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Achieving Permanency: Preparing Evidence for Termination of the Parent-Child Relationship¹

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I. Introduction

Although the majority of children who have been adjudicated children in need of services will be successfully reunified with a parent, some of the children will achieve permanent families through termination of the parent-child relationship and subsequent adoption. When family case managers and foster parents begin serving on children's cases, it is not possible to be certain whether reunification or termination of the parent-child relationship and adoption will be the best outcome. Fortunately, family case managers and foster parents can assure that the best reunification case is also the best termination case, if necessary. The provision of relevant services, involvement in case planning and Child and Family Team meetings, accurate thorough documentation of parents' response to services and detailed knowledge of children's best interests and needs can form the basis for successful reunification or provide needed evidence for termination. Indiana statutes and case law quotations from published decisions of the Indiana Court of Appeals and Indiana Supreme Court are included in this document. Case law quotations explain what the

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Appellate Courts have decided about specific cases before them and serve as precedent upon which trial court judges can rely in making their decisions on similar cases. The United States Supreme Court has said that the purpose of terminating parental rights is not to punish parents, but to protect the children. Lassiter v. Department of Social Services, 452 U.S. 18 (1981).

II. Standard and Burden of Proof, Court Appointed Counsel for Parents, and Hearsay Evidence

- a. The Department of Child Services or GAL/CASA must prove all of the elements of the termination case by clear and convincing evidence. Clear and convincing evidence is the highest standard of evidence for non-criminal cases. The standard of proof in Child in Need Services cases is preponderance of the evidence, which is lower than the standard required for termination proceedings. Parents have the right to free court appointed counsel in termination cases. Many Indiana counties also provide parents with free court appointed counsel to appeal the trial court's decision.

- b. Indiana law allows the juvenile court to refer the child's case for adoption proceedings while the appeal is pending. (IC 31-35-6-3). Unlike CHINS dispositional and placement and jurisdiction hearings, termination proceedings do not allow for reports from DCS, GALs, CASAs, or service providers to be admitted into evidence if the parents object. These reports usually contain hearsay, which is a statement by a person who is not at court that is offered to prove the truth of the statement. Because hearsay evidence may not be admissible in termination proceedings, it is necessary to have family case managers, GALs, CASAs, foster parents, therapists and other service providers appear at court and testify about their personal observations, what they did, and their contacts with the parents and children. Statements which the parents made are not hearsay, but the person to whom the statement was made must testify about the statement in court. The person who testifies about the parent's statement should also testify to the date the statement was made and the circumstances of the statement. For this reason, family case managers, and other service providers need to keep records about their contacts with parents and ask parents directly for updates on the parents' case plan progress and situation. Foster parents and other service providers should keep good records of

contacts with parents, observations of parents' homes and parent-child interaction, and children's statements about abuse, neglect, fears, and wishes. A reliable statement of a child under the age of fourteen (or between the ages of fourteen and eighteen if the child has a disability of general intellectual functioning or adaptive behavior) may be admitted into evidence through the testimony of the person who heard the child make the statement if the correct legal procedures are followed in advance. (See IC 31-35-4-1 through 4).

- c. Sometimes agency business records can be admitted into evidence even though the records are hearsay. Agency records must meet strict business records standards and cannot contain conclusory lay opinions. Business records should not be the main evidence in termination cases. In In Re Termination of Parent-Child Relationship of E.T., 808 N.E. 2d 639 (Ind. 2004), the Indiana Supreme Court ruled that the reports which a private service provider agency prepared for DCS were not admissible into evidence as business records and the trial court judge had made a mistake in admitting the reports into evidence when the parents objected to admission of the records.
- d. The Court must begin the hearing on a petition to terminate the parent-child relationship not more than ninety days after the petition is filed. The court must complete the hearing not more than 180 days after the petition is filed. (IC 31-35-2-6).

III. What Must Be Proven to Terminate the Parent-Child Relationship

IC 31-35-2-4 provides that the following must be proven by DCS or the child's GAL/CASA:

- 1) The child has been adjudicated a Child in Need of Services or a delinquent child;
- 2) One of the following exists:
 - a) The child has been removed from the parent for at least six (6) months under a dispositional decree;
 - b) 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
 - c) The child has been removed from the parent and has been under supervision of DCS for at least fifteen (15) months of the most recent twenty-two (22) months;

- 3) There is reasonable probability that:
 - a) 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
 - b) The continuation of the parent-child relationship poses a threat to the well-being of the child;
- 4) Termination is in the best interests of the child; and
- 5) There is a satisfactory plan for the care and treatment of the child.

IV. Six Months Removal Under Dispositional Decree or Removal From Parent and Under Supervision of DCS for at Least Fifteen of Most Recent Twenty-Two Months

- a. Removal under a dispositional decree is not satisfied by removal at a detention, initial, or factfinding hearing. Courts have held, depending on the facts, that removal of the child from the custody of one parent effectively removed the child from the custody of both parents. Wagner v. Grant County Dept. Public Wel., 653 N.E. 2d 531, 533 (Ind. Ct. App. 1995); Matter of K.H., 688 N.E. 2d 1303, 1305 (Ind. Ct. App. 1997). To be safe, the predispositional report by the family case manager or GAL/CASA should include a recommendation for the removal of the child from each parent's custody. This is true even if the dispositional hearing for each parent is held at a separate time.
- b. Indiana Courts have held that a temporary trial placement at home may not break the chain of events such that a new six month period must be completed to fulfill the time requirements. Matter of Miedl, 425 N.E. 2d 137, 140 (Ind. 1981); Matter of A.N.J., 690 N.E. 2d 716, 721 (Ind. Ct. App. 1997). Trial court decisions which terminated the parent-child relationship have been reversed by the Court of Appeals because the termination petitions were filed earlier than six months after the children's removal. Platz v. Elkhart County Dept. of Welfare, 631 N.E. 2d 16, 19 (Ind. Ct. App. 1994).
- c. The Indiana Court of Appeals clarified that the time the child spends in relative placement is included in the fifteen months DCS supervision time period. In Re G.H., 906 N.E. 2d 248, 251-52 (Ind. Ct. App. 2009).

- d. This requirement can be proven through certified copies of CHINS documents and testimony of the family case manager, foster parents, or relative caretakers regarding the child's date of placement and length of residence in out-of-home care.

V. Appellate Court Opinions and Evidence On Reasonable Probability

- a. The juvenile court is not required to find both (1) that there is a reasonable probability that the conditions that resulted in removal or the reasons for placement outside the home will not be remedied; and (2) that continuation of the parent-child relationship poses a threat to the well-being of the child. Proof of only one of these requirements is needed. In Re L.S., 717 N.E. 2d 204, 209 (Ind. Ct. App. 2000). A juvenile court may properly consider the services offered by DCS, and the parent's response to those services, as evidence of whether conditions will be remedied. A.F. v. Marion County Office of Family & Children, 762 N.E. 2d 1244, 1252 (Ind. Ct. App. 2002). In C.T. v. Marion Cty. Dept. of Child Services, 896 N.E.2d 571, 588 (Ind. Ct. App. 2008), the Court of Appeals cautioned that the juvenile court's CHINS case determination that reunification services are no longer required neither abolishes a parent's fundamental right to family integrity, nor absolves DCS of its responsibility to properly oversee and manage the case. A pattern of unwillingness to deal with parenting problems and to cooperate with those providing social services, in conjunction with unchanged conditions, support a finding that there exists no reasonable probability that the conditions will change. Lang v. Starke Cty. Office of Fam. Children, 861 N.E. 2d 366, 372 (Ind. Ct. App. 2007). Where there are only temporary improvements, and the pattern of conduct shows no overall progress, the court might reasonably infer that under the circumstances, the problematic situation will not improve. In Re Invol. Termn. Of Par. Child Rel A. H., 832 N.E. 2d 563, 571 (Ind. Ct. App. 2005).

When determining whether a reasonable probability exists that the conditions justifying a child's removal and continued placement outside the home will not be remedied, the court must judge a parent's fitness to care for his or her children at the time of the termination hearing, taking into consideration evidence of changed conditions. In

Re J.T., 742 N.E. 2d 509, 512 (Ind. Ct. App. 2001). The court must also evaluate the parent's habitual patterns of conduct to determine whether there is a substantial probability of future neglect or deprivation. In Re B.D.J., 728 N.E. 2d 195, 201 (Ind. Ct. App. 2000). The court need not wait until a child is irreversibly harmed such that his physical, mental, and social development is permanently impaired before terminating a parent-child relationship. In Re M.M., 733 N.E. 2d 6, 12 (Ind. Ct. App. 2000). The court is entitled to give more weight to the parent's habitual patterns of conduct than to the parent's testimony of recently changed conditions. A.J. v. Marion County Office of Family, 881 N.E. 2d 706, 716 (Ind. Ct. App. 2008). The DCS is not required to rule out all possibilities of change; rather, it need establish only that there is a reasonable probability that the parent's behavior will not change. In Re Involuntary Termination of Parent-Child Relationship of Kay L., 867 N.E. 2d 236, 242 (Ind. Ct. App. 2007). In Prince v. Department of Child Services, 861 N.E. 2d 1223, 1231 (Ind. Ct. App. 2007), the Court said that DCS and the trial court should not have the burden to monitor treatment and continually modify drug and alcohol treatment until the parent achieves sobriety. Rather, it is the parent's responsibility to make positive changes and to request additional assistance. The Court of Appeals affirmed the trial court's finding that there was a reasonable probability that the conditions resulting in removal would not be remedied in In Re A.W., 907 N.E.2d 533, 539 (Ind. Ct. App. 2008). The Court noted the mother's failures to cooperate with drug treatment, to complete sixteen court ordered drug screens, and to visit the children. Parents' mental retardation, standing alone, is not a proper ground for termination, but mental deficits do not excuse parental failures to participate in services or allow parents to keep their children regardless of danger to the children's health and well-being. In Re A.S., 905 N.E.2d 47, 50 (Ind. Ct. App. 2009).

- b. Evidence which supports this requirement could include testimony of the family case manager who conducted the original investigation of abuse or neglect to show the conditions which resulted in removal. Evidence from the family case manager and other service providers regarding the case plan, services offered, parents' compliance with services and how the parent's situation improved or failed to improve due to the services is also important in proving this requirement. Testimony from the GAL/CASA and

family case manager concerning the encouragement they gave to parents to participate in and profit from services and the parents' responses to them regarding service participation would also help to prove this requirement. The testimony from mental health professionals who evaluated or treated the parents is also relevant. Records of incarceration, criminal convictions, and drug test results, if properly authenticated as official or business records, could help prove this legal requirement.

VI. Continuation of the Parent-Child Relationship Poses a Threat to Well-Being of Child

- a. Evidence of parents' negative behaviors, including drug use, domestic violence, and criminal activity, has been found by Indiana Appellate Courts to support the threat to well-being requirement of termination law. Case law which affirmed the findings of trial judges that continuation of the parent-child relationship posed a threat to the child's well-being includes In Re L.S., 717 N.E. 2d 204, 210 (Ind. Ct. App. 2000), in which the trial court noted evidence of marital discord, spousal abuse, and serious emotional problems. The Court of Appeals stated that children should not be compelled to suffer emotional injury, psychological adjustments, and instability to preserve parental rights. Id. Untreated prescription drug and street drug abuse, domestic violence, failure to visit the child regularly, and lack of stable, safe housing supported the trial court's determination that continuation of the parent-child relationship posed a threat to the child's well-being in In Re A.I., 825 N.E. 2d 798, 807-811 (Ind. Ct. App. 2005). In In Re D.L., 814 N.E. 2d 1022, 1029 (Ind. Ct. App. 2004), the Court found that evidence that the mother had not yet abandoned her life of cocaine use supported the trial court's finding of threat to well-being of the children. In Everhart v. Scott County Office of Family, 779 N.E. 2d 1225, 1233 (Ind. Ct. App. 2002), the Court found that the father's previous physical abuse of one of the children, which caused a serious injury, and for which the father was criminally convicted, supported the trial court's finding that continuation of the relationship posed a threat to the children's well-being. The parents' previous neglect of older siblings which had probably caused pervasive developmental delays, and the previous termination of parental rights to older siblings supported the trial court's threat-to-well-being conclusion regarding twins who were removed from the parents' care at

birth in In Re W.B., 772 N.E. 2d 522, 531-34 (Ind. Ct. App. 2002). In Adams v. Office of Fam. & Children, 659 N.E. 2d 202, 206 (Ind. Ct. App. 1995), evidence that the parents had not completed child sexual abuse treatment created the likelihood that the abuse would recur and was sufficient to prove the threat-to-well-being requirement.

- b. Evidence to support the threat-to-well-being requirement could include personal observations of the family case manager, service providers, and GALs/CASAs to show the parents' history of poor parenting, neglect, abuse, and domestic violence and the effect of these problems on the children. Evidence of parents' statements to others, including foster parents, regarding the parents' ongoing circumstances would also be helpful to show a pattern. Evidence from foster parents and the child's mental health therapists and medical providers about the effect of parental visitation on the children's behavior could also support the threat-to-well-being requirement. Parents' criminal records and Department of Correction records, including evidence of probation violations and negative behavior while imprisoned (especially behaviors which resulted in increased incarceration time), could also support the threat-to-well-being finding.

VII. Termination is in the Best Interests of the Child

- a. The trial court must subordinate the interests of the parents to those of the children when evaluating the circumstances surrounding the termination of the parent-child relationship. Matter of D.G., 702 N.E. 2d 777, 781 (Ind. Ct. App. 1998). In determining what is in the best interests of a child, the court is required to look beyond the factors identified by the Department of Child Services and look to the totality of the evidence. McBride v. Monroe County Off. Of Family & Children, 798 N.E. 2d 185, 203 (Ind. Ct. App. 2003). The court need not wait until a child is irreversibly harmed before terminating the parent-child relationship. Matter of C.M., 675 N.E. 2d 1134, 1139 (Ind. Ct. App. 1997). The Court of Appeals has opined that the testimony of a child's Guardian ad Litem, CASA, and family case manager regarding the child's need for permanency supports a finding that termination is in the child's best interests. In Re J.S., 906 N.E. 2d 226, 236 (Ind. Ct. App. 2009).

- b. In two recent Indiana Supreme Court cases, the Court has reversed termination of parental rights judgments when parents were incarcerated but were scheduled to be released soon. In In Re G.Y., 904 N.E.2d 1257 (Ind. 2009), the Court reversed the trial court's termination order, finding that the court had made a mistake in concluding that termination was in the child's best interests. The mother's criminal activity had occurred before the child's birth, and the mother had been the sole caretaker for the child's first twenty months of life. The trial court terminated the mother's parental rights in March 2008. The mother was scheduled to be released from incarceration in May or June, 2009 and had participated in many services, including furthering her education, while incarcerated. In In Re J.M., 908 N.E.2d 191 (Ind. 2009), the trial court denied the termination petition for incarcerated parents at the trial in January, 2008. The parents expected that they would be released in January, 2009 and April, 2009. The child's attorney Guardian ad Litem appealed the trial court's order to the Indiana Court of Appeals, which instructed the trial court to terminate parental rights. The Indiana Supreme Court vacated the Court of Appeals decision, finding that the trial court's conclusion that the parents' ability to establish a stable and appropriate life upon release could be observed and determined within a relatively quick period of time and the child's need for permanency was not severely prejudiced. The Indiana Supreme Court cautioned that the G.Y. and J.M. decisions, made close together in time, were not a reflection of any presumption as to the outcome of termination cases involving incarcerated parents.
- c. Depending on the specific facts of the case, the court may grant a termination petition for some of the parent's children but deny the termination petition for other children of the same parent. In In Re I.A., 903 N.E.2d 146, 156 (Ind. Ct. App. 2009), the court granted and the Court of Appeals affirmed termination of the mother's rights to her youngest child, who had tested cocaine positive at birth and had many medical problems. The trial court denied termination of the mother's parental rights to her four older child. Although the mother argued against breaking up the sibling group, the Court of Appeals was unpersuaded, noting that the youngest child had special needs and had never been in the care of his mother or with his siblings on a daily basis. The mother had shown

indifference to her youngest child since his birth and did not care enough to learn about the child's diagnoses or treatment.

- d. Evidence regarding children's best interests can be elicited from family case managers, GALs, CASAs, foster parents, relative caregivers, children's therapists, teachers, and medical providers. One strategy is for the family case manager who originally investigated the report of abuse or neglect to visit the child prior to the termination hearing to observe and testify about improvements in the child's physical appearance, demeanor, and behavior. The GAL or CASA may testify about the child's wishes and fears. Matter of Adoption of D.V.H., 604 N.E. 2d 634, 639 (Ind. Ct. App. 1992). Testimony from visitation supervisors can provide valuable information about parent-child interaction and the child's reaction to the parent. Mental health professionals can testify about bonding, or the lack of bonding, between the child and parent. Mental health professionals, service providers (including First Steps therapists), foster parents, and relative caregivers can testify about the child's improved development and behavior in out-of-home care.

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

- a. Indiana case law, including Page v. Greene County Dept. of Welfare, 564 N.E. 2d 956, 961 (Ind. Ct. App. 1991), 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. In J.K.C. v. Fountain County Dept. of Pub. Welfare, 470 N.E. 2d 88, 93 (Ind. Ct. App. 1984), the Court said that there was no requirement of a specific adoptive family to prove that a satisfactory plan existed. The plan does not have to include adoption, and evidence that adoption is unlikely does not make the plan unsatisfactory. Ramsey v. Madison County Dept. of Family, 707 N.E. 2d 814, 817 (Ind. Ct. App. 1999). In A.J. v. Marion County Office of Family, 881 N.E. 2d 706, 719 (Ind. Ct. App. 2008), the Court affirmed the trial court's termination order even though the plan was to place the seven children in three different adoptive homes. In Lang v. Starke Cty. Office of Fam. Children, 861 N.E. 2d 366, 375 (Ind. Ct. App. 2007),

the trial court found and the Court of Appeals affirmed that independent living was an acceptable plan for the children.

- b. Evidence to support the satisfactory plan requirement may include testimony from family case managers, home based counselors, GALs, CASAs, and prospective adoptive parents. It is important to include evidence as to how the children's special medical, educational, supervision, and therapy needs will be met as part of the plan. If the children will be placed in separate adoptive homes, testimony from adoptive parents about plans for post adoption sibling contact (IC 31-19-16.5-1 through 7) would also be important.