

Children's Law Center of Indiana



Child in Need of Services (CHINS) Standard and Burden of Proof, Appointment of Counsel, and Hearing Timelines¹

By: Derelle Watson-Duvall, J.D.
Kids' Voice of Indiana
The Derelle Watson-Duvall
Children's Law Center of Indiana
September 2010

I. Standard and Burden of Proof

The standard of proof for CHINS cases is the preponderance of the evidence. IC 31-34-12-3. In Re N.E., 919 N.E.2d 102 (Ind. 2010); Roark v. Roark, 551 N.E.2d 865 (Ind. Ct. App. 1990). The CHINS procedure is a civil procedure, subject to the procedural rules and rights applicable to civil trials. IC 31-32-1-3. All CHINS cases are tried by Judicial Officers. There is no right to a jury trial in a CHINS case. IC 31-32-6-7; E.P. v. Marion Cty. Office of Fam. & Child., 653 N.E.2d 1026 (Ind. Ct. App. 1995).

The Indiana Department of Child Services (DCS) has the burden of proof in CHINS cases. In Re N.E., 919 N.E.2d 102 (Ind. 2010). Three statutes create rebuttable presumptions in CHINS cases. IC 31-34-12-4 affects the burden of proof in a CHINS case. It states:

A rebuttable presumption is raised that the child is a child in need of services because of an act or omission of the child's parent, guardian, or custodian if the state introduces competent evidence of probative value that:

(1) The child has been injured;

¹ Disclaimer: Kids' Voice and Children's Law Center staff do not provide legal advice, and neither this presentation nor any other communication you have with any of them creates an attorney-client relationship with you. You should consult your own attorney before taking or failing to take any legal action based on the content of this document or any other communications with Kids' Voice or Children's Law Center staff.

- (2) at the time the child was injured, the parent, guardian, or custodian:
 - (A) had the care, custody, or control of the child; or
 - (B) had legal responsibility for the care, custody, or control of the child; and
- (3) the injury would not ordinarily be sustained except for the act or omission of a parent, guardian, or custodian.

There is also a rebuttable presumption that a child is a CHINS if the child is living in the same household as the victim of a sexual offense and the offender lives in the household with the child. IC 31-34-12-4.5 states:

- (a) There is a rebuttable presumption that a child is a child in need of services if that state establishes that:
 - (1) another child in the same household is the victim of a sex offense described in IC 31-34-1-3; and
 - (2) the sex offense described in IC 31-34-1-3:
 - (A) was committed by an adult who lives in the household with the child; and
 - (B) resulted in a conviction of the adult or a judgment under IC 31-34-11-2 as it relates to the child against whom the sex offense was committed.
- (b) The following may not be used as grounds to rebut the presumption under subsection (a):
 - (1) The child who is the victim of the sex offense described in IC 31-34-1-3 is not genetically related to the adult who committed the act, but the child presumed to be a child in need of services under this section is genetically related to the adult who committed the act.
 - (2) The child who is the victim of the sex offense described in IC 31-34-1-3 differs in age from the child presumed to be the child in need of services under this section.
- (c) This section does not affect the ability to take a child into custody or emergency custody under IC 31-34-2 if the act of taking the child into custody or emergency custody is not based upon a presumption established under this

section. However, if the presumption established under this section is the sole basis for taking a child into custody or emergency custody under IC 31-34-2, the court first must find cause to take the child into custody or emergency custody following a hearing in which the parent, guardian, or custodian of the child is accorded the rights described in IC 31-34-4-6(a)(2) through IC 31-34-4-6(a)(5).

The third rebuttable presumption address the parent's, guardian's, or custodian's failure to provide medical treatment for a child due to the parent's, guardian's, or custodian's religious beliefs. IC 31-34-1-14 states:

If a parent, guardian, or custodian fails to provide specific medical treatment for a child because of the legitimate and genuine practice of the religious beliefs of the parent, guardian or custodian, a rebuttable presumption arises that the child is not a child in need of services because of the failure. However, this presumption does not do any of the following:

- (1) Prevent a juvenile court from ordering, when the health of a child requires, medical services from a physician licensed to practice medicine in Indiana.
- (2) Apply to situations in which the life or health of a child is in serious danger.

Indiana law also provides that evidence of prior or subsequent acts or omissions by the parent, guardian, or custodian is admissible in the CHINS proceeding. IC 31-34-12-5 states:

Evidence that a prior or subsequent act or omission by a parent, guardian, or custodian injured a child is admissible in proceedings alleging that a child is a child in need of services to show the following:

- (1) Intent, guilty knowledge, the absence of mistake or accident, identification, the existence of a common scheme or plan, or other similar purposes.
- (2) A likelihood that the act or omission of the parent, guardian, or custodian is responsible for the child's current injury or condition.

The Indiana Rules of Trial Procedure apply in CHINS cases. IC 31-32-1-3.

II. Counsel for Parents

Indiana law does not provide for court appointed counsel for each parent, guardian, or custodian in a CHINS proceeding. In Re M.M., 733 N.E.2d 6 (Ind. Ct. App. 2000); Smith v. Marion County DPW, 635 N.E.2d 1144 (Ind. Ct. App. 1994). In E.P. v. Marion Cty. Office of Fam. & Child., 653 N.E.2d 1026 (Ind. Ct. App. 1995), the Court held that there is no Fourteenth Amendment right to counsel for parents in CHINS cases. The E.P. Court opined that a parent who requests counsel under the civil attorney appointment statute in a CHINS proceeding on the basis of indigency is entitled to an indigency hearing, and if determined to be indigent, counsel shall be appointed. After the E.P. opinion, the Indiana Supreme Court in Sholes v. Sholes, 760 N.E.2d 156 (Ind. 2001), limited the civil attorney appointment statute, requiring courts to assess not only the person's indigency, but the court's assessment of the nature of the case, the genuineness of the issues, the availability of volunteer counsel, and whether mandating the expenditure of public funds is appropriate. The Indiana General Assembly significantly amended the civil attorney appointment statute, IC 34-10-1-2, in 2002 to provide that the court may, under exceptional circumstances, assign an attorney to prosecute or defend a cause if the court is satisfied that the person who applies for leave to prosecute or defend a cause as an indigent person lacks sufficient means. The court may consider the following factors in deciding to appoint counsel: (1) the likelihood of the applicant prevailing on the merits of the claim or defense; and (2) the applicant's ability to investigate and present claims or defenses without an attorney, given the type and complexity of the facts and legal issues in the case. IC 34-10-1-2(d) requires the court to deny an application if the court determines that (1) the applicant failed to make a diligent effort to obtain an attorney before filing the application or (2) the applicant is unlikely to prevail on his claim or defense. But see Matter of R.R., 587 N.E.2d 1341 in which the Court ruled that it was an abuse of discretion to fail to appoint counsel for Mother in the underlying CHINS case. The Court apparently considered the mother's diminished mental capacity in its ruling.

The purpose of a CHINS adjudication is not to punish the parents, but to protect the children. In Re A.H., 913 N.E.2d 303 (Ind. Ct. Ap. 2009). A CHINS adjudication

focuses on the condition of the child and can also come about through no wrongdoing on the part of either parent, for example, where a child substantially endangers his own health or that of another or because parents lack the financial ability to meet the child's extraordinary medical needs. In Re N.E., 919 N.E.2d 102 (Ind. 2010).

III. Timelines for CHINS Hearings

The statutory timelines for holding CHINS hearings are:

- (1) The detention hearing must be held within 48 hours (not including Saturdays, Sundays, or legal holidays) of the time the child is taken into custody by DCS or law enforcement. IC 31-34-5-1(a).
- (2) The CHINS petition shall be filed before the detention hearing. IC 31-34-10-2(h).
- (3) If a detention hearing is held under IC 31-34-5, the initial hearing shall be held at the same time as the detention hearing. IC 31-34-10-2(i). A guardian ad litem or court appointed special advocate shall be appointed at the initial hearing to represent and protect the child's best interests. IC 31-34-10-3.
- (4) The court may schedule an additional detention hearing on the court's own motion, the motion of a person representing DCS, the child, or the child's parent, guardian, or custodian. IC 31-34-5-4; IC 31-34-5-5.
- (5) The court may schedule an additional initial hearing on the CHINS petition to comply with statutory procedures with respect to any person for whom a summons has been issued. IC 31-34-10-2(j). An additional initial hearing shall be held not more than 30 days after the date of the first initial hearing. IC 31-34-10-2(k). The additional initial hearing may be held more than 30 days after the date of the first initial hearing if the court grants an extension of time for extraordinary circumstances and states the extraordinary circumstances in a written court order. IC 31-34-10-2(k).
- (6) The factfinding hearing shall be completed not more than 60 days after the CHINS petition has been filed. IC 31-34-11-1(a). The time to complete the factfinding hearing may be extended by the court for an additional 60 days if all parties consent to the additional time. IC 31-34-11-1(b).

- (7) The dispositional hearing must be completed not more than 30 days after the court finds that the child is a CHINS. IC 31-34-19-1.
- (8) If the court does not accept the DCS recommendations set out in the DCS predispositional report, the court may continue the dispositional hearing for not more than 7 business days so DCS can consider alternate dispositional recommendations. IC 31-34-19-6.1(c).
- (9) The court shall order DCS to file a report on the progress made in implementing the dispositional decree every 3 months after the dispositional decree is entered. IC 31-34-21-1(b). The court may perform a periodic case review any time after the progress report is filed. IC 31-34-21-2(d).
- (10) The court shall review the child's case in a formal court hearing at least 6 months after the date of the child's removal from the child's parent, guardian, or custodian or at least 6 months after the date of the dispositional decree, whichever occurs first. IC 31-34-21-2(b)(c). The case may be reviewed more often if ordered by the court. IC 31-34-21-2(a).
- (11) IC 31-34-21-7(a)(1) states that the court shall hold a permanency hearing not more than 30 days after the court finds that reasonable efforts to reunify or preserve the child's family are not required as described in IC 31-34-21-5.6. (This finding is based on specific facts listed at IC 31-34-21-5.6(b)).
- (12) The court shall hold a permanency hearing every 12 months after the date of the original dispositional decree or every 12 months after the child was removed from the child's parent, guardian, or custodian. IC 31-34-21-7(a)(2).
- (13) After the permanency hearing, the court must continue to hold a formal court hearing at least every 6 months as long as the child continues to be under the juvenile court's jurisdiction in the CHINS case. IC 31-34-21-2(b)(c).