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In **A.D. v. Clark**, 737 N.E. 2d 1214 (Ind. Ct. App. 2000), the Court affirmed the trial court's order granting the mother's motion to stay the involuntary termination hearing pending the hearing on the foster parents' petition for adoption. The foster parents had filed an adoption petition, to which the birth mother and father had consented, under a separate cause number. The trial court had jurisdiction over both the involuntary termination petition, which had been filed in November, 1998, and the foster parents' adoption petition, which had been filed later. Both the Marion County OFC and the child's Guardian ad Litem, Child Advocates objected to the child's adoption by the foster parents, who were allowed to intervene in the termination proceeding.

**MCOFC and GAL invited error and waived the issue of setting termination hearing within ninety days by failing to object to requested continuances.** The GAL contended that the court had violated IC 31-35-2-6, which states that the court shall commence a hearing on termination petition not more than ninety days after the termination petition is filed. The Court noted that the termination hearing had been continued three times and that neither the MCOFC nor the GAL had objected to any of the continuances. The MCOFC had joined in the first motion for continuance. The Court noted that the MCOFC and GAL first objected to a continuance of the termination proceeding after the court granted the mother's motion to stay the termination proceeding pending the adoption hearing. The Court found that the GAL and MCOFC had invited error and therefore any error in failing to schedule the hearing within the statutory time limit had been waived by the GAL. *Id.* at 1217. The Court quoted **Stolberg v. Stolberg**, 538 N.E. 2d 1, 5 (Ind. Ct. App. 1989), for the principle that a party may not take advantage of an error which he commits, invites, or which is the natural consequence of his own neglect or misconduct. **A.D.** at 1217. The Court noted that the standard in reviewing a motion to stay proceedings is abuse of discretion. *Id.* at 1216. In footnote three the Court stated that because the issue had been waived, the Court need not address whether IC 31-35-2-6 requiring a termination hearing within ninety days was mandatory or discretionary. *Id.* at 1217.

**Public policy was not violated by holding hearing on adoption prior to termination hearing.** The Court disagreed with the GAL's contention that the public policy of "high priority" in placing children in safe, permanent homes was thwarted by the trial court. The Court opined that it was the best use of judicial resources to hold the hearing on the adoption petition first, and that the termination hearing could be immediately scheduled if the adoption petition were denied. *Id.* The Court stated that, by hearing the adoption first, the trial court was taking the most expeditious approach to addressing all issues related to the child and to determining the child's best interest. *Id.*

**Withholding of MCOFC's consent does not preclude adoption.** In footnote four, the Court opined that the MCOFC's refusal to consent to the adoption does not necessarily "seal the fate of this petition". *Id.* The Court stated that the petition for adoption may be granted over MCOFC's refusal to consent if it is shown that MCOFC is not acting in the child's best interest in withholding consent. *Id.*

**In Matter of A.M.**, 596 N.E. 2d 236 (Ind. Ct. App. 1992), the trial court terminated the parental rights of the mother with respect to two of her children, and in a joint petition terminated the parental rights of the father with respect to his one child. The Appellate Court affirmed the termination of the mother's parental rights, and reversed the termination of the father's parental rights.

The mother's first child was determined a CHINS in 1987 after the child was beaten by the mother's boyfriend, who was the biological father of the first child, but was not a party to the termination proceedings. The boyfriend was incarcerated for battery on the child. The mother was given a plan which included the following: provide for the child's needs; complete individual counseling for stress; inform the DPW if the boyfriend attempted to contact the child; obtain timely medical care for the child; provide accurate information to the DPW; complete a psychological evaluation; and complete a program with the visiting nurse. The child was to have been allowed to stay in the mother's custody if she complied with the orders. She then gave birth to a second child, who was alleged to be the child of the father in this case.

The mother returned to the relationship with the boyfriend after his release from incarceration. The mother allowed the boyfriend to have contact with the children. The court placed the first child in foster care to prevent future instances of abuse by the boyfriend. The child was subsequently returned to the mother's custody. The DPW visited the mother's trailer and found: the heat was turned off; children were sleeping in dirty clothing; the first child was sleeping in an undersized bassinet; and the rooms were messy and cluttered. Both children were removed from her custody. In 1989 the DPW filed a petition to terminate the mother's parental rights toward both children, which the trial court ordered.

The mother appealed, arguing that the evidence did not show she was unable to remedy the conditions resulting in the children's removal from her custody. The evidence showed: the DPW worked with the mother for four years to teach her the skills necessary to allow her to raise her children; DPW provided counseling to overcome "characterological deficiencies;" the mother had frequent progress then regress cycles; she had an inability to think about the consequences of future actions; she repeated the same mistakes; she was arrested for writing bad checks and shoplifting; she neglected the medical needs of the children; she moved eight or nine times in two years; she failed to visit the children when they were not in her custody; she allowed the children to place small objects in their mouths; she moved out of town without notifying DPW; and she did not visit the children for eight months. *Id.* at 238-39 Her counselors agreed that she would never be able to effectively mother her children, and that due to her "characterological deficiencies", she would never change. *Id.*

**Trial court's denial of motion to put on additional evidence after the close of termination proceedings, but before entry of judgment was not reversible error.** The mother relied on Page v. Greene County Dept. Of Public Welfare 564 N.E. 2d 956 (Ind. Ct. App. 1991), in which the Court stated, "[a]lthough a trial court should judge a parent's fitness to care for a child as of the time of the termination hearing and take into consideration any evidence of changed conditions, 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 of the children." *Id.* at 960

The father's parental rights were terminated by the trial court with respect to the second child which was then alleged to be his child. The father argued that the trial court's judgment was erroneous because there was no evidence to support termination. Specifically, he alleged that the DPW tacked his case onto the mother's to tie up loose ends so the child could be adopted. When the child was removed from the mother's home the father established paternity. DPW informed the father that he would need to do the following: childproof his home; complete a home study; submit to a substance abuse evaluation; and complete a parenting evaluation.

The father complied with all but the parenting evaluation. He had been scheduled to see a DPW provided counselor, and missed two appointments due to scheduling conflicts with his job. The DPW then required him to complete the evaluation with a counselor, and pay for it himself. He did not finish the evaluation because he failed to pay the counselor. He testified at the hearing that he was unable to pay.

**The DPW should not tack a termination petition of a second parent onto the termination petition of the first parent without specifically proving all of the elements required for termination of both parents.** The Court held that the DPW should not have tacked termination of the father's parental rights onto the petition to terminate the mother's parental rights, stating "[t]here was a total lack of evidence to establish the required elements of the statute. Therefore, as a matter of law, the trial court clearly erred in terminating [the father's] parental rights." *Id.* at 240 Additionally, the Court criticized the DPW, "DPW, which according to the testimony of [the child's] guardian ad litem was most concerned about quickly resolving the matter of [the child's] custody, chose a plan of action which after nearly three years has not settled the matter. This is ironic, given testimony establishing that, even under DPW's critical view of [the father], he would have been ready from six months to one year after the date of the termination hearing." *Id.* at 240 n. 3. The Court noted that the only evidence DPW offered against the father was the DPW's opinion that there was a satisfactory plan for the care and treatment of the child. IC 31-6-5-4 (4).

In In Re A.M.H., 732 N.E. 2d 1284 (Ind. Ct. App. 2000), the Court affirmed the dismissal of a voluntary termination of the parent-child relationship filed by the Knox County Office of Family and Children. The mother of three adjudicated CHINS who had lived in foster care for over two years had signed forms for voluntary relinquishment of parental rights, consent to adoption and waiver of notice of hearing at a meeting with the case manager. The Knox County Office filed a petition for voluntary termination of the parent-child relationship which the trial court dismissed after a hearing when the mother later sought to withdraw the voluntary termination of her parental rights.

**Denial of due process in a parental rights termination may be error even if not accompanied by fraud, duress or undue influence** The OFC appealed, relying on the Appellate Court's earlier decision in Snyder v. Shelby County Dep't of Pub. Welfare, 418 N.E. 2d 1171 (Ind. Ct. App. 1981). In Snyder, the Court stated, "a parent who executes a voluntary relinquishment of parental rights is bound by the consequences of such action, unless the relinquishment was procured by fraud, undue influence, duress, or other consent-vitiating factors." Id. at 1180. The Court declined to hold that a denial of due process in a parental rights termination is never error unless accompanied by fraud, duress or undue influence. A.M.H. at 1285 n.1.

**Case manager's failure to contact mother's counsel before accepting mother's signature on voluntary termination forms resulted in dismissal of voluntary termination petition.** The case manager knew that the mother was represented by counsel in the CHINS proceeding, but the case manager did not contact the mother's counsel before the case manager allowed the mother to sign the forms. The trial court also had the following evidence before it: the case manager knew the mother was easily influenced; the O.F.C. had been asking the mother to voluntarily terminate for at least two months before the forms were signed; the mother had a diminished mental capacity and a history of psychological problems, drug and alcohol abuse and depression; the mother may not have understood the words used in the consent forms.

The Court noted the enhanced right to counsel in termination proceedings and the requirement of proving the statutory requisites for termination of a parent-child relationship by clear and convincing evidence. Id. at 1285, 1286. The Court further noted two Indiana Supreme Court opinions on the importance of notice to counsel when one party knows the other is represented. The Court further opined that, in light of the general importance of notice to counsel for a represented party and the substantial due process implications of termination proceedings, the trial court's dismissal of the voluntary termination petition was not error. Id. at 1286.

In A.P. v. PCOFC, 734 N.E. 2d. 1107 (Ind. Ct. App. 2000), the Court of Appeals reversed the trial court's order granting involuntary termination of parental rights. The parents had five children from their marriage, and a sixth child from the mother's previous marriage. The Porter County Office of Family and Children (PCOFC) first intervened in 1995 with an attempt at a program of informal adjustment, and subsequent CHINS petition concerning two of the children. The mother admitted the allegations of the petition, and the father failed to appear due to incarceration. The children were allowed to remain in the home. At a status hearing twelve months later, the court entered an order stating that, "[c]hildren are placed in Foster Care." There were no written findings accompanying the order which was entered at the recommendation of the CASA. Almost one year later the PCOFC filed its first termination petition. The petition was with respect to the two children named in the CHINS petition. No hearing was held on the petition. The next action on the case was in 1999 when the PCOFC filed another termination petition concerning only one of the children. The parents moved to disqualify the magistrate pro tem, which was denied. The court entered findings consistent with its holding that granted the petition to terminate the parent-child relationship. **Attorney's temporary judge appointment was valid.** On appeal the Court held that the temporary judge was appointed properly, pursuant to IC 33-13-16-1(a). This section provides that regular circuit, superior or county court judges may appoint temporary judges as long as the appointment is made in a writing filed before the temporary judge proceeds with the disposition of the case and other statutory conditions are met. Id. at 1111. A temporary judge must be a competent attorney admitted to the practice of law in Indiana and must be a resident of the judicial district of the court. Id.

**Multiple procedural irregularities in CHINS and termination process denied parents procedural due process and warranted reversal.** The parents contended that certain statutory requirements were not followed in the CHINS and termination proceedings, in violation of their due process rights.

The Court found the following errors on review of the record: (1) the PCOFC admittedly failed to provide the parents with copies of at least some, and possibly all, of the child's case plans as required by IC 31-34-15; (2) the termination petition filed in this cause did not comport with the requirements of IC 31-35-2-4; (3) the original underlying CHINS petition filed with respect to the child was unsigned and unverified in violation of IC 31-34-9-3; (4) no permanency hearing was ever held as required by IC 31-34-21-7; (5) the original CHINS dispositional order, the modification of that order providing for the child's out-of-home placement, and every other order entered by the trial court, with the exception of the termination judgment, contained no written findings and conclusions upon the record concerning its reasons for those dispositions as required by IC 31-34-19-10; (6) the trial court entered a no-contact order against the father without following the statutory prerequisites for entry of such an order as contained in IC 31-34-17; (7) the father was deprived, on at least two occasions, of his right to be present at review hearings in the child's CHINS case in violation of IC 31-34-21-4(b).

In reaching its decision on the Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) due process factors, the Court stated that in parental rights proceedings, the private interest affected is "commanding." Santosky v. Kramer 455 U.S. at 745, 758, 102 S. Ct. 1388, 1397, 71 L. Ed. 2d 599 (1982). Further, there is no governmental interest that would justify a disregard of procedures set forth by our legislature; rather, those procedures must be followed." A.P. at 1118. The Court was not convinced that any one of the above irregularities by itself substantially increased the risk of error to the extent that the parents were deprived of due process, but there was an increased risk of error because of the, "multiplicity of procedural irregularities." Id. at 1118.

The Court relied on the authority of Mathews v. Eldridge, 424 U.S. 319, 335 (S. Ct. 1976), and stated that the nature of the process due in parental rights termination proceedings turns on a balancing of the, "three distinct factors. . . 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." Santosky v. Kramer, 455 U.S. 745, 754 (S. Ct. 1982). The private interests affected are parent's rights to raise their children without undue interference from the State. Choices about marriage, family life, and the upbringing of children are among those rights which the United States Supreme Court has ranked as of basic importance in our society and are rights sheltered by the Fourteenth amendment. M.L.B. v. S.L.J., 519 U.S. 102, 116-17, 117 S. Ct. 555, 564, 136 L. Ed. 2d 473 (S. Ct. 1996). The countervailing governmental interest is to protect the children. Essentially, it is the other prong of the balancing test that is at issue in this case. The risk of error created by the State's chosen procedure was what tipped the scale. The statutes imparted due process rights associated with termination proceedings, but the state did not strictly follow the process.

CHINS proceedings, are distinct from involuntary termination proceedings. A.P. at 1112. A CHINS determination does not necessarily lead to a termination of parental rights. However, the two separate proceedings are not independent of each other. IC 31-35-2-2 states that an involuntary termination proceeding is governed by the procedures prescribed by the CHINS statutes contained in IC 31-34. An involuntary termination of parental rights relies on prerequisite proceedings, either a CHINS proceeding, or a juvenile delinquency proceeding. The Court reasoned that, "procedural irregularities in a CHINS proceedings [sic] may be of such import that they deprive a parent of procedural due process with respect to the termination of his or her parental rights. It would be incongruous to hold

that a county, with the assistance of a juvenile court, may commence CHINS proceedings for a child and remove a child from his or her home, yet disregard various portions of the CHINS and termination statutes on several occasions and still terminate parental rights following the passage of time after a CHINS dispositional decree and a child's removal from the home." *Id.* at 1113.

**Case plans were not negotiated with parents and copies were not provided.** The PCOFC failed to provide the parents with case plans, which are required under IC 31-34-15-1. The case plan must be completed after negotiating with the parents. The parents alleged, and the Court agreed, that there was no negotiation, as required under IC 31-34-15-2. Additionally, a copy of the completed plan must be sent to the parents within ten days after it is completed, according to IC 31-34-15-3. The Court stated, "[e]ven if these case plans did comport with the statutory requirements, it is clear that not all of them were provided [to the parents]; in fact it is possible that none of them were." *Id.* The Court found that, "[t]his failure to provide [the parents] with copies of [the child's] case plans could have substantially increased the risk of error with respect to the termination of parental rights, in that [the parents] may have been deprived of some degree of notice as to what conduct on their part could lead to the termination of those rights." *Id.* at 1114. The Court noted, "[w]e recognize the difficulty of meeting this requirement while [the father] was incarcerated, but there is no reason this could not have been done each time with [the mother]." *Id.* at 1113 footnote 5.

**The involuntary termination petition did not comply with the statutory requirements.** The petition contained none of the allegations required by IC 31-35-2-4(b)(2). Based upon this error, the Court reasoned that there was a risk of increased error inherent in this omission, "in that [the parents] lacked prior notice of the statutory termination provisions upon which the PCOFC intended to rely at the termination hearing." *Id.* at 1114-15.

In addition to the above errors cited by the parents, the Court reviewed the record of the trial court and found no fewer than five additional clear and substantial procedural irregularities. The Court relied on the authority of the Indiana Supreme Court which held that where the "interests, rights, and privileges of juveniles are involved, appellate courts may search the record and determine issues inherent therein." *Hicks v. State*, 230 N.E. 2d. 757, 758 (Ind. 1967).

**CHINS petition unsigned and unverified.** The first clear error not raised by the parents is a failure to follow IC 31-34-9-3, which "plainly requires that a CHINS petition be verified and signed by a person representing the interests of the State." *Id.* at 1115. This requirement is necessary to ensure that a representative of the state believes a CHINS proceeding is appropriate, and to ensure the veracity of the allegations supporting such a petition.

**No permanency hearing was held pursuant to IC 31-34-21-7.** The current statute requires the court to, "hold a permanency hearing not more than thirty days after a court finds that reasonable efforts to reunify or preserve a child's family are not required." IC 31-34-21-7(a) Additional permanency hearings shall be held every twelve months after the date of the original dispositional decree, or twelve months after a CHINS was removed from the parent's custody, whichever came first. IC 31-34-21-7(2)(A) and (B). Prior to 1998 the wording in the statute was essentially the same, except the wording was "formal hearing," rather than "permanency hearing." The record contained no indication that such a hearing was ever held. During a permanency hearing the court, "shall . . . examine procedural safeguards used by the county office of family and children to protect parental rights." IC 31-34-21-7(b)(6) The Court stated that the trial court might have remedied the PCOFC's failure to provide copies of the case plans if the permanency hearing had taken place. *Id.* at 1115.

**CHINS dispositional and modification decrees lacked required findings** IC 31-34-19-10(5) provides that a court "shall accompany [its] dispositional decree with written findings and conclusions upon the record concerning . . . [t]he court's reasons for the disposition." In this case the court entered into the record that the "[c]hildren are placed in Foster Care." *Id.* "An omission of written findings concerning a court's reasoning for an out-of-home placement may have a substantial impact in a subsequent termination proceeding." *Id.*

**Incarcerated father was not transported to court for review hearings.** The father had a right to be present at the review hearings in the CHINS proceedings. The statute says that the court "shall provide" parents "an opportunity to be heard and to make any recommendations to the court in a periodic case review." IC 31-34-21-4(b) The father was denied an opportunity to be heard on at least two occasions. The father had previously notified the court that he wished "to be present at ANY and ALL hearings involving my children." *Id.* at 1116.

**Protective order procedures required by IC 31-34-17-2 and 3 were not followed.** The court restrained the father from having any contact with his children. At no time did either the CASA or the PCOFC request such an order by means of a verified petition comporting with the requirements of IC 31-34-17-2 and 3 for the issuance of protective orders in a CHINS proceeding. The trial court did not enter findings supporting its protective order. The court must find that the best interests of the child would be served if a person refrained from direct or indirect contact with the child before it issues a protective order pursuant to IC 31-34-17-4. The trial court never provided a basis for these orders. *Id.* at 1116.

**Ruling did not add additional elements to prove termination.** The Court stressed that it was not adding an additional element to those that an agency seeking to terminate parental rights must prove by clear and convincing evidence. Those elements are set forth in [IC] 31-35-2-4 and are exclusive. *Id.* at 1118. This case is distinguished from *In Re B.D.J.* 728 N.E. 2d 195 (Ind. Ct. App. 2000), in which the Court stated, "while a participation plan serves

as a useful tool in assisting parents in meeting their obligations, . . . termination of parental rights may occur independently of them, as long as the elements of [IC] 31-35-2-4 are proven by clear and convincing evidence.” In B.D.J. the Court was addressing the sufficiency of the evidence supporting a finding that the conditions leading to the children’s removal would not be remedied. In B.D.J. the father alleged that the OFC failed to provide services to remedy the situation. The Court held that the father sat, “idly by” and never sought services from the OFC and thus he could not argue he had been improperly denied services. Id. at 201.

In ***In Re Wardship of B.C.***, 441 N.E. 2d 208 (Ind. 1982), the Indiana Supreme Court vacated the Court of Appeals opinion published at 433 N.E. 2d 19 (Ind. Ct. App. 1982), and affirmed the trial court in all respects. The trial court terminated the parental rights of the mother who was schizophrenic.

The child was made a ward of the state by an emergency order issued by the court, after the mother gave her twenty-month-old daughter to a couple whom she did not know while in the parking lot of a department store. Four days later the mother went to the mental health center for assistance finding her child, because she lost the couple's phone number. The mental health center, with the help of the media, found the child, but could not immediately find the mother. The DPW filed a petition for permanent wardship, and to terminate parental rights. A Guardian Ad Litem was appointed for the mother. Prior to the hearing, the mother was committed to Richmond State Hospital. The trial court terminated the mother's parental rights.

The mother appealed on three issues:

“(1) whether there was sufficient evidence of probative value to support the trial court's finding that there was a reasonable probability that the conditions which resulted in the removal of [the child] would not be remedied; (2) whether the DPW failed to provide reasonable and adequate services to [the mother] to assist her in fulfilling her parental obligations; and (3) whether the trial court erred by admitting into evidence certain reports of the DPW which contained hearsay.” *Id.* at 211.

**When the conditions that led to the removal of the child were caused by mental illness, the trier of fact may find that the underlying conditions would not be remedied, even if there is evidence that the mental illness can be cured.** The court found the following factors to summarize the mother's recent history: her “initial abandonment of the child to strangers, instability of home life, lack of job skills, inability to find and hold a job for more than brief periods, inability to support herself and the child, failure to support herself and the child, failure and refusal to cooperate with the Department of Public Welfare and other social service agencies.” *Id.* It was also found that the mother was provided with an antipsychotic medication, which was to be self administered. The mother did not take her medication as directed. She was later prescribed an antipsychotic which could be administered by injection every two weeks. She failed to keep her appointments for the injections. The Supreme Court quoted the dissenting opinion from the Appellate Court in great length. The essential quote is, “[w]e find no reason to reverse the trial court on the mere claim that some medical program might exist which might possibly cure [the mother]. The record indicates that the medical procedures employed either failed or [the mother] refused to cooperate.” *Id.* at 211. The Supreme Court agreed with the dissent and stated that the trier of fact is capable of making the determination of whether or not there was a reasonable probability that the conditions would not be remedied, even without testimony from a medical expert. Even further, if the court had heard evidence from a psychiatrist that the mental condition could be changed, it could still have reached a conclusion that the conditions would not be remedied.

**Trial court had sufficient evidence that reasonable services have been offered, and refused as an element of their case.** The second issue on appeal concerns a section of the statute which has been modified. At the time of this case there was an additional element to the termination statute, as follows: “Reasonable services have been offered or provided to the parent to assist him in fulfilling his parental obligations, and either he has failed to accept them or they have been ineffective.” IC 31-6-5-4(3) (Burns 1980) The Court found that, “the record specifically contains ample testimony from several witnesses that [the mother] failed to cooperate in availing herself of the offered services and failed to abide by any of the plans established for her benefit. Accordingly, we find that the trial court had sufficient evidence before it to conclude as it did that reasonable services had either provided or offered to [the mother] to assist her in fulfilling her parental obligations, and that the services were either ineffective or refused by [the mother].”

In **In Re B.D.J.**, 728 N.E. 2d 195 (Ind. Ct. App. 2000), the County Division of Family and Children filed petition to terminate the parent-child relationship of father with his three children, who had been placed in foster care after removal from their mother. Trial court terminated father's relationship with all three children. The father appealed, arguing there was insufficient evidence to support the involuntary terminations under IC 31-35-2-4. Court of Appeals affirmed the terminations, holding that substantial evidence supported the trial court's determination that the conditions which led to the placement of children in foster care, rather than with father, would not be remedied, that termination was in the best interests of the children, and that a plan for the children's care existed, as required to support termination.

In July 1997, the County Division of Family and Children (DFC) was called to the home of the children's mother and discovered the children home alone, asleep on a couch that was soaked with urine. Furthermore, the apartment was cluttered and dirty and the only food found in the home was eggs and old cottage cheese. The children were removed and DFC was granted emergency wardship. A detention hearing was held and two of the children were placed with the paternal grandmother, one with the maternal grandfather. In September the children were all adjudicated CHINS. By March 1998, all three children had been placed in foster care at the request of the respective grandparents. Throughout the time the children were in the care of the DFC, the father failed to appear at virtually every hearing. In October 1999, the trial court terminated the parent-child relationship between the father and the three children.

**Required proof prior to termination.** The father argued the evidence was insufficient to terminate his parental rights under IC 31-35-2-4(b)(2). To terminate the parent-child relationship, under IC 31-35-2-4(b)(2)(B), the State is required to show by clear and convincing evidence that "the conditions that resulted in the child's removal or the reason for placement outside the home of the parents will not be remedied". *Id.* at 200. Because the children were not in the custody of the father at the time of removal, the State was only required to show that the reason the children were not placed with the father would not be remedied. *Id.* at 201.

The court must determine what conditions led the DFC to place the children in foster care rather than placing them with the father, and the court must then consider whether there is reasonable probability that those conditions will be remedied. *Id.* To assess a parent's fitness to care for the child, the court considers the abilities of the parent at the time of the termination hearing and considers evidence of changed circumstances. The court can consider evidence of the services offered to the parent, and the parent's response to those services; however, the termination statute does not require proof that the DFC offered services to the parent. *Id.* A "parent may not sit idly by without asserting a need or desire for services and then successfully argue that he was denied services to assist him with his parenting." *Id.* In the present case, the father sought no services from the DFC. Furthermore, a parent's failure to appear for assessments, parenting classes, and court hearings reflects ambivalence and an unwillingness to change existing conditions. In addition, with regard to the father's poverty and disability, the Court agreed with the trial court when it stated:

"Poverty can be a crushing burden. However, poverty cannot excuse child 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.

The Court found that the children were not placed with the father upon their removal from the mother because of conditions in the father's home. The DFC continued to retain the children in foster care due to the father's inability to provide housing for the children, maintain contact with the children, failure to attend hearings, and failure to support the children. The Court held that the trial court was correct in considering the father's habitual patterns of conduct in finding that sufficient evidence existed to support the conclusion that there was reasonable likelihood that the conditions which led the children to be placed outside the father's home would not be remedied. *Id.* at 203.

**Best interests of the child.** In addition to finding that the conditions which led to the removal of the child or the reasons for placement outside the home of the parent will not be remedied, the court must also find that termination of the parent-child relationship is in the best interests of the child. The Court found that the father's failure to support the children and his present inability to meet their needs, combined with testimony of the case manager and social services director, was sufficient to support the trial court's conclusion that termination was in the children's best interests. *Id.* at 204.

**Plan for treatment of child.** IC 31-35-2-4(b)(2)(D) requires the trial court to find that there is a satisfactory plan for the care and treatment of the child. The Court agreed with the trial court that the plan of the DFC to have the children adopted by the foster parents or to pursue other adoptive placement for the special needs children was adequate, stating that the "plan does not need to be detailed, so long as it offers a general sense of the direction in which the child will be going after the parent-child relationship is terminated." *Id.* at 204.

In **B.R.F. v. Allen County D.P.W.**, 570 N.E. 2d 1350 (Ind. Ct. App. 1991), the father appealed from a termination of parental rights decree. The Appellate Court affirmed the decision of the trial court, holding that: (1) the evidence supported termination of rights, and (2) Department of Public Welfare's plan for child was satisfactory. The Court characterized the father's issues on appeal as: whether there was sufficient evidence to satisfy the statutory elements for the termination of parental rights, under the revised statute which went into effect July 1, 1990. Specifically, the father challenged the trial court's determination that, "there is a reasonable probability that the conditions which resulted in the child's removal will not be remedied." IC 31-35-2-4(b)(2)(B)(i). The evidence supporting the trial court's finding was: (1) the father did not fully complete any portion of the Parent Participation Plan except the requirement that he attend parenting classes, (2) he served two months in jail for possession of stolen license plates, (3) he was convicted of possession of a controlled substance, and (4) he was then currently incarcerated. The trial court found that, "[s]uch a pattern of unwillingness to confront parenting responsibilities and to cooperate with counselors 'in conjunction with unchanged and unacceptable home conditions' has been held to support a finding that there exists no reasonable probability the unacceptable conditions will be remedied." *Id.* at 1352.

**Inability to provide adequate housing, and incarceration poses a threat to the well-being of the child.** The Court also affirmed the trial court's finding that the evidence was adequate to support the finding that continuation of the parent-child relationship posed a threat to the well-being of the child. 31-35-2-4(b)(2)(B)(ii). This finding was based on the evidence: the father's inability to provide son with adequate housing, the father's criminal convictions, and present incarceration. The Court held that this was established by clear and convincing evidence. The father's final issue on appeal questioned the adequacy of the DPW's plan for the care and treatment of the child, namely proposed adoption of a five-year-old was not feasible. The DPW's plan was to place the child in a foster home, provide medical care, and schooling. The caseworker did intend to transfer the case to the Adoption Division. The Court found that the DPW was able to "point out in a general sense to the trial court the direction in which its plans were going." Matter of Meidl, 416 N.E. 2d 491 (Ind. Ct. App. 1981).

**In Matter of C.D.**, 614 N.E. 2d 591 (Ind. Ct. App. 1993), the DPW filed a petition for the termination of the parental rights of the mother and father. The trial court granted the petition after entering specific findings of fact and conclusions of law. The Appellate Court affirmed the court's decision. The parents appealed with several issues, which the Court restated as: whether there was clear and convincing evidence to support termination of the parental rights of the mother and father.

The CHINS determination was made in April 1988. The father was afforded opportunities for visitation with the children commencing in September of 1987, but was unable to relate to the children; refused to cooperate with caseworkers supervising the visitations; refused to take instruction and advice regarding interaction with the children by the caseworkers of the Department of Welfare or counselors providing services to the children; all of which, according to experts, had a damaging effect on the emotional well-being of the children; the father failed to cooperate with service providers and therapists in completing evaluations geared toward reunification; failed repeatedly to make telephone contact with the children as scheduled on a weekly basis; and when making telephone contact continued to communicate inappropriately with the children leading to further emotional damage of the children; the mother voluntarily absented herself from the children, without any contact whatsoever, from August of 1988 to July of 1991, during which time the mother was wholly unavailable to participate in services offered by the Department of Public Welfare for the purpose of reunification with the children.

The trial court entered findings concerning each element of the statute. Termination of the parent-child relationship is in the best interest of these children in that they have suffered severe emotional difficulties as a result of their parents' frequent and long-term voluntary absences; failure of the parents to adequately protect them; physical abuse of the father and former step-father. The court also concluded that continued contact with the parents would be detrimental to the long-term emotional and mental health and well-being, as well as physical well-being of the children. The Tippecanoe County Department of Public Welfare has a satisfactory plan for the care and treatment of the children, that being immediate adoption of said children.

**Although children were removed from the custody of the mother on grounds not applicable to the father, independent grounds for removal from father were present. This was sufficient to support the finding that the requirements of IC 31-6-5-4(c)(1) had been met.** The court distinguished this case from Matter of A.M., 596 N.E. 2d 236 (Ind. Ct. App. 1992). In Matter of A.M. the Court found that the child had never been removed from the care of the father because the father had never cared for the children, whereas, in Matter of C.D., the father had lived with the children during his marriage to the mother, and he had visitation rights after the divorce.

**A new CHINS proceeding need not be initiated each time an additional ground for intervention is discovered.** Matter of Y.D.R., 567 N.E. 2d 872 (Ind. Ct. App. 1991). After the initial CHINS petition was filed, further psychological evaluations and testimony from the father revealed sufficient grounds warranting removal of the children from the father. The grounds were brought out at the CHINS hearing and became the basis of the dispositional decree.

**The father's beliefs on corporal punishment, including hitting a four month old child with a paint stirrer when she would not calm down in church, and statement that he did not intend to change his beliefs or behavior supported findings that conditions would not be remedied.** The Court upheld the findings of the trial court that there was a reasonable probability the conditions which resulted in the removal of these children would not be remedied. Specifically, the father gave no indication of his willingness to modify his behavior and beliefs regarding physical punishment of the children. Due to his long periods of voluntary absence from the children since they were infants, it was unreasonable to assume given his history that he would be able to adequately parent these children and provide for their emotional needs. Furthermore, based on the testimony of experts, it was unreasonable to assume that the mother had matured or could have matured to a point where she could have provide for the protection of the children, stability of the children, and for their physical and emotional needs. The children were then seven and eight-years-old and both parents had repeatedly and for long periods of time voluntarily absented themselves from the children to the extreme detriment of the children and to the extent that there was no reason to believe that the parent-child relationship bond could have been reestablished. Testimony of psychologist indicated that it was unlikely that the mother could have adequately parented the children if reunification were attempted.

The Court also upheld the finding that efforts to reunify the children with the mother or father would have been detrimental to the emotional well-being of both children. Psychologists disagreed about the father's fitness as a parent. Father's psychologist did not think the father would be dangerous toward the children. Another psychologist described the father's relationship with his children as "strongly negative," and further reunification efforts could result in psychological and behavioral problems for the children. Matter of C.D., at 595.

The father argued that termination is inappropriate unless the situation while in parent's custody would be wholly inadequate for the child's survival. Matter of Tucker, 578 N.E. 2d 774, 778 (Ind. Ct. App. 1991), the Court restated the Tucker holding, "[t]his is a graduated yardstick according to which the particulars of a case must be measured. In so doing, the trial court must subordinate the interests of the parent to those of the children involved." Id. The evidence showing that the children had been subjected to physical and mental abuse, and unstable living conditions

was sufficient. The father's interests in maintaining his parental relationship needed to be subordinate to the children's interest in physical, mental, and social growth.

In **Matter of D.G.**, 702 N.E. 2d 777 (Ind. Ct App. 1998), the mother appealed from order terminating her parental rights to child. The Court of Appeals affirmed, holding that the evidence regarding a prior termination of the mother's parental rights with respect to another child was properly admitted, and that sufficient evidence supported the termination of the mother's parental rights of this child.

The father battered the mother and the mother reported to the police that the father had also struck the child and caused extensive bruising. A CHINS petition was filed in January 1997, and the child was removed from the home and adjudicated a CHINS. The mother was ordered to attend supervised visits, participate in parenting classes and counseling, obtain a medical evaluation, and attend a battered women's group once a week. In January 1998, O.F.C. filed a petition to terminate the parental rights of the mother, alleging that continuation of the parent-child relationship posed a threat to the well-being of the child. The petition was granted in March 1998.

**Sufficiency of the evidence on "threat to well-being", "best interest of child", and "satisfactory plan".** The Court noted the following evidence: The father battered the mother on at least three occasions in 1996, once during her pregnancy with the child; the mother reported the father struck and bruised the child; the mother attended all the parenting classes, two counseling sessions, but no classes for battered women; the mother traveled to another state and did not attend supervised visitation for a month. *Id.* at 781. The Court found the above and following evidence sufficient to support a finding that continuation of the parent-child relationship posed a threat to the well-being of the child and that termination was in the child's best interest: the mother's lifestyle was unstable and potentially dangerous for the child; the mother did not have a job or permanent residence; the mother's choice of mates posed a threat to the child; the mother was continuing to live with the father even though he had not attended court ordered services; the father's inability to control substance abuse and anger posed a threat to the child's well-being. *Id.* In addition, the case worker's testimony that the child was highly adoptable and that O.F.C. intended to seek adoptive parents for her was sufficient to demonstrate that the O.F.C. had a satisfactory plan for the child. *Id.*

**Evidence of prior termination admissible.** On appeal, the mother objected to testimony that another of her children had been adjudicated CHINS due to her neglect and that her parental rights had been terminated to that child despite extensive services. She argued that this evidence was irrelevant and that its prejudicial effect outweighed its probative value. *Id.* at 779. Although IC 31-34-12-5, which allows for the admission of prior acts in a CHINS case, does not specifically apply to termination cases, Ind. Evidence Rule 405 does apply to termination cases. *Id.* Evid. R. 405 allows for the admission of proof of "specific instances of that persons' conduct" when the character of a person is an essential element of the case. 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 O.F.C.'s previous intervention, the mother had not developed adequate parenting skills, and her 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.*

**Standard concepts in termination of parental rights.** Involuntary termination of parental rights is the "most severe action" a juvenile court can take. *Id.* The Court stated that "termination is designed to be a last resort, available only when all other reasonable efforts have failed." *Id.* at 781. A parent's right to raise his children is protected by the Fourteenth Amendment, but parental interests are not absolute and must be subordinated to the child's interest in determining the appropriate disposition of a petition to terminate parental rights. *Id.*

**Standards on appeal: specific findings of fact and fundamental error.** When the trial court enters specific findings and conclusions on its own motion, the specific findings control only as to the issues they cover. *Id.* at 780. The specific findings will not be set aside unless they are clearly erroneous and the general judgment can be affirmed on any legal theory supported by the evidence. Evidence not objected to at trial can be raised on appeal under the fundamental error rule. Following the criminal standard, the error is fundamental if it is "so prejudicial to the rights of the defendant that it makes a fair trial impossible." *Id.* at 779 footnote 2.

In **In Re D.L.M.**, 725 N.E. 2d 981 (Ind. Ct. App. 2000), the mother's parental rights were terminated and the mother appealed, arguing that she did not receive proper notice of the termination hearing. The Court of Appeals reversed, holding that the mother did not receive proper notice prior to termination.

O.F.C. filed petition to terminate the mother's parental rights on May 12, 1999 with regard to her two children, who had previously been adjudicated CHINS. A termination hearing was scheduled for August 31, 1999. It was subsequently rescheduled for August 6, 1999, with a Chronological Case Summary record which reflected that the clerk of the court was to notify parties. The clerk sent notice of the new hearing date to the mother's attorney, but did not send additional notice directly to the mother. The mother failed to appear at the August 6, 1999 hearing. The court terminated the mother's parental rights following the presentation of evidence.

**Notice requirements.** IC 31-35-2-6.5 applies to notice of termination hearings in a CHINS case. Specifically, at the time of this case, the statute required:

(b) At least five (5) days before a hearing on a petition or motion under this chapter:

(1) the person or entity who filed the petition to terminate the parent-child relationship shall send notice of the review to the persons listed in subsection (c).

(c) The following persons shall receive notice of a hearing on a petition or motion filed under this chapter:

(1) The child's parent Id at 983.

The Court, stating that as the language of the statute requiring notice be sent to the child's parent is plain and unambiguous, and therefore not subject to judicial interpretation, held that O.F.C. is required to serve notice on the parent, not only the parent's attorney. Note that the time period in which to send notice was amended effective July 1, 2000 from five days to ten days.

In **Matter of D.S.**, 577 N.E. 2d 572 (Ind. 1991), the Supreme Court accepted transfer, vacated an unpublished memorandum decision of the Court of Appeals which affirmed the granting of a petition for termination of the parent-child relationship, and reversed the trial court's decision. The Court remanded the proceedings with instructions to conduct the case consistent with the Supreme Court opinion and the Indian Child Welfare Act of 1978, 25 U.S. 1901 through 1963. The child was one-half Potawatomi Indian and had been born six weeks prematurely and at risk due to prenatal alcohol abuse in South Bend, not on an Indian reservation. The child was removed by the St. Joseph County Welfare Department two days after birth because the father had forced welfare workers who had come to check on the child to leave the parents' home and police observed that the parents were arguing and apparently intoxicated. A CHINS detention hearing was held which was attended by two representatives of the Potawatomi Indian Nation. No tribal representatives attended any of the subsequent hearings.

The child was adjudicated CHINS, and ordered to be continued in foster care until the parents demonstrated control of their substance abuse problems. The court entered an order terminating the mother's parental rights seventeen months after the CHINS adjudication, finding that the Indian Child Welfare Act did not apply; that substance abuse by the mother would not be remedied; that reasonable services offered to help the mother fulfill her parental obligations were ineffective; and that termination was in the child's best interests.

**Termination of parental rights order reversed due to failure to follow Indian Child Welfare Act provisions regarding notice to tribe.** The Court quoted the ICWA definition of "Indian Child" as an unmarried person under the age of eighteen who is either a member of an Indian tribe or is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. The Court remanded the factual question of the child's tribal membership for the trial court. The Court further disagreed with the Court of Appeals and held that the mother and child in this case presumptively constituted an "Indian family" for purposes of initiating ICWA inquiries.

The Court went on to say that, assuming the child is an Indian child as defined by ICWA, then ICWA applies and its provisions controlling termination of parental rights should have been followed by the trial court. *Id.* at 574. ICWA reflects a preference for tribal court jurisdiction and for children not born on a reservation, jurisdiction must be transferred to the tribal court upon petition of the parent or the tribal, absent good cause not to transfer to the tribal court. The Court also opined that, although no one had requested a transfer to the tribal court, absent proper notice, the tribe would not have had an opportunity to file such a request. The Court found that, although the trial court noted that subpoenas had been served on two representatives of the Potawatomi Tribe for the termination hearing, there were no subpoena returns in the record and thus no way to determine the adequacy of notice. The record also did not show whether the two persons to whom subpoenas had been sent were tribal agents designated and entitled to receive notice. The Court noted that Bureau of Indian Affairs published guidelines set forth detailed notice requirements of ICWA, including provisions for notifying the Bureau in cases where the parents or the child's Indian tribe cannot be located. *Id.* at 575. The Court remanded the case to the trial court to serve notice to the Potawatomi tribe in conformance with ICWA.

**Failure to require evidence beyond a reasonable doubt from ICWA qualified expert witnesses warranted reversal of termination order.** ICWA provides that parental rights termination be proven beyond a reasonable doubt, including "qualified expert witnesses". *Id.* Indiana state law requires that termination be based on the lower standard of "clear and convincing" evidence. The Court opined that proceeding under state law, rather than federal law, which imposed a greater evidentiary burden, was error. *Id.*

The mother further disputed the qualifications of the expert witnesses who testified at the termination hearing. The Bureau of Indian Affairs guidelines define "qualified expert witnesses" as: members of the tribe recognized by the tribe as knowledgeable in tribal customs concerning family organization and child rearing practices; lay expert witnesses having substantial experience in the delivery of child and family services to Indians; professional persons having substantial education and experience in the area of their specialty. *Id.* at 575, 576. The Court found that it was error for the trial court to fail to inquire of the expert witnesses as to their specific qualifications related to the placement of Indian children. *Id.* at 576. The Court opined that one of the problems ICWA sought to correct was the failure of welfare workers to understand Indian culture and practices concerning the raising of children. *Id.*

In Matter of D.T., 547 N.E. 2d 278 (Ind. Ct. App. 1989), the Court of Appeals affirmed the judgment of the trial court terminating the parental rights of the mother with respect to her children.

In late 1985, the mother took her child to be examined by a physician for signs of sexual abuse. There were no physical signs of abuse, but the child informed the physician that she had been touched “where she shouldn’t be touched.” Id., at 278. The mother admitted to the DPW that she had molested the child when the child was an infant. She also stated that her husband was forcing the child to perform oral sex on him. The child was not removed from the home because the husband was no longer living in the home. About one week later the mother called the DPW and asked that the child be removed so that her husband could return home. Three other children remained in the home. The parents began participating in therapy.

The DPW initiated CHINS proceedings regarding all four children. The court found that all children were CHINS, and the child that was abused was to remain in foster care. At the six month review the other children were removed from the home. The DPW alleged that the children were at risk due to the mother’s psychological problems.

In 1987 the DPW filed a petition for termination of the parent-child relationship. The court granted the petition in early 1988.

**Counsel for mother not ineffective in termination case.** The mother raised three issues on appeal. First, she contended that she did not receive effective assistance of counsel. Specifically, she argued that her attorney had “very little experience in juvenile matters, that he failed to make pretrial discovery, and failed to make timely objections to statutory procedures, and that he told [the mother] to stop cooperating with the DPW once it had initiated termination proceedings.” Id. at 281-82 The Court applied the standard used in criminal cases to evaluate counsel’s effectiveness. To show ineffective assistance of counsel, the mother would have had to prove that, “counsel’s representation fell below an objective standard of reasonableness under prevailing professional norms and that the substandard performance was so prejudicial as to have deprived [the mother] of a fair adjudication.” Schiro v. State, 533 N.E. 2d 1201, 1204 (Ind. 1989). Further, it must be shown that the “decision reached would have been different absent the errors.” Lawrence v. State, 464 N.E. 2d 1291, 1294 (Ind. 1984). The mother did not prove that the failure to initiate discovery prejudiced her defense, or that an attorney following professional norms would have done so. She also failed to show that she would have any likelihood of prevailing on objections which her counsel failed to make. The Court also stated, “[i]nexperience, isolated mistakes, poor strategy or bad tactics do not necessarily amount to ineffective assistance.” Id. at 1295., Schiro v. State, 533 N.E. 2d at 1206.

**The record showed that the mother’s counsel had vigorously objected and cross-examined witnesses.** The most serious allegation was that her attorney advised her “not to pay any more attention” to the DPW. Matter of D.T., 547 N.E. 2d at 282. The mother contended that she relied on her counsel’s advice to her detriment, and that if she had remained in DPW’s programs, her parental rights would not have been terminated. The Court relied on Matter of J.H., 468 N.E. 2d 542, 546 (Ind. Ct. App. 1984), stating “participation in DPW’s programs alone does not guarantee that a court will find that a person had been a fit parent.” In this case the DPW had initiated termination proceedings because the mother was not making progress in these programs. However, she did not demonstrate prejudice.

**Judge’s inadvertent reference to earlier proceedings, not in the record did not overcome the presumption that the judge was not biased.** The second issue, the mother argued that she was denied a fair trial due to judicial bias. She contended that the trial court entered findings of fact which were not offered as evidence by the DPW in its case. The court referred to the CHINS proceeding and stated that one of the children was declared a CHINS because the mother was physically abusive; that the mother’s first contact with the DPW was “in 1978, because of her neglect and poor supervision.” Id. at 282-83. The Court reasoned that there was evidence in the record that the mother had physically abused the child, and had previous contact with the DPW, even though there is no specific reference to the cause number, the CHINS proceeding, or of the record of the CHINS proceeding. The Court stated that “[t]hese errors do not render the findings completely erroneous, and even if the findings correctly state what is in the record, the court could correctly find that they lead to the conclusion that [the mother’s] habitual pattern of inappropriate conduct was not in the children’s best interest.” Id. at 283. Further, the Court cites additional authority to show that the mother did not meet her burden of proof that the trial judge was biased. “The law presumes the trial judge was unbiased.” “In order to overcome that presumption, the party asserting bias must show that the trial judge has personal prejudice for or against a party.” Lasley v. State, 510 N.E. 2d 1340 (Ind. 1987). Also, “[c]lear bias or prejudice exists only where there is an undisputed claim or where the judge has expressed an opinion on the merits of the controversy before him.” Wallace v. State, 486 N.E. 2d 445, 456 (Ind. 1985). In support of its holding the Court reasoned that a trial judge is very likely to have knowledge of previous proceedings, and inadvertent references to previous proceedings not in the record will not necessarily lead to a conclusion that the judge was biased. D.T. at 283.

The mother argued that she was denied due process because she was not given notice of all of the conditions that had to be remedied to prevent termination of her rights. The court based its decision to terminate the mother’s parental rights on, “her meager earnings and lack of housing,” among other deficiencies. The CHINS petition contained allegations that there was sexual abuse, and that the, “children’s physical or mental condition was seriously impaired or endangered as a result of the inability of the parent to supply the children with necessary food, clothing, shelter,

medical care, education or supervision.” Id. at 283. The Court noted that the initial removal from the home was based on the sexual abuse. However, “it became obvious that independent of, and perhaps because of, the sexual abuse, [the mother] was unable to provide for her four children with the care and necessities they needed.” Id. at 284. The mother appeared at the initial CHINS hearing, and the six month review hearing. At the review hearing the court ordered the mother to comply with the case plan, which called for the provision of homemaker services, crisis counseling, individual and family counseling, and home based family services. The Court found that the mother, “participated in the proceedings, received service of summons, and initially participated in the remedial effort. Her notice was adequate, and assuming other procedural requisites have been met, she was not denied due process of law.” Id.

**Findings of fact that “mischaracterize” evidence but were supported by testimony and evidence on the record were not “clearly erroneous.”** The mother claimed that the evidence supporting the court’s judgment was insufficient. The trial court entered numerous findings of fact, and all were supported by testimony and evidence in the record. Three of those findings mischaracterized the evidence. The mother argued that the evidence did not support the inference that the conditions would not be remedied. She participated in counseling, and parenting classes. She asserted that her daughters would outgrow the condition that caused them discomfort when the mother smoked. She had divorced the man that molested one of the children. The Court noted that the evidence clearly showed that, “because of the history of abuse and family instability, [the mother’s] children need stability and special care to overcome the psychological harm already inflicted on them. [The mother] has proven herself unwilling or unable to meet those needs despite the efforts of various social service agencies.” Id. at 286.

The Court concluded that the children’s special needs because of their history made the conclusion that there was substantial evidence justifying termination even more imperative. Id. The Court further stated that, “[t]he 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.

In **Matter of Danforth**, 542 N.E. 2d 1330 (Ind. 1989), the Indiana Supreme Court set aside the Court of Appeals decision at 512 N.E. 2d 228. The Court of Appeals had overturned the trial court's termination of parental rights of the father, determining that there was not sufficient evidence to support the trial court's decision.

**Evidence that father left his children in the getaway car while he committed a robbery was sufficient to terminate his parental rights.** The evidence that influenced the Supreme Court's decision was that the father had been arrested for multiple burglaries, and armed robbery served five years in the Indiana Department of Correction, threatened to kill his ex-wife and case worker upon his release, and had left his then one and two-year-old children in his getaway vehicle while committing a robbery. Further, the children had not been under their father's care for six and one half years prior to the filing of the petition to terminate his parental rights. The children's visits with their father in prison had upset them.

**Need not wait until there are bleeding victims before terminating the parent-child relationship.** The Supreme Court referred to the dissent in the Appellate decision that stated, "[a] review of the record convinces me that there is sufficient evidence to support the trial court's determination. . . [t]he 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." In addition, the dissent stated, "[s]urely we need not wait for bleeding victims before we find sufficient evidence of the likelihood of [the father's] future incarceration." Danforth, 542 N.E. 2d 1330, 1331 quoting Danforth, 512 N.E. 2d 228, 232.

The Supreme Court relied upon the reasoning in J.K.C. v. Fountain County Dept. of Pub. Wel., 470 N.E. 2d 88 (Ind. Ct. App. 1984), that the trial court's "determination should not be disturbed unless there is a total absence of evidence to support it."

In **Matter of Dull**, 521 N.E. 2d 972 (Ind. Ct. App. 1988), parental rights of mentally retarded parents were terminated by the trial court, when the parents failed to improve parenting skills after participating in counseling, and other programs. The Court of Appeals affirmed the trial court's decision.

The mother and father were both mentally handicapped with respective IQ scores of 62 and 72. Both parents experienced substantial difficulty in "learning, self-direction, and socialization skills." *Id.* at 973. The children were removed from the home, and determined CHINS in 1985. Services provided for the parents included: full-time day care services, nutrition instruction, family and mental health counseling services, Homemaker services, weekly visits from the Visiting Nurse and social worker, and parent consultation. In 1986 the DPW petitioned for termination, and the court entered judgment terminating parental rights in 1987.

After receiving numerous services from the DPW, the parents showed "no improvements of a degree sufficient enough to warrant continuing these services." *Id.* at 974. Further, the court determined that the reason the parents did not benefit from the services was due to their, "innate inability to comprehend and/or retain parenting skills from said services which inability is caused by their mental and social handicap." *Id.* The Court found that this was sufficient to support the finding that there was a reasonable probability that the conditions that resulted in the children's removal would not be remedied.

The court concluded as a matter of law that the parent's mental and social deficiencies would not in all likelihood improve, thereby justifying the finding that there was a reasonable probability that the conditions that resulted in the children's removal will not be remedied.

**Parent's mental incapacity "caused" children's developmental delays, and would not likely be remedied.** On appeal, the parents argued that the evidence was insufficient to support the findings that the children's developmental delays were caused by the parents, and would not have been remedied had the children remained in the home. Testimony from the caseworker indicated that the house was, "filthy," and the parents could not control the older child's behavior. *Id.* at 975. Further, testimony indicated that the parents related to their children on a "child to child" basis rather than as "parent to child." *Id.* There was minimal interaction between the parents and children. Other witnesses testified that the parents had "continuing difficulty with essential parenting skills . . . even after they attended counseling sessions." *Id.* The clinical psychologist testified that the oldest child was "emotionally disturbed," "masturbated excessively," destroyed furniture, and "ate profusely." *Id.* The youngest child was "developmentally delayed in all areas of emotional growth and made virtually no progress while living with her parents." *Id.* In addition, the parents attended court-ordered classes, but "were unable to comprehend and learn basic parenting skills." *Id.* at 975-76. The Court concluded that the evidence supported the findings that the parents lacked the skills necessary to raise their children properly, and the decision that the conditions would not be remedied. The court found that the parents lacked "appropriate parenting skills, which is demonstrated by their disregard of positive attention towards their children, lack of demonstration of physical and emotional nurturing [sic] and neglect of the children's welfare which has been detrimental to [the children's] growth and development resulting in significant development, emotional and social delays prior to their removal, and that said conditions will continue to exist if the children were to reside with their parents." *Id.* The court also found that the children made significant progress after removal from the home.

**Parent's mental incapacity may be considered along with all other pertinent evidence of the parent's fitness.** The parents contended that mental retardation should not be considered in deciding whether to terminate a parent-child relationship. The Court relied on case law from Illinois, Montana, Massachusetts, Michigan, and North Carolina to provide a foundation for the decision on this issue. Analysis of the case law led the Court to the conclusion that the "majority of jurisdictions recognize that while an adjudication of a parent's mental retardation will not alone render that parent unfit, evidence of such adjudication may be considered, along with all other pertinent evidence bearing upon the question of that parent's fitness." *Id.* at 976. The evidence did not support the parents' contention that their parental rights were terminated solely because of their mental retardation. The Court concluded that the trial court was correct in finding that the parents were mildly mentally retarded, and that it was clearly demonstrated that the parents, "could not provide [the children] with the necessary home environment which would allow them to develop without severe developmental delays accompanied by emotional disturbances." *Id.* The Court held: "the trial court's consideration of the parents' low intelligence levels, along with the other evidence. . . supports the finding that the requirements of IC 31-6-5-4 were satisfied." *Id.* at 977.

In **Matter of E.E.**, 736 N.E. 2d 791 (Ind. Ct. App. 2000), the Court of Appeals affirmed the trial court's judgment terminating the mother's parental rights. The mother argued that there was insufficient evidence to support the trial court's judgment, and that the OFC failed to comply with the Americans with Disabilities Act (ADA).

The underlying CHINS petition was based on the fact that the mother left her six-month-old child unattended in an Indianapolis parking garage. The child suffered from a heart condition, and digestive reflux, and required constant monitoring due to the child's medical condition. The mother was attending a hearing on the termination of her parental rights with respect to her two older children. The OFC further alleged that the mother had an, "extensive history of mental illness, neglect of her children, and an inability to benefit from family services. *Id.* at 791. The child was found to be a CHINS.

The parental participation plan required the mother to secure a stable source of income and suitable housing, sign an authorization to release her mental health records, participate in parental counseling and assessment, complete a psychological evaluation and visit [the child] on a regular basis. The mother did not comply with the terms of the parental participation order, and the OFC subsequently filed a petition for termination of parental rights.

**Evidence of mother's mental illness, inability to parent, suicidal and homicidal ideation, and lack of cooperation with mental health therapy and medication was sufficient to terminate parent-child relationship.** The mother argued that the OFC presented insufficient evidence to prove that there was a reasonable probability the conditions which resulted in the child's removal would not be remedied or that the continuation of the relationship posed a threat to the well being of the child. The Court of Appeals recounted the evidence that was most favorable to the judgment, as follows: the mother had been diagnosed as paranoid schizophrenic; had exhibited substantial difficulty coping with parenting and household duties; social workers had recommended placement of the mother in a group home; the mother had been hospitalized for suicidal ideation on two occasions; she needed at least one year of successful psychotherapy and psychopharmacotherapy before she could reliably perform parenting duties; she had sporadically rejected prescribed medications in favor of herbal remedies; she had refused to participate in outpatient therapy; a therapist observed a lack of parent-child bonding; and the mother appeared unable to appreciate the child's basic needs for safety and stability. The Court relied on the **Matter of D.L.W.**, 485 N.E. 2d 139, 142 (Ind. Ct. App. 1985), "[a]lthough the trial court should assess a parent's ability to care for his or her child as of the date of the termination proceeding, the court must also examine the parent's pattern of conduct."

**Alleged noncompliance with ADA is separate and distinct from termination statute.** The mother claimed that the OFC failed to reasonably accommodate her disability when providing services, in non-compliance with the Americans With Disabilities Act (ADA). The mother relied on **Tyler v. City of Manhattan**, 849 F. Supp. 1429, 1439 (U.S. District of Kansas 1994). The mother observed that, "a violation is established upon a showing that she: is a qualified individual with a disability; was excluded from participation in or denied the benefits of some public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and such exclusion, denial of benefits or discrimination was by reason of her disability." **Matter of E.E.**, at 795. The Court determined that the mother stated the burden of proof, but did not present any evidence to substantiate her claim. She did not identify any particular service or benefit that she was denied. The Court opined, "any alleged noncompliance with the ADA by the OFC in the provision of family services would be a matter separate and distinct from the operation of our termination statutes." *Id.* at 796.

**The provision of family services is not a requisite element of our termination statutes. A failure to provide services, or the provision of services in an allegedly discriminatory manner does not serve as a basis on which to directly attack a termination order.** The Court stated that, when an agency opts to provide services to assist parents in improving parental skills, the provision of those services must be in compliance with the ADA, citing **Stone v. Daviess County Div. Of Children and Family Services**, 656 N.E. 2d 824, 830 (Ind. Ct. App. 1995), trans. denied. However, the Court reasoned that "the provision of family services is not a requisite element of our parental rights termination statute, and thus, even a complete failure to provide services would not serve to negate the necessary element of the termination statute and require reversal." *Id.*

In **Egley v. Blackford County DPW**, 592 N.E. 2d 1232 (Ind. 1992), the Indiana Supreme Court granted transfer to address the proper standard to be applied in actions to terminate parental rights. The Court of Appeals had erroneously applied dicta from **Matter of Miedl**, 425 N.E. 2d 137, 141 (Ind. 1981), holding that, “parental rights may be terminated only where there is clear and convincing evidence that the continued custody of the parents is wholly inadequate for the child’s very survival.” The Supreme Court vacated the opinion of the Court of Appeals, and affirmed the trial court’s decision terminating parental rights.

In 1987, the Blackford County DPW began intervention with the family. The DPW found that the trailer where the family lived had holes in the floor, no water, a furnace that did not work, and an improperly vented kerosene heater. The children were removed from the home temporarily. The DPW began to work with the parents to help improve the home environment. The parents were counseled regarding budgeting, homemaking, and supervised visitation. The parents also attended parenting classes.

During the course of the next two years the DPW continued to monitor the family. Additional problems were discovered with the children. The four-year-old child was not toilet trained, was mentally retarded, and had a speech abnormality. The nine-month-old child was usually confined to a crib, and had underdeveloped motor skills. Both children were socially deprived. The children were again removed from the home.

While in foster care, the four-year-old became toilet trained within two weeks, and his speech abnormality improved. Both children were more socially active. The DPW continued to work with the parents to improve their parenting skills. However, the caseworkers, “eventually concluded that [the mother] who had an IQ of fifty-seven, and [the father] who had an IQ of seventy-three, did not have the mental capability to comprehend and retain the information given to them.” **Egley**, 592 N.E. 2d 1232 at 1233.

Testimony of the psychologist indicated that the father, “lacked the desire to be a more successful parent and was more motivated by economic concerns.” **Id.** The father was also diagnosed with a personality disorder which would require long-term psychotherapy to correct.

**Incapacity to benefit from counseling supported termination.** In 1989 the court granted the DPW’s petition to terminate the parental rights of both parents. The parents argued on appeal that their parental rights were terminated because of their intellect. The Court cited **Dull v. Delaware County Department of Public Welfare**, 521 N.E. 2d 972 (Ind. Ct. App. 1988), “[m]ental retardation of the parents, standing alone, is not a proper ground for terminating parental rights.” However, the Court also cited **In Re wardship of B.C.**, 441 N.E. 2d 208, 211 (Ind. 1982), where mental illness may be a consideration when, “the parents are incapable of or unwilling to fulfill their legal obligations in caring for their children.” The trial court’s findings supported the inference that the parents were incapable of or unwilling to follow the recommendations of the DPW, to improve their parenting skills.

**Threat to the children’s survival is not the termination standard.** The Court of Appeals erroneously relied on dicta in the **Miedl** decision which stated, “[children] are taken because the present place in the custody of their parents is wholly inadequate for their very survival.” **Matter of Miedl**, 425 N.E. 2d 137 at 141. The **Miedl** statement was interpreted by the Court of Appeals as an element of the termination statute, for establishing that termination was in the best interests of the children. The Supreme Court opined that the Court of Appeals had applied an incorrect standard for termination of parental rights. **Egley** at 1234.

In **State Ex Rel Gosnell v. Cass Cir. Court**, 577 N.E. 2d 957 (Ind. 1991), the trial court denied the parent's motion for change of judge in the termination proceedings, based upon an invalid statutory provision. The Supreme Court issued a writ of mandate ordering the trial court to grant the change of judge, and held that the statute was invalid, in that it conflicted with Ind. Trial Rule 76. The Court then issued the opinion deciding the other issue that the termination proceeding is a separate proceeding from the CHINS proceeding, and that each should be separately docketed.

The Cass County DPW took custody of the mother's five children subject to a CHINS petition. Subsequently, a termination proceeding was initiated. The mother moved for a change of judge, under Ind. Trial Rule 76, alleging that, "the termination proceeding was a new proceeding, was not a final action in the CHINS case, and that the provisions of IC 31-6-7-9 are in conflict with T. R. 76 in that the statute requires that cause be shown for the granting of a change." *Id.* The trial court denied the motion.

**The Supreme Court establishes procedures in change of judge, and legislature establishes the substantive right to a change.** The Supreme Court relied on State ex rel. Blood v. Gibson Cir. Ct., 289 Ind. 394, 157 N.E. 2d 475 (Ind. 1959), which stated that the Supreme Court, "determines the procedure to be followed in instances of change of judge or change of venue and the legislature establishes where there is a substantive right to such a change. *Id.* at 958. The Court then held that IC 31-6-7-9 was in conflict with T. R. 76, and that provision of the statute was void and of no effect and the provisions of T. R. 76 prevail. *Id.*

**Termination proceeding is a distinctly separate action from CHINS proceeding, but governed by the same procedural statutes.** The mother argued that a termination proceeding was not an integral part of a CHINS proceeding. The Supreme Court agreed, reasoning that many CHINS petitions eventually lead to termination proceedings, but it is not an inevitable result. In some cases a CHINS intervention is based upon temporary circumstances. The Court noted that the termination statute states that the proceedings under that section are distinct from the proceedings under the CHINS statute. Formerly IC 31-6-5-3 recodified as 31-35-2-2 states: "Proceedings under this chapter are governed by the procedures prescribed by [CHINS, delinquency and procedural statutes]. . . but are distinct from proceedings under IC 31-34 [CHINS] and 31-37 [delinquency]." IC 31-35-2-2. The Court held that a proceeding for termination of the parent-child relationship is a separate proceeding, should be separately docketed, and that the operation of T. R. 76 proceeds from that point. Gosnell at 958.

In **Harris v. Delaware County Division**, 732 N.E. 2d 248 (Ind. Ct. App. 2000), the Court reversed and remanded the order terminating the father's parental rights. The Delaware County Division of Family and Children had filed a termination petition in January, 1999. The father attended the initial hearing on the termination petition, but failed to attend the fact-finding hearing, which, after a continuance, was held in October, 1999. Notice of the fact-finding hearing date was issued to the father by publication in the local newspaper. On appeal the father argued that Delaware County Office of Family and Children did not properly follow the Indiana Rules of Trial Procedure for service of summons by publication.

**Failure to file necessary publication documents pursuant to T.R. 4.13 warranted reversal.** Noting that termination of parental rights proceedings are in rem proceedings, the Court opined that the requirements of T.R. 4.13 are a "directive" to counsel seeking service by publication. Id. at 249. The Court found that Delaware County Office of Family and Children filed a praecipe, affidavit of diligent inquiry and summons for service by publication for the child's mother, but had failed to file the praecipe and affidavit for the father. Only a summons for publication was filed regarding the father. The Court concluded that the failure to file all of the documents required by T.R. 4.13 resulted in failure to provide proper notice to the father of the hearing on termination.

**IC 31-35-2-6.5 may require publication notice of hearing date on termination petition even if parent is aware of proceedings.** The Court also quoted IC 31-35-2-6.5 for the requirement of notice of hearing to be sent by the termination petitioner to the parent at least five days (as of July 1, 2000, this statute was amended to ten days) prior to the hearing. Harris had appeared at the initial hearing on the termination proceeding and therefore presumably knew that the termination petition had been initiated. The Court's decision reversing the termination order due to lack of publication notice seems to require a second notice, by publication if necessary, of the actual hearing date to the parent.

In ***In Re J.J.***, 711 N.E. 2d 872 (Ind. Ct. App. 1999), the Court affirmed the termination of the father's parental rights with respect to his daughter. A hearing on the underlying CHINS petition was held when the daughter was almost nine-months-old. At the hearing, evidence was heard that the mother was, "in a perpetual state of crisis and entered into abusive relationships with men." *Id.* at 873. There was evidence that the daughter suffered from Shaken Baby Syndrome, and that her parents were unable to provide a safe, stable environment for her. Following the hearing the daughter was placed in foster care.

As part of the reunification plan the court ordered the father to do the following: complete a psychological evaluation, complete the SHARE (anger management) program, undergo random drug / alcohol screens, and participate in supervised visitation upon recommendation of the evaluating psychologist. The father belatedly complied with the psychological evaluation, but failed to follow through on the recommendations that arose from the evaluation, and did not complete the SHARE program. The recommendations were that the father complete several education classes, and counseling programs before commencing visitation.

At the hearing on the Termination Petition, the father was unable to offer a discernible justification for having failed to complete the SHARE program, and he admitted that there was no good reason that he delayed nine months before beginning the evaluation.

**Evidence of the father's violent behavior, and failure to complete court ordered evaluation supported termination judgment.** The Court found that ample evidence supported the termination on all elements including: (1) there was nine month delay in completing the court ordered evaluation without legitimate reasons, (2) the father had been ordered to complete the SHARE program once during the CHINS proceeding, and twice by the criminal court, (3) he had received three battery convictions, (4) he demonstrated a pattern of instability in relationships, employment, and housing, and (5) he had paid no child support, and no court ordered reimbursement. The court found that the father had abandoned his daughter. Further, the court found that continuation of the parent-child relationship posed a threat to the well-being of the child, in that the father had never established a relationship with his daughter nor demonstrated any desire to do so since prior to the CHINS proceeding.

**Court's order denying contact between child and father until father completed psychological evaluation and anger management training was not erroneous.** In response to the father's complaint that the court had restricted his visitation pending an evaluation and participation in treatment, the Court noted that the restriction was not clearly erroneous. The Court cited IC 31-34-19-6, commenting that the requirement of evaluation and treatment "was the least restrictive intervention that was still in the child's best interest." *Id.* at 875.

In ***In Re L.S.***, 717 N.E. 2d 204 (Ind. Ct. App. 1999), the Court affirmed the involuntary termination of parental rights of the father, and three minor children. The trial court ruled that there was clear and convincing evidence that there was a reasonable probability that the conditions that led to the children's removal would not be remedied, and that the continuation of the parent-child relationship posed a threat to the well-being of the children. Either finding, standing alone, would be sufficient. The father appealed only one finding; that the state failed to present clear and convincing evidence of the reasonable probability that the conditions that led to the children's removal would not be remedied. The mother was not a party to the appeal.

The children were removed from the home after the mother's attempted suicide, and a restraining order was entered against the father, on behalf of the mother and the children. After the parents admitted the CHINS petition, they were ordered to undergo marital counseling, which they did. The counseling was deemed ineffective due to a personality conflict with the counselor. The children were again removed from the home after the father ran over the mother's foot with his car during an episode where he, "did act in an unreasonable, dangerous irresponsible manner in regard to the children thus placing them in danger . . . he did operate an automobile in the presence of the children while in a state of rage sufficient to overcome his rational faculties." *Id.* at 207. The trial court found that the children, as well as the mother were in danger due to the father's behavior.

The father moved to a half-way house for six months, where he received counseling for depression, gender identity disorder, alcohol abuse, and parenting skills. After the father's release from the half-way house he reunited with the mother. Their fighting continued. He was arrested for spousal battery. The couple were evicted from their apartment due to their fighting. Neither parent was involved in counseling, or employed. At that time visitation was suspended until the parents complied with counseling, communicated with the children in writing, and the father dressed in gender neutral clothing for visitation to avoid additional stress to the children.

The father refused to dress as a man and discontinued his cooperation, and made no further attempts to visit. He lived out of state for approximately eighteen months in order to undergo gender reassignment treatment. He returned to Indiana approximately two weeks prior to the termination hearing, at which time the children had been in and out of foster care for about five years.

The father was unwilling to cooperate with the OFC in its efforts to reunite the family; he failed to stay in contact with the OFC by providing an address; he did not consider the emotional impact on the children of his move out of state, or of the gender reassignment procedure; and he was unwilling to cooperate in dealing with serious marital problems. *Id.* at 210-11.

**The trial court was obligated to look at the parent's habitual pattern of conduct to determine the likelihood of future neglect or deprivation of the children.** In considering whether there was a reasonable probability that the conditions that led to the children's removal would not be remedied, the Court recognized that the parents no longer lived together, and had not lived together for some time prior to the termination hearing. The court heard testimony that the parents were "at war" with one another; that the marital discord stemmed largely from the father's transexualism and desire for a sex change operation; and that the couple reunited regularly because they suffered from dependency issues that made it difficult for them to separate, even though they had commenced divorce proceedings. The parent's habitual pattern of conduct indicated that they would continue to get back together, and that the relationship would not improve. This became more apparent after the father completed the gender reassignment procedure, which was the principal cause of contention between the couple.

Even though the father completed a counseling program for parenting skills, gender identity disorder, depression, and alcohol abuse, he did not effectively address the precipitating issue which was marital counseling.

The Court reasoned that the best interests of the child are paramount in termination proceedings and that the children should not be compelled to suffer emotional injury, psychological adjustments, and instability to preserve parental rights. Moreover, citing *Egley*, 592 N.E. 2d at 1234, when the evidence shows that the child's emotional and physical development is threatened, termination of the parent-child relationship is appropriate.

Findings that influenced the Court's decision were: it was [the father's] choice to place [his] needs above those of the children by choosing to leave the state; there was no indication that [the father] fully considered the emotional impact that the move out of state had on the children or the psychological adjustment they would face after learning of the gender reassignment. Citing *Matter of D.B.*, 561 N.E. 2d 844, 848 (Ind. Ct. App. 1990), the court reasoned that a pattern of unwillingness to deal with the 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.

The Court held the trial court was justified in concluding that the OFC proved by clear and convincing evidence that the father's parental rights should be terminated.

In **Matter of Relationship of M.B.**, 638 N.E. 2d 804 (Ind. Ct. App. 1994), the parents appealed the trial court's order granting termination of the parent-child relationship. The Appellate Court affirmed the trial court's decision. The Marshall County DPW initiated CHINS proceedings in 1988 after a report of neglect, which consisted of, "the children eating off a dirty kitchen floor, dishes overflowing in the kitchen sink with mold growing on them, dirty diapers, and a dirty bathroom." *Id.* at 805. A second report of neglect came in 1989. "The youngest child was found to be undernourished, and underdeveloped." *Id.* The father was arrested for molesting his step-child who lived. The step-child was allowed to go live with the biological father, and was not a party to any further proceedings. Both the mother and father were then charged with child molesting. The children were removed from the home, and placed in foster care. The father was convicted of multiple counts of child molesting. He was sentenced to twenty years beginning in 1990. The mother pled guilty to one count of child molesting, and one count of welfare fraud. The mother was released on bond and exercised visitation privileges with the children. A determination was made that the children were CHINS. In 1992, the DPW filed a petition for termination of parental rights. Before the hearing on the termination case, the DPW filed a "Petition For Hearing To Introduce Statements Pursuant to . . . 31-6-15-1 Et. Seq." *Id.* at 806. {recodified as 31-35-4-1 et. seq.} The court granted the petition over objection of the parents. In 1993 the court entered a judgment terminating the parental rights of both parents.

The parents raised five issues on appeal. (1) whether the trial court erred in failing to require DPW to prove by clear and convincing evidence each element set forth in IC 31-6-5-4(c) {recodified as 31-35-2-4(b)}; (2) whether the trial court erred in admitting the out-of-court statements of the minor children; (3) whether the trial court gave undue consideration to the pro se dissolution of marriage between the parents; whether the trial court erred in failing to return the parent-child relationship to the "status quo"; and (5) whether the appellants were denied their constitutional right to confront witnesses.

**The state only needs to prove that there is a reasonable probability that the conditions that resulted in the removal will not be remedied, or that the continuation of the relationship poses a threat to the well-being of the child.** Issue (1) involved the question of whether the DPW must prove both (A) and (B) of IC 31-6-5-4(c)(2) {recodified as 31-35-2-4(b)(2)(B) (i) and (ii)} The statute clearly requires proof of only one of the two. "(B) there is a reasonable probability that: (i) the conditions that resulted in the child's removal. . . will not be remedied; or (ii) the continuation of the parent-child relationship poses a threat to the well-being of the child." IC 31-35-2-4(b)(2)(B). In this case, the DPW elected to present evidence of (ii) only. The trial court entered findings supporting its judgment. When the children were first removed from the home they exhibited "strange behavior." *Id.* Specifically, the youngest child protested strongly against having his diaper changed. Another child simulated intercourse with the foster mother, and urinated on her. The child stated, "this is how you love people." *Id.*

**Affidavit submitted by psychologist that mental or emotional harm would result from children testifying, and availability of children to testify excuses actual presence of the children.** Issue (2) involved the admission into evidence of out-of-court statements by the children. The statute that was in effect at the time of this case has been amended to provide separate statutes for CHINS and termination cases. Also, the language, "in a hearing attended by the child," has since been removed. The parents argued that the DPW's failure to have the children present at the termination proceeding should have resulted in the statements being excluded. *Id.* at 809. At the hearing counsel for the DPW stated that the children were available to attend the hearing, but counsel did not want the children to listen to the testimony. The trial judge accepted the children's availability, as opposed to actual presence, and defense counsel did not object. The trial court relied on an affidavit by a child psychologist which indicated, "the children would be traumatized if forced to recount their abuse." *Id.* at 809. The Court stated that the trial court upheld the spirit of the statute by protecting the children from further trauma associated with testifying. The court found that there was a substantial likelihood of mental or emotional harm if the children were to testify. Therefore, the court was justified in admitting the affidavit into evidence.

**Psychologist's affidavit satisfied statutory requirement of certification.** A related issue is the admission of the affidavit by the psychologist. The parents argued that the affidavit provided did not satisfy the statutory certification requirement of "certification" and should not be admitted. *Id.* at 809. The Court relied on the plain meaning of the word certification as supplied by Black's Law Dictionary, "[t]o authenticate or vouch for a thing in writing. To attest as being true or as represented." *Id.* at 810. The Court reasoned that the affidavit does nothing more than attest that the children would regress rather than open up if questioned at trial." *Id.* The trial court allowed the "certification" based on actual psychological examination of the children and in part on hearsay, according to the analysis of the Appellate Court. The Court reasoned that there was other evidence that supported the trial court's decision, and the trial court was correct in allowing the affidavit into evidence.

**Court refused return to status quo when it places the parent's interests above those of the child.** The parents argued that there should be a return to the status quo, citing **Matter of Lozier**, 453 N.E. 2d 345 (Ind. Ct. App. 1983). The Court noted that **Lozier** was decided before the amendment to the termination statute that added an option of terminating parental rights upon a showing of harm to the child if the parent child relationship is continued. The DPW in **M.B.** had proceeded under this section of the statute. "Although Mother has undergone some treatment, there is no

indication that she is now ready to be a responsible parent.” M.B. at 810. The Court reasoned that, “a return to the status quo would return the children to an environment which created the anti-social behavior from which they are now slowly recovering.” Id. at 810-11.

In ***In Re M.M.***, 733 N.E. 2d 6 (Ind. Ct. App. 2000), the Court affirmed the order involuntarily terminating the parent-child relationship between a minor mother who had been adjudicated CHINS and the child to whom the mother given birth at age fourteen. The minor mother had been adjudicated a CHINS and placed in foster care when she was eight or nine years old. The mother had multiple placements, from which she frequently ran away, and became pregnant by another resident at a group home in Ohio. The mother ran away from the group home and received no prenatal care and used drugs, alcohol, and cigarettes during the last five months of her pregnancy. The mother delivered her child, who was born weighing one pound, fourteen ounces, prematurely. The child was placed in several hospitals and later in the first of several attempted joint foster home placements with the minor mother. The CHINS petition alleged that the child had been born when the mother was a fourteen year old ward of Elkhart County, the child had a birth weight of one pound, fourteen ounces, and the mother was unable to care for him. A guardian ad litem was appointed for the mother. The mother did not request counsel and admitted that the child was a CHINS. After the mother and child had resided together in three different foster homes, the mother was sent to the Juvenile Detention Center because she had committed battery on the foster mother. Counsel was appointed for the mother at the review hearing, one month after the mother and son were physically separated due to the mother's detention for battery. A fourth joint foster placement was arranged, but the mother ran away from a shelter care facility prior to the placement, and remained on the run for three months until she was arrested for shoplifting, and spent the next four months at the Indiana Girls School. The mother made no effort to see or ask about the child.

A petition to terminate the parent-child relationship was filed seven months after the mother's battery detention. Counsel for the mother filed a motion to dismiss the termination petition, which the court denied. Two months later, after an evidentiary hearing, the termination petition was granted. On appeal, the mother presented two issues: whether the court appropriately denied the motion to dismiss and whether the O.F.C. presented sufficient clear and convincing evidence to support the termination.

**Failure to appoint counsel for minor mother who did not request counsel was neither abuse of discretion nor fundamental error.** The Court opined that because the mother did not request counsel, the pauper counsel statutes, IC 34-10-1-1 and IC 34-10-1-2, did not apply. The Court was unpersuaded by the mother's Fourteenth Amendment argument that she had been denied due process of law. Noting that there is a presumption against appointment of counsel when the litigant's personal liberty is not at stake, the Court stated that there is a three part test to evaluate whether due process requires appointment of counsel for an indigent litigant. The three elements are: (1) the private interests at stake; (2) the governments interest; and (3) the risk that the procedures used will lead to an erroneous decision. These three elements must be balanced against each other and weighed against the presumption against appointment of counsel. *Id.* at 10. The Court indicated that in this case the private interest in the right to raise one's children is an essential, basic right within the protection of the Fourteenth Amendment. The Court also found that the State has a compelling interest in protecting children and advancing their best interests. The Court further found that, unlike a termination or paternity proceeding, an erroneous CHINS adjudication has a far less disastrous impact on the parent-child relationship. *Id.* The Court found that the mother's due process rights were not violated by the court's failure to appoint counsel for her.

The Court also responded to the mother's argument that the trial court had abused its discretion in failing to appoint counsel for her pursuant to IC 31-32-4-3. In its analysis the Court noted that it may be an abuse of discretion when lack of counsel is likely to lead to particularly damaging uncontested allegations which might virtually assure a subsequent termination decision. *Id.* at 11. The Court found that in the instant case the uncontested allegations of the CHINS petition did not virtually assure a subsequent termination decision. The Court opined that it was the evidence of what occurred after the CHINS adjudication that eventually led to termination of the mother's parental rights. *Id.* The Court was also unpersuaded by the mother's claim of fundamental error. To overturn a trial court ruling on fundamental error, the error must be a clearly blatant violation of basic and elementary principles and the harm or potential harm therefrom must be substantial and appear clearly and prospectively. *Id.* The Court concluded that, "we do not see how the result in her termination case would have been different if counsel had been appointed during the CHINS proceeding". *Id.*

**Six months removal requirement was met for minor CHINS mother who ran away from court ordered placement and never provided home for child.** The mother argued that the O.F.C. had failed to prove the termination requirement at IC 31-35-2-4(b)(2)(A) that the child had been removed from her for six months pursuant to a dispositional decree. Citing *Tipton v. Marion County Dept. Of Public Welfare*, 629 N.E. 2d 1262, 1266 (Ind. Ct. App. 1994), the Court characterized removal as a dispositional decree which authorized out-of-home placement. *Id.* at 12. The Court acknowledged the unusual fact situation presented by the instant case. The Court found that when the mother went to juvenile detention because of battery on her foster mother, and because the mother and son never resided together again due to the mother's actions of running away and shoplifting, the child was "effectively" removed from the mother for at least six months. *Id.* The Court also noted that the child as a CHINS had always been under the supervision of foster parents and, in turn, the O.F.C.

**Minor mother's pattern of running away, delinquent behavior, and use of alcohol and marijuana supported termination finding that there was reasonable probability that conditions would not be remedied.** With regard to the reasonable probability that the conditions which resulted in removal would not be remedied, the Court cited the following in support of its conclusion that the trial court had not erred: the child had been a ward of the court and in foster care since birth; the mother ran away, leaving the child in foster care, and the mother's whereabouts were unknown for three months; the mother did not participate in or benefit from the extensive services offered to her throughout the twenty-seven months since the birth of the child; the mother was unable to meet the child's basic physical needs; the mother engaged in battery, truancy, shoplifting, underage drinking of alcohol, and smoking marijuana; the mother never had sole responsibility for the child. *Id.* at 13.

**Testimony of case manager and court appointed special advocate supported finding that termination was in the child's best interests.** In response to the mother's argument that the and the child's court appointed special advocate. Both testified that termination was in the child's best interests. The Court also opined that their testimony, coupled with the evidence that the conditions that resulted in removal would not be remedied and that the continuation of the parent-child relationship posed a threat to the child's well-being, was sufficient to show clearly and convincingly that termination was in the child's best interests. *Id.*

**Erroneous termination findings were harmless error.** The Court agreed with the mother's contention that some of the court's findings were incorrect or unsupported by the record. The Court also opined that in light of the fact that the accurate findings supported the termination, any erroneous findings were harmless error. The Court also reiterated that a termination of parental rights adjudication will be reversed only upon a showing of clear error which leaves the Court with a definite and firm conviction that a mistake has been made. *Id.* at 14.

In ***In Re M.R.***, 728 N.E. 2d 204 (Ind. Ct. App. 2000), the Court of Appeals affirmed the trial court's termination of the mother's rights with respect to her four children.

Involuntary termination proceedings were initiated by the OFC, to terminate the parental rights of the mother and her four children after both parents admitted the allegations of a CHINS petition. All four children had been removed from the parent's home for seventeen months at the time the involuntary termination petitions were filed. The mother was appointed a court appointed attorney who represented her at all subsequent proceedings. During a status hearing on the termination petitions, the mother presented Voluntary Relinquishment and Termination of Parental Rights, and Waiver of Notice and Consent to Judgment and Decree, effectively giving up her right to a hearing on the Involuntary petition. At that point the case became a Voluntary Termination Proceeding.

Before the Voluntary Relinquishment was entered into evidence, the mother was examined by the OFC's counsel and identified all four petitions. She testified that she understood the effect of the document on her parental rights, duties, and responsibilities. She denied that any promises or threats were made to induce her to sign the petition. She acknowledged that she would have no further rights to or responsibilities for her children, and that, in all likelihood, they would be adopted. She affirmed that she had not taken mood altering medication. She further testified that she understood that there was a trial scheduled on the petitions for involuntary termination of her parental rights, and that she chose not to proceed with the trial.

**The state need not prove the allegations of the Involuntary Petition when a subsequent Voluntary**

**Relinquishment is accepted by the court.** The mother appealed alleging that the State did not prove the allegations of their Involuntary Petition by clear and convincing evidence. The Court said that, "where a parent has freely and voluntarily executed a relinquishment of her parental rights, the State is relieved of the clear and convincing standard of proof, which remains necessary to effect and involuntary termination of the parent-child relationship." *Id.* at 208. The Court reasoned that after the Voluntary Relinquishment was accepted by the court, IC 31-35-1-1 was no longer controlling in the proceedings, and that IC 31-35-1-12 became the controlling standard in the proceedings. The proceedings are subject to the safeguards outlined in the statutes governing voluntary termination of parental rights.

In **In Re N.B.**, 731 N.E. 2d 492 (Ind. Ct. App. 2000), the father appealed from an order terminating his parental rights. The Court affirmed, determining that there was sufficient evidence in the record to support the trial court's decision that termination of parental rights would be in the best interests of the child.

**Evidence was sufficient to terminate the parental rights of alleged father who was incarcerated.** The father was unable to provide necessary care and supervision for the child due to his incarceration. The child was determined to be a CHINS. The father was released from prison for one day before being arrested for battering the child's mother. The Court also noted that the father had an extensive criminal record, both as a juvenile and as an adult. He had only been out of prison for one day of the child's life. The trial court ordered compliance with a Parent Participation plan. The father did not comply with the plan. He has never seen the child. He has never established paternity, and he has never paid child support. The mother's parental rights had already been terminated. The evidence in the record was sufficient to support terminating the father's parental rights. The trial court's decision was not clearly erroneous.

In **Phelps v. Sybinsky**, 736 N. E. 2d 809 (Ind. Ct. App. 2000), the Court affirmed the trial court's order which dismissed a class action complaint for declaratory and injunctive relief concerning 1998 amendments to the Indiana termination of the parent-child relationship statute. The statute, IC 31-35-2-4.5-(a)(2), required that effective July 1, 1999, a petition for termination of the parent-child relationship must be filed for every adjudicated CHINS who had been removed from parents and placed out of home by the county office of family and children for fifteen of the most recent twenty-two months. The statute also required at IC 31-35-2-4(b)(3) that the petitioner indicate whether at least one factor existed which would apply as the basis for filing a motion to dismiss. Among the factors requiring a motion to dismiss pursuant to IC 31-35-2-4(d)(1) was that termination is not in the best interests of the child.

Among the plaintiffs were parents of an autistic child with behavior problems who regularly visited their child in foster care. The Marion County Office of Family and Children had notified the parents that a termination petition would be filed because the child had been in foster care for fifteen of the most recent twenty-two months. The MCOFC had further informed the parents that the agency would be filing a motion to dismiss the termination petition because it did not believe that termination was in the child's best interests. The parents filed a class action complaint, alleging that the Indiana statute violated federal law and provisions of both the state and federal constitutions. The defendants moved to dismiss pursuant to Ind. Trial Rule 12(b)(6). The parties also filed cross-motions for summary judgment.

**Standard of review for T. R. 12 (B)(6) Motions.** The Court noted that a T. R. 12(B)(6) motion tests the legal sufficiency of a claim, not the facts that support it. *Id.* at 813. In reviewing a T. R. 12 (B)(6) dismissal, the Court looks at the complaint in the light most favorable to the plaintiffs, with every inference drawn in their favor to determine if there is any set of allegations under which the plaintiffs could be granted relief. *Id.*

**1998 Amendments do not violate federal law, 42 U. S. C. section 675 (5)(E).** The plaintiffs contended that the Indianan statute violated federal law by requiring that the termination petition be filed even if termination is not in the child's best interests. The federal law stated that a termination petition must be filed unless the petition is not in the child's best interests. The Court opined that the two Indiana statutes, IC 31-35-2-4 and IC 31-35-2-4.5, accomplish the same result, although they take slightly different approaches to do so. *Id.* at 814. The Court stated that under the federal statute, the county attorney's review and determination will prevent some petitions from ever being filed, while under the Indiana statutes petitions must be filed in all cases and the trial court is required to make the determination as to the child's best interests. The Court stated that the Indiana procedure "does even more to safeguard the best interest of children in foster care" and the means by which the Indiana procedure accomplishes this do not violate federal law. *Id.* at 815.

**1998 Amendments do not violate the Indiana Constitution by infringement of executive power.** In responding to one of the plaintiff's separation of powers constitutional arguments, the Court noted that "[l]egislation under constitutional attack is clothed in a presumption of constitutionality." *Id.*, quoting *Matter of Tina T.*, 579 N. E. 2d 48, 56-57 (Ind. 1991). It is the challenger's burden to show that the alleged constitutional defects are clearly apparent. The true interpretation of separation of powers is that any one department of the government may not be controlled or even embarrassed by another department, unless so ordained in the Constitution. Each branch of the government has specific duties and powers that may not be usurped or infringed upon by the other branches of government. *Phelps* at 815.

The Court found that the 1998 amendments curtailed the executive branch discretion of the county OFC attorney by requiring the filing of a termination petition when a child has been removed from home for fifteen of the most recent twenty-two months. The Court further opined that the "legislative branch has merely exercised its constitutional prerogative to enact laws" and the members of the executive branch must follow their constitutional duty to faithfully execute laws. Ind. Const. Art. V, section 16. The Court stated that there is nothing unconstitutional about a legislative mandate requiring the executive to take a specific action. *Id.* at 816. The Court characterized the 1998 amendments as a time period set by the General Assembly after which executive branch personnel are required to file a petition to terminate and bring the matter to a trial court for a determination of a child's best interests. *Id.* The Court held that the statute does not control or embarrass the executive branch and thus does not violate Article III, Section 1 of the Indiana Constitution. *Id.*

**1998 Amendments do not tread on Indiana Supreme Court's exclusive province to regulate attorney conduct.** The plaintiffs alleged that the Indiana statutes impermissibly tread on the exclusive province of the Indiana Supreme Court to regulate attorney conduct by requiring attorneys to violate the following Rules: 1.2(a), 2.1, 3.1, 3.3(a)(1), and 8.4(a). The Court agreed with the plaintiffs that the statute contained "directly conflicting" language and was not a "model of good draftsmanship". *Id.* The Court further found that the statute does not require attorneys to violate the above Rules of Professional Conduct for the following reasons: the client O. F. C. is clearly interested in following the law and allowing a judicial determination of the child's best interests; the attorney must use his independent professional judgment when there are grounds to move for dismissal; the attorney is not required to bring a "frivolous" action because a judicial determination of a child's best interests is not frivolous; the attorney is not required to make a false statement of material fact because the petition must note any grounds for dismissal. *Id.* at 817. The Court found

that the statute did not require attorneys to violate the Rules of Professional Conduct or otherwise violate Article III, Section 1 of the Indiana Constitution. Id.

**1998 Amendments do not violate the Substantive Due Process Clause of the Fourteenth Amendment to the U. S. Constitution.** The Court disagreed with the plaintiffs that the statute should be subjected to a “strict scrutiny” standard of review. Id. at 818. The Court characterized the 1998 statute as merely setting a benchmark for additional involvement of the judicial process; termination must still be proven clearly and convincingly. Id. The Court determined that the statute does not significantly interfere with a fundamental right; therefore, strict scrutiny is not the appropriate standard of review. Id.

With regard to the Substantive Due Process claim, the Court noted that the judiciary is not empowered to sit as a superlegislature to weigh the wisdom of legislation. Id., citing Exxon Corp. v. Governor of Maryland, 437 U. S. 117, 124, 98 S. Ct. 2207, 57 L. Ed. 2d 91 (1978). The Court stated that legislation must merely bear a rational relation to a legitimate government purpose. The Indiana statute seeks to facilitate adoptions rather than endless foster care placements. The required filing of a termination petition bears a rational relation to the State’s very legitimate interest in promoting adoptions of children who have been removed from their parental home for an extended period and, with the statutory protections provided, does not violate the Due Process Clause. Phelps at 818.

**1998 Amendments do not violate the Equal Protection Clause of the Fourteenth Amendment of the U. S. Constitution.** The plaintiffs argued that the automatic filing of a termination petition after fifteen months’ removal from the home denies individual determinations based on whether termination is in the best interests of the child. The Court disagreed, stating that the Equal Protection Clause does not reject the government’s ability to classify persons in the creation and application of laws so long as the classification is not based on impermissible criteria or arbitrarily used to burden a group of individuals. Id. The Court held that the General Assembly’s line drawing at fifteen months bears a rational relation to a legitimate state interest and therefore does not violate the Equal Protection Clause. Id. at 819.

In **Matter of R.R.**, 587 N.E. 2d 1341 (Ind. Ct. App. 1994), the trial court failed to follow statutory procedures in CHINS and termination proceedings resulting in reversal of both adjudications.

The mother appealed the trial court's denial of her Ind. Trial Rule 60 motions for relief from the judgments adjudicating her child a CHINS and terminating her parental rights. The Court found that the trial court had abused its discretion in denying the mother's motions.

**Trial court lacked subject matter jurisdiction over CHINS proceeding due to failure to comply with multiple jurisdictional prerequisites.** The Court opined that the multiplicity of procedural omissions, which were exacerbated by the mother's diminished mental capacity (she had an IQ of seventy-five and was considered "learning disabled") led to the court's lack of subject matter jurisdiction. *Id.* at 1343. The Court further stated that lack of subject matter jurisdiction rendered the trial court's order a nullity, and went on to say that some of the omitted procedures, standing alone, would not necessitate reversal. The CHINS procedures which were not followed in **R.R.** include: 1) the welfare department filed the CHINS petition three days before it received authorization. IC 31-6-4(10)(a)(b) {recodified at 31-34-9-2(2)}; 2) the petition did not contain a concise statement of the facts upon which the allegations were based. IC 31-6-4-10(c)(3) {recodified at 31-34-9-3(4)(C)}; 3) the request to take the child into custody was not supported by sworn testimony or affidavit. IC 31-6-4-10(e) {recodified at 31-34-9-5(a) and (b)}; 4) the court order authorizing detention did not comply with IC 31-6-4-10(e) {recodified at 31-34-9-5(a) and (b)} because there were no written findings of fact to support detention; 5) the court did not comply with initial hearing procedures; 6) no guardian ad litem was appointed; 7) no counsel for mother was appointed. *Id.* at 1344-45. (Note that appointment of guardian ad litem for child and counsel for mother are within the court's discretion, but the Court held that in these circumstances the trial court had abused its discretion in failing to appoint either.) *Id.* at 1345.

**Court must enter true finding or dismiss termination petition.** The error found in the termination proceeding was that no termination petition was before the court when the order terminating the parent-child relationship was issued. The termination petition was filed on July 22, 1988, but denied by the trial court on March 15, 1989. On August 25, 1989, the court entered a termination order. The Court found that IC 31-6-5-4.3 {recodified at 31-35-2-8}, which requires the court to either terminate the relationship or dismiss the petition, had not been complied with. Because the petition had been dismissed, the court's termination order of August 25, 1989 was void.

In **Ramsey v. Madison County Dept. of Family**, 707 N.E. 2d 814 (Ind. Ct. App. 1999), the Court affirmed the order involuntarily terminating the father's parental rights. The child had been adjudicated a CHINS because he had been sexually molested by the father, who had custody of the child. The father pleaded guilty to one count of child molesting and to incest and was sentenced to eighteen years in prison with a release date in August, 2005. The father was ordered not to have contact with the child unless it was approved by the child's therapist.

The O.F.C. filed a petition to involuntarily terminate the parent-child relationship pursuant to IC 31-35-3-4 et seq. IC 31-35-3-8 provides that conviction of certain offenses, including child molesting when the child is under the age of sixteen, are prima facie evidence that there is a reasonable probability that the conditions that resulted in removal will not be remedied or that continuation of the parent-child relationship poses a threat to the child's well-being. On appeal the father argued that insufficient evidence had been presented to meet the reasonable probability or threat to well-being elements delineated at IC 31-35-3-4(2).

**Prima facie evidence** The Court defined prima facie evidence as such evidence as is sufficient to establish a given fact and remains sufficient if uncontradicted. Id. at 816. The contradiction of prima facie evidence merely creates a question that must be resolved by the trier of fact. Id. The Court noted the following as prima facie evidence: the father was convicted of child molesting and incest; the child was the victim; the child was seven years old at the time of the offenses. The Court was unpersuaded by the father's attempts to contradict this evidence by claiming that he did not molest the child but entered a guilty plea to avoid a longer sentence and that he was taking anger management and parenting classes while in prison.

**Failure to provide services and proceeding to termination despite compliance.** In footnote three, the Court responded to the father's claims that O.F.C. had failed to provide him with services and that he had done everything that had been asked of him. The Court opined that, in light of the evidence of the father's criminal acts toward the child and the child's behavior and emotional problems, the trial court's failure to consider evidence of the father's progress was not reversible error. Id. at 817.

**Evidence of child's fears, needs, and behavior problems supported findings of threat to well-being, conditions causing removal would not be remedied, and best interest of child.** The Court cited the following in finding sufficient evidence of the above elements of the termination statute: child feared further abuse by the father; child exhibited behavioral and emotional problems including encopresis, running away, setting fires, and sexually acting out; child's counselor testified that counseling would be needed indefinitely; father's defiance of court ordered no contact with child; counselor's testimony that termination was in child's best interest.

In **Matter of Robinson**, 538 N.E. 2d 1385 (Ind. 1989), the Supreme Court vacated the decision of the Appellate Court, and affirmed the trial court's decision to terminate the father's parental rights to his three children.

The father appealed the termination of his parental rights stating that, at the time the trial court entered the termination judgment there was insufficient evidence that the children had been removed from the custody of the parent for at least six months under a dispositional order or decree. IC 31-35-2-4(b)(2)(A)(i) The father's second contention was that the evidence failed to clearly and convincingly establish a reasonable probability the conditions resulting in the removal of the children would not be remedied.

The Madison County DPW first became involved with the family in 1976. A CHINS petition was filed in 1981 resulting in the removal of the children from the parent's home once again. The allegations which prompted the filing of the petition were that the mother was neglecting the children, and the father was physically abusing them. The father was charged with two Class D Felonies for the physical abuse of two of his children. He spent about eight months in prison, ending in 1983. The court made the CHINS determination and made the children wards of the Welfare Department. The court also ordered a program of participation for the mother, as the father was unavailable to attend the hearing due to his incarceration. After his release from incarceration a dispositional hearing was held concerning the father's participation in the program. There was no determination made that the children would be removed from the custody of the father. The children had already been removed from his custody for about two years.

**CHINS determination that removed the children from the mother's custody while the father was incarcerated made it unnecessary to state that the children were removed from the father's custody when the court indicated that the children were in the custody of OFC and would so remain.** The father contended that the state failed to prove the element that the children were removed from his custody for at least six months under a dispositional order or decree. IC 31-35-2-4(b)(2)(A)(i) The Court noted that the children were already removed from the custody of the father so there was no need to specifically state that the children were removed from the father's custody in the dispositional order. When the order terminating the father's parental rights was entered in 1987, the trial court was correct in finding that the children had been removed from the custody of the father for at least six months under a dispositional order or decree. The father was present at the dispositional hearing in 1983 wherein the court, "acknowledged and found that the children were legally in the Welfare Department's custody and would remain so. . ." *Id.*, at 1387.

**Sufficient evidence of reasonable probability that conditions resulting in removal would not be remedied.** The father's second contention on appeal was that the DPW failed to show by clear and convincing evidence that there was a reasonable probability the conditions resulting in the removal of the children would not be remedied. The evidence showed that the father had not complied with even one of the provisions of the dispositional order. None of the children wished to visit the father as he was disruptive to them and they feared him. His psychiatrist described him as unwilling, or unable to take responsibility for himself. This would prevent him from being able to properly be responsible for his children. In addition, he continued to show a pattern of behavior that was abusive toward others. Specifically, he was abusive toward the residents, and staff of the residential program in which he was staying. The evidence showed, "[father] not only failed to make any effort to reestablish himself with the children but resisted all efforts by the Welfare Department to help him in his quest." *Id.* at 1388.

In **S.M. v. Elkhart Cty. Off. Of Fam. & Chil.**, 706 N.E. 2d 596 (Ind. Ct. App. 1999), the Court affirmed the trial court's order terminating the parent-child relationship between the mother and her four children. The children had been removed from the mother's custody due to neglect and physical abuse when the mother was intoxicated. The children were adjudicated CHINS and placed with their maternal grandmother. The court ordered the mother to participate in alcohol treatment, found the mother in contempt twice for failure to complete the programs and ordered jail time for her. The mother continued drinking sporadically and came to court in an intoxicated state. On appeal the mother raised two issues for review.

**Court's decision to allow mother to be recalled as a witness by the O.F.C. was within trial court's discretion.**

The termination hearing was conducted on two different dates which were separated by several weeks. The mother was called as an adverse witness by the O.F.C. on the first day of trial. In the intervening weeks, the mother submitted several recently completed documents to the caseworker; one of the documents included a statement made by the mother that she had no history of alcohol abuse. The O.F.C. recalled the mother as a witness on the second day of trial to elicit testimony about her statement on the document. The court allowed the mother to be recalled over the objection of her counsel. On appeal the mother alleged that the court had committed prejudicial error because one of the findings of fact was based on her recalled testimony and because she had no opportunity to present responsive evidence. The court rejected the mother's argument, finding that a trial judge has discretion to determine whether a party may recall a witness. Id. at 598. See Ind. Evidence Rule 611(a)(1). The Court also noted the following in support of its finding: the mother had given the form to the caseworker and could not have been surprised by its contents; there was very little responsive evidence available to the mother, given her acknowledgment of purposeful misrepresentation of alcohol abuse on the form; the mother's counsel had the opportunity to solicit the mother's explanation on cross-examination.

**Error in excluding the mother from courtroom during children's testimony was waived by failure to object timely and was not fundamental error.** When the children were called as witnesses, the trial court decided, after a discussion with counsel and the guardian ad litem, that the mother should leave the courtroom during their testimony. Since the mother's counsel failed to make a timely objection to this procedure, the error was waived on appeal unless the exclusion of the mother was fundamental error. The court noted in footnote three that Indiana courts have applied the fundamental error doctrine in termination cases and other civil cases. Id. at 599. The Court discussed the various legislative revisions to child testimony in criminal cases and termination cases and concluded that the statutes require, at the very least, that the trial court employ a procedure that allows the parent to hear and observe the children's testimony. Id. at 600. The Court held that, because the mother could neither see nor hear the children during their testimony the trial court's decision to exclude her was error. Id. In footnote five the Court noted that the CHINS and termination statutes still permit closed-circuit or videotaped testimony during which the child can neither observe nor hear the parent. Id.

The Court further defined fundamental error as "a clearly blatant violation of basic and elementary principles, and the harm or potential for harm therefrom must be substantial and appear clearly and prospectively". Id., quoting Reynolds v. State, 460 N.E. 2d 506, 508 (Ind. 1984). The Court found that the children's testimony concerning their mother's frequent intoxication, physical abuse, and their fear of her was persuasive but reflective and reiterative of other evidence the court had received. The harm from the procedural error in excluding the mother from the children's testimony was not substantial enough to be deemed fundamental error and was therefore waived by the mother's failure to object at trial. Id. at 600.

In **Smith v. Div. Of Family & Children Serv.**, 729 N.E. 2d 1049 (Ind. Ct. App. 2000), the Court affirmed the trial court's order terminating the parent-child relationship between the mother and her three children. The children had been found to be Children in Need of Services and the dispositional orders allowed the children to remain in the mother's home with the requirement that the mother participate in case manager supervision, parent nurturing program, family preservation program, individual counseling and a support group. More than six months after the CHINS adjudication and after the dispositional decree was entered, the Office of Family and Children sought and obtained an emergency change of placement for the children from their mother's custody to foster care, shelter care, or relative care. The emergency order provided that the mother could request a hearing on the change of placement within ten days; otherwise, the temporary order would become permanent. The mother requested a hearing, which was held in October, 1998. The Court entered an order placing the children in foster care, and stating that the modification of dispositional order entered on July 15, 1998 should remain in effect. The Court further noted in October, 1998 that the mother had requested that her petition to object to the change of placement be withdrawn. A petition to terminate the mother's parental rights to all three children was filed six months after the court granted the emergency change of placement petition in July, 1998. The petition was granted ten months later.

**Emergency placement order was modification of dispositional decree and tolled the six month removal requirement for termination.** On appeal the mother argued that Delaware County had failed to prove that her children were removed under a dispositional decree for at least six months prior to the filing of the termination petition. The Court disagreed, stating that the record indicated that the emergency change of custody was in fact a modification of the original dispositional order. The Court noted that the court's order on the evidentiary hearing in October specifically included the language that the modification of the dispositional order shall remain in effect. The Court found that the emergency placement order was a modification of the existing dispositional decree; thus, the children had been removed from the mother's care for the six months required by IC 31-35-2-4. *Id.* at 1052.

In **Tipton v. Marion County DPW**, 629 N.E. 2d 1262 (Ind. Ct. App. 1994), there were two fathers involved in the termination appeal; each father had a child by the same mother. Both fathers appealed the termination of their parental rights in their respective children. The Court of Appeals reversed as to the father for whom this case was named, and affirmed as to the other father.

The fathers challenged the sufficiency of the trial court's findings and the evidence as to three elements of the termination statute. 1) Did DPW prove that the children had been "removed from the parent" for at least six months under a dispositional decree. 2) Was the evidence offered at the termination hearing sufficient to sustain the trial court's findings, and did the findings permit the conclusion that there was a reasonable probability that the conditions that resulted in the children's removal would not have been remedied, or that the continuation of the parent-child relationship would have posed a threat to the well-being of the children. 3) Would the termination of parental rights have been in the best interests of the children.

The Court of Appeals decided this case on the basis of the record of the termination proceedings alone, noting that "[t]he DPW did not introduce into evidence the CHINS petition, the predispositional report, the parental participation order, the modification report or any other document or order containing written findings... Neither did the DPW ask the court to take judicial notice of the underlying CHINS proceedings." *Id.* In order to evaluate the trial court's decision that the conditions that resulted in the removal of the children were unlikely to be remedied, the Court looked to the record of the termination proceedings, and "looked beyond the factors identified by the DPW to the totality of the evidence in ascertaining whether the statutory criteria have been met." *Id.* at 1267.

**A dispositional decree that authorizes out-of-home placement is equivalent to removal under a dispositional decree, as required by the termination statute. Children were removed from the home of one parent, and effectively removed from the home of all parents.** The Court noted that the legislature had not defined the terms "removed," or "removal." However, the terms were used in conjunction with the terms "detention," "out-of-court placement," and the child being "taken into custody." The Court concluded that "removal under a dispositional decree must refer to a dispositional decree which authorizes an out-of-home placement." *Id.* at 1265-66. The original dispositional decree did not authorize an out-of-home placement. It merely ordered the DPW to supervise the children while they remained with their mother. Nine months later the trial court modified the dispositional decree and authorized an out-of-home placement. The Court noted that even though the fathers did not have physical custody of the children; the removal of the children from the mother effectively removed the children from the fathers. *Id.* at 1266.

**Trial Court's findings regarding housing and lack of stability did not prove that father's living arrangements posed threat to well being of children.** Testimony by a caseworker described the conditions which were necessary for the fathers to regain custody of the children. The trial court made findings relating to each of the DPW's conditions for reunification. "The court found that neither father completed a parenting assessment or attended parenting classes, and that neither participated in counseling... both fathers failed to demonstrate stability in housing or to demonstrate a consistent financial ability to care for their children, and... failed to visit with their children on a consistent basis during the time they were CHINS." *Id.* The Court held that the evidence offered on the matter of "stability of housing" did not support a reasonable inference that the father's [Tipton's] living arrangements posed or had ever posed a threat to the well-being of his child. The DPW did not offer any evidence that anyone had ever visited Tipton's home, or that Tipton could not provide his child with an adequate home because he moved too frequently, or that the places were not suitable for a child.

**Mere showing of financial instability insufficient to prove that there is a reasonable probability that the circumstances will not be remedied, or that a parent is unfit.** The DPW did not meet its burden of proof regarding Tipton's financial instability. The Court cited *Matter of D.T.*, 547 N.E. 2d 278, 285 (Ind. Ct. App. 1989) trans. denied. The state must show, "either a reasonable probability that the neglect or dependency of the child caused by the father's inconsistent income would not be remedied or that it poses a threat to the well-being of the child. Unless the 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 the father is of low or inconsistent income of itself does not show unfitness." *Tipton* at 1267.

With respect to Boster, the other father in this case, the evidence did not support the court's finding that Boster, "had failed to demonstrate the 'consistent financial ability' to care for his child." *Id.* at 1268. Boster had steady income from his employment for about eighteen months prior to the termination hearing.

The DPW also alleged that the fathers failed to visit the children when given the opportunity. The Court found that the fathers were prohibited from visiting with the children by a letter from the DPW which required the fathers to complete drug/alcohol assessments prior to receiving visits.

**Father's refusal to permit the DPW to further investigate circumstances, standing alone, is not grounds for termination.** The only findings that the trial court made regarding the actual parent-child relationship between the fathers and the children were that the "fathers' failure to appear for assessments and court hearings reflect ambivalence, the failure to attend parenting classes an unwillingness to change conditions; but the fathers' refusal to permit the DPW to further investigate their circumstances in and of itself is not the statutory ground for termination."

Id. at 1269. The Court determined that these findings were not supported by the evidence in the record.

**The statute requires a showing that the parent-child relationship poses a threat to the well-being of the child, not simply that it is less than optimal.** Psychological testing of both fathers consisted of completing the MMPI. The results of Tipton's MMPI showed his "impulse control and judgment are only fair. His impulsiveness and low frustration tolerance coupled with his resentment of external demands couple (sic) impair his ability to function optimally as a parent." Id. The Court opined that this finding was supported by the evidence, but that it did not support the judgment. The Court noted that the statute requires a showing that the parent-child relationship poses a threat to the well-being of the child, not simply that it is less than optimal. Id.

**MMPI results that show an inability to function adequately as a parent were supported by the evidence, and the finding supported the judgment of termination.** With respect to Boster, the MMPI indicated that his "depression, anxiety, poor judgment and impulse control, and resentment of external demands all suggest an inability to function adequately as a parent. His emotional problems are such that he is only marginally capable of managing his life; and would not be able to care for a child. His suspiciousness and tendency to externalize responsibility for problems suggest that he may be resistive to therapy, but he needs to resolve his own problems before parenting issues can be addressed." Id. at 1269-70. Boster's MMPI results, in addition to his failure to find adequate housing until shortly before the termination hearing supported the judgment that the conditions which resulted in removal from Boster would not be remedied.

**Finding that the termination was in the children's best interest was not supported by the evidence.** The trial court entered a finding that it was in the children's best interest to terminate the parental rights of both fathers. The court found that the children "need a permanent, safe and stable home in order to meet their needs for a 'normal healthy emotional and physical development'." Id. at 1270. The DPW did not offer any evidence pertaining to the physical or emotional development of either of the children, either in terms of how the children had been doing overall or since they had been placed in foster care. The DPW did not present any evidence that the children had ever been harmed by the relationship which existed with their fathers. The Court noted that the facts in Tipton were analogous to In the Matter of A.M., 596 N.E. 2d 236 (Ind. Ct. App. 1992), trans. denied. In Tipton the Court opined at page 1270 that, "[w]hen an individual is truly unfit to parent, the child evinces the harmful nature of the relationship, and the State can easily meet its burden of proving that termination is in the child's best interest. The State did not have or failed to garner that kind of particularized evidence and offered little evidence that it knew anything about the nature of either father's relationship with his child. . . Instead, the DPW asked the court to assume that termination would be in the child's best interest." Id.

In **Young v. Elkhart County Office of Family**, 704 N.E. 2d 1065 (Ind. Ct. App. 1999), the mother and father appealed the trial court's termination of their parental rights. The Court of Appeals affirmed the trial court's decision with respect to the father, and reversed with respect to the mother. The Court of Appeals held that the judgment terminating the putative father's parental rights was not clearly erroneous, but the court erroneously entered a default judgment terminating the mother's parental rights without giving her a three-day notice of default judgment. The mother and father were never married, and paternity was never established. The mother and father lived together for several years. The father was incarcerated numerous times during the period preceding the CHINS, and termination proceedings. While the father was incarcerated, the mother left the children at their paternal grandmother's house, and did not return. The children were removed from the grandmother's house and placed in foster care. The children were determined to be CHINS. The mother had a fourth child while she was incarcerated. That child was immediately placed in protective custody. Services were offered to the mother; however, the Court does not indicate whether or not the mother participated in those services.

A petition to terminate the parental rights of the mother and father was filed. The mother did not attend the hearing, but the father did attend. The trial court terminated the father's parental rights, after hearing evidence from both sides. The mother was represented by counsel, who moved to withdraw as counsel for the mother. The trial court granted the request to withdraw. The court then entered a 'default judgment' against the mother, terminating her parental rights.

**Certified record of underlying CHINS proceedings admitted into evidence at termination hearing sufficient to invoke court's jurisdiction to terminate the parent-child relationship.** The father argued that the Elkhart County OFC did not present sufficient evidence to prove that the children were CHINS thereby precluding the trial court's jurisdiction for a termination of his parental rights. The father erroneously contended that the court's CHINS dispositional order was not in the record of the termination proceedings. The Court stated that the record contained the pleadings and orders from the CHINS proceedings, including the dispositional order adjudging the children to be CHINS. The Court noted that the "transcript of the hearing does not contain the exhibits introduced by the parties. However, the transcript does reflect that the State offered into evidence 'the certified record of the underlying CHINS proceedings.'" *Id.* at 1068 n.1. one. The Court determined that the "documents are sufficient to establish that [the children] were. . .in need of services and to invoke the jurisdiction of the trial court to order [the father's] parental rights involuntarily terminated." *Id.* at 1068. In addition, the Court found that the evidence presented was sufficient to establish each element of the termination statute.

**Respondent mother entitled to three-day notice of default judgment when counsel has withdrawn.** The mother argued that the trial court abused its discretion in entering a default judgment against her. She contended that it was error to terminate her parental rights by default. The Court referred to Trial Rule 55(B) which requires the defendant to be given notice of the court's intention to enter a default judgment, three days in advance. This applies when defense counsel has appeared, filed responsive pleadings, and withdrawn. In this instance, counsel for the mother withdrew because he had not had recent contact with her prior to the termination hearing. The mother failed to appear for the hearing. Responsive pleadings had been filed earlier in the proceedings.

**Judgment on the merits is appropriate when the OFC establishes a prima facie case, and the respondent parent fails to appear.** The Court noted that "when the defendant has filed a responsive pleading, a default judgment is improper even if the defendant fails to appear for trial." *Id.* The Court indicated that a judgment on the merits would have been appropriate in this case, if the OFC had presented any evidence to support the termination, establishing a prima facie case. *Id.* at 1069. The OFC contended that there was sufficient evidence to sustain the trial court's entry of judgment on the merits. However, none of the evidence was entered into the record.