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CHINS CASES

n **In Re B.W.**, 709 N.E. 2d 370 (Ind. Ct. App. 1999), the mother appealed from juvenile court's modification of custody order awarding custody of child to the father. The mother argued that the juvenile court had no jurisdiction to decide a post-dissolution petition for modification of child custody concurrently with a child in need of services (CHINS) adjudication. The Court affirmed in part and reversed in part, holding that the juvenile court lacked authority to consolidate dissolution and CHINS proceedings for the purpose of making a final custody determination, and the juvenile court exceeded its jurisdiction in purporting to modify the decree of dissolution concurrent with the CHINS adjudication.

The parents divorced in 1994 and the mother was granted custody of child. In 1997, the father filed an Emergency Petition for Custody in the dissolution court, alleging that child had been hospitalized for injuries caused by mother's boyfriend. The dissolution court granted the Emergency Petition, awarding custody to the father. On October 3, 1997, the Office of Family and Children (O.F.C.) filed a petition alleging child to be in need of services. On the same day, the court found probable cause that child was a CHINS, ordered the child to be a ward of O.F.C., and placed child with the father temporarily. On October 15, 1997, the juvenile court ordered the petition for change of custody filed by the father in the dissolution court to be consolidated with the pending CHINS petition in juvenile court. All further proceedings were held in juvenile court. On October 27, 1997, the juvenile court conducted a dispositional hearing at which the mother entered a denial; however, the juvenile court proceeded to disposition against the father, ordering child's continued wardship with O.F.C. and custody remain with the father. Fact-finding for the mother was scheduled for April 1998. In March 1998, the father filed for permanent custody of child. The mother moved to dismiss the father's petition, arguing that no proceedings inconsistent with the pending CHINS could be entertained by any court, even the juvenile court, until the conclusion of the CHINS. The mother further alleged that the juvenile court lacked subject matter jurisdiction to modify the custody provisions of the original dissolution decree. The juvenile court set the issue of permanent custody for the same time as the CHINS fact-finding hearing, and following that hearing adjudicated the child a CHINS, granted the father's petition for modification of custody, awarding permanent custody to Father, and ordered the O.F.C. to release wardship of child.

Juvenile court with CHINS proceeding before it lacked jurisdiction to modify dissolution custody concerning same child. IC 31-30-1-1 sets forth that the juvenile court has exclusive original jurisdiction in proceedings in which a child, including a child of divorced parents, is alleged to be a child in need of services under IC 31-34. *Id.* at 372. IC 31-30-2-1 provides for the juvenile court's continuing jurisdiction over a child in need of services and over the child's parent, guardian, or custodian continues until the child becomes twenty-one (21), unless the court discharges the child and the child's parent, guardian, or custodian at an earlier time. *Id.* IC 31-34-20-1 provides that the juvenile court may enter one or more orders as a dispositional decree including removal of the child from the child's home and placement in another home or shelter care facility, or awarding wardship of the child to a person or shelter care facility. *Id.*

General jurisdiction over a child custody matter rests with the court in which jurisdiction is vested for dissolution matters. However, upon the commencement of a CHINS proceeding, exclusive jurisdiction is vested in the juvenile court, and no other court has jurisdiction to entertain any proceedings which conflict with that exclusive jurisdiction until the resolution or dismissal of the CHINS action. *Id.* The Court stated that given the dispositional alternatives available to the juvenile court in a CHINS proceeding, custody determinations are collateral to the juvenile court's jurisdiction, and thus, during the pendency of a CHINS, the juvenile court has exclusive jurisdiction over custody decisions until the parties are discharged or the cause is transferred. *Id.* at 373. However, the Court went on to point out that because juvenile courts have no jurisdiction in dissolution proceedings, they have no jurisdiction over the custody of a child other than in the context of a CHINS proceeding. *Id.*

In reversing that portion of the juvenile court's order that purported to grant the father's petition to modify custody, the Court held that, notwithstanding the appropriateness of the CHINS disposition, the juvenile court exceeded its jurisdiction in making a custody jurisdiction. The Court stated that the CHINS proceeding in the juvenile court only prevented the dissolution court from making a custody determination during the pendency of the CHINS proceedings, but did nothing to rob the dissolution court of its continuing jurisdiction over dissolution matters. The Court held that the juvenile court was without authority to consolidate the dissolution action with the CHINS proceeding, as the court that enters a dissolution decree retains continuing jurisdiction to modify custody. *Id.* Once the CHINS is closed following the entry of disposition, the juvenile court's exclusive jurisdiction over the case ends, and any modification of the terms of the dissolution would have properly been heard by the dissolution court. *Id.*

In **In Re C.S.**, 713 N. E. 2d 863 (Ind. Ct. App. 1999), the Court reversed the trial court's order appointing the paternal grandmother as legal guardian of an adjudicated CHINS due to lack of subject matter jurisdiction. The child had been adjudicated CHINS by the Putnam Circuit Court and placed with her paternal grandmother. The grandmother petitioned to be appointed guardian in a separate legal action in the Putnam Circuit Court after the CHINS adjudication. The mother objected to the grandmother's request to be appointed guardian, arguing that the CHINS proceeding was pre-eminent. The Putnam Circuit Court did the following: held two hearings in which both the CHINS and the guardianship petition were addressed; entered an order granting the guardianship under the CHINS cause and closing the CHINS case; issued an order under the guardianship cause appointing the grandmother as the child's guardian.

Guardianship proceeding while child was the subject of a CHINS proceeding was conducted in the absence of subject matter jurisdiction. The Court noted the exclusive jurisdiction of juvenile courts over a CHINS proceeding and stated that no other court may exercise jurisdiction while a CHINS proceeding is pending. Id. at 865. The Court held that because a CHINS action was pending, the Putnam Circuit Court was without jurisdiction to accept the guardianship petition or hold hearings on it. Id. The Court also stated in footnote three, "[w]e do not exalt form over function with our holding that one judge presiding over a court with jurisdiction over both probate and juvenile matters, may not simultaneously conduct probate and juvenile proceedings involving the same child." Id.

In ***In Re C.W.***, 723 N.E. 2d 956 (Ind. Ct. App. 2000), the grandparents appealed from the CHINS order denying their petitions for kinship placement of minor child. The Court affirmed, holding both that the evidence supported the finding under the first petition that it was in the child's best interest that to be placed with foster parents rather than grandparents, and that grandparents lost standing to pursue the second kinship placement petition after the adoption court granted the foster parent's petition for adoption.

The mother lived with the grandparents after child's birth. Shortly thereafter, the child resided with mother and mother's live-in boyfriend. On January 16, 1998, the child was hospitalized for injuries incurred while in the custody of the mother and boyfriend. On January 17, 1998, O.F.C. obtained an emergency detention order for child and on January 26, 1998 filed a CHINS petition. On February 26, 1998, the child was released from the hospital and placed in foster care. On March 24, 1998, grandparents filed the first petition for kinship placement. The mother admitted that the child was CHINS on April 13, 1998, although she denied causing the child's injuries. The child was continued in foster care. Following the June 1, 1998 dispositional hearing, the court denied grandparent's petition for kinship placement and continued child in foster care. The grandparents filed a second petition for kinship placement on February 17, 1999. Parents' parental rights were terminated in April 1999 and the foster parents filed a petition to adopt in the same month. The court granted foster parents' petition to adopt and the grandparent's second petition for kinship placement was denied in June 1999.

1998 petition for kinship placement not in best interest of child. The Court affirmed the trial court judgment denying the grandparent's Petition for Kinship Placement. The trial court accepted the recommendation of the CASA and the O.F.C. that the child should not be placed with the grandparents based on evidence that the child had bronchitis and the grandparents smoked, and had not eradicated all smoke from their home and vehicles and continued to present a threat to the physical health of the minor child. Placement with the grandparents was not in the best interest of the child.

1999 petition for kinship placement heard after child's adoption. The Court ruled that the grandparents had standing to file a subsequent petition for kinship placement before the child was adopted by her foster parents; however, once the probate court granted the adoption the grandparents' right to proceed on the petition ended. After the child's adoption the grandparents no longer held the status of grandparents, and had no standing to seek placement. *Id.* at 963.

Notice to grandparents of foster parent petition for adoption. In foot notes six (6) and seven (7), the Court noted that the O.F.C. should have informed the grandparents of the pending adoption petition of the foster parents. The Court commented on recent case law interpreting a requirement in the adoption law for the court to give notice of the adoption to all interested parties, noting that grandparents could be considered interested parties in some cases. *Id.* at 960.

In ***E.P. v. Marion Cty. Office of Fam. and Child.***, 653 N. E. 2d 1026 (Ind. Ct. App. 1995), an interlocutory appeal, the Court affirmed the trial court's decision regarding appointment of counsel and a jury trial for the mother in a CHINS proceedings. The case was remanded for the trial court's determination of the mother's financial and economic resources. The CHINS petition alleged that one of the children had been sexually molested by the mother's boyfriend. At the initial hearing the mother was advised that she had a right to an attorney, but the court was not responsible to appoint counsel because it was not a criminal case. After a continuance for the mother to obtain counsel, the mother advised the court that she was unable to obtain counsel and she entered a denial to the CHINS petition. The mother subsequently failed to answer interrogatories as ordered by the court, and the court sanctioned her by prohibiting her from calling witnesses at the fact-finding hearing or presenting evidence to controvert allegations that the boyfriend sexually abused the child or that the child told the mother of the abuse. At the fact-finding hearing the mother was advised that her testimony could be used to incriminate her in pending criminal litigation and the court continued the hearing for the mother to obtain counsel. When the hearing resumed, counsel appeared with the mother for the sole purpose of requesting a jury trial and court appointment of counsel. The mother submitted a written motion for appointment of counsel and an affidavit asserting that she did not have the funds to hire counsel. The Court denied the motions after argument, but without hearing evidence of the mother's indigence. An interlocutory appeal was filed.

No right to jury trial. The mother argued that her right to a jury trial was not limited by IC 31-6-7-10(C) and was guaranteed by the Indiana and United States Constitutions and Ind. Trial Rule 38. The Court rejected the arguments. *Id.* at 1029, 1030. IC 31-6-7-10(c) (recodified at IC 31-32-6-7) clearly specifies that all matters in the juvenile court are to be tried by the court and not a jury. The jury guarantee in Article 1 section 20 of the Indiana Constitution applies to "actions triable by jury at common law," and is inapplicable to CHINS cases since no separate judicial system for juveniles existed at common law. The Seventh Amendment of the U. S. Constitution does not guarantee the right to a jury trial in state courts and does not preclude states from restricting the right to a jury. Ind. Trial Rule 39(B) does not grant a right to a jury, but only outlines the procedure for exercising the right. There is no right to a jury trial in a CHINS proceeding. *Id.* at 1031.

Due process does not mandate appointment of counsel. The mother argued that court appointment of counsel was required by: the Due Process clause of the Fourteenth Amendment of the U. S. Constitution; the juvenile code statute on appointment of counsel, IC 31-6-7-2(b) (recodified at IC 31-32-4-3); and the attorney for poor person statute. IC 34-1-1-3 (recodified at IC 34-10-1-1). *Id.* at 1031. In addressing the due process argument, the Court noted that there is a presumption against appointment of counsel unless a litigant's physical liberty is at stake, but the presumption may be overcome where other elements of due process so require. The Court then did a two-step analysis. First, it balanced the mother's private interests (the constitutionally protected right to raise her children without undue state interference), the government's interests (a compelling interest in protecting the welfare of children by intervening in the family when there is neglect, abuse or abandonment), and the risk that not appointing counsel in a CHINS case will lead to an erroneous decision. *Id.* at 1032. Second, the Court weighed those considerations against the presumption against appointment of counsel. The Court concluded that due process did not require appointment of counsel in this case, stating:

Thus even assuming without deciding that the risk of an erroneous CHINS adjudication is great when an indigent parent has no counsel to assist her through the various stages of the proceedings or to conduct vigorous cross-examination of the petitioner's key witness, we do not view the risk as outweighing the presumption against court appointed counsel. *Id.* at 1032.

No juvenile code mandate for appointment of counsel. IC 31-6-7-2(b) (recodified at IC 31-32-4-3) mandates appointment of counsel in termination of the parent-child relationship cases, but appointment is discretionary in CHINS cases and failure to appoint is reviewed on the "abuse of discretion" standard. *Id.* at 1033. Failure to appoint counsel may be an abuse of discretion when the absence of counsel is likely to lead to the establishment of "particularly damaging allegations" which virtually assure a subsequent termination decision. *Id.* The Court found no abuse of discretion in this case because the uncontested allegations, standing alone, would not be sufficient to assure a potential termination decision against the mother.

Right of indigent to court appointed counsel under IC 34-1-1-6 (recodified at IC 34-10-1-1). The Court ruled that the mother might be entitled to court appointed counsel under the attorney for poor person statute. IC 34-1-1-3. *Id.* at 1033, 1034. This statute states:

Any poor person not having sufficient means to prosecute or defend an action may apply to the court in which the action is intended to be brought, or is pending, for leave to prosecute or defend as a poor person. The court, if satisfied that such person has not sufficient means to prosecute or defend an action, shall admit the applicant to prosecute or defend as a poor person, and shall assign him an attorney" *Id.* at 1034.

To invoke IC 34-1-1-3 a parent "must request appointment of counsel based on his or her economic status." *Id.*

Because the mother met this requirement, the Court remanded the case to the trial court to appoint counsel for the mother at public expense if it determined that the mother does not have the resources to hire private counsel. If the trial court determined that the mother had sufficient means to hire counsel, that determination is reviewable on an “abuse of discretion” standard. Id. at 1034.

In ***E.R. v. Office of Family & Children***, 729 N.E. 2d 1052 (Ind. Ct. App. 2000), O.F.C. filed CHINS proceedings with respect to five children of Mexican nationals living in Marion County. The parents brought an interlocutory appeal from the juvenile court proceeding adjudicating all five children CHINS and placing them in foster care. Termination of parental rights proceedings were filed by O.F.C., but held in abeyance by trial court pending the resolution of the parent's appeal of the foster care placement under the CHINS. The Court affirmed all orders of the trial court.

The parents and four of the five children were born in Mexico, and thus were Mexican nationals. In October 1996 O.F.C. investigated injuries sustained by one of the children, exacerbated by the parents' failure to timely seek medical attention. No CHINS petition was filed at that time, as O.F.C. believed Immigration officials were arranging for the family's return to Mexico. The family was not deported. In January 1997 the same child received a severe head injury and was hospitalized. During this child's hospitalization, O.F.C. investigated and removed the three children remaining in the household, placing them in foster care. Upon the injured child's release from the hospital, she was also placed in foster care. All four children were adjudicated CHINS. In August 1998, the mother gave birth to a fifth child and based upon the CHINS adjudications of the other four children, O.F.C. filed a CHINS petition on the fifth child, who was removed from the parents, placed in foster care, and adjudicated a CHINS in May 1999. During the May hearing, the court reviewed the foster care placement of all the children. The parents objected to the current foster care placement, requesting that the children be placed with relatives in Mexico, citing to the Vienna Convention in support of their argument. The juvenile court continued the foster care placements, and certified the question of the applicability of the Vienna Convention to the proceedings to the Court of Appeals.

Indiana Appellate Rules do not permit certification of particular issues. In response to the parties' indication that the court had certified certain issues for review, the Court cited Ind. Appellate Rule 4(B) for the principle that the rules provide for appeals from interlocutory orders, but do not require or permit certification of particular issues. *Id.* at 1055. The Court noted that the parents did not clearly set out the order from which they were appealing, but found that the May, 1999 order was the only order from which an appeal could be had. The Court opined that the parents had waived the CHINS determination as to the four older children by failing to file a timely praecipe after the March, 1998 dispositional order concerning those children. *Id.* A praecipe had been timely filed regarding the CHINS disposition for the fifth child.

Court's orders were not erroneous despite failure to comply with Vienna Convention. The parents argued that, although the juvenile court had jurisdiction to act, the court's actions were erroneous due, in part to alleged violations of Article 37 of the Vienna Convention. The Vienna Convention requires the State to inform the foreign national's consulate without delay where the appointment of a guardian or trustee appears to be in the interest of a minor foreign national, but the Convention also provides that the giving of this information shall be without prejudice to the operation of the laws of the State. It was undisputed that the Mexican Consulate was not notified of the removal of the children by a State official but the Consulate had received actual notice of the proceeding by the parents two months after the removal of the children. After a discussion of case law in other jurisdictions, the Court opined that the parents had failed to show prejudice due to the violation of the notice provision and that, absent a showing of prejudice, technical violations of the Vienna Convention do not form the basis for relief from implementation of the substantive laws of Indiana. *Id.* at 1059.

Placement decisions not contrary to children's best interests despite cultural concerns. The parents argued that foster placement with parents who were familiar with Mexican culture or sending the children to relatives in Mexico was in the children's best interest, and that the children had been harmed by lack of a culturally appropriate placement. The Court noted that the placement decisions concerning all five of the children are continuing in nature and are ripe for interlocutory appeal. *Id.* The Court found that the injured child had been placed in a Spanish-speaking foster home that was equipped to meet her medical and therapeutic needs and that the other children had been provided with Spanish-speaking counselors and case managers. The Court also found that the following efforts had been made by the O.F.C. to place the children in Spanish-speaking foster homes: recruitment efforts to attract Spanish-speaking foster parents; contacting Hispanic people suggested by the parents for possible placement; making special efforts to grant emergency foster parent status to Spanish-speaking parents while certification was in progress; attempted assessment of the paternal grandparent's home in Mexico. The Court opined that the trial court and O.F.C. used the system available and attempted to adapt the system to best accommodate the children's immediate needs. The Court was unwilling to determine that only Hispanic foster parents can provide culturally appropriate care for Hispanic children who are determined to be CHINS. *Id.* at 1061. The Court also noted that the parents had invited error by refusing to allow a translation of the grandparents' home study by any source other than the Mexican consulate. *Id.* An error invited by the complaining party is not reversible error. *Id.*

In **Fox v. Arthur**, 714 N.E. 2d 305 (Ind. Ct. App. 1999), the Court vacated the Greene Circuit Court's custody modification order on mother's and intervener maternal grandparents' appeal because the Greene Circuit Court locked jurisdiction to enter the custody order due to the earlier initiation of a CHINS proceeding. The Court further remanded the CHINS case to the Greene Juvenile Court with instructions to set a hearing date pursuant to the CHINS petition and remanded the dissolution case to the Sullivan Circuit Court where the petition to transfer the dissolution case to the Greene Circuit Court was pending.

The child's parents were divorced in the Sullivan Circuit Court. The mother was awarded sole custody and the father was given visitation rights. Almost seven years later the Greene County Prosecutor petitioned the Sullivan Circuit Court for a transfer of the postdissolution proceeding to Greene County. One month later the Greene County O.F.C. filed a CHINS petition in Greene Juvenile Court alleging that the child had been sexually abused by her stepfather. The child was removed from her mother's custody and placed in foster care with her maternal grandparents. The father then petitioned the Sullivan Circuit Court for modification of custody and visitation. On the father's motion the Greene Circuit Court accepted transfer of the dissolution proceeding, consolidated it with the CHINS proceeding and held a hearing on the father's petition to modify custody and the CHINS disposition. The Greene Circuit Court then awarded the father sole custody of the child effective immediately upon the dismissal of the CHINS case.

Dissolution court lacked jurisdiction to hear the petition to modify custody while the CHINS case was pending.

The Court opined that, while generally jurisdiction over child custody matters rests with the dissolution court, IC 31-30-1-1 provides that the commencement of a CHINS proceeding vests exclusive jurisdiction in the juvenile court. *Id.* at 307. No other Indiana court has jurisdiction to entertain any proceedings which conflict with that exclusive jurisdiction. *Id.* Custody determinations are collateral to the juvenile court's jurisdiction, and during the pendency of a CHINS proceeding, the juvenile court has exclusive jurisdiction over custody decisions until the parties are either discharged or the juvenile court transfers the case. *Id.* The Court found that, because a CHINS petition had been filed in the Greene Circuit Court, the Sullivan Circuit Court had no jurisdiction to entertain the father's petition to modify custody. *Id.* at 308. Furthermore, the Greene Circuit Court had neither jurisdiction to grant transfer of the dissolution proceeding nor jurisdiction to consolidate the dissolution proceeding with the CHINS proceeding. *Id.* The Court therefore found that all judgments entered after the initiation of the CHINS proceeding were vacated and all motions filed before the CHINS petition were stayed.

Practitioners should note that the above decision was decided based on facts which occurred prior to the 1999 legislative enactment of IC 31-30-1-12 and IC 31-30-1-13. These provisions allow the court having jurisdiction of a dissolution or paternity custody proceeding to have concurrent original jurisdiction with the juvenile court for the purpose of modifying custody. Said modifications are effective only when the juvenile court either approves the custody modification or terminates the CHINS proceeding.

In **G.B. v. State**, 715 N.E. 2d 951 (Ind. Ct. App. 1999), the Court affirmed the trial court's denial of the child's Ind. Trial Rule 60(B)(1) motion alleging a mistaken adjudication of Resisting Law Enforcement rather than Disorderly Conduct. The Court reversed the trial court's denial of the child's Ind. Trial Rule 60(B)(8) motion and vacated the trial court's judgment on the child's probation modification hearing which adjudicated the child a child in need of services and committed her to the Department of Corrections until the age of eighteen. The child had admitted to delinquency allegations of Battery on a Law Enforcement Officer and Disorderly Conduct. The magistrate misstated the Disorderly Conduct charge as Resisting Law Enforcement, accepted the child's admission, and placed her on probation. Eight months later the child was charged with an alleged violation of probation at a modification hearing. Prior to the child's signing the waiver of her right to counsel at the modification hearing the child requested a lawyer from the trial court. The judge told the child to sign the papers because the child's mother had just waived the child's right to an attorney. The child admitted to violating her probation, was adjudicated a child in need of services and committed to the Department of Corrections. Ten months after the modification hearing, the child filed two T.R. 60 (B) motions, both of which were denied by the trial court.

Grant or denial of T.R. 60(B) motion for relief from judgment is left to equitable discretion of trial court. A trial court's decision on T.R. 60(B) motions will be reversed only for abuse of discretion. *Id.* at 952. Abuse of discretion occurs when the denial is clearly against the logic and effect of the facts and inferences which support the judgment for relief. *Id.* at 953. The movant must prove that relief is both necessary and just. *Id.*

T.R. 60(B)(1) motion alleging mistake, surprise or excusable neglect must be filed within one year of judgment. The child alleged a mistake in her original delinquency adjudication of Resisting Law Enforcement which had been made eighteen months prior to the filing of her T.R. 60(B)(1) motion. The Court noted that the record reflected that the trial court had correctly stated the elements of, and the code cite for Disorderly Conduct, not Resisting Law Enforcement. Nevertheless, the child had failed to meet the one year deadline for her mistake claim and the court's decision that her T.R. 60(B)(1) claim was untimely filed was affirmed. *Id.*

T.R. 60(B)(8) motion regarding right to counsel was timely filed. The Court noted that a T.R. 60(B)(8) motion alleging any reason justifying relief from the judgment other than the reasons allowed by T.R. 60(B)(1), (2), (3), and (4) shall be filed within a reasonable time. The determination of what constitutes a reasonable time varies with the circumstances of each case. *Id.* Prejudice to the opposing party and the basis of the moving party's delay are relevant to the question of timeliness. *Id.* The following factors led the Court to find that the child's T.R. 60(B)(8) motion regarding lack of counsel was filed within a reasonable time: the court transcripts were not received until five months after they were requested; the T.R. 60(B)(8) motion was filed four months following the receipt of the transcript; the state filed no brief in opposition to the child's motion. *Id.* at 954.

Meaningful consultation between the child and a specific individual is required before the child's constitutional rights can be waived. IC 31-32-5-1(2) provides inter alia that a parent can waive a juvenile's right to an attorney only if meaningful consultation has occurred between the parent and child. Meaningful consultation must be actual consultation of a meaningful nature or the express opportunity for consultation which the juvenile then forsakes in the presence of proper authority. *Id.* The juvenile must knowingly and voluntarily waive his constitutional rights. *Id.* The Court opined that the record disclosed that the child did not voluntarily join the waiver of counsel and her response to the judge's question cast significant doubt on whether meaningful consultation had occurred between the child and her mother. *Id.* The Court vacated and reversed the modification judgment which found the child in violation of her probation. *Id.*

In **H.B. v. State**, 713 N.E. 2d 300 (Ind. Ct. App. 1999), the Court affirmed the trial court's granting of a summary judgment motion to dismiss a negligence suit by molested children against the Elkhart County Office Division of Family and Children. The children had been removed from the mother's home and placed in foster care. One of the children was allegedly molested by the mother's boyfriend while visiting at the mother's home. The incident was reported to the DFC and the Elkhart Juvenile Court ordered the child, the mother and the boyfriend to undergo counseling. Over one year later, the DFC recommended, and the Elkhart Juvenile Court ordered, the children to be reunified with the mother who still lived with the boyfriend. At least two of the children were molested by the boyfriend for two years following the Court ordered reunification. In their lawsuit, the children argued that the DFC had been negligent for failing to report to law enforcement the original molestation which had occurred during visitation from foster care. The children also alleged negligence by the DFC in reuniting them with the mother. The trial court granted the state's summary judgment motion based on the doctrine of judicial immunity.

Standard for review of summary judgment motion. Ind. Trial Rule 56(C) provides that summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Once the movant has sustained the burden of proving that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law, the opponent must respond by setting forth specific facts showing a genuine issue for trial. *Id.* at 302. The Court of Appeals, in reviewing an entry of summary judgment, does not weigh the evidence but will consider the facts in the light most favorable to the non-moving party. *Id.*

DFC caseworkers acting in accordance with juvenile court orders were entitled to absolute judicial immunity from suit. It is well-settled law that judges are entitled to absolute judicial immunity from suits for money damages for all actions taken in the judge's judicial capacity, unless the actions are taken in the complete absence of jurisdiction. *Id.* Absolute judicial immunity also extends to persons who perform tasks so integral or intertwined with the judicial process that these persons are considered an arm of the judicial officer who is immune. *Id.* The U.S. Supreme Court has established a functional approach where the court looks to the nature of the function performed, not the identity of the actor who performed it. *Forester v. White*, 484 U.S. 219, 224, 108 S. Ct. 538, 98 L. Ed 2d 555 (1988). The Appellate Court of Indiana held that a probation officer's activities, which were necessary to the implementation and enforcement of the trial court's orders regarding foster care placement, were acts intimately associated with the judicial process, entitling immunity from suit. *J.A.W. v. State*, 650 N.E. 2d 1142 (Ind. Ct. App. 1995), affirmed on transfer, 687 N.E. 2d 1202 (Ind. 1997).

The caseworkers employed by DFC were acting to assist the juvenile court judge in his decisions regarding the care and custody of the children. The DFC and its employees were acting pursuant to Indiana statutes by completing case plans and a predispositional report. The caseworkers were also monitoring the progress of the mother and her boyfriend in accordance with court orders. The Court concluded that the caseworkers were acting as an arm of the juvenile court in recommending that the children be returned to the mother. *Id.* at 303. The Court also held that the failure to report alleged molestation which took place after the CHINS adjudication to law enforcement occurred in the course of the DFC's court ordered duties and also fell within the scope of judicial immunity. *Id.* The DFC's acts were intimately associated with a judicial proceeding and entitled the DFC to absolute immunity.

In Hallberg v. Hendricks Cty. Office, 662 N. E. 2d 639 (Ind. Ct. App. 1996), the Court affirmed the CHINS adjudication of two children of parents who had been divorced in Allen County. The mother had been granted custody of the children and the father had been granted visitation in the dissolution action in the Allen Superior Court. The mother moved to Hendricks County with the children and, upon allegations that the father sexually abused one of the children, the mother filed a petition to modify visitation in the Allen Superior Court. She also filed a petition for protective order in the Hendricks Superior Court. The protective order was granted and then dismissed the next day on jurisdictional grounds. A month later, the Hendricks Circuit Court conducted an emergency hearing (without notice to the father) to determine if a protective order should be issued under the CHINS statute. The court found probable cause to believe the children were CHINS and issued a protective order prohibiting the father from having contact with the children and sent notice to the father of the order and a final hearing date. On the day of the hearing, the Office of Family and Children filed a CHINS petition. The father did not appear, the mother admitted that the children were CHINS, and the court set a date for the fact-finding hearing. The father was not served with a copy of the CHINS petition. The fact-finding hearing was held, the father failed to appear, and the court issued findings and conclusions that the children were CHINS.

CHINS emergency protective order does not require notice. The Court ruled it was not error for the Hendricks Circuit Court to issue a protective order without notice to the father. The Court noted that the juvenile court has the authority under IC 31-6-7-14(a)(1) (recodified at IC 31-32-13-1 through IC 31-32-13-9) to issue an order “to control the conduct of any person in relation to the child.” Under subsection (c) of that statute the court is required to give notice and conduct a hearing; however, under subsection (f) the juvenile court may issue an order without notice or hearing on an affidavit or sworn testimony that an emergency exists. The Court did not mention that an emergency order is valid for only 72 hours although it may be extended for good cause shown upon the record.

Juvenile court has exclusive jurisdiction over CHINS proceedings. The father argued that only the Allen Superior Court which issued the visitation order in the dissolution case had jurisdiction of the CHINS case. The Court rejected the argument. The juvenile court has exclusive jurisdiction in CHINS proceedings if the jurisdictional prerequisites are satisfied. The jurisdictional prerequisites include the following: the child fits within one of the CHINS categories listed in IC 31-6-4-3(a)(1)-(8)(recodified at IC 31-34-1-1 through IC 31-34-1-8; IC 31-34-10-10, IC 31-34-1-11); the office of family and children files the necessary preliminary inquiry and evidence of probable cause; and the juvenile court authorizes the filing of the CHINS petition. The Court noted the absence of a preliminary inquiry report and order authorizing the filing of the CHINS petition but ruled that the presentation of probable cause evidence and the court’s order finding probable cause sufficiently complied with the jurisdictional prerequisites. The Hendricks Circuit Court therefore had jurisdiction over the CHINS proceeding regardless of where the visitation order was entered.

Failure to serve copy of CHINS petition not a violation of due process where father had notice of the allegations. The Court ruled that failure to serve the father with a summons and a copy of the CHINS petition as required by IC 31-6-7-4 (recodified at IC 31-34-10-2) was not a violation of due process. Although the father was not served with a copy of the CHINS petition, he was given adequate notice through service of the protective order which reflected a finding of probable cause that the father had molested the children and advised him of the next hearing date. The father was not prejudiced by the failure of service because the father was given the opportunity to address the allegations in the CHINS fact-finding hearing and he chose not to appear.

Trial court’s denial of father’s second and third motions for continuance was not an abuse of discretion. The father alleged the court erred in denying his motions for continuance because the continuances were needed to adequately prepare for the fact-finding hearing and because he had not received a copy of the CHINS petition. It is within the discretion of the trial court to deny or grant a continuance. The Court found no error in the denial of the continuances because the father had at least one month after he filed his first motion for continuance, which was granted, to prepare. The father did not show how he was prejudiced by the court’s failure to grant the continuances.

Court’s order adjudicating children CHINS and continuing them in the custody of the mother to receive recommended services was a final, appealable judgment. The Court was unpersuaded by the Department’s argument that the father’s appeal should be dismissed because the CHINS order was not a final, appealable judgment. The Court had previously held in In the Matter of M. R., W. D. and C. J., 452 N.E. 2d 1085, 1088 (Ind. Ct. App. 1983), that it is only after the CHINS disposition that a final, appealable judgment exists because that choice finally determines the rights of the parties. The Court opined that, although a separate dispositional hearing had not been held, the trial court’s determination that the children were to remain in the custody of the mother and receive recommended services was an order which finally determined the rights of the parties. Hallberg at 643. Thus, a final and appealable judgment existed and the Court addressed the merits of the father’s appeal.

Dicta whether child hearsay exception applies when child testifies in CHINS hearing. The Court included the child’s statement to the caseworker in its listing of evidence that it found sufficient to support the CHINS judgment. However, the Court noted in footnote nine the father’s argument that the statement should have been excluded because the father did not receive advance notice that the statement would be used at trial as is required by the CHINS child hearsay exception statutes at IC 31-6-15-2 and IC 31-6-15-5 (recodified at IC 31-34-13-1 through 4). The Court stated

in the footnote that the child hearsay statutes “are applicable to those instances where a victim is not going to testify.” Id. at 647. If the child victim is going to testify, as occurred in this case, the Office of Family and Children is not required to give notice of its intent to introduce the child’s statement. This dicta is contrary to the language of IC 31-6-15-3(2)(A) (recodified at IC 31-34-13-3) which specifically makes the child hearsay statutes and the related notice provisions applicable to situations in which the child testifies in the CHINS termination hearing. It is arguable that the child hearsay statute is not applicable when the child testifies in the CHINS hearing if the child’s out-of-court statement is otherwise admissible.

In **In Re J.C.**, 735 N.E. 2d 848 (Ind. Ct. App. 2000), the Court affirmed the order requiring the Hendricks County Office of Family and Children to pay the fees of the court appointed guardian ad litem in a CHINS proceedings. The one year old child was adjudicated a CHINS. Dan Zielinski was appointed to serve as the child's guardian ad litem and to determine what visitation, if any, should be provided to parents. The guardian ad litem requested that Hendricks County O.F.C. pay his guardian ad litem fee of \$492.00. The Hendricks County O.F.C. responded with a motion alleging that there was no legislative authority for O.F.C. to pay for the guardian ad litem fee, that the entity required to pay the guardian ad litem fee was the county fiscal body, and that the payment of guardian ad litem fee by the O.F.C. would create a conflict of interest.

Indiana statute requires the county office of family and children to pay for services for the child. In this case of first impression, the Court opined that there was a statutory basis at IC 31-40-1-2 for ordering the O.F.C. to pay for the guardian ad litem's services of investigation into the propriety and frequency of visitation between the child and his parents. Id. at 849. The Court declined to address the appellate argument raised by the O.F.C. that IC 33-2.1-7-3.1 provides for a county fiscal body and the division of state court administration to establish a county guardian ad litem fund as a source of payment. This argument could not be addressed because it is well settled law that a party may not advance an argument on appeal that is different from the argument raised in the trial court. Id. at 850.

Requiring the O.F.C. to pay the guardian ad litem fee does not create a conflict of interest. The O.F.C. argued that requiring their payment for a guardian ad litem fee in a CHINS proceeding created an impermissible conflict of interest because both the office of family and children and the guardian ad litem were parties to the CHINS action. The Court agreed with the trial court's finding that there was no conflict of interest caused by requiring payment of the guardian ad litem by the O.F.C. Id. The Court stated that payment of the guardian ad litem by the office of family and children did not create the appearance that the office of family and children controlled the guardian ad litem or that they were not separate and distinct entities. Id.

In **Mafnas v. Owen County Office of Family**, 699 N.E. 2d 1210 (Ind. Ct. App. 1998), the Court affirmed in part and reversed and remanded in part, determining four issues concerning CHINS adjudication and parental reimbursement. Owen County OFC filed a CHINS petition alleging that the parents had physically abused and neglected four of their children. The oldest child, who was seventeen years and nine months old at the time of the filing of the CHINS petition, reached the age of eighteen prior to the CHINS adjudication. The parents moved to dismiss the CHINS petition regarding the oldest child. The Court adjudicated all four children Children in Need of Services three months after the oldest child reached the age of eighteen, but also stated that it had lost jurisdiction over the oldest child and could not exercise any jurisdiction over the child. Six weeks later, the court entered a reimbursement order against the parents in the amount of \$25.00 per month toward the \$24,518.33 expended by the county for services provided to the children. Six months after the reimbursement order was entered, the Owen County OFC filed a motion for rule to show cause for parental failure to pay the monthly reimbursement. The parents were found to be in contempt and ordered to serve a thirty day jail sentence, but the court stayed execution of the sentence pending appeal.

Parents were allowed to raise jurisdictional issues from dismissed appeal in subsequent appeal. The parents had attempted to appeal the court's CHINS adjudication and dispositional order, but their initial appeal was dismissed due to their failure to timely submit a record of proceedings. OFC contended that the parents had waived two issues because the issues had been available on the first appeal. The Court stated that an issue ripe for review but not raised in the first appeal will be considered as finally determined and deemed affirmed. *Id.* at 1212. The Court further stated that when the first appeal is dismissed for failure to meet jurisdictional requirements, the appellant may be allowed, in a subsequent appeal, to raise issues which were raised in the initial appeal. *Id.* The Court further opined that the parents' first two issues raised the question of subject matter jurisdiction and that the issue of lack of jurisdiction may be raised at any time. *Id.* If the parties do not raise the issue, the court is required to consider the issue sua sponte. *Id.*

CHINS determination entered after child's eighteenth birthday was void. The parents contended that the court lacked jurisdiction to enter a CHINS finding concerning the oldest child who had reached the age of eighteen. The Court agreed, noting that it was clear from a reading of IC 31-6-2-3 and IC 31-6-1-9 (recodified at IC 31-34-1-1 through 8) that the court had subject matter jurisdiction to determine whether the oldest child was a CHINS only until the child reached the age of eighteen. *Id.* at 1213. The Court opined that the CHINS determination made after the oldest child's eighteenth birthday was void. *Id.*

Prior to CHINS adjudication the court lacked power to order parental reimbursement for costs of children's care. The parents contended, and the Court agreed that there was no provision in IC 31-6-4-18 (recodified at IC 31-40-1-3) which allowed the court to order reimbursement for the costs of the oldest child's care. Because the oldest child was not adjudicated a CHINS before his eighteenth birthday the court lacked the power to order reimbursement for the oldest child's care. *Id.*

Court's reimbursement order which applied to CHINS adjudication of three youngest children was proper and could be enforced by contempt and incarceration. The Court disagreed with the parents' contention that the court lacked authority to find them in contempt or to incarcerate them for failure to pay the reimbursement order. The Court opined that the reimbursement represented the support required for the children while they were in the county's custody. *Id.* Because the reimbursement costs were in the nature of child support, enforcement by contempt was available. *Id.*, see also *Pettit v. Pettit*, 626 N.E. 2d 444 (Ind. 1993). The Court was unpersuaded by the parents' contention that enforcement of a judgment by contempt and incarceration violated Article I, section 22 of the Indiana Constitution. *Id.* at 1214. The Court quoted *Pettit*, 626 N.E. 2d 444, 445 for the principle that child support obligations arise out of a natural duty of a parent and not from the debt of the obligor. *Id.* The Court found that the reimbursement order applying to the three youngest children could be enforced by contempt and incarceration. *Id.*

In **Maybaum v. Office of Family & Children**, 723 N.E. 2d 951 (Ind. Ct. App. 2000), the Court reversed the CHINS adjudication because the parents had not been given notice that they would be required to defend against a claim that the father had failed to protect the child from injury. The adopted child alleged sexual abuse by the father, which the father denied. The CHINS petition alleged that the father had forced the child to perform oral sex on him. Prior to the hearing, a medical examination of the child revealed clear evidence of a penetrating injury to the child's genitals. The medical report was admitted into evidence by the O.F.C. at the CHINS fact-finding through testimony of the family case manager. The child testified at the fact-finding hearing, but her testimony was equivocal, containing varying statements: that her father had forced her to perform oral sex; that if discipline problems in her home were relaxed her story regarding molestation would change; that she knew what molestation meant; that she did not know what molestation meant. The parents' attorney presented testimony from the father's physician that he had seen the father for the problem of alleged impotency. The child's sister testified that the child had allegedly touched the sister's private parts and did not want to get in trouble for this conduct. The mother testified concerning the child's masturbation and sexual exploration and contact with siblings.

The trial court concluded that there was insufficient evidence to find that the father had molested the child per IC 31-34-1-3 as alleged in the CHINS petition. Nevertheless the court concluded that the child was a child in need of services pursuant to IC 31-34-1-2 because the father had a legal responsibility to care for the child and had failed by act or omission to protect the child from injury.

CHINS petition must contain citation to the applicable provision of juvenile law and concise statement of facts on which the allegations are based. The Court noted the requirements of IC 31-34-9-3(4)(B), (C) regarding the correct citation to the applicable CHINS provision and the concise statement of facts on which the allegations are based. The Court opined that these provisions were enacted to give the parents notice of the allegations and an opportunity to contradict the O.F.C.'s case. *Id.* at 954. The Court characterized the CHINS petition as an integral part of ensuring that parents have notice of the allegations. *Id.* The Court opined that when parents do not receive notice of the specific allegations against them, they do not know what evidence to present on their behalf, which evidence or witnesses to obtain by compulsory process or which questions to ask during cross-examination, rights explicitly granted to them under the CHINS statute. *Id.* at 956. The parents were entitled to notice that they were required to defend against a claim that they had failed to protect the child, and to specifics concerning the acts and circumstances of their alleged failure to protect. *Id.*

In CHINS fact-finding, parents did not expressly or impliedly consent to trial on issues not raised in the pleadings. The Court cited Ind. Trial Rule 15(B), which provides that if issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Notice may be express if raised prior to or during trial, or implied, if the evidence presented at trial places a reasonably competent attorney on notice that the issue was before the court. *Id.* at 954. The Court opined that their review of the record revealed that at no time did the O.F.C. expressly inform the parents or the court that it intended to deviate from the petition to show that the child was a CHINS due to injury caused by parental act or omission. The Court also did not find implied consent. Implied consent will not be found if the parties did not know or could not have known that the unpleaded issue was being litigated. *Id.* at 955. Evidence which is relevant, not only to the unpleaded issue but also to the issues set forth in the pleadings will not necessarily notify a party that an unpleaded issue is being tried. *Id.* The Court also opined that the parents' attorney could not have been aware that O.F.C. was proceeding under a different section of the CHINS statute and noted that the closing statement of the parents' attorney suggested that, after all of the evidence was presented, the attorney was still under the belief that the only allegation was the father's molestation of the child.

Trial court cannot base CHINS decision on theory not set forth by O.F.C. The Court opined that, while the trial court's sincere desire to obtain much-needed services for the child was understandable, to permit the trial court to base its decision upon a theory not set forth by the O.F.C. would contravene the purpose of the CHINS statutes. *Id.* at 956.

In **Mikel v. Elkhart County DPW**, 622 N.E. 2d 225 (Ind. Ct. App. 1993), the father was held in civil contempt for failure to follow orders of the juvenile court. The Court of Appeals reversed the decision of the juvenile court on the grounds that there was no Parental Participation Petition filed which is a prerequisite for ordering parental participation. The juvenile court does not have jurisdiction over the parents absent compliance with statutory procedures.

The mother and father were involved in a dissolution of marriage proceeding in the Elkhart Superior Court. The court found an emergency situation existed and venued the case to the Elkhart Circuit Court Juvenile Division. The DPW filed a CHINS petition alleging physical abuse by the father, and neglect by the mother. The children were placed in protective custody. At the initial hearing the parents were, “admonished to not create any difficulties or problems for the children, as far as their relationship, to attempt to keep the children out of the dispute as to their marriage.” *Id.* at 226. The father was found to be in contempt for failure to follow the court orders, a ninety-day jail sentence was imposed, but suspended on the condition that the father submit to a psychiatric assessment. The father complied with the order to receive a psychiatric assessment. The court entered additional orders to the father as follows: participate in supervised visits, be involved in individual and family counseling, follow the recommendations of his doctor, take his medication, continue to receive psychological testing, finish parenting classes, and pay \$96.00 per week for the cost of the services for his children. A hearing was set to address two additional allegations of contempt. The father failed to appear. The father was arrested, found in contempt, and sentenced to 180 days in jail, or in a mental health facility.

An issue that is a question of great public interest, and is likely to recur is not moot. On appeal the father presented three issues, only two of which were addressed by the Court. Issue one: were the issues moot? Issue two: Does the juvenile court acquire authority over parents when a CHINS petition is filed or when the children are adjudicated as CHINS, or only when a parental participation petition is filed? The Court determined that the issues were not moot because the issue was one that is likely to recur. The Court reasoned, “[t]he point at which the juvenile court has jurisdiction over a parent is a question of great public interest. Due to the large number of cases the juvenile court handles and because [the father] may be subject to additional court orders, we think this issue is likely to recur.” *Id.* at 227.

DPW must file petition for parental participation to invoke the jurisdiction of the juvenile court over the parents. The father argued, with respect to the second issue, that, “since a petition for parental participation was not filed, the juvenile court did not have proper authority to compel him to act or refrain from acting. . . since the court failed to invoke its authority over him, the orders were invalid and do not constitute a proper basis for contempt.” *Id.* at 227-28. The Court held that IC 31-6-4-17 recodified at 31-34-16-1 provides the statutory basis for the juvenile court’s jurisdiction over the parent. The statute requires filing of a verified petition alleging: “the respondent is the child’s parent. . . the child has been adjudicated a delinquent child or a child in need of services. . . the parent, guardian, or custodian should. . . obtain assistance in fulfilling obligations as a parent. . . provide specified care, treatment or supervision for the child. . . work with any person providing care, treatment, or rehabilitation for the child; or refrain from direct or indirect contact with the child.” IC 31-6-4-17(b).

Parental Participation Petition is not an optional procedure. The DPW argued that the statute “does not state that the opportunity to participate will be provided only if DPW files a participation petition.” *Id.* at 228. The Court looked to the legislative intent and opined that, “[w]e do not think that the legislature enacted the statute intending it to be an ‘optional’ procedure to be performed before a court orders parents to do or refrain from certain actions.” *Id.*

Even though juvenile court has exclusive original jurisdiction, the statute implies that the procedures must be followed. The DPW also argued that the juvenile court has exclusive original jurisdiction in “[p]roceedings in which a child, including a child of divorced parents, is alleged to be a child in need of services. . . proceedings governing the participation of a parent, guardian, or custodian in a program of care, treatment or rehabilitation for a child.”

However, the Court noted that the original exclusive jurisdiction statute IC 31-6-4 recodified at 31-30-1 also cross references 31-6-4-17 recodified at 31-34-16-1, the parental participation statute. The Court indicates that although it is not specifically stated, the statute implies that the procedural requirements of the parental participation statute are a necessary requisite to requiring parental participation.

The Court noted that its decision was consistent with statutory commentators who wrote, “[t]his section was intended to create the exclusive procedure available to the juvenile court for acquiring jurisdiction over parents whose child is the subject of a delinquency or [CHINS] proceeding. The filing of the petition required by this section is jurisdictional; that is, if the petition is not filed, the court has no statutory power to order the parents to ‘participate’ in the disposition of the court.” *Id.* at 229, footnote 1.

In **Wardship of Nahrwold v. Dept. of Public Welfare**, 427 N.E. 2d 474 (Ind. Ct. App. 1981), the Court found that the mother was afforded the process due in the particular situation and affirmed the trial court's order which released the child to the mother after the mother consented to an informal adjustment. The child was removed from the mother's home by the Allen County caseworker without a court order after the child was found unsupervised at home. The child had apparently been spanked with a metal spatula, causing bruises or marks. The Department requested to file a CHINS petition and to take custody of the child. The juvenile court referee heard evidence from the child, the mother and the caseworker at a detention hearing, but denied the mother's request for a record of the proceeding and denied the mother's request to present character witnesses. The referee stated that the child would be released into the mother's custody if the mother consented to a program of informal adjustment involving counseling and Department supervision. The mother consented to the informal adjustment program, and the child was released to the mother subject to the Department's supervision. The CHINS petition was not authorized to be filed and no fact-finding hearing was required.

Mother was afforded due process at CHINS detention hearing; due process did not include the opportunity to call character witnesses at the detention hearing. Noting that the question of due process in a CHINS detention hearing was a case of first impression in Indiana, the Court looked to U. S. Supreme Court decisions, which opined that "due process is not a technical conception with a fixed content" and "due process is flexible and calls for such procedural protections as the particular situation demands." *Id.* at 478, quoting *Cafeteria Workers v. McElroy*, 397 U. S. 886, 885, 81 S. Ct. 1743, 1748, 6 L. Ed. 2d 1230 (1961) and *Morrissey v. Brewer*, 408 U. S. 471, 481, 92 S. Ct. 2593, 2600, 33 L. Ed. 2d 484 (1972). The Court held that the referee had used the detention hearing to satisfy two statutory requirements: whether further detention was proper and whether the filing of a CHINS petition should be authorized. The Court analogized to a criminal probable cause hearing where the accused does not have the right to a "full panoply of adversary safeguards." *Id.* at 489. The Court stated that if an accused individual does not have a due process right to a full adversary hearing when probable cause for his arrest and incarceration are determined, then a parent suffers no prohibited lack of due process when her child is temporarily removed if a reasonable basis exists to believe the child is a Child in Need of Services. *Id.* The Court found that the Department and the court had acted on their probable cause belief that the child was a CHINS. The Court went on to say that only proceedings conducted subsequent to the authorization of the CHINS petition are adjudicatory in nature. *Id.* Neither due process nor the statutory scheme required that the mother be permitted to call character witnesses at the detention stage. *Id.* at 480. It was sufficient that the mother was given the opportunity to be present with counsel and state her version or explanation of the events in question. *Id.* While a parent's right to custody cannot be terminated by less than a full evidentiary hearing, the Department or court can intervene in the parent-child relationship on the bases of a probable cause CHINS determination. *Id.*

In **In the Matter of P.R.**, 497 N. E. 2d 1070 (Ind. 1986), the Supreme Court vacated the trial court's findings of fact and conclusions of law in a case involving an adjudicated CHINS child's request for an abortion pursuant to IC 35-1-58.5-2.5 (recodified at IC 16-34-2-4).

Mother whose rights have not been terminated is proper person to give parental consent to abortion upon adjudicated CHINS despite welfare wardship. The Court found that wardship placement of a child under the Marion County Department of Public Welfare did not terminate the mother's parental rights. Parental consent to abortion under IC 35-1-58.5-1 (recodified at IC 16-18-2-267) is defined as the written consent of the parent or legal guardian of an unemancipated pregnant woman under the age of eighteen to the performance of an abortion on the minor pregnant woman. Id. at 1070. The Court concluded that the mother of the pregnant child was the proper person to give parental consent to the performance of an abortion upon the child and that it was wholly unnecessary under the facts of this case for the Welfare Department to give its consent to the abortion. Id.

In **Parker v. Dept. of Public Welfare**, 533 N. E. 2d 177 (Ind. Ct. App. 1989), the Court approved the trial Court's CHINS determination against the mother's argument that the evidence was insufficient. The mother of three children ages two, six, and nine years left the children at a friend's house, and then abused speed and Valium, and forgot the children's location. A police investigation was begun regarding the children's whereabouts. An officer observed that the mother's eyes were bloodshot, she seemed intoxicated, she was irrational, uncooperative and combative, she kept changing her story, and there were needle marks on her arm. By the time of the CHINS hearing the mother was under psychiatric care with diagnoses of manic-depression and drug abuse and was responding to medications, but according to her psychiatrist remained unstable and it was too early to make a definitive prognosis. During a visit, the mother struck the oldest child and allowed the youngest child to fall to the floor when the mother got up to leave. There was also evidence that the children had been fed and clothed and bore no marks of abuse.

Mother who suffered from manic-depression, abused drugs and forgot where she had left the children posed a danger to the children. The mother conceded the facts concerning her problems, but argued that there was no evidence that her condition had endangered the children or had any negative effect on them. The Court disagreed, stating that under Indiana law a child is a CHINS when the child is endangered by parental action or non-action. The Court stated that the welfare department and the court need not wait to take action until tragedy occurs or children are irretrievably ruined by a parent who is out of control. Id. at 179. The Court opined that for the safety and well-being of the children, the court properly interceded to correct a dangerous and deteriorating situation and that the court's coercive intervention was necessary. Id.

In **Roark v. Roark**, 551 N.E. 2d 865 (Ind. Ct. App. 1990), the Court affirmed the CHINS adjudication of four children despite the father's arguments that the evidence was insufficient. Prior to the parents' divorce, the father physically and emotionally disciplined the children with the following methods: he bruised their buttocks and legs through belt whippings; he left finger bruises on the children's faces when he slapped them; he held a child's hand over an open flame; he forced a child to hold a push-up position until the child cried in pain; and he locked the children in their rooms while he took a nap. The father took custody of the children when the couple divorced. Subsequently, the infant daughter of the father's girl friend suffered second and third degree burns while in the father's care. The father's children were removed from his care and the welfare department filed a CHINS petition alleging abuse under IC 31-6-4-3(a)(2) (recodified at IC 31-34-1-2).

Evidence of the father's past abusive acts toward his own children, some of which occurred several years prior to the incident that gave rise to the CHINS petition, was admissible. The Court ruled that evidence that a parent had injured a child (other than his own) was sufficient to meet the "injury" requirement of the abuse statute, as long as the evidence also showed that the parent had injured his own child in the past. See IC 31-6-7-13(c) (recodified at IC 31-34-12-5)(evidence of parent's injury to any child is admissible). The Court explained: that the CHINS statutes do not require that the courts and the Welfare Department wait until a tragedy occurs to intervene; a child is a Child in Need of Services when it is endangered by parental action or inaction. Parker v. Monroe County Department of Public Welfare, 533 N.E. 2d 177, 179 (Ind. Ct. App. 1989). Certainly, a child who has been injured in the past by a parent may be considered endangered when that parent's acts or omissions cause injuries as severe as those sustained in this case to another child in the parent's care. Id. at 872.

Holding a child's hand over a burning flame is emotional abuse. The Court stated that holding a child's hand over a burning flame, regardless of whether the child is injured, is emotional abuse of the highest order and speaks for itself in terms of causing psychological damage to a child. Id. at 871.

Use of a belt on a young child is unreasonable corporal punishment. The Court of Appeals rejected the respondent's argument that his use of a belt on his children was protected by the corporal punishment defense at IC 31-6-4-3(e) (recodified at IC 31-34-1-15). The Court stated that the use of belt on any child under the age of ten is an unreasonable form of corporal punishment. Id. at 871.

Testimony by caseworker and sheriff concerning children's statements was inadmissible hearsay. The trial court had allowed the caseworker and the Porter County Sheriff deputy to testify regarding the children's statements concerning how the daughter of the father's girlfriend was burned. The children's statements included the following: the father had repeatedly pushed his girlfriend's daughter into a tub full of hot water; the father had tried to drown one of his own children in the past; the father had pushed the girlfriend's child into a wall; the father had instructed a child to say that one of the other children had injured the girlfriend's child; the father had given another of his children a nosebleed by shoving her into a wall. The Court held that the hearsay statements were inadmissible and could not be considered in addressing the sufficiency of the evidence argument. The Court opined that the legislature, in enacting the child hearsay statute at IC 31-6-15-2 (recodified at IC 31-34-13-1), intended that hearsay statements attributed to children under the age of ten years must be considered in the manner set forth by the statute for their admission in CHINS proceedings. Id. at 869.

Appeal was not moot due to consequences of CHINS adjudication despite post dispositional return of children to the father. The DPW contended that the appeal should be dismissed as moot because the children had been returned to the father's care, DPW supervision was discontinued, and the cause had been dismissed. The Court disagreed, and characterized an appeal as moot when one of the following circumstances exists: the parties lack a legally cognizable interest in the outcome; the principal questions in issue have ceased to be matters of real controversy between the parties; or the Court on appeal is unable to render effective relief on an issue. Id. The Court concluded that the appeal was not moot because of the potentially devastating consequences of a CHINS determination. Id. at 868. The Court listed the following consequences: the record of a CHINS proceeding is available to the prosecutor, Departments of Welfare and Corrections, and a criminal court judge for use in pre-sentence investigation; the father had been criminally charged with child neglect; the record would be available for use by the children's mother in a future custody or child support action; the record may be used to impeach the father as a witness in a criminal case or to discredit his reputation; CHINS determinations often accumulate and in extreme cases result in termination of the parent-child relationship.

In **In Re T.G.**, 726 N.E. 2d 857 (Ind. Ct. App. 2000), the Court reversed a CHINS adjudication and remanded it with instructions to dismiss the action. The CHINS proceeding, based on allegations of child seduction of a seventeen-year-old girl by her stepfather, was initiated one month before the child's eighteenth birthday. The child became eighteen years old on April 17, 1999. The trial court, after granting two requests for continuances, held a fact-finding hearing and adjudicated the child a CHINS on July 1, 1999 after her eighteenth birthday.

If child is not adjudicated CHINS prior to eighteenth birthday, court loses subject matter jurisdiction. The Court initially noted that the issue of the court's lack of jurisdiction may be raised at any time. Id. at 859. If parties do not raise the jurisdictional issue, the court is required to consider the issue sua sponte. Id. The Court opined that IC 31-9-2-13 clearly mandates an adjudication prior to the child's eighteenth birthday in order for the court to maintain jurisdiction over the child because in this statute a child is defined as a person who has been adjudicated a child in need of services before the person's eighteenth birthday. Id. The Court was unpersuaded by the O.F.C.'s argument that the mother should not be allowed to complain about lack of jurisdiction because the fact-finding hearing was delayed based on the mother's request for a continuance. The Court, disagreed, stating that it was within the court's power to grant or deny the request for continuance. Id. at 860. The Court presumed that the trial court knew and followed the law and noted that the Guardian ad Litem had informed the trial court on the record that the child would be eighteen years old in April.

In **T.Y.T. v. Allen County Div. of Family**, 714 N.E. 2d 752 (Ind. Ct. App. 1999), the Court affirmed the CHINS adjudication of an abandoned one year old child despite the mother's arguments that the court lacked jurisdiction under the Uniform Child Custody Jurisdictional Act and that there was insufficient evidence to support a CHINS adjudication. The child was born to a seventeen year old group home resident in California. The mother was arrested for underage drinking shortly after the child's birth. The child was removed from the care of the mother by the California Division of Family and Children and placed with the child's identified father. The mother left the group home when she reached the age of eighteen but did not live with or attempt to regain custody of the child. The mother lived in eight different locations and was not employed. The father traveled to Fort Wayne, Indiana and subsequently abandoned the child to a childcare provider. The childcare provider notified Allen County D.F.C. which filed a CHINS petition and placed the child in foster care pending the CHINS adjudication hearing. Prior to the CHINS adjudication the caseworker located the mother in Illinois. The mother said that she was pregnant, lacked a job or car and was living with a convicted felon who had been involved in illegal drugs. The mother was informed of, but failed to appear for two CHINS court hearings concerning the child.

Indiana Juvenile Court had jurisdiction under CHINS statutes to address emergency situation of child born in California and later brought to Indiana by identified father. The Court cited Matter of E.H., 612 N.E. 2d 174 (Ind. Ct. App. 1993), adopted at 624 N.E. 2d 471 (Ind. 1993), for the principle that the jurisdiction conferred on courts in CHINS cases enables the State to respond to emergency situations involving children who are not likely to be helped without court intervention. T.Y.T. at 755. Abandonment of a child is one of the emergencies that provides a bases for exercising jurisdiction under the CHINS statute. The Court noted that if the CHINS court intends to exercise jurisdiction over a child on an ongoing basis after the emergency passes, it must follow the procedures set forth in the U.C.C.J.A.

The Court further found no evidence that a California court had ongoing jurisdiction in the matter, and that the record did not support the mother's assertion that California had priority jurisdiction over Indiana as the child's "home state" because there was no record that California had exercised such jurisdiction. The child's maternal grandmother had initiated a custody action in California which was "dropped" when the maternal grandmother moved to Texas.

CHINS petition need not allege that allowing child to remain in parent's home is contrary to child's best interests or that reasonable efforts have been made to prevent the need for out of home placement. The Court disagreed with the mother's assertion of error by the trial court in finding that placement of the child with the mother was contrary to the child's best interests, that reasonable efforts had been made by D.F.C. to prevent the need for the child's placement, and that the child should remain in foster care. The Court held that at a fact-finding hearing the court decides only whether the child is a CHINS based upon the criteria set out in the CHINS statute, and that this had been done by the trial court. Id. at 756. The Court noted that at the dispositional hearing the State must support the allegation that reasonable efforts were made to reunite the child with the parent or guardian. Id. Because the court's findings of which the mother complained were not essential elements of the determination that the child was a CHINS, their inclusion in the case could not constitute reversible error. Id.

Evidence of child's abandonment by parents was sufficient to support CHINS adjudication. The Court found that the following evidence was sufficient to support the CHINS determination: the child had been abandoned by her putative father; the mother did not even know the child's whereabouts; the mother was not attempting to ascertain the child's whereabouts.

In **Worrell v. Elkhart Cty. Office of Family**, 704 N.E. 2d 1027 (Ind. 1998), the Supreme Court granted transfer, vacated the published Court of Appeals decision reported at **Matter of R.D.**, 692 N.E. 2d 929 (Ind. Ct. App. 1998), and affirmed the trial court's order dismissing foster parents' petition for visitation with their former foster children. The Supreme Court held that foster parents do not have standing to petition for visitation with former foster children. Three children who shared the same mother had lived with the foster parents for seventeen months. The foster parents requested and obtained the removal of the oldest of the three children due to his actions toward the foster parents' natural daughter. The remaining two children were removed from the foster parents' home two months later so that the three children could be reunited in the same placement. The foster parents petitioned for visitation, but the trial court dismissed their petition due to lack of standing.

Foster parents lack standing to petition for visitation with their former foster children. The Court of Appeals has established a two part test for determining whether to grant visitation to a non-parent, non-grandparent third party. The third party must first show the existence of a custodial and parental relationship and then show that visitation is in the child's best interest. *Id.* at 1028. The first issue is standing; the second issue is the standard by which the question of visitation is adjudged after the cognizable right is established. *Id.* The Supreme Court agreed with the previously reported Appellate case law which extended third party visitation only to step-parents and held that the two part test does not extend to foster parents. *Id.* at 1029. The Court differentiated foster relationships from parent and step-parent relationships in the following ways: foster relationships are designed to be temporary, providing a safe, nurturing environment until the child can either be returned to natural parents or adopted; foster relationships are contractual in that the State reimburses foster parents for their care of children; the foster relationship may be one in a series of temporary relationships.