voluntary termination and adoption statutes both provide that the consent of the putative father to termination of his parental rights and/or adoption can be irrevocably implied when certain conditions are met, neither of those proceedings were applicable to the instant case involving a petition for involuntary termination of parental rights. Id. at 871. The Court stated that none of the involuntary termination statutes require that a "putative father take any steps to establish his paternity in order to contest a termination action where an adoption is not pending." Id. The Court noted that DCS could have dealt with the situation by electing to initiate adoption proceedings rather than involuntary termination proceedings when its permanency plan for the child was adoption. Id. at 871-72.

See also the following cases in which termination of the alleged father's parental rights was sought: **In Re R.A.**, 19 N.E.3d 313, 321 (Ind. Ct. App, 2014) (Court reversed trial court's termination judgement for biological incarcerated Father who had not filed to establish paternity), *trans. denied*; **A.J. v. Marion County Office of Family**, 881 N.E.2d 706 (Ind. Ct. App. 2008) (termination of alleged Father's parental rights affirmed where, among other things, he admitted paternity but failed to legally establish paternity), *trans. denied*; **In Re E.E.**, 853 N.E.2d 1037 (Ind. Ct. App. 2006) (termination affirmed despite ambiguous notice and denial of request for continuance to secure alleged Father's presence), *trans. denied*; **In Re C.C.**, 788 N.E.2d 847 (Ind. Ct. App. 2003) (alleged Father failed to establish paternity or visit because he did not want to bond with child only to find out he was not biological father; termination affirmed), *trans. denied*; **In Re D.Q.**, 745 N.E.2d 904 (Ind. Ct. App. 2001) (termination denial remanded for adequate assessment of whether facts were sufficient to support termination of absent alleged Father's parental rights to one of the children).

V. C. Ten Day Notice of Termination Hearing to Parents, Foster Parents, Prospective Adoptive Parents, and Others

IC 31-35-2-6.5(a) requires that notice of a hearing on a petition for termination of the parent-child relationship or a hearing on a motion to dismiss the petition must be given by the party who filed the termination petition or motion to dismiss (the DCS attorney or the child's guardian ad litem/court appointed special advocate) ten days before the hearing. The following persons shall be given notice: (1) the child's parent, guardian, or custodian, and the attorney for the parent, guardian, or custodian; (2) prospective adoptive parents named in an adoption petition, under certain situations; (3) any person whom DCS knows is "currently providing care" for the child; (4) any other suitable relative or person whom DCS knows has had "a significant or care taking relationship to the child"; and (4) any other party to the CHINS proceeding. IC31-35-2-6.5(g) states that a person does not become a party to the termination proceeding as a result of the person's right to notice and opportunity be heard. IC31-35-2.5-1(h) states that, if the parent of an abandoned infant does not disclose the parent's name as allowed by IC 31-34-2.5-1(c), there is no requirement for that parent to be notified of a hearing described in IC31-35-2-6.5(c). Note that the parents of an abandoned infant must still be served with the termination petition, including a "John Doe" and/or "Jane Doe" service by publication if the parents' whereabouts cannot be ascertained despite diligent efforts to locate them. It is important to distinguish service of process from service of a ten day notice of a hearing. Both are required to comply with the termination of the parent-child relationship process. See this Chapter at III.E. for an explanation of service of process when a termination petition has been filed.

Practice Note: The ten day notice requirement is not included in the involuntary termination statute based on the criminal conviction of the parent at IC 31-5-3-1 through 9, but it is recommended that practitioners send the ten day notice of hearings on petitions filed pursuant to IC 31-35-3-1 through 9 to avoid reversals of termination judgments on procedural grounds.

IC 31-35-2-6.5 has been strictly enforced with regard to modifications in the originally set date for the termination trial. In **In Re D.L.M.**, 725 N.E.2d 981 (Ind. Ct. App. 2000), the court initially scheduled the termination trial date for August 31 and then rescheduled the trial for August 6. The court gave notice of the changed date to Mother's attorney. Mother did not appear for trial, and the court took evidence and entered a judgment of termination. The Court reversed for lack of notice to Mother on the following reasoning: the heightened principles of due process and the fundamental rights at stake in the termination hearing; the unambiguous language of IC 31-35-2-6.5 that notice must be given to the parent five days [now ten days] in advance of the hearing; and the brief time before the trial in this particular case. Id. at 983-984. The Court said that, although Ind. Trial Rule 5(B) provides that service should be made upon the attorney of record, IC 31-35-2-6.5 places an additional requirement on the moving party to serve the parent with notice as well as the parent's attorney. Id. at 984 n.5. The Court mentioned the OFC's argument that the caseworker log contained a written notation that she had given Mother notice of the new hearing date, but the Court responded that the log could not be taken into consideration on appeal because it was only included in the appendix of the appeal and was not part of the record on appeal. Id. at 983 n.4. The Court reiterated the well-established rule of appellate procedure that the Court may not consider evidence outside of the record. Id. See also **Harris v. Delaware County Division**, 732 N.E.2d 248 (Ind. Ct. App. 2000) (termination judgment reversed because IC 31-35-2-6.5 required notice to Father of the changed date of the termination hearing, and publication notice of the changed date was not made in strict compliance with the trial rules).

In **In Re H.K.**, 971 N.E.2d 100 (Ind. Ct. App. 2012), the Court remanded the termination proceeding with instructions that the trial court conduct a hearing to determine whether the statutory ten day notice requirements of IC 31-35-2-6.5 were met and whether, if the notice requirements were not met, Mother's due process rights were violated. Id. at 104. DCS filed petitions to terminate Mother's

parental rights to her three children. During a case conference, Mother was personally served with copies of the involuntary termination petitions, summons, and orders setting an initial hearing for all three termination cases. The initial hearing was held. Mother failed to appear but was represented by counsel. Mother had not visited the children, and had ceased all communications with the DCS case manager and service providers. The trial court scheduled an evidentiary hearing on the termination petitions and assigned a new attorney to represent Mother. Approximately three weeks before the termination hearing, Mother's attorney filed a Notice to the Court indicating that she had made three unsuccessful attempts to locate Mother. The hearing on the termination petitions was held and Mother failed to appear. At the beginning of the termination hearing, Mother's attorney moved to continue the hearing, arguing that DCS had failed to provide Mother with proper notice of the hearing. Mother's attorney told the court that she had finally spoken with Mother earlier that same morning and that Mother, who had been residing in Florida, indicated she "was unaware of the proceedings today" and "had never received any paperwork regarding the termination or the termination proceedings." DCS objected to the requested continuance and emphasized that the trial court's records confirmed that Mother was personally served with the petition. DCS argued that: (1) efforts had been made to locate Mother, including mailing notice of the termination hearing to Mother's last known address; (2) the family case manager had finally located Mother; (3) testimony would show that after receiving personal service of the termination petition, Mother was part of further conferences at DCS where the termination was discussed. The trial court denied the requested continuance and proceeded with the termination hearing. At the hearing, the case manager did not testify as to whether DCS ever provided Mother with the ten day notice of the evidentiary hearing, nor was other testimony offered or documentary evidence submitted to show Mother was ever provided with notice of the termination hearing. At the conclusion of the hearing, the trial court found that notice had been provided to all persons required by statute in the most effective means under the circumstances, and that, although Mother informed her attorney that she was unaware of the termination proceedings, documents indicating personal service and testimony from the case manager indicated otherwise. Later that same day, the trial court entered its written judgment terminating Mother's parental rights.

Mother's sole argument on appeal was that she was entitled to a reversal because DCS failed to provide her with proper notice of the termination hearing. The Court observed that IC 31-35-2-6.5 provides, in relevant part, that at least ten days before a hearing on a termination petition or motion, the person or entity who filed the petition to terminate the parent-child relationship shall send notice to the child's parent. Id. at 102-03. Quoting In Re T.W., 831 N.E.2d 1242, 1246 (Ind. Ct. App. 2005), the Court noted that "[c]ompliance with the statutory procedure of the juvenile code is mandatory to effect termination of parental rights." H.K. at 103. The Court observed that failure to comply with the statutory notice is thus "a defense that must be asserted." H.K. at 103, quoting In Re T.W., 831 N.E.2d at 1246. The Court said that, once placed in issue, DCS bears the burden of proving compliance with the statute. H.K. at 103. The Court noted that, although DCS entered into evidence copies of the termination petitions and summonses pertaining to the initial termination hearing that were mailed to Mother's last known address, the record on appeal was devoid of any evidence showing DCS likewise attempted to serve Mother with the ten day notice of the termination trial. Id. The Court opined that, although IC 31-35-2-6.5 does not require compliance with Ind. Trial Rule 4, which governs service of process and incorporates a jurisdictional component, DCS was nevertheless required by IC 31-35-2-6.5 to send notice of the termination hearing to Mother's last known address at least ten days before the hearing. Id.

See also the following termination cases which discuss the ten day notice: **In Re H.T.**, 911 N.E.2d 577, 580-81 (Ind. Ct. App. 2009) (MCDCS failed to provide Mother with essential information including date, time, and location of termination hearing, so Mother's statutory right to notice of termination hearing pursuant to IC 31-35-2-6.5 was fatally compromised and termination judgment

was reversed); **In Re A.P.**, 882 N.E.2d 799, 805 (Ind. Ct. App. 2008) (Court declined to reverse termination of Father's parental rights based on alleged faulty notice of termination hearing by publication because: (1) Father waived this argument by failing to raise it at trial; and (2) waiver notwithstanding, although notice by publication may have been faulty, Father received actual notice of hearing from case manager and Father's brother appeared at hearing on Father's behalf); **In Re B.J.**, 879 N.E.2d 7, 14, 23 (Ind. Ct. App. 2008) (DCS did not fail to fulfill its statutory obligation to provide Father with notice of termination hearing, nor was Father's constitutional right to due process violated when DCS sent notice of termination hearing to Father's last known address pursuant to IC 31-35-2-6.5.), *trans. denied;* **Q.B. v. MCDCS**, 873 N.E.2d 1063, 1067-68 (Ind. Ct. App. 2007) (Court concluded that adequate notice of termination hearing was given to Father and his due process rights were not violated where: (1) Father did not appear at hearing, his whereabouts were unknown, and sending notice to his last known address would have been futile; (2) the guardian ad litem had objected to the continuance request made by Father's attorney as not being in the children's best interests; (3) at the time of the hearing, the children had been in foster care for more than two years; (4) unsuccessful attempts had been made to reunite the family; and (5) Father's rights were not fatally compromised because he was represented by counsel who cross-examined witnesses and had the opportunity to review and object to any evidence tendered by DCS or the guardian ad litem); **In Re E.E.**, 853 N.E.2d 1037, 1042-43 (Ind. Ct. App. 2006) (notice was ambiguous because it included both first and second choice trial dates, but Father's failure to object to form of notice constituted waiver; there was no fundamental error where hearing was held on one of the two dates in the notice and the notice referred Father to his counsel), *trans. denied*; **In Re T.W.**, 831 N.E.2d 1242, 1247 (Ind. Ct. App. 2005) (any procedural irregularity regarding proof of notice did not violate Mother's due process rights; Mother was present at trial, represented by counsel, testified, and had shown no prejudice by lack of notice); **In Re C.C.**, 788 N.E.2d 847, 852 (Ind. Ct. App. 2003) (OFC complied with Ind. Trial Rule 5(B) in serving notice to alleged Father at last known address; service of process is different from service of notice), *trans. denied*; **In Re A.C.**, 770 N.E.2d 947, 949-50 (Ind. Ct. App. 2002) (OFC complied with notice requirements by serving notice on Father's attorney and mailing notice to Father's last known address).

IC 31-35-2-6.5 contains additional notice provisions for foster parents. Subsection (d) specifically requires DCS to provide ten days' notice of the termination hearing to the child's foster parent by certified mail or "face to face contact" by the child's caseworker. Subsection (f) provides that the court "shall" continue the termination hearing if DCS does not provide the court with a signed verification from the foster parent that the foster parent was notified of the hearing at least five business days before the hearing. The court is not required to continue the hearing if the foster parents appear for the hearing.

V. D. Rights of Foster Parents, Prospective Adoptive Parents and Other Non-Parties to Give Recommendations and Written Statements in Termination Hearing

IC 31-35-2-6.5(e) provides that all persons who are entitled to the ten day notice of the termination hearing shall be given an "opportunity to be heard and make recommendation to the court at the hearing." The opportunity to be heard and to make recommendations pursuant to IC 31-35-2-6.5(e) includes the right to "submit a written statement to the court that, if served upon all parties to the child in need of services proceeding" (and the persons described in IC 31-36-2-6.5(c) and (d)) "may be made a part of the court record." The statute does not clarify if the statement will be admitted over a hearsay objection, particularly when the declarant is not available for cross-examination. The discretionary "may" language suggests that the judge can entertain objections to a motion to admit the statement.

V. E. Change of Judge and Can Have Same Judge for Termination and CHINS Case

All parties have a right to a change of judge in the termination case without showing cause, if they comply with the necessary trial rules. **State ex rel. Gosnell v. Cass Cir. Court**, 577 N.E.2d 957 (Ind. 1991) (juvenile code provision requiring "cause" for change of judge, now codified at IC 31-32-8-1, is in conflict with the trial rules and is void).

IC 31-32-8-2 provides that the judge who heard the underlying criminal case against the parent may not hear a termination case filed under the special provisions of IC 31-35-3-1 through 9 [termination petition based on parent's criminal conviction for sex crimes or murder, causing suicide, voluntary or involuntary manslaughter when parent's child or stepchild was the victim and was under sixteen years old at the time of the offense]. Except for cases subject to IC 31-32-8-2, the juvenile judge who heard the CHINS case may hear the termination case involving the same children and parents. See **Matter of D.T.**, 547 N.E.2d 278, 283 (Ind. Ct. App. 1989) (law presumes that trial judge is unbiased, and the judge's knowledge of prior CHINS proceedings does not show bias in absence of evidence that judge had personal prejudice for or against a party).

In **In Re E.P.**, 20 N.E.3d 915 (Ind. Ct. App. 2014), *trans. denied*, the Court concluded Father's claim that Dearborn Circuit Court Judge Humphrey violated IC 31-32-8-2 by presiding over the termination proceeding for Father's children when Judge Humphrey had previously presided over Father's criminal case was a procedural claim that Father had waived. Id. at 919. The Court noted IC 31-32-8-2 provides that the judge who presided over the trial at which an individual was convicted of an offense listed at IC 31-35-3-4 may not be the judge who presides over the proceedings in an action filed under IC 31-35-3 [termination petition on parent convicted of specific criminal acts] with respect to that individual. Id. The Court said that Judge Humphrey had jurisdiction to consider the petition to terminate Father's parental rights pursuant to IC 33-28-1-2, which provides that all circuit courts have original and concurrent jurisdiction in all civil and criminal cases. Id. at n.7. The Court opined that Father's claim implicated procedural or legal error, not jurisdiction. Id. Citing Johnson Cnty. Rural Elec. Membership Corp. v. S. Cent. Ind. Rural Elec. Membership Corp., 883 N.E.2d 141, 145 (Ind. Ct. App. 2008), the Court said that non-jurisdictional procedural errors may be waived if they are not raised at the appropriate time. E.P. at 919. The Court noted that Father failed to timely object to Judge Humphrey's presiding over the termination case after Judge Humphrey reminded the parties that he had presided over Father's criminal case. Id.

In **Carter v. KCOFC**, 761 N.E.2d 431 (Ind. Ct. App. 2001), the Court affirmed the trial court's judgment terminating Mother's parental rights. Id. at 439. Prior to the termination hearing, the judge had entered a permanency hearing order which approved termination of Mother's parental rights as the permanency plan. Mother's request for a change of judge for the termination hearing was denied. On appeal, Mother argued, inter alia, that the judge had violated Canon 3 of the Judicial Code of Conduct by presiding over the termination hearing after previously approving the permanency plan and further that it was fundamentally unfair for the judge to act as trier of fact in a proceeding to determine whether Mother's parental rights should be terminated. The Court was unable to determine Mother's claim of a violation of a Judicial Canon because the Indiana Supreme Court has exclusive jurisdiction over alleged violations of the Code of Judicial Conduct. Id. at 434-35. With regard to Mother's complaint of fundamental unfairness, the Court noted that the moving party must establish that a judge has personal prejudice for or against a party and that adverse rulings and findings by the trial judge do not constitute bias per se. Id. at 435. The Court further opined that the mere fact that a judge has gained knowledge of a party by participating in other actions does not establish the existence of bias or prejudice. Id. The Court said that, by approving the permanency plan at the CHINS proceeding, the trial court judge was merely approving a plan of action for the OFC to pursue in an effort to further the best interests of the child. Id. at 436. The court's approval of the

permanency plan did not indicate that the trial judge was prejudiced against Mother's parental abilities to the extent that he would necessarily terminate her parental rights at a subsequent termination hearing. Id. The Court noted that the trial judge took his responsibility of deciding whether to terminate Mother's parental rights very seriously in that the judge did the following: (1) appointed a guardian ad litem for the child; (2) conducted a two day trial at which he considered testimony of numerous witnesses; (3) took the decision under advisement for two months; (4) entered findings of fact and conclusions thereon demonstrating that he had carefully balanced the interests of Mother and the child. Id. The Court concluded that Mother had failed to meet her burden of proving that the judge was not impartial or objective and held that the judge was not biased or prejudiced against her at the termination hearing. Id. The Court opined that the trial court did not abuse its discretion in denying Mother's request for change of judge. Id.

V. F. Right to Counsel and Interpreter

A parent has the right to be represented by counsel in the termination proceeding. IC 31-32-4-1. If the parent does not hire counsel, nor specifically waive the right to counsel, then the court must appoint counsel for the parent. IC 31-32-4-3. In **Keen v. Marion Cty. D. of Public Welfare**, 523 N.E.2d 452 (Ind. Ct. App. 1988), the Court considered whether Mother had waived her right to appointment of counsel. A public defender had been appointed for Mother, but on the date of the trial Mother requested a continuance so that she could obtain her own counsel. The trial court granted the continuance reluctantly but informed Mother that she was waiving her right to counsel and might have to represent herself. Mother failed to obtain private counsel and at the next scheduled trial date requested that a public defender be re-assigned to her case. The trial court refused and the hearing proceeded. The Court affirmed the trial court's decision to terminate Mother's parental rights, and ruled that Mother had waived her right to counsel. Id. at 454, 456. The Court stated that parental termination actions are civil in nature and the stringent requirements prescribed for criminal cases are not required. Id. at 455.

V. F. 1. Right to Counsel

The United States Servicemembers Civil Relief Act applies to any civil proceeding in which the defendant servicemember does not make an appearance. The law was enacted to protect service members from exposure to personal liability without an opportunity to defend themselves in person or through counsel. This statute includes affidavit requirements, appointment of an attorney to represent a defendant in military service, and a stay of proceedings. Courts, DCS attorneys and case managers, guardians ad litem/court appointed special advocates and counsel for parents should determine whether the Servicemembers Relief Act applies to a parent in a termination of the parent-child relationship case and follow the required procedures. See Chapter 2 at IV.C.1. for additional information.

Practice Note: Practitioners should note that Indiana criminal law does not provide a defendant with the right to choose his court appointed counsel. See **Jackson v. State**, 992 N.E.2d 926, 931 (Ind. 2013); **Luck v. State**, 466 N.E.2d 450, 451 (Ind. 1984). It seems reasonable that a parent in a termination of the parent-child relationship case also does not have the right to court appointed counsel of the parent's choice.

In **In Re D.P.**, 27 N.E.3d 1162 (Ind. Ct. App. 2015), the Court reversed the trial court's order terminating Mother's parental rights, because the Court could not conclude that Mother's due process rights had received adequate protection. Id. at 1168. The Court noted that Mother did not have counsel present at the two termination hearings, nor was counsel appointed for her. Id. at 1167. Citing IC 31-32-4-3, the Court noted that parents are entitled to court appointed counsel when they have not already waived that right. Id. at 1166. Quoting In Re G.P., 4 N.E.3d 1158, 1166 (Ind. 2014), the Court stated that, "if the State imparts a due process right, then it must give

that right." D.P. at 1166. The Court's review of the record disclosed no opportunity for Mother to seek counsel, save for a single sentence in the letter from DCS notifying Mother that she was entitled to counsel. Id. at 1168. The Court concluded that Mother did not affirmatively waive counsel. Id. The Court found this "particularly worrisome given DCS's knowledge of Mother's apparently significant learning and cognitive problems, and the placement of the children in a stable foster home where the foster parent intended to adopt the children." Id. at 1168. Finding that both constitutional and statutory guarantees were transgressed, the Court opined that the magnitude of Mother's parental rights and the risk of error in the State's procedural approach outweighed the State's interest in its chosen procedural path. Id.

In **In Re G.P.**, 4 N.E.3d 1158 (Ind. 2014), the Indiana Supreme Court vacated the trial court's judgment terminating Mother's parental rights. Id. at 1169. The Court opined that IC 31-34-4-6 provided Mother, who requested court appointed counsel at a CHINS review hearing and who was found by the trial court to be indigent, the statutory right to counsel at the CHINS proceedings, and that those proceedings flowed directly into an action to terminate Mother's parental rights. Id. at 1163, 1169. See Chapter 2 at IV.C. for further discussion of parents' rights to court appointed counsel in CHINS cases.

In **Parent-Child Rel. of I.B. v. Indiana Child Services**, 933 N.E.2d 1264, 1267 (Ind. 2010), the Indiana Supreme Court held that Indiana statutes dictate that parents' right to counsel continues through all stages of the termination proceeding, including appeal. See this Chapter at VI.K.4. for further discussion.

In **K.S. v. Marion County Dept. Child Services**, 917 N.E.2d 158 (Ind. Ct. App. 2009), the Court reversed the trial court's decision, vacated the trial court's termination order, and remanded the case for further proceedings with instructions. Id. at 165. Mother had attended a pretrial hearing with her attorney. At the pretrial hearing Mother was given actual notice of the trial date on the termination petition. Mother failed to appear for the scheduled trial date and also failed to appear for five additional hearing dates. On the day of the fifth scheduled hearing, the trial court granted Mother's attorney's oral motion to withdraw from representing Mother. The oral motion to withdraw did not comply with Marion Circuit and Superior Court Civil Rule LR 49-TR 3.1-201, which requires a ten day notice to the client, except for good cause shown, expressly informing the client that failure to secure new counsel may result in dismissal or a default judgment and other pertinent information such as a trial setting date. After the withdrawal of Mother's attorney, the court proceeded to hear evidence and entered findings of fact and conclusions of law terminating Mother's parental rights. On appeal, the Court interpreted the local Rule to mean that the trial court is not permitted to grant an attorney's request to withdraw her appearance if that attorney has not given her client written notice and filed a copy with the court at least ten days prior to the trial date. Id. at 164. The Court said that, if the requesting attorney shows good cause for not timely filing her request with the court, then the court may consider the attorney's request. Id. The Court opined that the good cause exception applies only when the attorney fails to timely file her written request with the court at least ten days prior to the trial date, but the other requirements, specifically the local Rule's demand that the attorney expressly inform her client of the intent to withdraw and of the risk the client is facing by the attorney's decision, must still be satisfied to comply with the local Rule. Id. The Court held that the trial court 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 local Rule. Id. at 165. The Court ordered that, on remand, Mother's attorney might seek to withdraw her appearance, provided that her motion to withdraw complies with the local Rule. Id. The Court said that, if Mother's attorney complied with the local Rule, and Mother again failed to appear in person or failed to take the

steps necessary to obtain new counsel within a reasonable time, the trial court might reinstate the termination order vacated by the Court's decision. Id.

In **Baker v. County Office of Family & Children**, 810 N.E.2d 1035 (Ind. 2004), a termination case, the parents, who were not married, claimed that the trial court did not adequately inquire about their decision to go forward with representation at the termination trial by the same lawyer. The lawyer stated prior to the final hearing that both parents consented to his joint representation and that no conflict existed because there was no situation that the parents would be blaming each other for the allegations raised by OFC. Both parents stated at the hearing that they agreed to the joint representation. On appeal, the parents contended that their right to counsel had been violated because there had not been an adequate demonstration that they understood the consequences of joint representation. They argued that the right to counsel should be judged by a standard that would make it easier for parents who lose at trial to gain a second one. The Supreme Court concluded that transporting the structure of the criminal law, featuring the opportunity for repeated re-examination of the original court judgment through ineffectiveness of counsel claims and the post-conviction process, has the potential for doing serious harm to children whose lives have by definition already been very difficult. Id. at 1039. The Court gave the following reasons for departing from the criminal law standard for parents' counsel in termination proceedings: (1) experience in criminal law with the present system of direct appeals, post-conviction proceedings, and habeas petitions demonstrates that with rare exception counsel perform capably and thus ensure accurate decisions; (2) criminal prosecutions and termination proceedings are substantially different in focus, because the resolution of a civil juvenile proceeding focuses on the best interests of the child, not on guilt or innocence; (3) extended litigation in termination cases imposes a substantial burden on vulnerable children whom the system seeks to protect; (4) it is in the child's best interest and overall well being to limit the potential for years of litigation and instability; (5) the odds of an accurate determination in a termination case are enhanced by the fact of judicial involvement that is much more intensive than in the usual criminal case. Id. at 1039-41.

The 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. Id. at 1040. 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. The Court found that there was nothing to suggest that representation by a single lawyer led to a fundamentally unfair hearing in the instant case, noting: (1) joint representation did not result in a conflict of interest because both parents preserved the same interests of preserving parental rights; (2) the lawyer appropriately questioned and cross-examined witnesses on behalf of both parents and cross-examined both parents; (3) the parents were not presenting evidence against one another or blaming one another; (4) the record did not suggest that either parent stood to gain significantly by separate representation; (5) each parent was responsible for his or her own participation in services and neither could gain from the other's participation or lack thereof. Id. at 1042.

In **In Re A.P.**, 882 N.E.2d 799 (Ind. Ct. App. 2008), on appeal of the termination of his parental rights, Father alleged he had received ineffective assistance of counsel. The Court quoted from the Indiana Supreme Court's decision in Baker v. County Office of Family & Children, 810 N.E.2d 1035, 1041 (Ind. 2004), which is discussed above, to the effect that, in termination cases, when parents claim ineffective assistance of counsel on appeal, the inquiry is "whether it appears that the parents received a fundamentally fair trial whose facts demonstrate an accurate

determination." A.P. at 806. It is not a matter of whether the counsel properly objected to matters, but "whether the lawyer's overall performance was so defective that the appellate court cannot say with confidence that the conditions leading to the removal of the children from parental care are unlikely to be remedied and that termination is in the child's best interest." Id. The Court examined the sufficiency of the evidence supporting the termination of Father's parental rights. Id. The Court found that the child had been removed from Father for over six months at the time of the termination hearing; that there was a satisfactory plan for her care and treatment – continued placement with and eventual adoption by Mother's cousin who had been caring for the child since she was removed from her parents' care; that DCS had established that the conditions that resulted in the child's removal from Father would not be remedied; and it was in the child's best interests that the parent-child relationship be terminated. Id. at 807. 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 if his parental rights were not terminated. Id. at 807-08. The Court found that Father received a fundamentally fair trial whose facts demonstrated an accurate determination. Id. at 808. The Court said that the overall performance of Father's lawyer was sufficiently effective such that the Court could say with confidence that DCS adequately proved its case in favor of termination. Id. The Court commended Father's attorney for doing the best she could under extraordinarily difficult circumstances, and when faced with underlying facts that she could not change. Id.

In **D.A. v. Monroe County Dept. of Child Serv.**, 869 N.E.2d 501 (Ind. Ct. App. 2007), the Court reversed and remanded the trial court's termination of Father's parental rights to his three children. Id. at 512. The Court held, among other things, that the trial court abused its discretion by granting the motion of Father's attorney to withdraw her appearance. Id. at 509. Father's attorney had not informed Father of her intent to withdraw prior to filing her motion to withdraw, did not send him a copy of the motion once it was filed, and did not make sure that Father was aware of the final hearing date. Id. The Court found that (1) the attorney's failure to notify Father of her intention to withdraw and failure to apprise him of the pending termination hearing date prior to filing her petition violated Monroe Circuit Court Civil Rule No. 2; and (2) a trial court may set aside its own rule only if the court assures itself that it is in the interests of justice to do so, that the substantive rights of the parties are not prejudiced, and that the rule is not a mandatory rule. Id. The Court determined that Father's rights were prejudiced by his attorney's failure to follow the local rule and by the trial court's granting of her motion to withdraw. Id. The Court noted that (1) Father, who had no notice of the motion to withdraw, of the date scheduled for the hearing on the motion to withdraw, or of the actual hearing on the motion to withdraw (which took place the day before it was initially scheduled) did not have time to secure new counsel; (2) Father was deprived of counsel without notice in violation of Father's right to counsel in termination proceedings provided for in IC 31-32-2-5; and (3) the trial court conducted a termination hearing in which Father was unable to present evidence and cross-examine witnesses because he was neither present nor represented by counsel. Id.

In **Lang v. Starke Cty. Office of Fam. Children**, 861 N.E.2d 366 (Ind. Ct. App. 2007), Father argued in his appeal of the termination of parental rights order that he had been denied effective assistance of counsel. Father cited the following three ways in which his counsel was ineffective: (1) failure to ensure that Father had an opportunity to review the tapes and transcripts of the CHINS proceedings; (2) failure to cite statutory or case law during his cross-examination

regarding DCS's denial of visitation; and (3) failure to take action to reinstate Father's visitation during the pendency of the termination hearing. The Court cited the standard for effectiveness of counsel in termination cases enumerated in Baker v. County Office of Family & Children, 810 N.E.2d 1035 (Ind. 2004), discussed above. The standard is whether the lawyer's overall performance was so defective that the appellate court cannot say with confidence that the conditions leading to the removal of the children are unlikely to be remedied and that termination is in the child's best interest. Lang at 375.

With regard to the CHINS tapes and transcripts, Father's attorney filed a motion requesting that Father be allowed to review the tapes and transcripts. The court granted the motion, but the machines needed to view the materials were in use when Father went to court for the review. Father called his attorney after not being able to review the materials, but took no other action during the three months between the scheduled review date and the termination proceeding. The Court concluded that Father's inability to review the hearings, at which he was present, did not affect the Court's confidence that termination was in the children's best interests or the reasons for removal would not be remedied. Id. at 376. The Court stated that Father had not shown in any way how his ability to review the transcripts and tapes could have affected the trial court's order. Id. With regard to the attorney's failure to cite case law and statutes during cross-examination, the Court noted that Father conceded that his attorney performed effectively at trial. Id. The Court opined that Father had not shown how his counsel's citation to authority would have affected the course of proceedings and that failure to cite the law at trial did not affect the Court's confidence in the trial court's decision. Id. With regard to the attorney's failure to attempt to reinstate visitation, the Court found that Father had neither argued nor presented evidence that he had requested his attorney to do so. Id. The Court stated that it was not incumbent upon an attorney to secure visitation when Father had not so requested and this failure did not cast doubt on the proceeding. Id. The Court concluded that Father's attorney provided him with effective assistance. Id.

In **Lawson v. Marion County OFC**, 835 N.E.2d 577 (Ind. Ct. App. 2005), the Court reversed the termination judgment against Father, concluding that his due process rights were significantly compromised because his attorney was excused from the hearing before its completion, leaving Father unable to cross-examine witnesses regarding critical evidence against him. Id. at 581. Father did not appear at the termination hearing, despite having been notified of the date, but his attorney was present at the start of the hearing. The OFC presented evidence from two witnesses, after which Father's attorney asked to be excused from the hearing if none of the OFC's further evidence related to Father. The trial court excused Father's attorney. Despite the unmistakable implication that OFC had concluded with its evidence against Father, OFC then presented additional evidence against him, including two witnesses and a parenting assessment report. Two of the trial court's findings in support of the termination judgment were based on the witness testimony and assessment. The Court cited IC 31-32-2-3(b), which provides that a parent in a termination proceeding is entitled to cross-examine witnesses and introduce evidence on his own behalf. The Court held that, while a swift resolution of the matter was necessary to avoid further uncertainty regarding the child's permanency, the error in the case was "too great to ignore." Id. at 580.

See also **In Re J.G.,** 911 N.E.2d 36, 37 (Ind. Ct. App. 2009) (Court found that, notwithstanding recent revision of relevant statutes, General Assembly did not intend for DCS to bear burden of court appointed legal services in termination proceedings and that county should continue to be responsible for these costs).

V. F. 2. Right to Interpreter

In **S.E. v. Indiana Dept. of Child Services**, 15 N.E.3d 37 (Ind. Ct. App. 2014), the Court held that the trial court did not violate Mother's right to procedural due process by requiring her to testify by signing to an interpreter. Id. at 44. The Court noted that the trial judge first permitted Mother, who was deaf, to testify orally, but the record indicated that the trial judge was having difficulty understanding Mother's spoken testimony and therefore required Mother to testify by signing to an interpreter, who then spoke Mother's responses aloud. Id. The Court opined that the trial court was acting within its discretion in making this decision, citing Ind. Evidence Rule 611(a), which provides that "[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." S.E. at 44. The Court reasoned that Mother failed to establish how testifying by signing to an interpreter was prejudicial to her case, and said that, without the interpreter, the factfinder would have been unable to understand Mother's testimony clearly. Id. The Court also noted that Mother failed to raise her due process concern at trial and first brought her argument on appeal, effectively waiving the argument. Id. at 43. The Court observed that, to the extent Mother asserted that she was not adept at using sign language, Mother never indicated at the termination hearing that she was having difficulty explaining herself using sign language. Id. at 44.

In **Tesfamariam v. Woldenhaimanot**, 956 N.E.2d 118 (Ind. Ct. App. 2011), the Court affirmed the trial court's dissolution custody decision, but also held that due process required the trial court to establish that Mother's interpreter was qualified, and to administer an oath to the interpreter to provide accurate translation. Id. at 123. Although the trial court failed to do so, the Court held there was no fundamental error, and that Mother had waived her objections. Id. at 122-23. Mother and Father are natives of Africa whose native tongue is Tigrinya. Mother is a United States citizen and has resided in the U.S. since 1987, but she does not speak English fluently. At the time of the hearing, Mother was taking English classes. Father, who arrived in the U.S. in 1995, spoke English fluently enough to communicate without the aid of an interpreter. Mother requested a final hearing regarding Father's Petition for Dissolution of Marriage, as well as for an interpreter to be present at the hearing. At the final dissolution hearing, the trial court utilized the services of Language Line, a telephone interpretation service that is funded by the Indiana Supreme Court. The trial court issued an order granting Father sole legal and physical custody of the children, and Mother appealed. Mother's primary contention was that the trial court denied her due process because it failed to administer an oath to her interpreter, and failed to ensure that her interpreter was properly qualified as an expert. Although this issue had been addressed in criminal cases, where case law mandates the use of an interpreter to translate court proceedings, it had never been addressed in a civil case. Id. 121. The Court found that many of the due process concerns in a criminal case were also relevant in a civil case. Id. Because of the similar due process concerns, the Court found it appropriate to draw extensively from criminal jurisprudence in making its decision in this case. Id.

The Court found that the trial court abused its discretion because it failed to qualify the interpreter as an expert, and because it failed to administer an oath to the interpreter to provide an accurate translation. Id. at 122. The Court reasoned that because both of these actions are necessary to protect a party's due process rights, and because the due process rights in a child custody case are substantial, it was appropriate to require the same procedural safeguards in a civil case as in a criminal case. Id. The Court noted that previous case law had presented a list of fourteen questions that a trial court could ask to qualify an interpreter as an expert. The questions are: "(1) Do you have any particular training or credentials as an interpreter? (2) What is your native language? (3) How did you learn English? (4) How did you learn [the foreign language]?

(5) What was the highest grade you completed in school? (6) Have you spent any time in a foreign country? (7) Did you formally study either language in school? To what extent? (8) How many times have you interpreted in court? (9) Have you interpreted for this type of hearing or trial before? (10) Are you a potential witness in this case? (11) Do you know or work for any of the parties? (12) Do you have any other potential conflicts of interest? (13) Have you had an opportunity to speak with the non-English speaking person informally? Were there any particular communication problems? (14) Are you familiar with the dialect or idiomatic particularities of the witness?" Tesfamariam at 122, quoting Cruz Angeles v. State, 751 N.E.2d 790, 795 (Ind. Ct. App. 2001). Although the Court determined that the trial court had abused its discretion in not qualifying the translator as an expert, and in not administering an oath to the interpreter to provide an accurate translation, the Court determined there was no fundamental error, and that Mother had waived her arguments. Id. at 123.

In **Arrieta v. State**, 878 N.E.2d 1238 (Ind. 2008), the Indiana Supreme Court held:

> We distinguish defense interpreters, who simultaneously translate English proceedings for non-English-speaking defendants, from proceedings interpreters, who translate non-English testimony for the whole court. We conclude that courts should regularly provide proceedings interpreters at public expense when they are needed, regardless of a defendant's indigency even when the defendant speaks English, as they are part of the basic apparatus of a court's operation. By contrast, we see little reason why the public should finance defense interpreters for defendants who possess financial means.

Id. at 1239. The Court also noted that the Indiana Code does not have a statute addressing interpreter fees in criminal proceedings, but it does address interpreter fees in civil proceedings at IC 34-45-1-4 (court has discretion to set fees and determine person responsible for cost when court appoints interpreter).

In **Gado v. State**, 882 N.E.2d 827 (Ind. Ct. App. 2008), *trans. denied*, the Court held that the trial court had not abused its discretion in concluding that the defendant did not require a Djerma interpreter and proceeding to trial after affording the defendant the services of a certified French interpreter. Id. at 832. The Court noted that (1) the State had presented considerable evidence that the defendant was less than candid regarding his alleged inability to speak and understand English and possibly French, the official language of the defendant's native country, Niger; and (2) the trial court had essentially found that the defendant intentionally was attempting to frustrate his prosecution by faking inability to communicate in any language other than Djerma, a rare language for which it is very difficult to find interpreters. Id. at 831.

In **Nur v. State**, 869 N.E.2d 472 (Ind. Ct. App. 2007), *trans. denied*, the Court affirmed the trial court's denial of the defendant's motion for a new trial, finding that the trial court was not put on notice that the defendant had a significant language difficulty, or that any misunderstandings were due to his comprehension of English, as opposed to an underlying mental defect. Id. at 481. In its analysis of the case, the Court set forth guidelines as to how trial courts should undertake to decide whether to appoint defense interpreters, interpreters who simultaneously translate English-speaking proceedings for non-English speaking defendants:

> Whenever a trial court is put on notice that a defendant has a significant language difficulty, the court shall make a determination of whether an interpreter is needed to protect the defendant's due process rights. A trial court is put on notice of a potential language barrier when a defendant manifests a significant language difficulty or when an interpreter is specifically requested. The court's decision as to whether an interpreter is needed should be

> based on factors such as the defendant's understanding of spoken and written English, the complexity of the proceedings, issues, and testimony, and whether, considering those factors, the defendant will be able to participate effectively in his defense. Absent such indications, however, the court is under no obligation to inquire into the defendant's need for an interpreter.

Id. at 479.

The Court also discussed the standard for reviewing the trial court's decision:

> A trial court's decision whether to appoint an interpreter is reviewed for an abuse of discretion. An abuse of discretion occurs if a decision is against the logic of the facts and circumstances before the court. The abuse of discretion standard applies if the issue of appointing an interpreter is raised at the trial court level, either by the parties or by the court on its own motion. Where no request is made for an interpreter and the record shows that the defendant has no significant language difficulty, a trial court does not abuse its discretion by failing to appoint an interpreter.

Id. at 480 (citations omitted).

See also **In Re A.P.**, 882 N.E.2d 799, 803 (Ind. Ct. App. 2008) (initial CHINS hearing was continued to arrange for Spanish interpreter for Father, and when Father did not appear at next scheduled hearing date, trial court again continued hearing without additional action because of possible language barriers to Father's having correctly understood what was going on).

V. G. Appointment of Guardian ad Litem/Court Appointed Special Advocate

IC 31-35-2-7(a) requires the appointment of a guardian ad litem/court appointed special advocate for the child in a termination case when the parent objects to the termination of parental rights. IC 31-35-2-7(b) provides that the court may reappoint the guardian ad litem/court appointed special advocate who represented the child's best interests in the CHINS proceeding. Failure to appoint a guardian ad litem/court appointed special advocate for the child in a termination proceeding has resulted in the reversal of trial courts' termination judgments. See **Jolley v. Posey County DPW**, 624 N.E.2d 23 (Ind. Ct. App. 1993) and **Matter of S.L.**, 599 N.E.2d 227 (Ind. Ct. App. 1992).

In **D.T. v. Indiana Dept. of Child Services**, 981 N.E.2d 1221 (Ind. Ct. App. 2013), the trial court terminated minor Father's parental rights. The Court affirmed the termination order, concluding that minor Father's due process rights were not violated when the trial court failed to appoint a guardian ad litem for Father. Id. at 1226. The child was born when Father was fifteen years old. DCS filed a CHINS petition when the child was two days old. Father requested and was appointed a public defender, who represented him throughout the CHINS hearings. Father's mother was also present for most of the hearings and was involved in the case. Father never requested the appointment of a guardian ad litem, but argued on appeal that a guardian ad litem would have insisted that the obligations imposed on Father be tailored to a minor, and would have understood the importance of the choices made at the initial CHINS hearings. The Court agreed with Father that the participation decree could have been better tailored to a minor parent, and that the language regarding employment and housing were not written with a minor parent in mind. Id. at 1225. The Court observed that, in the termination order, the trial court emphasized Father's failures to meet obligations that *were* appropriate for a minor, and that it was the sum total of Father's lack of participation that largely informed the court's opinion and not choices made at any one hearing (emphasis in opinion). Id. The Court found that IC 31-32-3-11, which allows the juvenile court to appoint a guardian ad litem or court appointed special advocate for the child at any time, could have applied to Father, but the wording clearly indicates that the appointment of a guardian ad litem under this section is

discretionary. Id. at 1226. The Court concluded that any risk of error created by not providing Father with a guardian ad litem was low. Id.

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 that the trial court's failure to appoint a guardian ad litem or court appointed special advocate 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 not persuaded 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. Id. at 901. 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 in the CHINS case, 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. The Court opined that, because the guardian ad litem 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 for the child but had also appointed counsel for Mother when the termination petition was filed. Id. The Court affirmed the trial court's order terminating Mother's parental rights. Id.

In **Kern v. Wolf**, 622 N.E.2d 201 (Ind. Ct. App. 1993), the Court rejected Mother's claims that: (1) the child's court appointed special advocate should not be allowed to file a termination petition; and (2) the court appointed special advocate exceeded her authority because she "obtained depositions, summoned and cross-examined witnesses and generally exercised a dominant role in the termination proceedings". Id. at 203-04. The Court found that the court appointed special advocate's statutory empowerment to "represent and protect the best interests of a child and to provide the child with services requested by the court" gave the court appointed special advocate sufficient authority to rigorously pursue the termination of Mother's parental rights. Id. at 204.

IC 31-34-10-3 states that the juvenile court shall appoint a guardian ad litem/court appointed special advocate for every child alleged to be a child in need of services at the initial CHINS hearing. Ideally, the same guardian ad litem/court appointed special advocate would represent the child's best interests at both the CHINS and termination proceedings. See the following termination cases where the facts noted that the same guardian ad litem/court appointed special advocate represented the children in both the CHINS and termination proceedings and testimony of the guardian ad litem/court appointed special advocate was specifically noted in the Appellate Courts' opinions: **McBride v. County Off. Of Family & Children**, 798 N.E.2d 185, 193 (Ind. Ct. App. 2003); **In Re W.B.**, 772 N.E.2d 522, 526-28 (Ind. Ct. App. 2002). See also Chapter 6 at III.G. for discussion of the guardian ad litem/court appointed special advocate evidence and role in termination proceedings.

V. H. Initial Hearing on the Termination Petition

Although there is no statutory authority or requirement for an initial hearing on the termination petition, holding an initial hearing is standard practice. At the initial hearing the judge should (1) review the termination petition and clarify the consequences of termination of parental rights for the parents; (2) advise the parents of their rights under IC 31-32-2-3 and IC 31-32-2-5; (3) appoint counsel for the parents; (4) determine whether the parents admit or deny the termination petition or need the opportunity to speak with their counsel before admitting or denying the termination petition; (5) appoint a guardian ad litem/court appointed special advocate under IC 31-35-2-7 for the child; and (6) set dates for a pretrial conference and, if appropriate, for the contested termination hearing.

V. I. Termination Hearing Commenced Ninety Days from Filing Petition and Completed One Hundred Eighty Days from Filing Petition

IC 31-35-2-6 and IC 31-35-3-7 provide that when a hearing on an involuntary termination petition is requested, the hearing shall be commenced within ninety days of the filing of the petition. IC 31-35-2-4.5(b) requires that a person mandated to file a termination petition shall also request a hearing on the petition. IC 31-35-2-6(a) states

> Except when a hearing is required after June 30, 1999, under section 4.5 of this chapter, the person filing the petition shall request the court to set the petition for a hearing. Whenever a hearing is requested under this chapter, the court shall:
>
> (1) commence a hearing on the petition not more than ninety (90) days after a petition is filed under this chapter; and
>
> (2) complete a hearing on the petition not more than one hundred eighty (180) days after a petition is filed under this chapter.

IC 31-35-2-6(b) states that if the hearing is not held within the time set forth in subsection (a), the court shall dismiss the termination petition without prejudice upon the filing of a motion by a party.

In **In Re K.W.**, 12 N.E.3d 241 (Ind. 2014), the Indiana Supreme Court reversed the trial court's termination order, finding that the court had abused its discretion in denying incarcerated Mother's motion to continue the termination hearing and proceeding instead without her participation in the hearing. Id. at 249. The Court noted the time requirements of IC 31-34-2-6, but opined that this statutory framework should not weigh against Mother. Id. at 245 n.3. The Court: (1) presumed that Mother would not file a motion to dismiss after her own continuance pushed the hearing over the deadline; (2) noted that Mother had not objected to any other continuance sought in the case; (3) said that the missed deadline would not end the matter as DCS could simply file a new termination petition; and (4) noted the fact that the case was backed up against a statutory deadline was not entirely (or even mostly) Mother's fault because the DCS attorney had previously continued the case due to a family illness. Id.

Practice Note: Practitioners should note that termination petitions based on the parent's conviction of certain criminal offenses, IC 31-35-3-1 through 9, do not specifically require that the hearing be completed within 180 days. It is recommended that termination hearings based on petitions filed pursuant to IC 31-35-3-1 also be completed within the 180 day time limit to avoid appealable issues. Although IC 31-35-2-6 requires that the hearing be "completed," it does not address whether this means that the court must enter an order on the petition pursuant to IC 31-35-2-8 within 180 days. The court's ability to take the termination petition under advisement is governed by Ind. Trial Rule 53.2, which, with some exceptions, allows the judge *only* 90 days to take matters under advisement before issuing the order. Practitioners are encouraged to comply with the above time requirements to avoid appealable issues.

In **State Ex Rel. Hoffman v. Allen Circuit Court**, 868 N.E.2d 470 (Ind. 2007), the Indiana Supreme Court held, as a matter of first impression, that the exception at Ind. Trial Rule 53.2(B)(1) to the application of the 90-day limit during which a court may take an issue of law under advisement prior to its determination applies only where the parties stipulate or agree on the record that the time limitation for decision set forth in this rule shall not apply. Id. at 472. The Court opined that the failure of parties to object to a judicial declaration presuming their agreement does not satisfy this requirement that they stipulate or agree on the record. Id. at 472-73. The Court declined to grant the requested writ of mandamus here, considering the unique circumstances in this case, but stated, "[h]enceforth, a fact pattern analogous to that presented today will require withdrawal from the trial court and appointment of a special judge by this Court." Id. at 473. According to the Court, the parties' submission of proposed findings and conclusions may be a judicial convenience, but is not

necessary to a court's decision-making function, and the 90-day period applies even when the parties' submission of proposed findings of fact and conclusions of law is contemplated. Id.

V. J. Same Procedures for CHINS and Termination Cases

IC 31-35-2-2 provides that termination cases are governed by the procedures prescribed for CHINS cases, but that termination proceedings are distinct from CHINS proceedings. This confusing language has been interpreted to mean that the procedural rules for CHINS cases generally apply to termination cases. This is the position stated in **Ross v. Delaware County Dept. of Welfare**, 661 N.E. 2d 1269, 1270 (Ind. Ct. App. 1996), " although termination hearings are separate from CHINS proceedings, termination hearings adopted the same procedures as the CHINS proceedings." This general rule does not apply to statutes which specifically require different procedures or standards for the termination proceeding, such as the mandatory appointment of counsel unless waived (IC 31-32-4-3), and the "clear and convincing standard of proof" for the termination judgment (IC 31-34-12-2).

In **In Re G.P.**, 4 N.E.3d 1158 (Ind. 2014), the Indiana Supreme Court vacated the trial court's judgment terminating Mother's parental rights because Mother was denied her statutory right to counsel during the course of the CHINS proceedings and "those proceedings flowed directly into an action to terminate her parental rights." Id. at 1169. The Court observed that the two proceedings should be viewed as a continuum: the termination case rests on the foundation built during the CHINS case. Id. at 1168. When that foundation is flawed, the termination proceeding will collapse. Id.

In **Hite v. Vanderburgh Cty Office Fam. & Chil.**, 845 N.E.2d 175 (Ind. Ct. App. 2006), the Court stated that:

> although termination proceedings and CHINS proceedings have an interlocking statutory scheme because involuntary termination proceedings are governed by the CHINS statutory procedures, CHINS proceedings are separate and distinct from involuntary termination proceedings because a CHINS cause of action does not necessarily lead to an involuntary termination cause of action.

Id. at 182.

The Hite Court went on to contrast the situation in Hite with that of A.P. v. PCOFC, 734 N.E.2d 1107 (Ind. Ct. App. 2001), *trans. denied*. Due to the multiple procedural errors in the CHINS case in A.P., the A.P. Court opined that the termination judgment warranted reversal. A.P. at 1112-13. Hite at 181-82. The Court found seven procedural irregularities in the A.P. CHINS case but noted that none of the deficiencies, standing alone, would have resulted in a due process violation. A.P. at 1118. Hite at 183. The Hite Court noted that incarcerated Father only alleged that he failed to receive notice of the original CHINS action and copies of case plans. Id. at 183. The Hite Court also found it significant that Mother was present at the CHINS hearing and submitted the matter to the court based on stipulated facts, the court was required to schedule a dispositional hearing upon Mother's admission, and Father's expected release date from incarceration was over five years after Mother's CHINS admission. Id. at 184. The Hite Court found that the risk of error was not substantial because Father appeared in person and by counsel for the CHINS review and by counsel for the permanency hearing and had the opportunity to be heard. Id.

In **In Re J.Q.**, 836 N.E.2d 961 (Ind. Ct. App. 2005), a CHINS case, the Court reversed the CHINS adjudication and quoted from A.P. v. PCOFC, 734 N.E.2d 1107, 1112-13 (Ind. Ct. App. 2000), *trans. denied*:

> Our legislature's enactment of an interlocking statutory scheme governing CHINS and involuntary termination of parental rights compels this court to make sure that each procedure is

> conducted in accordance with law. See id. Both statutes aim to protect the rights of parents in the upbringing of their children, as well as give effect to the State's legitimate interest in protecting children from harm. Id. We conclude that in order to properly balance these two interests, the trial court needs to carefully follow the language and logic laid out by our legislature in these separate statutes.

J.Q. at 967.

In **Castro v. Office of Family and Children**, 842 N.E.2d 367 (Ind. Ct. App. 2006), *trans. denied*, the Court rejected Father's claim that procedural errors in the underlying CHINS case denied him due process throughout the CHINS and termination proceeding. Id. at 378. The Court addressed Father's specific claimed procedural irregularities: (1) failure of OFC to notify Father of removal of the child from Mother's home did not constitute a deprivation of due process because Father's incarceration prevented him from doing anything about the removal; (2) any violations of the technical time restrictions for the case plan did not constitute deprivation since Father was able to communicate by letter with the OFC case manager, and Father eventually received copies of the case plan; (3) the conditions in the case plans were clear and any minor inconsistencies did not deprive Father of due process; and (4) OFC was unable to offer services or even fully evaluate Father because he was serving a 40 year prison sentence. Id. at 375-77.

V. K. Standard of Proof

The standard of proof for the termination petition is "clear and convincing evidence." See IC 31-34-12-2; **Santosky v. Kramer**, 455 U.S. 745, 102 S. Ct. 1388 (1982); **Shaw v. Shelby Cty. D. of Public Welfare**, 584 N.E. 2d 595 (Ind. Ct. App. 1992). The statute that established "clear and convincing" as the standard of proof on termination petitions is not in conflict with IC 31-35-2-4(b)(2)(B) which requires only "a reasonable probability" that the conditions that resulted in the child's removal will not be remedied or continuation of the parent-child relationship poses a threat to the child. See **In Re Wardship of R.B.**, 615 N.E.2d 494, 497 (Ind. Ct. App. 1993).

In **In Re N.G.**, 51 N.E.3d 1167 (Ind. 2016), the Indiana Supreme Court affirmed the trial court's order terminating Mother's parental rights to three of her children. Id. at 1174. The Court cautioned that, in an appellate review of a termination judgment, the "clear and convincing" evaluation is to be applied judiciously. Id at 1170. The Court quoted In Re E.M., 4 N.E.3d 636, 642 (Ind. 2014), which states:

> Reviewing whether the evidence "clearly and convincingly" supports the findings, or the findings "clearly and convincingly" support the judgment, is not a license to reweigh the evidence. Rather, it is akin to the "reasonable doubt" standard's function in criminal sufficiency of the evidence appeals – in which we do not reweigh the evidence or assess the credibility of the witnesses, and consider only whether there is probative evidence from which a *reasonable jury could have* found the defendant guilty beyond a reasonable doubt…. Our review must give due regard to the trial court's opportunity to judge the credibility of the witnesses firsthand, and not set aside [its] findings or judgment unless clearly erroneous.

(Emphasis in E.M. opinion). N.G. at 1170. Citing Civil Commitment of T.K. v. Dep't. of Veterans Affairs, 27 N.E.3d 271, 273 (Ind. 2015), the Court said that in the appellate review of claims alleging a lack of proof by clear and convincing evidence, the reviewing court must determine whether there is probative evidence from which a reasonable fact-finder could have found the challenged matters proven by clear and convincing evidence. N.G. at 1170 n.1.

In **In Re V.A.**, 51 N.E.3d 1140 (Ind. 2016), the Indiana Supreme Court, quoting Estate of Reasor v. Putnam Cnty., 635 N.E.2d 153, 159060 (Ind. 1994), explained that "clear and convincing proof is a standard frequently imposed in civil cases where the wisdom of experience has demonstrated the need for greater certainty, and where this *high standard* is required to sustain claims which have serious social consequences or harsh or far reaching effects on individuals to prove willful, wrongful, and unlawful acts to justify an exceptional remedy." (Emphasis in V.A. opinion). V.A. at 1144. Quoting In Re Adoption of O.R., 16 N.E.3d 965, 972 (Ind. 2014), the Court noted that this heightened standard is of particular import within the context of termination proceedings because "the Fourteenth Amendment to the United States Constitution protects the traditional right of parents to establish a home and raise their children." V.A. at 1144. The Court concluded that the evidence presented did not meet the heightened burden of clear and convincing and reversed the termination judgment. Id. at 1153.

In **In Re N.Q.**, 996 N.E.2d 385 (Ind. Ct. App. 2013), the Court reversed the trial court's order granting DCS's second petition to terminate the parent-child relationship between Parents and their four children. Id. at 396. At the hearing on the second termination petition: (1) DCS relied heavily upon evidence presented at the first termination hearing held eighteen months earlier; (2) Parents presented evidence that Father had qualified for Social Security disability, they were current on their bills, and they were keeping their current apartment clean; (3) Parents' current living situation had been deemed adequate for their sixteen-year-old daughter to reside with them; and (4) DCS did not present evidence refuting Parents' version of the current condition that existed in their home. Id. at 393. The Court found 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 Parents' new income and their ability to keep current on their bills and maintain a clean residence." Id. at 395. The Court noted the trial court's failure to consider that DCS did not present evidence contradicting Parents' claims, despite DCS's burden to prove its case by the heightened "clear and convincing" standard. Id.

In **In Re C.M.**, 963 N.E.2d 528 (Ind. Ct. App. 2012), *on rehearing*, the Court reaffirmed its original opinion at 960 N.E.2d 169 (Ind. Ct. App. 2011). The Court held that DCS is required to make a prima facie showing regarding current conditions supporting termination of parental rights. Id. at 528. DCS asserted that the Court had imposed an undue burden upon it by recognizing that DCS has to make a prima facie showing regarding current conditions before the parent is obliged to come forward with any evidence. According to DCS: (1) the parent bears the burden of going forward with evidence of changed conditions; and (2) there should be a "hierarchy" of evidence for consideration by the court, with evidence of historical conduct to be paramount over evidence of current or changed conditions. The Court looked to the Legislature for statutory guidance, and noted that pursuant to IC 31-35-2-4(b)(2)(B), if the child has not been adjudicated a CHINS on two separate occasions, DCS must show either "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" or "a reasonable probability that the continuation of the parent-child relationship *poses* a threat to the well-being of the child." (Emphasis in opinion.) Id. at 529. DCS must also establish that termination *is* in the best interests of the child (emphasis in opinion). Id. The Court observed that our Legislature has employed present-tense language. Id. The Court opined that it is not sufficient to show that a parent had shortcomings in the past. Id. The Court said that it is incumbent upon DCS to put forth evidence of lack of remedial measures or evidence of that which poses a threat to the child. Id. The Court opined that there may well be no evidence of "changed" conditions, but there must be evidence of "current" conditions. Id. The Court further stated that it may not assign a hierarchy to evidence where the Legislature has not done so. Id. The Court reiterated that a determination that the parent-child relationship shall be terminated is essentially a conclusion of law which must be supported by factual findings that must rest upon clear and convincing evidence. Id. at 530.

In **In Re C.M.**, 960 N.E.2d 169 (Ind. Ct. App. 2011), reaffirmed on rehearing at 963 N.E.2d 528 (Ind. Ct. App. 2012), the Court reversed the trial court's order which terminated the parent-child relationship between Mother and her three children. Id. at 175. The Court opined that Mother was not required to produce evidence in order to withstand the termination petition. Id. The Court said that the trial court's conclusions of law included language suggesting that Mother had a burden of proof she did not have. Id. The Court observed that IC 31-35-2-4 requires the DCS to establish, by clear and convincing evidence, each of the requisite elements to support the termination of parental rights. Id. The Court said that a prima facie showing necessarily includes some evidence of current conditions. Id. The Court said that, here, the DCS did not present a prima facie case of a reasonable probability either that the conditions leading to removal would not be remedied or that Mother posed a threat to the children. Id.

In **In Re A.B.**, 924 N.E.2d 666 (Ind. Ct. App. 2010), the Court observed that, although DCS had the burden of proving the allegations in IC 31-35-2-4 by clear and convincing evidence, clear and convincing evidence need not show that the custody by the parent is wholly inadequate for the child's survival. Id. at 670, citing Bester v. Lake County Office of Family & Children, 839 N.E.2d 143, 148 (Ind. 2005). The Court said that it is sufficient to show by clear and convincing evidence that the child's emotional and physical development would be threatened by the parent's custody. Bester at 148. A.B. at 670.

The constitutionality of the "clear and convincing" standard was affirmed in **Castro v. Office of Family and Children,** 842 N.E.2d 367, 377 (Ind. Ct. App. 2006), *trans. denied*. The Court quoted Santosky v. Kramer, 455 U.S. 745, 769-70, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) for the proposition that the "clear and convincing standard strikes a fair balance between the rights of the natural parents and the State's legitimate concerns." Castro at 377.

In **McBride v. County Off. of Family & Children**, 798 N.E.2d 85 (Ind. Ct. App. 2003), Mother asserted that the court's termination order warranted reversal because the court applied the wrong standard of proof in its findings which stated that there was a reasonable possibility that the conditions that led to removal would not be remedied. Mother claimed that, because the court's finding used the term "reasonable possibility" rather than "reasonable probability" as required by statute, the court held OFC to a lower standard of proof. The Court agreed with OFC that the word "possibility" was a typographical error which did not warrant reversal. Id. at 200. The Court opined that the trial court's statements during the initial hearing on the termination petition which included the term "reasonable probability", combined with review of the court's findings and conclusions as a whole, revealed that the court was aware of and applied the correct standard of proof. Id.

In **Matter of A.C.B.**, 598 N.E.2d 571 (Ind. Ct. App. 1992), Father's appeal raised the issue of whether the trial court had used the correct "clear and convincing" standard of proof as required by IC 31-6-7-13(a) (recodified at IC 31-34-12-2). Van Hoosier v. Grant County, Etc., 443 N.E.2d 350 (Ind. Ct. App. 1983), was cited by Father in support of his argument. At the time of the Van Hoosier decision, the "clear and convincing" standard had recently been delineated by the United States Supreme Court in Santosky v. Kramer , 455 U.S. 745, 769-70, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). Because the order in the Van Hoosier case was silent as to the standard of proof, that case was remanded. The Court found that the situation in A.C.B. was different because the "clear and convincing" standard had been in effect for approximately ten years and had also been codified. The Court held, "[t]he absence of language indicating use of the clear and convincing standard no longer suggests use of the lesser preponderance of the evidence standard. Absent additional evidence that the court labored under the wrong standard of proof, a silent record will not support an allegation of error." Id. at 572. See also **Moore v. Jasper County Dept.**, 894 N.E.2d 218, 229 (Ind. Ct. App. 2008) (Court found that, without reweighing of evidence or assessing witness credibility, thorough

review of record left firm conviction that trial court's termination orders were not supported by clear and convincing evidence).

V. L. Right of Incarcerated Parent to be Present for Termination Hearing

Indiana case law holds that an incarcerated parent does not have an absolute right to be present for a termination hearing, but if the parent is not present, the case law indicates that the parent should be provided an opportunity to participate in the proceedings in a meaningful time and in a meaningful manner.

In **In Re J.E.**, 45 N.E.3d 1234 (Ind. Ct. App. 2015), *trans. denied*, the Court affirmed the trial court's order terminating Father's parental rights to his one-year-old child. Id. at 1249. The Court concluded that the trial court acted within its discretion in denying Father's motion to be transported to the termination hearing. Id. Citing In Re C.G., 954 N.E.2d 910, 922 (Ind. 2011), the Court observed that the decision on whether to permit an incarcerated parent to be transported to court in a termination proceeding is a matter within the trial court's sound discretion. J.E. at 1247. The Court looked to In Re C.G., 954 N.E.2d at 922-23, in which the Indiana Supreme Court adopted eleven factors that trial courts should balance in determining whether to transport an incarcerated parent. J.E. at 1247. The Court noted the trial court clearly stated it had considered the C.G. factors in denying Father's transportation motions; and specifically emphasized the factors it found compelling; namely, the cost and inconvenience factor and the availability of testimony by another reasonable means. Id. at 1248. The Court opined that the C.G. list is clearly not exhaustive and there is nothing in the C.G. opinion which indicates that the trial court must make findings on each and every factor in the list. Id. The Court did not read the C.G. opinion to require the trial court to specify that it did not find certain factors compelling or even relevant to Father's case. Id. The Court observed that: (1) Father's telephone participation allowed him to be connected such that he could hear witness testimony and counsel's argument before the court, as well as the court's responses and pronouncements; (2) at one point, the court had to caution Father for interrupting an in-court witness during her testimony; and (3) the trial court cleared the courtroom to afford Father the opportunity to confer privately with his counsel. Id. The Court also found it unfortunate that Father, having made himself unavailable for these proceedings due to incarceration, had not appeared when he was free and ordered to do so. Id. at 1249.

In **In Re K.W.**, 12 N.E.3d 241 (Ind. 2014), the Indiana Supreme Court vacated the trial court's order terminating Mother's rights to her child. Id. at 249. Mother was incarcerated at Marion County Jail on the day of the termination hearing, so her attorney moved for a continuance. Mother's attorney said that Mother had been in the Jail for a few weeks, but she anticipated being released in eight days to work release or home detention. The trial court denied Mother's motion, held the hearing with Mother absent, but still represented by her attorney, and terminated Mother's and Father's rights to the child. Mother appealed, arguing that the trial court violated her due process rights when it denied her motion for continuance and held the termination hearing without her being present. The Court analyzed the holdings in In Re C.G., 945 N.E.2d 910 (Ind. 2011) and Tillotson v. Dept. of Family and Children, 777 N.E.2d 741 (Ind. Ct. App. 2002), discussed below, and noted the alternatives of Mother participating in the hearing either telephonically or by video conference in lieu of a continuance. Id. The Court opined that it would have been the best practice for Mother's attorney to at least attempt to pursue alternatives to Mother's in court presence and that only an eleventh hour discovery of a client's inability to attend a termination hearing would justify not bringing the matter to the trial court's attention sooner. Id. at 246. The Court said the record showed that Mother's attorney aptly cross-examined DCS's witnesses and presented brief testimony from the child's maternal grandmother, but these efforts fell well short of telling Mother's side of the story or presenting her explanations for the events DCS outlined. Id. at 247. The Court opined that, even though there is no absolute constitutional right for a parent to be present at a termination hearing, this does not invariably correlate to a conclusion that it is permissible to omit the parent from participating in the

process entirely. Id. The Court said that even though case law has held that a parent does not have an absolute right to be present at a termination hearing, the parent does have the right to be heard at a meaningful time and in a meaningful manner (multiple citations omitted). Id. at 247-48. The Court observed that, in this termination proceeding, which challenged her fitness as a parent to her child, Mother was not heard at *any* time or in *any* manner (emphasis in opinion). Id. at 249.

In Re C.G., 954 N.E.2d 910 (Ind. 2011), the Indiana Supreme 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 might 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.

In **In Re H.L.**, 915 N.E.2d 145 (Ind. Ct. App. 2009), the Court concluded that the incarcerated Father was not deprived of due process when he was not present at the termination hearing. Id. at 150. The Court noted: (1) Father had been incarcerated throughout the CHINS proceedings, but was appointed counsel to represent him in the CHINS and termination proceedings; (2) Father's attorney was advised that a transport order would not be signed, but Father could appear telephonically if his attorney arranged it; (3) there is no indication in the record that Father requested telephonic participation; and (4) Father requested a continuance so further discussions could take place regarding possible post-adoption visitation, but the continuance was denied. The Court concluded that Father had not shown that he was deprived of the opportunity to be heard at a meaningful time and in a meaningful manner; he simply did not avail himself of the opportunity offered to him. Id. at 148.

In **Tillotson v. Dept. of Family and Children**, 777 N.E.2d 741 (Ind. Ct. App. 2002), Parents were incarcerated for neglect of dependent, did not request a hearing in their motions to be transported to the court hearing from the prisons where they were incarcerated, and failed to specify any type of alternative means available to trial court for their testimony in the termination trial. Under the narrow facts of this case, the trial court's failure to implement an alternative means for Parents to testify did not deprive them of due process of law. Id. at 746. The Court "cautioned that, in future cases, trial courts would be well advised to fully consider alternative procedures by which an incarcerated parent could meaningfully participate in the termination hearing when the parent cannot be physically present." Id. The Court listed the following alternative procedures: (1) using a speaker phone at the hearing; (2) entering the parents' depositions into evidence; or (3) continuing the hearing after the State has presented its case and allowing the parent time to review a transcript or audio tape of the hearing and then respond to allegations raised by the State's witnesses. Id. at 746 n.7.

In **J.T. v. Marion County OFC**, 740 N.E.2d 1261 (Ind. Ct. App. 2000), Father was incarcerated in Florida. He was given notice of the termination petition and was appointed counsel to represent him, but was not present for the hearing. Father appealed the termination judgment on the grounds that the court's failure to obtain his presence for the hearing was a denial of due process, and ineffective assistance of counsel. The Court balanced the factors necessary to determine what process was due,

and noted: (1) the privacy interest was significant; (2) the risk of error due to Father's non-presence was decreased significantly by appointment of counsel for Father; and (3) the state had a compelling interest in not obtaining the presence of Father given the state's interest in reducing the delay for the child in the adjudication, the significant cost and administrative burden in transporting Father from prison, and the need to protect society from the risk of an escaped criminal. Id. at 1246. Based upon the balancing test, the Court held that failure to secure Father's physical presence at the termination hearing did not deny Father due process of law. Id.

See Chapter 2 at IV.B for discussion on right of incarcerated parent to be present for hearings.

V. M. No Constitutional Right of Parent to be Present for Hearing

In **A.B. v. Indiana Dept. of Child Services**, 61 N.E.3d 1182 (Ind. Ct. App. 2016), the Court affirmed the trial court's order terminating Father's rights. Id. at 1191. Father contended that his parental rights to his child were terminated without due process of law because the trial court terminated Father's telephonic participation during the termination hearing due to Father's angry outbursts. Father lived locally and was not incarcerated at the time of the hearing. Father obtained permission from the trial court to appear telephonically at the hearing. On the first day of the hearing, Father interrupted the judge, the attorneys, and the witnesses on numerous occasions. The judge warned Father that if he continued this behavior, the court would disconnect the telephone. On the second and final day of the hearing, Father continued his disruptive behavior, which included threats against DCS staff. The judge issued a second warning and told Father he would disconnect the telephone if Father exhibited another outburst. Father was called as a witness by DCS, and he engaged in a profane rant. The judge disconnected the telephone as previously warned. The judge indicated that he would permit Father to appear at the hearing in person, but Father refused to appear in person. As a result, Father was unable to present testimony in his case in chief. The Court opined that Father was not denied due process. Id. at 1188. The Court observed that the trial court initially extended Father a courtesy by allowing him to appear telephonically, but aptly withdrew this privilege upon Father's relentless abuse of it. Id. at 1187. In support of its decision, the Court quoted Steelwag v. State, 854 N.E.2d 64, 68 (Ind. Ct. App. 2006), which states "[a] trial judge must be given latitude to run the courtroom and maintain discipline and control of the trial." A.B. at 1187-88.

In **In Re J.E.**, 45 N.E.3d 1243 (Ind. Ct. App. 2015), *trans. denied*, Father appealed the trial court's termination judgment, challenging the trial court's denials of his motion for continuance and his motion to be transported to the hearing from the correctional facility in Edinburgh, Indiana. Citing In Re K.W., 12 N.E.3d 241, 248-49 (Ind. 2014), the Court opined that due process affords parents the opportunity to be heard at a meaningful time and in a meaningful manner, but this does not mean that parents have an absolute right to be *physically* present at the termination hearing (emphasis in opinion). J.E. at 1246. The Court affirmed the trial court's termination judgment. Id. at 1249.

In **In Re A.B.**, 922 N.E.2d 740 (Ind. Ct. App. 2010), the Court reversed the juvenile court's termination judgment and remanded the case with instructions to give Mother a new opportunity testify on her own behalf. Id. at 746. Mother attended the initial termination hearing, was assigned to a court appointed attorney, was ordered to attend a meeting with her attorney to discuss her case prior to trial, and was ordered to appear at court on July 7, 2009, at 8:30 a.m. for an evidentiary hearing on the termination petition. Mother initially failed to appear for the termination hearing, which commenced at 9:44 a.m. The juvenile court was informed that Mother was not present, that she had failed to show for her attorney-client meeting and that she had never contacted her attorney. An oral motion for continuance was made, which the juvenile court denied. Mother's attorney asked for leave to withdraw her appearance, stating that she had never spoken with or met Mother. The juvenile court granted the motion for leave to withdraw, gave Mother's attorney permission to leave, and proceeded with the evidentiary hearing. The State called the family case manager as its only witness. After the

case manager's testimony was concluded and she was dismissed from the witness stand, the bailiff informed the juvenile court judge that Mother had arrived at the courthouse at 10:05. The judge commented that Mother could see her former attorney, but stated that she was going forward and "[w]e're almost done here." Mother was never permitted to enter the courtroom. The trial court entered a judgment terminating Mother's parental rights. The Court concluded that the juvenile court violated Mother's constitutional right to due process of law when it prohibited Mother from participating in the termination hearing. Id. The Court opined that the juvenile court acted within its discretion when it initially proceeded with the termination hearing in Mother's absence, having first verified that Mother had received proper notification of the date, time, and location of the hearing. Id. at 745. While acknowledging that a parent does not have a constitutionally guaranteed right to be physically present at a termination hearing, the Court concluded that the risk of error was substantial where, as here, the juvenile court terminated Mother's parental rights after conducting a short hearing during which only one witness for the State testified, no cross-examination was conducted, Mother was not represented by counsel, and Mother was prohibited from attending the hearing and/or presenting evidence although present in the courthouse before the end of the hearing. Id. The Court said that, under such circumstances, the juvenile court may not have had an accurate picture of the evidence before making its termination decision. Id. The Court warned that "[t]hese are very hard and unusual facts, and our opinion should not be broadly extended to other cases, and circumstances." Id. at 746.

See also the following termination cases which state that a parent does not have a constitutional right to be present at the hearing: **In Re S.S.**, 990 N.E.2d 978, 984 (Ind. Ct. App. 2013), *trans. denied*; **In Re B.J.**, 879 N.E.2d 7, 16 (Ind. Ct. App. 2008), *trans. denied*; **In Re E.E.**, 853 N.E.2d 1037, 1044 (Ind. Ct. App. 2006), *trans. denied*; **In Re C.C.**, 788 N.E.2d 847, 853 (Ind. Ct. App. 2003), *trans. denied*.

V. N. Continuances

In **In Re J.E.**, 45 N.E.3d 1243 (Ind. Ct. App. 2015), *trans. denied*, the Court concluded that the trial court acted within its discretion in denying Father's request for a continuance until after his release from incarceration. Id. at 1247. Citing J.P. v. G.M., 14 N.E.3d 786, 789-90 (Ind. Ct. App. 2014), the Court said that the decision to grant or deny a motion for continuance: (1) is within the sound discretion of the trial court; (2) an abuse of discretion occurs where the trial court reaches a conclusion that is clearly against the logic and effect of the facts or the reasonable and probable deductions that may be drawn therefrom; and (3) no abuse of discretion will be found where the moving party has not shown that he was prejudiced by the denial of his continuance motion. J.E. at 1246. Citing Rowlett v. Vanderburgh Cnty. Office of Family & Children, 841 N.E.2d 615, 619 (Ind. Ct. App. 2006) *trans. denied*, a termination of parental rights case, the Court noted that when the trial court denies a motion for continuance, an abuse of discretion will be found if the moving party has demonstrated good cause for granting the motion. J.E. at 1246. Citing In Re C.G., 954 N.E.2d 910, 917 (Ind. 2011), a termination of parental rights case, the Court noted that due process affords parents the opportunity to be heard at a meaningful time and in a meaningful matter. J.E. at 1246. Citing In Re K.W., 12 N.E.3d 241, 248-49 (Ind. 2014), the Court also noted that this does not mean that parents have an absolute right to be *physically* present at the termination hearing (emphasis in opinion). J.E. at 1246. The Court observed that: (1) Father's counsel attended the termination trial in person on Father's behalf and requested that the hearing be continued until after Father's expected release date from DOC, which was about four months; (2) Father had been remanded to DOC based on his failure to adhere to probation reporting requirements; (3) in considering the efficacy of a continuance, the trial court reflected on Father's patterns with respect to attendance, communication, and participation when he was not incarcerated; and (4) Father's lack of communication with his counsel showed that he had little interest in the preparation of his case. Id. at 1246-47. The Court noted that, during the termination hearing, the trial court cleared the courtroom and afforded Father the opportunity to

consult privately with counsel, which allowed Father the opportunity to assist in the presentation of his case. Id. at 1247. Finding that Father had failed to establish how he would have better assisted counsel in preparing and presenting his case if his continuance had been granted, the Court opined that Father had failed to demonstrate any prejudice stemming from the trial court's denial of his request for continuance. Id.

In **In Re B.H.**, 44 N.E.3d 745 (Ind. Ct. App. 2015), *trans. denied*, the Court declined to conclude that Mother was denied a fair trial because the juvenile court denied her two motions for continuance, both of which were filed on the date of the scheduled termination hearings. Id. at 749. On the morning of the first scheduled day of the termination hearing, Mother filed a motion for continuance, alleging that she was unable to attend the hearing because of work and transportation issues and that she had not received notice of the hearing. The Court found that Mother had notice of date of the termination hearing because her attorney was present when the hearing date was scheduled. Id. at 748. The Court held that Mother's own failure to make arrangements with work was not good cause for a last minute continuance, especially when multiple witnesses had traveled from out of state to testify. Id. The Court found no abuse of discretion in the denial of Mother's first request for a continuance. Id. at 749. On the morning of the second scheduled day of the termination hearing, Mother again filed a last minute motion for continuance, alleging that she was unable to attend the hearing because the person who was supposed to transport her to court had been injured. DCS objected, stating that if Mother had notified DCS as soon as there was a problem, DCS would have provided transportation for Mother to court. The Court found no abuse of discretion in the juvenile court's denial of Mother's second request for a continuance. Id. The Court also noted that Mother was represented by counsel, who cross-examined witnesses and had the opportunity to introduce evidence on her behalf, throughout the termination proceedings. Id. The Court affirmed the termination judgment. Id. at 752.

In **In Re K.W.**, 12 N.E.3d 241 (Ind. 2014), the Indiana Supreme Court concluded that the trial court abused its discretion by denying Mother's motion to continue the termination hearing and proceeding instead without her participation. Id. at 249. The Court vacated that portion of the trial court's order terminating Mother's parental rights. Id. Mother was incarcerated at the Marion County Jail on the day of the termination hearing, so her attorney moved for a continuance, stating that Mother anticipated being released within eight days to home detention or work release. The trial court denied the motion for continuance, held the hearing in Mother's absence, although her attorney was present to cross-examine witnesses and offer testimony from the child's maternal grandmother, and issued its order terminating Mother's parental rights. The Court noted that: (1) the requested continuance would pose an inconvenience to the parties and witnesses, but the inconvenience would be no greater than any continuance; (2) the hearing had already been continued twice, and only once (and then only partially) at Mother's request; (3) the delay resulting from continuing the case could have been as short as two weeks; (4) the DCS attorney had previously requested an emergency continuance of another trial setting on this case, to which Mother did not object, because of a family illness that would prevent the DCS attorney from being in court the following day; (5) this proceeding had not been overly drawn out or delayed; (6) there was not an overwhelming sense of urgency in this case, because Mother's child was two years old, not at risk of physical or emotional abuse as a result of any delay, and was healthy and doing well in a preadoptive home. Id. at 248. The Court observed that, by the time Mother's motion for continuance was made, the trial court was presented with only one choice: continue the trial or proceed without Mother's voice being heard at all. Id. The Court noted that, rather than contining the trial until Mother's release date or accommodating a readily available alternate means for Mother to present testimony by telephone or video conference, the trial court "opted to carry out a proceeding by which Mother's fundamental rights to parental autonomy were challenged, attacked, and taken away---without Mother's personal participation in any way." Id. The Court found that Mother showed good cause why her motion for continuance should have been granted, and doing otherwise was clearly against the logic and circumstances of this case. Id.

In **In Re S.S.**, 990 N.E.2d 978 (Ind. Ct. App. 2013), *trans. denied*, the Court concluded that Mother was not denied due process when the juvenile court terminated her parental rights to three of her children after denying her motion for a continuance. Id. at 985-86. Mother's three children were removed by DCS due to Mother's medical neglect of their special needs and failure to supervise them. The children were four years, two years, and ten months old at the time of their removal. The juvenile court determined that the children were CHINS after Mother admitted that her housing was unstable, the youngest child was diagnosed with failure to thrive, the middle child was diagnosed with autism, Mother needed assistance obtaining medical care for the children, and intervention was necessary for the children to receive the needed services. The juvenile court entered its dispositional decree ordering Mother to contact DCS weekly; notify DCS of any change in address, household composition, telephone, employment, arrest, or criminal charges; participate in home-based services, a parenting assessment, the children's medical, mental health, and dental appointments; and attend all visits with the children. Instead of following the orders in the dispositional decree, Mother left Indiana, claiming that she was going to visit family in Alabama and would return. Mother changed her telephone number and refused to provide her address to DCS or the home-based service provider. Although Mother informed the service provider that she would attend the permanency hearing, she failed to appear. DCS discovered that Mother was in Florida when Florida CPS contacted DCS about Mother. DCS filed a petition to involuntarily terminate the relationship between Mother and the children. Mother was personally served in Florida with a copy of the summons. Mother failed to appear at the initial termination hearing and also failed to appear at the evidentiary hearing on the termination petition, but was represented by counsel. Mother's counsel requested a continuance until a time when Mother could be there because Mother lived in Florida. The juvenile court denied Mother's motion for continuance. The juvenile court heard evidence on the termination petition, which included that: (1) Mother was repeatedly abused by Boyfriend while she was pregnant with his child, but returned to live with Boyfriend, who was also Mother's first cousin, despite the criminal charges of domestic violence; (2) Mother declined a protective order against Boyfriend, lost her housing eligibility because she left the domestic violence shelter, and failed to cooperate with the prosecutor's office so the charges against Boyfriend were dropped; (3) despite the children's medical conditions that included very bad teeth which required caps, Mother brought candy and sugary drinks to visits to bribe the children into behaving; (4) despite repeated instruction from medical personnel at Riley that Mother had to feed the youngest child slowly through his G-tube to prevent aspiration, Mother would speed up his feeding, failed parent care instruction, and could not feed the youngest child without assistance; and (5) Mother left the children unattended during visits, was not able to focus on more than one child at a time, did not redirect the oldest child's aggressive behavior, and was often resistant to parenting prompts from the visit supervisor. Id. at 982-83. The Court also noted the following evidence about the children's needs: (1) since the children's removal, the oldest child was diagnosed with Rett's syndrome, for which autism is the main symptom, was taking medication, and was "like a completely different child" according to the foster mother; (2) the middle child had a developmental therapist, continued to have speech and communication delays, and was learning how to play; (3) the youngest child suffered from ear infections and could receive nutrition only through his G-tube, but weighed twenty-four pounds and was "pretty healthy"; and (4) doctors believed that the youngest child would always aspirate his food because his body does not respond normally to allow him to cough up food, and medical professionals at Riley believed that he had cerebral palsy but had not yet diagnosed him. Id. at 983. The Court noted the recommendations of the case manager, the court appointed special advocate, and the guardian ad litem that the court terminate Mother's parental rights. Id. at 983-84.

The Court said that, under the facts and circumstances of this case, the risk of error created by the denial of Mother's motion for a continuance was minimal: (1) Mother's counsel stated that Mother had her telephone number and knew how to contact her; (2) Mother was aware of the date of the

termination hearing because she signed the summons and spoke to the case manager about the hearing; (3) Mother was represented by counsel throughout the termination hearing and her counsel questioned witnesses and gave a closing argument. Id. at 984-85. The Court found that Mother had failed to show prejudice. Id. at 985. Citing In Re B.J., 879 N.E.2d 7, 17 (Ind. Ct. App. 2008), the Court noted that it has recognized that delays in adjudication impose significant costs on the children involved. S.S. at 985. The Court noted evidence presented at the termination hearing, including Mother's significant exposure to domestic violence, Mother's difficulty "keeping herself safe," Mother's problems meeting the children's medical needs, Mother's failure to make any lasting changes, Mother's departure from the state shortly after the dispositional order was entered, her failure to visit the children for ten months, and the children's progress in foster care. Id. The Court concluded that upon balancing Mother's interest, the risk of error by not having Mother present, and the State's interest in protecting the welfare of these children, under the facts and circumstances of this case, the juvenile court did not deny Mother due process of law when it denied her motion for continuance. Id. at 985-86.

In **In Re A.D.W.,** 907 N.E.2d 533 (Ind. Ct. App. 2008), the Court held that the trial court did not abuse its discretion in denying Mother's motion for a continuance of the termination hearing. Id. at 538. 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. The children were determined to be CHINS. The children had been wards of DCS on four previous occasions. Services were ordered, but Mother failed and evaded drug tests; did not complete the substance abuse treatment programs as ordered; consistently failed to attend the ordered day treatment program which resulted in her case being closed by the treatment facility; failed to properly use the court-ordered resources provided by Parent Aide, but instead used them to help her run errands; missed approximately fourteen scheduled visits with her children in an eight month period; and created numerous problems during other visits with her inappropriate behavior. Both parties requested and received a number of continuances of the termination hearings. Mother was incarcerated for possession of cocaine; was released; and requested CHINS services and visits with her children which requests were denied by the trial court. Mother also tested positive for morphine, hydrocodone, hydromorphone, and alpha-hydroxy alprzolam, for which she did not have valid prescriptions. Mother again requested a continuance and parenting services from DCS, both of which were denied; and the trial court held a hearing on the termination petitions. Mother's parental rights were terminated by the trial court. On appeal, Mother argued that the trial court abused its discretion when it denied her continuance motion. The Court observed that Mother was not incarcerated at the time of the termination hearing, she had been released for over two months at that time, and, although Mother had the opportunity to demonstrate her ability to assume parental duties, she chose not to do so and continued the same pattern of inappropriate behavior, as demonstrated by her recent positive drug test. Id. at 537. The Court observed that Mother had made no improvements at the time of the hearing, Mother tested positive for numerous drugs, and Mother sent her daughters inappropriate gifts and an inappropriate letter after being released from incarceration.

In **In Re E.D.,** 902 N.E.2d 316 (Ind. Ct. App. 2009), *trans. denied*, after balancing the substantial interest of Mother with that of the State, and in light of the minimal risk of error created by the challenged procedure, the Court concluded that, under the facts of this case, the trial court did not deny Mother due process of law when it denied her counsel's request to continue the termination hearing. Id. at 323. On appeal, Mother argued that her request for a continuance was premised on the assertion that, because of her serious mental health issues, Mother was unable to assist in her defense, and that this inability should be treated the same as a situation in which a criminal defendant is found to be incompetent to stand trial. The Court specifically noted the following facts and law: (1) the child was removed from Mother's care and placed in a foster home after Mother exhibited bizarre behavior, which posed a risk to the child at the hospital following his birth; (2) throughout the CHINS

proceeding, DCS was unable to locate Mother, and Mother neither saw the child nor contacted DCS regarding the child; (3) the trial court had already continued the termination hearing once to allow Mother to obtain medical records and allow a guardian ad litem to interview and represent Mother's interests in the termination proceeding; (4) Mother was in prison at the time of the termination hearing, and, one and one-half years, which was the entire length of the child's young life, had passed between the child's removal and his termination hearing; and (5) "[w]hile continuances may be necessary to ensure the protection of a parent's due process rights, courts must also be cognizant of the strain these delays place upon a child." In Re C.C., 788 N.E.2d 847, 853 (Ind. Ct. App. 2003). E.D. at 322. The Court concluded that the risk of error caused by the trial court's denial of Mother's continuance request was minimal. Id. In assessing the risk of error created by the challenged procedure, the Court disagreed with Mother's contention that the risk of error was great because, by denying Mother's request for a continuance, the trial court denied Mother's due process rights to assist counsel in her defense and to understand the proceedings against her. Id. The Court found that the due process safeguards afforded a defendant in a criminal trial are not applicable to a parent in a civil termination proceeding. Id. The Court quoted Baker v. Marion County Office of Family & Children, 810 N.E.2d 1035, 1039 (Ind. 2004) for its recognition that "criminal prosecutions and termination proceedings are substantially different in focus. The resolution of a civil juvenile [termination] proceeding focuses on the best interests of the child, not on guilt or innocence as in a criminal proceeding." E.D. at 323. The Court affirmed the trial court's termination order. Id.

In **In Re S.B.,** 896 N.E.2d 1243 (Ind. Ct. App. 2008), the Court affirmed the trial court's termination of Father's parent-child relationship with the children. Id. at 1249. The trial court's judgment terminating Father's parental rights included specific findings of facts and conclusions of law based on the evidence presented both during the original termination hearing and the evidence presented at the CHINS review hearing. One of the specific findings stated that after the termination hearing "[t]he court also concluded that [DCS] had met its burden of proof as to [F]ather and that the Court was inclined to terminate [F]ather's rights. However, the court granted [F]ather one final chance to prove he could make necessary changes to care for his children." Father appealed the termination of his parental rights to the children. The Court held that the trial court's decision to postpone its pronouncement of judgment and give Father one final chance, despite its conclusion that DCS had already satisfied its burden of proof, was in direct violation of IC 31-35-2-8, which clearly provides that a trial court shall either find the allegations in the petition to be true and terminate the parent-child relationship, or find the allegations not to be true and dismiss the petition. Id. at 1248. The Court, *sua sponte*, raised this issue which it found to be dispositive. Id. at 1247. The Court examined IC 31-35-2-8, found it to be clear and unambiguous on its face, and found that the words of the statute must be given their plain, ordinary meaning. Id. at 1247-48. The Court held that, because the trial court failed to comply with IC 31-35-2-8, its judgment terminating Father's parental rights was erroneous, but that the trial court's error was harmless. Id. at 1248. The Court observed that, (1) although it did not approve of the trial court's postponement of its ruling, remanding this cause for a new termination hearing would be against the best interest of the children who "have lingered in the system six months longer than needed while Father dabbled with services, continued to use alcohol, and failed to maintain regular contact with the twins;" (2) the current system has already been criticized for putting children in limbo too long, thereby fostering instability and unhinged relationships; and (3) it was undeniable that it was within the child's best interest and overall well being to limit the potential for years of litigation and uncertainty. Id. at 1248-49. In view of these considerations and the trial court's clear determination that DCS satisfied its burden of proof at the termination hearing, and again at the review hearing, the Court affirmed the trial court's termination of Father's parental rights to the children. Id. at 1249.

In **C.T. v. Marion Cty. Dept. of Child Services,** 896 N.E.2d 571 (Ind. Ct. App. 2008), *trans. denied,* after balancing the substantial interests of both Father and the State as they related to the termination

hearing, and in light of the minimal risk of error created by the challenged procedure, the Court concluded that the juvenile court did not abuse its discretion, nor was Father denied due process of law, when the court denied Father's motion to continue and proceeded with the termination hearing in his absence. Id. at 588. The juvenile court had terminated the parental rights of Father, after denying the request of Father's attorney that the termination hearing be continued until Father was released from prison, which was scheduled to occur in three months. On appeal, Father alleged that he was denied due process of law when the court denied his motion to continue the termination hearing. The Court opined: (1) when the State seeks to terminate the parent-child relationship, it must do so in a manner that meets the requirements of due process; (2) the nature of the process due in a termination of parental rights proceeding turns on the balancing of three factors which are, the private interests affected by the proceeding, the risk of error created by the State's chosen procedure, and the countervailing governmental interest supporting use of the challenged procedure; (3) in termination cases, both the private interests of the parents and the countervailing governmental interests that are affected by the proceeding are substantial; (4) a termination action affects a parent's interest in the care, custody, and control of his or her child, which has been repeatedly recognized as one of the most valued relationships in our society; (5) as such, a parent's interest in the accuracy and justice of the decision is a commanding one; (6) the State's *parens patrie* interest in protecting the welfare of a child is also significant; (7) although the State does not gain when it separates children from the custody of fit parents, the State has a compelling interest in protecting the welfare of the child by intervening in the parent-child relationship when parental neglect, abuse, or abandonment are at issue; (8) when balancing the competing interests of a parent and the State, the risk of error created by the challenged procedure, in this case, Father's absence from the termination hearing, must be considered; (9) although IC 31-35-2-6.5(e) states that a trial court shall provide a party with an opportunity to be heard at the hearing, this statutory provision does not create a constitutional right for Father to be physically present at the termination hearing; and (10) the doctrine of invited error, grounded in estoppel, provides that a party may not take advantage of an error that he commits, invites, or which is the natural consequence of his own neglect or misconduct. Id. at 586-88. The Court observed that: (1) the child was physically removed from his parents and placed in foster care; (2) the termination hearing did not commence until over one year after the child's removal; (3) Father, who had been incarcerated throughout the majority of the CHINS case, remained incarcerated at the time of the termination hearing and was not expected to be released from prison for three months; (4) a significant amount of time had passed since the child's initial removal; (5) if the court had granted Father's continuance request, the child would have had to continue to wait for at least four additional months before a termination hearing could even commence; (6) although continuances may be necessary in certain situations to ensure the protection of a parent's due process rights, the Court has previously held that courts must also be cognizant of the strain these delays place upon a child; (7) Father was represented by counsel throughout the entire termination hearing; (8) Father's counsel cross-examined the State's witnesses and was granted the opportunity to introduce evidence in defense of the action; (9) Father received actual notice of the termination hearing, signed the original advisement of rights form, and then attached a handwritten letter requesting a continuance of the hearing until his release and stating that he did not want to be transported "at this time;" (10) Father maintained regular contact with Mother, who testified that Father wrote to her approximately once a week and it appeared from his responses that he received her letters; (11) Father failed to communicate with his attorney prior to the termination hearing; and (12) Father's attorney informed the court that he had attempted to contact Father by sending him at least three letters, to which Father failed to respond. Id. at 587-88. The Court concluded that the risk of error caused by the juvenile court's denial of Father's motion to continue was minimal considering that: (1) in failing to respond to his attorney's letters or to communicate with his attorney prior to the termination hearing, despite his actual knowledge of the hearing, Father invited the alleged error of which he complained; and (2) Father failed to allege any specific prejudice that resulted from his

absence from the termination hearing. Id. at 588. The juvenile court's termination order was affirmed. Id.

In **In Re A.P.**, 882 N.E.2d 799 (Ind. Ct. App. 2008), the Court held that, although it would have been equally appropriate and perhaps more desirable for the trial court to have granted the continuance request of Father's attorney, the trial court had not abused its discretion in denying the request. Id. at 806. The Court noted that (1) a continuance would have afforded Father's attorney more time to communicate with her client, to better understand the underlying factual circumstances, and to seek assistance from someone better versed in immigration law; (2) it is always in the best interests of the child involved to reach a resolution as promptly as possible; and (3) everyone involved agreed that it was unlikely Father planned to return to the U.S. and, if he did, he would face battery charges and possible jail time. Id. at 804-06. The Court held it was reasonable for the trial court to conclude that, even if Father's attorney had been granted more time to communicate with her client, she would still ultimately have faced the same problem of defending the parental rights of a client who lived in a different country from his child and had no plans to return because, among other things, he allegedly engaged in criminal activity while he was here. Id. at 806.

In **A.J. v. Marion County Office of Family**, 881 N.E.2d 706 (Ind. Ct. App. 2008), *trans. denied,* the Court held that, while it could not say that the juvenile court's termination of Mother's parental rights to her children was clearly erroneous, perhaps the more prudent course would have been to continue the case for an additional seven weeks in order to establish whether Mother completed the Intensive Outpatient Program and remained drug free. Id. at 719. The Court noted that Mother had made significant progress in dealing with her substance abuse problem and appeared to have a genuine desire to maintain a relationship with her children but DCS had legitimate and substantial concerns regarding Mother's failure to timely complete court-ordered services, her significant history of substance abuse, and the danger her substance abuse posed to the children. Id. The Court affirmed the juvenile court's termination judgment. Id.

In **Rowlett v. Vanderburgh County OFC**, 841 N.E.2d 615 (Ind. Ct. App. 2006), *trans. denied*, the Court reversed and remanded the trial court's judgment terminating Father's parental rights because the trial court had abused its discretion in denying incarcerated Father's motion for continuance of the termination dispositional hearing. Id. at 619-20. Father asserted that he would be released from prison six weeks after the scheduled hearing and he wanted an opportunity to become established in the community and to participate in reunification services. OFC opposed the requested continuance because the children had been under the supervision of OFC for over two years and would benefit from permanent adoptive placement with their grandmother. The Court concluded that Father had shown good cause for the continuance and had demonstrated prejudice by the denial of the continuance. Id. at 619. The Court noted Father's participation in rehabilitation programs while incarcerated, and held that the trial court should have granted his continuance and reset the hearing after he was given a sufficient period following his release to demonstrate his willingness and ability to assume parental duties. Id. at 620. The Court opined that the continuance would have little immediate effect on the children since the plan was adoption by the maternal grandmother with whom they had resided for nearly three years since the CHINS determination had been made. Id. at 623.

In **J.M. v. Marion County OFC**, 802 N.E.2d 40 (Ind. Ct. App. 2004), *trans. denied*, the Marion County OFC, the guardian ad litem, and Mother filed a joint motion for a 90 day continuance of the trial on the termination of the parent-child relationship petition because Mother was allegedly participating in services toward reunification with the children. The OFC asserted, however, that it was not changing its permanency plan to reunification. The trial court denied the joint motion for continuance and also denied the parties' renewed continuance request made on the day of trial. The trial court observed that it was a "primary concern" to achieve "permanency for children quickly." Id.

at 42. The termination petition was granted, and Mother appealed, contending that the trial court erred in denying the joint motion for continuance. Noting that a ruling on a non-statutory motion for continuance is within the sound discretion of the trial court, the Court opined that a trial court's continuance decisions will be reversed only upon a showing of an abuse of discretion and prejudice resulting from such abuse. Id. at 43. The Court noted that Mother had been granted nearly two years to complete the court ordered services and programs and further that she had failed to show that she was prejudiced by the trial court's refusal to grant the motion for continuance. Id. at 44.

See also the following cases in which the Court concluded that parents' due process rights were not violated when the trial court denied the parent's motion for continuance, and proceeded with the termination hearing in the parent's absence: **In Re B.J.**, 879 N.E.2d 7, 16-17 (Ind. Ct. App. 2008), *trans. denied*; **Q.B. v. MCDCS**, 873 N.E.2d 1063, 1067-68 (Ind. Ct. App. 2007); **In Re E.E.**, 853 N.E.2d 1037, 1044 (Ind. Ct. App. 2006), *trans. denied*; and **In Re C.C.**, 788 N.E.2d 847, 853 (Ind. Ct. App. 2003), *trans. denied.*

V. O. Res Judicata

In **In Re L.B.**, 889 N.E.2d 326 (Ind. Ct. App. 2008), the Court affirmed the trial court's termination of Father's parental rights. Id. at 342. The Court held the trial court had properly determined that the second petition for the termination of Father's paternal rights to the children was not barred by the doctrine of res judicata because the first petition, which was dismissed without prejudice due to a procedural error, did not finally determine the underlying issues on the merits. Id. at 341-42.

VI. EVIDENTIARY ISSUES

VI. A. Child Testimony by Court Ordered Videotape or Closed Circuit Television

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 child has impairment of intellectual functioning or adaptive behavior) can testify by videotape or closed circuit television instead of testifying in the courtroom. IC 31-35-5-4(3) states that DCS must send notice of intent to use the statutes for closed circuit television testimony or court ordered videotaped testimony by the child to the parties and their attorneys at least seven days before the proceedings. 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 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).

VI. B. Can the Judge Conduct an in Camera Interview of the Child?

The juvenile code makes no provision for in camera interviews of children in CHINS and termination cases. The code does provide at IC 31-35-5 that competent children can testify outside the courtroom by closed circuit television or videotaping under certain circumstances.

VI. C. Hearsay, Child Hearsay Exception, and Guardian ad Litem/Court Appointed Special Advocate Testimony

If a party objects hearsay is not admissible evidence in the termination hearing unless it fits within a recognized hearsay exception under the Indiana Rules of Evidence or the Child Hearsay Exception at IC 31-35-4.

In **Matter of A.F.**, 69 N.E.3d 932 (Ind. Ct. App. 2017), *trans. denied*, the Court affirmed the trial court's order which terminated Father's parental rights to his three children. Id. at 949. On appeal, Father asserted the trial court improperly admitted hearsay testimony from the children's behavioral

clinician that she had received reports from the foster home that the oldest child was lying and stealing. Father also claimed the court erred by admitting hearsay testimony from the children's mental health therapist about a report from Dalton and Associates which concluded the oldest child had reactive attachment order (RAD), and a report that the oldest child exhibited sexualized behaviors. The Court noted evidence from the foster mother, who testified without objection about the oldest child's behavior of lying and stealing, symptoms of ADHD, RAD, and reattachment disorder, and sexualized behaviors. Id. at 942-43. The Court also noted the therapeutic support specialist testified that the oldest child danced suggestively and made sexualized comments, and that the children showed other signs of sexualized behavior when playing with dolls. Id. at 943. The Court opined that the testimony about which Father complained was cumulative and was admitted without contemporaneous objection. Id. The Court could not say the trial court's admission of the hearsay testimony warranted reversal of the termination judgment. Id. Father also asserted that the trial court improperly permitted the oldest child's mental health therapist to testify about what the child said to the therapist in response to Father's letter in which he said he was no longer in prison and expressed his love for the children and his desire to see them. The Court found the trial court did abuse its discretion in admitting into evidence the oldest child's statements to her therapist pursuant to Ind. Evidence Rule 803(4) (Statement Made for Medical Diagnosis or Treatment). Id. at 948.

In **D.B.M. v. Indiana Dept. of Child Services**, 20 N.E.3d 174 (Ind. Ct. App. 2014), *trans. denied*, the case manager was on maternity leave at the time of the termination hearing, and her supervisor testified at the hearing despite Father's hearsay objection. DCS established that the supervisor had personal knowledge of the case, and argued that DCS employees routinely rely on hearsay from service providers as part of the DCS employees' job. The supervisor testified that: (1) DCS did not have a valid address for Father on multiple occasions; (2) Father failed to notify DCS of any housing or employment changes: (3) Father failed to comply with the trial court's order to participate in services recommended by the family functioning assessment; (4) Father had not exercised any parenting time with the child throughout the case; (6) the child was thriving in his foster care placement. The trial court terminated Father's parental rights. Father appealed, arguing that the supervisor's testimony was inadmissible hearsay, and that, without her testimony, there was insufficient evidence to support the trial court's order. Quoting In Re A.J., 877 N.E.2d 805, 813 (Ind. Ct. App, 2007), *trans. denied*, the Court observed that "[t]he admission of evidence is entrusted to the sound discretion of the trial court….[t]he fact that evidence was erroneously admitted does not automatically require reversal, and we will reverse only if we conclude the admission affected a party's substantial rights." D.B.M. at 179. The Court found that the supervisor's testimony was admitted to prove the truth of the matter asserted and therefore constituted hearsay. Id. The Court opined that, to the extent the supervisor's testimony was based on records in DCS's possession, it would likely be admissible pursuant to the hearsay exceptions for business or public records, Ind. Evidence Rule 803(6) [business records exception] or Ind. Evidence Rule 803(8) [public records exception]. Id. The Court quoted both Rules, and noted that Rule 803(8) does not contain several of the foundational requirements for business records found in Rule 803(6). Id. at 180. The Court said that, because there was no evidentiary foundation laid, it could not determine whether either hearsay exception applied. Id. The Court concluded that DCS had presented the same evidence, and more thorough evidence, through the testimony of the new case manager and the guardian ad litem; thus, any error in admitting the supervisor's testimony was harmless. Id. The Court held the evidence supported the trial court's determination that there was a reasonable probability the conditions resulting in the child's removal or the reasons for his placement outside Father's home would not be remedied, and affirmed the termination judgment. Id. at 182.

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 issues raised by Mother on appeal was her claim that the trial court erred by admitting the DCS caseworker's progress

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

In **In Re Relationship of E.T.**, 808 N.E.2d 639 (Ind. 2004), the Indiana Supreme Court affirmed in part and vacated in part the Court of Appeals opinion, In Re E.T., 787 N.E.2d 483 (Ind. Ct. App. 2003), and affirmed the trial court's judgment terminating the parent-child relationship. E.T., 808 N.E.2d at 646. The trial court's CHINS dispositional decree had required the parents to enroll in a Parents and Partners home-based services program offered by SCAN, Inc., a private social services agency. The program included home visits and supervised visitation. The reports from SCAN were admitted into evidence at the termination trial over the parents' objection. On transfer, the 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 645. The Court held that the SCAN reports did not qualify 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 645 n.4.

In **In Re W.B.**, 772 N.E.2d 522 (Ind. Ct. App. 2002), a case where Parents' rights to their twins were terminated, the Court opined that the trial court erred in admitting statements made by the twins' older siblings to their therapists and to others regarding sexual and physical abuse by Parents. Id. at 533. The trial court had held, in overruling Parents' objections, 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 therapists to determine a course of treatment. Id. at 532. The Court found the record devoid of any evidence of the first requirement of McClain v. State, 675 N.E.2d at 331 (Ind. 1996), which is that the declarant must be motivated to provide truthful information in order to promote diagnosis and treatment. W.B. at 533. The Court noted that one of the therapists' testimony clearly portrayed the young children as "mentally and emotionally incompetent" and no doubt "totally unaware" of the therapist's professional purpose. Id. The Court further cited the Indiana Supreme Court's observation in McClain, 675 N.E.2d 329, 331 that this exception to the hearsay rule does not lend itself easily to the testimony or statements of young children. W.B. at 533. The Court did not find that the improper admission of hearsay evidence warranted reversal of the termination judgment because the trial court's finding of physical and sexual abuse was "but one of several findings

supporting its ultimate finding that the continuation of the parent-child relationship posed a threat to the twins' well-being." Id. at 533-534.

In **In Re A.C.**, 770 N.E.2d 947 (Ind. Ct. App. 2002), Father appealed the trial court's judgment terminating the parent-child relationship. One of the issues raised on appeal was whether there was sufficient evidence that the Marion County OFC had notified him of the termination hearing date. The family case manager testified that: (1) she was familiar with the case file; (2) the notification letter introduced into evidence was the same as the letter in the case file; and (3) the author of the letter was a paralegal at Marion County OFC. Father contended on appeal that the letter was inadmissible hearsay. The Court held that the letter was not hearsay because it was not offered for the truth of the matter asserted, namely that there would be a court hearing on the given date. Id. at 952. The letter was offered for the non-hearsay purpose of establishing that the OFC had sent a notification letter to Father. Id. The Court opined that the trial court did not err in admitting the letter over the hearsay objection of Father's counsel and affirmed the termination judgment. Id.

The Child Hearsay Exception at IC 31-35-4 provides that a child's out-of-court statement may be admissible in a termination case 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. See Chapter 7 for a detailed discussion on procedures for the Child Hearsay Exception.

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. The Court also 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 810. 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. 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 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 similar for termination cases and for CHINS cases. In **In Re J.Q.**, 836 N.E.2d 961 (Ind. Ct. App. 2006), the Court reversed the CHINS adjudication due to lack of sufficient evidence. Id. at 967. 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. Id. at 964-66. In **Townsley v. Marion County Dept. of Child**, 848 N.E.2d 684 (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. Id. at 689. 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 Court's confidence in the CHINS determination. Id. at 687-89. *Practice Note:* Practitioners should review the above opinions and IC 31-35-4-1 through 4 when child hearsay statements are an issue in termination cases so that correct statutory procedures are followed.

Although the prohibition against hearsay would generally prevent a guardian ad litem/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, 639 (Ind. Ct. App. 1992), an appeal of a termination case and related adoption case, that the guardian ad litem/court appointed special advocate may be allowed to summarize the needs and desires expressed by the child without restating the exact language of the child. See also **Matter of A.F.**, 69 N.E.3d 932, 948 (Ind. Ct. App. 2017) (Court opined the trial court's admission of the guardian ad litem's testimony on statements the children made to her about their desires for future placement did not warrant reversal of termination judgment), *trans. denied*. But see **In Re O.G.**, 65 N.E.3d 1080, 1088 (Ind. Ct. App. 2016) (Court held that guardian ad litem's testimony on the child's wishes was inadmissible hearsay, and the trial court erred by admitting it), *trans. denied*.

Practice Note: Practitioners should note that no termination of the parent-child relationship statute provides for the admission into evidence of guardian ad litem/court appointed special advocate reports which contain hearsay if the parents object to the admission of the reports based on the hearsay contained in the reports. If the guardian ad litem/court appointed special advocate report contains hearsay, the hearsay information in the report must qualify for one of the exceptions to the hearsay rule for the report to be admissible despite the parents' objection. Guardian ad litem/court appointed special advocate reports which contain hearsay of probative value are admissible in predispositional reports (IC31-34-19-2), case review reports (IC 31-34-22-3), and dispositional modification reports (IC31-34-23-4).

VI. D. Privileged Communications and Mental Health and Drug Records

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). See Chapter 7 at II.C. on discovery and admissibility of privileged information.

IC 16-39-2 and IC 16-39-3 [statutes on mental health confidentiality] may be an issue in termination cases. IC 16-39-2-3 provides that mental health records are confidential and shall be disclosed only with the patient's consent unless otherwise provided by IC 16-39. IC 16-39-2-9 provides that the child's mental health records can be obtained by the child's parents, guardian, or other court appointed representative. IC 16-39-4-2 specifically provides for the child's guardian and guardian ad litem/court appointed special advocate to obtain the child's mental health records. 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. See IC 16-39-2-5 for specific provisions on the requirements for the patient's written request for release of mental health records. Mental health records may be obtained without consent through a hearing process described at IC 16-39-3, in which the party seeking the records shows good cause for the disclosure of the information. IC 16-39-3-8 specifically provides for DCS to obtain mental health records of a parent, guardian, or custodian of a child as part of the preliminary inquiry of a CHINS case under IC 34-7 when an emergency exists, other reasonable means of obtaining the information are not available or

would not be effective, or the need for disclosure in the child's best interests outweighs the potential harm to the patient.

In **L.G. v. S.L.**, 76 N.E.3d 157 (Ind. Ct. App. 2017), an adoption case, the Court reversed the trial court's dismissal of putative Father's motion to contest the adoption of his child and the trial court's entry of the adoption decree for the child. Id. at 177. The Court said that the overarching issue in the case was whether Father caused undue delay in the adoption proceedings when he objected to Adoptive Parents' request for the release of his mental health records. Id. at 159. The Court found that, because Adoptive Parents did not comply with IC 16-39-3-3 by filing a petition for the release of Father's mental health records, the trial court erred when it attributed the delay in the production of Father's mental health records to him. Id. at 170. Quoting Williams v. State, 819 N.E.2d 381, 386 (Ind. Ct. App. 2004), *trans. denied*, the Court opined that "[d]iscovery of mental health records [is] subject to the particularized requirements" of IC 16-39-2-and -3. L.G. at 168-69. The Court noted that when Father objected to the unqualified release of his mental health records, Adoptive Parents were then required to file a petition for release of the records (IC 16-39-3-3(2)), and provide notice to Father and the mental health providers of a hearing on that petition (IC 16-39-3-4). Id. at 169. The Court explained that the trial court was then required to hold a confidential hearing (IC 16-39-3-6), and was required to make findings that (1) other reasonable methods of obtaining the information were not available or would not be effective, and (2) the need for disclosure outweighed the potential for harm to the patient (IC 16-39-3-7). Id. The Court held that, as a matter of law, Father was entitled to object to Adoptive Parents' demands for the unqualified release of his confidential mental health records until Adoptive Parents had filed a petition and requested a hearing in compliance with the Indiana Code. Id. at 170.

In **In Re Invol. Termn. of Par. Child Rel. A.H.**, 832 N.E.2d 563 (Ind. Ct. App. 2005), Father objected to the introduction of his psychiatric report prepared for the purpose of obtaining social security disability benefits and to the testimony of a licensed social worker from a mental health center. This evidence was offered by OFC in a termination of the parent-child relationship proceeding. The trial court admitted the report and the social worker's testimony into evidence and granted the termination petition. On appeal, Father argued that the admission of the report and the social worker's testimony was error because Father had not signed a release for the admission of the report; therefore, his right of privacy pursuant to the 1996 Health Insurance Portability and Accountability Act (HIPAA) had been violated. The Court noted that HIPAA restricts access to medical records without the individual's direct consent, but that exceptions do exist, which include the reporting of child abuse. 42 C.F.R. § 160.203(c); 42 C.F.R. § 164.512 (2)(c). Id. at 567-68. The Court observed that the provisions of HIPAA override or preempt State laws. 42 C.F.R. § 160.203. Id. at 568. The Court went on to note that IC 16-39-3-3, IC 16-39-3-4 and IC 16-39-3-8 provide for mental health records to be obtained by petition, hearing and court order. Id. The Court cited Doe v. Daviess County, 669 N.E.2d 192 (Ind. Ct. App. 1996) and Carter v. KCOFC, 761 N.E.2d 431 (Ind. Ct. App. 2001), both of which addressed the court ordered release of parents' confidential medical records in termination proceedings. A.H. at 568-69. The Court concluded that the rationales of Doe and Carter, namely that the parents' right to nondisclosure of records had to give way to the court's duty to safeguard the physical, mental, and emotional well-being of the child, controlled the issue raised by Father. A.H. at 568-69. The Court opined that, even though the trial court may not have followed the precise procedures regarding the admissibility of Father's medical records, 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. 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. U.S.C.A. 290dd-2 states that 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. Carter at 437. 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. Id. 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)

Carter at 438.

Before addressing whether the trial court violated Mother's federal privilege, the Court observed that OFC had filed the medical documents 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 trial 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 Mother 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.

A second issue argued an appeal by Mother was that the trial court erred by permitting the health care provider to use privileged drug and alcohol records to refresh her memory while testifying about Mother's past drug and alcohol problems. The Court noted that a trial court may permit a witness to refresh his memory of facts by referring to a written memorandum, written either by himself or by another, at or near the time of the occurrences, but the memorandum cannot be substituted in the stead of the recollection of the witness. Id. If the inspection of the writing refreshes the witness's recollection of facts which he had previously known, the witness can then testify to such facts as being within his own personal knowledge. Id. The Court held that, to the extent that the health care provider may have testified from medical documents which Mother claimed were privileged, Mother waived the privilege during the CHINS proceeding or the needs of the court to meet the interests of the child clearly outweighed any confidentiality to which Mother might be entitled. Id. The Court

concluded that the trial court did not err in allowing the health care provider to testify from the medical records. Id.

In **Doe v. Daviess County**, 669 N.E.2d 192 (Ind. Ct. App. 1996), the Court 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. at 194-96. 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. at 195.

VI. E. Admitting Copies of Other Courts' Records in Termination Hearing and Judicial Notice

At the termination hearing, DCS may offer into evidence certified copies of the CHINS detention orders, CHINS petition, CHINS admission or the court's judgment from the factfinding 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). However, there may be some question as to whether the CHINS records containing hearsay (particularly dispositional and review hearing reports) may be objectionable on hearsay grounds if offered into evidence in the termination proceeding.

Ind. Evidence Rule 201, Judicial Notice, 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 N.Q.**, 996 N.E.2d 385 (Ind. Ct. App. 2013), the Court reversed and remanded the trial court's second termination judgment, concluding that there was insufficient evidence to support it. Id. at 387. The Court had previously reversed the trial court's first termination judgment in a memorandum decision because the first termination petition had been filed three months before the dispositional decree; therefore, it did not meet the requirement of IC 31-35-2-4(b)(2)(A). Id. at 388. During the trial on the second termination petition, DCS offered, and the court admitted into evidence, the transcript and exhibits from the first termination hearing, despite Parents' objection. The Court found that the lack of a dispositional decree prior to DCS's filing of the first termination petition tainted the first termination trial. Id. at 395 n.8. The Court did not hold that the record of the first termination proceeding was inadmissible, but said that the extent to which this record was relied upon by DCS and the trial court was "problematic at best." Id. The Court found it "troubling" that DCS would, at the second termination hearing, rely almost entirely upon the transcript and exhibits from the first termination hearing to prove that Parents' rights should be terminated eighteen months later. Id. at 395.

In **In Re D.K.**, 968 N.E.2d 792 (Ind. Ct. App. 2012), the Court affirmed the termination judgment and 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 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 rely on parts of 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 determined by Indiana Appellate Rule 50. Id. at 797. At the beginning of the termination trial, DCS asked the trial court to take judicial notice of the underlying CHINS file, per Ind. Evidence Rule 201(b), and the trial court agreed to do so. Id. at 795-796. In its appellate brief, DCS related facts that were based on documents in the CHINS action. However, the Court noted that none of these facts ostensibly relied on by the trial court or referred to by DCS in its appellate brief were actually supported by any evidence introduced at the termination of parental rights hearing, because the underlying CHINS record of which the trial court took judicial notice was not made part of the record upon appeal. Id. at 796. The Court determined that termination of parental rights cases are similar in nature to post-conviction relief cases in that they both must refer to and heavily rely on records in different but related proceedings. Id.

In **Carter v. KCOFC**, 761 N.E.2d 431 (Ind. Ct. App. 2001), Mother argued on appeal that the introduction of her drug and alcohol treatment records at the termination hearing violated her federal privilege. The Court observed that OFC had filed the medical documents with the court during the CHINS proceeding and prior to the termination proceedings. Id. at 437. The Court opined that, even assuming that the privilege would apply to the medical records exhibits, 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 proceedings." Id. at 438.

In **In Re Paternity of P.R.**, 940 N.E.2d 346 (Ind. Ct. App. 2010), a paternity custody modification case, the Court opined that, pursuant to the 2010 amendment to Ind. Evidence Rule 201, the trial court properly took judicial notice of a protective order file which Mother had obtained against her boyfriend, who punched a hole in the wall at the house where Mother and the children were living. Id. at 350. The Court pointed out that the better practice would have been for the court to have given the parties notice and an opportunity to be heard before taking judicial notice of other court's orders. Id.

In **Rosendaul v. State**, 864 N.E.2d 1110 (Ind. Ct. App. 2007), *trans. denied*, a criminal case, the trial court properly took judicial notice of how filings in the case were dated. Id. at 1116. The Court cited to Ind. Evidence Rule 201 as providing that a trial court may take judicial notice of a fact, regardless of whether a party requested it; and a judicially-noticed fact must be one not subject to reasonable dispute in that it is either: (1) generally known within the territorial jurisdiction of the trial court; or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Id. The Court opined that the trial court may take judicial notice of the pleadings and filings in the case before it, or of their contents, and a rebuttable presumption arises, which requires the defendant to come forward with evidence to dispute the presumption. Id.

Appellate decisions have affirmed the admissibility of certified copies of criminal court documents from other criminal cases. See **Christie v. State**, 939 N.E.2d 691, 694 (Ind. Ct. App. 2011) (trial court properly took judicial notice of defendant's new conviction and therefore had sufficient evidence that defendant had violated the conditions of his community correction placement); **Tyson v. State**, 766 N.E.2d 715, 718 (Ind. 2002) (finding that defendant was habitual offender for sentence enhancement affirmed on evidence of certified copies of information, plea agreement, and court minutes for guilty plea regarding prior operating while intoxicated offense); **Tate v. State**, 835 N.E.2d 499, 509-10 (Ind. Ct. App. 2005) (certified information, commitment record, abstract of judgment, and plea agreement were appropriately admitted pursuant to Evidence Rule 803(8) to support criminal conviction of unlawful possession of firearm by serious violent felon), *trans. denied*. See also IC 34-39-3-1 and Ind. Evidence Rule 803(22).

But see **Matter of D.P.**, 72 N.E.3d 976 (Ind. Ct. App. 2017), a CHINS case, in which Father had recently been incarcerated on a pending charge of domestic violence with Mother as the victim. At the CHINS factfinding hearing, the DCS attorney gave the trial court Father's criminal court cause number, and the court judicially noticed the cause number, and that it was a felony charge in a Marion County court. The Court concluded the trial court took the correct approach to judicial notice of the charges against Father. Id. at 984. The Court noted there was no detailed information on the alleged incident to support the CHINS adjudication. Id. The Court opined that Evid. R. 201 does not provide for judicial notice of all facts contained within a court record. Id. at 983. Quoting Brown v. Jones, 804 N.E.2d 1197, 1202 (Ind. Ct. App, 2004), *trans. denied*, the Court said that, even if court records may be judicially noticed, "facts recited within the pleadings and filings that are not capable of ready and accurate determination are not suitable for judicial notice." D.P. at 983. Again quoting Brown, 804 N.E.2d at 1202, the Court said, "[u]nless principles of claim preclusion apply, judicial notice should be limited to the fact of the record's existence, rather than to any facts found or alleged in the record of another case." D.P. at 983. The Court found there was a lack of admissible evidence to support the elements of the CHINS action and reversed the juvenile court's CHINS adjudication. Id. at 985. See also **Sigo v. Prudential Property and Cas. Ins.**, 946 N.E.2d 1248, 1254 (Ind. Ct. App. 2011), *trans. denied*, in which the Court opined that if the drafters of IC 34-39-3-1 or Indiana Rule of Evidence 803(22) had intended for acquittal evidence to be admissible, they would have expressly said so.

VI. F. Introduction of Evidence after Termination Hearing Concluded

In **In Re Termination of Parent-Child Relation. of S.F.**, 883 N.E.2d 830 (Ind. Ct. App. 2008), the Court found that Father was denied due process when the trial court conducted an independent investigation and did not allow him an opportunity to respond. Id. at 832. The Court reversed the termination judgment, and remanded the case with instructions to conduct a new trial. Id. at 839. At the conclusion of evidence in the termination case, the trial court had ordered Allen County DCS to request an investigation of the parents' home by the Allen County Health Department and that the Health Department file a report of its findings with the court. The inspection was conducted and the Health Department report was submitted to the court, but the report was not received into evidence or included in the court file. The court then entered the termination judgment which included information from the Health Department report concerning the unsanitary and dangerous condition of the parents' home. The court did not provide an opportunity for Father to review the entire report or hold a hearing on the report where Father had the opportunity to cross-examine the Health Department inspector or to offer his own evidence contradicting the report. In reversing the termination judgment, the Court opined that: (1) the trial court's consideration of a report that was generated through its independent investigation to which Father was not given an opportunity to respond violated Father's due process rights; (2) Father's failure to object to the order regarding the Health Department investigation or to file a motion to correct error did not waive the issue because the trial court's actions amounted to fundamental error; (3) the trial court's consideration of the Health Department report was not harmless error because a former "restoration worker" and a DCS employee had testified concerning improvements in the hygiene and safety conditions of the parents' home and a second DCS family case manager testified that the home was a sanitary and safe place to return a child. Id. at 837-39.

In **In Re D.Q.**, 745 N.E.2d 904 (Ind. Ct. App. 2001), the Marion County OFC and Child Advocates, the guardian ad litem, appealed from the trial court's denial of the petition to terminate the parent-child relationship. One of the issues raised was whether the trial court abused its discretion when it reopened the case despite OFC's objection, and allowed Mother to present additional post-hearing evidence over four months after the parties had rested and the court had taken the termination petition under advisement. Mother's post-hearing evidence included her new lease agreement as well as photographs of her new apartment and its furnishings. The OFC and guardian ad litem cross-examined Mother and offered the testimony of the OFC case manager and the guardian ad litem,

who reaffirmed their recommendations concerning termination of the parent-child relationship. The Court opined that evidence must be offered during the course of a trial and it is within the trial court's discretion to permit a party to present additional evidence once the party has rested, both parties have rested, or after the close of all the evidence. Id. at 908. The Court held that OFC and the guardian ad litem had not demonstrated how the trial court's decision to reopen the evidence had resulted in any prejudice; thus, there was no clear abuse of discretion. Id.

In **Matter of A.M.**, 596 N.E.2d 236 (Ind. Ct. App. 1992), Mother argued on appeal that the trial court erred in not ruling on her motion to present additional evidence after the termination hearing, but prior to the issuance of the judgment. Mother cited language in Page v. Greene County Dept. of Public Welfare, 564 N.E. 2d 956 (Ind. Ct. App. 1991), that the court must evaluate the parent's habitual patterns of conduct to determine whether there is a substantial probability of future neglect. The Court was not persuaded, noting that the evidence presented at the termination hearing established that Mother was habitually unable to care for the children properly or provide a stable environment. The Court held that the trial court's failure to consider Mother's evidence of her progress after the termination hearing was not reversible error. Id. at 239.

VI. G. Offensive Collateral Estoppel to Prevent Relitigation of CHINS Judgment

In **Adams v. Office of Fam. & Children**, 659 N.E. 2d 202 (Ind. Ct. App. 1995), a termination case, he Parents alleged on appeal that the evidence was insufficient to prove the children had been sexually molested by Father. The Office of Family and Children responded that the juvenile court had adjudicated that the children were molested as the grounds for the CHINS judgment in a factfinding hearing; therefore, Parents were collaterally estopped in the termination hearing from alleging that the molestation had not occurred. The Court agreed with the Office of Family and Children, and ruled that the parents were barred from relitigating the sexual abuse allegations in the termination case. Id. at 206. But see **Matter of C.M.**, 675 N.E. 2d 1134 (Ind. Ct. App. 1997), in which the Court held that Mother was not barred from offering evidence in a termination hearing challenging the original judgment of CHINS. Id. at 1138. The Court ruled that Mother's original admissions in the CHINS case were admissible in the termination proceeding, but Mother was not estopped from trying to refute her prior admissions by presenting evidence to the contrary. Id.

VI. H. Evidence of Termination Judgment on Another Child and Character Evidence

In **In Re A.G.**, 45 N.E.3d 471 (Ind. Ct. App. 2015), *trans. denied*, the Court noted evidence that Father: (1) had been incarcerated for four years and ten months out of the last seven years; (2) was convicted of auto theft in New York, identity theft in Florida, and possession of a firearm by a felon in Georgia; (3) had three other children who lived with their respective mothers; and (4) had not supported his other children. Id. at 479. The Court found that this evidence supported the trial court's judgment that there was a reasonable probability that the circumstances leading to the child's removal from Father would not be remedied. Id. The Court affirmed the judgment terminating Father's parental rights. Id. at 480.

In **In Re W.B.**, 772 N.E.2d 522 (Ind. Ct. App. 2002), the twins who were the subjects of the termination case were been born during the CHINS and termination proceeding regarding five older siblings. The twins were removed at birth, a CHINS petition was filed, and the trial court found the twins to be Children in Need of Services, stating that they were subject to high risk of abuse and neglect because of Parents' prior neglect of the older siblings. The trial court's judgment terminating parental rights to the twins was affirmed on appeal, despite Parents' argument that there was insufficient evidence and the trial court had wrongly focused on Parents' past behavior as a factor favoring termination. Id. at 535. The Court noted that evidence submitted in support of the termination included the following: (1) Mother's parental rights to eight other children and Father's parental rights to five other children had previously been terminated; (2) Parents had five counts of

neglect of a dependent charges pending regarding the twins' older siblings; (3) a Child Protection Services caseworker had removed the older siblings because the home was dirty and inappropriate; (4) the older siblings had been found to be severely delayed developmentally, socially, emotionally, and intellectually; (5) three of the older siblings were diagnosed with Post Traumatic Stress Syndrome; (6) the older siblings exhibited bizarre behavior, including aggression, withdrawal, and sexual acting out; (7) the court appointed special advocate for the older siblings testified to the lack of housing stability when the older siblings lived with Parents. Id. at 531-34. The Court noted that the trial court's findings considered Parents' improved circumstances, and said that it was clearly within the trial court's discretion to conclude that Parents' current improvements might not stand the test of time. Id. at 534.

In **Matter of D.J.**, 702 N.E. 2d 777 (Ind. Ct. App. 1998), the Court ruled evidence that Mother's relationship with an older child had been involuntarily terminated was admissible in the termination trial on Mother's younger child. Id. at 780. The Court noted that, although the CHINS provision at IC 31-34-12-5 for the admissibility of evidence that prior or subsequent acts or omissions of a parent, guardian or custodians injured a child did not specifically apply to termination cases, Ind. Evidence Rule 405 applies to termination cases and allows for admission of proof of "specific instances of that person's conduct" when the character of a person is an essential element of the case. Id. at 780 n.4. The Court determined that the character of a parent is "an integral factor in assessing a parent's fitness and in determining the child's best interest." Id. at 780. The evidence demonstrated that, despite the previous intervention of the office of family and children, Mother had not developed adequate parenting skills, and Mother's habitual pattern of behavior was relevant to determine whether she was likely to be able to provide a satisfactory home for the child in the future. Id. The Court held that specific instances of a parent's character, including evidence regarding a previous termination of parental rights, is admissible character evidence in a subsequent termination proceeding. Id. The termination judgment was affirmed. Id. at 781.

VI. I. Expert Testimony, Skilled Witness Testimony, and Testimony Based on Experience

See Chapter 7 at V. for information on expert testimony and scientific evidence. For examples of expert opinion testimony noted in termination cases, see **B.H. v. Indiana Dept. of Child Services**, 989 N.E.2d 355, 360-62 (Ind. Ct. App. 2013) (social worker evaluator was qualified as expert and testified on her recommendations and the results of Mother's Child Abuse Potential Inventory); **In Re A.J.**, 877 N.E.2d 805, 815 (Ind. Ct. App. 2007) (no error in trial court's allowing psychologist expert witness to testify as to his recommendations for treatment which were based in part on results of polygraphs given to Mother and Father), *trans. denied*; **In Re A.I.**, 825 N.E.2d 798, 807-08 (Ind. Ct. App. 2005) (testimony of parents' counselors), *trans. denied*; **Stewart v. Randolph County OFC**, 804 N.E.2d 1207, 1212-14 (Ind. Ct. App. 2004) (testimony of therapist), *trans. denied*; **Termination of Parent-Child Rel. of L.V.N.**, 799 N.E.2d 63, 70 (Ind. Ct. App. 2003) (testimony of mental health center director); **McBride v. County Off. Of Family and Children**, 798 N.E.2d 185, 192-93, 202 (Ind. Ct. App. 2003) (testimony of psychologist and of pediatrician who was serving as court appointed special advocate).

A witness who has not been qualified as an expert witness or a skilled witness may testify as to an opinion which is rationally based on the witness's personal observation, knowledge, and past experience. See Indiana Evidence Rule 701 and **Matter of A.F.** 69 N.E.3d 932, 949 (Ind. Ct. App. 2017) (in termination case, Court concluded trial court did not abuse its discretion by admitting testimony from guardian ad litem that children, who had been the subjects of three separate CHINS proceedings, suffered trauma from being removed from Parents, returned to Parents, and removed again; guardian ad litem did not need to be qualified as expert witness since her opinion was rationally based on her personal observation, knowledge, and past experience), *trans. denied*.

In termination cases, attorneys for the parties may qualify family case managers, law enforcement personnel, private agency social workers, and foster parents as skilled lay witnesses who can testify to their opinions and inferences based on personal experience under Ind. Evidence Rule 701. See the following criminal cases where law enforcement officers were qualified as skilled witnesses: **Haycraft v. State**, 760 N.E.2d 203, 211 (Ind. Ct. App. 2001) (officer was a skilled witness on "grooming" technique of child molesters); **Vasquez v. State**, 741 N.E.2d 1214, 1217 (Ind. 2001) (officer was a skilled witness on smell of toluene); **O'Neal v. State**, 716 N.E.2d 82, 89 (Ind. Ct. App. 1999) (officer was a skilled witness on cocaine dealing), *trans. denied*. But see the following cases in which law enforcement officers were not qualified as skilled witnesses: **Kubsch v. State**, 784 N.E.2d 905, 922-23 (Ind. 2003) (officer was not a skilled witness on murderer dissociating himself from victim) and **Farrell v. Littell**, 790 N.E.2d 612, 617-18 (Ind. Ct. App. 2003) (officer was not a skilled witness regarding whether sexual abuse had occurred)

VI. J. Court Ordered Withdrawal of Consent and Entry of Involuntary Termination Judgment

In **In Re K.H.**, 838 N.E.2d 477 (Ind. Ct. App. 2005), the OFC filed a petition for involuntary termination of parental rights. Four months later, Mother signed a consent for the child's adoption by the maternal grandmother as well as an agreement for postadoption privileges. Neither the maternal grandmother nor the court signed the agreement. The maternal grandmother could not complete the adoption because Mother had not consented to the adoption by the grandmother's husband, maternal step-grandfather. (IC 31-19-2-4 requires that a petition for adoption by married persons may not be granted unless husband and wife both join in the adoption). Mother did not visit the child for over one year. One year after Mother signed her consent to adoption by the maternal grandmother, OFC moved to set aside the consent and postadoption privileges agreement, requesting that the court proceed to trial on the involuntary termination petition. OFC alleged, inter alia, that Mother could not be located, the adoption could not proceed due to lack of consent for the maternal step-grandfather to adopt the child, adoption was in the child's best interests, and the alleged father's parental rights had previously been terminated. In response, Mother's counsel filed an objection to OFC's motion, stating the following: (1) Mother's counsel could not locate Mother; (2) revoking the consent would prejudice Mother by denying her an opportunity to negotiate any postadoption contact and the adoptive parents might deny contact; (3) OFC knew or should have known that the maternal grandmother was married before preparing the adoption documents which Mother had signed; (4) Mother was not obliged to consent to adoption by both spouses to effect postadoption privileges; (5) as an alternative, the court could void or modify the postadoption privileges agreement to bind the maternal step-grandfather to its terms. The court held a hearing on OFC's motion at which Mother's counsel rested on her objection. The court denied the motion for continuance filed by Mother's counsel, heard evidence on the termination petition, and entered an order terminating Mother's parental rights.

Mother appealed the trial court's order granting OFC's motion to set aside the adoption consent and postadoption privileges agreement, arguing that OFC's motion rested on several factual allegations: (1) the grandmother and step-grandfather were married when the consent was signed and continued to be married; (2) Mother refused to consent to adoption for both grandmother and step-grandfather; (3) the adoption had been held in abeyance; (4) attempts to contact Mother had been unsuccessful. Mother argued that OFC had not presented any evidence to prove these factual allegations, but had relied solely on the argument of counsel. The Court noted that Mother did not argue: (1) the validity of her consent; (2) the denial of the request for continuance; or (3) the merits of the involuntary termination order. Id. at 480. The Court found that, at the hearing on OFC's motion, Mother's counsel rested on the contents of her written objection, which constituted an admission that the grandmother and step-grandfather were married at all relevant times and that attempts to contact Mother had been unsuccessful. Id. The Court found that, "[a] clear and unequivocal admission of fact by an attorney is a judicial admission which is binding on the client," citing Parker v. State, 676 N.E.2d 1083, 1086 (Ind. Ct. App. 1997). K.H. at 480. The Court affirmed the trial court's order setting aside Mother's

consent to adoption and agreement for post-adoption privileges. Id. at 478. The Court found that Mother failed to carry her burden of showing reversible error. Id. at 480.

VI. K. Issues on Termination Appeal

VI. K. 1. Parties to Appeal and Standard of Review

In **In Re E.M.**, 4 N.E.3d 636 (Ind. 2014), the Indiana Supreme Court explained that, in termination proceedings, weighing the evidence by the heightened "clear and convincing " standard is the trial court's prerogative, in contrast to the Court's well-settled, highly deferential standard of review. Id, at 642. The Court confines its review to two steps: whether the evidence clearly and convincingly supports the findings, and then whether the findings clearly and convincingly support the judgment. Id. The Court opined that reweighing whether the evidence "clearly and convincingly" supports the findings, or the findings "clearly and convincingly" support the judgment, is not a license to reweigh the evidence; rather it is akin to the "reasonable doubt" standard in criminal sufficiency of the evidence appeals, in which the Court considers only whether there is probative evidence from which a *reasonable jury could have* found the defendant guilty beyond a reasonable doubt (emphasis in opinion). Id. The Court does not independently determine whether that heightened standard is met. Id. The Court noted that it must "give 'due regard' to the trial court's opportunity to judge the credibility of the witnesses firsthand," and "not set aside [its] findings or judgment unless clearly erroneous", quoting K.T.K. v. Indiana Dep't of Child Servs., 989 N.E.2d 1225, 1229 (Ind. 2013). E.M. at 642.

In **In Re S.B.**, 5 N.E.3d 1152, 1153-54 (Ind. 2014), the Indiana Supreme Court said 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.

In **In Re Parent-Child Relationship of S.M.**, 840 N.E.2d 865 (Ind. Ct. App. 2006), the Court affirmed the trial court's order terminating the parental rights of putative Father. Id. at 872. In its appellate brief, DCS suggested that Father did not have standing to challenge the termination of his parental rights because he had taken no action to establish paternity. DCS cited the voluntary termination statute, IC 31-35-1-4.5, which provides that a putative father's consent to termination of the parent-child relationship is irrevocably implied if the putative father fails to establish paternity within a reasonable period after receiving actual notice of Mother's intent to proceed with adoptive placement of the child. The Court stated that DCS was asking to extend the statute beyond the bounds set by the legislature. Id. at 871. The Court discussed the options of petitioning for adoption pursuant to IC 31-19, voluntary termination pursuant to IC 31-35-1, and involuntary termination pursuant to IC 31-35-2. Id. at 870-72. The Court noted that DCS had chosen to seek involuntary termination of the putative father's rights under IC 31-35-2 and had named Father as a respondent. Id. at 872. The Court stated that, in requesting that the juvenile court assert its jurisdiction over Father and winning a judgment directly adverse to his interest, DCS had precluded itself from arguing that Father lacked standing. Id. The Court opined that Father had standing to challenge the juvenile court's termination decision. Id.

In **In Re Involuntary Term. of Parent-Child Rel. [A.K.]**, 755 N.E.2d 1090 (Ind. Ct. App. 2001), the trial court's termination of Mother's parental rights was affirmed. Id. at 1099. One of the issues which Mother argued on appeal was that the guardian ad litem should not be a party to the appeal because the guardian ad litem had presented no evidence independent from OFC and did not hold an independent position on appeal. Mother contended that she was prejudiced because she was forced to defend her appeal against two identical interests. Although Mother had waived the issue for appeal by failing to object to the guardian ad litem being a party at the

termination hearing, the Court addressed the issue and found that there is both statutory authority (IC 31-35-2-7) and an appellate rule (Ind. Appellate Rule 17(A)) allowing the guardian ad litem to be a proper party to a termination appeal. Id.

VI. K. 2. Findings of Fact and Conclusions of Law

IC 31-35-2-8 requires the trial court, in granting or denying a termination petition, to enter findings of fact that support the entry of conclusions of law.

In **In Re Involuntary Termination of Parent-Child Relationship of N.G**., 61 N.E.3d 1263 (Ind. Ct. App. 2016), the Court remanded the trial court's order terminating Mother's parental rights to her child with instructions for the court to enter proper findings of fact and conclusions of law to support its order. Id. at 1266. The Court found that the trial court's findings were so sparse that the Court could not discern whether the trial court based its order on proper statutory considerations. Id. The trial court's unnumbered findings of fact comprised little more than one page. Id. at 1265. The Court observed that IC 31-35-2-8(c) states "the court *shall* enter findings of fact that support the entry of the conclusions" terminating a parent-child relationship (emphasis in opinion). Id.

In **In Re R.A.**, 19 N.E.3d 313 (Ind. Ct. App. 2014), *trans. denied*, the trial court entered its order terminating Father's parental rights. The Court stated that the threshold question in the case was whether the evidence supported the trial court's findings. Id. at 318. The Court concluded that a number of the trial court's findings were not supported by the evidence and set them aside. Id. at 319-20. Setting the erroneous findings aside, the Court concluded that the remaining findings did not support the trial court's termination judgment. Id. at 320. The Court reversed the termination judgment. Id. at 322.

In **In Re I.P.**, 5 N.E.3d 750 (Ind. 2014) and in **In Re S.B.**, 5 N.E.3d 1152 (Ind. 2014), the Indiana Supreme Court granted transfer, vacated the published Court of Appeals decisions, and reversed the trial courts' judgments terminating the parents' rights. I.P. at 752. S.B. at 1154. Both cases resulted from circumstances similar to those outlined in In Re D.P., 994 N.E.2d 1228 (Ind. Ct. App. 2013), discussed immediately below. In both cases, the magistrate who presided over the termination hearings resigned her position before reporting recommended findings and conclusions to the juvenile court judge. The cases were transferred to a replacement magistrate. After reviewing the record and without holding a new evidentiary hearing, the replacement magistrate reported recommended findings and conclusions to the judge. The judge approved the findings and conclusions and ordered the parents' rights terminated. In both cases, the Court explained that the Court gives great deference to the trial court's decision to terminate parental rights because the judge or magistrate presiding at a termination hearing has a superior vantage point for assessing witness credibility and weighing evidence. I.P. at 752. S.B. at 1153-54. The Court noted that, in both cases, the replacement magistrate had only reviewed the record before reporting his findings and conclusions to the judge, and neither parent had agreed to the use of this procedure. I.P. at 752. S.B. at 1154. In both cases, the Court found that the procedure used violated the parents' due process rights. I.P. at 752. S.B. at 1153.

In **In Re D.P.**, 994 N.E.2d 1228 (Ind. Ct. App. 2013), the Court reversed the termination judgment and remanded for a new evidentiary hearing. Id. at 1233. The Court concluded that Father's due process rights were violated because the replacement magistrate, who had reviewed the record of the termination hearing and then reported recommended findings of fact and conclusions thereon to the juvenile court judge, had not heard the evidence at the termination trial. Id. The first magistrate heard the evidence at the termination trial, which included conflicting testimony from incarcerated Father, the DCS case worker, and the guardian ad litem

on whether the reasons for removing the child from Father's care would be remedied and whether termination was in the child's best interests. The first magistrate took the case under advisement and did not report her recommended findings of fact and conclusions thereon to the juvenile court judge before resigning her position. The Court opined that the replacement magistrate could not properly resolve questions of credibility and weight of evidence because he did not have the opportunity to hear the evidence and observe the demeanor of the witnesses. Id. The Court said that Indiana Courts have long held that a party to an action is entitled to a determination of the issues by the judge who heard the evidence, and when the issues remain undetermined at the resignation, death, or expiration of the judge's term, his successor cannot decide, or make findings in the case, without a trial *de novo* (multiple citations omitted). Id. at 1232.

In **In Re A.K.**, 924 N.E.2d 212 (Ind. Ct. App. 2010), the Court stated that:

> We believe that a judgment terminating the relationship between a parent and child is impossible to review on appeal if it is nothing more than a mere recitation of the conclusions the governing statute requires the trial court to reach. Indiana's parents and children deserve more, and the basic notions of due process inherent in our system of justice demand more.

Id. at 220. The Court held that in termination cases, trial courts must enter findings of fact that support the entry of the conclusions called for by Indiana statute and the common law. Id.

In **Moore v. Jasper County Dept.,** 894 N.E.2d 218 (Ind. Ct. App. 2008), the Court found the trial court's termination orders to be deficient in that they failed to satisfy the requirements of IC 31-35-2-4(b) and -8, but the Court determined that remand would not cure the error in this case. Id. at 224. The Court stated that, because the trial court neglected to: (1) make any findings specifically pertaining to the statutory requirements delineated in IC 31-35-2-4(b)(2)(B) and (C); (2) make any conclusions based on its findings; and (3) provide an explanation as to how its findings supported its judgments, the Court was unable to determine whether the trial court violated Mother's parental rights in terminating her parental relationship with her twins. Id. Based on a review of the evidence in the record, the Court concluded that, although the termination orders did not satisfy the requirements of IC 31-35-2-4 and -8 because the findings were a mere recitation of the evidence presented and the trial court failed to provide a nexus between its purported findings and its judgments, simply remanding this cause with instructions for the trial court to enter specific factual findings that were fully supported by the evidence and to provide an explanation as to how its factual findings supported its termination order would not cure the error in this case. Id. at 224-25.

In **In Re B.J.**, 879 N.E.2d 7 (Ind. Ct. App. 2008), *trans. denied*, the Court found one of the trial court's findings of fact to be erroneous because it was based on evidence that had been stricken from the record. Id. at 20. The Court determined that the erroneous finding did not constitute the sole support for any conclusion of law necessary to sustain the judgment; therefore, the erroneous finding was not cause for reversal of the termination judgment. Id. The Court noted: (1) a Court on review must determine whether the specific findings are adequate to support the trial court's decision; (2) the Court is to disregard any special finding that is not proper or competent to be considered; (3) such a finding cannot form the basis of a conclusion of law; (4) a trial court's judgment may be reversed only if its findings constitute prejudicial error; and (5) a finding of fact is not prejudicial to a party unless it directly supports a conclusion. Id. at 19-20.

In **Parks v. DCDCS**, 862 N.E.2d 1275 (Ind. Ct. App. 2007), the Court remanded the trial court's termination judgment for the entry of proper findings of fact and conclusions of law. Id. at 1281. The trial court adopted verbatim the proposed findings of facts and conclusions of law submitted by DCS. The Court observed that the majority of the findings were mere recitations of testimony and witness opinions. Id. at 1279. Citing Perez v. U.S. Steel Corp., 426 N.E.2d 29, 33 (Ind. 1981), the Court said that statements of this kind are "not findings of basic fact in the spirit of the requirements." Parks at 1279. In Parks, only five findings contained in the trial court's order were not preceded by "testified that" and could therefore be considered proper findings. Id. The five proper findings of fact were insufficient to support the judgment of termination of the parental rights of Mother and Father. Id. at 1280. The Court stated:

> Because the findings are deficient, we must remand to the trial court for proper findings that support the judgment. Termination of parental rights is such a serious matter that we must be convinced that the trial court based its judgment on proper considerations. We cannot determine this based on these findings.

Id. at 1280-81.

In **A.F. v. MCOFC**, 762 N.E.2d 1244 (Ind. Ct. App. 2002), the Court affirmed the trial court's termination judgment. Id. at 1254. The Court was not persuaded by 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. Id. at 1249. The Court quoted Wrinkles v. State, 749 N.E.2d 1179, 1188 (Ind. 2001), which states that the practice of adopting a party's proposed findings is not prohibited. A.F. at 1249. The Court cited the following in support of the trial court's entry of findings that were verbatim reproductions of submissions by the prevailing party: (1) the enormous volume of cases; (2) the lack of law clerks and other resources; and (3) the need to keep the docket moving as a high priority for the trial bench. Id. 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.

VI. K. 3. Trial Rule 59 Relief Granted on Motion to Correct Error

In **In Re R.S.**, 774 N.E.2d 927 (Ind. Ct. App. 2002), *trans. denied*, the trial court heard evidence on an involuntary termination petition regarding Mother and putative Father. Initially the court granted the termination petition only as to putative Father. One month after the conclusion of evidence, the court vacated the order denying the termination of Mother's parental rights. The court entered a nunc pro tunc order, indicating that the sua sponte action had been taken pursuant to Ind. Trial Rule 59. At the conclusion of a hearing on the motion to correct error, the court terminated Mother's parental rights. On appeal, Mother alleged that the trial court erroneously invoked T.R. 59 to correct error because the subsequent order finding the first order to be "against the weight of the evidence" failed to identify the perceived error and therefore hindered Mother's appeal. The Court disagreed, citing T.R. 59(J)(7), which provides in pertinent part: "The court, if it determines that prejudicial or harmful error has been committed, shall take such action as will cure the error, including without limitation . . . alter, amend, modify or correct judgment. . . . If corrective relief is granted, the court shall specify the general reasons therefore." R.S. at 931. The Court found that the trial court's order on its sua sponte motion to correct error was proper. Id. at 932. The Court noted that the trial court moved to correct its ruling as against the weight of the evidence, and at the hearing on motion to correct error, the judge summarized her review of the evidence adduced at the three evidentiary hearings and specifically identified the evidence supporting termination. Id. at 931. The Court opined that reversal of the judgment terminating Mother's parental rights was not required because Mother was not hindered in her ability to formulate her appeal challenging the sufficiency of the evidence to support termination. Id.

VI. K. 4. Right to Appellate Counsel and Other Issues

In **In Re Adoption of C.B.M.**, 992 N.E.2d 687 (Ind. 2013), the Indiana Supreme Court vacated the children's adoption by their foster parents, which had been granted five years previously. Id. at 697. The children had been adopted while Birth Mother's appeal of the termination of the parent-child relationship judgment was pending. Birth Mother had not requested a stay of the termination judgment. The adoption court denied Birth Mother's request to set aside the adoption, but the Court reversed the adoption court's decision, finding that the court had abused its discretion in failing to set aside the adoption. Id. at 696-97. The Court stated that Birth Mother's rights, both as a parent *and as a litigant with an absolute right to appeal*, were constitutionally protected (emphasis added). Id. at 689. The Court observed that, even apart from Birth Mother's substantive parental rights, Indiana is particularly solicitous of the right to appeal. Id. at 692. The Court noted that Article 7, Section 6 of the Indiana Constitution guarantees "in all cases", including termination, "an absolute right to one appeal." Id. The Court opined that Birth Mother's appellate right would mean little if it could be short-circuited by an adoption judgment being issued before her appeal was completed. Id.

In **Parent-Child Rel. of I.B. v. Indiana Child Services**, 933 N.E.2d 1264 (Ind. 2010), the Indiana Supreme Court affirmed the juvenile court's judgment which denied the appointment of appellate counsel to represent Mother in an appeal of the involuntary termination of Mother's parental rights. Id. at 1271. After the trial court involuntarily terminated Mother's parental rights, Mother's counsel had filed a notice of appeal and moved for the appointment of appellate counsel. Mother's counsel had never had contact with Mother, who did not attend the termination hearing. Mother's counsel did not know whether Mother wanted to file an appeal. The juvenile court denied the motion to appoint appellate counsel but appointed counsel to appeal this decision. The Supreme 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. Id. at 1267. The Court observed that the parents' right to counsel in termination of parental rights cases is granted by statute and case law (IC 31-32-2-5, IC 31-32-4-1, IC 31-32-4-3; Taylor v. Scott, 570 N.E.2d 1333 (Ind. Ct. App. 1991), *trans. denied*). I.B. at 1267. The Court noted that Black's Law Dictionary provides several definitions for the word "proceeding", including any step in the process of a resolution of a matter before a court. Id. In the Court's view, a "proceeding" is not limited to the trial court stage. Id. The Court said that, for the purposes of the statutes implicated in this case, a proceeding does not limit the appointment of counsel to the trial proceeding but rather applies to the entire process, including through the direct appeal proceeding. Id.

The Court 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 observed that this case presents the dilemma an attorney faces where, after a client's parental rights have been terminated, the client does not cooperate or communicate the client's instructions with respect to an appeal to the attorney. Id. at 1268. 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 of representation and to consult with the client as to the means by which the client's objectives are 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 stated that an appeal of a decision to terminate parental rights, by its very nature, causes delay and prolongs the process of uncertainty for a child. Id. at 1270. 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. The Court said that if a parent is present at the termination hearing and contests the termination order, the parent is entitled to appeal the termination order with the assistance of court-appointed counsel, although the parent can waive the right to appeal. Id. at 1270. The Court said that, when the parent does not appear at the termination trial, is not present when the termination order is issued, or has not had contact with counsel, the parent's trial lawyer has an obligation to contact the client and inform the client of the result of the termination proceeding. Id. At this point, the parent's lawyer can receive instructions with respect to an appeal. Id. If the lawyer does not know the parent's whereabouts, the lawyer must use due diligence to locate the client during the time period between the entry of the termination order and the time that the notice of appeal is due. Id. If the lawyer cannot locate the client or get clear instructions from the client with respect to an appeal, the lawyer should not file a notice of appeal. Id. The Court observed that the Trial Rules may provide a remedy in certain situations if the parent resurfaces and seeks to pursue an appeal after the time period for filing the notice has closed. Id. The Court found that, on the facts of this case, the lawyer had no basis to file an appeal and the trial court's decision to deny the appointment of appellate counsel for that purpose was correct. Id. at 1271. The Court observed that, due to Mother's own inaction, her counsel could not ethically or effectively represent that she wanted an appeal. Id.

In **Termination of the Parent-Child Relationship [J.G.] v. DCS**, 4 N.E.3d 814 (Ind. Ct. App. 2014), the Court concluded that Mother had forfeited her right to appeal the trial court's order terminating her parental rights to her two-year-old twins because she failed to file a timely Notice of Appeal. Id. at 819. The Court dismissed Mother's appeal. Id. Evidentiary hearings were held on the termination petition. On March 25, 2013, the trial court issued an order terminating Mother's parental rights. Mother filed a Notice of Intent to Appeal on April 4, 2013, and, in that document, requested the appointment of separate, outside counsel for appeal of the termination order. The trial court appointed appellate counsel on April 25, 2013, and Mother's Notice of Appeal was filed on May 3, 2013, well past the thirty day time limit for filing appeals of final judgments as required by Ind. Appellate Rule 9(A)(1). The Court observed that Appellate Rule 9(F) requires the following information to be included in the Notice of Appeal: a designation of the appealed judgment or order; a designation of the court to which the appeal is taken; direction for the trial court clerk to assemble the Clerk's Record; and a designation of the portions of the Transcript that should be prepared. Id. at 817. Mother argued that the Court should ignore the thirty day time limit because appellate counsel was not appointed until after the thirty day time limit had expired. The Court looked to In Re D.L., 952 N.E.2d 209, 213-14 (Ind. Ct. App. 2011), *trans. denied*, in which the Court concluded that Parents had forfeited their right to appeal because they failed to file their Notices of Appeal within thirty days of the final judgment, and their appeal was dismissed. J.G. at 818-19. The Court quoted Appellate Rule 9(A)(5), which provides that "[u]nless the Notice of Appeal is timely filed, the right to appeal *shall be forfeited* except as provided by P.C.R.2.," which applies to criminal cases (emphasis in opinion). J.G. at 819. The Court of Appeals urged the Indiana Supreme Court to consider allowing belated appeals in cases where parents' parental rights have been terminated. Id. at 820 n.1.

In **In Re D.L.**, 952 N.E.2d 209 (Ind. Ct. App. 2011), *trans. denied*, the Court dismissed Parents' appeal from the trial court's orders which involuntarily terminated their parental rights to their six children. The trial court issued an order terminating Parents' rights to the five youngest children on August 20, 2010, and issued an order terminating Parents' rights to the oldest child on August 23, 2010. On August 30, 2010, Mother's trial counsel filed a "Notice of Intent to Appeal and

Request for Appointment of Counsel" with the trial court. On August 31, 2010, Father's trial counsel filed an identical notice with the trial court. The notices generally advised the trial court that Parents wished to appeal the termination of parental rights and requested appointment of counsel to represent Parents in the appellate process. The trial court appointed appellate counsel for Mother on August 30, 2010, and appointed appellate counsel for Father on August 31, 2010. On September 23, 2010, appellate counsel filed a Notice of Appeal with respect to all six cause numbers, requesting assembly of the Clerk's Record and preparation of the transcript. The Court opined that Parents had forfeited their right to appeal because they did not file a timely Notice of Appeal. Id. at 213. The Court opined that the Notice of Appeal is jurisdictional and that the Notices of Intent to Appeal filed by Parents did not fulfill the purpose of the notice of appeal requirement; namely, to serve as a mechanism to alert the trial court and the parties of the initiation of an appeal and to trigger actions by the trial court clerk and court reporter, setting in motion the filing deadlines imposed by the Appellate Rules. Id. Having determined that the Notices of Intent to Appeal were not "functionally equivalent" to a Notice of Appeal, the Court opined that the filing of the Notices of Intent to Appeal did not serve to initiate Parents' appeal on the date of filing. Id. The Court observed that the termination orders in this case were issued on August 20 and August 23, 2010; thirty days from these dates was September 20 (the first business day after the thirtieth day, Sunday, September 19, 2010) and September 22, 2010, respectively. Id. The Notice of Appeal was filed on September 23, 2010, and was not filed timely. Id. The Court also reviewed the record and found no clear error in the trial court's decision. Id. at 214.

In **In Re Adoption of T.L.**, 4 N.E.3d 658 (Ind. 2014), an adoption case in which the Indiana Supreme Court considered Father's appeal of the adoption of his two children by their stepfather without Father's consent. The Court considered Father's appeal on its merits in spite of its procedural defect of filing a delayed notice of appeal. Id. at 661. Father was incarcerated, and his court appointed attorney had withdrawn from his case after the adoption order was entered, informing Father that he would need to pursue any appeal on his own. Father had sent a letter to the trial court within thirty days of its adoption judgment, notifying the trial court of his intention to appeal the adoption, and requesting the appointment of a new attorney to represent him and an extension of time in which to file an appeal. Although the letter did not contain all of the information required by Ind. Appellate Rule 9, the trial court treated Father's letter as a notice of appeal and appointed a new attorney to represent Father on his appeal. Father's new attorney filed an Amended Notice of Appeal about six weeks after the adoption judgment was entered. The Court noted that the Fourteenth Amendment protects the right of parents to raise their children, and said that, when such substantial rights are at issue, the Court has often preferred to decide cases on their merits rather than dismissing them on procedural grounds. Id. at 661 n.2.

VII. POST TERMINATION

VII.A. Effect of Termination Judgment

IC 31-35-6-4(a) states that, if the 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. IC 31-35-6-4(b) states that any support obligations that accrued before the termination are not affected, but the support payments shall be made under the juvenile or probate court's order.

VII.B. After the Termination Judgment

If a termination judgment is entered, the child continues as a CHINS, subject to the review hearing requirements. DCS will seek a permanent option for the child, and the child's guardian ad litem/court appointed special advocate may assist in this endeavor. The court has the

authority under IC 31-35-6-1(a) to refer the case to the probate court for adoption proceedings or to order any dispositional alternative 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/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; and (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. IC 31-35-6-3 states that an appeal of a termination decision does not prevent the court in its discretion from referring the matter for adoption proceedings while the appeal is pending. But see IC 31-19-11-6, which states that an adoption may not be granted if the parent-child relationship has been terminated and: (1) the time for filing an appeal (including a request for transfer or certiorari) has not elapsed; (2) an appeal is pending; or (3) an appellate court is considering a petition for transfer or certiorari.

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 termination judgment two years after the entry of the judgment. At the time of Birth Mother's motion, the children had been adopted for almost one year. 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 at the termination hearing, and the termination judgment was issued seven days after the conclusion of the 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 that her 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 the termination judgment. Id.

VIII. CASE LAW ON REQUIRED ELEMENTS

VIII.A. Six Months Removal After Disposition and Removal/ Supervision for Fifteen of Most Recent Twenty-two Months

IC 31-35-2-4(b)(2)(A)(i) requires proof that the "child has been removed from the parent for at least six (6) months under a dispositional decree." This element must be proven unless the reasonable efforts exception at (A)(ii) or the child's removal from parents and supervision by DCS or probation for the fifteen of twenty-two months provision of (A)(iii) apply to the case. The following cases discuss the removal requirements.

VIII.A. 1. Was Specific Dispositional Order Issued Removing Child from Home?

In **Matter of G.M.**, 71 N.E.3d 898 (Ind. Ct. App. 2017), the Court reversed the juvenile court's order terminating Father's parental rights to the child, affirmed the court's termination of Mother's parental rights, and remanded to the juvenile court for proceedings consistent with the opinion. Id. at 909. On appeal of the termination judgment, Father argued DCS did not prove the child had been removed from his care under a dispositional decree for at least six months as

required by IC 31-35-3-4-(b)(2)(A)(i). The child was removed from Parents' care six days after birth and found to be a CHINS based on Mother's use of unprescribed painkillers and heroin during pregnancy, the child's drug withdrawal at birth, and Father's inability to care for the child because Father was on probation for rape and was not permitted to be around children unsupervised. Father's probation was later revoked, and he was incarcerated. Father admitted the child was a CHINS, but the juvenile court did not enter a dispositional decree for Father, stating that Father's dispositional decree would not occur until he was released from incarceration. Although Father raised this issue for the first time on appeal, the Court opined that waiver did not apply. Id. at 904. Quoting Parent-Child Relationship of L.B. and S.B. v. Morgan Cty. Dept. of Public Welfare, 616 N.E.2d 406, 407 (Ind. Ct. App. 1993), *trans. denied*, the Court explained that concerning the requirement a child must be removed under a dispositional decree before a court can terminate a parent's rights, the "constitutionally protected rights of parents to establish a home and rise their children mandates that the failure of a juvenile court to require compliance with any condition precedent to the termination of this right constitutes fundamental error which this court must address *sua sponte*." G.M. at 904. The Court noted that when DCS filed the termination petition, the child had not been removed as to Father under a dispositional decree for at least six months, so the juvenile court erred in granting the petition for termination of Father's parental rights. Id.

In **Smith v. Division of Family and Children Serv.**, 729 N.E.2d 1049 (Ind. Ct. App. 2000), the children were adjudicated CHINS but the dispositional order allowed the children to remain with Mother and required Mother to participate in a variety of programming. The children were subsequently removed from Mother on a Verified Petition for Emergency Change of Placement which was granted, with the proviso that Mother could object to the order within ten days of its issuance. A subsequent hearing was held in which Mother withdrew her objection to the removal of the children. The Court ruled that the emergency placement order was a modification of the existing dispositional decree, and therefore the children had been removed from Mother's care for six months under the "dispositional" order as required by the termination statute. Id. at 1052.

In **Matter of Y.D.R.**, 567 N.E.2d 872, 875 (Ind. Ct. App. 1991), Mother appealed the trial court's order terminating the parent-child relationship, arguing that a dispositional hearing was never held and therefore one of the statutory elements for termination of the parent-child relationship had not been met. The Court of Appeals acknowledged that the trial court never entered an order labeled "Dispositional Decree;" however, the Court found that the trial court had held a hearing immediately after Mother's admission to the CHINS petition and the hearing complied with the disposition statute.

In **Matter of Robinson**, 538 N.E.2d 1385 (Ind. 1989), the Indiana Supreme Court similarly 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:

> It would be unrealistic to say the children were not removed from Father's custody by a dispositional hearing or decree merely because the court did not expressly say in this order he was removing the children from Father's custody. The children were already removed from his custody for two years, so the use of the exact language was not necessary.

Id. at 1387.

VIII.A. 2. Did Dispositional Order Remove Child from Care of Noncustodial Parent?

Proof of the "removal" element was challenged by noncustodial and putative fathers in several cases in which the children had been removed from the care of their mothers, but fathers were not residing with the children and mothers at the time of the removal. In **Wagner v. Grant County Dept. Public Wel.**, 653 N.E.2d 531, 533 (Ind. Ct. App. 1995), Father alleged that the child had not been removed from his custody for six months under a dispositional decree, because the child was not in Father's physical care due to his incarceration when the welfare department removed the child from Mother. Relying on Tipton v. Marion County DPW, 629 N.E.2d 1262, 1266 (Ind. Ct. App. 1994), the Court ruled that the removal of the child from the physical custody of Mother at the dispositional hearing more than six months before the filing of the termination petition "effectively" removed the child from the custody of both parents. Wagner at 533 n. 3. See also **Matter of K.H.**, 688 N.E.2d 1303, 1305 (Ind. Ct. App. 1997) (Father was incarcerated at time child was removed from Mother, but Court ruled that removal of child from custodial parent effectively removed child from custody of both parents for purposes of six month element in termination statute). But see **Matter of A.M.**, 596 N.E. 2d 236 (Ind. Ct. App. 1992), the Court of Appeals reversed the termination judgment and ruled that the evidence indicated the child had been removed from the care of Mother, not the care of the alleged Father; therefore, the child had not been removed from the care of Father under a dispositional decree. Id. at 240.

In **In Re A.B.**, 924 N.E.2d 666 (Ind. Ct. App. 2010), the Court found that there was sufficient evidence to support the termination of Father's and Mother's parental rights, and affirmed the trial court's judgment. Father was not married to Mother and was the child's alleged father. Mother admitted to the CHINS petition on the day it was filed. The trial court removed the child from Mother's custody and entered a dispositional decree as to Mother. Father did not appear for this CHINS hearing, although it was soon learned that he was living with Mother and was aware of the CHINS proceeding but declined to accept service of process for it. Father did not want to appear in court because he had outstanding arrest warrants. After attempts to effect personal service on Father failed and service by publication was accomplished, the court defaulted Father at a hearing, again finding the child was a CHINS. The trial court's dispositional order as to Father, entered the same day Father was defaulted, directed that no services be provided to him until he appeared in court and demonstrated "a desire and ability to care for the child." Father first appeared in court at a permanency hearing. The trial court appointed a public defender to represent Father in the CHINS proceeding, entered a denial on his behalf, and set a pretrial hearing. Father failed to appear at the pretrial hearing, and moved to Ohio. DCS filed a petition to terminate Mother's and Father's parental rights to the child. The trial court held a hearing on the termination petition, and granted the petition.

Father's sole argument on his appeal of the termination judgment was that DCS failed to prove that the child was removed from his care for at least six months under a dispositional decree (as required by IC 31-35-2-4(A)). Father claimed the trial court effectively set aside the default dispositional order as to him when the court entered a denial on his behalf at 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. Id. at 672. The Court was not persuaded by Father's argument, stating: (1) the trial court never expressly stated that it was setting aside the dispositional order; (2) the Indiana Supreme Court has unequivocally held that Ind. Trial Rule 60, which governs relief from judgments or orders in civil cases, does not permit a trial court to *sua sponte* set aside a judgment, unless it is merely to correct a clerical mistake as permitted by T.R.60(A); (3) a judgment can only be set aside by a party filing a motion under T.R.60(B) and after a hearing has been conducted under T.R.60(D); (4) because there was no claim of clerical mistake in the dispositional order and Father never filed

a motion to set aside that order, the trial court lacked authority to set it aside *sua sponte* and could not have done so; (5) the Court perceived no basis upon which the dispositional order could have been set aside under T.R.60(B). Id. at 671-72. The Court said, "we cannot permit Father to avoid the impact of the default dispositional order, which resulted from Father's willful neglect of the CHINS proceeding." Id. at 672.

VIII.A. 3. Was Dispositional Order Issued at Least Six Months Before Filing of Termination Petition?

In **In Re N.Q.**, 996 N.E.2d 385 (Ind. Ct. App. 2013), the Court quoted Matter of Robinson, 538 N.E.2d 1385, 1387 (Ind. 1989), which said that dispositional decrees are "one of many steps in the continuing procedural scheme for the care and protection of children with the ultimate result of either returning them to their home or terminating the parental rights." N.Q. at 394. The Court said that dispositional hearings, and the orders which result therefrom, are used to set "a program to be pursued that will ultimately result in a final disposition of the cause." Robinson at 1387. N.Q. at 394. The N.Q. Court observed that the timing requirements provided by IC 31-35-2-4(b)(2)(A) 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. Id. at 395.

The Court reversed the trial courts' termination judgments because the termination petitions were filed less than six months after the dispositional orders were entered in the following cases: **Matter of G.M.**, 71 N.E.3d 898 (Ind. Ct. App. 2017) (judgment terminating incarcerated Father's parental rights reversed because no dispositional order was entered for Father); **In Re B.F.**, 976 N.E.2d 65 (Ind. Ct. App. 2012) (termination petition filed less than four months after entry of dispositional decree); **In Re Q.M.**, 974 N.E.2d 1021 (Ind. Ct. App. 2012) (termination petition filed before dispositional orders were entered); **In Re K.E.**, 963 N.E.2d 599 (Ind. Ct. App. 2012) (termination petition filed five months and seventeen days after trial court entered dispositional order); and **In Re D.D.**, 962 N.E.2d 70 (Ind. Ct. App. 2011) (termination petition filed four days after entry of dispositional decree); **Platz v. Elkhart County Dept. of Welfare**, 631 N.E.2d 16 (Ind. Ct. App. 1994) (termination petition filed five months and two days after child's removal); **Parent-Child Relationship of L.B. and S.B. v. Morgan County Dept. of Public Welfare**, 616 N.E.2d 406 (Ind. Ct. App. 1993) (termination petition filed five months and four days after dispositional decree).

See the following cases where the Court found that the six months removal after dispositional decree requirement had been met: **In Re A.B.**, 887 N.E.2d 158 (Ind. Ct. App. 2008) (child had been removed from Mother for over six months at time of filing of termination petition); **In Re A.P.**, 882 N.E.2d 799, 807 (Ind. Ct. App. 2008) (child had been removed from Father for over six months at time of Father's termination hearing); **In Re B.J.**, 879 N.E.2d 7, 20 (Ind. Ct. App. 2008) (contrary to Mother's argument on appeal, Court held that DCS is required to prove only one of three conditions listed in IC 31-35-2-4(b)(2)(A), and here DCS met that statutory requirement by proving by clear and convincing evidence that the children had been removed from the parents' care for well over six months), *trans. denied*; **In Re A.J.**, 877 N.E.2d 805 (Ind. Ct. App. 2007) (children had been removed from parents under terms of dispositional decree for more than six months at time termination petition was filed), *trans. denied.*

VIII.A. 4. Must Child Be Removed from Parent for Period of Six Months Immediately Before Filing of Termination Petition?

There has been an issue as to whether the six month removal period must occur immediately before the termination petition is filed, and what effect the time a child spends on "extended visits" or "trial periods" at home has on the filing of the termination petition. In **Matter of Miedl**, 425 N.E.2d 137 (Ind. 1981), the Indiana Supreme Court discussed the meaning of the statutory requirement that the child be removed from the custody of the parent for six months

under a dispositional decree before a termination petition may be filed. The trial court on its own motion had made a verbal order to the welfare department to place the children with Mother under the continued wardship of the department. The trial placement was unsuccessful, and the court ordered the children returned to foster care. The petition for termination of the parent-child relationship was filed a month after the children returned to foster care. The children had resided under the care, supervision, and custody of the welfare department for a period of more than one year preceding the termination judgment, and the Court held that the six months removal requirement had been met. Id. at 140. 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. Id.

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 found the record showed that DCS presented clear and convincing evidence that the child had been removed from Mother's care for fifteen out of the twenty-two months prior to the filing of the termination petition and for six months following the dispositional decree, although pursuant to the statute, proof of only one of these time periods would suffice. Id. at 252. 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. Id.

In **In Re M.M.**, 733 N.E.2d 6 (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 infant, who had been adjudicated to be a CHINS. The trial 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 placed with her infant because Mother ran away from the foster placement and had 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. Id. at 12. The Court noted that Mother had never provided her infant with a home from which the infant could be removed, and the infant had always been under the supervision of foster parents and the office of family and children. The Court noted that the infant 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. Id.

In **Matter of A.N.J.** 690 N.E.2d 716, 721 (Ind. Ct. App. 1997), the Court found that two to three years had passed since the dispositional order and therefore the six month requirement was satisfied even though the children had been returned to their parents for two different periods of time during that two to three year stretch.

VIII.A. 5. Effect of Out-Of-State Dispositional Orders

In **Matter of Munson**, 444 N.E.2d 912 (Ind. Ct. App. 1983), the Rush County Department of Public Welfare attempted to use an adjudication made in Georgia that the children were in need of services as a basis for terminating Father's parental rights. Before coming to Indiana, the children had been returned to Father in Georgia. The Court held that the Georgia proceedings were not dispositional; hence the Indiana statutory requirements for termination had not been met. Id. at 914. The termination of parental rights order which had been granted by the trial court was reversed. Id.

VIII.A.6. Was Child Removed from Parent and Under Supervision for Fifteen of Most Recent Twenty-two Months?

In **Matter of Bi.B.**, 69 N.E.3d 464 (Ind. 2017), the Indiana Supreme Court reversed the trial court's order terminating Father's parental rights to his two children. Id. at 469. The Court noted that IC 31-35-2-4(b)(2)(A) establishes "a waiting period" which "affords parents the opportunity to reunify with their children" by requiring DCS to wait for one of three time periods before filing an involuntary termination petition. Id. at 467. The Court looked to IC 31-34-2-4(b)(2), and noted it requires that the termination petition *must* allege that one of the three waiting periods is true (emphasis in opinion). Id. The three waiting periods are: (1) the child has been removed from the parent for at least six months under a dispositional decree [IC 31-35-2-4-(b)(a)(2)(A)(i)]; (2) the court has entered a finding under IC 31-34-21-5.6 that reasonable efforts for family preservation or reunification are not required [IC 31-35-2-4(b)(2)(A)(ii)]; and (3) the child has been removed from the parent and has been under DCS supervision for fifteen of the most recent twenty-two months [IC 31-35-2-4(b)(2)(A)(iii)]. Id. In the instant case, DCS's termination petitions alleged: (1) pursuant to IC 31-35-2-4(b)(2)(A)(ii), the trial court had entered a finding under IC 31-34-21-4-5.6 that reasonable efforts for family preservation or reunification were not required; and (2) pursuant to IC 31-35-2-4(b)(a)(A)(iii), the children had been removed from the parents and under the supervision of DCS for fifteen of the most recent twenty-two months. Neither allegation was true because there was no finding regarding reasonable efforts pursuant to IC 32-34-21-5.6; and the termination petitions were filed five days before the fifteen-month anniversary of the children's removal. Although it was true that the children had been removed from the parents for six months under a dispositional decree, DCS failed to allege in the termination petitions that the children had been removed from the parents for at least six months under a dispositional decree [IC 31-35-2-4(b)(2)(A)(i)]. At the evidentiary hearing on the termination petitions, Father argued that DCS failed to prove the two waiting periods which were alleged in the petitions. The trial court granted the termination petitions. On appeal, the Court noted the parties' agreement that IC 31-35-2-4(b)(2)(A)(ii), the no reasonable efforts allegation, did not apply, so the focus was on whether DCS proved the fifteen month removal waiting period which was alleged in the petitions. Id. at 467-68. The Court opined that DCS failed to prove the fifteen month waiting period had passed. Id. at 468. The Court held that, by using the present tense word "is", not the future tense, the statute plainly requires that the fifteen month removal allegation be true when the termination petition is filed. Id. The Court opined that terminating Father's parental rights despite DCS's failure to allege an applicable statutory waiting period required reversal of the termination judgment. Id. at 469. The Court looked to IC 31-35-2-8(b), which provides, "[i]f the court does not find that the allegations in the petition are true, the court *shall* dismiss the petition." (Emphasis in opinion.) Id. The Court explained that "shall" is mandatory, and the Court cannot engraft qualifying language onto that directive. Id.

In **In Re A.G.**, 45 N.E.3d 471 (Ind. Ct. App. 2015), *trans. denied*, the Court affirmed the trial court's order terminating the parental rights of incarcerated Father. Id. at 480. Father was incarcerated in Florida when Mother gave birth to the child. The child tested positive for cocaine and THC, and Mother admitted using numerous other harmful substances during her pregnancy. The child was hospitalized in intensive care because of severe drug withdrawal for the first two weeks of his life; during that time, the child was adjudicated to be a CHINS. The child was released to foster care from the hospital. After the CHINS adjudication, DCS sought to determine the identity of the child's biological father. Father meanwhile completed his sentence in a Florida prison and was transferred to Georgia to serve a sentence for a different crime. Father's paternity was established when the child was fourteen months old. The Court held that the requisite time period for filing a termination was properly calculated from the time of the child's removal from his home. Id. at 478. The Court noted that a parent's interests must be subordinated to a child's interests when considering a termination petition. Id. at 475. The Court interpreted the statute to

refer to removal from the *child's* home in calculating the duration of the removal, and not the home of a particular parent (emphasis in opinion). Id. at 477. Although Father only knew with certainty that he was the child's father for the four months preceding the termination hearing, the Court noted that the child had been removed from both of his parents' care for the full eighteen months that he had been alive. Id. at 476-77. The Court said that, with respect to the fifteen month time constraint in the federal and Indiana statutes, the focus of the inquiry is the length of time the child has been in temporary custody, not the length of time the child was removed from a particular parent. Id. at 478. The Court opined that, "[t]o implement the legislative intent, the focus of the inquiry under Indiana code 31-35-2-4(b)(2)(A)(iii) should also be the length of time the *child* has been out of his home, and not the length of time since the child was removed from a particular *parent*". (Emphasis in opinion). Id. The Court said that, in cases where paternity is not immediately established, trial courts must look to the other statutory requirements in IC 31-35-2-4(b)(2) to determine whether termination is appropriate. Id.

In **In Re J.W., Jr.**, 27 N.E.3d 1185 (Ind. Ct. App. 2015), the Court held that the trial court was correct in finding that the child had been removed from Parents for the requisite fifteen of the most recent twenty-two months. Id. at 1191. The Court held that IC 31-35-2-4(b)(2)(A)(iii) simply requires DCS to comply with the statutory waiting period; namely, that a child has been removed from a parent for fifteen of the most recent twenty-two months. The Court opined that the statute does not condition the waiting period on whether DCS provided or made available any type of services to the parent. Id. at 1187. Quoting In Re G.Y., 904 N.E.2d 1257, 1260-61(Ind. 2009), the Court observed that DCS's "burden of proof in termination of parental rights is one of 'clear and convincing' evidence." J.W., Jr. at 1188. The Court noted that IC 31-35-2-4(b)(2)(A) states, in relevant part, that DCS is required to allege and prove 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; or (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* (emphasis in opinion). Id. The Court noted Parents conceded that (1) absent their proposed tolling, fifteen of the relevant twenty-two months had passed; and (2) DCS had demonstrated all of the other elements required to terminate their parental rights. Id. Quoting S.E.S. v. Grant Cnty. Dep't. of Welfare, 594 N.E.2d 447, 448 (Ind. 1992), the Court observed that the Indiana Supreme Court has long recognized that, in "seeking termination of parental rights", DCS has no obligation "to plead and prove that services have been offered to the parent to assist in fulfilling parental obligations." J.W., Jr. at 1190. Quoting In Re H.L., 915 N.E.2d 145, 148 (Ind. Ct. App. 2009), the Court said it has stated on several occasions that, although "[the] DCS is generally required to make reasonable efforts to preserve and reunify families *during the CHINS proceedings*," that requirement in our CHINS statutes "is not a requisite element of our parental rights termination statute, and a failure to provide services does not serve as a basis on which to directly attack a termination order as contrary to law." (Emphasis added.) J.W., Jr. at 1190.

VIII.B. Reasonable Probability Conditions that Resulted in Removal or Continued Placement Outside the Home Will Not be Remedied

IC 31-35-2-4(b)(2)(B)(i) requires proof that "there is a reasonable probability that: (i) the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied." Note that DCS is required to prove IC 31-35-2-4-(b)(2)(B)(i), *or* the threat to well-being as stated in IC 31-35-2-4(b)(2)(B)(ii) (discussed in VIII. C. of this Chapter below), *or* that the

child has been adjudicated a CHINS on two separate occasions (IC 3-35-2-4(b)(2)(B)(iii)). DCS is required to prove only one of these three elements.

Case law reflects many factors which the courts have taken into consideration in determining whether the reasons for the child's removal from the parent or placement outside the home of the parent will be remedied. Cases listed in VIII.B.1. are examples of the range of factors considered on this element. Practitioners should also review this Chapter at IX. for cases dealing with specific parenting factors or conditions relevant to the issue of whether the problems can be remedied, such as criminal activity, sexual abuse, and substance abuse.

In **In Re D.W.**, 969 N.E.2d 89 (Ind. Ct. App. 2012), the Court affirmed the trial court's judgment which terminated Father's parental rights. Id at 97. On appeal, 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). Because 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 looked to case law on statutory interpretation. Id. at 94-95. The Court noted 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 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.

VIII.B. 1. Examples of Range of Factors Considered

In **Matter of G.M.**, 71 N.E.3d 898 (Ind. Ct. App. 2017), the Court affirmed the termination of Mother's parental rights to her child. Id. at 909. The child was removed from Parents' care when he was six days old because Mother admitted using unprescribed pain killers and heroin while pregnant, the child experienced drug withdrawal at birth, and Father was unable to care for him because Father was on probation for rape and was not permitted to be around children unsupervised. Parents' rights were terminated, and they appealed. Mother was incarcerated for violation of probation at the time of the termination hearing. The Court opined the trial court erred in terminating Father's parental rights because the juvenile court had not issued a dispositional order for him. Id. at 904. The Court opined the juvenile court did not err when it concluded there was no reasonable probability that Mother would remedy the conditions that led to the child's removal from her care. Id. at 908. Mother argued the court's conclusion was not supported by the evidence because she had steady employment, reliable transportation, and a place for herself and her child to live. Mother also testified that she was aware of the child's special needs, felt her training as a certified nursing assistant would help her learn the specific requirements of his medical care quickly, would be released from incarceration within four months, no longer had a problem with drugs, and was willing to complete any requested services. The Court noted the evidence suggested otherwise, since Mother did not complete services offered by DCS, even after the court ordered her to do so; did not regularly visit with the child and seek to understand his condition and how to treat it; and had multiple positive drug screens, the last of which resulted in her arrest and subsequent incarceration for violation of probation. Id.

In **In Re O.G.**, 65 N.E.3d 1080 (Ind. Ct. App. 2016), *trans. denied*, the Court reversed and remanded the juvenile court's order terminating the parent-child relationship between Parents and their child. Id. at 1096. The child was found to be a CHINS after Mother admitted: (1) she and Father had a history of domestic violence; (2) Father had recently punched her in the face, causing her to lose consciousness; (3) Mother tested positive for marijuana use; and (4) Father had a pending charge for possession of cocaine. The Court identified two general reasons why the child was initially removed from Mother's care custody, namely (1) ongoing domestic violence between Mother and Father; and (2) Mother's drug use. Id. at 1090. The Court also identified two reasons for the child's continued placement outside of Mother's care, namely (1) concerns about Mother's mental health; and (2) possibly, concerns about Mother's stability. Id. On the first two reasons, the Court noted evidence that: (1) Mother completed a domestic violence assessment and a twenty-six week domestic violence program; (2) Mother made significant progress in therapy on her ability to acknowledge the violence between her and Father and its effect on the child; (3) in the two and one-half years between the last domestic violence incident between Mother and Father, there was not a scintilla of evidence that Parents were in a relationship of any kind; (4) Mother completed a substance abuse assessment, which recommended no further substance abuse services; and (5) Mother completed a number of random drug screens, and there was no evidence that she provided any problematic screens. Id. at 1091-92. The Court found there was no clear and convincing evidence that domestic violence or substance abuse would not be remedied. Id. at 1092. On the third and fourth reasons, the Court noted evidence that: (1) after her services were suspended by juvenile court, Mother sought out a mental health provider, participated in an assessment, and complied with recommendations, including completing an anger management class; (2) Mother sought out a psychiatrist, her medication was changes, and as a result, she was better able to manage her emotions; (3) Mother had been living with the child's maternal grandmother, a DCS approved placement, for sixteen months, had stable employment and recently had obtained a promotion and a raise; and (4) Mother had been incarcerated briefly on three occasions, but had no pending criminal matters pending at the time of the termination hearing except for a suspended driver's license. Id. at 1092-93. The Court found that the evidence did not clearly and convincingly support conclusions that Mother's mental health and stability were unlikely to be remedied. Id. at 1093.

In **In Re A.W.**, 62 N.E.3d 1267 (Ind. Ct. App. 2016), the Court reversed the trial court's order which terminated Mother's parental rights to her two children, who are half-siblings. Id. at 1269. The Court concluded DCS did not prove by clear and convincing evidence that the reasons for the children's removal from Mother would not be remedied. Id. at 1273. Mother and the father of the younger child (Father) were married. Mother also had an older child from a former relationship. The trial court did not terminate the parent-child relationship between Father and the younger child. DCS did not appeal the trial court's denial of the DCS petition to terminate Father's parental rights to the younger child. Mother, Father, and the two children were staying at a hotel when Mother and Father got into a fight. Mother was arrested for possession of heroin and Father was arrested for violating a restraining order that Mother had obtained against him. A CHINS petition was filed and granted, and, at the time of the termination hearing, the children were living together in a foster home. Mother was sentenced to probation on her criminal charge, but violated probation on two occasions and was sentenced to incarceration. Mother was scheduled to be released from prison seven months after the termination hearing, remained married to Father, and both Mother and Father testified that they intended to stay together with the younger child after Mother's release. The Court opined that, given the circumstances, the fact that the trial court terminated Mother's parental rights but did not terminate Father's parental rights to the younger child undermined the court's finding that the conditions leading to the children's removal would not be remedied. Id. The Court noted that, despite the court appointed special advocate's concerns

about the historically toxic relationship between Mother and Father, the trial court did nothing to prevent Father and Mother from living together with the younger child. Id. The Court held that allowing Mother to live with the younger child supported the conclusion that DCS failed to prove by clear and convincing evidence that Mother's drug problem would not be remedied. Id. In support of its opinion, the Court noted Mother had made significant progress in dealing with her addiction, including her completion of individual therapy, AA meetings, Parenting classes, and family classes. Id. at 1274. The Court agreed with Mother that her situation was factually similar to that of the father in In Re K.E., 39 N.E.3d 641 (Ind. 2015), where the Indiana Supreme Court found it was not proven by clear and convincing evidence that the father could not remedy the conditions for his child's removal. A.W. at 1274.

In **A.B. v. Indiana Dept. of Child Services**, 61 N.E.3d 1182 (Ind. Ct. App. 2016), the Court affirmed the trial court's order terminating Mother's parental rights to her two children and Father's parental rights to his child. Id. at 1191. The children are half-siblings; Mother is the birth parent of both children and Father is the birth parent of the older child. At the time of the termination hearing, Mother was serving a fifteen year sentence, with ten years executed at the Department of Correction and five years suspended to probation and a consecutive two year executed sentence. Mother's offenses were Class B felony dealing methamphetamine, Class D felony possession of methamphetamine, Class C felony neglect of a dependent and Class D felony possession of precursors. On appeal, Mother argued that the reasons for the children's removal would be remedied when she was released from prison, which Mother expected would occur on a date between seven months and nineteen months after the termination trial. The Court was not persuaded by Mother's argument and found that the trial court's conclusion on the reasonable probability issue was not clearly erroneous. Id. The Court cited the following evidence, which amply supported the trial court's conclusion that "Mother is in no position to care for the children and it is beyond reason for the children to have to wait for Mother to demonstrate an ability or willingness to meet their needs": (1) it was not clear that Mother's release date from prison was imminent at the time of the termination hearing; (2) the Department of Correction website reflected a projected release date for Mother which was almost three years after the hearing; (3) Mother would be on probation for five years following her release from prison, and she had violated probation multiple times in the past; (4) Mother's extensive criminal history spanned her adult life, both pre- and post-motherhood; (5) Mother failed to provide certificates of completion for any services she had completed in prison; (6) Mother placed the children in danger by raising them in a home with active meth labs; and (7) Mother had not yet adequately addressed her substance abuse issues. Id. at 1189-90.

In **In Re N.G.**, 51 N.E.3d 1167 (Ind. 2016) the Indiana Supreme Court affirmed the trial court's order terminating Mother's parental rights to three of her children, a son and twin daughters. Id. at 1174. The children were removed due to Mother's: (1) untreated mental health diagnoses; (2) history of substantiated physical abuse of her son, who stated that Mother had struck him with a spiked belt and a board; (3) non-compliance with a prior DCS case in another county; and (4) and her "faking good responses" to the Child Abuse Potential Inventory prior to the initiation of the most recent CHINS case. The trial court listed the following findings to support its conclusion that there was a reasonable probability that the conditions resulting in the removal of the children would not be remedied: (1) Mother's history of verbal abuse towards the children; (2) Mother's history of physical abuse of her son; (3) Mother's failure to protect her son from physical abuse by her boyfriend; (4) Mother's lack of compliance and progress in counseling; (5) Mother's history of not taking her medication as prescribed; (6) Mother's history of not taking her son to therapy on a regular basis and not following advice from his psychiatrist; (7) Mother's inability to control and redirect her children's behavior during visitation; (8) the negative behaviors exhibited by the children immediately following visitation with Mother; (9) the

emotional distress suffered by the children as a result of contact with Mother; (10) the improvement in the children's behavior and mental health after visitation with Mother was suspended; (11) the invalid test results from Mother's Child Abuse Potential Inventory; and (12) Mother's limited insight with respect to her mental health and behavioral issues. On appeal, Mother argued that the evidence was insufficient to support the trial court's findings and conclusions. Mother claimed that two of the findings about her attendance and participation in therapy were supported by insufficient evidence. The Court opined that, viewed in the light most favorable to the judgment, the record supported the challenged court findings. Id. at 1171. The Court noted the following evidence: (1) Mother's current therapist did not "see any change or any progress" in Mother's supposed distorted thinking and questioned whether Mother was benefitting from therapy; (2) Mother's two previous therapists testified that Mother had not benefitted from their services due to lack of participation and lack of investment in therapy; and (3) Mother's psychologist opined that there should be some signs of improvement after three to six months of participation in cognitive behavioral therapy. Id. The Court concluded that there was probative evidence from which a reasonable fact-finder could have made the findings which Mother contested had been proven by clear and convincing evidence. Id.

In **In Re V.A.**, 51 N.E.3d 1140 (Ind. 2016), the Indiana Supreme Court reversed the trial court's order terminating Father's parental rights and remanded the case for further proceedings. Id. at 1153. Mother did not contest the termination judgment and was not a party to the appeal. The Court found that the evidence presented did not meet the heightened burden of clear and convincing proof. Id. Mother had contacted DCS expressing concerns that she was overwhelmed with caring for the parents' two-year-old child. Mother was the child's primary caregiver while her husband, the child's Father, was at work. After providing services to the parents and the child in the home for a month, DCS filed a CHINS petition, and placed the child in foster care. At the CHINS hearing, the trial court determined that Mother suffered from schizo-effective disorder. After a four day termination hearing, at which Father was represented by counsel, the trial court terminated the parental rights of both parents. Father appealed, challenging the trial court's conclusion that there was a reasonable probability the conditions necessitating the child's removal would not be remedied. The Court noted the following conclusions by the trial court: (1) Mother and Father have little recognition, if any, of Mother's mental illness; (2) both parents are not supportive of the medicinal regimen Mother requires to maintain her mental health and safely provide for a small child; (3) Father has been afforded the option of separately providing for the child but has chosen to remain with his wife; (4) Father does not have the support or ability to provide the level of supervision required to ensure the child's safety when in the company of Mother; (5) Father is unwilling and incapable of ensuring that Mother has no unsupervised contact with the child while Mother refrains from following her required medical care; (6) the circumstances at the time of the termination hearing are the same as those which existed at the time of the Preliminary Inquiry and the CHINS adjudication. Id. at 1145. The Court said that, in order to determine whether there was a reasonable probability that the conditions necessitating the child's removal would not be remedied, the Court must consider only those reasons attributable to Father. Id. at 1146. The Court noted that the termination order focused primarily on Mother's conduct and how her conduct affected the child. Id. The Court considered the testimony of the DCS caseworker who had worked with the parents before the child's removal and on which the trial court relied. Id. at 1146-47. The Court noted the caseworker's testimony that: (1) Father complied fully with the safety plan, including participating in Daybreak Services, which offered alternative child care solutions to prevent the child from being alone in Mother's care; (2) Father was assisted by other caregivers; (3) the safety plan which the caseworker developed worked successfully for over a month; (4) even though Mother's mental health continued to be of concern, "the immediate safety concerns …were addressed." Id. at 1147. The Court opined that Father's unwillingness to live separately from a mentally ill spouse, without more, was an

insufficient basis upon which to terminate *his* parental rights (emphasis in opinion). Id. The Court looked to case law, including Egly v. Blackford Cty. Dep't. of Pub. Welfare, 559 N.E.2d 1232, 1234 (Ind. 1992), which has long held: "Mental [disability] of the parents, standing alone, is not a proper ground for terminating parental rights." V.A. at 1147. Because it has long found the custodial parent's mental disability to be an insufficient basis for termination, the Court "fail[ed] to see how simply living with a relative suffering from mental illness provides a more satisfactory basis for termination." Id. at 1148. The Court noted that the trial court did not find, and the record did not support, that the child had been abused by Mother during the time the child was in Father's custody. Id.

The Court also reviewed the trial court's conclusion that there was a reasonable probability that the conditions which led to the child's removal would not be remedied. Id. at 1148-51. Quoting In Re I.A., 934 N.E.2d 1127, 1134 (Ind. 2010), the Court observed that "the factors identified by the trial court as conditions that would not be remedied are relevant only if those conditions were factors in DCS' decision to place [the child] in foster care in the first place." V.A. at 1148. The trial court did not find that Father's "little recognition if any of [Mother's] mental illness" was a factor in DCS's decision to remove the child from the home, so the Court did not believe it was an appropriate basis to support the conclusion that DCS had met its heightened burden of proof that termination was appropriate. Id. The Court observed that: (1) neither Father nor his therapists testified that he was unwilling to ensure that Mother had no unsupervised contact with the child; (2) the DCS caseworker testified that Father complied fully with the safety plan and it worked until DCS removed the child from Father's care; (3) other than concerns expressed by therapists and DCS case managers based on generalized behaviors of individuals with psychotic disorders, there was no evidence that *this* mother had acted in a way that resulted in or created a substantial risk of physical harm to the child (emphasis in opinion). Id. at 1148-49. According to the Court, the trial court's finding that Father lacked the ability to provide the level of supervision required to care for the child was tempered by the fact that those services were not available to him or required by the Parent Participation Plan. Id. at 1150. The Court found that the record reflected: (1) referrals to service providers from DCS were for Mother, not Father; (2) Father actively participated in skill building services for six months; (3) Father actively participated in counselling sessions at Bowen Center for about seven months, working with Mother on their marital relationship and progress was demonstrated; (4) Father complied with the court ordered case plan for reunification; (5) Father accompanied Mother on her visits to healthcare providers, thus reflecting that Father supported Mother's need for therapy. Id. at 1150-51. The Court opined that Father could not be held accountable for failing to convince Mother to take her recommended medications. Id. at 1151.

In **In Re A.G.**, 45 N.E.3d 471 (Ind. Ct. App. 2015), *trans. denied*, the Court affirmed the trial court's order terminating the parent-child relationship between Father and his eighteen-month-old child. Id. at 480. The child, whose drug withdrawal after birth was so severe that it took weeks of hospital care for him to recover, was placed in foster care immediately after his release from the hospital. The Court noted the trial court's finding that Father had been incarcerated for four years and ten months out of the last seven years, and had never seen, held, touched, cared for, or supported the child. Id. at 479. The Court also noted that Father had three other children who lived with their respective mothers, and during his period of incarceration, Father had provided care for none of them. Id. The Court concluded that Father's history of incarceration, his present lack of support for his other children, and his complete lack of contact with the child supported the trial court's judgment that there was a reasonable probability that the circumstances leading to the child's removal from Father would not be remedied. Id. at 480.

In **In Re B.H.**, 44 N.E.3d 745 (Ind. Ct. App. 2015), *trans. denied*, the Court affirmed the juvenile court's finding that there was a reasonable probability that the conditions leading to the children's initial and continued removal from Mother would not be remedied. Id. at 750. The Court noted that the children were initially removed as a result of Mother's admitted drug use and the older child's positive drug test for methamphetamine. Id. The Court observed that, over the course of the CHINS case, Mother repeatedly failed to take a substance abuse intake assessment, failed to complete the recommended Intensive Outpatient Program, repeatedly tested positive for opiates, failed to show up for random drug screens, and gave birth to a third child who tested positive for opiates and methamphetamine at birth. Id. Because Mother had failed to address her substance abuse issues, despite multiple opportunities to do so, the Court held the evidence supported the juvenile court's conclusion that the conditions that resulted in the children's removal from Mother's care and custody would not be remedied. Id.

In **In Re K.E.**, 39 N.E.3d 641 (Ind. 2015), the Indiana Supreme Court reversed the trial court's termination of Father's parental rights. Id. at 652. The Court noted that, in determining whether the conditions that led to a child's removal are likely to be remedied, a trial court must balance a parent's habitual conduct against any changed circumstances. Id. at 647. The Court opined that, in balancing these factors, a trial court should consider the services offered to the parent, as well as the parent's engagement with services. Id. The Court determined that, although Father had been unable to engage in services referred by DCS due to his incarceration, he had been actively engaged in services available to him through the Department of Correction. Id. at 648. Furthermore, the Court held that incarceration and a distant release date alone are insufficient to show that the conditions leading to removal will not be remedied. Id.

In **In Re E.P.**, 20 N.E.3d 915 (Ind. Ct. App. 2014), the Court affirmed termination of Father's parental rights and determined there was sufficient evidence to show a reasonable probability that the conditions leading to the child's removal would not be remedied. Id. at 922. The Court noted that, pursuant to Indiana statute, a parent's conviction of certain offenses, including child molestation, creates a *prima facie* case that the conditions will not be remedied. Id. 921. The Court also noted that the determination requires balancing the habitual conduct of the parent against any changed circumstances, and observed that Father had been only partly compliant with services prior to his incarceration due to convictions for child neglect, child molesting, and battery of Mother. Id. at 922.

In **In Re D.B.M.**, 20 N.E.3d 174 (Ind. Ct. App. 2014), the Court affirmed the trial court's termination of Father's parental rights, finding that the record demonstrated there was a reasonable probability that the conditions leading to the child's removal would not be remedied. Id. at 182. Noting that Father had not participated in services, provided child support, or participated in any parenting time with the child since the case began, even prior to his incarceration, the Court held that there was sufficient evidence to support the trial court's termination order. Id.

In **In Re C.A.**, 15 N.E.3d 85 (Ind. Ct. App. 2014), the Court affirmed the termination of both Mother's and Father's parental rights and determined that there was sufficient evidence in the record for the trial court to find a reasonable probability that the conditions leading to the children's removal would not be remedied. Id. at 94, 96. In making its determination, the Court noted that: (1) Mother had failed to participate consistently in services and had recently stopped participating; (2) Mother had missed or cancelled multiple appointments for her visitation with the children; (3) Mother was cohabitating with a man who had a criminal history as well as a history of interaction with DCS; (4) Mother could not demonstrate that she would be able to provide stable housing for the children; and (5) Mother was refusing to meet with her service

providers. Id. at 94. With respect to Father, the Court noted that: (1) Father's release date had been pushed back a year as a result of a threatening letter he sent to Mother and her boyfriend; (2) Father could not demonstrate that he would be able to provide for his children upon his release; (3) Father's drug conviction would make it difficult for him to secure a steady income; and (4) Father's release from prison would render him subject to the same environment in which he had engaged in use of methamphetamine in the past. Id. at 95-96.

In **In Re S.E.**, 15 N.E.3d 37 (Ind. Ct. App. 2014), the Court affirmed the trial court's termination of Mother's parental rights. Id. at 48. In support of the trial court's finding of a reasonable probability that the conditions leading to removal would not be remedied, the Court noted that Mother had refused to participate with service providers referred by DCS and the only service provider still involved at the time of the termination hearing characterized Mother's improvement in her mental health as "mild". Id. at 46. Mother's case manager also testified that Mother had shown no improvement over the course of the case, and based on this, the Court determined there was sufficient evidence to support the trial court's order. Id. at 46.

In **In Re Z.C.**, 13 N.E.3d 646 (Ind. Ct. App. 2014), *trans. denied*, the Court affirmed the trial court's order terminating Mother's parental rights to her child who was born with controlled substances in his bloodstream. Id. at 470. The Court found that the following evidence at the termination hearing supported the trial court's conclusion that the conditions that resulted in the child's removal from Mother's custody would not be remedied: (1) Mother was arrested and incarcerated on drug charges before the child was released from hospitalization for drug withdrawal symptoms; (2) Mother admitted the child was a CHINS because she was incarcerated and would need substance abuse treatment when released; (3) at the termination hearing, Mother's criminal defense counsel testified Mother had agreed to plead guilty to conspiracy to deal heroin, that her minimum sentence would be ten years, and that her sentencing date and the length of her sentence remained unknown. Id. at 469.

In **Termination of the Parent-Child Rel. [J.G.] v. DCS**, 4 N.E.3d 814 (Ind. Ct. App. 2014), the Court dismissed Mother's appeal of the trial court's termination order on her two children because Mother had failed to file a timely Notice of Appeal. Id. at 819. The Court also elected to address Mother's argument that the trial court clearly erred when it concluded that there was a reasonable probability that the conditions resulting in the children's removal would not be remedied. Id. at 820. The Court found that sufficient evidence supported the trial court's decision, noting the following: (1) Mother had a long-standing history of substance abuse, and, although she claimed to be sober, her prognosis was poor; (2) service providers were concerned that, in light of her history, Mother would relapse; (3) Mother maintained her relationship with Father, who abuses alcohol, despite the history of domestic violence between them; (4) Mother failed to complete DCS provided services and cancelled multiple visits with the children; (5) visitations ultimately ceased seven months before the termination trial due to Mother's arrest for criminal confinement because she had taken a young child from the child's backyard in a mistaken believe that the child was one of her older children for whom her rights had been terminated; (6) Mother had received services from DCS for many years and still had not progressed in her ability to parent. Id.

In **In Re N.Q.**, 996 N.E.2d 385 (Ind. Ct. App. 2013), the Court reversed the trial court's second termination judgment and remanded for a hearing which fully considered Parents' current circumstances as well as their habitual patterns of conduct to the extent that such patterns existed. Id. at 396. The Court recognized that at the second termination hearing, DCS had relied heavily upon the evidence presented at the first termination hearing, which had been held eighteen months earlier. Id. at 392. The Court of Appeals had previously reversed the first termination

judgment in a memorandum decision because the first termination petition had been filed three months prior to the dispositional decrees that removed the four children from Parents' custody. The Court found it was error for the trial court to issue its second termination order which did not adequately consider the evidence presented by Parents of their current conditions, including Parents' new income and their ability to keep current on their bills and maintain a clean residence. Id. at 395. The Court said that the trial court also failed to consider the lack of evidence refuting Parents' version of the current conditions that existed in Parents' home, despite the fact that it was DCS's burden to provide its case by a heightened "clear and convincing" standard. Id. Quoting In Re A.I., 825 N.E.2d 798, 806 (Ind. Ct. App. 2005), *trans. denied*, the Court said that the termination statute 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." N.Q. at 392.

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 and concluded there was clear and convincing evidence to support the trial court's ultimate 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. Id. at 1125. The Court noted the following evidence in support of the trial court's determination: (1) Mother's drug use during the termination proceedings; (2) Mother's ongoing relationship with Father despite her concerns that he had molested one of their older children and posed a threat to the two children in this case; (3) Mother made no progress in her ability to parent the children because she did not complete services; (4) Mother and Father were both incarcerated at the time of the termination hearing; (5) Father made no progress in services because of his incarceration; (6) Father's history, particularly his repeated incarceration, was proof of his instability; (7) Father is a convicted child molester; (8) at the time of the termination hearings, the significant concerns about Father's behavior toward children had not been addressed, much less remedied, due to his repeated incarceration. Id. at 1124-25.

In **K.T.K. v. Indiana Department of Child Services**, 989 N.E.2d 1225 (Ind. 2013), the Indiana Supreme Court determined that the State met its burden to show that "the conditions that resulted in the child[ren]'s removal or the reasons for placement outside [Mother's] home...will not be remedied" pursuant to IC 31-35-2-4(b)(2)(B)(i). Id. at 1234. In its analysis of whether the State's evidentiary burden had been met, the Court first examined evidence on the conditions which resulted in the children's removal, including Mother's serious substance abuse issues, which rendered her incapable of providing the necessary care and supervision that her three children required. Id. at 1232. The Court also noted evidence on Mother's incarcerations while the children were placed in foster care, Mother's history of criminal behavior, and her " 'criminal mentality' that manifests itself in disregard for the law." Id. at 1233. Having determined the reasons for which the children were removed from Mother's care, the Court found the following evidence showed clearly and convincingly that a reasonable probability existed that the conditions that led to the children's removal would not be remedied: (1) the DCS case manager explained that "history is a good indicator of the future" and her concerns were based on Mother's substance abuse history and criminal activity, [which] would be a good indicator ...of what would happen and a good indicator for the children as to what could happen as well"; (2) a psychologist evaluator opined that "it is difficult to predict with certainty that [Mother] has truly turned her life around", and that Mother "might not always be able to inhibit her impulses, and the fact that she has led a pretty risky lifestyle in the past...predisposes her to returning to that lifestyle if things become too stressful for her"; (3) a second psychologist evaluator, who prepared a written psychological and parenting review on Mother's behalf, did not contradict the first evaluator's conclusion, and testified that Mother's likelihood of re-offending was more based on her ability to remain clean and sober. Id. at 1233-34. The Court also said that the trial court

was within its discretion to "disregard the efforts Mother made only shortly before termination and to weigh more heavily Mother's history of conduct prior to those efforts." Id. 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 to her two children, who had been removed from Mother's custody for almost four years at the time of the termination trial. Id. at 366. The children were removed by DCS because Mother was being evicted and had no home. 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. The Court noted the following evidence, inter alia, which supported the trial court's determination: (1) Mother failed to participate in or benefit from the services offered to her; (2) even when the trial court denied the first termination petition, gave Mother a second chance, and ordered additional services, 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) the social worker evaluator 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 services because of her low cognitive functioning and emotional immaturity; (5) the social worker evaluator explained that Mother viewed the children's needs as secondary to her own and had indicated no interest in working or supporting herself financially; (6) Mother refused to participate in individual counseling, missed nearly half of the sessions in her intensive parenting-skills course, and rarely completed her homework assignments; (7) some parenting-skills sessions were ended early because Mother yawned, texted, or played with her phone during sessions; (8) Mother lacked stable or significant employment, had moved twelve times since the children's removal, and paid for only one of those residences; (9) at the time of the termination hearing, Mother was unemployed and financially supported by her parents, was living with her brother and sister in a two-bedroom apartment, and testified that the children could not live there. Id. at 365. The Court said that its review of the record showed that, since the time of the children's removal four years ago, Mother had demonstrated a persistent unwillingness and inability to take the steps necessary to show she was capable of parenting her children and providing them with a safe and stable home environment, despite DCS's ongoing efforts. Id. at 366.

In **In Re J.C.**, 994 N.E.2d 278 (Ind. Ct. App. 2013), the Court affirmed the trial court's 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. Id. at 291. In response to Mother's arguments, the Court noted that the children had been removed from Mother's care more than once because of her drug use and criminal activity. Id. at 289. The Court also 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...", and said that this finding summarized the other more specific findings which were all supported by the evidence. Id. The Court characterized Mother's arguments on the level of services received or the observations her providers made as mere invitations to reweigh the evidence. Id.

In **A.D.S. v. Indiana Dept. of Child Services**, 987 N.E.2d 1150 (Ind. Ct. App. 2013), *trans. denied*, the Court was satisfied that clear and convincing evidence supported the trial court's findings, and the findings supported its conclusion that there was a reasonable probability that the reasons for the children's placement outside the home would not be remedied. Id. at 1158. The Court noted the following evidence: (1) Mother had a long history of cocaine abuse and had undergone inpatient treatments twice but had relapsed both times; (2) Mother's past cocaine

usage and her instability resulted in her rights being terminated to two other children and her voluntary relinquishment of her rights to a third child; (3) Mother last used cocaine five months before the termination trial; (4) Mother had issues with domestic violence, including convictions for criminal recklessness and domestic violence and her violation of a no contact order with Father the year before the termination trial; (5) Mother had failed to complete her court-ordered domestic violence classes and she still resided with Father, who also failed to complete his domestic violence classes; (6) while Mother had tested negative for drugs, she had also missed several recent drug screens, including a screen the week prior to the termination hearing, and she had tested positive four times for cocaine during the pendency of the case. Id. at 1157-58. The Court noted Mother's argument that the trial court erred in its conclusion, because at the time of the hearing, she was employed, tested negative on recent drug screens, and was not engaging in domestic violence. Id. The Court said that Mother's argument was simply a request to reweigh the evidence, which the Court would not do on appeal. Id. at 1158.

In **In Re Ma.J.**, 972 N.E.2d 394 (Ind. Ct. App. 2012), the Court reversed the termination order. Id. at 404. The Court determined that DCS failed to meet its statutory burden of proving that the conditions that resulted in the children's removal or the reasons for placement outside of Mother's home would not be remedied. Id. The Court further stated that Mother's progress in this case was hardly inconsistent or last minute. Id. The Court noted that the trial court, in making its decision, solely focused on Mother's behavior leading up to her incarceration. Id. at 401-02. The Court observed that, although a parent's habitual patterns are relevant, termination of parental rights cannot be based solely on conditions that existed in the past, but no longer exist. Id. The Court opined that, ultimately, the trial court was supposed to determine Mother's fitness *at the time of the termination hearing* (emphasis in opinion). Id. at 403. The Court noted that, by the time the termination hearing concluded, Mother had undisputedly made significant progress in each area of concern. Id. The Court observed 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, had not been involved in *any* relationship, let alone an abusive one, and there had been no additional incidents of violence since the children's original removal (emphasis in opinion). Id. The Court also noted that Mother had an appropriate home, was holding down a job, regularly visited the children, and they had a positive, loving relationship. Id.

In **In Re D.K.**, 968 N.E.2d 792 (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. Id. at 799. The Court noted that the reason for the child's initial removal from Mother's care was neglect because the child had been left with an inappropriate caregiver without appropriate food and clothing when Mother was on the verge of eviction. Id. at 798. The Court noted the following evidence in support of the trial court's 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 a 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. Id. at 798-99.

In **In Re C.M.**, 960 N.E.2d 169 (Ind. Ct. App. 2011), reaffirmed on rehearing at 963 N.E.2d 528, the Court opined that the trial court's findings focused on Mother's historical conduct and findings as to Mother's current circumstances, or evidence of changed conditions were

insufficient to support the court's conclusion that termination of Mother's rights was warranted. Id. at 175. The Court found that the trial court's findings of fact had evidentiary support in the record, but the trial court made no factual determinations with respect to evidence of changed conditions. Id. at 174. The Court noted that Mother testified that she had accomplished each of the things required to remedy the prior conditions and accomplish reunification goals. Id. at 175. The Court noted Mother's testimony that she lived alone with her infant twins, had a current source of income, her home had been deemed suitable by the Ripley County DCS, and she was in voluntary, intensive substance abuse treatment. Id. The Court observed that Mother's testimony was not directly contradicted, and the trial court made no determination as to whether Mother's testimony was credible or lacking in credibility. Id. The Court reversed the trial court's termination order. Id. at 175.

In **In Re M.W.**, 942 N.E.2d 154 (Ind. Ct. App. 2011), *trans. denied*, the Court reversed the trial court's order which terminated Mother's parental rights. Id. at 161. 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. Id. at 160. 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 could be observed and determined within a relatively short period of time. Id. at 160-61. The Court concluded that DCS failed to carry its burden of establishing, by clear and convincing evidence, a reasonable probability that the conditions resulting in the child's removal from Mother would not be remedied. Id. at 160.

In **In Re A.B.**, 924 N.E.2d 666 (Ind. Ct. App. 2010), the Court found there was sufficient evidence to support the trial court's termination judgment, and affirmed the judgment. Id. at 672. 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. Id. at 670. The Court said that the evidence made it reasonable for the trial court to conclude that Mother's drug use had not been 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. Id. at 670-71.

In **In Re I.A.,** 903 N.E.2d 146 (Ind. Ct. App. 2009), the Court affirmed the trial court's order terminating Mother's parent-child relationship with her youngest child. Id. at 156. In concluding that there was sufficient evidence to support the trial court's determination that there was a reasonable probability that the reasons for the youngest child's placement outside the home would not be remedied, the Court noted: (1) the trial court's findings, including that Mother had not availed herself of the training needed to provide for the youngest child's medical needs; (2) Mother's testimony, which revealed that she had made no real effort to learn about the youngest child's medical conditions or his current medical needs; (3) Mother was not even sure of the youngest child's diagnoses; (4) Mother refused when doctors asked her to give a blood sample to help their diagnosis of the youngest child; (5) the child was eventually diagnosed with Noonan's Disorder; (6) Mother admitted that she was unaware of the child's current medical needs, including the names of his doctors and his medicines, as well as his therapies; (7) Mother's response of "fine," when she was specifically asked how the child was on the day she was testifying, denoted "an utter lack of comprehension of what challenges [the child] faces;" (8) Mother immediately shifted the blame for her ignorance to the child's foster parents, saying

that they used to provide her with this information but quit doing so when she relapsed; (9) Mother was nonresponsive when she was asked if she could not simply have called the case manager to inquire about the youngest child; (10) although, at the end of the termination hearing, Mother expressed a desire to learn about the child's needs, Mother had been indifferent to the child's needs all along; and (11) Mother abused drugs during the entire pregnancy because she was depressed about being pregnant. Id. at 154-55.

In **C.T. v. Marion Cty. Dept. of Child Services,** 896 N.E.2d 571 (Ind. Ct. App. 2008), *trans. denied*, 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. Id. at 582, 585. 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, her 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. Id. at 582. Although the Court acknowledged and applauded Mother's efforts to change her life since she had been released from prison, the Court held that 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. Id. at 582-83. 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; (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) by the time of the termination hearing, had 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. The Court affirmed the termination judgment. Id. at 586.

In **Moore v. Jasper County Dept.,** 894 N.E.2d 218 (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. Id. at 229. The Court reversed the termination judgment. Id. 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 were 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. Id. at 228. 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 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; (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. Id. The Court also opined that the trial court's statement that it "would have been willing to delay this termination proceeding to see whether or not the changes which [Mother] has made in her life are permanent, and whether she can properly care for [the twins]" if not for the federal government's mandate requiring a speedy and permanent resolution for children, suggested that the trial court's decision to terminate Mother's parental rights might have been improperly based, at least in part, on a suspicion that Mother's change in circumstances may not be permanent. Id.

In **In Re A.P.**, 882 N.E.2d 799 (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. Id. at 808. 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 child 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 if his parental rights were not terminated. Id. at 807-08.

In **A.J. v. Marion County Office of Family**, 881 N.E.2d 706 (Ind. Ct. App. 2008), *trans. denied*, the Court could not say that the trial court's termination of Mother's and Father's parental rights to their respective children was clearly erroneous, and the Court affirmed the termination judgment. Id. at 719. The Court noted: (1) "While there is abundant evidence supporting the trial court's termination of Father's parental rights to the youngest child, the case in favor of terminating Mother's parental rights is less compelling"; (2) Mother had made significant progress in dealing with her substance abuse problem and appeared to have a genuine desire to maintain a relationship with her children; (3) DCS had legitimate and substantial concerns regarding Mother's failure to timely complete court-ordered services, her significant history of substance abuse, and the danger such a problem posed to the children; and (4) perhaps the more prudent course would have been to continue the case for an additional seven weeks in order to establish whether Mother completed the IOP program and remained drug free. Id. The Court observed the evidence most favorable to the judgment indicated that: (1) Mother had about thirteen months after she learned of the children's removal from Grandmother to complete services; (2) during that time, Mother tested positive for THC during her drug and alcohol assessment and was discharged from her first attempt at Intensive Outpatient (IOP) treatment for lack of participation, but did not re-initiate services for five months; (3) the children were originally removed from Mother because she had failed to provide them with a stable, drug-free living environment; and (4) at the time of the termination hearing four years later,

notwithstanding her recent progress in combating her drug addiction, Mother still had to complete seven weeks with the IOP aftercare program, and also had to complete home-based counseling, which could not begin unless or until Mother had successfully completed the IOP. Id. at 715-16.

In **In Re B.J.**, 879 N.E.2d 7 (Ind. Ct. App. 2008), *trans. denied*, Father and Mother claimed DCS had failed to prove by clear and convincing evidence that there was a reasonable probability that the conditions that resulted in removal of the children and continued placement outside the Parents' home would not be remedied. The Court stated that (1) a trial court must judge a parent's fitness to care for his child at the time of the termination hearing taking into consideration evidence of changed conditions; (2) a trial court may consider the parent's response to the services offered through DCS; (3) a pattern of unwillingness to deal with parenting problems and to cooperate with those providing social services, in conjunction with unchanged conditions, supports a finding that there exists no reasonable probability that the conditions will change; (4) DCS is not required to rule out all possibilities of change, but need only establish that there is a reasonable probability that the parent's behavior will not change; and (5) a 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. Id. at 18-19, 22. Father asserted that he had completed or almost completed each requirement in the trial court's dispositional decree. Father had admitted to the allegations which had prevented initial placement of the children with him: (1) he had failed to establish paternity; and (2) he had failed to show an ability or willingness to appropriately parent the children. The Court observed that a review of the record revealed that, despite Father's initial compliance and a multitude of services offered to him over fourteen months, these conditions still had not improved. Id. at 19. The Court noted Father had failed to: (1) complete substance abuse intensive outpatient treatment or home-based counseling; (2) establish his paternity: (3) provide proof of stable housing or of any employment; and (4) attend the termination hearing. Id. The Court found that this evidence clearly supported the trial court's finding that "Father's ability to parent is unknown at this time" and its ultimate conclusion that "[t]here is a reasonable probability that the conditions that resulted in the removal of the children from [Father] … will not be remedied." Id. The Court also found the trial court's ultimate determination that there was a reasonable probability that the conditions leading to the removal and continued placement of the children outside of Mother's care would not be remedied was not clearly erroneous. Id. at 22. The Court noted the evidence most favorable to the trial court's judgment revealed: (1) while Mother did successfully complete her parenting assessment and parenting classes, as well as exercise visitation with the children, Mother's visitation had to be suspended for about four months due to her missed visits; (2) Mother failed to obtain mental health treatment for her depression despite multiple reminders from her case manager that such treatment was a condition for reunification; (3) despite at least three separate referrals for intensive outpatient treatment for her substance abuse problem, which was the impetus for DCS's initial involvement in the case, Mother failed to complete treatment and was discharged due to her lack of participation; and (4) Mother also provided only minimal proof of attendance at Narcotics Anonymous and Alcoholics Anonymous meetings. Id. at 21. The Court found that the evidence supported the trial court's finding: "There is no indication that Mother will be able to complete services given her history of an inability to do so in the fourteen months since services commenced." Id. at 22. The Court affirmed the termination judgment. Id. at 23.

In **In Re A.J.**, 877 N.E.2d 805 (Ind. Ct. App. 2007), *trans. denied*, the Court found that termination of Parents' parental rights was supported by sufficient evidence. Id. at 816. DCS filed a CHINS petition for several reasons, including the fact that Mother was residing in the psychiatric unit and there was a concern that the children had been sexually molested by Father. The trial court ordered that the children reside outside of Parents' home. Id. at 816-17. The trial court concluded that there was a reasonable probability that the conditions that resulted in the

children's removal from and continued placement outside the care and custody of Parents would not be remedied. In affirming the termination judgment, the Court noted: (1) the oldest child's own testimony regarding the abuse she suffered while in the care of her parents was both detailed and credible; (2) the oldest child's testimony was substantiated by the testimony of the child's therapist and another psychologist witness; (3) at the time of the final termination hearing, Mother was not in compliance with the terms of the Dispositional Order; (4) Mother testified that she did not believe that she had a mental health problem and she continued to deny Father had ever molested the oldest child; (5) Mother admitted she had not participated in any psychological evaluation or in any follow-up counseling, nor taken any medications for her mental health issues for the past eleven months; (6) at the time of the termination hearing, Father still had not admitted to sexually molesting the oldest child; (7) Father had not completed any of the sexual offender classes which were necessary for reunification; (8) the guardian ad litem testified that termination of Parents' parental rights and subsequent adoption was in the best interests of the children; and (9) DCS had a satisfactory plan for the care and treatment of all three children following termination of Parents' parental rights. Id. at 816-17.

In **In Re Involuntary Termination of Parent-Child Relationship of Kay L.**, 867 N.E.2d 236 (Ind. Ct. App. 2007), the Court held that DCS established by clear and convincing evidence that there was a reasonable probability the conditions which resulted in the children's removal would not be remedied, the continuation of the parent-child relationship was a threat to their well-being, and the trial court properly determined that termination of Mother's parental rights was in the best interests of the children. Id. at 242. In arriving at these conclusions, the Court cited the following evidence: (1) the children were originally removed because of Mother's abandonment and lack of supervision, poor hygiene, and a life- and health-endangering environment; (2) following their removal, Mother failed to take part in the CHINS proceeding and did not pursue reunification, failing to keep in contact with DCS for a full year after the CHINS proceeding was instituted; (3) at one point, Mother made the necessary changes to be reunited with her children and was reunited with them; (4) after three months of reunification, Mother: (a) tested positive for marijuana and cocaine and admitted to drinking a six-pack of beer every other day, (b) admitted that she left her children under the supervision of unauthorized adults, including her physically violent boyfriend; (c) admitted that she at times left the children alone with the oldest child in charge, and instructed them to lie and keep it a secret if anyone asked about it; therefore, DCS again removed the children; (5) Mother's drug use led to the revocation of her probation; (6) at the time of the termination hearing, Mother was incarcerated; (7) Mother had no plan for employment following her release from prison; (8) Mother failed to comply with a number of dispositional goals put in place during the CHINS proceeding; and (9) although Mother might have had a sincere desire to be reunited with her children, she was unable to make choices that would keep the children safe. Id.

In **Castro v. Office of Family and Children**, 842 N.E.2d 367 (Ind. Ct. App. 2006), *trans. denied*, the Court found that Father's incarceration and consequent inability to provide food, shelter, clothing, medical care, education or supervision supported the trial court's finding that a reasonable probability existed that the conditions that resulted in the child's removal would not be remedied. Id. at 373-74. The Court also found that several other factors weighed in favor of the trial court's decision to terminate Father's rights: (1) the child was in need of stability and permanency; (2) the child was doing well in her current placement; and (3) there was no guarantee that Father would be a suitable parent once he was released from prison or that he would even obtain custody. Id. at 374-75. The Court affirmed the termination judgment. Id. at 378.

In **Rowlett v. Office of Family and Children**, 841 N.E.2d 615 (Ind. Ct. App. 2006), *trans. denied*, the Court concluded the office of family and children did not present clear and convincing evidence that there was a reasonable probability that the conditions which resulted in the children's removal would not be remedied. Id. at 622. At the time of the termination hearing, Father was incarcerated, but expected to be released six weeks after the hearing. The Court noted the following evidence: (1) while incarcerated, Father had participated in individual and group services, including services in encounters, anger management and impulse control, parenting skills, domestic violence, self-esteem, self-help, and substance abuse; (2) Father had earned twelve hours of college credit, testified that he had not used drugs while incarcerated and that, once released, he planned to continue counseling and other services to help him maintain sobriety; (3) Father testified that he had secured employment and housing with his aunt after his release; and (4) Father testified that he had been accepted at a university and planned to take college courses upon his release. Id. The Court reversed the termination judgment and remanded for further proceedings under the CHINS order. Id. at 624.

In **In Re Parent-Child Relationship of S.M.**, 840 N.E.2d 865 (Ind. Ct. App. 2006), the Court affirmed the trial court's ruling that there was a reasonable probability that the conditions resulting in the child's removal would not be remedied. Id. at 870. The putative Father had failed to take any steps toward establishing his paternity or demonstrating his fitness as a parent, and was aware of the steps he needed to take to do so. Id. The Court affirmed the termination judgment. Id. at 872.

In **In Re D.L.**, 814 N.E.2d 1022 (Ind. Ct. App. 2004), *trans. denied*, the Court found that Mother's failure to follow the recommendations of her drug and alcohol assessment, missing drug treatment program sessions, her positive drug tests for cocaine, and her failure to maintain a stable source of income adequate to provide for her children supported the trial court's finding that there was a reasonable probability that the conditions that resulted in her younger child's removal would not be remedied. Id. at 1028. Mother: (1) failed to follow the recommendations of her drug and alcohol assessment by missing scheduled sessions of her drug treatment program and testing positive for drugs; (2) testified that she relapsed every couple of months; and (3) did not have a job at the time of the hearing, and relied upon others to pay her mortgage and utilities. Id. 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 with instructions to enter a termination order regarding the older child. Id. at 1030.

In **In Re Involuntary Term. Paren. of S.P.H.**, 806 N.E.2d 874 (Ind. Ct. App. 2004), the Court found that, despite Father's contention that his substance abuse was under control, there was ample evidence, including Father's convictions for neglect and drug possession and dealing, to suggest that his conduct posed a substantial probability of future child neglect and deprivation. Id. at 881-82. Father blatantly denied that there were drugs in his home even after he was arrested for drugs and drug precursors. The Court affirmed the trial court's finding that the conditions that resulted in the children's removal would not be remedied, and affirmed the termination judgment. Id. at 882-83.

In **In Re Termination of Relationship of D.D.**, 804 N.E.2d 258 (Ind. Ct. App. 2004), *trans. denied*, the Court found that Mother's habitual patterns of failing to: (1) address her mental health problems; (2) be consistent in taking her medication; (3) address her addiction problems; and (4) provide a safe, consistent, nurturing residence and environment for her child supported the trial court's conclusion that there was a reasonable probability that the reasons for the child's continued placement outside of Mother's home were likely to continue. Id. at 267. Mother argued

that the trial court did not take into account evidence of changed conditions that were presented during the termination hearings, but the Court opined that the alleged changed conditions were based solely on the testimony of Mother and her husband. Id. at 266. Mother also tested positive for marijuana four months before the trial court's judgment was entered. The Court affirmed the termination judgment. Id. at 268.

In **Termination of Parent-Child Rel. of L.V.N.**, 799 N.E.2d 63 (Ind. Ct. App. 2003), the DFC presented clear and convincing evidence from several witnesses which demonstrated that Mother had made little progress in correcting her problems in that she: (1) repeatedly failed to attend scheduled case conferences and hearings; (2) regularly refused to participate in forty-two court-ordered drug screens, and had eight drug screens with positive or diluted results; (3) was in and out of jail several times; (4) failed to have a positive role in the children's lives since the DFC became involved in the case; (5) had still been unable to stop using cocaine for any period longer than a few months. Id. at 69-70. The Court opined that DFC had sufficiently established by clear and convincing evidence that there was no reasonable probability that the circumstances which led to the children's removal would be remedied, and affirmed the termination judgment. Id. at 70-71.

In **McBride v. County Off. Of Family & Children**, 798 N.E.2d 185 (Ind. Ct. App. 2003), the Court found that the following evidence was sufficient to support the trial court's finding that Mother could not remedy the reasons the children were removed from her care: (1) Mother insisted on having contact with Father, who abused her and their children; (2) Mother failed to work with service providers to develop a safety plan as required by the court; (3) Mother did not participate in individual and family counseling; (4) Mother was diagnosed with severe post-traumatic stress disorder, depressive disorder, disassociative disorder, and dependent personality disorder; (5) Mother failed to consistently have a relationship with children; (6) the children had been removed from Mother's care several times; and (7) the children were in need of permanency. Id. at 200-02. The Court affirmed the termination judgment. Id. at 203.

In **In Re J.W.**, 779 N.E.2d 954 (Ind. Ct. App. 2002), *trans. denied*, the Court found that the following evidence supported the finding that there was a reasonable probability that the conditions that resulted in the child's removal from Mother's home would not be remedied: (1) Mother had been diagnosed with probable Munchausen's Syndrome by Proxy and antisocial and histrionic personality disorders which are not likely to be amenable to treatment by psychotherapy or other means; (2) Mother left the area for more than four months, and did not contact or request visitation with her child; (3) Mother had been convicted of theft and child neglect and had been charged with forgery. Id. at 960-61. The Court affirmed the termination judgment. Id. at 964.

In **In Re A.L.H.**, 774 N.E.2d 896 (Ind. Ct. App. 2002), the Court found that Mother's failure to complete a counseling program, parenting classes, and to obtain and maintain stable and adequate housing supported the trial court's determination that the conditions that led to the child's removal were unlikely to be remedied. Id. at 899-900. The Court noted that Mother did not exercise her right to visit the child, and demonstrated a lack of commitment to complete the actions necessary to preserve her parent-child relationship with the child. Id. at 900. The Court affirmed the termination judgment. Id. at 901.

In **In Re W.B.**, 772 N.E.2d 522 (Ind. Ct. App. 2002), the Court found that Parents' improvements in their personal habits and lives came at a time when they were not burdened by caring for the two young children and that these improvements would not necessarily continue once Parents added the additional and significant burden of childrearing. Id. at 531. The Court noted: (1) five

other children had lived in a filthy, unstable environment with Parents and had previously been removed from Parents' home; (2) Parents had shown previous patterns of unstable and unsuitable living conditions; and (3) Parents also had a long history of failing to maintain consistent employment. Id. at 529-31. Therefore, the Court affirmed the trial court's conclusion that there was a reasonable probability that the conditions which led to the removal of the children would not be remedied. Id. at 531. The Court affirmed the termination judgment. Id. at 535.

In **In Re E.S.**, 762 N.E.2d 1287 (Ind. Ct. App. 2002), the Court found Mother's active search for assistance despite the fact that the county division of family and children did not provide her with any services did not support a finding that the conditions that resulted in the child's removal would not be remedied. Id. at 1291-92. The division of family and children did not conduct any type of evaluation of the progress that Mother was making in counseling. Id. Mother also attended parenting classes at which she excelled, according to her instructor. Id. Therefore, the Court reversed the trial court's termination of Mother's parental rights. Id. at 1292.

In **In Re Involuntary Term. of Parent-Child Rel. [A.K.]**, 755 N.E.2d 1090 (Ind. Ct. App., 2001), the children had been out of Mother's care for twenty-two months by the time of the termination trial. Id. at 1094. During that time, Mother did not maintain regular visitation with her children, and admitted that she had used crack cocaine almost daily for three to four years, including up to three weeks before the termination trial. Id. at 1096-97. Mother did not complete outpatient therapy or attend twelve-step meetings as recommended by her addictions counselor. Id. There was no evidence that Mother had successfully treated her drug abuse or addressed her parenting problems. Id. at 1097. The Court concluded that the trial court did not err in determining that the condition which led to removal would not be remedied and affirmed the termination order. Id. at 1093, 1097.

In **In Re D.J.,** 755 N.E.2d 679 (Ind. Ct. App. 2001), *trans. denied,* the Court opined DFC presented the following clear and convincing evidence that the conditions which resulted in the children's removal from Mother's home had not been remedied: (1) the children were removed from Mother's home due to lack of cleanliness in the home, and because of concerns over Mother's parenting skills and ability to care for their needs; (2) the caseworker testified that Mother's parenting skills had deteriorated during his contact with the family; and (3) Mother did not follow through on recommendations of DFC and did not take full advantage of the services offered to her. Id. at 684-85. The Court found that Mother's pattern of conduct both before and during the proceedings supported the trial court's determination that the conditions that resulted in removal would not be remedied. Id. at 685. The Court affirmed the termination judgment. Id.

In **In Re K.S.**, 750 N.E.2d 832 (Ind. Ct. App. 2001), OFC, the court appointed special advocate, and the trial court made repeated attempts to facilitate the preservation of the family, and Mother made repeated efforts to provide her children with a safe, sanitary and suitable home. Id. at 837. The Court also noted the trial court's finding that Mother had also been nurtured, counseled, medicated, taught, encouraged and threatened with termination of parental rights in an effort to achieve the common goal of all the parties to this proceeding. Id. at 837-38. Despite all efforts, the trial court found the problems which continued to plague Mother and her children inevitably and invariably returned. Id. at 838. The Court affirmed the trial court's decision that the conditions that resulted in the removal of these children on numerous occasions would never be remedied and affirmed the termination order. Id. at 837-38.

In **In Re T.F.**, 743 N.E.2d 766 (Ind. Ct. App. 2001), the Court found the following evidence supported the finding that there was a reasonable probability that the conditions that resulted in the removal of the children from the home would not be remedied: (1) Father's continued and

consistent denial that he was responsible for hitting the child; (2) the unsafe and life endangering condition that Mother placed the children in by continuing to cohabit with Father despite an order from the criminal court that Father was to have no contact with the children; and (3) the uncleanliness of the home and Parents' failure to demonstrate a safe and clean home environment. Id. at 774-76. The Court affirmed the termination judgment. Id. at 776.

VIII.B. 2. Proof of Service Delivery Not Required Element

Although case law consistently holds that proof of services is not a required element of the termination case, evidence that services were offered and the parents' response to those services may be relevant to show whether there is a reasonable probability that the conditions that resulted in the removal from the parents' home or the continued placement outside of parents' home will not be remedied. See **In Re B.D.J.**, 728 N.E.2d 195, 201 (Ind. Ct. App. 2000) (trial court can consider evidence of services offered to parent and parent's response to services, but termination statute does not require proof that office of family and children offered services to parent; parent cannot sit idly by without asserting need or desire for services).

In **In Re J.W., Jr.**, 27 N.E.3d 1185 (Ind. Ct. App. 2015), the Court affirmed the trial court's order terminating Parents' rights to their three children. Id. at 1187. On appeal, Parents raised a single issue for appellate review: whether the statutory requirement at IC 31-35-2-4(b)(2)(A)(iii) that the children be removed from Parents for fifteen of the most recent twenty-two months before a termination petition may be filed is tolled during any period in which DCS fails to provide or make services available to the parent. The Court found that Parents' argument presented a case of first impression, and required the Court to interpret the statute. Id. at 1189. Quoting State v. Prather, 922 N.E.2d 746, 750 (Ind. Ct. App. 2010), *trans. denied*, the Court said that "we are obliged to suppose that the General Assembly chose the language it did for a reason." J.W. at 1189. The Court found the language of IC 31-35-2-4(b)(2)(iii) is unambiguous and does not condition the waiting period for filing a termination petition on whether DCS provided services or whether the parent successfully or unsuccessfully participated in any services. Id. at 1190. Quoting S.E.S. v. Grant Cnty. Dep't. of Welfare, 594 N.E.2d 447, 448 (Ind. 1992), the Court observed the Indiana Supreme Court has long recognized that, in "seeking termination of parental rights", DCS has no obligation "to plead and prove that services have been offered to the parent to assist in fulfilling parental obligations." J.W., Jr. at 1190. Quoting In Re H.L., 915 N.E.2d 145, 148 (Ind. Ct. App. 2009), the Court said it has stated on several occasions that, although "[the] DCS is generally required to make reasonable efforts to preserve and reunify families *during the CHINS proceedings*, that requirement in our CHINS statutes "is not a requisite element of our parental rights termination statute, and a failure to provide services does not serve as a basis on which to directly attack a termination order as contrary to law." (Emphasis added in J.W., Jr. at 1190.) The Court said that Parents' argument amounted to "a request to make the providing of services by DCS a basis upon which to directly attack a termination order, contrary to our case law, and reads into our termination statutes a provision that our legislature has not seen fit to include." J.W., Jr. at 1190.

In **In Re E.E.**, 736 N.E.2d 791 (Ind. Ct. App. 2000), Mother left her six-month-old infant alone in a vehicle parked in a parking garage while she was attending a termination of parental rights hearing for her two older children. The infant was found to be a CHINS, and services were provided to Mother to facilitate her compliance with the parental participation decree, with limited success. Mother was diagnosed with paranoid schizophrenia and exhibited considerable difficulty coping with parenting and household duties. Mother's parental rights were terminated, and on appeal, she argued that OFC failed to reasonably accommodate her disability when providing family services, as required by the Americans with Disabilities Act (the ADA). The Court noted that Mother failed to identify any particular service denied her on account of her

mental disability. Id. at 796. Citing Stone v. Daviess County Div. Of Children and Family Services, 656 N.E.2d 824, 839 (Ind. Ct. App. 1995), *trans. denied*, the Court explained that any alleged nonconformance with the ADA in OFC's provision of family services would be a matter separate and distinct from the operation of the termination statute. E.E. at 796. The Court said that the provision of family services is not a requisite element of Indiana termination statutes, and a complete failure to provide services would not negate a necessary element of the termination statute and require reversal. Id. The Court affirmed the termination judgment, concluding that Mother could not directly attack the judgment on the grounds that she was denied appropriate services because of her mental disability. Id.

Several termination of the parent-child relationship cases discuss DCS's offer of services in situations where parents were incarcerated. See **In Re J.E.**, 45 N.E.3d 1243, 1248-49 (Ind. Ct. App. 2015) (Court affirmed termination of Father's parental rights; quoting In Re B.D.J., 728 N.E.2d 195, 201 (Ind. Ct. App. 200) that the law on termination of parental rights does not require DCS to offer services to the parent), *trans. denied*; **In Re Z.C.**, 13 N.E.3d 464, 470 (Ind. Ct. App. 2014) (Court was unable to address alleged inadequacy of services offered to incarcerated Mother during CHINS proceeding because that issue is unavailable during appeal following termination; termination affirmed), *trans. denied*; **In Re H.L.**, 915 N.E.2d 145, 148 n.3 (Ind. Ct. App. 2009) (failure to provide services does not serve as a basis on which to directly attack a termination order as contrary to law; termination affirmed); **Hite v. Vanderburgh Cty Office Fam. & Chil.**, 845 N.E.2d 175, 184 (Ind. Ct. App. 2006) (Father's expected release date was over two years after the date of the termination trial and he could not participate in Vanderburgh County OFC's services due to his incarceration; termination affirmed); **Castro v. Office of Family and Children**, 842 N.E.2d 367, 375 (Ind. Ct. App. 2006) (Father argued that he had a right to have necessary services provided to him, but Court agreed that OFC had done everything it could to best of its ability given resources it has and Father's incarceration; due process requirements were met and termination affirmed), *trans. denied*; **Rowlett v. Office of Family and Children**, 841 N.E.2d 615, 622 (Ind. Ct. App. 2006) (because of Father's incarceration, OFC did not, nor was it required to, provide Father with services directed at reunification; Father made good faith effort to better himself through department of correction services; termination reversed), *trans. denied*.

VIII.B. 3. What Conditions Must Noncustodial Parent Remedy?

Several cases discuss the issue that the reasons for the removal of the child from the custodial parent's home or the child's continued placement outside the custodial parent's home should not apply to the parent who was not living with the child at the time of the child's removal. In those cases, the Court found that the trial court must review the evidence on why the child was not placed with the noncustodial parent after the child was removal from the custodial parent.

In **In Re O.G**, 65 N.E.3d 1080 (Ind. Ct. App. 2016), *trans. denied*, the Court reversed and remanded the juvenile court's order which terminated the parent-child relationship between Parents and their child. Id. at 1096. The child was removed from Mother's care and custody. Father attended the initial hearing on the CHINS case, but later was incarcerated several times. The Court found the evidence did not support the juvenile court's conclusion that Father was unwilling to be a parent to the child, or that termination of the child's relationship with Father was in the child's best interests. Id. The Court found an "extraordinarily troubling pattern of behavior" by DCS in that: (1) the case manager made little to no effort to contact Father at the initiation of the CHINS case; (2) after DCS made its own internal decision that the case plan was to reunify the child with Mother, the case manager's minimal efforts to engage Father ceased altogether; (3) the case manager failed to comply with the court's order to re-refer services for Father; (4) when Father asked the court to order DCS to make new service referrals for him, the court declined and DCS did not make any referrals. Id. at 1095-96. The Court noted that when

Father was not incarcerated, he made multiple efforts to contact the case manager to engage in services and when Father was incarcerated or on work release, he participated in services available to him. Id. at 1096. Noting that Father's record was "far from sterling", the Court said that he deserved a genuine chance to prove that he could parent his child and "ha[d] the constitutional right to try." Id.

In **In Re R.A.**, 19 N.E.3d 313 (Ind. Ct. App. 2014), *trans. denied*, Father learned of his biological paternity of the child from DNA test results received while he was incarcerated in the Johnson County Jail awaiting trial on several criminal charges, including sexual misconduct with a minor, theft, and possession of paraphernalia. Father admitted the child was a CHINS based on his inability to parent the child due to his incarceration, and agreed to participate in services upon his release. Father did not file a petition to establish his paternity of the child. Six months later, while Father was still incarcerated awaiting trial, DCS petitioned to terminate his parental rights. At the time of the termination hearings, Father's sister was available to care for the child and had begun visiting with the child. The uncertainty of Father's availability to parent the child, together with the unique facts of this case, particularly the six month time period from DNA testing until the filing of the termination petition, the involvement of Father's family, and the post-incarceration services requirement, led the Court to conclude that reversal of the termination judgment was warranted. Id. at 321.

In **In Re E.M.**, 4 N.E.3d 636 (Ind. 2014), the Indiana Supreme Court affirmed the trial court's decision terminating Father's parental rights. Id. at 649. The Court "recognized the great value of encouraging non-custodial fathers to be involved in their children's lives." Id. The Court held that the following findings were supported by the evidence: (1) Father's violence against Mother had also abused his two children, who were in early infancy and barely one year old at the time of the removal; (2) Father denied all services offered during the year after the children were removed and failed to attend most of the CHINS hearings; (3) Father continued to deny domestic violence despite his recent domestic violence and prior conviction for a violent crime; (4) Father failed to complete any counseling or therapy. Id. at 644-647. The Court noted the additional evidence that Father made no effort to maintain his relationship with the children while he was in prison, did not even notify DCS that he was in prison, and his testimony at the termination hearing showed his continuing lack of insight into the domestic violence which led to the CHINS case. Id. at 647.

In **In Re D.B.**, 942 N.E.2d 867 (Ind. Ct. App. 2011), *trans. denied*, the Court reversed the juvenile court's judgment terminating Father's parental rights, and remanded the case for further proceedings under the CHINS case. 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 said a thorough review of the record revealed the trial court's finding that Father had tested positive for marijuana *throughout the case* was not supported by clear and convincing evidence (emphasis in opinion). Id. at 873. The Court noted: (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 DCS case manager explained that there were some "initial issues" with marijuana, but Father thereafter "tested clean" for six months and DCS "dismissed" that service; (4) Father confirmed that he had not used marijuana since he tested positive. Id. at 873. The Court also held that the juvenile court's findings that Father "did not participate in individual counseling" and was "sporadic with his visitation" were not supported by the evidence. Id. at 874. The Court noted: (1) the record revealed Father successfully completed parenting classes and consistently participated in individual counseling for over a year until DCS 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 opined the law is 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. Id. at 875. Given the circumstances, the Court did not believe this case had reached the "last resort" stage. Id.

In **In Re. I.A.**, 934 N.E.2d 1127 (Ind. Ct. App. 2010), the Court reversed the trial court's judgment which had terminated Father's parental rights. Id. at 1136. Father's child and the child's six half-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 by Mother, could not be attributed to Father. Id. at 1134. 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. Id. The Court found nothing in the termination order or the record indicating the conditions that led DCS to place the child in foster care and to continue the child in foster care rather than placing the child with Father. Id. The Court concluded DCS failed to demonstrate by clear and convincing evidence that there was a reasonable probability that the reasons for placement outside the home of Father would not be remedied. Id. at 1134-35.

In **A.J. v. Marion County Office of Family**, 881 N.E.2d 706 (Ind. Ct. App. 2008), *trans. denied*, the Court affirmed the trial court's findings with regard to both Father and Mother that the reasons for the removal of the children and their continued placement elsewhere would not be remedied. Id. at 715-17. The Court noted evidence that Parents were not offered services during the time period after they had signed consents to the adoption of the children by Grandmother and before the children were removed from Grandmother's care because of substantiated abuse allegations against Grandmother. Id. at 714-15. The Court held that: (1) the trial court's judgment was supported by numerous other findings which substantiated its determination; and (2) even if the challenged findings were erroneous, they could not serve as a basis for reversible error. Id. at 715. The Court was not convinced 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. Id. at 716-17. The Court noted Father's admission 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. Id. at 716. The Court said that 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 Intensive Outpatient Program (IOP) drug treatment program, drug counseling, and random drug screens; and (4) during his drug assessment, Father admitted he had used marijuana for about seventeen years, that he had previously participated in drug treatment programs during which he had stayed clean for about six months, and then he started using marijuana again. Id. at 716-17. The termination judgment was affirmed. Id. at 719.

In **Castro v. Office of Family and Children**, 842 N.E.2d 367 (Ind. Ct. App. 2006), *trans. denied*, the Court said it was true that, because of his incarceration, Father did not and could not have contributed directly to the physical conditions that led to the child's removal from mother's home due to his incarceration. Id. at 373. The Court found that Father was equally unable to remedy those conditions for the same reason. Id. Therefore, the Court found the trial court did not commit clear error when it determined there was a reasonable probability that the conditions that resulted in the child's removal would not be remedied. Id. at 374. The Court affirmed the termination judgment. Id. at 378.

In **In Re Parent-Child Relationship of S.M.**, 840 N.E.2d 865 (Ind. Ct. App. 2006), DCS informed putative Father of three things that would provide him with a foundation to demonstrate his fitness as a parent: establish paternity, undergo a parenting assessment, and undergo a drug and alcohol assessment. DCS offered to provide a parenting assessment to putative Father, an Illinois resident, in Indiana, but he never made arrangements for this service and never indicated his desire to seek an alternative resolution of the issue. Putative Father informed DCS that he had recently completed a drug treatment program and was told that a drug and alcohol assessment could be waived if he would provide documentation of this fact, but he failed to do so. Putative Father was also informed of the procedure to establish his paternity of the child in court, but never made any effort to do so. The Court opined that DCS had provided putative Father with the information he needed to take steps toward becoming a parent to the child, but he declined to make use of this information. Id. at 870. Therefore, the Court affirmed the trial court's determination that there was a reasonable probability that the conditions resulting in the child's removal would not be remedied. Id. The Court affirmed the trial court's termination judgment. Id. at 872.

In **In Re R.J.**, 829 N.E.2d 1032 (Ind. Ct. App. 2005), the child was adjudicated a CHINS and was removed from Mother's home and placed in foster care. Later Father was located and he established paternity. Father completed the services required of him and maintained regular visitation with his child. Father tested negative for drugs, rented an apartment and obtained a full time job. The trial court placed the child in another foster home and terminated Father's parental rights. The Court opined 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 had failed to provide a safe plan for the child's care while Father was at work. Id. at 1039. Stating the trial court's conclusions that the conditions resulting in the child's placement outside the home would not be remedied and that continuation of the parent-child relationship posed a threat to the child's well-being were clearly erroneous, the Court reversed the termination order. Id.

In **In Re B.D.J.**, 728 N.E.2d 195 (Ind. Ct. App. 2000), the Court said that, because the children were not in Father's custody at the time of the removal, the State was required to show that the reasons the children were not placed with Father would not be remedied. Id. at 200-01. The Court opined that the trial court must first, determine what conditions led DFC to place the children in foster care rather than placing them with Father; and second, determine whether there is a reasonable probability that those conditions will not be remedied. Id. at 201. In affirming the

termination judgment, the Court found that the children were not placed with Father after they were removed from Mother because of Father's: (1) inability to provide a safe and healthy environment for the children; (2) habitual failure to provide for the children's needs, including housing; (3) failure to maintain contact with the children; and (4) failure to provide support for the children. Id. at 202-03. The Court opined that sufficient evidence was provided at trial that there was a reasonable likelihood that Father would be unable to provide for the children's basic needs and that these conditions would not be remedied. Id. at 203. The Court affirmed the trial court's termination judgment. Id. at 204.

Other cases which discuss this issue include: **In Re A.A.C.**, 682 N.E.2d 542 (Ind. Ct. App. 1997); **Matter of C.D.**, 614 N.E.2d 591 (Ind. Ct. App. 1993); **Matter of A.M.**, 598 N.E.2d 236 (Ind. Ct. App. 1992); and **Matter of Y.D.R.**, 567 N.E.2d 872 (Ind. Ct. App. 1991). See also this Chapter at V. B. for termination petitions involving noncustodial or alleged fathers.

VIII.B. 4. Notice to Parent of Problems to Be Remedied and Effect of Case Plan on Termination

Parents have appealed termination judgments, arguing that they did not have notice of what they must do to obtain reunification with their children and avoid termination of the parent-child relationship. In some cases, the failure to provide parents with a copy of case plans was an issue. See Chapter 8 at I.F. for detailed discussion on case plans.

In **C.A. v. Indiana Dept. of Child Services**, 15 N.E.3d 85 (Ind. Ct. App. 2014), the Court affirmed the trial court's judgment terminating the rights of both parents. Id. at 87. On appeal, Mother claimed that her due process rights were violated because she was neither given nor signed a case plan, which DCS must prepare for every CHINS case after negotiating with parents. The Court noted the family case manager's testimony that, during team meetings attended by Mother, the team made recommendations regarding what Mother had to do so her children could be returned to her. Id. at 93. The Court said the record indicated that it was not Mother's lack of knowledge or direction as to what she needed to do to get her children back, but Mother's lack of participation. Id. The Court noted that the purpose of the regular team meetings was to set goals and make a plan to reach them. Id. The Court cautioned DCS to be more cognizant of the statutory framework by which it should abide, which includes providing a case plan to each parent. Id. The Court could not conclude that the failure by DCS to provide a case plan to Mother resulted in a procedural irregularity so egregious that Mother was denied due process of law. Id.

In **In Re I.A.**, 934 N.E.2d 1127 (Ind. 2010), the Court reversed the trial court's judgment terminating Father's parental rights. Id. at 1136. The Court found that DCS had not proven by clear and convincing evidence that there was a reasonable probability that the reasons for the child's placement outside of Father's home would not be remedied or that continuation of the parent-child relationship between Father and the child posed a threat to the child's well-being. Id. The Court noted that, at the time of the child's removal from Mother by DCS, Mother and Father were not residing in the same household, and the child was living with Mother and in her sole custody and care. Id. at 1133-34. The Court found that a case plan for reunification was never developed for Father indicating what was expected of him, and, other than a parent aide, no services were provided to assist Father in developing effective parenting skills. Id. at 113-36.

In **In Re R.J.**, 829 N.E.2d 1032 (Ind. Ct. App. 2005), the Court reversed the termination judgment because the findings were not supported by the evidence. Id. at 1039. The Court noted that a primary issue on appeal was the parties' disagreement as to whether there was evidence supporting the finding that adjudicated Father failed to provide safe and adequate housing for himself and the child. Id. at 1037. Although OFC witnesses testified that Father's apartment

building was not suitable for a child because there was no playground, there were transients in the building, no other children had been seen in the building, and the apartment was on the fifth floor, the Court concluded that this evidence did not support the trial court's finding that Father failed to provide safe and adequate housing. Id. at 1037, 1039. The Court noted that Father had first rented a studio apartment in the same building, but the caseworker insisted that the child could not be reunified with Father unless he obtained a larger apartment. Id. at 1037. Father then secured a one-bedroom apartment in the same building. Although the caseworker visited the apartment several times, there was no evidence that OFC ever required, suggested or implied that Father would not be reunified with the child because of the apartment building in which he lived. Id. The Court opined that it was "inappropriate and unfair" for OFC to request that Father secure a larger apartment and not inform him that the building itself was unsuitable until the hearing. Id. The Court stated that Father's right to raise and nurture his own child is constitutionally protected and OFC's evidence fell substantially short of that necessary to involuntarily terminate Father's parental rights. Id. at 10378-38.

In **In Re A.I.**, 825 N.E.2d 798 (Ind. Ct. App. 2005), *trans. denied*, Parents argued that OFC failed to place them on notice as to what it considered a safe environment for the child, thereby denying them due process of law. Parents acknowledged that they each received and signed a Parental Participation Plan, but argued that the plan did not require Mother to leave Father despite the fact that OFC apparently required her to do so for reunification. Parents contended that OFC's failure to provide them with a safety plan or help them develop a plan that specifically outlined their obligations in preparing a safe environment hampered their ability to satisfy OFC demands. The Court found this argument to be without merit, stating it was an argument of semantics as to what constitutes a "safety plan." Id. at 813. The Court found that Father refused to leave the home, even when the trial court had ordered him to do so. Id. The Court found that the parties knew and understood that Father was to leave the home and were aware of the items contained in the Parental Participation Plans to which they agreed and signed. Id. The Court noted that Parents never requested a clarification of the recommendations or services prompted by OFC and found there was no basis for the claim that they lacked notice or were hampered by their ability to comply with OFC's requirements. Id.

In **Stewart v. Randolph County OFC**, 804 N.E.2d 1207 (Ind. Ct. App. 2004), *trans. denied*, Mother contended that OFC did not negotiate case plans with her and therefore her right to due process was denied. The Court found that the caseworker reviewed each of the case plans with Mother and asked her if she "had any problems with any of the responsibilities" before asking Mother to sign them. Id. at 1211. The Court also noted that Mother was represented by counsel at every stage of the proceedings and she never objected to the requirements set out in the case plans. The Court held that Mother had not demonstrated that she was denied due process. Id. The Court opined that the evidence showed that Mother understood what was expected of her under the case plans. Id. at 1211 n.2.

In **McBride v. County Off. Of Family and Children**, 798 N.E.2d 185 (Ind. Ct. App. 2003), Mother argued on appeal that her due process rights had been violated because the OFC failed to meet the statutory requirement of completion of a case plan in sixty days. Mother also complained about the plan's contents. The Court opined that any alleged deficiencies regarding the case plan did not deprive Mother of due process. Id. at 196. The Court noted the following: (1) Mother admitted at the termination hearing that OFC provided her with case plans and that she was aware of what was required of her before the children could be returned to her care; (2) OFC presented a draft case plan to Mother within the sixty-day period, but she did not sign it until four months later. Id.

In **In Re T.F.**, 743 N.E.2d 766 (Ind. Ct. App. 2001), the Court affirmed the probate court's order terminating Parents' parental rights. Id. at 767. The Court recognized the significance of providing copies of case plans to Parents, but did not find reversible error because the record indicated Parents were fully informed of what they needed to do to avoid termination and the case did not reflect other procedural errors. Id. at 772-73.

In **A.P. v. PCOFC**, 734 N.E. 2d 1107 (Ind. Ct. App. 2000), *trans. denied*, the Court found that the CHINS and termination cases were "interlocking" and failure to provide parents with a copy of the case plan reflecting requirements not contained in court orders was error, which, combined with a multiplicity of other procedural errors in the CHINS and termination cases, demanded reversal of the termination judgment. Id. at 1112-14, 1118.

VIII.C. Reasonable Probability that Continuation of Parent-Child Relationship Poses Threat to Well-Being of Child

IC 31-35-2-4(b)(2)(B)(ii) provides that there must be proof that "there is a reasonable probability that:(ii) the continuation of the parent-child relationship poses a threat to the well-being of the child." Note that DCS is required to prove only one of the elements stated at IC 31-35-2-4(2)(B).

VIII.C. 1. Cases Which Affirmed Threat to Well-Being Conclusions

In **In Re B.H.**, 44 N.E.3d 745 (Ind. Ct. App. 2015), *trans. denied*, the Court found the evidence readily supported the juvenile court's conclusion that a continuation of the parent-child relationship with Mother posed a threat to the children's well-being. Id. at 750. The Court said that the evidence of Mother's ongoing substance abuse issues which had never been remedied and her inability to maintain stable housing supported the trial court's conclusion on this issue. Id. The Court noted that, while Mother's one time residence met minimal standards, her live-in boyfriend, a convicted violent felon with substance abuse issues and prior DCS history, did not. Id. The Court also noted that Mother was homeless the month before the second day of the termination hearing. Id.

In **A.P. v. Indiana Department of Child Services**, 981 N.E.2d 75 (Ind. Ct. App. 2012), the Court affirmed the trial court's order which terminated the parental rights of Mother and Father to their two children. The Court found that the trial court did not abuse its discretion in concluding that Mother posed a threat to the children's 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 in a thirteen month period, 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"; (4) Mother had made no changes in other aspects of her life, including the chaos in her home life that had temporarily convinced her on more than one occasion that she should voluntarily terminate her parental rights; (5) Mother verbalized her problems, but did not act upon correcting them and continued to blame those around her for her difficulties; (6) Mother's failure to take responsibility for her problems extended to the permanent suspension of her driver's license, and her inability to admit that her disregard for the law resulted in "serious felony charges and further incarceration." Id. at 81-82. The Court observed that, even with the permanent presence of Grandparents in Mother's home, Mother could not avoid drugs that impaired her ability to parent and put her children at risk. Id. at 82. The Court also said that the trial court's findings supported its conclusion that there was a reasonable probability that continuation of the parent-child relationship between Father and the children posed a threat to the children's well-being. Id. at 84. Father contended that the trial court's findings were insufficient to support its conclusion that continuation of his parental relationship posed a threat to the children's well-being, and

specifically argued that the findings did not have a nexus to the children's well-being and their relationship with Father. The Court noted the following trial court's findings in support of its conclusion that continuing the parent-child relationship posed a threat to the children's well-being: (1) Father had been held in contempt for failure to maintain contact with DCS and for failure to visit the children; (2) Father had shown a pattern of failure to attend court proceedings in the CHINS and paternity cases and was one and one-half hours late to one of the termination hearings; (3) Father did nothing during the CHINS case; (4) the guardian ad litem attempted to reach Father by telephone and mail, but was unsuccessful. Id. at 83-84. The Court found no evidentiary basis to allow the trial court to conclude that Father's neglect would not continue, and that his continued neglect did not pose a threat to the children's well-being. Id. at 84.

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 was 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 which supported the trial court's conclusion that continuing the child's relationship with Father posed a threat to her well-being: (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 the family visitation facilitator stated that the child had indicated she was afraid of Father; (3) the child's behavior problems escalated after visitation with Father in that she acted aggressively, had nightmares, did not sleep well, and urinated in odd places; (4) 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; (5) the child's developmental delays and poor hygiene on the date she was taken into DCS custody suggested that Father did not know how to care for her properly, and Father still had not demonstrated that he had the knowledge to care for the child. Id. at 223-24.

In **In Re A.B.**, 887 N.E.2d 158 (Ind. Ct. App. 2008), the Court affirmed the termination of Mother's parental rights. Id. at 170. The Court held 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. Id. at 167. The Court noted: (1) the psychologist's testimony as to how Mother struggled to meet her own personal and emotional needs; (2) specific examples that the child repeatedly experienced significant regression after spending unsupervised time at home with Mother; (3) testimony of the treatment facility's therapist about 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 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 (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. Id. at 617, 619. The Court noted that: (1) Father had a history of substantiated

sexual abuse with his former step-daughter; (2) Father's 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 who were living in Florida; and (4) Father had serious psychological issues which, if left untreated, could interfere with his ability to provide a safe home environment for the child; (5) the case manager felt that 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 (6) Father had not been involved in counseling other than one or two sessions. Id. at 617. The Court also noted Father's refusal to admit he had a problem and his failure to complete any of the court-ordered counseling. Id.

In **In Re A.J.**, 877 N.E.2d 805 (Ind. Ct. App. 2007), *trans. denied*, the Court found that termination of Parents' parental rights was supported by sufficient evidence. Id. at 817. The trial court concluded that there was a reasonable probability that the continuation of the parent-child relationship between the children and Parents posed a threat to the well-being of each child. In affirming the termination, the Court noted: (1) the oldest child's testimony regarding the abuse she suffered while in the care of her parents was both detailed and credible; (2) the oldest child's testimony was substantiated by the testimony of the child's therapist and another psychologist witness; (3) at the time of the final termination hearing, Mother was not in compliance with the terms of the dispositional order; (4) Mother did not believe that she had a mental health problem and continued to deny that Father had ever molested the child; (5) Mother admitted she had not participated in any psychological evaluation or in any follow-up counseling, nor taken any medications for her mental health issues for the past eleven months; (6) at the time of the termination hearing, Father still had not admitted to sexually molesting the child; (7) Father did not complete any of the sexual offender classes which were necessary for reunification; (8) the guardian ad litem testified that termination of Parents' parental rights and subsequent adoption was in the best interests of the children; and (9) DCS had a satisfactory plan for the care and treatment of all three children following termination. Id. at 816.

In **In Re Involutary Termination of Parent-Child Relationship of Kay L.**, 867 N.E.2d 236 (Ind. Ct. App. 2007), the Court held DCS established by clear and convincing evidence that there was a reasonable probability the conditions which resulted in the children's removal would not be remedied, the continuation of the parent-child relationship was a threat to their well-being, and the trial court properly determined that termination of Mother's parental rights was in the best interests of the children. Id. at 242. In arriving at these conclusions, the Court cited the following evidence: (1) the children were originally removed because of Mother's abandonment and lack of supervision, poor hygiene, and a life- and health-endangering environment; (2) following their removal, Mother failed to take part in the CHINS proceeding and did not pursue reunification, failing to keep in contact with DCS for a full year after the CHINS proceeding was instituted; (3) at one point, Mother made the necessary changes to be reunited with her children and was reunited with them; (4) after three months of reunification, DCS removed the children from Mother's home due to her positive tests for marijuana and cocaine, and her admissions that she left the children alone or with unauthorized adults; (5) Mother's drug use led to the revocation of her probation; (6) at the time of the termination hearing, Mother was incarcerated; (7) Mother had no plan for employment following her release from prison; (8) Mother failed to comply with a number of dispositional goals put in place during the CHINS proceeding; and (9) although Mother might have had a sincere desire to be reunited with her children, she was unable to make choices that would keep the children safe. Id.

In **In Re Invol. Termn. of Par. Child Rel. A.H.**, 832 N.E.2d 563 (Ind. Ct. App. 2005), the Court found that Father's inability to maintain a stable and suitable living environment for the children supported the trial court's finding that he posed a threat to the children's well-being. Id. at 571.

Evidence showed that Father had exhibited threatening and violent behavior to himself and others over a long period of time and also suffered from a variety of mental health disorders. Id. at 570-71. The Court affirmed the termination of Father's parental rights. Id. at 571.

In **In Re A.I.**, 825 N.E.2d 798 (Ind. Ct. App. 2005), *trans. denied*, the Court found that the following evidence was sufficient to support the finding that continuation of the parent-child relationship posed a threat to the child's well-being: (1) Father attended only half of the counseling sessions before being dismissed from therapy; (2) Father projected blame for the domestic violence onto Mother; (3) Mother suffered from panic attacks, had been diagnosed as bi-polar, and was very depressed; (4) Mother was in an unhappy marriage and was a domestic violence victim; (5) Mother was very sporadic in her attendance at therapy; (6) Mother stated that she believed Father had molested his daughter and her two sons and felt that she could not protect the child from him; (7) Mother admitted she had a drug problem; (8) Mother attempted to go to a treatment facility many times, but withdrew each time; (9) Parents were unemployed, and did not have stable, safe housing; (10) Parents did not obtain drug treatment; (11) Parents failed to visit the child on a consistent basis; (12) Parents disappeared for weeks at a time; (13) Parents tested positive for drug use in random drug tests. Id. at 807-11. The Court affirmed the termination judgment. Id. at 817.

In **In Re D.L.**, 814 N.E.2d 1022 (Ind. Ct. App. 2004), *trans. denied*, the Court found that because Mother had not abandoned her life of drug abuse despite being given over two years to do so, the evidence supported the trial court's finding there was a reasonable probability that the continuation of the parent-child relationship posed a threat to the well-being of her younger child. Id. at 1029. The Court noted the following evidence: (1) Mother had tested positive for cocaine just one month before the termination hearing and had not maintained a stable source of income with which to support her children; (2) when Mother was abusing drugs and had custody of her children, she would leave them for long periods of time with various caregivers without picking them up as scheduled; (3) the trial court found that when Mother abused drugs, she endangered her children in a variety of ways. Id. at 1028-29. The Court affirmed the judgment terminating Mother's parental rights to her younger child. Id. at 1029. The Court reversed and remanded the trial court's judgment that Mother's parental rights to her older child should not be terminated with instructions to enter a termination order regarding the older child. Id. at 1030.

In **In Re K.S.**, 750 N.E.2d 832 (Ind. Ct. App. 2001), the Court found the evidence clearly showed that the continuation of the parent-child relationship posed a threat to the well-being of the children. Id. at 832-33. The trial court found that the children loved Mother and recognized that she loved them, but they were repeatedly physically and psychologically harmed by her inability to overcome her personal demons that keep her from translating her feelings into long-lasting actions of love. The Court found that the children had a need for permanency, and that it would be in their best interests to grow up in a clean, safe, secure, and stable environment, free of garbage, free of diseased, flea-infested animals, and free of being ushered out of their home and school to stay one step ahead of the next CPS investigation. Id. at 838. The Court affirmed the termination judgment. Id. at 839.

In **In Re L.S.**, 717 N.E. 2d 204 (Ind. Ct. App. 2000), the Court affirmed the termination judgment, finding that the following evidence was sufficient to show the reasons for removal would not be remedied and continuation of parent-child relationship posed a threat to the well-being of the children: (1) Parents were constantly at "war" with each other and this conflict was emotionally hard on the children; (2) Parents had dysfunctional personalities and an inability to relate in relationships; (3) Father chose to place his own need for gender change over the needs of his children and failed to recognize the emotional impact and adjustment

needs of his children; (4) Father chose to move out of state and thereby end his contact with his children. Id. at 210-11.

See also **In Re Involuntary Term. Paren. of S.P.H.**, 806 N.E.2d 874, 883 (Ind. Ct. App. 2004) (continuation of the parent-child relationship posed a threat to the children's well-being where children had made significant progress and improvement in behavior since being placed in foster care, no suitable relative placements were available, and Father would not be released from incarceration for another two or three years); **Everhart v. Scott County Office of Family**, 779 N.E.2d 1225, 1233 (Ind. Ct. App. 2002 (Court found that Father's previous physical abuse of one of his children supported trial court's finding that continuation of parent-child relationship posed threat to well-being of children), *trans. denied*; **In Re W.B.**, 772 N.E.2d 522, 531-34 (Ind. Ct. App. 2002) (Court found sufficient evidence to support trial court's conclusion that continuation of parent-child relationship posed threat to children's well-being, where: (1) Mother's parental rights to eight children had been previously terminated; (2) Father's parental rights to five children had been previously terminated; (3) four of children's five older siblings had been found to be severely developmentally delayed upon removal from Parents' care; (4) probable cause of four older siblings' pervasive delays was parental neglect); **In Re Involuntary Term. of Parent-Child Rel. [A.K.]**, 755 N.E.2d 1090, 1097 (Ind. Ct. App. 2001) (Court found no error in trial court's finding that maintaining parent-child relationship posed threat to children's well-being because: (1) Mother only partially completed parenting assessment portion of her counseling; (2) bonding assessment could never be completed because Mother failed to keep her scheduled visitation with children; (3) Mother's parenting assessment revealed that she was at extreme risk for abusing or neglecting her children without any intensive services; (4) Mother's counselor testified that drug abuse can impair parenting ability and stress of parenting could cause Mother to relapse; (5) Mother admitted to engaging in prostitution to support her drug habit); **Jackson v. Madison County Dept. of Family**, 690 N.E.2d 792, 794 (Ind. Ct. App. 1998) (Court found evidence of Mother's manic-depressive illness, lack of significant employment for ten years, inability to provide safe housing, and detrimental influence on one of the children was sufficient evidence to prove that continuation of parent-child relationship posed a threat to children's well-being); **Matter of M.B.**, 666 N.E.2d 73, 77-78 (Ind. Ct. App. 1996) (Court found that Father's extensive criminal record, substance abuse problem, and failure to care for another child who was adopted by Paternal Grandmother supported the trial court's finding that continuing the parent-child relationship posed a threat to the children); **Adams v. Office of Fam. & Children**, 659 N.E.2d 202, 206 (Ind. Ct. App. 1995) (Court found that evidence of Parents' failure to complete treatment for sexual abuse of children created likelihood that abuse would reoccur and posed threat to children's well-being); and **B.R.F. v. Allen County D.P.W.**, 570 N.E.2d 1350, 1352 (Ind. Ct. App. 1991) (Court found that Father's inability to provide child with adequate housing, and Father's criminal convictions and present incarceration demonstrated clearly and convincingly that continuation of parent-child relationship posed threat to child's well-being).

VIII.C. 2. Cases Which Reversed Threat to Well-Being Conclusions

In **In Re O.G.**, 65 N.E.3d 1080 (Ind. Ct. App. 2016), *trans. denied*, the Court reversed and remanded the juvenile court's order which terminated Parents' rights to their child. Id. at 1096. The Court did not find clear and convincing evidence that a continuation of the parent-child relationship between Mother and the child posed a threat to the child's well-being. Id. at 1094. The Court noted the following evidence: (1) the case manager testified DCS was not concerned about Mother's parenting, Mother and the child had a "strong bond", and Mother is a "loving mother" to the child; (2) the homebased therapist testified that visits between Mother and the child went well, Mother met all of the child's needs during visits, and Mother and the child were bonded; and (3) the guardian ad litem testified that Mother and the child had a "strong relationship." Id. The Court also found there was insufficient evidence to support the trial court's

conclusion that Father was unwilling to be a parent to the child, noting the absence of DCS engagement with Father. Id. at 1095-96. The Court opined that Father deserved a genuine chance to prove that he could parent his child. Id. at 1096.

In **In Re K.E.**, 39 N.E.3d 641 (Ind. 2015), the Indiana Supreme Court reversed the trial court's termination of Father's parental rights, noting the Court was not persuaded that Father's past criminal history and drug abuse provided clear and convincing evidence that Father currently posed a threat to the child's well-being. Id. at 649. Based upon Father's recent improvements and the healthy bond he had developed with the child, the Court could not find sufficient evidence to support the trial court's conclusion that, at the time of the termination hearing, Father posed a threat to the child's well-being. Id. The Court acknowledged that DCS recommended termination solely on the grounds that the child deserved permanency. Id. at 649-50. The Court considered the impact of delaying termination on the child's well-being, and found it significant that Aunt, who was the child's relative caretaker, the court appointed special advocate, and the DCS case manager all acknowledged it was unlikely that the child would be harmed by delaying termination. Id.

In **In Re D.B.**, 942 N.E.2d 867 (Ind. Ct. App. 2011), *trans. denied*, the Court found 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. Id. at 874. 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 had not been consistent with services. Id. The therapist described Father as nice, patient, kind, open to learning and being told things, and never negative or aggressive. Id.

In **In Re I.A.**, 934 N.E.2d 1127 (Ind. Ct. App. 2010), the Court concluded that DCS failed to prove by clear and convincing evidence that there was a reasonable probability that continuing the parent-child relationship threatened the emotional or physical well-being of the child. Id. at 1136. 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 to reunite 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 H.T.**, 901 N.E.2d 1118 (Ind. Ct. App. 2009), the Court found that because 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 Father's involvement in her life. Id. at 1122. 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 he was in prison, Father: (1) participated in programs with the intention of being released and fathering his daughter; (2) earned a BA from Ball State University and the attendant three-year deduction in his sentence; and (3) completed a substance abuse program and parenting

classes. DCS filed a CHINS petition on the child and her half-sister, and they were removed from Mother's home and placed with the half-sister's paternal grandparents (Foster Parents). Because Father was incarcerated, he could not provide care to the child at the time, but he sent letters and cards to the child and sent letters to the Foster Parents in an attempt to get to know them, to maintain a long distance relationship with the child, and to thank them for their assistance with the child. Foster Parents did not respond to Father's letters, and withheld the letters and cards from the child. Fifteen months after the child's removal from Mother, DCS filed a petition for involuntary termination of Father's parental rights. After his release from prison, Father called DCS to ask when he would start court-ordered services and was informed that DCS did not want to meet with him and would not provide services because such services were not in the child's "best interest." Following a hearing, the trial court terminated Father's parental rights. On appeal, the Court reviewed the case law and statutory framework in which termination cases are decided and noted that the trial court based its termination order on IC 31-35-2-4(b)((2)(B)(ii), which allows for termination when "the continuation of the parent-child relationship poses a threat to the well-being of the child." Id. at 1121. The Court found this case very similar to Rowlett v. Office of Family and Children, 841 N.E.2d 615 (Ind. Ct. App. 2006), in which the Court reversed the determination that a father, who had been in prison while his children thrived in foster care with the maternal grandparents, should be deprived of his parental rights. H.T. at 1121-22. The Court noted: (1) here, as in Rowlett, the child was not in a temporary arrangement pending termination of Father's parental rights 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 would not have a relationship with her half-sister appeared to be unfounded in that Father testified, "If I was to be in [the child's] life, she could see her sister as much as she wanted"; (3) as to the concern of MCDCS, the trial court, and the guardian ad litem that the child had not had a face-to-face meeting with Father, there was contact between him and the child before removal, lack of post-removal contact while Father was in prison was not due to him but to the inaction of others, and the lack of face-to-face contact after his release was occasioned by the filing of the termination petition, not by Father; (4) while in Rowlett Father's fitness was in question, the trial court in the H.T. case found that Father was willing and able to complete any services and become the custodial parent of his daughter. Id. at 1122.

In **Moore v. Jasper County Dept.,** 894 N.E.2d 218 (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. Id. at 228. 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. Id. The Court noted 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. Id.

In **In Re Term. of Parent-Child Relat. of A.B.**, 888 N.E.2d 231 (Ind. Ct. App. 2008), *trans. denied*, the Court reversed the judgment terminating Parents' parental rights. Id. at 239. The Court held 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. Id. The Court noted that the record showed: (1) following the child's removal from their care, 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, 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. Id. at 238. The Court also: (1) listed specific examples of how, at the time of the termination hearing, Parents were continuing to improve their economic and residential circumstances while living in Pennsylvania; and (2) found it significant that the caseworker testified she had no objection to the dismissal of the CHINS cases of the child's siblings so Parents could move to Pennsylvania, but the child's case had not been dismissed at that time because of problems in the home involving paternal grandmother's presence and because the child's toe still needed surgery; and (3) by the time of the termination hearing, these conditions had been remedied and thus were no threat to the child. Id. The Court observed that: (1) the family no longer lived with paternal grandmother, but 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 and the toe really bothered her; (3) the 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 **Bester v. Lake County Office of Family**, 839 N.E.2d 143 (Ind. 2005), the Indiana Supreme Court found that there was nothing in the record which 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. Id. at 152. Evidence showed that: (1) since before the termination hearing, Father had been employed full-time, and all of his random drug tests were negative for drugs and alcohol; (2) 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; (3) Father also visited his child on a regular basis and Father's and child's relationship was loving, caring and happy. Id. at 150-52. 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. Id. at 153. The Court concluded that Father's 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. Id. at 152. The Court found that OFC had not demonstrated by clear and convincing evidence that the child's emotional and physical development were threatened by Father's custody. Id. at 152-53.

In **In Re R.J.**, 829 N.E.2d 1032 (Ind. Ct. App. 2005), the Court reversed the trial court's termination judgment, finding there was not clear and convincing evidence to support the trial court's conclusion there was a reasonable probability that continuation of the parent-child relationship posed a threat to the child's well-being. Id. at 1039. The evidence showed that Father: (1) established suitable housing, and there was no evidence that he had "ongoing mental health issues that he has failed to effectively address"; (2) completed all of the services offered to him, and, except for the initial drug screen, none of the random drug screens were positive; and

(3) regularly visited the child, and often provided clothes, toys and gifts to the child during his visits. Id. at 1053-38.

In **In Re E.S.**, 762 N.E.2d 1287 (Ind. Ct. App. 2002), the Court found that the evidence was insufficient to prove that maintaining the parent-child relationship posed a threat to the child's well-being. Id. at 1292. The Court noted the child's behavior improved after the court terminated Mother's visitation rights, but the child also changed foster homes, was put on psychotropic medications, and changed therapists and therapy methods. Id. at 1291. The Court reversed the trial court's termination of Mother's parental rights. Id. at 1292.

VIII.D. Termination in Best Interests of Child

Many termination of the parent-child relationship opinions discuss the requirement of proof that termination is in the best interests of the child, but best interests is only one factor in termination cases. In **In Re Term. Of Parent-Child Relat. of A.B.**, 888 N.E.2d 231 (Ind. Ct. App. 2008), *trans. denied*, the Court opined that, although the guardian ad litem and the DCS caseworker both recommended termination of parental rights because they felt 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. The Court said that "[a] parent's right to his or her children may not be terminated solely because a better place to live exists elsewhere." Id.

The majority of opinions have found that the evidence supported the court's determination that termination was in the child's best interests. These cases are discussed immediately below.

In **Matter of G.M.**, 71 N.E.3d 898 (Ind. Ct. App. 2017), the Court reversed the termination of Father's parental rights to the child, affirmed the termination of Mother's parental rights to the child, and remanded to the juvenile court for proceedings consistent with the Court's opinion. Id. at 909. The CHINS petition was filed for the child when he was six days old based on Mother's use of unprescribed painkillers and heroin during pregnancy and the child's drug withdrawal at birth. The child also had a heart condition and required heart surgery. The Court held the juvenile court did not err when it concluded termination of Mother's parental rights was in the child's best interests because there was sufficient to support the conclusion. Id. The Court noted the following evidence in support of the juvenile court's best interests conclusion: (1) the DCS case manager testified termination was in the child's best interests because he was established in a home where he had been provided appropriate care, he had no bond with Parents, and Parents had not cared for or bonded with him; and (2) the guardian ad litem testified that termination was in the child's best interests because Mother had not made strides to address her substance abuse, had not attended the child's medical appointments or visited him, and had not learned about his medical condition. Id.

In **A.B. v. Indiana Dept. of Child Services**, 61 N.E.3d 1182 (Ind. Ct. App. 2016), the Court affirmed the trial court's order terminating Mother's parental rights to her two children and terminating Father's parental rights to the child born of his relationship to Mother. Id. at 1191. On appeal, Mother argued that the children would benefit if Mother were given "one more chance" since her sentence committing her to the Department of Correction for Class B felony dealing in methamphetamine, Class F felony possession of methamphetamine, Class D felony possession of precursors, and Class C felony neglect of a dependent was "almost served." The Court disagreed with Mother's argument, noting: (1) the evidence did not support Mother's claim that her twelve year sentence was almost served; (2) at the time of the termination hearing, Mother had been incarcerated for three years and had not seen her children for three years; (3) it could be two to three years before Mother was released from prison to probation; (4) both the DCS family case manager and the court appointed special advocate discussed the children's need for permanency and stability and testified that

termination of Mother's parental rights was in the children's best interests. Id. The Court opined that DCS sufficiently established that termination of parental rights was in the children's best interests. Id.

In **In Re N.G.**, 51 N.E.3d 1167 (Ind. 2016), the Indiana Supreme Court affirmed the trial court's order terminating Mother's parental rights to three of her children, a son and twin daughters. Id. at 1174. The children were removed due to Mother's untreated mental health diagnoses, substantiated history of physical abuse of her son who stated that Mother had struck him with a spiked belt and a board, Mother's non-compliance with a prior DCS case in another county, and Mother's "faking good responses" to the Child Abuse Potential Inventory prior to the initiation of the most recent CHINS case. On appeal, Mother claimed that there was insufficient evidence to support the trial court's finding that termination of her parental rights was in the children's best interests. The Court noted the following findings by the trial court: (1) the court appointed special advocate and the guardian ad litem both opined that termination was in the three children's best interests; and (2) the son's psychiatrist opined that termination of parental rights was in the son's best interests. Id. The Court held that a reasonable finder of fact could conclude that termination was in the children's best interests. Id.

In **In Re A.G.**, 45 N.E.3d 471 (Ind. Ct. App. 2015), *trans. denied*, the Court, citing McBride v. Monroe Cnty. Office of Family & Children, 798 N.E.2d 185, 203 (Ind. Ct. App. 2003), observed that: (1) in determining what is in the child's best interests, the trial court is required to look to the totality of the evidence; (2) in doing so, the court must subordinate the interests of the parents to those of the child; (3) the court need not wait until the child is irreversibly harmed before terminating the parent-child relationship. A.G. at 479. The Court noted it had previously held that the recommendation by both the case manager and the 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. A.G. at 479, citing A.D.S. v. Ind. Dep't of Child Servs., 987 N.E.2d 1150, 1158-59 (Ind. Ct. App. 2013), *trans. denied*. The Court said that both the case manager and the court appointed special advocate supported termination of Father's parental rights and adoption by the child's current caregivers. Id. at 479-80. The Court concluded that the totality of the evidence supported the trial court's determination that termination of Father's parental rights was in the child's best interests. Id. at 480.

In **In Re B.H.**, 44 N.E.3d 745 (Ind. Ct. App. 2015), *trans. denied*, the Court found the evidence about Father's incarceration and his substance abuse issues demonstrated that the juvenile court did not err by concluding that termination of his parental rights was in the children's best interests. Id. at 751-52. The Court noted that Father's children were five and seven years old when he stabbed their uncle in the children's presence. Id. at 751. The Court also noted the following evidence in support of the juvenile court's order terminating Father's parental rights: (1) when the children were removed, Father was dealing in and using methamphetamine, which contributed to an environment that led to his seven-year-old child's positive test for methamphetamine; (2) Father's release date was nearly five years away from the date of the termination hearing; (3) Father did not testify about his housing or employment plans following his release, or his completion of any substance abuse programs while incarcerated. Id. at 751-52. The Court also found that, given Mother's wholesale inability or refusal to address her substance abuse and housing issues and improve her parenting skills, the juvenile court did not err by finding that termination of Mother's rights was in the children's best interests. Id. at 751. The Court also noted Mother did not maintain consistent contact with the children in person or by telephone and that the children were in a loving, stable placement with their maternal grandparents, who planned to adopt them. Id. at 750-51. The Court affirmed the termination judgment as to both parents. Id. at 752.

In **In Re A.S.**, 17 N.E.3d 994 (Ind. Ct. App. 2014), the Court affirmed the trial court's ruling that termination was in the children's best interests. Id. at 1006. Although the Court conceded that permanency alone is not sufficient to support a termination of parental rights, the Court also noted that five separate witnesses, including the DCS case manager, the court appointed special advocate, and the children's therapist, all testified that termination would serve the children's best interests. Id. The Court also noted that Parents' substance abuse had not improved and had in fact worsened since the CHINS case began. Id. The Court noted that recommendations of the court appointed special advocate and case manager that termination be granted, in conjunction with evidence that the conditions leading to the children's removal will not be remedied, are sufficient to demonstrate that termination of parental rights is in the children's best interests. Id.

In **C.A. v. Indiana Dept. of Child Services**, 15 N.E.3d 85 (Ind. Ct. App. 2014), the Court affirmed the trial court's termination of Mother's and Father's parental rights to their three children. Id. at 96. The Court did not find error in the trial court's determination that termination of Parents' rights was in the children's best interests. Id. at 95-96. The Court noted the following evidence on the children's best interests: (1) recommendations from service providers, the court appointed special advocate, and the family case manager that termination of Parents' rights was in the children's best interests; and (2) Mother exhibited disinterest in the children by frequently cancelling scheduled visits with them, speaking on the telephone throughout the visits, and leaving visits thirty to forty-five minutes early. Id. at 94-95. The Court explained that, in making the termination decision, a trial court must look at the totality of the circumstances in a particular case, and the court need not wait until a child is irreversibly harmed before terminating the parent-child relationship. Id. at 94.

In **In Re S.E.**, 15 N.E.3d 37 (Ind. Ct. App. 2014), the Court affirmed termination of Mother's parental rights, noting that multiple service providers, including Mother's case manager and the child's guardian ad litem, testified that they believed termination would be in the child's best interests. Id. at 46. The Court found that the evidence that the conditions leading to the child's removal would not be remedied, in conjunction with testimony from multiple service providers that termination would best serve the child's interests, was sufficient to support an order terminating parental rights. Id. The Court also noted that any last-minute attempt by Mother to correct her behavior was not necessarily sufficient to overcome a long record of more than two years of failure to comply with services. Id.

In **In Re E.M.**, 4 N.E.3d 636 (Ind. 2014), the Indiana Supreme Court affirmed the trial court's order terminating Father's parental rights to his two children, who were removed from home by DCS when the younger child was in early infancy and the older child was barely one year old. Id. at 649. Father argued that termination was not in the children's best interests, and, at oral argument before the Court, cited social science research that shows significant benefits to children whose non-custodial fathers remain involved in their lives. The Court observed that attempting to preserve and reunify families promotes not just parents' fundamental liberty interest in raising their own children, but also the children's best interests. Id. at 646. The Court further observed that children also have a paramount need for permanency, which the Court has called "a central consideration for determining the child's best interests", quoting K.T.K. v. Indiana Dept. of Child Services, 989 N.E.2d 1225, 1235 (Ind. 2013). E.M. at 647-48. The Court noted the following evidence: (1) the children had lived and bonded with their grandmother for nearly a year and a half; (2) the children had never bonded with and did not know Father; (3) Father was still not ready to parent the children; and (4) Father would likely need additional services on parenting, domestic violence, and anger management. Id. at 648. The Court said the final question was whether Father's efforts after his release from prison *necessarily* made the children's interest in family preservation more compelling than their need for permanency after three years (emphasis in opinion). Id. The Court opined that children's vital interests in both preservation and permanency are inherently at odds in termination cases. Id. at 649. The Court held

that, after hearing the extensive testimony and reviewing voluminous exhibits, the trial court was within its discretion to find the children's needs to be weightier than Father's belated efforts. Id.

In **In Re J.C.**, 994 N.E.2d 278 (Ind. Ct. App. 2013), the Court affirmed the trial court's judgment which terminated Mother's parental rights. Id. at 291. The Court opined the trial court's findings supported its conclusion that termination was in the children's best interests. Id. Among the findings the Court noted were: (1) Mother's drug use and criminal activity had resulted in the children's removal more than once; (2) Mother was incarcerated at the time of the termination hearing with a release date scheduled for the following year; (3) Mother faced revocation of her probation for an earlier charge based on drug-related criminal activity. Id. at 286. Although Mother argued that she never harmed her children, and that "DCS providers repeatedly commented on Mother's tender care for her children, her neat and organized home, and her willingness to comply with the requests of the court and the Department of Child Services", the Court responded that Mother's arguments were invitations to reweigh the evidence, which the Court cannot do. Id. at 290.

In **K.T.K. v. Indiana Dept. of Child Services**, 989 N.E.2d 1225 (Ind. 2013), the Indiana Supreme Court affirmed the trial court's judgment that terminated Mother's rights to her three children, ages ten, seven, and two years. Id. at 1236. On appeal, Mother challenged the trial court's conclusion that termination was in the children's best interests. The Court could "not say that the trial court erred in concluding that termination of Mother's parental rights was in the children's best interests." Id. The Court noted the following evidence in support of the trial court's conclusion: (1) the children had been placed in five different living environments over a period of sixteen months and at times were separated; (2) the children's home-based therapist testified that the children were doing better since being placed in Foster Parents' home four months before the Court began hearing evidence on the termination petition, and that the uncertainty of where they were going to be had been troublesome to the children; (3) a psychologist evaluator testified that the children were more bonded with Foster Parents than would normally be expected in that short period of time and the children's best interests would be served by allowing them to remain in Foster Parents' care; (4) the guardian ad litem testified that termination was in the children's best interests based on her concerns over the length of time that it took Mother to commit to a path of recovery and "the fact that the children just really need a permanent home"; (5) the family case manager supported termination because the children "need some sort of stable permanency and a drug free environment to grow and develop as normal kids deserve"; and (6) the family case manager testified that the children's permanency needs would be satisfied by termination and adoption by Foster Parents. Id. at 1235. The Court quoted In Re A.C.B., 598 N.E.2d 570, 572 (Ind. Ct. App. 1992), which states that "[i]ndividuals who pursue criminal activity run the risk of being denied the opportunity to develop positive and meaningful relationships with their children." K.T.K. at 1235-36. The Court opined that, not only did Mother's choice of conduct result in a substantial period of incarceration during the children's young lives, but she deprived them of their youth and innocence by exposing them to her drug usage and—as their primary caretaker—jeopardized their physical safety by neglecting to properly supervise them while she pursued her desire to continue using drugs. Id. at 1236.

In **A.D.S. v. Indiana Dept. of Child Services**, 987 N.E.2d 1150 (Ind. Ct. App. 2013), *trans. denied*, 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 and affirmed the termination judgment. Id. at 1159. Citing In Re M.M., 733 N.E.2d 6, 13 (Ind. Ct. App. 2000), the Court observed it has previously held that the recommendation by both the case manager and child advocate to terminate parental rights, in addition to evidence that the conditions resulting in removal would not be remedied, was sufficient to show by clear and convincing evidence that termination was in the child's best interests. A.D.S. at 1158-59. The Court noted the following evidence in support of the trial court's conclusion that termination was in the children's best interests: (1) the family case

manager and the guardian ad litem supported termination of Mother's rights and adoption by the children's current caregivers; (2) Mother's issues with substance abuse and domestic violence had not been remedied and posed a risk to the safety of the children if they were returned to her care; (3) "[p]ermanency is a central consideration in determining the best interests of a child," quoting In Re G.Y., 904 N.E.2d 1257, 1265 (Ind. 2009); (4) the children had suffered from a lack of permanency and had improved while residing with their current pre-adoptive caretakers. Id. at 1159.

In **In Re A.P.**, 981 N.E.2d 75 (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. Id. at 83. Mother argued that she had a loving bond with the children and pointed to evidence of her attendance at programs while incarcerated. The Court noted the following findings by the trial court: (1) the guardian ad litem reported that it was in the children's best interests for Mother's parental rights to be terminated; (2) 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, her lack of progress with home-based counseling, and her failure to pay ordered child support to Grandparents. Id. The Court also noted the testimony of the family case manager that Mother's past behavior had proven to be the best predictor of her future behavior; thus, he concluded that termination of Mother's parental rights was in the children's best interests. Id. The Court said that Mother's strong bond with the children did not eradicate the effects that her continued behavior had and would have upon them. Id. 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. Id. at 84-85. Father argued that he and the children developed a loving bond when he allegedly engaged in unauthorized visits with the children and pointed to maternal grandmother's and others' testimony on his positive relationship with the children. The Court said that both the guardian ad litem and the family case manager had concluded that termination of Father's rights was in the children's best interests. Id. at 84. The Court noted that, with regard to the positive testimony of Mother and the maternal grandmother at the termination hearing, the trial court was not required to believe or assess the same weight to evidence as the person citing the evidence. Id. at 85.

In **In Re C.G.**, 954 N.E.2d 910 (Ind. 2011), the Indiana Supreme Court found that the evidence supported the trial court's findings that termination was in the child's best interests. The Court stated 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) the child's therapeutic needs were being served; and (4) the child was bonded to her foster family and the goal was for the child to be granted a permanent home in a loving and stable environment. Id. at 924-25.

In **In Re A.K.**, 924 N.E.2d 212 (Ind. Ct. App. 2010), the Court affirmed the trial court's termination order, finding that termination of both Mother's and Father's rights was in the child's best interests. Id. at 221, 224. When the child was removed from Mother and Father, both parents were intoxicated, Father had tried to attack Mother with a hatchet, and the child was very dirty and developmentally delayed. The dissolution court had awarded custody of the child to Father and denied parenting time to Mother until it was recommended by a licensed mental health professional. The Court found that the evidence supported the conclusion that termination of Mother's rights was in the child's best interests. Id. at 221. The Court noted the evidence that Mother had been unable to remain drug free, manage her mental illness, and maintain stable housing along with her inability to meet case plan requirements, which would have allowed her visitation with the child. Id. The Court noted that the following evidence supported the conclusion that termination of Father's parental rights was in the child's best interests: (1) Father's familial bond with the child was tenuous and he had not demonstrated an ability to parent the child; (2) although the child still had behavioral issues, her

behavior had improved except after visitation with Father, whom she feared; (3) the child required stability Father could not provide; (4) the continuation of reunification efforts would disrupt the progress the child had made both emotionally and cognitively. Id. at 224.

In **In Re H.L.**, 915 N.E.2d 145 (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. Id. at 150. 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. Id. 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. Id.

In **In Re A.D.W.,** 907 N.E.2d 533 (Ind. Ct. App. 2008), the Court affirmed the trial court's termination of Mother's parental rights. Id. at 540. The Court opined that, when determining whether termination of parental rights is in the best interest of the child, the trial court need not wait until a child is irreversibly harmed such that his or her physical, mental, and social development are permanently impaired before terminating the parent-child relationship. Id. 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 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 because their grades had improved since being placed with their aunt and uncle and the children had stability for the first time in their lives; (3) the children's therapist testified that she believed it would be harmful to the children to continue the parent-child relationship, the children had been doing better since having more stability in their lives, and they would continue to improve with stability. Id. The Court concluded that the recommendations by the caseworker and the 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. Id.

See also the following cases where termination judgments were affirmed based in part on the children's best interests. **In Re J.S.**, 906 N.E.2d 226, 236-37 (Ind. Ct. App. 2009) (Court held that termination was in child's best interests based on totality of evidence, including severity of child's initial injuries and Parents' failure to offer explanation as to how they were sustained, Parents' failures to complete or to benefit from many services available to them, and testimony of case manager and court appointed special advocate recommending termination); **In Re I.A.**, 903 N.E.2d 146, 156 (Ind. Ct. App. 2009) (Court found termination of Mother's parent-child relationship with her youngest child was in youngest child's best interests, even though, at same time, trial court had denied termination petition for Mother's four older children); **In Re L.B.**, 889 N.E.2d 326, 339-41 (Ind. Ct. App. 2008) (Court held that evidence was sufficient to support that termination was in the children's best interests, including testimony of guardian ad litem and case manager, evidence of Father's current drug use, Father's failure to complete court-ordered services, and fact that children were happy, bonded with the foster parents, and doing well in their pre-adoptive foster homes); **In Re A.B.**, 887 N.E.2d 158, 163, 169-70 (Ind. Ct. App. 2008) (Court found termination of Mother's parental rights in child's best interests where Mother had been unable and unwilling to provide the child with a safe and stable home environment); **In Re S.L.H.S.**, 885 N.E.2d 603, 617-18 (Ind. Ct. App. 2008) (termination of Father's parental rights in child's best interests where: (1) Father failed to complete court-ordered counseling services and sex offender specific treatment, to exercise regular

visitation with child, and to pay court-ordered child support; (2) Father was unemployed and refused to admit he had any psychological or psychosexual problems; (3) child had been removed from his parents' home and under supervision of DCS for half his life; (4) the court appointed special advocate testified that continuation of parent-child relationship posed a threat to child's well-being, termination was in child's best interest, and child needed permanency; and (5) the case manager testified in favor of termination); **A.J. v. Marion County Office of Family**, 881 N.E.2d 706, 117-19 (Ind. Ct. App. 2008) (Court found recommendations of caseworker and guardian ad litem, coupled with evidence of Mother's extensive drug history, her failure to complete court-ordered services, and testimony that children were happy and doing well in their pre-adoptive foster homes sufficient to support determination that termination was in children's best interests), *trans. denied*; **In Re B.J.**, 879 N.E.2d 7, 22-23 (Ind. Ct. App. 2008) (totality of evidence supported conclusion that termination of Mother's parental rights was in children's best interests, where Mother had not completed court ordered services, and the children were progressing well and their medical and psychological needs were being met in foster care), *trans. denied*; **In Re A.J.**, 877 N.E.2d 805, 816 (Ind. Ct. App. 2007) (termination of the parent-child relationship between the children and their parents was in children's best interest; Father had completed no services, Mother was not in compliance with terms of dispositional order, and the guardian ad litem testified that termination was in the children's best interests), *trans. denied*; **In Re Involuntary Termination of Parent-Child Relationship of Kay L.**, 867 N.E.2d 236, 242 (Ind. Ct. App. 2007) (DCS established by clear and convincing evidence that termination of Mother's parental rights was in best interests of the children because Mother had failed to comply with dispositional goals and had been unable to make choices that would keep her children safe); **Castro v. Office of Family and Children**, 842 N.E.2d 367, 374-75 (Ind. Ct. App. 2006) (Court affirmed termination was in the best interests of child because (1) Father's continued incarceration would prevent him from providing housing, stability, and supervision for the child; (2) child was in need of stability and permanency; (3) child was doing well in her current placement; and (4) there was no guarantee Father would be a suitable parent once he was released from prison or that he would even obtain custody), *trans. denied*; **In Re Invol. Termn. of Par. Child Rel. A.H.**, 832 N.E.2d 563, 570-71 (Ind. Ct. App. 2005) (Father's mental health impairment together with his habitual pattern of conduct supported trial court's conclusion that it was in children's best interests that Father's parental rights be terminated); **In Re A.I.**, 825 N.E.2d 798, 811 (Ind. Ct. App. 2005) (termination was in child's best interests where Parents failed to adequately demonstrate a change from conditions that necessitated child's continued removal, Parents failed to provide stable environment for the child, Parents' substance abuse and mental health problems continued, Parents failed to use services provided since removal of child, and court appointed special advocate and case manager testified that they believed termination to be in child's best interest), *trans. denied*; **In Re D.L.**, 814 N.E.2d 1022, 1030 (Ind. Ct. App. 2004) (Court opined that termination of Mother's parental rights was in best interests of both children, affirmed judgment terminating Mother's parental rights to her younger child, and reversed determination that Mother's parental rights to older child should not be terminated and remanded to trial court with instructions to enter order terminating Mother's parental rights to older child; Mother had been given ample time to leave behind her life of drug abuse and maintain stable source of income with which to support her children), *trans. denied*; **In Re Involuntary Term. Paren. of S.P.H.**, 806 N.E.2d 874, 883 (Ind. Ct. App. 2004) (termination of Father's parental rights was in children's best interests where: (1) case manager testified that children needed sense of permanency and stable place to live, and had done well in their foster home; (2) Father was incarcerated, and even assuming he would be released in two or three years, he would have missed significant part of children's developmental years; (3) Father would not be able to provide financially for children while incarcerated; (4) there was no guarantee Father would ever be able to care for his children or that he would ever get custody of them upon his release; and (5) children's needs were too substantial to force them to wait for determination whether Father would be able to be parent for them); **In Re Termination of Relationship of D.D.**, 804 N.E.2d 258, 267 (Ind. Ct. App. 2004) (Court found that Mother's history of substance abuse and mental health

problems supported trial court's determination that termination was in child's best interests), *trans. denied*; **McBride v. County Off. Of Family & Children**, 798 N.E.2d 185, 203 (Ind. Ct. App. 2003) (termination in children's best interests where caseworkers and court appointed special advocate, who was a pediatrician, testified that termination of Mother's parental rights would serve children's best interests and that children needed permanency, and several witnesses testified that children were thriving in their current foster home); **In Re C.C.**, 788 N.E.2d 847, 855-56 (Ind. Ct. App. 2003) (termination of Father's parental rights in child's best interest where child had lived with foster family from age of ten days, Father had only visited him once, reunification with Father was not recommended because he failed to complete services, and guardian ad litem testified that giving Father more time to complete services was not in child's best interests because it would continue to delay permanency in child's life), *trans. denied;* **In Re J.W.**, 779 N.E.2d 954, 963-64 (Ind. Ct. App. 2002) (termination of Mother's parental rights was in child's best interests where psychiatrist diagnosed Mother with probable Munchausen's syndrome by proxy and recommended Mother have only supervised visitation with child and never have custody of child), *trans. denied*; **In Re A.L.H.**, 774 N.E.2d 896, 900 (Ind. Ct. App. 2002) (termination in child's best interest where Mother had history of inability to provide stable environment for child in that Mother had lived in seven different residences over five year period); **In Re W.B.**, 772 N.E.2d 522, 534-35 (Ind. Ct. App. 2002) (termination was in children's best interests because they were thriving in their foster placement, foster mother was prepared to provide them permanent home through adoption, and further efforts to reunify children with Parents would only necessitate children remaining in limbo rather than working toward permanency that children needed and deserved; Court was not persuaded by Parents' evidence of improvements they had made while proceedings were pending, which included Mother's stable employment, Father's new business, length of their current residence, and their interaction with children); **A.F. v. MCOFC**, 762 N.E.2d 1244, 1253 (Ind. Ct. App. 2002) (termination in children's best interests where children suffered from multiple physical and emotional problems which improved after they were removed from Father's care; since being placed in foster care children were thriving, participating in activities, and making good grades in school; children had indicated that they did not wish to return to Father's home; Father failed to make attempt to see children for over a year and consistently placed his own needs and interests before his children's; and witnesses testified that it was in children's best interests to terminate Father's parental rights); **In Re Involuntary Term. of Parent-Child Rel. [A.K.]**, 755 N.E.2d 1090, 1097 (Ind. Ct. App. 2001) (termination in children's best interests where Mother failed to keep scheduled visitation with children and to complete services provided by OFC; relatives who had been investigated as possible placements for children were not approved; and children had suffered from Mother's drug abuse and had thrived since being placed with foster mother); and **M.H.C. v. Hill**, 750 N.E.2d 872, 878-79 (Ind. Ct. App. 2001) (termination in child's best interests where child had been in continuous care of his paternal aunt since he was four months old; termination of parental rights would insure that relationship between child and his aunt continued without interruption, providing the child with stability; child had thrived and experienced normal healthy development, and developed a sibling relationship with his aunt's children; aunt had taken child to the correctional facility to visit with Father and was not opposed to continuing visits; Father had eight felony convictions and was currently incarcerated; Father had five other children, with whom he had very little contact; and three of Father's other children were wards of the State of California).

In the following cases, the trial court's judgment terminating parental rights was reversed on appeal, and the Court found that termination of the parent-child relationship was not in the child(ren)'s best interests.

In **In Re A.W.**, 62 N.E.3d 1267 (Ind. Ct. App. 2016) the Court reversed the trial court's order which terminated Mother's parental rights to her two children, who are half-siblings. Id. at 1269. Mother and the Father of the younger child were married. Mother also had an older child from a prior

relationship. The trial court did not terminate the parent-child relationship between Father and the younger child. DCS did not appeal the trial court's denial of the DCS petition to terminate Father's parental rights to the younger child. Both children were residing in foster care at the time of the termination hearing. Mother and Father testified that they wished to reunite with the children after Mother's release from prison. Father stated that he was prepared to separate from Mother if she relapsed and used drugs again, and testified that there would be no drug use allowed around the children. The Court concluded that DCS had failed to prove by clear and convincing evidence that terminating Mother's rights to both children, thus separating the children, was in the children's best interests. Id. at 1275. The Court observed that the trial court had allowed Mother, Father, and the younger child to reunite, but left the older child, who is seen as Father's daughter, separated from her family. Id. at 1274-75. The Court said that, while the Indiana Code does not prohibit terminating only one parent's rights to a child, terminating only one parent's rights in this case was "incongruous." Id. at 1273. The Court noted the following evidence on the children's best interests: (1) the case manager and the foster mother testified it was in the children's best interests to remain together; (2) Father testified that the children had been together their entire lives and would "hurt dearly" if they were separated; (3) the trial court called the children's relationship with one another an "important sibling bond." Id. at 1275. The Court noted that, despite all of this testimony, the trial court still concluded that the children should be separated, with the older child bring adopted by her foster parents and the younger child being returned to the care of his Father. Id.

In **Termination of Parent-Child Relationship [of R.S.]**, 56 N.E.3d 625 (Ind. 2016), the Indiana Supreme Court reversed the trial court's order terminating Father's parental rights to his ten-year-old child. Id. at 631. The Court held that the trial court's findings did not clearly and convincingly support its conclusion that termination was in the child's best interests. Id. at 629. The Court found it "overwhelmingly apparent" through the trial court's findings and the testimony provided at the termination hearing that Father and the child love one another and have a close bond. Id. at 629-30. The Court noted that Father exercised parenting time with the child two to three times per week, including overnights, and the trial court concluded that continued visitation with Father was in the child's best interests. Id. at 630. The Court also noted that, since his release from incarceration, Father had repeatedly demonstrated a desire to parent the child and had made progress by his successful completion of probation and maintaining clean drug screens. Id. The Court found that Father's failure to attend every scheduled supervised visitation or to attend CHINS hearings was not clear and convincing evidence that he was uninterested or unwilling to parent the child. Id.

In **In Re V.A.**, 51 N.E.3d 1140 (Ind. 2016), the Indiana Supreme Court reversed the trial court's termination judgment, finding that the evidence did not meet the heightened clear and convincing burden. Id. at 1153. Mother suffered from mental illness and refused to take her medication. Father had elected to remain with Mother, so the child was removed from home and adjudicated a CHINS. The child's guardian ad litem testified that terminating parental rights would "give this child a different opportunity". The Court noted that "the rights of parents to raise their children should not be terminated solely because there is a better home for the children." In Re K.S., 750 N.E.2d 832, 837 (Ind. Ct. App. 2001). V.A. at 1151. Quoting In Re I.A., 934 N.E.2d 1127, 1136 (Ind. 2010), the Court observed that "termination is intended as a last resort, available only when all other reasonable efforts have failed." V.A. at 1151-52. The Court said that, although it was unfortunate for any child to experience the "emotional turmoil" and difficulties of living with a parent who is suffering from mental illness, the evidence did not clearly and convincingly establish that the way to serve the child's best interests was to "give this child a different opportunity" by irrevocably severing her relationship with Father and making her freed for adoption. Id. at 1152. The Court observed that the need for permanency is certainly *a* factor in determining whether termination is in the child's best interest, but a child's need for immediate permanency is not reason enough to terminate parental rights where the parent has an established relationship with the child and has taken positive steps

toward reunification in accordance with a Parent Participation Plan (emphasis in opinion). Id. The Court did not believe the trial court's concerns that Father *may not* be able to simultaneously care for Mother and the child in the same household was a sufficient basis upon which to find that DCS had proven that termination was in the child's best interests (emphasis in opinion). Id. at 1152 n.8. The Court found it clear that, at the time of the termination hearing, DCS had not yet found an adoptive home for the child. Id. at 1152. The Court reviewed statistics, including that in 2012 there were approximately 2400 children in Indiana foster care awaiting adoption and the declining numbers of adoptions from DCS care between 2012 and 2014. Id. at 1152 n.9. The Court opined that relegating the child as a permanent ward of the State for an undetermined period of time until a special needs adoptive placement was identified did not clearly and convincingly show that termination was in the child's best interests by establishing permanency. Id. at 1152-53.

In **H.G. v. Indiana Dept. of Child Services**, 959 N.E.2d 272 (Ind. Ct. App. 2011), *trans. denied*, the Court stated that the evidence did not support the trial court's conclusion that termination was in the children's best interest. Id. at 289. The Court noted that Mother and the 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 could 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 G.Y.,** 904 N.E.2d 1257 (Ind. 2009), the trial court terminated Mother's parent-child relationship with her son and the Indiana Supreme Court reversed the termination judgment. Id. at 1266. Mother was the child's sole caretaker during the first twenty months of his life; and there were no allegations that she engaged in any criminal behavior during this period, or was an unfit parent in any way. Mother had delivered cocaine to a police informant the year before the child's birth, for which offense she was arrested and incarcerated, thirty-two months after the offense. DCS filed a CHINS petition alleging the child was a CHINS because Mother had been unable to make the appropriate arrangements for his care. The child was placed in foster care. Mother pled guilty to Dealing in Cocaine as a Class B felony and was sentenced to twelve years, with four years suspended to probation. The child was found to be a CHINS and the trial court ordered continued placement in foster care and "Reunification with parent(s)" as the permanency plan. At the dispositional hearing, the child was continued in foster care and Mother was ordered to obtain a source of income and suitable housing, and to complete home-based counseling, a parenting assessment, parenting classes, and a drug and alcohol assessment. Ten months after the dispositional hearing, DCS filed a petition to terminate the parent-child relationship. At the time the hearings on the termination petition took place, Mother's date or release from prison was more than two years in the future. The Court held that DCS did not present clear and convincing evidence to demonstrate that termination of Mother's parental rights was in the child's best interests. Id. at 1262-66. 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 would remain unavailable to parent because her pattern of criminal activity made it likely that she would 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 had a closer relationship with his foster parents than he did with Mother; and (D) the child's general need for permanency and stability. Id. The Court found that none of the four 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. at 1265-66. The Court noted that: (1) all of Mother's criminal history consisted of offenses committed before the child's conception, and for the first twenty months of his life, the record gave 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 showed 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 attending large group classes and that even though she had a history of drug use, she had not used cocaine since before the child's birth; (6) Mother also completed a 15-week parenting class and actively participated in an inmate to work program which would result in an apprenticeship certification and job placement after release from prison; (7) Mother was also in the midst of her second semester working towards an associate's degree, which when completed would result in her release date being moved up by about one year; (8) Mother had started a culinary arts certification program; and (9) Mother had visited the child at prison monthly for one to two hours and no concerns had been raised by the monitoring case manager. Id. at 1261-65.

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 Court concluded that termination of Mother's parental rights at this time was premature, in that everyone agreed that the child should continue to reside in a facility so that he could receive full-time medical and behavioral care, and no one could predict when, or even whether, the child would become stabilized, or what would be best for him when and if he did become stabilized. Id. at 313-14. The Court opined that, to say that Mother's parental rights must be terminated merely because her child has special needs and she needed 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 **In Re Term. of Parent-Child Relat. of A.B.**, 888 N.E.2d 231 (Ind. Ct. App. 2008), *trans. denied,* the Court reversed the termination judgment. Id. at 239. The Court observed that, although the caseworker and the guardian ad litem recommended termination of Parents' parental rights because they felt it was in child's best interests to be adopted by pre-adoptive foster mother, this alone could not serve as the basis for termination of parental rights. Id. The Court said that a parent's right to his or her children may not be terminated solely because a better place to live exists elsewhere. Id. at 239.

In **In Re E.E.S.**, 874 N.E.2d 376 (Ind. Ct. App. 2007), *trans. denied*, the Court reversed the termination of Mother's parental rights. Id. at 382. The Court concluded the evidence demonstrated that termination was in the best interests of the children, but OFC had failed to uphold its end of the agreement with Mother that in exchange for Parents' admitting to allegations of the CHINS petitions, OFC would maintain and support the family bond until Mother was released from prison and had an opportunity to engage in services. Id. at 381-82.

In **Rowlett v. Office Of Family and Children**, 841 N.E.2d 615 (Ind. Ct. App. 2006), *trans. denied*, the Court concluded that the record did not support a finding that termination at that point in time was in the children's best interests. Id. at 622. The Court reversed the termination judgment, noting the following evidence: (1) Father had maintained a relationship with the children while incarcerated by letters and telephone calls; (2) the children were happy to talk to Father, telling him they loved him and asking him when he was coming home; (3) providing stability to the children through adoption

by their grandparents with whom the children had resided for three years was not in and of itself a valid basis for termination; and (4) there was little harm in extending the wardship, which would have little, if any, impact on the children who were thriving in their grandparents' care. Id. at 622-23.

In **In Re R.J.**, 829 N.E.2d 1032 (Ind. Ct. App. 2005), the Court reversed the termination judgment due to insufficient evidence. Id. at 1039. Although many of OFC's witnesses recommended termination because it was in the child's best interests, the Court opined that this evidence, alone, was not a basis for termination. Id. at 1038. Best interests is only one of several factors a trial court must consider before granting a termination petition. Id. at 1038-39.

VIII.E. Satisfactory Plan for Care of Child

IC 31-35-2-4(b)(2)(D) requires proof that "there is a satisfactory plan for the care and treatment of the child." The case law is clear that the plan does not have to be detailed, as long as it offers a general sense of the plan for the child. See **Matter of Miedl**, 425 N.E.2d 137, 141 (Ind. 1981), in which the Indiana Supreme Court stated that, "[i]t was certainly not the intention 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 involved….the Legislature intended that the Welfare Department would point out in a general sense to the trial court the direction in which its plans were going." The plan does not have to include information about placement with a specific adoptive family, but may identify the foster parents or relatives as a possible adoptive placement. The plan does not have to guarantee that the child will be adopted, and can include other permanent options for the child besides adoption.

Evidence that there is a specific adoptive family available for the child is not required for this element to be met. In **Matter of D.G.**, 702 N.E.2d 777, 781 (Ind. Ct. App. 1998), the Court found that the caseworker's testimony that the child is "highly adoptable and OFC intends to seek adoptive parents for her" sufficiently demonstrated that the office had a satisfactory plan for child. Identification of foster parents or relatives as potential adoptive parents may be relevant to a finding that the proposed plan for the child is satisfactory. In **In Re B.D.J.**, 728 N.E.2d 195, 203 (Ind. Ct. App. 2000), the Court found that the plan of the office of family and children to have the children adopted by foster parents or to pursue other placement for the special needs children was adequate. The Court relied on the following testimony of the office of family and children caseworker in affirming the trial court's ruling that the plan for the children was satisfactory: "The foster parents have expressed some interest. If that does not work out, the children's - the children have already been turned over to the special needs adoption team and their names have been placed there." Id. at 204.

The plan for the child does not have to include adoption, and evidence that adoption is unlikely does not make the plan for the child unsatisfactory. In **Ramsey v. Madison County Dept. of Family**, 707 N.E.2d 814, 817 n. 3, the Court affirmed the plan of the office of family and children to continue the child's counseling and to attempt to reunify the child with Mother, his noncustodial parent. The child had been sexually abused by Father, who had been convicted and received an eighteen year prison sentence. In **Doe v. Daviess County**, 669 N.E.2d 192 (Ind. Ct. App. 1996), the Court affirmed the finding that long term foster care was a satisfactory permanent plan for the child (who was fourteen years old at the time of the termination hearing) despite Mother's argument that the child would have no permanent parent after Mother's rights were terminated. The Court stated that the Division's plan for long term foster care was satisfactory because the child "is not of an adoptable age, has a history of behavioral and psychiatric problems, and has special needs." Id. at 196. In **Stone v. Daviess Co. Div. Child Serv.**, 656 N.E.2d 824 (Ind. Ct. App. 1995), Father claimed that the DCFS did not offer an acceptable long term plan for the children if termination was granted. He argued that adoption of all five children by one family was unlikely, and that separation

of the siblings in different long term foster homes was a probable result. The Court rejected the claim and stated, "we cannot conclude that the DCFS plan is unsatisfactory. The best interests of the children dictate termination of parental rights." Id. at 829. In **B.R.F. v. Allen County D.P.W.**, 570 N.E.2d 1350 (Ind. Ct. App. 1991), the Court found that the welfare department had adequately established a satisfactory plan for the care and treatment of the child as part of its petition to terminate the parent-child relationship. The caseworker's plan was to place the child in a foster home, provide him with medical care and schooling, and transfer the case to the adoption division of the welfare department. Although Father emphasized the caseworker's inability to recall the last time the welfare department had successfully placed a child who was five years of age for adoption, the Court stated that this evidence did not negate the finding that the welfare department was able to "point out in a general sense to the trial court the direction in which its plans were going." Id. at 1353. In **Shaw v. Shelby Cty. D. of Public Welfare**, 584 N.E.2d 595 (Ind. Ct. App. 1992), the Court affirmed the trial court's finding that the welfare department had devised an adequate plan for the child's care and treatment. Id. at 601. The child in question had been placed in a residential treatment center for children with emotional problems. The child's behavioral problems included violent outbursts, physical abuse of himself and others, suicide threats and attempts, and sexual acting out. The child had not improved as anticipated after his mental health placement. Nevertheless, the Court found that an adequate plan for care and treatment had been devised, and stated that the welfare department had no obligation to present evidence of a specific adoptive home demonstrably superior to the natural parents' home. Id at 601.

In **In Re A.S.**, 17 N.E.3d 994 (Ind. Ct. App. 2014), *trans. denied*, the Court found the trial court did not err in determining that DCS's plan for the children's care and treatment was satisfactory. Id. at 1007. DCS's plan for the children was that their Aunt and her husband would adopt them. Mother argued that DCS's plan was unsatisfactory because: (1) Aunt did not want anything to do with the children unless parental rights were terminated; and (2) DCS had terminated Aunt's visitation with the children because she had violated a condition of her visitation by discussing the case, the parents, and their half-sister's death with the children. Father claimed that the plan was unsatisfactory because there was no guarantee that the adoption would take place or that the children would stay together. The Court quoted Lang v. Starke Cty. Office of Fam. Children, 861 N.E.2d 366, 375 (Ind. Ct. App. 2007), *trans. denied*, which states that: (1) for a plan to be "satisfactory," it "need not be detailed, so long as it offers a general sense of the direction the child will be going after the parent-child relationship is terminated"; (2) a DCS plan is satisfactory if the plan is to find adoptive parents; (3) there need not be a guarantee that a suitable adoption will take place; (4) a plan is not unsatisfactory if DCS has not identified a specific family to adopt the children. A.S. at 1007. The Court explained that it is within the authority of the adoption court, not the termination court, to determine whether an adoptive placement is appropriate. Id. The Court concluded it was satisfactory in this case that DCS's plan for the children was adoption. Id.

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 to her three children. Id. at 291. On appeal, Mother argued that DCS's plan for care and treatment of the children, namely adoption by Paternal Grandmother (Grandmother), was not satisfactory. Mother complained that Grandmother had taken the children to prison to visit Father on numerous occasions, but Grandmother did not allow similar visitation to Mother while Mother was incarcerated. Mother was concerned that, if Grandmother were permitted to adopt, Grandmother might alienate the children from Mother while allowing a relationship with Father, even though both Parents' rights had been involuntarily terminated for drug use and criminal activity. The Court responded that its standard of review and the controlling law compelled the Court to hold that the evidence supported the trial court's finding of an adequate plan for the children's future care as a necessary element for termination of Mother's rights. Id. at 290. The Court noted that

such finding was not tantamount to affirmation that adoption of the children by Grandmother would be in their best interests. Id.

In **H.G. v. Indiana Dept. of Child Services**, 959 N.E.2d 272 (Ind. Ct. App. 2011), *trans. denied*, 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 relied heavily on a child's need for permanency. Id. at 294. 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 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." (Emphasis in opinion.) Id.

In **In Re A.K.**, 924 N.E.2d 212 (Ind. Ct. App. 2010), the Court affirmed the termination judgment. Id. at 224. The Court rejected Father's argument that DCS failed to prove there was a satisfactory plan for the child's care and treatment, noting that the evidence established: (1) the foster parents had filed a petition to adopt the child; (2) on the date of the termination hearing, the child had resided with the foster family for almost two years; (3) the child had a strong bond with the foster family and her interaction with her foster mother was "excellent." Id.

See also the following cases: **In Re B.M.**, 913 N.E.2d 1283, 1284, 1287 (Ind. Ct. App. 2009) (trial court did not err by failing to consider the child's placement with Father's sister as an alternative to terminating Father's parental rights, where: (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) the child had been living with his godparents for about a year and DCS's plan for the child was adoption); **In Re L.B.**, 889 N.E.2d 326, 341 (Ind. Ct. App. 2008) (Court held it could not conclude that plan set forth by DCS for adoption of children by their current foster parents, who were providing therapeutic foster care, was unsatisfactory); **In Re S.L.H.S.**, 885 N.E.2d 603, 618 (Ind. Ct. App. 2008) (Court observed that satisfactory plan for care and treatment of child need not be detailed, so long as it offered general sense of direction in which child would be going after parent-child relationship was terminated; DCS's plan that child be adopted was satisfactory); **A.J. v. Marion County Office of Family**, 881 N.E.2d 706, 719 (Ind. Ct. App. 2008) (Court held that, in view of the evidence, it could not conclude that DCS's plan of adoption for care and treatment of children was unsatisfactory, where all seven children were currently placed in pre-adoptive homes and were doing well; the oldest three boys were placed in a pre-adoptive home together, the middle child was placed in a separate home because she was struggling with some of her siblings, and the youngest three children were placed together in a third pre-adoptive foster home), *trans. denied;* **In Re A.J.**, 877 N.E.2d 805, 816 (Ind. Ct. App. 2007) (Court found DCS's plan for care and treatment of children, namely adoption, satisfactory), *trans. denied*; **Lang v. Starke Cty. Office of Fam. Children**, 861 N.E.2d 366, 374-75 (Ind. Ct. App. 2007) (Court held that plan of adoption for younger children, although suitable parents had not yet been located, and plan of independent living program for older child was satisfactory), *trans. denied*; **Rowlett v. Office of Family and Children**, 841 N.E.2d 615, 623-24 (Ind. Ct. App. 2006) (Court reversed termination of Father's parental rights and found that, where children had been in maternal grandmother's care for nearly three years and plans were that upon termination of Father's rights they would continue under her care, little harm existed in extending CHINS wardship until Father had chance to prove himself fit

as parent), *trans. denied*; **In Re Invol. Termn. of Par. Child Rel. A.H.**, 832 N.E.2d 563, 571 (Ind. Ct. App. 2005) (Court found children had thrived since their placement in foster care and OFC had developed a plan for adoption of children); **In Re Termination of Relationship of D.D.**, 804 N.E.2d 258, 268 (Ind. Ct. App. 2004) (Court found OFC's plan for adoption that gave general sense of direction for child's care and treatment supported trial court's finding that there was suitable plan for child's future care where child was residing in foster home, and the foster parents were interested in adoption but were not ready to make final decision), *trans. denied;* **In Re C.C.**, 788 N.E.2d 847, 856 (Ind. Ct. App. 2003) (Court found adoption intention of foster parents who had cared for child since his birth and loved him to be sufficient evidence of satisfactory plan where caseworker and guardian ad litem confirmed that child's needs were being met by foster parents), *trans. denied*; **A.F. v. MCOFC**, 762 N.E.2d 1244, 1253 n.6 (Ind. Ct. App. 2002) (OFC had identified adoption plans for the children, and this plan satisfied the Indiana Code); **In Re Involuntary Term. of Parent-Child Rel. [A.K.]**, 755 N.E.2d 1090, 1098 (Ind. Ct. App., 2001) (Court concluded that adoption was satisfactory plan where OFC presented evidence that children were thriving under care of foster mother who wanted to adopt them after the termination); and **In Re D.J.**, 755 N.E.2d 679, 685 (Ind. Ct. App. 2001) (Court determined DFC had presented sufficient evidence that there was satisfactory plan for care and treatment of children following termination where plan was not perpetual foster care, but adoption into an appropriate and suitable home and, if foster family intended to adopt children, the home would have to be approved as appropriate and suitable environment), *trans. denied.*

IX. CASE LAW ON SPECIFIC SUBJECT AREAS

IX. A. Criminal Activity and Incarceration

The parental rights of incarcerated parents and parents with criminal histories were terminated in the cases discussed below.

In **Matter of A.F.**, 69 N.E.3d 932 (Ind. Ct. App. 2017), *trans. denied*, the Court affirmed the trial court's order which terminated Father's parental rights to his three children. Id. at 949. Three separate CHINS proceedings had been filed for the children. The first CHINS petition and removal was in 2008, the second CHINS petition and removal was in 2009, and the third CHINS petition and removal was in 2012. Father's incarcerations for several crimes, including domestic battery against Mother, battery by bodily waste, robbery with bodily injury, parole violation, and operating a vehicle while intoxicated necessitated the filing of all three CHINS petitions. In its order terminating Father's parental rights, the trial court found that there was a reasonable probability that Father would not remain available in the future given his criminal history pattern of participating in services only to be incarcerated. Father appealed the termination judgment, asserting that the trial court improperly admitted hearsay evidence and unqualified expert testimony. One of the disputed issues raised by Father concerned the admission of the guardian ad litem's testimony about the children's statements on their desires for future placement. The Court opined that the admission of the guardian ad litem's testimony did not warrant reversal in light of other evidence, including Father's multiple incarcerations, the case manager's recommendation that adoption was in the children's best interests, and the therapist's support for the adoption plan. Id. at 948.

In **A.B. v. Indiana Dept. of Child Services**, 61 N.E.3d 1182 (Ind. Ct. App. 2016), the Court affirmed the trial court's order terminating Mother's parental rights to her two children and terminating Father's parental rights to his child who was born to Mother. Id. at 1191. Mother pled guilty to four criminal charges, Class B felony dealing methamphetamine, Class C felony neglect of a dependent, Class C felony possession of methamphetamine, and Class D felony possession of precursors before the CHINS case was filed. On three of the charges, Mother was sentenced to fifteen years in prison, with ten years executed and five years suspended to probation. On one

charge, Mother was sentenced to two years in prison, to be served consecutively to the other sentence. Mother was incarcerated throughout the CHINS and termination proceedings, and had not seen her children for three years at the time the trial court entered its termination order. On appeal, Mother challenged the trial court's finding that DCS had established by clear and convincing evidence a reasonable probability that the conditions resulting in the children's removal and placement outside her care would not remedied. The Court found the record amply supported the trial court's conclusion that "Mother is in no position to care for the children and it is beyond reason for the children to have to wait for Mother to demonstrate an ability or willingness to meet their needs." Id. at 1190. In support of the trial court's finding, the Court noted the following evidence: (1) Mother's release date from prison was ambiguous; according to the Department of Correction website, her projected release date was almost three years after the termination hearing; (2) Mother would be on probation for five years following her release and had violated probation for previous offenses multiple times in the past; (3) Mother had an extensive criminal history, including convictions for ten offenses in addition to the offenses for which she was currently incarcerated; (4) Mother committed her most serious crimes after giving birth to her children, and placed them in danger by raising them in a home with active meth labs; (5) Mother testified to a list of services she had completed in prison, but failed to provide certificates of completion for any of them. Id. at 1189-90. The Court noted that Mother cooperated with DCS and attempted to better herself while in prison, but she had been in prison for the majority of the children's lives and would continue to be for some time. Id. at 1190. The Court observed that Mother had yet to adequately address her substance-abuse issues, which appeared to be at the root of her criminal behavior. Id.

In **In Re J.E.**, 45 N.E.3d 1243 (Ind. Ct. App. 2015), *trans. denied*, the Court affirmed the trial court's order terminating Father's parental rights to his one-year-old child. Id. at 1249. Father posited that the outcome of the case hinged on a dispute between himself and the DCS family case manager as to whether Father was made aware of the services in which he was expected to participate. He asserted that the trial court abused its discretion by failing to consider that taking his testimony by telephone would affect the court's ability to judge his credibility. The Court was not persuaded by Father's claim that this case turned on the resolution of the dispute between himself and the case manager. Id. at 1248. Quoting In Re B.D.J., 728 N.E.2d 195, 201 (Ind. Ct. App. 2000), the Court noted that "the law concerning termination of parental rights does not require [DCS] to offer services to the parent to correct the deficiencies in childcare." J.E. at 1248. The Court observed that, despite the disagreement between Father and the case manager regarding who should have initiated contact regarding services, Father admitted that: (1) he remembered the CHINS court ordered him to participate in certain services; (2) the case manager was present, but he did not ask her how to complete the services; and (3) that he "should've asked her." Id. at 1249. The Court also noted that Father had visited the child only twice and admitted that he had decided to forego opportunities to visit the child. Id. The Court also found it unfortunate that Father, having made himself unavailable for these proceedings due to incarceration, had not appeared when he was free and ordered to do so. Id.

In **In Re A.G.**, 45 N.E.3d 471 (Ind. Ct. App. 2015), *trans. denied*, the Court affirmed the trial court's order terminating incarcerated Father's parental rights. Id. at 480. The Court noted the following in support of the trial court's judgment: (1) Father had been incarcerated for four years and ten months out of the last seven years; (2) Father was convicted of auto theft in New York, identity fraud in Florida, and possession of a firearm as a felon in Georgia; and (3) Father was incarcerated months before the child was born, and had never seen, held, touched, supported, or cared for his child who had resided in foster care for eighteen months, the child's entire life. Id. at 477, 479.

In **In Re B.H.**, 44 N.E.3d 745 (Ind. Ct. App. 2015), *trans. denied*, the Court affirmed the juvenile court's order terminating Mother's and Father's parental rights to their two children. Id. at 752. The Court found the evidence about Father's incarceration and his other issues demonstrated that the

juvenile court did not err by concluding that termination of his parental rights was in the children's best interests. Id. Father argued that the order terminating his parental rights should be reversed because the sole reason supporting termination was the fact of his incarceration, but the Court found that the fact of his incarceration was not the sole evidence supporting termination. Id. at 751-52. The Court noted that Father's children were five and seven years old when he stabbed their uncle in the children's presence. Id. at 751. The Court also noted the following evidence in support of the juvenile court's order terminating Father's parental rights: (1) when the children were removed, Father was dealing in and using methamphetamine, which contributed to an environment that led to his seven-year-old child's positive test for methamphetamine; (2) Father's release date was nearly five years away from the date of the termination hearing; (3) Father did not testify about his housing or employment plans following his release, or his completion of any substance abuse programs while incarcerated. Id. The Court observed that, to the extent Father argued reversal of the termination order was warranted because DCS did not provide him with services during his incarceration, it is well established that DCS is not required to provide services before commencing termination proceedings. Id. at 752, n.3, citing In Re H.L., 915 N.E.2d 145, 148 n.3 (Ind. Ct. App. 2009).

In **In Re E.P.**, 20 N.E.3d 915 (Ind. Ct. App. 2014), *trans. denied*, the Court affirmed the trial court's order terminating Father's parental rights to his child. Id. at 917. Father pled guilty to Class B felony child molesting and Class B felony neglect of a dependent with regard to injuries suffered by the child's half-sister. Father was sentenced to twenty years in the Department of Correction, was a credit-restricted felon, and was scheduled to be released in 2029. The Court noted IC 31-35-3-8(1) states that a showing that Father was convicted of an offense listed at IC 31-35-3-4 (which includes child molesting) is prima facie evidence that " the conditions that resulted in the removal of the child from a parent under a court order will not be remedied." Id. at 921.

In **In Re C.A.**, 15 N.E.3d 85 (Ind. Ct. App. 2014), the Court affirmed the trial court's order terminating the parental rights of Father, who had been incarcerated for drug and child neglect charges since the CHINS adjudication for his three children. Id. at 96. The Court noted the following in support of its finding that the trial court did not err in determining there was a reasonable probability that the conditions leading to the children's removal would not be remedied: (1) Father's release date had already been pushed back by one year because he wrote a letter threatening Mother and her boyfriend; (2) it was entirely possible that the children would have to wait almost three years for Father to be released from prison; (3) the children had not seen Father since he was arrested; and (4) even if he were released from incarceration early, Father would have a Class B felony dealing in methamphetamine conviction on his record, and would have difficulty establishing a stable life for himself, let alone for the children. Id. at 95.

In **In Re Z.C.**, 13 N.E.3d 464 (Ind. Ct. App. 2014), *trans. denied*, the Court affirmed the trial court's order terminating the parental rights of Mother, who was incarcerated in the State of Kentucky as a result of federal drug charges. Id. at 470. In response to Mother's claim that there was insufficient evidence to support the termination order, the Court noted that: (1) the child came into the State's custody because Mother was arrested on drug charges before the child, who was born with controlled substances in his system, was released from hospitalization after birth for drug withdrawal symptoms; (2) Mother admitted that the child was a CHINS because she was incarcerated and would need substance abuse treatment when released; (3) Mother's criminal defense counsel testified that Mother had agreed to plead guilty to conspiracy to deal heroin and her minimum sentence would be ten years; (4) at the time of the termination hearing, Mother's sentencing date and the length of her sentence were unknown. Id. at 469. Although Mother also asserted that the trial court should not have concluded the reasons for the child's placement outside her care would not be remedied because she needed to participate in services upon her release from incarceration, the Court noted: (1) at the time termination proceedings commenced, the services offered to Mother as part of the CHINS

adjudication ceased; and (2) the Court was unable to address the alleged inadequacy of services offered to Mother during the CHINS proceeding because that issue was unavailable during a termination appeal. Id. at 469-70. The Court also disagreed with Mother's argument that the trial court erred when determining that termination of her rights would be in the child's best interests. Id. at 470. The Court noted that both DCS and the court appointed special advocate believed termination was in the child's best interest and that the testimony of such individuals supported the trial court's findings and conclusions. Id.

In **In Re E.M.**, 4 N.E.3d 636 (Ind. 2014), the Indiana Supreme Court affirmed the trial court's order terminating Father's parental rights to his two children, who were removed from home by DCS due to Father's repeated domestic violence against Mother when the older child was barely one year old and the younger child was in early infancy. Id. at 649. Father failed to appear at court after the first two CHINS hearings, visited the children only once after their removal, dropped out of contact with DCS, and was then incarcerated in Illinois for a felony firearm conviction the year after the children's removal. Father contacted DCS over two years later, and the trial court terminated his parental rights. In affirming the termination judgment, the Court recognized that Father's incarceration played a substantial role in his failure to bond with the children, but said that incarceration alone cannot justify "tolling" a child welfare case as Father sought to do. Id. The Court observed that Father could not contend the lack of bonding with the children was merely a byproduct of his imprisonment when he had nearly a year before his imprisonment to engage in services and bond with his children but failed to do so. Id. The Court said that Father could have made at least some effort to communicate with the children, perhaps by sending cards or short letters, or by telephoning them. 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 judgment terminating Mother's and Father's parental rights to their two children. Id. at 1125. The Court concluded 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 that resulted in the children's removal or the reasons for placement outside the home would not be remedied. Id. Among the evidence noted by the Court 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 was a convicted child molester. Id. at 1124-1125. The Court said that, at the time of the termination hearings, the significant concerns about Father's behavior toward the children had not been addressed, much less remedied, due to his repeated incarceration. Id. at 1125.

In **K.T.K. v. Indiana Dept. of Child Services**, 989 N.E.2d 1225 (Ind. 2013), the Indiana Supreme Court determined that the State met its burden to show that "the conditions that resulted in the child[ren]'s removal or the reasons for placement outside [Mother's] home...will not be remedied." Id. at 1234. The Court affirmed the trial court's termination judgment. Id. at 1236. The Court noted the record reflected Mother's history of criminal behavior, namely: (1) Mother was incarcerated for six months pending trial for charges of theft and receiving stolen property; (2) Mother was released, but was arrested again two weeks later for public intoxication, and remained incarcerated for three more months; (3) Mother's criminal background included operating while intoxicated convictions, multiple traffic citations including operating while intoxicated, driving while suspended, failure to abide by traffic laws, probation violations that resulted in probation revocation, and alcohol consumption by a minor. Id. at 1232-33. The Court said that the evidence of the psychologist evaluator that "it is difficult to determine whether [Mother's] criminal mentality has been altered" and that "her criminal history...strongly suggests that she is not opposed to violating the law or societal expectations for selfish purposes" clearly and convincingly supported the trial court's finding that Mother "has a 'criminal mentality' that manifests itself in disregard for the law." Id. The Court also

found 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. at 1233-34. 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. Id. at 1235-36. The Court quoted In Re A.C.B., 598 N.E.2d 570, 572 (Ind. Ct. App. 1992), a termination case, which states "[i]ndividuals who pursue criminal activity run the risk of being denied the opportunity to develop positive and meaningful relationships with their children." K.T.K. at 1235-36.

In **In Re J.C.**, 994 N.E.2d 278 (Ind. Ct. App. 2013), the Court affirmed the trial court's termination order, finding DCS presented sufficient evidence that the conditions that resulted in the removal of Mother's three children were not likely to be remedied, and that the findings supported the court's conclusion that termination was in the children's best interests. Id. at 291. Among the findings noted by the Court which supported the termination judgment were: (1) the two oldest children were removed from Mother's custody when she was arrested for theft and operating a motor vehicle while intoxicated, and the children were with Mother while she was committing the acts for which she was arrested; (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 in a work-release program; (4) all three children were removed again when Mother was arrested and incarcerated due to 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, remained incarcerated as of the date of the termination hearing, and had pending violations of probation and might receive additional executed time; (6) Mother was unable to fulfill her parental obligations due to incarcerations from multiple drug-related incidents. Id. at 284-86.

In **In Re C.G.**, 954 N.E.2d 910 (Ind. 2011), the Indiana Supreme Court affirmed the trial court's order which terminated the parental rights of incarcerated Mother. 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 noted 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 924-25.

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), *trans. denied*, the Court affirmed the trial court's denial of a request by Father's counsel to continue the termination hearing until after Father's release from prison which was scheduled to occur ten months in the

future. Id. at 588. The Court also affirmed the termination of Father's parental rights. Id. 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; (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. Id. at 584-85.

In **Matter of N.B.**, 731 N.E.2d 492 (Ind. Ct. App. 2000), the Court affirmed the trial court's termination order on findings that Father: (1) was incarcerated for all but one day of the child's life; (2) would not be released from prison for three more years; (3) had a lengthy juvenile and adult criminal record and pled guilty to battery of the child's mother; (4) did not establish paternity; (5) did not pay child support; and (6) did not comply with the conditions of the parental participation petition. Id. at 493-94.

In **Matter of M.B.**, 666 N.E.2d 73 (Ind. Ct. App. 1996), Father was serving a thirteen year sentence for theft and burglary at the time of the termination hearing. The Court found that the following evidence about Father was sufficient to prove that the conditions causing removal would not be remedied: (1) his juvenile delinquency record; (2) his series of adult criminal convictions, including the commission of additional offenses while on probation; (3) his extensive history of substance abuse and failed treatment programs; (4) his failure to raise another son who was adopted by the paternal grandmother as a result of Father's irresponsibility in parenting; and (6) his failure to avail himself of reunification services. Id. at 77-78. The Court found that consideration of Father's offenses in the termination case did not constitute an additional punishment for those offenses, and therefore was not a violation of due process. Id. at 80. A civil sanction can only violate double jeopardy if the sanction constitutes "punishment." Id. at 79. Termination proceedings do not have retributive or deterrent purposes, rather the purpose of the termination proceeding is to protect the best interests of the child. Id. at 80. The Court noted that the termination judgment was supported by substantial evidence other than Father's latest convictions. Id.

In **Matter of A.C.B.**, 598 N.E.2d 570 (Ind. Ct. App. 1992), the Court affirmed the termination judgment against adjudicated Father who was serving a twenty-three year sentence for armed robbery. Father had been incarcerated at the time of the child's birth, and his earliest anticipated release date was in three years. Although Father did not raise his incarceration as an issue on appeal, he did complain that visitation had been denied him. The Court responded that Father's inability to bond and visit with the child was due more to his own actions which resulted in his incarceration, than with his failure to establish legal paternity. The Court said that individuals who pursue criminal activity run the risk of being denied the opportunity to develop positive and meaningful relationships with their children. Id. at 572.

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 affirmed the juvenile court's termination judgment, listing the following evidence about Father as sufficient to support the judgment: (1) he had recently been released from five years of incarceration; (2) he had "repeatedly" committed armed

robberies and one burglary; (3) he had left the children in the getaway vehicle while he perpetrated a robbery; (4) he had told his wife he would kill her and the caseworker when he was released from prison; (5) the children had not been under his care for six and a half years; and (6) his visits upset the children. The 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 **Matter of D.L.W.**, 485 N.E.2d 139 (Ind. Ct. App. 1985), the child welfare department's wardship of the child was established while Mother was in the Indiana Women's Prison. After Mother was released from prison, she never maintained a permanent address so that the caseworker could offer services to her. Mother was again arrested, and spent eight more months in prison. A petition for termination of parental rights was filed one month after Mother's release, but the court delayed setting a hearing on the matter and issued specific rehabilitation orders to Mother. Mother failed to comply with those orders, and, after a hearing, the court entered the order terminating the parent-child relationship. The Court held that Mother's improvements, which coincided with immediate threats to her parental rights, had been temporary in nature, and also that Mother had at least three "second chances" while her child had waited for five years in foster care. Id. at 142-43. The Court felt that the child should be made to wait no longer for Mother to improve. Id. at 143.

See the following cases in which incarceration and criminal history was an issue: **In Re S.L.H.S.**, 885 N.E.2d 603, 617 (Ind. Ct. App. 2008) (termination judgment affirmed where Father, who was incarcerated at work release center and had not had custody of child for more than year when the two-year-old child was removed from Mother's care, had history of substantiated sexual abuse of his former stepdaughter, and his niece testified that he had repeatedly molested her as child); **In Re A.P.**, 882 N.E.2d 799, 807-08 (Ind. Ct. App. 2008) (Court affirmed termination of Father's parental rights where Father left country nine months after child's removal, allegedly because of pending battery charges; there was no evidence Father planned to return to U.S.; and, if he did return, he might face jail time for pending battery charges); **In Re Involuntary Termination of Parent-Child Relationship of Kay L.**, 867 N.E.2d 236, 242 (Ind. Ct. App. 2007) (Court affirmed termination of Mother' parental rights, where she was incarcerated after pleading guilty to neglect of dependent, and was also incarcerated during termination hearing because her probation was revoked based on positive drug tests and failure to report to probation office); **Castro v. Office of Family and Children**, 842 N.E.2d 367, 370-71 (Ind. Ct. App. 2006) (despite Father's remarkably good record during incarceration, which included obtaining college degrees and participation in anger management, parenting classes and other services, Court opined there was sufficient evidence to support termination where Father had been incarcerated since prior to nine-year-old child's birth, had never been a part of her life, had seen child only when she was infant, was serving a forty year sentence for criminal deviate conduct and burglary; and it would be sheer speculation to conclude that Father's sentence would be modified and that he would have ability to support and care for child), *trans. denied*; **Hite v. Vanderburgh Cty Office Fam. & Chil.**, 845 N.E.2d 175-77, 184 (Ind. Ct. App. 2006) (Court concluded failure to provide incarcerated Father with notice of initial CHINS action and case plans did not substantially increase risk of error in termination proceedings where Father was released from incarceration for only two months of child's life and was serving two-year sentence for attempted theft and fifteen-year sentence for sexual misconduct with a minor); **In Re**

Involuntary Term. Paren. of S.P.H., 806 N.E.2d 874, 880-881 (Ind. Ct. App. 2004) (termination judgment affirmed where Father was incarcerated throughout entire CHINS and termination proceedings, had pled guilty to dealing in controlled substance, possession of drugs, and neglect of dependent, received cumulative sentence of eight years with additional two years of probation and home detention upon his release, and had committed these offenses on property which was the home of Father and the children); **Everhart v. Scott County Office of Family**, 779 N.E.2d 1225, 1227-28 (Ind. Ct. App. 2002) (termination judgment affirmed where Father was sentenced to fourteen years for aggravated battery and neglect of his two-month-old child, would be imprisoned for many years, would be unable to care for children, and, even if he were able to receive good time in prison, he would still have missed seven years of children's lives and would not be able to provide financially for children), *trans. denied*; **In Re J.W.**, 779 N.E.2d 954, 961 (Ind. Ct. App. 2002) (evidence supporting termination judgment included Mother's guilty pleas to neglect of dependent and theft, her three month incarceration, and her pending forgery charge); **Tillotson v. Dept. of Family and Children**, 777 N.E.2d 741, 746 (Ind. Ct. App. 2002) (Parents' neglect of dependent conviction and four-year prison sentence was "directly related to the termination action and amounts to per se evidence of neglect."); **In Re W.B.**, 772 N.E.2d 522, 530 (Ind. Ct. App. 2002) (evidence of five pending neglect of dependent charges against Parents was among evidence supporting termination judgment); **M.H.C. v. Hill**, 750 N.E.2d 872, 874, 878-79 (Ind. Ct. App. 2001) (judgment affirmed where alleged Father was incarcerated at time child was removed from Mother's care, had acquired extensive criminal history during his adult life, never had custody of child, and had no bond with child); **Bergman v. Knox County OFC**, 750 N.E.2d 809, 810-12 (Ind. Ct. App. 2001) (termination judgment affirmed where, among other things, Mother was incarcerated for eighteen months, which contributed to her failure to comply with dispositional decree).

See also the following cases where termination of parental rights of incarcerated parents was affirmed: **Young v. Elkhart County Office of Family and Children**, 704 N.E.2d 1065 (Ind. Ct. App. 1999); **Matter of K.H.**, 688 N.E.2d 1303 (Ind. Ct. App. 1997); **In Re A.A.C.**, 682 N.E.2d 542 (Ind. Ct. App. 1997); **Wardship of J.C. v. Allen Cty. Office**, 646 N.E.2d 693 (Ind. Ct. App. 1995); **Wagner v. Grant County Dept. of Public Wel.**, 653 N.E.2d 531 (Ind. Ct. App. 1995); **B.R.F. v. Allen County DPW**, 570 N.E.2d 1350 (Ind. Ct. App. 1991).

The parental rights of incarcerated parents and parents with criminal histories were not terminated in the cases discussed below.

In **In Re O.G.**, 65 N.E.3d 1080 (Ind. Ct. App. 2016), *trans. denied*, the Court reversed and remanded the juvenile court's order terminating Parents' parental rights to their child. Id. at 1096. Father, who was incarcerated throughout much of the CHINS case, raised two issues on the admission of evidence about his criminal history. Father contended that the court should not have admitted the DCS exhibit of his Department of Correction (DOC) records or the DCS exhibit of his Putnamville Correctional Facility (Putnamville) records. Although DCS argued that Father had waived his objection because it was based on hearsay and relevance and did not specifically identity the business records exception to the hearsay rule, the Court found Father's general hearsay objection was sufficient to preserve his argument for appeal. Id. at 1087. The Court reviewed Ind. Evidence Rules 803(6) and 902(11) and found that the DCS exhibits did not qualify for admission as business records and the juvenile court erred in admitting the records into evidence. Id. The Court noted that the affidavit from the keeper of DOC records, which was attached to both exhibits did not contain the needed language for business records listed at Ind. Evid. R. 803(6), and the affidavit attached to the Putnamville records stated the record consisted of sixty-four pages, but only fifty pages were attached. Id. The Court also noted that the Putnamville records contained many documents not readily identifiable as documents prepared at the Putnamville correctional Facility by someone with personal knowledge, including the presentence

investigation report, which was prepared by a probation officer and the abstracts of judgment, which were prepared by the trial court. Id. On Father's hearsay objection to the case manager's testimony that Father had a "history of drug offenses and violent offenses," the Court opined that, by agreeing to the admission of his felonious criminal history, Father invited any alleged error, so the Court declined to address his objection. Id. at 1088. The Court also found that the evidence did not support the juvenile court's conclusion that Father was unwilling to be a parent to the child, or that termination was in the child's best interests. Id. at 1096.

In **In Re A.W.**, 62 N.E.3d 1267 (Ind. Ct. App. 2016), the Court reversed the trial court's order which terminated Mother's parental rights to her two children. Id. at 1269. Mother was sentenced to probation for possession of heroin two months after the children were adjudicated to be children in need of services. Mother violated probation for failing multiple drug screens, missing meetings with her probation officer, failing to complete intensive outpatient treatment, and committing a new criminal offense, and served two months in jail. About a year after the children's CHINS adjudication, the court found that Mother had again violated probation, her probation was revoked, and she was incarcerated in prison. Mother was incarcerated at the time of the termination hearing and was scheduled to be released seven months after the hearing. The Court found that DCS failed to prove by clear and convincing evidence that Mother's drug problem was unlikely to be remedied. Id. at 1274. The Court agreed with Mother that her situation was factually similar to that of the father in In Re K.E., 39 N.E.3d 641 (Ind. 2015). A.W. at 1274. The Court noted that, at the time of the termination hearing, Mother had made significant progress in dealing with her addiction. Id. The Court observed that, during her incarceration, Mother: (1) had participated in and completed individual therapy, AA meetings, parenting classes, and family classes; (2) the programs Mother completed were almost identical to the services which the trial court ordered in the CHINS dispositional order; and (3) Mother participated in early-release classes and was one of two prisoners who had been given the responsibility to clean the superintendent's and assistant superintendent's offices. Id.

In **In Re K.E.**, 39 N.E.3d 641 (Ind. 2015), the Indiana Supreme Court reversed the trial court's order terminating Father's parental rights to the younger of his two children, holding that there was insufficient evidence to demonstrate a reasonable probability that Father could not remedy the conditions for removal or that Father posed a threat to the child's well-being. Id. at 644. At the time of the trial court's order on the termination petition, Father, who had been convicted and incarcerated for dealing in methamphetamine, neglect of a dependent, and maintaining a common nuisance, expected to remain incarcerated for two to two and one half years. Evidence at trial revealed that Father had participated in twelve programs at the Department of Correction to improve his parenting and attitude and was attending meetings through AA and NA. The Court opined that, although Father's possible release from prison was still over two years away at the time of the termination hearing, that fact alone was insufficient to demonstrate that the conditions for removal would not be remedied. Id. at 648. The Court declined to establish a bright-line rule for when release must occur to maintain parental rights. Id. The Court opined that a parent's potential release date is only one consideration of many that may be relevant in a given case. Id. The Court noted that it does not seek to establish a higher burden upon incarcerated parents based on their possible release dates, nor does the Court believe the burden of proof should be reduced mainly because a parent is incarcerated. Id. The Court found that, given the substantial efforts which Father was making to improve his life by: (1) learning to become a better parent; (2) establishing a relationship with the child; and (3) attending substance abuse classes, DCS had not proven by clear and convincing evidence that Father could not remedy the conditions for the child's removal. Id. at 649. The Court reasoned that a parent's past criminal history and drug abuse do not necessarily provide clear and convincing evidence that the parent currently poses a threat to the child's well-being. Id.

In **In Re R.A.,** 19 N.E.3d 313 (Ind. Ct. App. 2014), *trans. denied*, the Court reversed the trial court's order terminating Father's parental rights to his two-year-old son. Id. at 321-322. Ten months after the child was removed from Mother due to her inappropriate housing, Father's paternity of the child was confirmed by DNA testing. At the time he received the letter confirming his paternity, Father was incarcerated at the Johnson County Jail awaiting trial on sexual misconduct with a minor, theft, and possession of paraphernalia. The trial court terminated Parents' rights while Father was still in jail awaiting trial. The Court noted that, at the time of the termination hearings, Father's sister was available to care for the child and had begun visiting the child and Father's ability to parent the child was uncertain due to his incarceration. The Court said that the uncertainty of Father's ability to parent, together with the unique facts of the case, particularly the six month time frame from DNA testing to the filing of the termination petition, the involvement of Father's family, and the post-incarceration services requirement to which Father agreed in the CHINS case, led the Court to the conclusion that reversal of the termination judgment was warranted. Id. at 321.

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. The Court concluded that DCS failed to meet its statutory burden of proving that the conditions that resulted in the children's removal or placement outside the home of Mother would not be remedied. Id. The two children had been removed from Mother and Father due to domestic violence, and a CHINS petition was filed. 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. The trial court approved the plan to allow DCS to proceed with terminating Mother's parental rights while Mother was in jail. When Mother was released from jail, DCS declined to offer her additional services. Mother then entered the drug court program, where Mother admitted she had been crushing and snorting her prescription drugs. If Mother did not successfully complete the drug court program, she would serve a seven year executed sentence. DCS filed a petition to terminate Mother's parental rights, and the termination hearing was concluded five months later. During this time, Mother remained in compliance with the drug court program. The Court opined that, while Mother's behavior prior to her incarceration was relevant, the trial court ultimately should determine Mother's fitness at the time of termination hearing. Id. at 402-03. The Court noted that Mother made significant progress in the eight months before the termination hearing: Mother was in compliance with the drug court program; progressing in treatment; attending two weekly support meetings; meeting regularly with her NA and AA sponsor; had provided thirty random negative drug screens; and was 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), *trans. denied*, the Court reversed the trial court's termination order. Id. at 294. At the time of the termination hearing, Mother of the three children, ages fourteen, eleven, and nine, was incarcerated at Rockville Correctional Facility and her earliest release date was over two years later. Father of the oldest child was incarcerated at Branchville Correctional Facility and his earliest release date was almost three years later. The Court found that the evidence did not support the trial court's conclusion that termination was 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 Indiana Supreme Court held that a child's need for permanency did not justify terminating parental rights. H.G. at 290. The Court said that the trial 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 had been cooperative and involved in their child(ren)'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 their child(ren), and their abilities to parent could be quickly assessed upon release. H.G. at 291-92.

In **In Re M.W.**, 943 N.E.2d 848 (Ind. Ct. App. 2011), *trans. denied*, 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 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 J.M.,** 908 N.E.2d 191 (Ind. 2009), the Indiana Supreme Court affirmed the trial court's denial of DCS's petition to terminate the parental rights of Mother and Father to their child. Id. at 196. Parents had an ongoing relationship with the child during the first three years of his life, and there were no allegations that during that time that they were unfit parents. When the child was three years old, Parents were convicted of attempted dealing in methamphetamine and were sentenced to ten-year suspended sentences. Mother was incarcerated for three days and placed on ten years probation. Father served two years in the Department of Correction and was placed on four years work release and four years probation. Later, Mother and Father were arrested and pled guilty to conspiracy to deal in methamphetamine. Mother was sentenced to twenty years with four years suspended to probation; and Father was sentenced to twelve years, with six years suspended to probation. Shortly after Mother's arrest, DCS removed the child from her care. He was placed with his maternal grandmother and aunt, in licensed foster care, with his paternal aunt and uncle, and thereafter in foster care where he remained. DCS filed a CHINS petition alleging the child's "parents are unable to provide care for him due to their incarceration." Parents admitted the allegations and were ordered to comply with a parent participation plan. When the child was seven years old, the court established a permanency plan that included termination of parental rights and adoption. DCS filed an involuntary termination petition. After a hearing, the trial court entered findings of fact and conclusions of law, denying the petition to terminate the parental rights of Mother and Father. The child's guardian ad litem appealed the trial court's order, and the Court of Appeals affirmed the trial court at 895 N.E.2d 1228, 1237 (Ind. Ct. App. 2008). Parents sought and were granted transfer to the Indiana Supreme Court, thereby vacating the Court of appeals opinion.

Following an examination of the four reasons the trial court gave for concluding that there was a reasonable probability that the conditions which resulted in the child's removal would be remedied and that continuation of the parent-child relationship did not pose a threat to the child's well-being, the Court held that the trial court's conclusion was not clearly erroneous. Id. at 195. Regarding the trial court's first reason, that Mother's and Father's "probable dates of release are close in time" and "are to occur soon," the Court observed that their release dates were relevant and important because their incarceration was the condition that resulted in the child's removal. Id. at 194. The Court reviewed the trial court's conclusion that Mother 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. at 195. The Court noted: (1) 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, he had a job waiting working excavation and 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 was supported by exhibits, stated that Father had obtained housing, begun fulltime employment, purchased a truck for transportation, registered it with BMV and obtained auto insurance; (5) Mother testified at the termination hearing that she was "right on track" to complete her bachelor's degree, which would push up her release date; (6) at oral argument, the guardian ad litem acknowledged that Mother had been released from incarceration and had completed her bachelor's degree; (7) Mother testified at the termination hearing that she had completed a 16-month community transition program; and (8) Mother's testimony that she had not lined up a job or housing after her release was offset by evidence that Father had a stable job and appropriate housing for her and the child. The Court concluded that the evidence supported the trial court's conclusion, and the Court saw no basis for rejecting the trial court's conclusion as clearly erroneous. Id. at 195-96.

In **In Re G.Y.,** 904 N.E.2d 1257 (Ind. 2009), the Indiana Supreme Court reversed the trial court's order which terminated Mother's parent-child relationship with her son. 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 1265-66. 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 would remain unavailable to parent because her pattern of criminal activity made it likely that she would 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 had a closer relationship with his foster parents than he did with Mother; and (D) the child's general need for permanency and stability. Id. at 1262-65. The Court found that none of the 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. at 1265-66. The Court noted that all of Mother's criminal history consisted of offenses committed before the child's conception, and for the first twenty months of his life, the record gave no indication Mother was anything but a fit parent. Id. at 1262. The Court acknowledged that permanency is a central consideration in determining the best interest of a child, but concluded that, in this case, where the child was under the age of five and Mother's release from prison was imminent, and given the highly positive reports about the quality of the foster care placement, continuation of the CHINS foster care arrangement would not have much, if any, negative impact on the child's well-being. Id. at 1263-64. The Court stated its agreement with Mother that "there was no evidence presented to show that permanency through adoption would be beneficial to [the child] or that remaining as a foster care ward until he could be reunited with his mother would be harmful to [the child]." Id. at 1265. The Court opined that this was especially true given the positive steps Mother had taken while incarcerated, her demonstrated commitment and interest in maintaining a parental relationship with the child, and her willingness to continue to participate in parenting and other personal improvement programs after her release. Id.

In **In Re H.T.**, 901 N.E.2d 1118 (Ind. Ct. App. 2009), the Court found that, because there was no need for the extreme measure of permanently terminating the parental rights of Father, who had recently been released from prison, the trial court clearly erred in concluding that the State had proven that the child's well-being was threatened by Father's involvement in her life**.** Id. at 1122. The Court held that the trial court erred in concluding that Father's efforts were "too late." Id. The Court noted the trial court did not base its termination order on IC 31-35-2-4(b)(2)(B)(i) because the condition that resulted in placement outside Father's custody, his incarceration, had been remedied by Father's release from prison; instead, the trial court based its termination order on IC 31-35-2-4(b)(2)(B)(ii), namely "the continuation of the parent-child relationship poses a threat to the well-being of the

child." Id at 1121. The Court found this case very similar to Rowlett v. Office of Family and Children, 841 N.E.2d 615 (Ind. Ct. App. 2006) in which the Court of Appeals reversed the determination that a father, who had been in prison while his children thrived in foster care with the maternal grandparents, should be deprived of his parental rights. H.T. at 1121. The Court noted: (1) as in Rowlett, the child was not in a temporary arrangement pending termination of Father's parental rights 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 would not have a relationship with her sister, appeared to be unfounded in that Father testified, "If I was to be in [the child's] life, she could see her sister as much as she wanted;" (3) responding to the concern of DCS, the trial court, and the guardian ad litem that the child had not met Father, the Court noted there was contact between Father and the child before removal, the lack of post-removal contact while he was in prison was not due to Father but to the inaction of others, and the lack of face-to-face contact after Father's release was occasioned by the filing of the termination petition, not by Father; (4) while in Rowlett Father's fitness was in question, the trial court in the present case found that Father was willing and able to complete any services and become the custodial parent of his daughter. H.T. at 1122.

In **In Re E.E.S.**, 874 N.E.2d 376 (Ind. Ct. App. 2007), *trans. denied*, the Court reversed the trial court's termination of Mother's parental rights because Bartholomew County Office of Family and Children (BCOFC) failed to uphold its end of the agreement with Mother that, in exchange for the parents' admitting to the allegations contained in the CHINS petitions, BCOFC would maintain and support the family bond until Mother was released from prison and had an opportunity to engage in services. Id. at 381. In doing so, the Court acknowledged that (1) the circumstances that led to the removal of the children had not been remedied because Mother was still incarcerated, and the maternal grandparents were still unable to provide a proper environment for the children; (2) the record demonstrated that termination of Mother's parental rights was in the best interests of the children; and (3) this was a case where the Court normally would affirm the termination. Id. The Court stated that it disapproved of such agreements because they restricted the OFC from acting pursuant to the termination statutes or in the best interests of the children; however, the Court could not "allow an OFC to ignore such an agreement when the parent's consideration for the agreement was, in essence, waiver of the right to due process at the CHINS proceeding." Id. at 382.

In **Rowlett v. Office of Family and Children**, 841 N.E.2d 615 (Ind. Ct. App. 2006), *trans. denied*, the Court reversed the judgment terminating Father's parental rights. Id. at 617. Father did not live in the home when children were removed from Mother, and Father was informed by the caseworker that he would need to establish paternity before the children could be placed with him. Father established paternity, admitted the allegations in the CHINS petition, and was granted supervised visitation. Father was then incarcerated for three years for multiple convictions related to methamphetamines. A termination petition was filed and Father filed a motion requesting a continuance of the termination hearing, which was denied. The termination hearing was set for six weeks before Father's anticipated release from prison. After a hearing, the trial court granted the termination. Father appealed, alleging the following: (1) error in denying the continuance and (2) failure to prove the statutory elements of the termination case by clear and convincing evidence. On the trial court's denial of Father's motion for continuance, the Court ruled that the denial was an abuse of discretion because Father showed good cause for the continuance. Id. at 619-20. The good cause was the opportunity for Father to participate in services offered by the OFC directed at reunifying him with his children upon his release from prison. Id. at 619. Although the Court noted that Father's incarceration was "by his own doing", the Court found other factors significant: (1) denial of the continuance meant Father's ability to parent his children would be assessed while he was in prison; (2) Father had participated in services while in prison that would be helpful for him in reaching his reunification goal; and (3) the children were in placement with their grandmother and therefore the continuation of the hearing would have "little immediate effect" upon them. Id. at 622-23. On the issue of sufficiency of the

evidence to support termination, the Court found that, given Father's positive strides toward parenting while incarcerated and commitment to continue personal improvement programs and services, the 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 621-22. The Court noted evidence that Father maintained a relationship with the children through letters and telephone calls and the children loved him. Id. at 622. The Court opined there was little harm in extending the CHINS wardship because the children were thriving in the care of their maternal grandmother. Id. at 623. The Court concluded that the record did not support a finding that termination was in the children's best interests. Id. at 622.

In **Bester v. Lake County Office of Family**, 839 N.E.2d 143 (Ind. 2005), the Indiana 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. at 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, he was employed full time, he testified he had not used drugs since the child was born, he tested negative for drugs on random tests, and the trial court made no finding that Father was currently involved with drugs or had been involved with drugs for the past three years. Id.

IX. B. Low IQ and Mental Disability

In **N.C. v. Indiana Dept. of Child Services**, 56 N.E.3d 65 (Ind. Ct. App. 2016), *trans. denied*, the Court affirmed the trial court's order terminating Father's parental rights. Id. at 71. Father is deaf, English is not his first language, and he completed a psychological evaluation which resulted in diagnoses of Depressive Disorder, Cognitive Disorder, and Intermittent Explosive Disorder. Father did not complete court-ordered services and had not visited the child for two years at the time of the termination hearing. In his appeal of the termination judgment, Father argued that DCS's failure to accommodate his disability was a defense in the termination proceeding, and that DCS had failed to accommodate his disability in violation of the American Disability Act (ADA). The Court found that Father's argument was waived because: (1) it was raised for the first time on an appeal; and (2) neither a cogent argument nor adequate citation to authority and portions of the record were developed. Id. at 69. The Court also found that the fundamental error doctrine did not apply. Id. Waiver notwithstanding, the Court addressed Father's argument. Id. The Court noted the following: (1) Father was provided an interpreter by DCS through Deaf Community Services; (2) Father expressed no issues with understanding any of the interpreters; (3) the family case manager also explained to Father why he was required to complete the court-ordered services; (4) during the termination proceeding, Father denied that he had any cognitive issues that limit his ability to understand what was occurring. Id. at 70. The Court declined to abandon its prior holding on the applicability of the ADA to termination proceedings, which was stated in Stone v. Daviess Cnty. Div. of Children and Family Servs., 656 N.E.2d 824 (Ind. Ct. App. 1995). N.C. at 70. In Stone, 656 N.E.2d at 830, the Court observed that, because the DCFS did not have a statutory duty to provide services

prior to termination of parental rights, Parents' discrimination claim based on the ADA could not serve as a basis to attack the termination order. N.C. at 70. The Court held that DCS reasonably accommodated Father's disability and did not discriminate against Father in violation of the A.D.A. Id.

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 because of her low cognitive functioning and emotional immaturity. Id. at 365.

In **T.B. v. Indiana Department of Child Services**, 971 N.E.2d 104 (Ind. Ct. App. 2012), *trans. denied*, 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 it 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 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 the Court 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 parental rights to two of her children, and that Mother's mental deficits did not preclude this result. Id. at 51. The children were removed from Mother's home due to neglect, including medical neglect, and were adjudicated CHINS. The trial court ordered a participation plan for Mother that included individual counseling, regular visitation, home-based services, random drug screens, parenting classes, psychological evaluation, obtaining employment, and maintaining appropriate housing. A licensed psychologist, who performed a psychological evaluation of Mother, determined that her "overall level of intellectual ability falls in the Borderline Mental Retardation range of cognitive functioning," and her scores indicated a learning disorder, generalized anxiety disorder, and depressive disorder. At the termination hearing: (1) Mother testified she had not maintained steady employment and admitted to continuous changes in her housing situation; (2) the home-based services counselor testified that in the early stages of her services, Mother was not attending required meetings or visitations; (3) although Mother's effort improved, she still accused the counselor and others of spoiling opportunities for her and did not take responsibility for her own decisions; (4) the DCS case manager testified that Mother was attending about 25 percent of visits with her children early in the case because Mother said the visits were

scheduled too early in the morning; (5) the case manager testified that Mother's visits and participation in counseling and other services began to improve, and were steady over the last few months, but Mother's motivation and willingness to obtain employment and housing did not improve at all; (6) Mother was living in a home with five other adults, some with criminal records; (7) Mother had not been truthful about her most recent pregnancy and failed to seek prenatal care until ordered to do so; and (8) the case manager testified that circumstances leading to the children's removal would not be remedied and that, although Mother loved her children, she had no stability in her household and did not remedy any of the problematic situations during the year her children were removed. The trial court terminated Mother's parental rights and she appealed. On appeal, Mother likened the termination of her parental rights to Indiana's prohibition on the execution of mentally retarded criminal defendants, and contended that she should 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, in this case, rather than basing the termination order on Mother's 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. The Court noted that the trial court found 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. The Court observed that no expert testified to link Mother's mental deficits to her failures during the year her children were in foster care. Id. The Court noted the home-based counselor testified that "the big picture with [Mother is] ... laziness, I think it's a lack of motivation and I think that she really wants to figure out how to live without working." Id. The Court likened this situation to that in R.G. v. Marion County Office of Family and Children, 647 N.E.2d 326 (Ind. Ct. App. 1995), *trans. denied*, where parental rights of parent with low IQs were terminated because they were unable and unwilling to develop the skills necessary to fulfill their legal obligations as parents. A.S. at 50-51.

In **Matter of J.T.**, 742 N.E.2d 509 (Ind. Ct. App. 2001), Mother had a borderline low 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 low because she did not believe she had problems and therefore was not likely to benefit from help. Id. at 512-14. In rejecting Mother's claim that her parental rights were terminated because of her low IQ and attention deficit disorder, the Court found 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 was 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. 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. Parents participated in services provided by the office of family and children, including parenting

classes, homemaker services, visitation, and family and individual counseling, but made little progress in solving their parenting problems. On appeal of the trial court's termination judgment, the Court found the evidence was sufficient based on the facts from the CHINS case stated above and the following evidence: (1) Father's belief that hitting the children and using a belt on them were acceptable and his unwillingness to consider different means of discipline; (2) the testimony of the clinical social worker that 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 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 (6) testimony regarding emotional and psychological harm suffered by the children in Parents' custody. Id. at 828-829. Parents alleged the office of family and children violated the Americans with Disabilities Act (ADA) by failing to provide rehabilitation and reunification services 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 829-30. 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. at 830.

In **R.G. v MCOFC**, 647 N.E.2d 326 (Ind. Ct. App. 1995), the child suffered from hydrocephalus and was severely developmentally delayed. The child required frequent medical attention and would always be dependent on others. Parents signed an Agreed Entry that the child would remain in foster care as long as an apnea monitor was needed. Services were delivered to Parents, who had IQs of 64 and 62, to train them to care for the child. When it was determined that Parents were not adequately progressing in their training, the office of family and children filed a termination petition, which was granted by the trial court. The Court affirmed the termination judgment, finding the following: (1) Parents failed to progress in the training and to become involved in the child's medical care; (2) Parents lacked the skills and knowledge necessary to fulfill the obligation of a parent to a child with specialized needs; (3) the foster parents were capable of caring for the child, had provided a stable home for the child since the child was two weeks old, and desired to adopt the child. Id. at 329-30. The Court opined that mental retardation, standing alone, is not a proper ground for terminating parental rights, but mental disability may be considered when the parents are incapable of, or unwilling to adequately care for the child. Id. at 330. The Court opined that the trial court properly considered Parents' mental disability in light of their incapability and unwillingness to fulfill their parental obligations to the child. Id.

In **Egly v. Blackford County DPW**, 592 N.E.2d 1232 (Ind. 1992), the Indiana Supreme Court vacated the Court of Appeals opinion at 572 N.E. 2d 312 and affirmed the trial court's order 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 Parents concluded that Parents lacked the capacity to comprehend and retain the parenting information provided. Parents argued that their parental rights had been terminated because of their intellect. The Court opined that Parents' mental retardation, standing alone, was not a 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 **Matter of R.R.**, 587 N.E.2d 1341 (Ind. Ct. App. 1992), the Court reversed the trial court's CHINS and termination orders due to multiple procedural omissions. Id. at 1345. The Court noted that Mother had an IQ of 75 and was considered "learning disabled." Id. at 1343 n.4. The Court

opined that the multiple procedural omissions, which were exacerbated by Mother's "diminished mental capacity" clearly operated to deny her due process. Id. at 1343.

See also **J.L.L. v. Madison County DPW**, 628 N.E.2d 1223 (Ind. Ct. App. 1994); **R.M. v. Tippecanoe County DPW**, 582 N.E.2d 417 (Ind. Ct. App. 1991); **Matter of M.J.G.**, 542 N.E. 2d 1385 (Ind. Ct. App. 1989); **Matter of Dull**, 521 N.E.2d 972 (Ind. Ct. App. 1988).

IX. C. Mental Illness

In **In Re O.G.**, 65 N.E.3d 1080 (Ind. Ct. App. 2016), *trans. denied*, the Court reversed and remanded the juvenile court's order which terminated Parents' rights to their child. Id. at 1096. The Court identified Mother's mental health issues as one of the reasons which "likely" contributed to the child's continued removal from Mother's care and custody. Id. at 1092. The Court noted evidence that: (1) Mother was complying with mental health recommendations, taking prescribed medication, and showing improvement as a result; (2) after services were suspended by the juvenile court, Mother went to a mental health provider on her own, participated in an assessment, and complied with recommendations, including an anger management class; (3) Mother sought out a psychiatrist, her medication was changed, and as a result, Mother was better able to manage her emotions. Id. The Court said the evidence revealed that, in the year leading up to the termination trial, Mother had made significant progress on her mental health, so the evidence was not clear and convincing that Mother's mental health was unlikely to be remedied. Id. at 1093.

In **In Re N.G.**, 51 N.E.3d 1167 (Ind. 2016), the Indiana Supreme Court affirmed the trial court's order terminating Mother's parental rights to three of her children. Id. at 1174. The Court noted the CHINS court found that Mother had multiple mental health diagnoses, including a bipolar disorder for which she had not been taking prescribed medication. Id. at 1172. The Court affirmed the trial court's conclusion that the findings clearly and convincingly supported the termination judgment, noting the following findings about Mother's mental health: (1) her lack of compliance and progress in counseling; (2) her history of not taking her medication as prescribed; and (3) her limited insight with respect to her mental health and behavioral issues. Id. at 1173.

In **In Re V.A.**, 51 N.E.3d 1140 (Ind. 2016), the Indiana Supreme Court reversed the trial court's order terminating Father's parental rights. Id. at 1153. Father and Mother were married and lived together. Mother suffered from schizo-effective disorder, a mental illness, and DCS involvement revealed that Mother's untreated mental illness prevented her from properly caring for the parents' two-year-old daughter while Father was at work. After a month of providing in home services to the parents and the child under a safety plan, DCS removed the child from home, filed a CHINS petition, and placed the child in foster care. Father was informed that he needed to make a choice between having Mother or the child live in his home. Father was unwilling to live separately from Mother. Sixteen months after the CHINS adjudication, the trial court terminated Parents' rights to the child. Mother did not contest the termination order, but Father appealed the termination order. The Court observed that the termination order focused primarily on Mother's conduct and how it affected the child. Id. at 1146. The Court said it must consider only those reasons for the child's removal which were attributable to Father, and not hold him responsible for Mother's actions. Id. Noting that Indiana Courts have long held that mental disability of the parents, standing alone, is not a proper ground for termination of parental rights, the Court opined that "Father's unwillingness to live separately from a mentally ill spouse, without more, was an insufficient basis upon which to terminate *his* parental rights." Id. at 1147. (Emphasis in opinion.) The Court "fail[ed] to see how simply living with a relative suffering from mental illness provides a …satisfactory basis for termination", and noted that the record did not support that the child had been abused by Mother during the time the child was in Father's custody. Id. at 1148. The Court opined that Father could not be held accountable for failing to convince Mother

to take her recommended medication, which was something the DCS appointed psychiatrist had been unable to do. Id. at 1151.

In **In Re S.E.**, 15 N.E.3d 37 (Ind. Ct. App. 2014), *trans. denied*, the Court affirmed the trial court's judgment terminating Mother's parental rights to her daughter, who had resided in foster care for over twenty-seven months. Id. at 40. The Court found the evidence supported the trial court's conclusion that there was a reasonable probability that the conditions resulting in the child's removal or the reasons for the placement outside Mother's home would not be remedied. Id. at 47. Citing In Re E.M., 4 N.E.3d 636, 643 (Ind. 2014), the Court said that trial courts: (1) should first identify the conditions that led to removal or placement outside the home and then determine whether there is a reasonable probability that those conditions will not be remedied; (2) should judge a parent's fitness at the time of the termination proceeding, taking into consideration evidence of changed conditions, and balancing any recent improvements against habitual patterns of conduct to determine whether there is a substantial probability of future neglect or deprivation; (3) may weigh a parent's prior history more heavily than efforts made only shortly before termination; and (4) may find that parents' past behavior is the best predictor of their future behavior. S.E. at 46. The Court noted the trial court's findings about Mother's extensive mental health issues, which had existed since Mother was ten years old, Mother's treatment by numerous providers which had been unsuccessful, and Mother's refusal to participate with DCS services, including her active undermining and sabotaging of services "for multiple superficial reasons." Id. The Court noted the following evidence which supported the trial court's findings: (1) multiple service providers testified they were unable to provide services to Mother because she was confrontational, accusatory, or noncompliant; (2) the lone provider who was still working with Mother at the time of the hearings, characterized Mother's progress as mild; (3) the case manager testified that Mother made essentially no progress while the case was pending. Id. The Court found Mother's argument that she could provide financially for the child through social security disability not persuasive, stating that "even if Mother is capable of providing financially for [the child] as she claims, that does not mean that Mother is capable of parenting [the child]." Id. at 47. The Court opined that the trial court's extensive findings showed, and Mother did not dispute, that Mother's mental health problems were not resolved at the time of the termination hearings, despite DCS's efforts. Id.

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 249. The Court quoted the trial court's extensive findings regarding Mother's mental health, and summarized some of its own reasons for affirming the trial court's order as follows: (1) Mother might have a sincere desire to be reunited with the child, but she had been unable to make choices to support the child's well-being; (2) throughout DCS's involvement, Mother 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 exhibited violent behavior and had no memory of it; and (3) these patterns contributed to Mother's continuing inability to provide a safe and stable environment for the child. Id. at 253-54.

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. Id. at 170. In doing so the Court noted that Mother, who was diagnosed with moderate to severe depression: (1) refused to participate in a court-ordered psychological evaluation for more than nine months, thereby preventing DCS from pursuing and developing the best possible approach to family reunification; and (2) refused to participate in individual counseling to help her address her own psychological issues which were interfering with her ability to parent the child. Id. at 163. The Court made a threshold finding, 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 (emphasis in opinion). Id.

In **In Re A.J.**, 877 N.E.2d 805 (Ind. Ct. App. 2007), *trans. denied*, the Court held that termination of Parents' parental rights to their three children was supported by sufficient evidence. Id. at 817. DCS filed a petition alleging the children to be CHINS for several reasons, including the fact that Mother was residing in the psychiatric unit and there was a concern that the children had been sexually molested by Father. In affirming the termination judgment, the Court noted: (1) the oldest child's testimony regarding the abuse she suffered while in the care of her parents was both detailed and credible; (2) the oldest child's testimony was substantiated by the testimony of the child's therapist and another psychologist witness; (3) at the time of the final termination hearing, Mother was not in compliance with the terms of the dispositional order; (4) Mother testified that she did not believe that she had a mental health problem and she continued to deny Father had ever molested the oldest child; (5) Mother admitted she had not participated in any psychological evaluation and had not participated in any follow-up counseling, nor taken any medications for her mental health issues for the past eleven months. 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 Father's mental health impairment. Id. at 571. The facts of the opinion include a listing of Father's mental health disorders of intermittent explosive disorder, anti-social personality disorder and avoidant personality disorder and the guardian ad litem's 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 566-67. The psychologist testified that Father expressed threatening, intense, and unwarranted anger and it would be difficult for anyone with Father's symptoms and disorders to parent normal children, not to mention his children who had special needs and were receiving special education services. Id. at 567. The Court concluded that the evidence of 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 570-71.

In **In Re Termination of Relationship of D.D.**, 804 N.E.2d 258 (Ind. Ct. App. 2004), *trans. denied*, contributing factors to the child's placement outside the home were Mother's mental illness diagnoses and attendant erratic behavior. Id. at 260. Mother had been diagnosed with a number of mental health problems, including borderline personality disorder, depression, and anxiety. Id. at 262-263. Symptoms of Mother's illnesses included extreme sadness, boundary issues, intense, hostile and dependent relationships, isolation from others, distrust of persons who might help her, a cycle of unrealistic valuing and devaluing of people, manipulation, and screaming outbursts; these symptoms were made worse when she was not medically compliant. Id. Mother's symptoms posed a risk to the child's healthy emotional development, and interfered with Mother's day to day functioning, and with appropriate parenting of a child. Id. at 263. Based on the evidence, the Court opined that the trial court's finding that the reasons for the child's out of home placement were likely to continue was not clearly erroneous, and the Court affirmed the trial court's order terminating Mother's parental rights. Id. at 267-68.

In **McBride v. County Off. Of Family & Children**, 798 N.E.2d 185 (Ind. Ct. App. 2003), the evidence which supported the termination judgment included that Mother was diagnosed with severe post-traumatic stress disorder, depressive disorder, dissociative disorder, and dependent personality disorder. Id. at 192. The doctor who conducted Mother's psychological evaluation testified that it

could take several years of therapy for Mother to resolve her problems and characterized the therapy process for her disorders as "very slow work." Id. The doctor also testified that relapse is common with Mother's condition and that, if Mother did relapse, it could have "fatal consequences." Id. at 193.

In **In Re J.W.**, 779 N.E.2d 954 (Ind. Ct. App. 2002), the Court found that evidence which supported the termination order included: (1) Mother was diagnosed with probable Munchausen's syndrome by proxy, antisocial personality disorder, and histrionic personality disorder; (2) these disorders are not likely to be amenable to treatment; and (3) Mother believed she had no problems which needed to be addressed. Id. at 960-61

In **In Re E.E.**, 736 N.E.2d 791 (Ind. Ct. App. 2000), the Court affirmed the order terminating the parent-child relationship between Mother, who had paranoid schizophrenia, and her child. Id. at 796. The following evidence showed that Mother's mental illness adversely affected her ability to parent the child: (1) Mother had paranoid and delusional thought processes and an inability to appreciate the child's need for safety and stability; (2) a psychologist testified that Mother would need at least one year of successful psychotherapy and medication therapy before she could reliably parent; (3) Mother sporadically rejected prescribed medications in favor of herbal remedies and had refused outpatient therapy for two years; (4) Mother thought the child was chanting her siblings' names and asking to go home when the child was merely crying during a visit; (5) Mother repeatedly changed her telephone number without informing the caseworker due to Mother's delusional fear that the telephone line was tapped; (6) Mother's medical records reflected homicidal ideation toward her children and her parents; and (7) the services provided to Mother had not enabled her to bond with the child. Id. at 794-95. The Court found that the office of family and children had established a reasonable probability that the conditions that led to the child's removal would not be remedied and that continuation of the parent-child relationship would pose a threat to the child's well-being. Id. at 795. Although Mother argued that OFC failed to reasonably accommodate her disability when providing family services, thereby violating the Americans with Disabilities Act, the Court opined that provision of services in a discriminatory manner does not serve as a basis to directly attack a termination order as contrary to law. Id. at 796.

In **In Re L.S.**, 717 N.E.2d 204 (Ind. Ct. App. 1999), the Court noted Parents' "dysfunctional personalities," inability to relate appropriately in relationships, and the negative effect of Father's gender issues on the children as factors in affirming the termination judgment. The Court stated:

> We are not unsympathetic to the severe emotional problems that Danielle [father] has faced, and her efforts to overcome them. Nor are we insensitive to the stigma attached to mental illness and transsexualism. However, we are also not unmindful that the best interests of the child are paramount in termination proceedings and that children should not be compelled to suffer emotional injury, psychological adjustments, and instability to preserve parental rights. Moreover, when the evidence shows that the child's emotional and physical development is threatened, termination of the parent-child relationship is appropriate.

Id. at 210-11.

In **Matter of J.O.**, 556 N.E.2d 948 (Ind. Ct. App. 1990), the trial court excluded testimony on Mother's mental health services and denied the termination petition. On appeal, the welfare department argued that the expert medical testimony was sufficient to support a termination judgment, even without the testimony on mental health services. The Court noted that "expert medical testimony is not the sine qua non of the county's case for termination of a mentally ill

parent's rights" and found the following evidence supported the trial court's denial of the termination petition:

> While there was evidence that visitation with J.O. [child] had been sporadic and somewhat unsuccessful, there was also evidence that D.O. [Mother] had held a job, would be leaving the hospital in a few months, and hoped to take parenting classes. She had an appointment shortly after the hearing which would determine D.O.' s placement in the semi-independent living program. D.O. no longer showed signs of the dyskinesia at the time of the hearing.

Id. at 950-51.

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 parental rights of Mother, who had a mental illness. 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 medication, 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 Mother." Id. at 211.

For other termination cases where the parent's mental illness was a factor, see **Jackson v. Madison County Dept. of Family**, 690 N.E.2d 792 (Ind. Ct. App. 1998); **Matter of Adoption of D.V.H.**, 604 N.E.2d 634 (Ind. Ct. App. 1992); **Matter of A.M.**, 596 N.E.2d 236 (Ind. Ct. App. 1992); **M.B. v. Dept. of Public Welfare**, 570 N.E.2d 78 (Ind. Ct. App. 1991); **R.M. v. Tippecanoe County DPW**, 582 N.E.2d 417 (Ind. Ct. App. 1991); and **Matter of Tucker**, 578 N.E.2d 774 (Ind. Ct. App. 1991).

IX. D. Sexual Abuse

In **In Re E.P.**, 20 N.E.3d 915 (Ind. Ct. App. 2014), *trans. denied*, the Court affirmed the trial court's order terminating Father's parental rights to the child. Id. at 917. Father had pled guilty to molesting the child's half-sister, and was incarcerated. The Court observed that IC 31-35-3-8(1) states that a showing that Father has been convicted of an offense listed at IC 31-35-3-4 is prima facie evidence that "the conditions that resulted in the removal of the child from the parent under a court order will not be remedied." Id. The Court noted that IC 31-35-3-4(1)(G) includes child molesting as one of the listed offenses. Id. Quoting Earl v. Am. States Prepared Ins. Co., 744 N.E.2d 1025, 1028 (Ind. Ct. Ap. 2001), the Court defined "prima facie" as "such evidence as is sufficient to establish a given fact and which will remain sufficient if uncontradicted." E.P. at 921. Citing Mullins v. State, 646 N.E.2d 40, 50 (Ind. 1995), the Court noted that the contradiction of prima facie evidence merely creates a question for the trier of fact. E.P. at 921. The Court observed that at the termination hearing, DCS introduced evidence of Father's incarceration for molesting the child's half-sibling, and Father did not object to this evidence. Id. Although Father argued that he had contradicted this prima facie evidence by protesting his innocence at the termination hearing, the Court was not convinced that his claims contradicted the prima facie evidence presented by DCS. Id. The Court opined that, to the extent that Father created a question of fact on whether the continuation of the parent-child relationship posed a threat to the child's well-being, the trial court resolved that question in DCS's favor. Id. The Court found no error in that regard. Id.

In **In Re S.L.H.S.**, 885 N.E.2d 603 (Ind. Ct. App. 2008), the Court affirmed the trial court's termination of Father's parental rights and noted that: (1) Father had a history of substantiated sexual abuse of his former stepdaughter; (2) Father's niece testified that he had repeatedly molested her as a child; (3) Father had failed to complete court-ordered counseling services and sex offender specific treatment; and (4) Father refused to admit he had a problem. Id. at 617-18.

In **In Re A.J.**, 877 N.E.2d 805 (Ind. Ct. App. 2007), *trans. denied*, the Court held that termination of Parents' parental rights to their three children was supported by sufficient evidence. Id. at 816. In affirming the termination judgment, the Court noted: (1) the oldest child's testimony regarding the sexual abuse and neglect she suffered while in the care of her parents was both detailed and credible; (2) the oldest child's testimony was substantiated by the testimony of the child's therapist and another psychologist witness; (3) Mother testified that she did not believe that she had a mental health problem and she continued to deny Father had ever molested the oldest child; (4) at the time of the termination hearing, Father still had not admitted to sexually molesting the child; (5) Father did not complete any of the sexual offender classes which were necessary for reunification. 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 Father's conviction for sexually molesting the child, together with evidence that the child feared being abused by 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 Marion County Office of Family and Children (OFC) removed three children from Parents' home and filed a CHINS petition alleging the children were sexually abused by Father. The court granted the CHINS petition. The dispositional plan required Mother and Father to complete psychological evaluations, participate in parenting classes, complete substance abuse evaluations, and participate in anger control counseling and in sexual abuse counseling. The court subsequently suspended Mother's visitation with the children because of her attempt to persuade the two oldest daughters to retract the sexual abuse allegations. OFC filed a petition to terminate the parent-child relationship and the petition was granted after a hearing. On appeal, the Court found the evidence was sufficient on each element of the termination statute. Id. at 207. Evidence of the sexual abuse of the children, Parents' lack of treatment and counseling regarding the sexual abuse, Father's history of alcohol abuse, and the length of time the children were placed outside the home, supported the finding that there was a reasonable probability that Parents could not remedy the conditions that resulted in placing the children outside the home. Id. at 206-07.

In **Matter of Relationship of M.B.**, 638 N.E.2d 804 (Ind. Ct. App. 1994) the Court found the evidence was sufficient to prove that continuation of the parent-child relationship posed a threat to the well-being of the children, and to affirm the termination judgment. Id. at 807. The Court noted the following evidence: (1) Father was convicted of child molestation and attempted child molestation of two unrelated children; (2) the home life provided by Mother and Father for the children included engaging the children in sexual acts, not allowing the children to use the bathroom, locking the children in their bedroom for several hours, allowing the children to smear feces on themselves and the walls, and forcing the children to eat off of a dirty kitchen floor; and (3) the children exhibited inappropriate sexual acts while in foster care. The Court found that "there is an habitual pattern of neglect and no indication of changed mentality on behalf of Mother." Id. at 808. With regard to the best interests of the children and Father's request that the children be placed with Grandparents, the Court stated:

> The situation provided by Mother and Father proved to be wholly inadequate for the children's survival; this is evidenced by D.B.'s malnutrition and the anti-social behavior they exhibited. The trial court found it in the best interests of the children to terminate parental rights so that the children could be adopted and provided with an adequate home. Given this finding, if custody was granted to Father's parents there would be potential contact between Father and children. The trial court specifically found that continuing such a relationship would not be in the children's best interests.

Id.

See also the following cases which include sexual abuse as a factor in the termination case: **S.J.J. v. Madison Cty. Dept. of Welfare**, 629 N.E.2d 866, 869 (Ind. Ct. App. 1994) (Mother refused to ask roommate involved in child pornography to leave during Mother's visitations with the children); **Shaw v. Shelby Cty. D. of Public Welfare**, 584 N.E.2d 595, 600 (Ind. Ct. App. 1992) (Parents permitted overnight guests in the home in violation of agreement to protect child from sexual abuse); **Matter of Y.D.R.**, 567 N.E.2d 872, 877 (Ind. Ct. App. 1991) (Mother continued to cohabit with suspected child molester); **Matter of D.B.**, 561 N.E.2d 844, 846 (Ind. Ct. App. 1990) (child was exposed to strangers having sexual intercourse in the home).

IX. E. Physical Abuse of Child, Corporal Punishment, Failure to Protect

In **In Re N.G.**, 51 N.E.3d 1167 (Ind. 2016) the Indiana Supreme Court affirmed the trial court's order terminating Mother's parental rights to three of her children. Id. at 1174. The children had been removed from Mother's home and adjudicated CHINS because she had a substantial history of physical abuse toward her son, who stated that she had hit him with a spiked belt and a wooden board. Mother stated that her boyfriend had struck the child. Mother argued on appeal that there was insufficient evidence to support the trial court's conclusions that: (1) there was a reasonable probability that the conditions that existed at the time of removal would not be remedied; and (2) termination was in the children's best interests. The Court affirmed the trial court's conclusion that the findings clearly and convincingly supported the judgment. Id. at 1172. The findings included Mother's history of physically abusing her son, Mother's failure to protect her son from her boyfriend, and Mother's history of verbal abuse toward the children. Id. at 1172-73.

In **In Re E.M.**, 4 N.E.3d 636 (Ind. 2014), the Indiana Supreme Court affirmed the trial court's order terminating Father's parental rights. Id at 649. Father's two children, who were barely one year old and in early infancy at the time of their removal by DCS, had been adjudicated CHINS based on reports of Father's repeated domestic violence against Mother. Police identified Father as the aggressor in an incident shortly after the children's removal where he admittedly bit Mother's face and Mother stabbed him in the abdomen. The Court noted that the neglect and domestic violence which resulted in the children's removal were so severe that the children's older half-siblings *fled from the home to call 911* during previous incidents, and witnessing the violence had caused the half-siblings to suffer post-traumatic stress disorder (PTSD) (emphasis in opinion). Id. at 643. In considering whether the conditions that resulted in the children's removal would not be remedied, the Court held that it was reasonable under the circumstances for the trial court to find that Father's violence towards Mother had also "abused" the children. Id. at 644. The Court opined that the trial court was not required to believe that the children were unaffected by the same violence that had caused their older half-siblings to develop PTSD. Id. The Court explained that "[a] lack of beatings therefore does not equate to a lack of abuse, nor does the children's tender age equate to a lack of harm. Infants as young as fifteen months exhibit behavioral disturbances from spousal violence." (citation omitted). Id.

In **In Re J.S.,** 906 N.E.2d 226 (Ind. Ct. App. 2009), the Court affirmed the trial court's order terminating the parent-child relationships of Mother and Father (Parents) with their son. Id. at 237. The Court found that DCS presented ample evidence to support the trial court's determination that there was a reasonable probability the conditions resulting in the child's removal from Parents' care would not be remedied and that termination was in the child's best interests. Id. at 234-37. The Court noted the following evidence: (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 the case manager 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; (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; and (6) evidence as to Parents' lack of successful participation and compliance with other dispositional orders such as obtaining employment and being drug free. Id. at 233-34.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 **In Re T.F.**, 743 N.E.2d 766 (Ind. Ct. App. 2001) the Court affirmed the termination judgment on evidence that Father had been arrested for battery and criminal neglect of the children, Mother endangered the children by denying Father abused the children and by continuing to cohabit with Father despite a criminal order that the children were to have no contact with Father, and Parents failed to demonstrate a safe and clean home environment. Id. at 774-76.

In **In Re J.J.,** 711 N.E.2d 872 (Ind. Ct. App. 1999), the child had been removed from the home because Mother was continually in a state of crisis and entered into abusive relationships with men, the child suffered from Shaken Baby Syndrome, and Parents were unable to provide a safe and stable environment for the child. Id. at 873. The Court affirmed the termination order on the following evidence: Father's history of abusive behavior, child's suffering from Shaken Baby Syndrome, and Father's failure to complete the evaluations and services designed to facilitate reunification as ordered by the court. Id. at 874-875.

In **Matter of D.G.**, 702 N.E.2d 777 (Ind. Ct. App. 1998), the Court affirmed the termination order on evidence that Father battered Mother, Father struck the child, Father demonstrated an inability to control his substance abuse and anger, Mother's lifestyle was unstable and potentially dangerous for the child, Mother did not attend the classes for battered women, Mother missed visitation for a month when she traveled out of state, Mother did not have a job or a permanent residence, and Mother's choice of mates posed a threat to the child. Id. at 781.

See the following cases where termination judgments based on physical abuse were affirmed: **Lang v. Starke Cty. Office of Fam. Children**, 861 N.E.2d 366 (Ind. Ct. App. 2007) (termination of Father's parental rights affirmed where Father hit one of children with belt, resulting in class D felony battery conviction, had physically abused his other children, had shown no ability to differentiate reasonable from unreasonable corporal punishment, continued to defend his actions in beating his child with belt, and had failed to cooperate with those charged with remedying the situation); **McBride v. County Off. Of Family & Children**, 798 N.E.2d 185 (Ind. Ct. App. 2003) (termination judgment affirmed on evidence that Mother continued to have contact with Father who had hit Mother and children, Mother stopped attending domestic violence support group, and Mother lied to shelter personnel and to a court in Georgia about her contact with Father); **Everhart v. Scott County Office of Family**, 779 N.E.2d 1225 (Ind. Ct. App. 2002) (termination judgment affirmed where Court held evidence supported finding of series of uncontrollable, violent conduct based on evidence that Father had

physically abused his two-month-old child on two occasions, that he had thrown the child and struck her on her head with kitchen ladle, and admitted to picking up child and squeezing her head; child suffered two skull fractures), *trans. denied*; **In Re A.L.H.**, 774 N.E.2d 896 (Ind. Ct. App. 2002) (termination judgment affirmed where child was removed from Mother's custody due to substantiated neglect and abuse; child was admitted to hospital for severe failure to thrive and had bruises on chest, epidural hematoma, and retinal hemorrhaging, which are all symptoms consistent with shaken baby syndrome; Mother had not remedied reasons for removal and demonstrated lack of commitment to complete the actions necessary to preserve parent-child relationship); **Kern v. Wolf**, 622 N.E.2d 201 (Ind. Ct. App. 1993) (termination of Mother's rights affirmed due to Mother's denial that Stepfather was abusive and her unsatisfactory progress in the long term counseling needed to protect the child's safety); **Matter of C.D.**, 614 N.E.2d 591 (Ind. Ct. App. 1993) (termination of Parents' rights affirmed on evidence that Mother was unable to protect children, Father's physical discipline of children, Father's failure to improve his relationship with children, Father's potential for violent behavior, and Father's intention to resume physical discipline); **Matter of Robinson**, 538 N.E.2d 1385 (Ind. 1989) (Court affirmed termination on evidence that Father was convicted of abusing two of the girls, the girls were terrified of Father and one girl was in psychiatric care, and Father had not complied with dispositional orders and had resisted all efforts toward rehabilitation).

But see the following cases where termination judgments based on physical abuse were reversed: **In Re Children: T.C. and Parents: P.C.**, 630 N.E.2d 1368 (Ind. Ct. App. 1994) (Court reversed termination judgment, stating that basing the child's removal on a single incident of abuse of a sibling which occurred two years previously did not warrant termination; Mother made substantial efforts to comply with parental participation plans); and **Waltz v. Daviess County Dept. of Public Welfare**, 579 N.E.2d 138 (Ind. Ct. App. 1991) (Court found evidence supporting termination was insufficient when there was no direct evidence that Mother shook the four-month-old child, causing bilateral subdural hematoma; it was unlikely that the child could suffer shaken baby syndrome again because she was two years old at the time of the judgment; and there was no evidence that Mother was aggressive, violent or abusive to the child or to a subsequently born sibling who remained in Mother's custody).

IX. F. Drug Abuse

In **Matter of G.M.**, 71 N.E.3d 898 (Ind. Ct. App. 2017), the Court reversed the termination of Father's parental rights because the termination petition was filed before Father's dispositional hearing was held. Id. at 909. The Court affirmed the trial court's order terminating Mother's parental rights, finding the juvenile court did not err when it concluded there was no reasonable probability Mother would remedy the conditions that led to the child's removal from her care. Id. The CHINS petition for the child was filed when he was six days old, and was based on Mother's use of unprescribed painkillers and heroin and the child's drug withdrawal at birth. Among the juvenile court's findings on the termination petition were that Mother did not comply with services and had four positive drug screens, which were for oxycodone, methadone, and opiates without a prescription, before she stopped reporting for drug screens. Mother disputed the juvenile court's findings, but the Court noted that multiple exhibits containing the results of Mother's drug screens which were presented by DCS supported the court's conclusion. Id. at 906. Mother argued the court should not have considered her positive drug screens because they were prior to the CHINS adjudication, but the Court noted the juvenile court's initial hearing order to Mother that she should have no drugs in her system when she visited the child. Id. The Court said Mother knew she was not to take drugs prior to the dispositional order which stated that she should not take drugs. Id.

In **In Re O.G.**, 65 N.E.3d 1080 (Ind. Ct. App. 2016), *trans. denied*, the Court reversed and remanded the juvenile court's order which terminated Parents' parental rights to their child. Id. at 1096. The Court identified Mother's marijuana use as a reason for the child's removal from her care

and custody, but found no evidence supported a conclusion that Mother's substance abuse would not be remedied. Id. at 1092. The Court noted evidence that: (1) Mother completed a substance abuse assessment, which recommended no further substance abuse services; and (2) Mother completed a number of random drug screens, and there was no evidence that Mother provided any problematic screens. Id.

In **In Re A.W.**, 62 N.E.3d 1267 (Ind. Ct. App. 2016), the Court reversed the trial court's order which terminated incarcerated Mother's parental rights to her two children, who are half-siblings. Id. at 1269. The trial court did not terminate Father's rights to his child who was born to Mother. Mother and Father were married and testified at the termination hearing that they intended to live together when Mother was released from prison. The children were removed and CHINS petitions were filed when Mother was arrested for possession of heroin and Father was arrested for violation of a restraining order due to his contact with Mother. The Court found some evidence in the termination record which supported the trial court's conclusion to terminate Mother's parental rights; namely, her positive drug screens while on probation and two revocations of probation. Id. at 1274. The Court noted that Mother, who was incarcerated at the time of the termination hearing but was scheduled to be released seven months after the hearing, had made significant progress in dealing with her addiction. Id. The Court also noted that, during her incarceration, Mother had completed individual therapy, AA meetings, parenting classes, family classes, and early-release classes. Id. The Court observed that these programs were almost identical to the services the trial court ordered for Mother in the CHINS dispositional order. Id. The Court opined there was "seemingly nothing else" that Mother could have done to demonstrate her commitment to becoming a better person and better parent, and obtaining reunification with her children. Id. The Court looked at Mother's history against her efforts while in prison, coupled with the fact that Mother would be living with Father and her younger child. Id. The Court said it was "left with only one conclusion: DCS did not prove by clear and convincing evidence that there was a reasonable probability that the conditions that resulted in the removal of [Mother's two children] would not be remedied." Id.

In **In Re B.H.**, 44 N.E.3d 745 (Ind. Ct. App. 2015), the Court affirmed the trial court's order terminating Mother's and Father's parental rights to their two children. Id. at 752. The Court found that the evidence supported the juvenile court's conclusion that there was a reasonable probability that the conditions that resulted in the children's removal from Mother's custody would not be remedied. Id. at 750. The Court said the children were removed as a result of Mother's admitted drug use and the older child's positive drug test for methamphetamine. Id. The Court noted the following evidence: (1) over the course of the CHINS case, Mother repeatedly failed to take a substance abuse intake assessment, and once she did so, she failed to complete the recommended Intensive Outpatient Program; (2) Mother repeatedly tested positive for opiates for which she did not have a prescription and failed to show up for multiple random drug screens; (3) during the CHINS proceedings, Mother gave birth to a third child who tested positive for opiates and methamphetamine at birth. Id.

In **In Re A.S.**, 17 N.E.3d 994 (Ind. Ct. App. 2014), *trans. denied*, the Court affirmed the trial court's order terminating Mother's and Father's parental rights. Id. at 997. The Court noted that, at the time of the termination hearing, Parents had failed to complete any services after the children were removed from their home as a result of Parents' drug use during the children's home visits. Id. at 1005. The Court noted the following evidence on Parents' failures to complete substance abuse treatment: (1) Mother's substance abuse worsened when DCS returned her children for the trial home visit; (2) after her second substance abuse evaluation, Mother attended only four meetings of group and individual therapy in the months before the termination hearing; (3) although Father did not abuse drugs in the eight months preceding the termination hearing, he failed to complete his substance abuse treatment when the children were placed with him for a trial home visit; (4) Father

failed to attend the last eight weeks of his substance abuse program, and was discharged for non-attendance. Id. The Court concluded that the trial court did not err in its determination that termination of parental rights was in the children's best interests. Id. at 1006. The Court noted the following evidence in support of the trial court's determination: (1) since the trial home visit, Parents discontinued and failed to complete their services; (2) the seriousness of Parents' substance abuse had increased over time; (3) Parents initially tested positive for marijuana and abused prescription drugs, but, during the trial home visit, Parents tested positive for amphetamines and cocaine; (4) multiple service providers, including the case manager, the court appointed special advocate, Parents' therapist, the family consultant, and the children's therapist, testified that termination was in the children's best interest; and (5) the case manager noted that the children had been removed from Parents' home for over two years, and Parents still had not completed their services. 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. The Court concluded there was clear and convincing evidence to support the trial court's ultimate 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. Id. Mother used drugs, particularly marijuana, throughout the termination proceedings, despite being ordered not to do so. According to Mother, marijuana was a "friend, family member, a way of life." Id. at 1119. When asked at one of the hearings on the termination petition if she would stop smoking marijuana, Mother said she did not know. 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 other states as support for her claim. The Court observed 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. The Court said that, to the extent Mother suggested that she was putting her drug use behind her, the trial court was entitled to weigh her statements at the last hearing against her history of drug use. Id. The Court could not reweigh that evidence or assess the credibility of Mother's testimony on appeal. 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. The Court noted the following evidence in support of the trial court's conclusions: (1) Mother was arrested and incarcerated for multiple drug related crimes; (2) 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; (3) Mother had the status of a "chemically addicted offender"; (4) none of the services, which included 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 **K.T.K. v. Indiana Dept. of Child Services**, 989 N.E.2d 1225 (Ind. 2013), the Indiana Supreme Court, affirming the trial court's termination judgment, found the evidence presented clearly and convincingly showed a reasonable probability existed that the conditions that led to the children's removal from Mother's home would not be remedied. Id. at 1234. The Court noted the following evidence, inter alia, on Mother's drug abuse problem and her response to treatment: (1) the children were placed in 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, and 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 as hash, LSD, ecstasy, cocaine, crack cocaine, and heroin and began using heroin on a regular basis around the age of twenty-six and last had heroin in 2010; (6) DCS case managers testified that Mother's drug screens tested positive for oxycodone, hydrocodone, cocaine, benzodinine, morphine, and marijuana. 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. The Court noted evidence that Mother had not used illegal drugs in approximately eleven months, resulting in forty negative drug screens during that time. Id. The Court said that the trial court was within its discretion to consider that the first eleven months of Mother's sobriety were spent in prison where she would not have had access to any illegal substances, nor be subjected to the stressors of maintaining a household and raising three young children that would normally trigger a desire to escape from the pressures of everyday life which drugs often provide. Id. The Court also said that the trial court was within its discretion to "disregard the efforts Mother made shortly before termination and to weigh more heavily Mother's history of conduct prior to those efforts." Id.

In **A.D.S. v. Indiana Dept. of Child Services**, 987 N.E.2d 1150 (Ind. Ct. App. 2013), *trans. denied*, the Court affirmed the trial court's 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 because of her failure to address her mental health and substance abuse issues. After the children's removal, Mother tested positive for cocaine. Despite being referred by DCS for substance abuse treatment, Mother missed multiple treatment sessions and provided inconsistent drug screens. The Court agreed with the trial court's finding that "without consecutive monitoring" Mother's sobriety is not a given, and she "has failed to demonstrate the capacity to remain sober on a consistent and permanent basis." Id. at 1157. The Court noted the following detailed findings regarding Mother's long struggle with substance abuse and her failure to complete rehabilitation services: (1) she had a long history of cocaine abuse, starting at age eighteen or twenty; (2) she had undergone inpatient treatments twice but relapsed both times; (3) her past cocaine usage and instability resulted in her rights being terminated to two other children and her voluntary relinquishment of her rights to a third child; (4) she testified to last using cocaine five months before the termination trial; (5) she 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, she was referred to an additional substance abuse assessment at a different agency which she failed to complete. Id.

In **In Re A.P.**, 981 N.E.2d 75 (Ind. Ct. App. 2012), the Court affirmed the termination of Mother's and Father's rights, and found that the 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 during a thirteen month period, 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"; (4) Mother had made no changes in other aspects of her life, including the chaos in her

home life that temporarily convinced her on more than one occasion that she should voluntarily terminate her parental rights; (5) Mother verbalized her problems, but did not act upon correcting them and continued to blame those around her for her difficulties; (6) Mother's failure to take responsibility for her problems extended to the permanent suspension of her driver's license, and her inability to admit that her disregard for the law resulted in "serious felony charges and further incarceration." Id. at 81-82. The Court observed that, even with the permanent presence of Grandparents in Mother's home, Mother could not avoid the drugs that impaired her ability to parent and put her children at risk. Id. at 82.

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 for 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 noted 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 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 would not be remedied, noting 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 was 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 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. Id. The Court opined that this evidence made it reasonable to reach the conclusion that Mother's 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.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 parental rights and affirmed the termination judgment. Id. at 224. The Court opined 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, that termination of Father's parental rights was in the child's best interests, and that there was a satisfactory plan for the child's care and treatment. Id. at 224. Father argued the DCS caseworker's opinion that Father denied his substance abuse problem was speculative and not supported by the evidence. The Court disagreed, finding that DCS had presented minimal evidence that Father had a substance abuse problem, including that: (1) Father tested positive

for marijuana; (2) Father failed to take two random drug screens. Id. at 222. The Court said that Father's refusal to participate in A.A. or N.A. reflected poorly on his stated goal of reunification with the child. 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. The CHINS petition was filed and the children were adjudicated to be CHINS. The children had been wards of DCS on four previous occasions. Services were ordered, but Mother failed and evaded drug tests; did not complete the substance abuse treatment programs as ordered; consistently failed to attend the ordered day treatment program which resulted in her case being closed by the treatment facility; failed to properly use the court-ordered resources provided by Parent Aide, but instead used them to help her run errands; missed approximately fourteen scheduled visits with her children and created numerous problems during other visits with her inappropriate behavior. The termination petitions were filed and, six weeks later, Mother was incarcerated for possession of cocaine. Mother was released after ten months of incarceration. Within two months of her release, Mother tested positive for morphine, hydrocodone, hydromorphone, and alpha-hydroxy alprzolam, for which she did not have valid prescriptions. In affirming the trial court's termination judgment, the Court concluded that 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 positive tests for drugs three weeks before the hearing was sufficient to support the termination of Mother's parental rights. Id. at 539.

In **In Re I.A.**, 903 N.E.2d 146 (Ind. Ct. App. 2009), the Court affirmed the trial court's order terminating Mother's parent-child relationship with her youngest child, who was born with cocaine in his system and suffered from numerous medical problems. Id. at 148. The Court observed that this case was very unusual in that, in the same proceeding, the trial court terminated Mother's parental rights to the youngest child but not to four of her other children. Id. at 156. The Court said that, because of the youngest child's special needs and because he was treated separately by both parties throughout the proceedings, Court found that the judgment terminating Mother's parental rights to the youngest child was not clearly erroneous**.** Id. The Court stated that, although it commended Mother for being drug-free at the termination hearing, kicking a cocaine habit for eight months is one thing, but "overcoming a pattern of indifference to a child who has many medical needs is quite another." Id. at 155.

In **C.T. v. Marion Cty. Dept. of Child Services**, 896 N.E.2d 571 (Ind. Ct. App. 2008), *trans. denied*, the Court affirmed the trial court's termination of the parent-child relationships of Mother and Father with their child who had originally been removed from Mother because he had tested positive for cocaine at birth. Id. at 586. Mother's and Father's parental rights to three older children had previously been terminated. Two of these children had also tested positive for drugs at birth.

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 because she left the children unattended. The Court affirmed the termination order despite Mother's insufficiency of the evidence challenge. Id. at 1231. Mother argued 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 **Bester v. Lake County Office of Family**, 839 N.E.2d 143 (Ind.2005) the Indiana Supreme Court reversed the termination of parental rights judgment, rejecting the trial court's conclusion 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 153. 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. at 152. The Court found that Father's criminal and drug 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 him, and the trial court made no finding that he had been involved with drugs in the past three years or was currently involved with drugs. Id. at 153.

In **In Re A.I.**, 825 N.E.2d 798 (Ind. Ct. App. 2005), *trans. denied*, the Court affirmed the termination order and found that there was "little doubt that the parties' serious substance abuse addictions detrimentally affected or greatly endangered" the child. Id. at 811. 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) Parents tested positive for drug use in random tests. Id. at 808-11.

In **In Re D.L.**, 814 N.E.2d 1022 (Ind. Ct. App. 2004), *trans. denied*, 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 to 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. Id. at 1030. Mother testified to using crack for five years and also to abusing the prescription drug Xanax. She tested positive for cocaine just a month before the termination hearing. Mother had yet to kick her drug habit despite the fact that she had over two years to get her life together. When Mother had custody of her children and was abusing drugs, she would leave the children for long periods of time with various caregivers without picking them up as scheduled. The Court's conclusion was that Mother endangered her children in a variety of ways when she used drugs. Id. at 1029.

In **In Re Involuntary Term. Paren. of S.P.H.**, 806 N.E.2d 874 (Ind. Ct. App. 2004), Father admitted that he grew marijuana, and had methamphetamine precursors on the property, but denied that there were drugs found in the house where the children were living. Father also claimed that he had forfeited his drug addiction. The Court found that it was the trial court's prerogative to conclude that Father might be drug free while in prison, but that, based on his pattern of conduct, it would not last once he was released and the probability of recurring drug abuse would be high. Id. at 881. The Court affirmed the trial court's termination order. Id. at 883.

In **In Re Termination of Relationship of D.D.**, 804 N.E.2d 258 (Ind. Ct. App. 2004), *trans. denied*, Mother had a history of substance abuse, including abuse of prescription drugs, marijuana, and alcohol. Based on Mother's history of substance abuse and her self-reported treatment history of two prior referrals for substance abuse treatment, it was recommended by substance abuse professionals that she attend either an Intensive Outpatient Program or an Inpatient Program to deal with issues of substance abuse. Since initiation of the CHINS case, Mother attended neither. Mother's substance abuse represented a safety issue because it could interfere with her compliance with medications prescribed for her mental health issues. Mother alleged that she had changed many of the conditions that resulted in the children's removal, but she failed to provide documentation to support the changed conditions. The trial court weighed Mother's credibility against the other testimony demonstrating Mother's habitual patterns of conduct in being inconsistent in taking her medication, addressing her addiction problems, and providing a safe, consistent, nurturing residence and environment for the child. The Court held the trial court's finding that there was a reasonable probability that the reasons for the child's continued placement outside Mother's home were likely to continue was not clearly erroneous, and the termination order was affirmed. Id. at 267.

In **In Re Involuntary Term. Of Parent-Child Rel. [A.K.]**, 755 N.E.2d 1090 (Ind. Ct. App. 2001), the Court affirmed the termination of the parent-child relationship on evidence which included that Mother used crack cocaine almost daily and that she had engaged in prostitution to get money to support her drug habit and pay for her necessities. Id. at 1096-98. Mother testified that she had used cocaine until three weeks before the termination trial. Both children had tested positive for cocaine at birth. Mother was still using drugs after her children were taken from her, and she was informed that continued use could cause her to lose her parental rights; however, she never took all the steps necessary to defeat her drug addiction. The Court concluded that Mother's continued drug use was a threat to the well-being of the children. Id. at 1097.

See the following cases in which drug abuse was a factor in the termination judgment: **A.J. v. Marion County Office of Family**, 881 N.E.2d 706, 716-19 (Ind. Ct. App. 2008) (their drug abuse and failure to complete services to remedy that drug abuse contributed to termination of both Mother's and Father's parental rights), *trans. denied*; **In Re B.J.**, 879 N.E.2d 7, 12, 13 (Ind. Ct. App. 2008) (Court affirmed termination of Mother's parental rights and noted that, despite at least three separate referrals for intensive outpatient treatment for her substance abuse problem, which was impetus for DCS' initial involvement in case, Mother failed to complete treatment and was unsuccessfully discharged due to her lack of participation, and she provided only minimal proof of attendance at NA and AA meetings), *trans. denied*; **In Re Involuntary Termination of Parent-Child Relationship of Kay L.**, 867 N.E.2d 236, 242 (Ind. Ct. App. 2007) (Court affirmed termination of Mother's parental rights, noting her continued drug and alcohol abuse as factor); **Termination of Parent-Child Rel. of L.V.N.**, 799 N.E.2d 63, 70 (Ind. Ct. App. 2003) (termination judgment supported by evidence of Mother's ongoing drug use where she had refused to participate in forty-two drug screens and had eight drug screens with positive or diluted results; had failed to successfully complete any drug or alcohol program; had participated in four drug treatment programs but had been unable to stop using cocaine for any period longer than few months; relapsed when out of a structured environment; and suffered from addiction which was a chronic progressive illness); and **In Re R.S.**, 774 N.E.2d 927, 931 (Ind. Ct. App. 2002) (termination judgment affirmed where only drug screen Mother took yielded positive result, Mother and children sometimes resided with Father, whom Mother described as drug addict, and Mother failed to comply with requirements offered to her including substance abuse treatment and parenting classes), *trans. denied*.

See also **Matter of A.N.J.**, 690 N.E.2d 716, 721 (Ind. Ct. App. 1997); **In Re A.A.C.**, 682 N.E.2d 542, 545 (Ind. Ct. App. 1997); **In Re Wardship of R.B.**, 615 N.E.2d 494, 498 (Ind. Ct. App. 1993); **Odom v. Allen County DPW**, 582 N.E.2d 393, 396 (Ind. Ct. App. 1991).

IX. G. Alcohol Abuse

For cases in which evidence of parents' ongoing alcohol abuse supported trial courts' termination judgments, see **K.T.K. v. Indiana Dept. of Child Services**, 989 N.E.2d 1225, 1236 (Ind. 2013) (Court affirmed termination of Mother's parental rights, noting her arrest for public intoxication and her history of convictions for operating a vehicle while intoxicated); **In Re J.C.**, 994 N.E.2d 278, 191 (Ind. Ct. App. 2013) (Court affirmed termination of Mother's parental rights, noting that the two oldest children were removed from her custody when she was arrested for operating a motor vehicle while intoxicated and the children were with her while she was committing the acts for which she was arrested); **In Re Involuntary Termination of Parent-Child Relationship of Kay L.**, 867 N.E.2d 236, 242 (Ind. Ct. App. 2007) (Court affirmed termination of Mother's parental rights, noting her continued drug and alcohol abuse as factor); **S.E.S. v. Grant County Dept. of Welfare**, 582 N.E. 2d 886, 887 (Ind. Ct. App. 1991), adopted and incorporated in 594 N.E. 2d 447 (Ind. 1992) (Court affirmed trial court's termination order despite Mother's recent sobriety based on trial court's conclusion that Mother was likely to relapse after she left treatment center, in light of her previous history of sobriety followed by relapse, as well as Mother's failure to acknowledge her role in creating special problems for her children); **Page v. Greene County Dept. of Welfare**, 564 N.E.2d 956, 960 (Ind. Ct. App. 1991) (Court rejected Father's argument that welfare department failed to provide reasonable services, and noted Father's pattern of alcohol abuse and violence, his failure to accept services arranged by the welfare department to overcome these problems, and Mother's complete lack of parenting skills).

IX. H. Failure to Seek Services, Cooperate with Service Providers, Complete Assessments, Improve Parenting, Attend Hearings, and Visitation Issues

Parents cannot claim on appeal that DCS failed to provide services as a reason for reversing a termination judgment. See **S.E.S. v. Grant Cnty. Dep't. of Welfare**, 594 N.E.2d 447, 448 (Ind. 1992) (Court has long recognized that, in seeking termination of parental rights, DCS has no obligation to plead and prove that services have been offered to the parent to assist in fulfilling parental obligations). Parents must make appropriate and timely efforts to cooperate with evaluations and to participate in rehabilitation services. See **In Re B.D.J.**, 728 N.E.2d 195, 201-02 (Ind. Ct. App. 2000) (Court affirmed termination judgment on evidence that Father sought no services and failed to appear for assessments, parenting classes, and court hearings); and **In Re T.F.**, 743 N.E.2d 766, 775-76 (Ind. Ct. App. 2001) (Mother's refusal to allow case manager access to check house because it was unclean supported conclusion that Mother failed to provide a clean and safe environment). Receiving services alone is not sufficient if the services do not result in needed changes or result only in temporary changes, or parents do not acknowledge a need for change. See **In Re M.M.**, 733 N.E.2d 6, 13 (Ind. Ct. App. 2000) (Mother's failure to participate in or benefit from services offered supported termination judgment). Failure to visit the child and problems with visitation have frequently been a factor in granting a termination petition. See **Lang v. Starke Cty. Office of Fam. Children**, 861 N.E.2d 366, 373 (Ind. Ct. App. 2007) (Father's failure to actively seek visitation with children and comply with OFC's reasonable requests regarding his behavior during visitation supported termination judgment).

In **Matter of G.M.**, 71 N.E.3d 898 (Ind. Ct. App. 2017), the Court affirmed the juvenile court's order terminating Mother's parental rights. Id. at 909. The Court opined the juvenile court did not err when it concluded there was no reasonable probability that Mother would not remedy the conditions that resulted in the child's removal. Id. at 908. The child was removed when he was two days old and a CHINS petition was filed in part due to Mother's admitted use of unprescribed drugs and heroin during pregnancy and the child's drug withdrawal after birth. The child had a heart condition. The juvenile court ordered Mother not to have drugs in her system when she visited the child, to participate in a substance abuse evaluation and ongoing substance abuse treatment, attend visitation

with the child, and to attend random drug screens. In support of the juvenile court's termination order, the Court noted the following evidence: (1) Mother did not complete services, including the substance abuse assessment and never met with a substance abuse counselor; (2) Mother did not regularly visit with the child; (3) Mother did not seek to understand the child's condition and how to treat it; and (4) Mother had multiple positive drug screens, the last of which resulted in her arrest and subsequent incarceration for violation of probation. Id. The Court said that Mother did not complete services, and "the time for completion of those services had long passed." Id.

In **In Re N.G.**, 51 N.E.3d 1167 (Ind. 2016) the Indiana Supreme Court affirmed the trial court's order terminating Mother's parental rights to three of her children. Id. at 1174. On appeal, Mother claimed that two of the trial court's findings on her attendance and participation in therapy were not supported by sufficient evidence. The Court concluded that there was probative evidence from which a reasonable fact-finder could have found that the trial court's contested findings had been proven by clear and convincing evidence. Id. at 1171. The Court noted the following evidence: (1) Mother's current therapist questioned whether Mother was benefitting from therapy; (2) Mother's two previous therapists testified that Mother had not benefitted from their services due to lack of participation and lack of investment in therapy; and (3) Mother's psychologist opined that there should be some signs of improvement after three to six months of participation in cognitive behavioral therapy. Id.

In **In Re J.W., Jr.**, 27 N.E.3d 1185 (Ind. Ct. App. 2015), the Court held, as a matter of first impression, that IC 31-35-2-4(b)(2)(A)(iii) [child has been removed from parent and under supervision of DCS or probation for at least fifteen of the most recent twenty-two months] does not condition the waiting period for filing a termination petition on whether DCS provided services or whether the parent successfully or unsuccessfully participated in services. Id. at 1190. The Court opined that Parents' argument on this issue "amounts to a request to make the providing of services by DCS a basis on which to directly attack a termination order, contrary to our case law, and reads into our termination statutes a provision that our legislature has not seen fit to include." Id. The Court noted the trial court found that Parents had repeatedly failed to cooperate with, attend, or make progress in the parenting aid services, visitation, and drug screens when those programs had been made available to them. Id. at 1191. The Court affirmed the trial court's termination of Parents' parental rights. Id.

In **D.B.M. v. Indiana Dept. of Child Services**, 20 N.E.3d 174 (Ind. Ct. App. 2014), *trans. denied*, the Court affirmed the trial court's termination judgment, concluding the evidence supported the court's determination that there was a reasonable probability that the conditions resulting in the child's removal or reasons for his placement outside Father's home would not be remedied. Id. at 182. The Court noted the following evidence: (1) the case manager and the guardian ad litem testified that Father did not comply with the court's order to participate in services recommended by the family-functioning assessment; (2) Father had not exercised any parenting time with the child and had no relationship with him; (3) Father did not attend the termination hearing, and the case manager and guardian ad litem did not know his whereabouts. Id.

In **In Re A.S.**, 17 N.E.3d 994 (Ind. Ct. App. 2014), *trans. denied*, the Court affirmed the trial court's termination of Parents' rights to their two children. Id. at 1007. The children were removed due to the death of their half-sister (which was caused by Parents' neglect), Parents' drug use, and their uncertain housing. In light of Parents' failures to complete substance abuse treatment, the Court agreed with the trial court's conclusion that there was a reasonable probability that the conditions which led to the children's removal would not be remedied. Id. at 1005. The Court noted the following evidence: (1) Mother's substance abuse worsened when DCS returned the children for a trial home visit which was unsuccessful; (2) Mother completed two evaluations with a substance abuse treatment provider, but attended only four meetings of group and individual therapy in the

months before the termination hearing; (3) Father turned to drug abuse when the children were placed with him for trial home visits; (4) even though Father attended a month of drug treatment, he failed to attend the last eight weeks of the program and was discharged for non-attendance. Id.

In **C.A. v. Indiana Dept. of Child Services**, 15 N.E.3d 85 (Ind. Ct. App. 2014), the Court affirmed the trial court's order terminating Mother's and Father's parental rights. Id. at 95-96. The Court noted the following evidence supported the termination order as to Mother: (1) at the time of the termination hearing, she was not meeting with her service providers; (2) she did not complete her individual therapy, and when her therapists changed, she did not want to continue; (3) she frequently cancelled visits with the children and did not consistently meet with the provider who transported her to the visits; and (4) when she visited the children, she talked on the phone throughout the visit and then left thirty to forty-five minutes early. Id. at 94.

In **In Re S.E.**, 15 N.E.3d 37 (Ind. Ct. App. 2014), *trans. denied*, the Court affirmed the trial court's order terminating Mother's parental rights. Id. at 48. The Court noted the following evidence which supported the trial court's conclusion that there was a reasonable probability that the conditions resulting in the child's removal or placement outside Mother's home would not be remedied: (1) multiple service providers testified they were unable to provide services to Mother because she was confrontational, accusatory, or noncompliant; (2) a psychologist, the lone provider who was still working with Mother at the time of the termination hearings, characterized Mother's progress as "mild"; and (3) the DCS case manager testified that Mother made essentially no progress while the case was pending. Id. at 46.

IX. I. Housing, Hygiene, Stability, Safety, Supervision, and School Attendance

Evidence on a parent's failure to provide safe and adequate housing may support a termination judgment. See **In Re B.D.J.**, 728 N.E.2d 195, 201-02 (Ind. Ct. App. 2000) (evidence of Father's inability to provide housing supported termination). Evidence on a parent's failure to provide a safe, stable, and adequately clean environment or to provide supervision for the child may also support a termination judgment. See **In Re J.T.**, 742 N.E.2d 509, 514 (Ind. Ct. App. 2001) (evidence that Mother lacked capacity to provide safe and supervised environment for child supported termination).

In **In Re O.G.**, 65 N.E.3d 1080 (Ind. Ct. App. 2016), *trans. denied*, the Court reversed and remanded the juvenile court's order terminating Parents' rights to their child. Id. at 1060. The Court identified Mother's stability as one of the conditions that "likely" contributed to the child's removal from Mother's care and custody. Id. at 1093. The Court noted evidence that: (1) Mother had been living with the child's maternal grandmother, who had been approved as a placement for the child in the CHINS case, for sixteen months leading up to the termination trial; (2) at the time of the termination hearing, Mother had stable employment and had recently received a promotion and a raise; (3) the case manager testified that Mother usually maintained employment throughout the CHINS case; (4) although Mother had been briefly incarcerated on three occasions, she had no pending criminal matters at the time of the termination trial with the exception of a suspended driver's license. Id. The Court found the evidence did not clearly and convincingly support a conclusion that Mother's stability issues were unlikely to be remedied. Id.

In **In Re V.A.**, 51 N.E.3d 1140 (Ind. 2016), the Indiana Supreme Court reversed the trial court's order terminating Father's parental rights. Id. at 1153. The child was removed from the care of her parents for safety reasons because Mother, who suffered from mental illness, was unwilling to take her medication, and Father was unwilling to live separately from Mother, to whom he was married. The Court opined that Father's unwillingness to live separately from his mentally ill spouse, without more, was an insufficient basis upon which to terminate *his* parental rights (emphasis in opinion). Id. at 1147. The Court observed that: (1) Father never testified he was unwilling to ensure that Mother

had no unsupervised contact with the child; (2) the therapists who counseled Father did not testify that he was incapable of ensuring that Mother had no unsupervised contact with the child; (3) the DCS case manager testified that Father complied fully with the safety plan; (4) other than concerns expressed by therapists and DCS case managers based on generalized behaviors of individuals suffering with psychotic disorders, there was no evidence that *this* Mother had acted in a way that resulted in or created a substantial risk of physical harm to the child; and (5) the record did not support the conclusion that the child in Father's care, *albeit* with Mother present, would be at risk (emphasis in opinion). Id. at 1148-50.

In **In Re B.H.**, 44 N.E.3d 745 (Ind. Ct. App. 2015), *trans. denied*, the Court affirmed the trial court's judgment terminating Mother's and Father's parental rights. Id. at 752. The Court noted the following evidence in support of the termination judgment: (1) Mother had been wholly unable to maintain stable housing; (2) while Mother's one-time residence met minimal standards, her live-in boyfriend, a convicted violent felon with substance abuse issues and prior DCS history, did not; (3) Mother was homeless one month before the second day of the hearing on the termination petition; (4) Father had dealt in and used methamphetamine in the house where the children were living, contributing to an environment that caused his seven-year-old child to test positive for methamphetamine. Id. at 750-51.

In **C.A. v. Indiana Dept. of Child Services**, 15 N.E.3d 85 (Ind. Ct. App. 2014), the Court affirmed the trial court's termination orders as to Mother and Father. Id. at 95-96. The children were removed from Parents' home when Parents were charged with drug and child neglect offenses and were subsequently incarcerated. The Court noted the following evidence in support of the termination judgment: (1) Mother's residence with her live-in boyfriend, who had prior DCS contacts and a criminal history, was an inappropriate place for the children to visit and to live; and (2) Father would have difficulty establishing a stable home for himself, let alone for the children, upon his release from incarceration with a class B felony methamphetamine conviction on his record. Id. at 94-95.

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 with 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 that Mother lived in no fewer than eight places over a period of two years, and Mother testified that she did not "stay in one place." Id. at 798-99. The Court said 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 **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 found the record supported the trial court's conclusion that termination of Mother's parental rights was in the child's best interests. Id. The Court noted that: (1) Mother might have a sincere desire to be reunited with the child, but she had been unable to make choices to support the child's well-being; (2) throughout DCS's involvement, Mother 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 exhibited violent behavior and had no memory of it; and (3) these patterns contributed to Mother's continuing inability to provide a safe and stable environment for the child. Id.

In **In Re Involuntary Termination of Kay L.**, 867 N.E.2d 236 (Ind. Ct. App. 2007), the Court affirmed the trial court's order terminating Mother's parental rights. Id. at 242. The three children were originally removed from Mother's custody because of her abandonment and lack of supervision, poor hygiene, and a life and health endangering environment. The Court noted the following evidence about Mother's care of the children when DCS returned them to her care in an attempt at reunification: (1) Mother left the children under the supervision of unauthorized adults, including her physically violent boyfriend; (2) Mother left the two younger children with their thirteen-year-old sister in charge and instructed them to lie and keep it a secret if anyone asked them; and (3) Mother tested positive for marijuana and cocaine while the children were living with her. Id.

In **Bester v. Lake County Office of Family**, 839 N.E.2d 143 (Ind. 2006), the Indiana Supreme Court reversed the termination order because the findings were either misleading or unsupported by the evidence. Id. at 153. With regard to Father's housing, the Court noted the trial court's finding that Father had neither established himself as independent nor obtained his own residence provided little guidance on whether the child's well-being would be threatened by Father's custody. Id. at 150. The Court noted the trial court had made no finding that Father was transient, and had not concluded that Father was unable or unwilling to provide the child with an adequate home, or that the homes of Father's relatives where he resided were unsuitable for the child. Id. at 150-51. Father had lived with his parents in Illinois for most of his life. Evidence showed that, after the Interstate Compact home study was completed, the OFC informed Father that, as a result of the home study, he could no longer reside in his parents' home if the child was going to be placed there. Id. at 151. Father left his parents' home and moved in with a friend for about two months. He then moved to Chicago to live with an aunt, where he paid rent and was living at the time of the termination hearing. The Court found that the trial court's findings revealed no causal connection between Father's living arrangements and any adverse impact on the child. Id. The Court noted that the home of Father's parents was clean, spacious, and adequately furnished with no hazards to prevent the child's placement in the home. Id. The Court also found that the lack of approval from the State of Illinois to place the child with Father pursuant to the Interstate Compact at IC 12-17-8-1 (recodified in 2006 at IC 31-28-4-1) was not relevant to the question of whether continuation of the parent-child relationship posed a threat to the child's well-being. Id. at 153.

In **In Re Termination of Relationship of D.D.**, 804 N.E.2d 258 (Ind. Ct. App. 2004), *trans. denied*, the Court noted the following trial court findings which supported the termination judgment: (1) despite assistance, Mother had resided in several different shelters, motels, and with various friends; (2) Mother had also worked several different jobs for three to six months each, and also had periods of unemployment; (3) it was unlikely that Mother was capable of providing the minimum requirements of a safe, secure and nurturing home environment for her child. Id. at 261-63.

In **McBride v. County Off. Of Family & Children**, 798 N.E.2d 185 (Ind. Ct. App. 2003), the Court affirmed the termination order and noted the trial court's finding that Mother had continued to maintain the abusive relationship with Father which had been proven dangerous for her and the children. Id. at 201-02. The Court noted that it was the trial court's duty to judge witness credibility, and the court may well have determined that Mother's word could not be trusted regarding her relationship with Father. Id. at 202. The Court also noted the following evidence in support of termination: (1) there was a pattern of Mother returning to an abuser; (2) Mother had placed her own needs before the children's needs; (3) Mother had been making decisions which endangered her children for seven and one-half years; (4) there had been four removals of the children. Id. at 201-02.

In **In Re C.C.**, 788 N.E.2d 847 (Ind. Ct. App. 2003), *trans. denied*, the Court affirmed the termination judgment on evidence which included that alleged Father had failed to secure and maintain a stable source of income and suitable housing. Id. at 855-56. The alleged Father's stay in the homeless shelter during the termination proceedings demonstrated a lack of ability to provide suitable housing and maintain a steady income. Id. at 855.

In **In Re R.S.**, 774 N.E.2d 927 (Ind. Ct. App. 2002), *trans. denied*, the children were removed from Mother's home because: (1) the residence was without electricity, running water or food; (2) one of the children, age ten years, had contracted gonorrhea after sexual involvement with another child; (3) the children were infested with lice, frequently absent from school, and lacked hygienic or social skills. The Court noted evidence 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.

In **Carrera v. Allen County OFC**, 758 N.E.2d 592 (Ind. Ct. App. 2001), the Court affirmed the termination judgment on evidence that Mother failed to obtain permanent residence. Id. at 595-96. Evidence showed that Mother and child lived in a motel, an automobile, a church, and a shelter. Id. at 595. The trial court found that Mother lived a transient existence, without stable housing for herself and the child. The Court noted that the testimony revealed Mother's persistent unwillingness and inability to provide the child with adequate housing and stability, and to ultimately provide for his well-being. Id. at 596.

In **In Re D.J.**, 755 N.E.2d 679 (Ind. Ct. App. 2001), *trans. denied,* the Court affirmed the termination judgment. Id. at 685. At the time of the children's removal, the home that Mother and children were living in was messy, cluttered, and dirty, the children were often left in the care of Mother's ten-year-old daughter, and the children were not well supervised at other times. The Court noted the trial court's finding that the "filthy conditions" of the house had not been rectified. Id. at 682. The Court was not persuaded by Mother's argument that the cleanliness of the home had improved since removal and the house had stayed in the improved condition for nearly two years. Id. at 685. The Court noted that the children were removed not only due to cleanliness issues, but also because of concerns about Mother's parenting skills and her inability to care for the children's needs, which had not improved. Id.

In **In Re D.Q.**, 745 N.E.2d 904 (Ind. Ct. App. 2001), the children were removed because they were playing in the street unsupervised, the caseworker found Mother asleep on the floor of her apartment, there were no diapers and no clean clothes for the children, and Mother was being evicted due to non-payment of rent and the poor condition of her apartment. The Court noted that, by the time of the termination hearing, Mother had successfully completed virtually all of her requirements set forth by the dispositional decree; including obtaining suitable housing, furnishings, and bedding for the children. Id. at 910. The Court affirmed the trial court's judgment denying the termination of

Mother's parental rights based on her significant improvements and establishment of adequate housing. Id. at 911.

IX. J. Poverty, Low Income, Failure to Support

Failure of a parent to provide financial support for the child is often listed as a factor supporting the termination judgment. See **Matter of A.N.J.**, 690 N.E.2d 716, 721 (Ind. Ct. App. 1997) (Father's failure to pay anything toward court ordered support was listed as one of the factors supporting the termination judgment); **Matter of K.H.,** 688 N.E.2d 1303, 1305 (Ind. Ct. App 1997) (Father provided no support for child except for a few diapers even though he was continuously employed before his incarceration); **In Re A.A.C.**, 682 N.E.2d 542, 545 (Ind. Ct. App. 1991) (Father's inability to maintain stable housing and employment and refusal to support the child were significant factors in the termination judgment).

Parental rights cannot be terminated due to the parent's poverty, but poverty can be a factor in the termination if it results in failure to provide basic necessities for the child. In **In Re B.D.J.**, 728 N.E. 2d 195 (Ind. Ct. App. 2000), the Court rejected Father's argument that his parental rights were being terminated due to his poverty. The Court quoted approvingly the language of the trial court:

> Poverty can be a crushing burden… However, poverty cannot excuse neglect or abuse. Nor can it excuse the total lack of an attempt to remedy the situation to meet even the most minimal of standards of acceptable child care.

Id. at 203.

In **In Re A.G.**, 45 N.E.3d 471 (Ind. Ct. App. 2015), *trans. denied*, the Court affirmed the trial court's order terminating incarcerated Father's parental rights. Id. at 480. In support of the trial court's conclusion that the conditions leading to placement outside Father's home, the Court noted that Father had not provided any support for the child in this case nor for his three other children who lived with their respective mothers. Id. at 479.

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 Court noted that, in addition to failing to improve her parenting skills, Mother had also failed to resolve her employment issues and lacked stable or significant employment throughout the case. Id. at 365. The case had been open for four years. Id. at 366. The Court noted that, at the time of the termination hearing, Mother was unemployed and financially supported by her parents. Id. at 365. The expert social worker, who conducted an assessment of Mother, noted that Mother had made it clear that she did not intend to get a job, but was waiting for her boyfriend's Social Security to come in, and she was going to marry him and live off his Social Security income. Id. at 359.

In **Bester v. Lake County Office of Family**, 839 N.E.2d 143 (Ind.2005), the Indiana Supreme Court reversed the order terminating Father's parental rights, finding that the evidence did not clearly and convincingly demonstrate that continuation of the parent-child relationship posed a threat to the well being of the child. Id. at 153. The Court took issue with the trial court's finding in support of termination that Father failed to provide financially for the child. Id. at 149. Although the Court acknowledged that it could not reweigh the evidence in determining whether Father had provided financially for the child, the Court noted that there was no evidence that Father was ordered to provide support and failed to do so. Id. "Absent some indication that Father was directed to provide financial support to Child, he cannot now be criticized for not doing that which he was never asked to do." Id.

In **In Re D.L.**, 814 N.E.2d 1022 (Ind. Ct. App. 2004), *trans. denied,* the Court affirmed the judgment terminating Mother's parental rights to her younger child and reversed the trial court's ruling that Mother's parental rights regarding her older child should not be terminated, remanding the case for the trial court to enter a termination order regarding the older child. Id. at 1030. Evidence showed that Mother did not have a job, relied upon others to pay her mortgage and utilities, and did not maintain a stable source of income adequate to support her children. Id. at 1028.

In **In Re Involuntary Term. Paren. of S.P.H.**, 806 N.E.2d 874 (Ind. Ct. App. 2004), the Court found that the needs of the children were too substantial to force them to wait for a determination of whether incarcerated Father would be able to be a parent for them. Id. at 883. Even assuming that Father would be released from incarceration in two to three years, he would have missed a significant part of the children's developmental years. Id. The Court observed that Father also would not be able to provide financially for the children, and upon his release from incarceration, there was no guarantee that he would be able to care for his children or get custody of them. Id

Reversing the termination judgment as to the father of one of the children, the Court stated in **Tipton v. Marion County DPW**, 629 N.E.2d 1262 (Ind. Ct. App. 1994) that no evidence had been shown that Father's different living arrangements were harmful to the child or that his poverty exposed the child to danger or caused neglect. Id. at 1268. The burden was on the State, not Father, to show either a reasonable probability that the neglect or dependency of the child caused by Father's inconsistent income would not be remedied or that it posed a threat to the well-being of the child. Id. The Court stated:

> Unless Father's poverty causes him to neglect his child or exposes the child to danger such that removal from his care would be warranted, the fact that Father is of low or inconsistent income of itself does not show unfitness....Again, the DPW made no showing that Father's economic circumstances posed a threat to the child's well-being; indeed, it appears to the contrary that Father's living arrangement with extended family provided a safety net during periods when Father was temporarily unemployed. Id.

In **Matter of D.T.**, 547 N.E.2d 278 (Ind. Ct. App. 1989), the Court concurred with Mother's argument that inadequate housing and income alone were not sufficient grounds to terminate her parental rights, but rejected her contention that participation in services alone was sufficient to show improvement in conditions. Id. at 285. The Court stated:

> We must be very careful not to terminate parental rights because the parents in question do not fit into a class-based notion of what a parent should be. The judiciary, prosecutors and the personnel in the welfare departments should not enforce their personal standards on those who are less well off. Lola [Mother] is correct that factors such as low income or inadequate housing are by themselves not sufficient grounds to terminate parental rights. She is also correct that incidents of neglect and abuse remote in time do not alone justify termination. However, termination may be based on evidence of recurring incidents up until the time of removal. Moreover, Lola is incorrect in asserting that mere participation in the DPW's programs is sufficient to show improvement in conditions, especially when her counselor and welfare personnel urged her to continue the programs and offered her alternative programs.

Id. (citations omitted).

After reviewing evidence of Mother's unstable living arrangements, unstable personality, refusal to continue professional help, and inability to meet the special needs of the children, the Court concluded in D.T. that while "certain factors alone—Lola's smoking, inadequate housing, low

income--would not justify termination of parental rights, all the factors are substantial evidence justifying termination." Id. at 286. The Court affirmed the termination judgment. Id.

IX. K. Termination For Some, But Not All Children in the Family

In **In Re I.A.,** 903 N.E.2d 146 (Ind. Ct. App. 2009), the Court affirmed the trial court's order terminating Mother's parent-child relationship with her youngest child, who was born with cocaine in his system and had numerous medical problems, even though, at the same time, the trial court had denied the termination petition with regard to four other of her children. Id. at 148. The Court observed that this case was very unusual in that, in the same proceeding, the trial court terminated Mother's parental rights to the youngest child but not to four of her other children. The Court opined that, because of the youngest child's special needs and because he was treated separately by both parties throughout the proceedings, the judgment terminating Mother's parental rights to the youngest child was not clearly erroneous. Id. at 156. The Court stated that, although it commended Mother for being drug-free at the termination hearing, kicking a cocaine habit for eight months is one thing, but "overcoming a pattern of indifference to a child who has many medical needs is quite another." Id.

In **In Re D.L.**, 814 N.E.2d 1022 (Ind. Ct. App. 2004), *trans. denied,* 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 to her older child should not be terminated. Id. at 1024. The trial court terminated Mother's parental rights with respect to the younger child, but did not terminate Mother's parental rights to the older child, thereby separating siblings who had always lived together. There were only two differences between the children, namely: (1) the older child was five years old and the younger child was nine months old when they were removed from Mother; and (2) the older child was bonded with both Mother and his foster parents while the younger child was bonded only with the foster parents. Id. at 1029. The Court ruled that separating the children would be extremely detrimental to both of the children, and the differences between the children did not support different results. Id. at 1030. The case was remanded with instructions to enter an order terminating Mother's parental rights to the older child. Id.

In **Matter of M.J.G.**, 542 N.E.2d 1385 (Ind. Ct. App. 1989), Parents noted on appeal that the department had allowed two of Parents' children to remain in the home while it sought termination on their three children who had been adjudicated CHINS. Parents argued that the evidence could not be clear and convincing on the termination petition if the home was adequately safe for two of their children. The Court found that this argument went to the credibility of the caseworker, not to the sufficiency of the evidence. Id. at 1388. The Court accepted the caseworker's opinion that the parents could not handle the stress of additional children in the home and affirmed the trial court's termination order. Id. at 1389.

IX. L. Inability of Parent to Bond with Child

The inability of the parent to bond with the child is often mentioned in termination opinions as part of the evidence in support of the trial court's findings that: (1) there is a reasonable probability that the conditions that resulted in the child's removal from the home or continued placement outside the home will not be remedied; (2) continuation of the parent-child relationship poses a threat to the child's well-being; or (3) termination of parental rights is in the best interests of the child.

In **In Re A.G.**, 45 N.E.3d 471 (Ind. Ct. App. 2015), *trans. denied*, the Court affirmed the trial court's order terminating the parental rights of incarcerated Father. Id. at 480. The Court noted that a parent's interests must be subordinated to a child's interests in considering a termination petition. Id. at 477. Although Father only knew with certainty that he was the child's father for the four months preceding the termination hearing, the Court noted that the child had been removed from the care of both parents for his entire life, eighteen consecutive months. Id. The Court noted the trial court's

finding that Father was incarcerated months before the child's birth, and had never seen, held, touched, cared for, or supported the child. Id. at 479. The Court found that Father's history of incarceration, lack of support for all of his children, and lack of contact with the child throughout the child's life supported the trial court's conclusion that there was a reasonable probability that the circumstances leading to the child's removal would not be remedied. Id.

In **In Re E.M.**, 4 N.E.3d 636 (Ind. 2014), the Indiana Supreme Court affirmed the trial court's order terminating Father's parental rights to his two children, who were removed from home by DCS when the older child was barely one year old and the younger child was in early infancy. Id. at 649. The Court noted that: (1) the children had been removed from the home for nearly three and a half years; (2) Father had visited the children only one time; (3) the children had lived and bonded with their grandmother for nearly a year and a half, while never having bonded with Father; (4) and Father was still not ready to parent them and would likely need additional services on parenting, domestic violence, and anger management. Id. at 648. The Court recognized that Father's incarceration 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, as Father sought to do. Id. The Court observed that Father could not contend that the lack of bonding was merely a byproduct of imprisonment when he had nearly a year before his imprisonment to engage in services and bond with his children, but failed to do so. Id. The Court said that Father could have made at least some effort to communicate with the children, perhaps by sending cards or short letters, or by telephoning them. Id.

In **In Re I.A.**, 934 N.E.2d 1127 (Ind. 2010), the Indiana Supreme 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 were referring to what they perceived as insufficient emotional attachment and interaction between Father and child. Id. The Court noted that the record certainly demonstrated that Father's parenting skills were 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 order terminating Father's parental rights to his son. Id. at 151. The Court held that, although evidence of Father's lackluster efforts to communicate with 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 for over three years, 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. 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 was strongly bonded, and to live with Father, with whom he was 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 held 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), *trans. denied*, the Court affirmed the trial court's order terminating the parental rights of 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. Quoting Matter of A.C.B., 598 N.E.2d 570, 572 (Ind. Ct. App. 1992), 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. The Court noted that the child was almost ten years old and Father had been incarcerated when the child was born, incarcerated when the child was taken into OFC custody, incarcerated when the termination hearing was held, and was apparently still incarcerated at the time of the Court of Appeals decision. Id. at 374-75. The Court found the trial court's conclusion that termination of Father's rights was in the child's best interests was supported by clear and convincing evidence and was not clearly erroneous. Id. at 375.

In **R.W., Sr. v. Marion Cty Dept. Child Serv.,** 892 N.E.2d 239 (Ind. Ct. App. 2008), the Court affirmed the trial court's termination judgment. Id. at 250. The Court noted the case manager's testimony that, at the time she discontinued home-based services, she felt Mother and Father could not safely parent children in their home and that the family was not "bonded." Id.

In **In Re D.L.**, 814 N.E.2d 1022 (Ind. Ct. App. 2004), *trans. denied*, the Court concluded that the trial court's denial of the termination petition regarding the 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 evidence that the older child was bonded to Mother and the foster parents, but the younger child was bonded only to the foster parents, who desired to adopt both children. Id. at 1029-30. The Court deemed the bonding of the older child to 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. [A.K.]**, 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. Id. at 1098. 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.

In **M.H.C. v. Hill**, 750 N.E.2d 872 (Ind. Ct. App. 2001), the Court found that OFC was not required as a matter of law to dismiss the petition to terminate alleged Father's rights because the child was living with his aunt. Id. at 879. The Court noted evidence that alleged Father was incarcerated, had never had the child in his custody, and there was no bond. Id. at 878.

See also **In Re E.E.**, 736 N.E.2d 791, 795 (Ind. Ct. App. 2000) (Court noted testimony of social worker that there was no parent-child bond between Mother and child); **Matter of M.B.**, 666 N.E.2d 73, 78 (caseworker testified that incarcerated Father had no bond with child); **Matter of A.C.B.**, 598 N.E.2d 570, 572 (Ind. Ct. App. 1992) (inability of incarcerated Father to bond with child was due to Father's own choice to participate in criminal activity and resulting incarceration); **R.M. v. Tippecanoe County DPW**, 582 N.E.2d 417, 420 (child's unnatural and erratic behavior toward

Mother raised questions as to the possibility of normal bonding); **Matter of Tucker**, 578 N.E.2d 774, 779 (Ind. Ct. App. 1991) (inability of mentally ill Mother to bond with child or give emotional support to child was a factor in affirming termination judgment).

IX. M. Medical or Special Needs of Child

In **Matter of G.M.**, 71 N.E.3d 898 (Ind. Ct. App. 2017), the Court affirmed the trial court's order terminating Mother's parental rights. Id. at 909. The child was removed from Parents when he was two days old because Mother admitted using unprescribed pain killers and heroin during pregnancy, the child underwent drug withdrawal at birth, and Father was unable to care for the child because Father had been convicted of rape and was not permitted to be around children. The child also had a heart condition and had many medical appointments. Among the evidence supporting the juvenile court's conclusion that there was no reasonable probability that Mother would remedy the conditions that led to the child's removal was Mother's failure to seek information on the child's medical condition and how to treat it. Id.

In **In Re S.S.**, 990 N.E.2d 978 (Ind. Ct. App. 2013), *trans. denied*, 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; and 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 I.A.,** 903 N.E.2d 146 (Ind. Ct. App. 2009), the Court affirmed the trial court's order terminating Mother's parent-child relationship with her youngest child, even though, at the same time, the trial court had also denied the termination petition with regard to four other of her children. Id. at 148. Mother's youngest child tested positive for cocaine at birth, and had never been in

Mother's care. The child was born with numerous problems, including extra digits on both hands, a heart murmur, right ventricular enlargement, pulmonary stenosis, organic encephalopathy, a disfigured scalp, one of his ears was fully attached to his scalp, and his neck leaned to one side. In finding that there was sufficient evidence to support the termination, the Court stated that although it commended Mother for being drug-free at the termination hearing, kicking a cocaine habit for eight months is one thing, but "overcoming a pattern of indifference to a child who has many medical needs is quite another." Id. at 155. In finding that the evidence was sufficient to support the determination that termination of Mother's parental rights was in the youngest child's best interests, the Court noted that: (1) at the time of the termination hearing, the youngest child was about 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 been in the care of the same licensed foster parents with whom he had formed a strong bond and who were responsible for taking him to his doctor and therapy appointments; (3) the family case manager and guardian ad litem testified that termination was in the child's best interests; (4) the guardian ad litem testified that the child was thriving with his foster parents who had stabilized his medical conditions. Id. at 156. The Court observed that Mother had been indifferent to her youngest child "since before he was even born". 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". The disorder is controlled with behavior management and medication. The child was placed at the Indiana Developmental Training Center at the time of the termination hearing. The Court concluded that termination of Mother's parental rights was premature, in that everyone agreed that, for now, the child should continue to reside in a facility so that he could receive full-time medical and behavioral care, and no one could predict when, or even whether, the child would become stabilized, or what would be best for him when and if he did become stabilized. Id. The Court opined that terminating Mother's parental rights merely because her child had special needs and she needed 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. Id. at 313. The Court emphasized that: (1) the problem here was not Mother's parenting skills or her love for her children, and she had not been reluctant to comply with DCS's suggested services, but instead, the problem was 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 occurred. Id. at 314. The Court reviewed 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's 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 argued 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's own witnesses testified that the child would need to remain a resident of the Center until he was stabilized; (5) the status of the child's relationship with Mother affected neither his ability to remain in the Center nor the fact that he continued to need specialized behavioral and medical assistance, and DCS would be paying for the child's stay at the Center regardless of whether the parental relationship was 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 might never be able to live in a home with other children, but DCS's witnesses acknowledged

that there was no way for anyone to know what the child and Mother would be able to handle once the child was stabilized, and that DCS's plans for the child were similarly unknown; (8) Mother testified that, when the child is stabilized, he gets along with his brothers, and he enjoys and is a help in caring for them; and (9) Mother acknowledged that, for the time being, the child needed to be cared for by the Center, but she hoped that after he was stabilized, he could return home. Id. at 311-14.

In **In Re A.B.**, 887 N.E.2d 158 (Ind. Ct. App. 2008), the Court affirmed the trial court's order terminating Mother's parental rights. Id. at 170. The Court noted evidence presented at the termination hearing that the child was a victim of sexual abuse and had been diagnosed with Attention Deficit Hyperactivity Disorder, Oppositional Defiant Disorder, and Impulse Control Disorder. Id. at 165. The Court noted, among other things: (1) DCS's involvement with Mother and the child stemmed from a referral DCS received while the child was residing at a 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 adjudicated the child to be 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 162-63. The 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 and termination of Mother's parental rights was in the child's best interests were supported by clear and convincing evidence. Id. at 165, 170.

In **Everhart v. Scott County Office of Family and Children**, 779 N.E.2d 1225 (Ind. Ct. App. 2002)*, trans. denied,* the Court affirmed the trial court's order terminating Father's parental rights. Id. at 1235. The Court noted the following evidence in support of the termination judgment: (1) one of the children had special medical needs that Father could not provide for while he was incarcerated; (2) the child's special needs were caused by injuries inflicted by Father, including two skull fractures due to physical abuse; (3) the child would need future surgeries; (4) the child was also subject to seizures as a result of the injuries and took medication to control seizure activity. Id. at 1234.

In **In Re Involuntary Term. Of Parent-Child Rel. [A.K.]**, 755 N.E.2d 1090 (Ind. Ct. App. 2001), the Court affirmed the termination judgment and noted the evidence that the children suffered from the effects of Mother's cocaine use prior to the children's birth. Id. at 1093-94. Evidence showed that one of the children experienced hypertonicity, which meant that her muscles were tight. Id. at 1094. This condition kept her from rolling over, sitting up, crawling and walking in the normal progression of development. Id. The child also displayed behaviors such as head banging and had difficulty learning the consequences of her actions. Id. The other child was underweight and developmentally delayed before being placed with his foster mother, but at the time of the termination trial, he no longer had any special needs. Id.

In **In Re E.S.**, 762 N.E.2d 1287 (Ind. Ct. App. 2002), the Court reversed the termination judgment, finding that the decision to terminate appeared to be based not on Mother's inadequacies as a parent but rather on the child's extraordinary needs. Id. at 1291. The child's special needs included that she was mildly mentally handicapped, socially delayed, and unable to communicate adequately. Id. at 1288. The child had been hospitalized on two occasions for psychiatric care after removal from Mother's care, was receiving outpatient therapy, and taking antipsychotic medication. Id.

In **In Re K.S.**, 750 N.E.2d 832 (Ind. Ct. App. 2001) the Court held that the trial court's findings and conclusions, including that one of the children had been hospitalized twice, was depressed, and had been placed on probation for battering Mother, clearly showed that continuation of the parent-child relationship posed a threat to the children's well-being. Id. at 838 n.5.

In **R.G. v. MCOFC**, 647 N.E.2d 326 (Ind. Ct. App. 1995), the Court found that the past failure and future inability of the mentally impaired Parents to meet the specialized needs of the child born with hydrocephalus supported the termination judgment. The Court noted that Parents would not be able to provide "even minimally sufficient care", and the child would "not reach his full potential" in Parents' care. The Court also found that Foster Parents had provided a stable home and desired to adopt the child, and that the child had bonded with Foster Parents. Id. at 329-330.

In **Shaw v. Shelby Cty. D. of Public Welfare**, 584 N.E.2d 595 (Ind. Ct. App. 1992), the Court affirmed the trial court's order terminating Parents' rights to the child. Id. at 601. The child was self abusive, physically aggressive toward others, and needed structure and consistency. The Court found that Parents were unable to meet his specialized needs. Id. at 600.

In **Matter of Y.D.R.**, 567 N.E.2d 872 (Ind. Ct. App. 1991), the Court found that evidence of Mother's inability to meet the needs of her children supported the termination judgment Id. at 873. The facts showed that improving the condition of the younger child "would require a great deal of counseling, warmth, positive but firm responses from his caretakers, consistency, and positive interaction between adults." Id. at 874. The other child was under-nourished, showed signs of emotional and social deprivation, and reflected severe expressive motor and cognitive language delay. The older child was first diagnosed to be mildly mentally handicapped, but when re-tested after a brief period in foster care showed significant gains. Id.

In **Matter of D.T.**, 547 N.E.2d 278 (Ind. Ct. App. 1989), the Court stated that the special needs of abused and neglected children could be considered as a factor in terminating the parent-child relationship:

> Children should not be taken from their parents because there is a better place for them than in the custody of their parent.... The law recognizes that some children have different and sometimes more demanding needs for their survival. The evidence in this case clearly shows that because of the history of abuse and family instability, [Mother's] children need stability and special care to overcome the psychological harm already inflicted on them... The children continue to grow up quickly; their physical, mental and emotional development cannot be put on hold while their recalcitrant parent fails to improve the conditions that led to their being harmed and that would harm them further.

Id. at 286.

IX. N. Improvement of Child in Foster Care and Potential Foster Care Adoption

In **C.A. v. Indiana Dept. of Child Services**, 15 N.E.3d 85 (Ind. Ct. App. 2014), the Court affirmed the trial court's order terminating Mother's and Father's parental rights to their three children. Id. at 87. The Court noted the trial court's findings that: (1) the children had suffered from PTSD as a result of living with Father when he was using and selling methamphetamine; (2) since the children had been placed with their foster family, they were excelling in school and had connected with foster parents; and (3) the oldest child began "sobbing uncontrollably" and had a "complete meltdown" when the therapist mentioned the prospect of reunification with Parents. Id. at 96.

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 were 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." Id. at 395, quoting In Re D.B., 942 N.E.2d 867, 875 (Ind. Ct. App. 2011).

In **K.T.K. v. Indiana Dept. of Child Services**, 989 N.E.2d 355 (Ind. 2013), the Indiana Supreme Court concluded 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. Id. at 1236. The Court affirmed the trial court's judgment which terminated Mother's parental rights. Id. 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 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 **B.H. v. Indiana Dept. of Child Services**, 989 N.E.2d 355 (Ind. Ct. App. 2013), the Court opined 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: (1) when first placed in foster care, the older child, age twenty-eight months, could say only ten words and hid food, and the younger child, age sixteen 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 would sometimes attack 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), *trans. denied*, the Court concluded 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 would continue to be met, and where they could grow. Id.

In **In Re C.G.**, 954 N.E.2d 910 (Ind. 2011), the Indiana Supreme Court found the evidence supported the trial court's findings that termination of the parent-child relationship was in the child's best interests. Id. at 925. The Court noted, inter alia, that the child's therapeutic needs were being served in foster care, the child was bonded to her foster family, the child had been placed with the same foster parents from the time of her removal, and her foster parents were willing to adopt her. Id. at 924-25.

In **In Re A.K.**, 924 N.E.2d 212 (Ind. Ct. App. 2010), the Court affirmed the trial court's termination judgment, and noted the following evidence: (1) the child's therapist testified about the child's strong attachment to her foster family and opined that she was likely experiencing anxiety "at the thought of having to leave her foster home..."; (2) although the child still had behavioral issues, her behavior had improved except after visitation with Father; (3) the child had made progress both emotionally and cognitively; (4) the foster parents had filed a petition to adopt the child. Id. at 223-24.

In **In Re H.L.**, 915 N.E.2d 145 (Ind. Ct. App. 2009), the Court affirmed the trial court's termination judgment, finding that DCS established by clear and convincing evidence the requisite elements to support the termination of Father's parental rights. Id. at 150. The Court noted the guardian ad litem's testimony that: (1) the child had extraordinary medical needs, and the child's foster mother was very diligent in administering medical procedures; (2) the child was doing very well in foster care; and (3) adoption by her foster parents was in the child's best interests. Id.

In **R.W., Sr. v. Marion Cty Dept. Child Serv.,** 892 N.E.2d 239 (Ind. Ct. App. 2008), the Court affirmed the termination judgment, finding there was sufficient evidence to support the trial court's order terminating the parental rights of both parents. Id. at 250. In doing so, the Court noted 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. at 249-50.

In **In Re Involuntary Term. Paren. of S.P.H.**, 806 N.E.2d 874 (Ind. Ct. App. 2004), the Court noted evidence that the two children had made significant progress and improvement in behavior since being placed in foster care. Id. at 882. 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 paternal aunt, but, based on Mother's drug use and easy access to the aunt's home, the Court concluded that the trial court properly found that there was no guarantee the aunt would be able to provide a safe and stable home for the children. Id. The Court affirmed the termination judgment. Id. at 883.

In **Stewart v. Randolph County OFC**, 804 N.E.2d 1207 (Ind. Ct. App. 2004), *trans. denied*, the caseworker's testimony showed that the children benefited from foster care and had significantly improved their speech and grades while they were in foster care. Id. at 1212. The Court affirmed the trial court's order terminating Mother's parental rights. Id.

In **In Re Termination of Relationship of D.D.**, 804 N.E.2d 258 (Ind. Ct. App. 2004), *trans. denied*, the evidence showed that the foster family was committed to making the child a part of their family, and showed interest in adoption but was not ready to make a final decision. Id. at 268. The Court opined that the trial court's finding that OFC had a suitable plan for the child's care was not clearly erroneous and the termination judgment was affirmed. Id.

In **In Re C.C.**, 788 N.E.2d 847 (Ind. Ct. App. 2003), *trans. denied*, the Court noted that foster parents, who had been caring for the child since birth, desired to adopt him. Id. at 856. The foster mother testified that her family had bonded to the child and come to love him. Id. The Court opined that there was sufficient evidence to terminate alleged Father's parental rights. Id.

In **In Re W.B.**, 772 N.E.2d 522 (Ind. Ct. App. 2002), at the time of the termination hearing the twins had lived with their great-aunt for nine months. The children were thriving in their current placement, and the great-aunt expressed a desire to adopt them, providing permanent placement for the twins. The trial court found that the effort to reunite the twins with Parents would only require that the twins remain in limbo rather than working toward the permanency that the twins needed and deserved. The

Court could not fault the trial court for concluding that Parents' habitual patterns of past conduct might eventually overcome their present, short-term improvements. Id. at 534.

In **In Re Involuntary Term. Of Parent-Child Rel. [A.K.]**, 755 N.E.2d 1090 (Ind. Ct. App. 2001), the Court affirmed the termination of the parent-child relationship on evidence which included that the children had developed a strong bond with their foster mother, a developmental therapist, who helped with the children's special needs. Id. at 1091, 1094-95. The children referred to the foster mother as "mommy." Id. at 1094-95. The children had thrived since being placed in foster care, and the foster mother wished to adopt them. Id. at 1095.

In **M.H.C. v. Hill**, 750 N.E.2d 872 (Ind. Ct. App. 2001), the child had been in the continuous care of his aunt for eighteen months. Termination of parental rights would insure that relationship would continue without interruption, providing the child with the stability and continuity of care that afforded his continued development. The trial court also found that during the child's care and custody with his aunt, he thrived and experienced normal healthy development, and he also developed a sibling relationship with his aunt's children, which was a positive force in his development. The aunt exhibited the understanding of importance of family and took the initiative to gain custody of the child from other foster care. The aunt also had taken the child to visit Father in prison and planned to continue to allow Father and child to interact with one another. The Court opined that the evidence supported the trial court's finding that it would be in the child's best interests to terminate Father's parental rights. Id. at 879.

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. S.E.S., 582 N.E.2d at 889.

Evidence that the child has improved in foster care, is bonded to the foster parents and/or that the foster parents are potential adoptive parents for the child has supported findings that termination is in the best interest of the child and that there is a satisfactory plan for the child. See **In Re B.D.J.**, 728 N.E.2d 195, 203 (Ind. Ct. App. 2000) (plan of office of family and children to have children adopted by Foster Parents or to pursue other placement for the special needs children was adequate); **In Re E.E.**, 736 N.E.2d 791, 795 (Ind. Ct. App. 2000) (Court noted evidence that child had improved in foster care and Foster Parents had adopted his siblings and desired to adopt him); **Matter of A.N.J.**, 690 N.E.2d 716, 719 (Ind. Ct. App. 1997) (testimony of guardian ad litem that children had bonded with Foster Family and had no interest in living with Father); **Adams v. Office of Fam. & Children**, 659 N.E.2d 202, 207 (Ind. Ct. App. 1995) (evidence that Foster Parents expressed desire to adopt children and could provide safe nurturing environment for children supported finding that there was a satisfactory plan for the children and that termination was in their best interest); **R.G. v. MCOFC**, 647 N.E.2d 326, 329-330 (Ind. Ct. App. 1995) (termination was in best interest of child in that Parents would not be able to provide "even minimally sufficient care," child would "not reach his full potential" in Parents' care, Foster Parents had provided stable home and desired to adopt child, and child had bonded with Foster Parents); **Matter of Adoption of D.V.H.**, 604 N.E.2d 634, 638 (Ind. Ct. App. 1992) (testimony of child psychologist that child's primary bond was with Foster Mother, removal from Foster Mother would be "disaster," and attempts to strengthen bond between child and Mother would not be in child's best interests

supported termination judgment); **Matter of Y.D.R.**, 567 N.E.2d 872 (Ind. Ct. App. 1991) (facts showed one of the children had significant gains in foster care); **Matter of Tucker**, 578 N.E.2d 774, 778 (Ind. Ct. App. 1991) (child's anger and wildness subsided in foster care, his emotional state improved dramatically, and he did not exhibit any self-abuse after being established in foster care); **Matter of Campbell**, 534 N.E.2d 273, 726 (Ind. Ct. App. 1989) (child had been behind socially and mentally but had improved since she had been in her foster home).

IX. O. Child's Need for Permanence, Ongoing Foster Care Harmful

In **Matter of A.F.**, 69 N.E.3d 932 (Ind. Ct. App. 2017), *trans. denied*, the Court affirmed the trial court's order which terminated Father's parental rights to his three children. Id. at 949. The children were the subjects of three separate CHINS proceedings. The first CHINS petition and removal was in 2008, the second CHINS petition and removal was in 2009, and the third CHINS petition and removal was in 2012. In answer to her counsel's question on whether there was trauma to the children from the cycle of removal from parents, living with parents, and subsequent removal from parents, the guardian ad litem testified this cycle kept the children "emotionally up and down" because they did not know what would happen next. Id. Citing Ind. Evidence Rule 702, which governs the admission of expert testimony, Father asserted that the guardian ad litem's testimony did not establish that she was an expert, and there was no evidence on the scientific principles or reliability of the guardian ad litem's testimony about trauma to the children. The Court looked to Ind. Evidence Rule 701, which provides: "If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; and (b) helpful to a clear understanding of the witness's testimony or to a determination of a fact in issue." A.F. at 949 n.3. The Court noted the guardian ad litem's testimony that she had served as a guardian ad litem for more than sixteen years, she was assigned as guardian ad litem for the children, she had received training on trauma, and she observed the children and spoke to them individually. Id. at 949. The Court concluded the guardian ad litem's opinion was rationally based on her personal observation, knowledge, and past experience; thus, the trial court did not abuse its discretion in admitting the guardian ad litem's testimony that the children suffered from trauma. Id.

In **In Re O.G.**, 65 N.E.3d 1080 (Ind. Ct. App. 2016), *trans. denied*, the Court reversed and remanded the juvenile court's order terminating Parents' rights to their child. Id. at 1096. The Court opined that, although the need for permanency and stability in a child's life cannot be overstated, that need cannot trump a parent's fundamental right to parent her child. Id. at 1094.

In **Termination of Parent-Child Relationship [R.S.]**, 56 N.E.3d 625 (Ind. 2016), the Indiana Supreme Court reversed the trial court's order terminating Father's parental rights to his child, who was placed in the home of the maternal grandmother (Grandmother). Id. at 626. The Court held that the trial court's findings did not clearly and convincingly support its conclusion that termination of Father's parental rights was in the child's best interests. Id. at 631. The Court observed that establishing permanency for the child was repeatedly expressed as a reason for termination. Id. at 630. The Court noted that the child had a stable home environment with Grandmother. Id. The Court said that, when a child is in relative placement, and the permanency plan is adoption into the home where the child has lived for years, prolonging the adoption is unlikely to have an effect upon the child. Id.

In **In Re V.A.**, 51 N.E.3d 1140 (Ind. 2016), the Indiana Supreme Court reversed the trial court's order terminating Father's parental rights to his four-year-old child. Id. at 1153. The guardian ad litem had recommended termination to "give this child a different opportunity". The Court opined that permanency is certainly *a* factor in determining whether termination is in the child's best interest, but clarified that a child's need for immediate permanency is not reason enough to terminate parental rights where the parent has an established relationship with his child and has taken positive steps

toward reunification (emphasis in opinion). Id. at 1152. The Court noted the foster mother's testimony that the child was welcome to stay in her home until a permanent placement was found for her, and the case manager's testimony that, in the absence of the foster mother's willingness to adopt the child, the plan was adoption. Id. The Court reviewed statistics, including that in 2012 there were approximately 2400 children in Indiana foster care awaiting adoption and that the number of adoptions from DCS care between 2012 and 2014 was declining. Id. at 1152 n.9. The Court opined that relegating the child as a permanent ward of the State for an undetermined period of time until a special needs adoptive placement was identified did not clearly and convincingly show that termination would establish permanency. Id. at 1152-53. The Court concluded that the goal of permanency might best be served by allowing the child to remain with her current foster family while DCS pursues the goal of reunification with Father as he receives appropriate services that enable him to better understand how to parent his child while simultaneously caring for his mentally ill wife. Id. at 1153. The Court also observed that the appointment of a legal guardian is another permanency option, and that employing the option of a guardianship, if reunification became unfeasible, would be consistent with the Court's well-established precedent that "involuntary termination of parental rights is an extreme measure that is designed to be used as a last resort when all other reasonable efforts have failed." In Re C.G., 954 N.E.2d 910, 916 (Ind. 2011). V.A. at 1153.

In **In Re K.E.**, 39 N.E.3d 641 (Ind. 2015), the Indiana Supreme Court could not find sufficient evidence to support the trial court's conclusion that, at the time of the termination hearing, incarcerated Father posed a threat to the child's wellbeing. Id. at 649. The Court acknowledged that DCS recommended termination of Father's parental rights solely on the grounds that the child deserved permanency. Id. at 649-50. The Court considered the impact of delaying termination on the child's wellbeing, and found it significant that the aunt, with whom the child was placed, the court appointed special advocate, and the DCS case manager all acknowledged that it was unlikely the child would be harmed by delaying termination of Father's parental rights. Id. at 650. The Court said that, if Father failed to comply with services and/or relapsed into a life of crime or drug use after he was released from prison, the child would remain in the loving environment of his aunt's home, and would not be "bounced around to various foster homes" or "denied stability if termination did not occur now". Id. The Court observed that the child's aunt expressed her willingness to adopt the child at any time, and that her willingness would not change if termination was delayed. Id. The Court found there was seemingly no risk that the child would be denied permanency if termination of Father's parental rights was delayed. Id. The Court noted that, even though Father admitted that the child's aunt was currently providing a good and stable home for the child, Father might also be able to provide a suitable home for the child in the future. Id. The Court reversed the trial court's order terminating Father's parental rights. Id. at 652.

In **In Re A.S.,** 17 N.E.3d 994 (Ind. Ct. App. 2014), the Court held that there was clear and convincing evidence to support the termination of Mother's parental rights to two of her children, and that Mother's mental deficits did not preclude this result. Id. at 51. While the Court agreed that the need for permanency is alone insufficient to terminate parental rights, the Court noted that multiple service providers had testified at trial that termination would serve the children's best interests, and that after two years Parents had continued to fail to participate in services provided by the department. Id. at 1006.

In **In Re E.M.**, 4 N.E.3d 636 (Ind. 2013), the Indiana Supreme Court affirmed the trial court's order terminating Father's parental rights. Id. at 649. The two children, who were in early infancy and barely a year old at the time of removal by DCS, had been removed from home for nearly three and one half years at the time of the termination trial. The children had never bonded with Father, and Father was still not ready to parent them. Id. at 648. The Court opined that children need not wait indefinitely for their parents to work toward preservation or reunification. Id. The Court held that it

was not clearly erroneous for the trial court to conclude that, after three and one half years, Father's efforts came too late, and that the children needed permanency 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 Indiana Supreme Court affirmed the trial court's judgment terminating Mother's parental rights, and found no error in the trial court's conclusion that termination was in the best interests of the three children. Id. at 1236. The Court 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 over a period of sixteen months and in some instances separated. Id. The Court noted the testimony of the children's home-based therapist that the uncertainty of their placement and future had been troublesome to the children. Id. The Court also noted the testimony of the psychologist evaluator that the children's best interests would be served by allowing them to remain in Foster Parents' care, and the testimony of the guardian ad litem and case manager that the children needed a permanent home. Id. The case manager confirmed that the children's need for permanency would be satisfied upon termination of Mother's parental rights because Foster Parents had already expressed a desire and willingness to adopt the children. Id.

In **H.G. v. Indiana Dept. of Child Services**, 959 N.E.2d 272 (Ind. Ct. App. 2011), *trans. denied*, 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 showed that Mother and the father of the oldest child were still incarcerated at the time of the termination hearing, and the father of the two youngest children had only recently obtained full-time employment. The Court noted that each parent still had work to do before reunification would be possible, but they had shown willingness to continue working toward reunification and they clearly had a bond with the children. Id. The Court noted that Parents have all had issues with drug use and run-ins with the law, but they had 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 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 an unwillingness to be adopted. Id.

In **In Re J.M.**, 908 N.E.2d 191 (Ind. 2009), the Indiana Supreme Court affirmed the trial court's denial of DCS's petition to terminate the parental rights of Mother and Father, who were incarcerated at the time of the hearing. Id. at 196. In explaining its determination, the Court examined the four reasons the trial court gave for denying the termination petition. Id. at 194-96. The trial court's fourth reason was 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. at 195. The Court concluded that the following evidence supported the trial court's conclusion on permanency: (1) Mother and Father had taken steps to provide permanency for the child upon their release from prison; (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, he had a job waiting for him; (3) Father had secured a home where Mother and the child could reside with him; (4) Father's "Motion to Supplement the Record," which was supported by exhibits, stated in relevant part that Father had obtained housing, fulltime employment, and transportation; (5) Mother testified at the termination hearing that she was "right on track" to complete her bachelor's degree, which would accelerate her release date; (6) at oral argument the guardian ad litem acknowledged that Mother had been released

from incarceration and her physical presence at oral argument was evidence that she had completed her bachelor's degree; (7) Mother testified at the termination hearing that she had completed a 16-month community transition program to prepare for her return to society; and (8) Mother's testimony that she had not lined up a job or housing after her release was offset by evidence that Father had a stable job and appropriate housing for her and the child. Id. at 195-96. The Court found the evidence supported the trial court's conclusion that the child's need for permanency was not severely prejudiced. Id. at 196.

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, a special needs child, because there was insufficient evidence that termination was in the child's best interests. Id. at 314. DCS argued that perhaps the child would be best served in the long run by adoption as an only child in a very specialized set of circumstances. The Court concluded that termination of Mother's parental rights at that time was, at best premature, in that everyone agreed that, for the time being, the child should continue to reside in a treatment facility so that he could receive full-time medical and behavioral care, and no one could predict when, or even whether, the child would become stabilized, or what would be best for him when and if he did become stabilized. Id.

In **A.J. v. Marion County Office of Family**, 881 N.E.2d 706 (Ind. Ct. App. 2008), *trans. denied*, the Court affirmed the trial court's termination judgment. Id. at 719. The Court addressed the trial court's finding that the children needed permanency and stability that Parents were unable to provide. Id. at 718. The Court said the permanency finding was supported by the testimony of the children's DCS caseworker and the guardian ad litem. Id. The guardian ad litem testified that: (1) she thought the children's behavioral problems, as well as some of the other problems, would be rectified if the children had permanency; (2) the children needed to be somewhere they knew they were going to stay and feel comfortable; and (3) Parents had not been engaged with the children, had not been visiting them, and had not moved forward on reunification over a 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 Parents completing services or for some form of reunification which had not happened. Id. Both the guardian ad litem and the 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 **Castro v. Office of Family and Children**, 842 N.E.2d 367 (Ind. Ct. App. 2006), *trans. denied*, Father was incarcerated when the child was born, when the child was taken into custody and when the termination hearing was held. He was serving a forty year sentence for criminal deviate conduct and burglary. The child was almost ten years old and had lived in foster care since the age of seven. The Court opined that, even assuming Father would eventually develop into a suitable parent, it must be asked how much longer the child should have to wait to enjoy the permanency that was essential to her development and overall well-being. Id. at 374-75. The Court held the trial court's conclusion that termination was in the child's best interests was supported by clear and convincing evidence. Id. at 375.

In **Rowlett v. Office of Family and Children**, 841 N.E.2d 615 (Ind. Ct. App. 2006), *trans. denied*, the Court reversed the termination judgment and was not persuaded by OFC's argument that termination of incarcerated Father's rights was in the children's best interests so the children could be adopted by the maternal grandmother and step-grandfather and be given a permanent home. Id. at 623. The children had been in the grandmother's care for nearly three years, and the Court saw "little harm in extending the CHINS wardship" until Father had time to prove himself a fit parent. Id. The Court acknowledged the importance of stability for children, but noted that this was not a case where

the children were in a temporary arrangement pending termination. Id. The Court stated that, in this case, continuation of the CHINS wardship would have little, if any, impact on the children. Id.

In **In Re D.L.**, 814 N.E.2d 1022 (Ind. Ct. App. 2004), *trans. denied*, the Court affirmed the trial court's judgment terminating Mother's parental rights to her younger child, reversed the judgment that Mother's parental rights to her older child should not be terminated, and remanded to the trial court with instructions to enter an order terminating Mother's rights to the older child. Id. at 1030. The children lived together in the home of foster parents who desired to adopt both of them. The guardian ad litem testified that both children needed permanency and that adoption, not reunification with Mother, would accomplish that. The Court ruled that separating the children would be extremely detrimental to both of the children, and the differences between the children did not support different results. 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 that the children needed permanency. Id. at 203. Both the court appointed special advocate and DCS caseworker testified that permanency was needed. 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.

In **Thompson v. Clark County Div. of Family**, 791 N.E.2d 792 (Ind. Ct. App. 2003), *trans. denied*, the Court reversed the termination judgment because Mother was denied due process when the court conducted the hearing in a summary proceeding despite the objection of Mother's attorney. Id. at 796. The Court noted that it was unfortunate that their decision would delay the children's permanency, but opined that the reversal was necessary because termination of parental rights was a "serious and intrusive" action. Id.

In **In Re C.C.**, 788 N.E.2d 847 (Ind. Ct. App. 2003), *trans. denied*, the Court affirmed the termination judgment on evidence that giving alleged Father more time to attempt to complete services was not in the child's best interests because it continued to delay the child's permanency, which had already been prolonged two years without results. Id. at 855. The child had lived with his foster family since birth and alleged Father had visited him only once. Id.

In **M.H.C. v. Hill**, 750 N.E.2d 872 (Ind. Ct. App. 2001), the Court found that the evidence supported the trial court's finding that termination was in the child's best interests. Id. at 879. The Court noted that the past conduct of the child's Mother and Father posed distinct threats to the permanency and stability necessary to the child's continuing physical, psychological, and emotional development. Id.

In **In Re K.S.**, 750 N.E.2d 832 (Ind. Ct. App. 2001), the Court noted the trial court's finding that the children had immediate needs for permanency and stability which their parents continued to be unable to provide for them, and which had been and would continue to be provided in an adoptive placement. Id. at 838.

See **In Re A.B.**, 887 N.E.2d 158, 163 (Ind. Ct. App. 2008) (Court affirmed termination of Mother's parental rights to child noting, among other things, that permanency plan was changed from reunification to termination of parental rights because: (1) Mother was not in compliance with Parent Participation Plan; and (2) DCS case manager testified that plan was changed because of six years of unsuccessful efforts to put family back together and child's need of permanent place with family that would be able to take care of her special needs); and **In Re S.L.H.S.**, 885 N.E.2d 603, 618 (Ind. Ct. App. 2008) (Court affirmed termination of Father's parental rights where court appointed special advocate testified that continuation of parent-child relationship posed threat to child's well-being, that

termination of Father's parental rights was in child's best interest, and that child needed permanency). See also **Matter of K.H.**, 688 N.E.2d 1303, 1306 (Ind. Ct. App. 1997); **Matter of M.B.**, 666 N.E.2d 73 (Ind. Ct. App. 1996); and **Matter of Adoption of D.V.H.**, 604 N.E.2d 634 (Ind. Ct. App. 1992).

IX. P. Child's Desires and Fears

Testimony about the child's positive relationship with and desire for permanent placement with foster parents and the child's poor relationship with natural parents has been presented in termination cases to show that termination is in the child's best interest and there is a satisfactory plan for the child. In **Matter of Adoption of D.V.H.**, 604 N.E.2d 634, 638 (Ind. Ct. App. 1992), the Court rejected Mother's argument that the trial court had erroneously admitted the hearsay testimony of the guardian ad litem on the child's desires and state of mind. The trial court had instructed the guardian ad litem to refrain from repeating the child's statements verbatim. The guardian ad litem testified to the child's desires to remain with his foster mother forever, that the child thought of his foster mother as his mother, and that the child did not want ongoing contact with his birth mother. In **Matter of A.N.J.**, 690 N.E.2d 716, 719 (Ind. Ct. App. 1997), the guardian ad litem testified the girls had bonded with their foster family and had no interest in living with Father. In **Matter of C.M.**, 675 N.E.2d 1134, 1140 (Ind. Ct. App. 1997), the caseworker testified that the child wanted to be adopted into a "forever family" and was "very happy with his current foster family."

Termination may be appropriate even when the child does not express a desire for this legal separation, if the service providers strongly recommend that termination is essential to the safety and permanency of the child. Loyalty to parents may make it impossible for some children to state a desire for termination. 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 eleven-year-old child had been deposed in the presence of his parents. 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 many factors enumerated by statute that the trial court must consider in making a best interests determination. Id. The Court concluded that in termination proceedings, as in custody cases, the wishes of the child are only one of the many factors the trial court must consider in determining the best interests of the child. Id. The Court found 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. 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.

Testimony about the child's fears of the parent can be evidence in the termination proceeding. See **Ramsey v. Madison County Dept. of Family and Children**, 707 N.E.2d 814, 817 (Ind. Ct. App. 1999) (child feared being abused by Father who had earlier been convicted of molesting the child); **Matter of Robinson**, 538 N.E.2d 1385, 1388 (Ind. 1989) (Father was convicted of physically abusing the two older girls who were terrified of him).

In **Matter of A.F.**, 69 N.E.3d 932 (Ind. Ct. App. 2017), *trans. denied*, the Court affirmed the trial court's order terminating Father's parental rights to his three children. Id. at 949. The trial court allowed the guardian ad litem to summarize the children's wishes for their future placement as follows: (1) the oldest child wanted only to be adopted; (2) the middle child wanted to be returned to Mother or Father, but, if this was not impossible, she felt loved by her foster parents and wanted to

be adopted; and (3) the youngest child would like for Mother and Father to reunite, or to live with Father, her uncle, and grandfather, but if these two options were not possible, she would be happy to be adopted by foster parents, who loved her. Father argued the trial court abused its discretion by allowing the guardian ad litem to summarize and testify to what the children had said. The Court noted that: (1) Father did not object following the trial court's statement that the guardian ad litem could summarize but not repeat what the children said verbatim; (2) two of the children indicated that they would live with Father. Id. at 948. The Court opined that under the circumstances and in light of other evidence, including Father's multiple incarcerations, the case manager's recommendation that adoption was in the children's best interests, and the therapist's support for the adoption plan, the Court could not say that reversal was warranted. Id.

In **C.A. v. Indiana Dept. of Child Services**, 15 N.E.3d 85 (Ind. Ct. App. 2014), the Court affirmed the trial court's order terminating Mother's and Father's parental rights to their three children. Id. at 87. The Court noted the following evidence in support of the trial court's conclusion that there was a reasonable probability that continuation of the parent-child relationship with Father posed a threat to the children's well-being: (1) the children suffered from PTSD as a result of living with Father before his arrest, but had "connected to the foster parents" and were "doing incredibly well in school" according to their therapist; (2) the children's therapist opined that the children "would be re-traumatized" if they were reunited with their parents which is "a very negative thing because the more repeated trauma a child suffers, the less likely they are [sic] to heal"; (3) the oldest child began "sobbing uncontrollably" and had a "complete meltdown" when the therapist mentioned the possibility of reunification. Id. at 96.

In **K.T.K. v. Indiana Dept. of Child Services**, 989 N.E.2d 1225 (Ind. 2013), the Indiana 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 1228. 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. at 1236. Among the evidence the Court noted was: (1) in a letter that the ten-year-old child wrote to the trial court begging the court to allow the children to remain with Foster Parents, the child recounted instances in which he observed Mother snorting drugs in the bathroom and then he "had to pick the lock and get in there"; (2) the ten-year-old child also wrote that he knew Mother smoked marijuana, and that Mother didn't take care of him; (3) the seven-year-old child told a psychologist evaluator that she did not feel safe with Mother because Mother drank beer, and also recalled an incident when she fell into a fire pit when Mother was supposed to be watching her. Id.

In **H.G. v. Indiana Dept. of Child Services**, 959 N.E.2d 272 (Ind. Ct. App. 2011), *trans. denied*, the Court reversed the trial court's termination judgment. Id. at 294. The Court noted that the oldest of the three children, then age fourteen, had expressed an unwillingness to be adopted and that, if parental rights were terminated, and the child refused to consent to the adoption, he would be stuck in the limbo of foster care until he aged out of the system. Id. at 293.

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 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 the family visitation facilitator both 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; (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 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 Father and that termination would ease the children's anxiety about the possibility of returning home in the future. 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 and noted the evidence of the court appointed special advocate, who had spent over two hundred hours on the case, that the children did not feel safe with Mother and did not trust Mother. Id. at 193.

In **A.F. v. MCOFC**, 762 N.E.2d 1244 (Ind. Ct. App. 2002), the Court found that OFC proved by clear and convincing evidence that termination was in the children's best interest. Id. at 1253-54. The Court noted the evidence that both children had repeatedly indicated that they did not wish to return to Father's home. Id. at 1253.

IX. Q. Medical Illness of Parent

In **In Re M.W.**, 942 N.E.2d 154 (Ind. Ct. App. 2011), *trans. denied*, 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. 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 could be observed and determined within a relatively short period of time. Id. at 160-61.

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 912. 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. 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.

See also **R.W., Sr. v. Marion Cty Dept. Child Serv.,** 892 N.E.2d 239, 249 (Ind. Ct. App. 2008) (contrary to Mother's contention on appeal, trial court did not base its decision to terminate Mother's parental rights upon mere fact that she had hearing disability, but rather properly considered Mother's refusal to take readily available steps to bridge communication gap caused thereby – a communication gap that seriously hindered Mother's ability to effectively care for her children).