

CHAPTER 11

INVOLUNTARY TERMINATION OF PARENT-CHILD RELATIONSHIP

I. OVERVIEW OF INVOLUNTARY TERMINATION OF PARENT-CHILD RELATIONSHIP

The legal process to obtain an involuntary termination of the parent-child relationship is initiated when the office of family and children or the guardian ad litem/CASA files a written petition to terminate the rights of a parent to his/her child who has been adjudicated a Child In Need of Services (CHINS). Adoption is a frequent goal of the involuntary termination procedure. Termination may also be appropriate for a child who is not a likely candidate for adoption, if continuation of the parent-child relationship is mentally or physically harmful to the child. For example, termination of the parent-child relationship of a violently sexually abusive parent ends the threat to the child of a visitation or possible reunion with that parent. When adoption is not a viable alternative for a child whose parental rights have been terminated, the office of family and children will seek other permanent placements for the child, such as a guardianship or permanent relative care.

In considering the appropriateness of filing a termination of the parent-child relationship petition, the moving party should consult with service providers, foster parents, child advocates, and relatives regarding the child and consider the potential benefits and harms of termination. See Janet L. Ward, A Question of Balance: Decision Making for CASA/GALs (National CASA Association).

A petition for termination of the parent-child relationship can be filed when the child has been removed from the parent for six months under a dispositional order, or earlier if there has been a ruling that reasonable efforts toward reunification are not required. IC 31-35-2-4(a)(2)(A)(i) and (ii). 1998 legislation added a provision mandating the filing of a termination of the parent-child relationship petition when a child has been in placement outside of the home for fifteen of the last twenty-two months, and other very limited situations. IC 31-35-2-4.5(a) and (b). In those mandatory situations, a motion to dismiss can be filed if the termination is not in the best interests of the child or the parents did not receive the services necessary to reunification. IC 31-35-2-4.5(d).

A. Basic Considerations and Concerns in Termination Law

In the case of J.L.L. v. Madison County DPW, 628 N.E. 2d 1223 (Ind. Ct. App. 1994), the Court of Appeals reiterated the basic philosophy and ground rules of termination case law: (1) parental rights are of a constitutional dimension and termination is not to punish parents; (2) rights can be terminated when parties are unable or unwilling to meet their responsibilities as parents, including situations in which the child is in immediate danger of losing his life as well as when the child's emotional and physical development is threatened; (3) the trial court must judge parental fitness at the time of the hearing and consider evidence of changed circumstances; and (4) the trial court must evaluate the parents' history (patterns of conduct) to determine if there is a substantial probability of future neglect or deprivation.

In In Re L.S., 717 N.E. 2d 204, 208 (Ind. Ct. App. 1999), the Court noted that (1) termination is intended as a last resort available only when all other reasonable efforts have failed, and (2) the purpose of terminating parental rights is not to punish the parents but to protect their children. See also Lassiter v. Department of Social Services 452 U.S. 18, 101 S. Ct. 2153 (1981) (purpose of termination of parental rights is not to punish parents). In Matter of Robinson, 538 N.E. 2d 1385 (Ind. 1989), the Court reviewed the purpose of CHINS and termination proceedings, and stated:

The desired result would be to resolve the problems in the home which led to the children's distress and return them there. If this cannot be done, the alternative which serves the best interests of the child or children is terminating parental rights and placing the children where they will receive proper care and protection.

Id. at 1386.

In Stone v. Davies Co. Div. Child Serv., 656 N.E. 2d 824, 828 (Ind. Ct. App. 1995), the Court noted several other general considerations in termination cases: (1) the parental right to raise the child protected by the 14th Amendment is not absolute and "must be subordinated to the child's interest in determining the appropriate disposition of a petition to terminate the parent-child relationship;" and (2) the trial court need not wait until the child is "irreversibly influenced" by the "deficient lifestyle" of the parent and the child's physical, mental and social growth is permanently impaired before terminating parental rights. See also the following cases reiterating these principles: Matter of M.B., 666 N.E. 2d 73 (Ind. Ct. App. 1996); Wardship of J.C. v. Allen Cty. Office, 646 N.E. 2d 693 (Ind. Ct. App. 1995); and R.G. v. MCOFC, 647 N.E. 2d 326 (Ind. Ct. App. 1995).

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

Although parental rights are of a constitutional dimension, the law allows for the termination of those rights when parents are unable or unwilling to meet their responsibilities as parents. This includes situations not only where the child is in immediate danger of losing his life, but also where the child's emotional and physical development are threatened.

Id. at 1234. The Supreme Court also opined that the Court of Appeals Egly opinion at 575 N.E. 2d 312 incorrectly interpreted a sentence from Matter of Miedl, 425 N.E. 2d 137 (Ind. 1981), as requiring a termination standard that continuation in the parent's custody was wholly inadequate for the child's very survival. The Supreme Court held in Egly that the sentence in Miedl was only dicta, and that no new requirement had been added to termination proceedings as a result of the Miedl opinion.

In the case of Tipton v. Marion County DPW, 629 N. E. 2d 1262 (Ind. Ct. App. 1994), the Court of Appeals noted throughout the opinion the following shortcomings of the welfare department's case in the termination hearing: (1) it made no showing of the conditions under which the CHINS petition was initiated or the reasons for the removal of the children from the mother; (2) it made no effort to demonstrate what circumstances, conditions, or behaviors of the fathers necessitated wardship or were so harmful they prevented placement of the children with the fathers after removal from the mother; (3) it did not introduce into evidence the CHINS petition, the predispositional report, the parental participation order, or the modification report; (4) it did not ask the juvenile court to take judicial notice of the underlying CHINS proceeding; and (5) it presented no evidence on the physical or emotional development of the children and no evidence that the children had been harmed by their relationships with their fathers. The Court quoted the U.S. Supreme Court's decision in Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208 (1972), for the proposition that unfitness cannot be presumed; it must be proven.

B. Role of Federal ASFA Law in State Termination Law

The Adoption and Safe Families Act (ASFA) of 1997 requires that states enact legislation, and follow procedures to ensure, that petitions for involuntary termination of the parent-child-relationship rights are filed for children who have been out of their homes under child welfare supervision for fifteen of the last twenty-two months. 42 U.S.C. 675(5)(E). Also an involuntary petition is mandated under federal law after a judicial determination that the child is an abandoned infant or that the child's parent has committed one of the specified criminal offenses against the subject child or another of the parent's children. Id. Federal law contains exceptions or "compelling reasons" why a petition for involuntary termination may not be required in certain situations. Id. See Chapter 4 at VI. for discussion on ASFA and other federal child welfare law.

II. JURISDICTION AND STANDING

A. Jurisdiction

The juvenile court and the probate court have concurrent original jurisdiction in all cases involving termination of the parent-child relationship. IC 31-30-1-5(2); IC 31-35-2-3. A termination petition is a separate and distinct legal proceeding and of "much greater magnitude" than the underlying CHINS action, and should be separately docketed from the CHINS action. State ex Rel. Gosnell v. Cass Cir., 577 N. E. 2d 957, 958 (Ind. 1991).

See Chapter 3 at II. G. for jurisdictional issues involving simultaneous CHINS, termination or adoption proceedings involving the same child.

B. Standing to File Involuntary Termination Action

An involuntary termination petition may be filed by the prosecutor, the attorney for the office of family and children, or the guardian ad litem/CASA. IC 31-35-2-4. Neither parent nor child has standing to file a termination of the parent-child relationship proceeding. Matter of Adoption of T.B., 622 N.E. 2d 921 (Ind. 1993).

C. Indian Children

In Matter of D.S., 577 N.E. 2d 572 (Ind. 1991), the Indiana Supreme Court reversed the trial court's order terminating the parent-child relationship between a Potawatomi Indian mother and her half-Indian child who did not reside on a reservation, and vacated the contrary Court of Appeals opinion at 560 N.E. 2d 119. The Supreme Court ruled that the trial court failed to comply with the strict notice requirements of the federal Indian Child Welfare Act (ICWA). Id. at 575. The Court also held that the standard of proof required under ICWA for termination of the parent-child relationship is "beyond a reasonable doubt," not "clear and convincing." Id. The Court found that the trial court erred in failing to inquire of the expert witnesses as to their specific qualifications related to the placement of Indian children as required by ICWA. Id. at 576. See also Matter of Adoption of T.R.M., 525 N.E. 2d 298 (Ind. 1988).

III. INVOLUNTARY TERMINATION PETITION, NOTICE, DEFAULT JUDGMENT

A. Mandatory and Non-Mandatory Termination Petition

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

B. Required Elements for Involuntary Termination Petition

The verified petition for involuntary termination must allege the following, quoting from IC 31-35-2-4(b)(2) (A) through (D):

(A) one (1) of the following exists:

(i) the child has been removed from the parent for at least six (6) months under a dispositional decree;

(ii) a court has entered a finding under IC 31-34-21-5.6 that reasonable efforts for family preservation or reunification are not required, including a description of the court's finding, the date of the finding, and the manner in which the finding was made; or

(iii) after July 1, 1999, the child has been removed from the parent and has been under the supervision of a county office of family and children for at least fifteen (15) months of the most recent twenty-two (22) months;

(B) there is a reasonable probability that:

(i) the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied; or

(ii) the continuation of the parent-child relationship poses a threat to the well-being of the child;

(C) termination is in the best interests of the child; and

(D) there is a satisfactory plan for the care and treatment of the child.

See this Chapter below at VIII. for detailed discussion on each of the required elements.

C. Involuntary Termination Petition with Parent Convicted of Certain Crimes Against a Child

Special termination pleadings may be used when a parent has been convicted of one of the enumerated crimes

against a child. IC 31-35-3-1 through 9 provide that when a parent is convicted of a heinous crime against his/her biological or adopted child or the child of his/her spouse, and the child victim was less than sixteen years of age, the criminal conviction is prima facie evidence in an involuntary termination case against the parent as to the child victim or the parent's other child that the conditions that resulted in the removal of the child from the parent will not be remedied or that continuation of the parent-child relationship poses a threat to the well-being of the child. The heinous crimes which apply to this statute are: murder, causing suicide, voluntary manslaughter, involuntary manslaughter, rape, criminal deviate conduct, child molesting, child exploitation, sexual misconduct with a minor, and incest.

In Ramsey v. Madison County Dept. Of Family and Children, 707 N.E. 2d 814, 816 (Ind. Ct. App. 1999), the child was adjudicated CHINS due to molestation by his father. The father pled guilty to one count of child molestation and incest in a separate criminal proceeding, and he was sentenced to prison and ordered to have no contact with the child. A termination petition was filed, heard, and granted under IC 31-35-3-4 alleging father's conviction of one of the enumerated offenses. In affirming the judgment on appeal, the Court noted that prima facie evidence means such evidence as is sufficient to establish a given fact and remains sufficient if uncontradicted. If the evidence is contradicted this merely creates a question that must be resolved by the trier of fact. Id. at 816. The Court rejected the father's attempt to contradict the evidence by alleging that he merely pled guilty to avoid a longer sentence and that he was now receiving anger management and parenting classes in prison. In addition to the prima facie evidence of the father's conviction, the Court noted the following evidence as supportive of the termination judgment: the child feared being abused by the father, and the child exhibited behavioral and emotional problems including encopresis, running away, setting fires, and sexual acting out which indicated the child's emotional development was threatened. Id. at 817.

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

The involuntary termination petition statute, IC 31-35-2-4(b)(3), obligates the petitioner to state if factors exist that would require dismissal of the involuntary termination petition and to specify each factor that would apply as a basis for dismissal. See Phelps v. Sybinski, 736 N.E. 2d 809, 814 (Ind. Ct. App. 2000) (statute requires petitioner to state if there is a basis for filing motion to dismiss).

E. Manner of Service and Other Notice Issues

The involuntary termination petition is separate from the underlying CHINS case and must be filed as a separate proceeding, with new notice to the parents. See State ex rel. Gosnell v. Cass Cir. Court, 577 N.E. 2d 957, 958 (Ind. 1991) (termination is a separate proceeding from underlying CHINS).

IC 31-35-2-2 provides that the CHINS procedural statutes on notice at IC 31-32-9-1 and 2 apply to termination cases. IC 31-32-9-1 provides that parents shall be given personal service at least three days before the hearing, and ten days before the hearing if service is by mail. However, many counties follow Ind. Trial Rule 6(C) which provides that a party has twenty days to file a responsive pleading. The juvenile code does not specifically require a responsive pleading.

Service of the involuntary termination petition on the parent should be accomplished by the best possible form of service since the consequences of these cases are so significant. The recommended means of service are personal delivery of the summons and petition by the sheriff or certified mail with a return receipt signed by the parent. If the petitioner is unable to obtain personal service on the parent, the next best form of service is to leave a copy of the petition and summons at the parent's last know address. If this form of service is used, Ind. Trial Rule 4.1(B) requires a follow-up mailing of a summons by regular mail to the same address. Case law indicates that service upon a defendant's "former residence" is insufficient to confer personal jurisdiction under T.R. 4.1(B). See Hill v. Ramey, N.E. 2d (Ind. Ct. App. 2001) (leaving a copy of protective order at home of father's parents where he had resided was insufficient to confer jurisdiction because father had moved to another residence); Mills v. Coil, 647 N.E. 2d 679, 681 (Ind. Ct. App. 1995) (service upon a defendant's former residence is insufficient to confer personal jurisdiction). Parents who are institutionalized or incarcerated should receive service via the superintendent of the institution as outlined in Trial Rule 4.3 A written confirmation of service from the superintendent, including the superintendent's information regarding whether the person has been allowed an opportunity to retain counsel, should be requested along with a copy of the summons signed by the parent.

Publication service is the least desirable form of service, to be used only when the parent cannot be located despite diligent efforts. Diligent efforts can include asking the parent's relatives and friends about the parent's

location, checking the telephone book, checking welfare records, checking employment security records, and seeking information from the local jail, Armed Forces, the Department of Corrections, and the Bureau of Motor Vehicles, if appropriate. See Abell v. Clark Cty. Dept. of Public Welfare, 407 N.E. 2d 1209 (Ind. Ct. App. 1980) (service by publication not proper because welfare department had access to mother's address as she was recipient of welfare benefits). Strict compliance with the trial rules is required for notice by publication. See Harris v. Delaware County Division, 732 N.E. 2d 248 (Ind. Ct. App. 2000). See also Chapter 3 Roman Numeral V. at C. for detailed requirements for service by publication.

If the parent is represented by counsel in the underlying CHINS case, it is recommended that a copy of the summons and termination petition be served on counsel. Although In Re A.M.H., 732 N.E. 2d 1284 (Ind. Ct. App. 2000) is a voluntary termination case, its reasoning may be applicable to other termination cases in which the parent is represented by counsel in the CHINS case. In A.M.H. the Court, noting mother's diminished mental capacity and psychological problems, affirmed the trial court's dismissal of the petition for voluntary termination upon failure of the caseworker to notify mother's CHINS attorney that the caseworker was discussing and obtaining a voluntary relinquishment of rights from the mother. The Court also broadly discussed the duty of petitioning counsel to give notice of proceedings to defending counsel who is known to represent the client, although a law suit or an appearance may not yet have been filed in that particular matter. See Smith v. Johnston, 711 N.E. 2d 1259 (Ind. 1999) (default judgment set aside for misconduct when plaintiff's attorney filed suit and pursued default judgment without notifying attorneys she knew represented defendant in matter).

Finally, with regard to notice of the termination pleading and the initial hearing date, it may also be significant to note IC 31-35-2-6.5 which requires that the party that filed the termination petition shall send notice of the termination hearing at "least ten (10) days before" the hearing to the parent, and other specified individuals. This section has been strictly enforced with regard to modifications in the originally set date for the termination trial, but may have some application to notice of the initial hearing in the termination case. In In Re D.L.M., 725 N.E. 2d 981 (Ind. Ct. App. 2000), the court initially scheduled the termination trial date for August 31 and then rescheduled the trial for August 6. The court gave notice of the changed date to the mother's attorney. The mother did not appear for trial, and the court took evidence and entered a judgment of termination. The Court of Appeals reversed for lack of notice to the mother on the following reasoning: the heightened principles of due process and the fundamental rights at stake in the termination hearing; the unambiguous language of IC 31-35-2-6.5 that notice must be given to the parent five days (now ten) in advance of the hearing; and the brief time before the trial in this particular case. Id. at 983-984. Although Ind. Trial Rule 5(B) provides that service should be made upon the attorney of record, IC 31-35-2-6.5 places an additional requirement on the moving party to serve the parent with notice as well as the parent's attorney. Id. at 984 n. 5. The Court mentioned in footnote 4 the argument of the office of family and children that the caseworker log contained a written notation that she had given the mother notice of the new hearing date, but the Court responded that the log could not be taken into consideration on appeal because it was only included in the appendix of the appeal and was not part of the record on appeal. Id. at 983 n. 4. The Court reiterated the well-established rule of appellate procedure that the Court may not consider evidence outside of the record. Id. See also Harris v. Delaware County Division, 732 N.E. 2d 248 (Ind. Ct. App. 2000) (termination judgment reversed because IC 31-35-2-6.5 required notice to the father of the changed date of the termination hearing, and publication notice of the changed date was not made in strict compliance with the trial rules).

F. Default Judgment and Judgment on Merits When Parent Does not Appear

The Court noted in Young v. Elkhart County Office of Family, 704 N.E. 2d 1065, 1068 (Ind. Ct. App. 1999), that default judgments are disfavored in Indiana. In Young, the mother did not appear for the termination hearing. The court granted the motion of mother's counsel to withdraw due to lack of communication with her client, and the court stated its willingness to enter a default judgment. Id. The hearing proceeded with regard to the father, and the mother's counsel did not participate. The court entered judgment terminating the parental rights of both parents. In reversing the default judgment against the mother on appeal, the Court noted that the requirements for a default judgment had not been satisfied. Ind. Trial Rule 55(B) requires three days notice of the default, and a default judgment is not proper when the defendant has filed a responsive pleading, even if the defendant fails to appear for trial. Id. at 1068. In this case there was no evidence that any party moved for default or that the mother was given the required notice of default, and the evidence showed that counsel had filed an appearance, a responsive pleading, and appeared with the mother at numerous hearings. Id. at 1069. Although the default judgment was error, the Court clarified that the trial court could have proceeded to take evidence and render a judgment if a prima facie case was established. Id. at 1068. The

Court stated:

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

Id. at 1069.

In Matter of A.N.J., 690 N.E. 2d 716 (Ind. Ct. App. 1997), the father did not appear for the initial hearing, and claimed on appeal that the trial court erred by failing to appoint counsel for him and taking evidence at the hearing. The Court noted that due to his failure to appear, "the trial court did not inform him of his statutory rights and could have entered judgment against him." Id. at 720.

IV. MANDATORY PETITION FOR TERMINATION OF PARENT-CHILD RELATIONSHIP

A. When is a Termination Petition Mandated?

IC 31-35-2-4.5 lists the situations under which a petition for involuntary termination is mandated, who shall file the petition, and the conditions under which a motion to dismiss the petition shall be filed. Unfortunately, this is a difficult statute to read. IC 31-35-2-4.5(b) indicates that the persons with standing to file a involuntary termination petition are mandated to file petitions for children who fall into either of the two categories listed in subsection (a) of the statute. The first category, (a)(1), includes children for whom the court has made a finding that reasonable efforts for family preservation or reunification are not required under IC 31-34-21-5.6. These types of cases may be referred to as "reasonable efforts exceptions." See Chapter 4 at VII. C. for detailed discussion on abandoned infants, prior termination cases, and parental criminal convictions that may qualify as reasonable efforts exceptions. The second category, (a)(2), includes children who have been removed from their parents under the supervision of the office of family and children, and have been in placement for fifteen of the last twenty-two months. The fifteen month period can be extended for up to sixty days to account for all or a portion of the time the child was in out-of-home placement prior to the CHINS adjudication. IC 31-35-2-4.5(a)(2)(B).

B. Who Must File Mandatory Termination Petition?

IC 31-35-2-4.5(b) provides that a person who has standing to file an involuntary termination petition is mandated to file a petition for a child who fits within the categories listed in subsection (a) of that statute. The persons with standing to file a termination petition are listed in IC 31-35-2-4(a) as counsel for the office of family and children, the prosecuting attorney, and the child's guardian ad litem/CASA. The statute does not clarify how it is determined which of those above identified persons must file the petition. The person filing the petition shall request that it be set for hearing. IC 31-35-2-4.5(b)(2).

C. Office of Family and Children and Prosecutor Can Be Joined in Mandatory Petition Brought by GAL/CASA

IC 31-35-2-4.5(c) provides that the prosecutor or the office of family and children are "entitled to be joined as a party" on a mandatory petition to terminate filed by a guardian ad litem/CASA "upon application to the court."

D. Motion to Dismiss Mandatory Termination Petition

IC 31-35-2-4(b)(3) requires that any person filing a petition for involuntary termination "must" indicate whether the statutory factors for a motion to dismiss apply to the case. IC 31-35-2-4.5(d) provides that "[a]party shall file a motion to dismiss" the petition for involuntary termination if any of the circumstances paraphrased below apply:

- COMPELLING REASON NOT TO TERMINATE, (d)(1). A motion to dismiss shall be filed if the case plan of the office of family and children documents a "compelling reason, based on facts and circumstances stated in the petition or motion, for concluding" that proceeding on a petition to terminate the parent-child relationship is "not in the best interests of the child." "A compelling reason may include the fact that the child is being cared for by a custodian who is a parent, stepparent, grandparent, or responsible adult who is the child's sibling, aunt, or uncle or a relative who is caring for the child as a guardian." The term "custodian" is defined in the juvenile code broadly at IC 31-9-2-31 as "a person with whom the child resides."

- OFFICE OF FAMILY AND CHILDREN DID NOT PROVIDE SERVICES AND CASE PLAN NOT EXPIRED, (d)(2). A motion to dismiss shall be filed if all of the following conditions exist: the reasonable efforts exception in IC 31-34-21-5.6 does not apply; the office of family and children did not provide services under the case plan or permanency or dispositional orders to permit and facilitate safe return of the child to the home; and the period for completion of family services under the case plan, permanency plan, and other dispositional orders has not expired.
- OFFICE OF FAMILY AND CHILDREN DID NOT PROVIDE SERVICES THAT ARE SUBSTANTIAL AND MATERIAL TO REUNIFICATION, (d)(3). A motion to dismiss shall be filed if all of the following conditions exist: the reasonable efforts exception in IC 31-34-21-5.6 does not apply; the office of family and children did not provide services under the case plan or permanency or dispositional orders: and the services that have not been provided are substantial and material to implement safe return of the child to the child's home.

The application of the mandatory motion to dismiss subsections in IC 31-35-2-4.5(d) is unclear. Arguably, the right to file a motion to dismiss only applies to those termination petitions that are mandated in subsection (a) of the statute (i.e. reasonable efforts exceptions or child out of home fifteen of the last twenty-two months), since the language of subsection (a) appears to limit the entire statute to those situations. If the statute is not so limited, parties will be able to file a motion to dismiss based on subsection (d) of this statute on any termination of the parent-child relationship petition.

E. Who Shall File Motion to Dismiss?

IC 31-35-2-4.5(d) provides that “a party shall file a motion to dismiss a petition to terminate the parent-child relationship” whenever the specified circumstances apply. The “party” language would include the office of family and children, the prosecuting attorney, the child’s guardian ad litem or CASA, and the child’s parents. This statute seems to illogically require that the office of family and children file a motion to dismiss its own mandatory petition for termination in some situations. See this Chapter below at IV. H. on the constitutionality of the mandatory termination petition process. However, this unusual approach is consistent with IC 31-35-2-4(b)(3) which provides that the petition for termination must state whether one of the specified circumstances applies that would “require” dismissal of the termination petition.

F. Hearing on Motion to Dismiss

The law is not clear if a hearing is required on a motion to dismiss, although that would seem to be the better practice and there are indications that a hearing was intended. See IC 31-35-2-6.5(b) (notice is required on the motion to dismiss hearing); IC 31-35-2-4.5(d) (court shall dismiss petition for termination if it “finds” that the allegations in the motion to dismiss are “established by a preponderance of the evidence”); Phelps v. Sybinski, 736 N.E. 2d 809, 815 (Ind. Ct. App. 2000) (Indiana law provides for judicial review of motion to dismiss mandatory petition for termination, rather than giving office of family and children discretion to avoid filing termination petitions in some cases). There are no time requirements for a hearing on the motion to dismiss. Some courts may want to combine the hearing on the motion to dismiss and the hearing on the petition for termination of the parent-child relationship.

G. Standard for Granting Motion to Dismiss

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

H. Constitutionality of Indiana Legislation Mandating Petitions for Involuntary Termination

In Phelps v. Sybinski, 736 N.E. 2d 809 (Ind. Ct. App. 2000) the parents of an autistic child brought a class action challenging the legality of the mandatory termination law at IC 31-35-2-4.5 for children who have been placed outside of their homes for fifteen of the last twenty-two months under the supervision of the office of family and children. The facts of the case show that the child had been placed outside of his home for the requisite period of time. Even though the office of family and children recommended a permanency plan of long term foster care or institutional care with regular parental visitation as being in the best interest of the child, the office filed the termination petition as required by law. Id. at 812. In response to the petitioner’s class action, the office of family and children filed a motion to dismiss the class action, which was granted after a hearing. The Court of Appeals affirmed the dismissal and upheld the mandatory termination petition law against challenges that it violated federal law, as well as state and federal

constitutional rights of due process and equal protection, and requirements for separation of powers. The Court began its opinion by stating that the federal 1997 Adoption and Safe Families Act, upon which the Indiana law is based:

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

Id. at 813. The Court then compared the federal law and Indiana law, and although they take different approaches to the issue, both laws require a preliminary determination as to whether termination is in the best interest of the child. Id. at 814-815. Under federal law, the county attorney has the discretion to avoid filing a petition if he determines that termination is not in the best interest of the child. Under Indiana law, the county attorney must file every petition for children who fit into the time criteria, but the attorney is required to allege if the termination is contrary to the best interest of the child and the trial court is required to determine if dismissal of the termination petition would be in the best interests of the child. The Court noted that Indiana law does even more to safeguard the interests of children in foster care by requiring a judicial review of motions to dismiss, and the Indiana procedures do not violate federal law. Id. at 815. Further, the Court ruled that Indiana law does not violate due process or equal protection of the law, nor does it require attorneys to violate the Rules of Professional Conduct. On this latter issue, the Court noted that the Indiana law does not require attorneys to bring frivolous actions because a judicial determination as to whether a termination petition is in the best interest of the child is not frivolous, and Indiana law does not require an attorney to make a false statement in his pleadings because the petitioner must note any existing grounds for dismissal in the termination petition. Id. at 817.

V. PROCEDURAL ISSUES

A. Parties to the Involuntary Termination Case

Given the general rule that termination cases follow the same procedures as statutorily set for CHINS cases, the parties to the termination case would be the same as those set out in IC 31-34-9-7 for the CHINS case: the child; the child's parent, guardian, or custodian; the office of family and children; and the guardian ad litem/ CASA.

IC 31-35-2-6.5(g) provides that a person entitled to the ten day notice of the termination hearing does "not become a party to a proceeding under this chapter as the result of the person's right to notice and the opportunity to be heard." IC 31-34-21-4.5 allows a foster parent to request to intervene at the review stage of the CHINS proceeding, and intervention may be granted if the court determines it is in the best interests of the child. Although there is no comparable statute for foster parent intervention for the termination proceedings, a foster parent or any other person can file a motion seeking to intervene as a party under Ind. Trial Rule 24.

B. Noncustodial Parents and Alleged Fathers

IC 31-9-2-88 defines "parent" to include both biological and adoptive parents, "regardless of their marital status." Thus, a father who was not married to the mother at the child's birth (alleged father) but later established his paternity by affidavit or a paternity proceeding, and a parent who is divorced from the custodial parent, qualify as parents under the juvenile code and have parental rights. These persons should be named in the termination petition and given notice, if all parental ties are to be terminated so that the child is free for adoption.

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

In some cases, the noncustodial parent may choose to voluntarily terminate his/her parental rights, even though the other parent continues to contest the termination. In Matter of J.T., N.E. 2d (Ind. Ct. App. 2001), the mother alleged that the trial court erred in accepting the voluntary termination of the father, prior to the contested trial regarding her parental rights. Although the Court ruled that the issue was moot on appeal

since mother's rights had been terminated, the Court cautioned trial courts "to be wary of voluntarily terminating the parental rights of a non-custodial parent before adjudicating the parental rights of the custodial parent" as doing so "could materially affect the rights of the child to receive support in the event the custodial parent's rights are not terminated." The trial court can heed this warning by taking the voluntary termination petition under advisement until judgment is obtained on the contested termination petition.

Case law also indicates that alleged fathers who have never established their paternity have an interest in the child, and should be included in the termination proceeding. See Matter of N.B., 731 N.E. 2d 492, 494 (Ind. Ct. App. 2000) (father had not established paternity at the time of the termination petition); Young v. Elkhart County Office of Family and Children, 704 N.E. 2d 1065, 1068 (putative father challenged sufficiency of evidence in termination case); Matter of K.H., 688 N. E. 2d 1303, 1305 (Ind. Ct. App. 1997) (paternity does not have to be established before commencing termination proceeding); Matter of A.C.B., 598 N. E. 2d 570, 572 (Ind. Ct. App. 1992) (Court noted putative father was provided same rights as those afforded to adjudicated fathers).

If the alleged father does not appear or participate in the CHINS proceeding or does not take an active role in the child's life, it is still necessary to file a termination proceeding regarding his parental rights and give him notice. Another plausible method of dealing with an inactive or never-active alleged father who has not established paternity is to seek termination of his parental rights by operation of law through the adoption process rather than the juvenile court termination process. This would only be appropriate when there is an existing adoption petitioner and legal grounds exist for dispensing with the father's consent in connection with the adoption. See Chapter 3 at II. G. for jurisdictional issues in CHINS, termination, and adoption proceedings regarding the same child.

- C. Ten Day Notice of Termination Hearing to Parents, Foster Parents, Prospective Adoptive Parents, and Others IC 31-35-2-6.5 requires that ten day notice (prior law required five day notice) of a hearing on a motion to dismiss or a hearing on a petition for termination of the parent-child relationship must be given by the party who filed the termination petition, which could include the office of family and children, prosecutor, or the guardian ad litem/CASA. The following persons shall be given notice: (1) the child's parent, guardian, or custodian, and any other party to the CHINS proceeding; (2) prospective adoptive parents named in an adoption petition, under certain situations; (3) any person whom the office of family and children knows is "currently providing care" for the child; (4) any other suitable relative or person whom the office of family and children knows has had "a significant or care taking relationship to the child"; and (5) any emergency medical services provider who has taken custody of an abandoned infant. This notice provision does not appear to apply to the involuntary termination statute based on the criminal conviction of the parent at IC 31-35-3-1 though 9. See this Chapter above at III. E. for case law on failure to give required notice to parent of termination hearing.

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

- D. Rights of Foster Parents, Prospective Adoptive Parents, and Other Non-Parties to Give Recommendations and Written Statements in Termination Hearing IC 31-35-2-6.5 provides that all persons who are entitled to the ten day notice of the termination hearing shall be given an "opportunity to be heard and make recommendation to the court at the hearing." A 2000 legislative amendment clarifies that the right to be heard includes the right to "submit a written statement to the court that, if served upon all parties to the child in need of services proceeding" (and other specified persons) "may be made a part of the court record." See section immediately above in this Chapter for list of persons entitled to notice under IC 31-35-2-6.5. The statute does not clarify if the statement will be admitted over a hearsay objection, particularly when the declarant is not available for cross-examination. The discretionary "may" language suggests that the judge can entertain objections to a motion to admit the statement.

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

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

There is no case or statutory law that the juvenile judge who heard the CHINS case may not hear the termination case involving the same children and parents. See Matter of D.T., 547 N.E. 2d 278, 283 (Ind. Ct. App. 1989) (law presumes that trial judge is unbiased, and the judge's knowledge of prior CHINS proceedings does not show bias in absence of evidence that judge had personal prejudice for or against a party). Note, however, that IC 31-32-8-2 provides that the judge who heard the underlying criminal case against the parent may not hear a termination case filed under the special provisions of IC 31-35-3-1 through 9.

F. Right to Counsel

A parent has the right to be represented by counsel in the termination proceeding. IC 31-32-4-1. If the parent does not hire counsel, nor specifically waive the right to counsel, then the court must appoint counsel for the parent. IC 31-32-4-3. However, in Matter of A.N.J., 690 N.E. 2d 716, 720 (Ind. Ct. App. 1997), the Court of Appeals ruled that it was not error to fail to appoint counsel for the father when he did not appear (despite notice) at the termination hearing to be advised of his rights, and the court proceeded to take evidence in his absence. In Keen v. Marion Cty. D. of Public Welfare, 523 N.E. 2d 452 (Ind. Ct. App. 1988), the Court of Appeals considered whether the mother had waived her right to appointment of counsel. A public defender had been appointed for the mother, but on the date of the trial the mother requested a continuance so that she could obtain her own counsel. The trial court granted the continuance reluctantly but informed the mother that she was waiving her right to counsel and might have to represent herself. The mother failed to obtain private counsel and at the next scheduled trial date requested that a public defender be re-assigned to her case. The trial court refused and the hearing proceeded. The Court of Appeals affirmed the trial court's decision granting termination of parental rights, and ruled that mother had waived her right to counsel. The Court stated that parental termination actions are civil in nature and the stringent requirements prescribed for criminal cases are not required. The Court stated that unlike the constitutional right to counsel in criminal proceedings, the due process clause does not mandate the right to court appointed counsel in all termination proceedings but it is determined on a case by case basis.

See Chapter 2 at IV. C. and D. for discussion on court appointed counsel in CHINS and termination cases.

G. Appointment of Guardian Ad Litem/CASA

If the parent opposes the termination petition, a guardian ad litem/CASA must be appointed for the child. IC 31-35-2-7. The court may appoint the guardian ad litem/CASA who currently represents the child in the CHINS case to serve in the termination case. Failure to appoint a guardian ad litem/CASA for the children in a termination proceeding resulted in reversal of the termination judgment in Jolley v. Posey County DPW, 624 N.E. 2d 23 (Ind. Ct. App. 1993), and Matter of S.L., 599 N.E. 2d 227 (Ind. Ct. App. 1992).

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

H. Initial Hearing on the Termination Petition

Although there is no statutory authority or requirement for an initial hearing on the termination petition, this is standard practice. At the initial hearing presumably the judge does the following: (1) reviews the termination petition and clarifies the consequences of termination; (2) advises the parents of their rights under IC 31-32-2-3 and IC 31-32-2-5, and appoints counsel for parents when required; (3) determines whether the parents admit or deny the termination petition and enters a judgment of termination if the parents make an admission; (4) appoints a guardian ad litem/CASA under IC 31-35-2-7 for the child if the parents enter a denial to the termination petition; (5) sets a date for the contested termination hearing if there is a denial.

I. Termination Hearing Commenced Ninety Days from Filing Petition

IC 31-35-2-6 and IC 31-35-3-7 provide that when a hearing on an involuntary termination petition is requested, the hearing shall be commenced within ninety days of the filing of the petition. See Phelps v. Sybinski, 736 N.E. 2d 809, 814 (Ind. Ct. App. 2000) (the Court noted in dicta that Indiana law requires "that a hearing on a petition to terminate parental rights be held within ninety days of its filing"). Arguably, if neither the office of family and children, guardian ad litem, CASA, nor defense counsel makes a specific request for the hearing, the court is not obligated to set the hearing to commence within the ninety day period. If this course is taken, the record should clearly reflect that the parties waive any possible right to have the cause tried in ninety days.

If the guardian ad litem or office of family and children does not object to motions for continuances of the termination hearing offered by other parties, they may waive the requirement at IC 31-35-2-6 that the hearing be commenced within ninety days. See A.D. v. Clark, 737 N.E. 2d 1214, 1216, 1217 (Ind. Ct. App. 2000) (trial court did not err in staying termination case while adoption petition involving same child proceeded).

IC 31-35-2-4.5(b) requires that a person mandated to file a termination petition shall also request a hearing on the petition; however, IC 31-35-2-6 seems to exempt all mandatory petitions under IC 31-35-2-4.5 from the ninety day requirement.

Practitioners should note that the ninety day provision only requires that the hearing be "commenced" within ninety days. Some interpret this provision to merely require that an initial hearing on the termination of parental rights be set within the ninety day limit.

J. Same Procedures for CHINS and Termination Cases

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

K. Standard of Proof

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

In Matter of A.C.B., 598 N.E. 2d 571 (Ind. Ct. App. 1992), the father's appeal raised the issue of whether the trial court had used the correct "clear and convincing" standard of proof as required by IC 31-6-7-13(a) (recodified at IC 31-34-12-2). An early case, Van Hoosier v. Grant County, Etc., 443 N.E. 2d 350 (Ind. Ct. App. 1983), was cited by the father in support of his argument. At the time of the Van Hoosier decision, the "clear and convincing" standard had recently been delineated by the United States Supreme Court in the Santosky case. Because the order in the Van Hoosier case was silent as to the standard of proof, that case was remanded. The Court found that the situation in A.C.B. was different because the "clear and convincing" standard had been in effect for approximately ten years and had also been codified. The Court held, "[t]he absence of language indicating use of the clear and convincing standard no longer suggests use of the lesser preponderance of the evidence standard. Absent additional evidence that the court labored under the wrong standard of proof, a silent record will not support an allegation of error." Id. at 572.

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

Indiana case law holds that an incarcerated parent does not have an absolute right to be present for a termination hearing, but if the parent is not present, the case law indicates that the parent should be provided

an opportunity to participate in the proceedings in a meaningful time and in a meaningful manner. In J.T. v. Marion County OFC, 740 N.E. 2d 1261 (Ind. Ct. App. 2000), the facts of the case show that the father was incarcerated in Florida. He was given notice of the termination petition and appointed counsel, but was not present for the hearing. The father appealed the termination judgment on the grounds that the court's failure to obtain his presence for the hearing was a denial of due process, and ineffective assistance of counsel. The Court balanced the factors necessary to determine what process was due, and noted as follows: (1) the privacy interest was significant; (2) the risk of error due to the father's non-presence was decreased significantly by appointment of counsel for the father; and (3) the state had a compelling interest in not obtaining the presence of the father given the state's interest in reducing the delay for the child in the adjudication, the significant cost and administrative burden in transporting the parent from prison, and the need to protect society from the risk of an escaped criminal. Based upon the balancing test, the Court held that failure to secure the father's physical presence at the termination hearing did not deny father due process of law. See Chapter 2 at IV. B. for discussion on right of incarcerated parent to be present for hearings and Appendix 4 on "Appeals from Involuntary Termination of Parent-Child Relationship: Some Basic Issues" for discussion on ineffective assistance of counsel.

VI. EVIDENTIARY ISSUES

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

IC 31-35-5-1 through 7 specify the conditions under which a competent child (under fourteen years of age, but up to eighteen years of age if child has impairment of intellectual functioning or adaptive behavior) can testify by videotape or closed circuit television instead of testifying in the courtroom. See S.M. v. Elkhart Cty. Off. of Fam. and Chil., 706 N.E. 2d 596, 600 (Ind. Ct. App. 1999) (although office of family and children filed motion for mother to wait outside courtroom while children testified and mother's attorney did not object to this procedure during hearing, Court found this procedure constituted error because only method for children to testify outside presence of parents is by closed circuit television or videotape in compliance with statutory procedures at IC 31-35-5-2 and 3). See Chapter 7 at VII. for detailed discussion on the use of closed circuit television or videotaping when testifying in the courtroom in the presence of the parents will be harmful to the child.

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

The juvenile code makes no provision for in camera interviews of children in CHINS and termination cases. The code does provide at IC 31-35-5 that competent children can testify outside the courtroom by closed circuit television or videotaping under certain circumstances. In the recent case of Matter of A.N.J., 690 N.E. 2d 716 (Ind. Ct. App. 1997), the Court of Appeals mentioned in the statement of facts that the trial court had conducted an in camera interview with the children; however, the propriety of the interview was not an issue in the appeal. Note the ruling in S.M. v. Elkhart Cty. Off. of Fam. and Chil., 706 N.E. 2d 596 (Ind. Ct. App. 1999), set out in the section immediately above, that children can testify outside of the presence of their parents only in compliance with IC 31-35-5-2 and 3.

C. Hearsay, Child Hearsay Exception, and Guardian Ad Litem/CASA Testimony

Hearsay is not admissible in the termination hearing unless it fits within a recognized hearsay exception under the Ind. Evidence Rules or the Child Hearsay Exception at IC 31-35-4. See Chapter 7 at VIII. for detailed discussion on the general rule excluding hearsay in CHINS factfinding and termination hearings, and hearsay exceptions to the exclusion rule.

The Child Hearsay Exception at IC 31-35-4 provides that a child's out-of-court statement may be admissible if a hearing is held and the court makes a finding that the statement is reliable and a finding that the child is unavailable to testify because (1) the child is incapable of understanding the nature and obligation of the oath (i.e. not competent to testify), (2) testifying would create a substantial likelihood of emotional or mental harm to the child, or (3) the child cannot be present for medical reasons. See Chapter 7 at IX. for detailed discussion on procedures for the Child Hearsay Exception. In Matter of Relationship of M.B., 638 N.E. 2d 804 (Ind. Ct. App. 1994), the welfare department filed a petition for a hearing to determine the admissibility of statements the children made to a counselor and a foster parent. The statements were admitted into evidence in the termination hearing. On appeal, the parents claimed the admission was error because (1) the children were not present in the courtroom, and (2) the affidavit that the children would suffer harm if required to testify was insufficient. The Court ruled that the actual presence of the children was not required

in the hearing because they were at all times available to testify, and the Court noted that the legislature had recently deleted the requirement that the children must be present for the hearing to determine admissibility. Id. at 809 n. 2. Also, the Court ruled that the affidavit of the psychologist satisfied the statutory requirement of “certification” of harm, even though the affidavit was based in part on hearsay information from the children’s counselor. The record showed that the psychologist examined the children for an hour, in addition to reviewing the counselor notes, and the psychologist’s affidavit showed a substantial likelihood of mental or emotional harm to the children. The Court said that the evidence satisfied the “clear and convincing standard” required for admissibility in termination cases under the Child Hearsay Exception statute. Id. at 810.

Although the prohibition against hearsay would generally prevent a guardian ad litem/CASA from testifying to the exact statements of the child, the Court said in Matter of Adoption of D.V.H., 604 N.E. 2d 634 (Ind. Ct. App. 1992) that the guardian ad litem may be allowed to summarize in the termination hearing the needs and desires expressed by the child without restating the exact language of the child

D. Privileged Communications and Mental Health and Drug Records

Case law has clarified that the statutory abrogation of privileges at IC 31-34-12-6 applies to termination cases, and case law has extended the statute beyond the specific privileged relationships enumerated therein. Case law provides that the following privileged relationships are not a bar to testimony in termination cases: physician-patient privilege, Shaw v. Shelby County DPW, 612 N.E. 2d 557, 558 (Ind. 1993); clinical social worker-patient privilege, Stone v. Daviess Co. Div. Child Serv., 656 N.E. 2d 824, 831 (Ind. Ct. App. 1995); psychologist-patient privilege, Ross v. Delaware County Dept. of Welfare, 661 N.E. 2d 1269, 1271 (Ind. Ct. App. 1996). See Chapter 7 at II. C. on discovery and admissibility of privileged information.

Although certain privileged communications between professionals may not be grounds for excluding information in termination proceedings, mental health confidentiality laws may still be an issue. These laws provide that mental health records are confidential and protected. However, the laws generally provide that the child’s mental health records can be obtained by the child’s parents or guardian, the office of family and children, or the guardian ad litem/CASA. The mental health records of a parent or adult caretaker for the child may be discovered if the parent or caretaker consents to disclosure in a written “release of information” form. The records may be obtained without consent through a hearing process in which the party seeking the records shows good cause for the disclosure of the information. Although the statutory law on mental health records has been modified substantially since Matter of J.O., 556 N.E. 2d 948 (Ind. Ct. App. 1990) was decided, it may still be good law in some aspects. In J.O. the Court ruled that the testimony of welfare caseworkers and mental health care providers that indicated what services were provided to the mother might be allowable under certain circumstances, despite the confidentiality laws. See Chapter 7 at II. D. 4. for discovery of mental health records.

In Doe v. Daviess County, 669 N.E. 2d 192, 196 (Ind. Ct. App. 1996), the Court of Appeals ruled that medical records and testimony of health care providers on mother’s alcoholism and drug addiction were admissible in compliance with federal hearing requirements. Drug and alcohol records may be disclosed without the patient’s consent, after a hearing, if good cause is shown upon the record. To determine good cause the court must apply a balancing test which weighs the public interest and the need for disclosure against the possible injury to the patient or program. See Chapter 7 at II. D. 6. for discovery of drug and alcohol records.

E. Admitting Copies of CHINS Records in Termination Hearing and Issues of Judicial Notice

At the termination hearing, the office of family and children may offer into evidence certified copies of the CHINS detention orders, CHINS petition, CHINS admission or the court's judgment from the factfinding hearing, predispositional and progress reports, dispositional and modification orders, review hearing findings and orders, and parental participation petitions and orders. See Tipton v. Marion County DPW, 629 N.E. 2d 1262, 1266 (Ind. Ct. App. 1994) (Court was critical of welfare’s failure to admit CHINS petitions, orders and reports into evidence at termination hearing); Adams v. Office of Fam. & Children, 659 N.E. 2d 202, 205 (Ind. Ct. App. 1995) (office of family and children admitted CHINS petition, CHINS order, predispositional report, and dispositional order in termination case). However, there may be some question as to whether the CHINS records containing hearsay (particularly dispositional and review hearing reports) may be objectionable on hearsay grounds if offered into evidence in the termination proceeding. There has been some controversy in Indiana as to whether the office of family and children can ask the trial court to take judicial notice of the court records from the underlying CHINS case, instead of admitting certified copies of the record into evidence. Case law holds that a court can take judicial notice of its own records in the present

case, or a continuation of the case. See Cunningham v. Hiles, 439 N.E. 2d 669 (Ind. Ct. App. 1982) (judicial notice applies to all stages of an entire proceeding and contempt is one stage of the original proceeding for purposes of judicial notice). In the termination case of Tipton v. Marion County DPW, 629 N.E. 2d 1262, 1266 (Ind. Ct. App. 1994), the Court implied that it is possible for a trial court to take judicial notice of the underlying CHINS record. In fact the Court in Tipton was openly critical of the welfare department in stating that the “DPW did not introduce into evidence the CHINS petition...or any other document or order containing written findings, which was required to be created during the proceedings...Neither did the DPW ask the court to take judicial notice of the underlying CHINS proceeding”. Id. at 1266. Despite the language of Tipton, most practitioners consider that the CHINS and termination proceedings are separate legal cases, see State v. Gosnell v. Cass Cir. Court, 577 N.E. 2d 957 (Ind. 1991), and therefore the judge in the termination case cannot take judicial notice of the orders from the CHINS case. This is consistent with the general rule in Indiana law that a court cannot in one case take judicial notice of a different case, even if the other case is before the same judge or involves a related subject between the same parties. See Lake County FCS v. Charlton, 631 N.E. 2d 526, 529 (Ind. Ct. App. 1994) (improper for court to take judicial notice in CHINS case of support issues heard by same judge in paternity case involving the same family members); Matter of A.C.B., 598 N.E. 2d 570, 573 (Ind. Ct. App. 1992) (trial court cannot take judicial notice of ruling in father’s paternity proceeding in the termination of parental rights case). However, case law does provide that it is not error for the court to take judicial notice if the party adversely affected by the judicial notice admits to the existence of the other case. See Kennedy v. Jester, 700 N.E. 2d 1170, 1173 (Ind. Ct. App. 1998) (not error to take judicial notice of pending murder appeal in civil case seeking payment of insurance proceeds, as party adversely affected by judicial notice acknowledged fact in question to trial court). Also, Indiana case law does indicate that equity and common sense may allow a judge to take judicial notice of orders from other cases, in some limited situations. See State v. Hicks, 525 N.E. 2d 316, 317 (Ind. 1998) (post-conviction relief trial judge was justified in taking judicial notice of proceedings which had occurred in his court, even though proceeding occurred at subsequent trial of co-defendant). Although there is no definitive case law on taking judicial notice of the underlying CHINS records in a termination case, the better practice is to introduce certified copies of the CHINS records into the termination hearing, rather than requesting that the court take judicial notice of the records.

F. Introduction of Evidence after Termination Hearing Concluded

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

G. Offensive Collateral Estoppel to Prevent Relitigation of CHINS Judgment

On appeal of the termination judgment, the parents in Adams v. Office of Fam. & Children, 659 N.E. 2d 202, 206 (Ind. Ct. App. 1995), alleged that the evidence was insufficient to prove the children had been sexually molested by the father. The office of family and children responded that the juvenile court had adjudicated that the children were molested as the grounds for the CHINS judgment in a factfinding hearing, and therefore the parents were estopped in the termination hearing from alleging the molestation had not occurred. The Court of Appeals agreed with the office of family and children and ruled that the parents were barred from relitigating the sexual abuse allegations in the termination case. However, in Matter of C.M., 675 N.E. 2d 1134, 1137-1138 (Ind. Ct. App. 1997), the Court of Appeals ruled that the mother was not barred from offering evidence in a termination hearing challenging the original judgment of CHINS. The court ruled that the mother's original admissions in the CHINS case were admissible in the termination proceeding, but the mother was not estopped from trying to refute her prior admissions by presenting evidence to the contrary.

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

In Matter of D.J., 702 N.E. 2d 777, 780 (Ind. Ct. App. 1998), the Court ruled that evidence that mother’s relationship with an older child had been involuntarily terminated could be admitted into evidence in the termination trial of the younger child. The Court noted that although the CHINS provision at IC 31-34-12-5

for the admissibility of evidence that prior or subsequent acts or omissions of a parent, guardian or custodians injured a child did not specifically apply to termination cases, Ind. Evidence Rule 405 applies to termination cases and allows for admission of proof of "specific instances of that person's conduct" when the character of a person is an essential element of the case. *Id.* at 780 n. 4. The Court determined that the character of a parent is "an integral factor in assessing a parent's fitness and in determining the child's best interest." *Id.* at 780. The evidence demonstrated that despite the previous intervention of the office of family and children, the mother had not developed adequate parenting skills, and the mother's habitual pattern of behavior was relevant to determine whether she was likely to be able to provide a satisfactory home for the child in the future. *Id.* The Court held that specific instances of a parent's character, including evidence regarding a previous termination of parental rights, is admissible character evidence in a subsequent termination proceeding. *Id.* See also *Matter of J.L.V., Jr.*, 667 N.E. 2d 186, 190 (Ind. Ct. App. 1996) (office of family and children could admit evidence in CHINS factfinding hearing of mother's prior involvement with office of family and children regarding four other children who were not subject of CHINS petition currently before trial court).

See Chapter 7 at X. on prior and subsequent acts and omissions and character evidence.

- I. Expert Testimony
See Chapter 7 at V. on expert testimony and scientific evidence.
- J. Issues on Termination Appeal
See Appendix 4 at "Appeals from Involuntary Termination of Parent-Child Relationship: Some Basic Issues."

VII. POST TERMINATION

- A. Effect of Termination Judgment
IC 31-35-6-4 provides that:

- (a) If the juvenile or probate court terminates the parent-child relationship:
 - (1) all rights, powers, privileges, immunities, duties, and obligations, including any rights to custody, control, visitation, or support, pertaining to that relationship, are permanently terminated; and
 - (2) the parent's consent to the child's adoption is not required.
- (b) Any support obligations that accrued before the termination are not affected. However, the support payments shall be made under the juvenile or probate court's order.

- B. After the Termination Judgment

If a termination judgment is entered, the child continues as a CHINS, subject to the review hearing requirements. The office of family and children and the guardian ad litem/CASA will seek a permanent option for the child.

The court has the authority under IC 31-35-6-1 to refer the case to the probate court for adoption proceedings or to order any dispositional alternatives available under IC 31-34-20-1. If the juvenile court refers a post-termination case to the probate court for adoption, the juvenile court shall review the child's case once every six months until a petition for adoption is filed. IC 31-35-6-1(b). When the case is referred to the court with probate jurisdiction for adoption proceedings, the guardian ad litem/CASA shall comply with the following requirements from IC 31-35-6-2:

- (1) Provide the county department with information regarding the best interests of the child.
- (2) Review the adoption plan as prepared by the county department as to the best interests of the child.
- (3) Report to the court with juvenile jurisdiction and, if requested, to the court having probate jurisdiction, regarding the plan and the plan's appropriateness in relationship to the best interests of the child.

VIII. CASE LAW ON REQUIRED ELEMENTS

A. Removal from Parent for Six Months Under Dispositional Decree

IC 31-35-2-4(b)(2)(A)(i) requires proof that the "child has been removed from the parent for at least six (6) months under a dispositional decree." This element must be proven unless the reasonable efforts exception at (A)(ii) or the fifteen of twenty-two months provision of (A)(iii) apply to the case. The following subissues have been generated by this six month removal requirement.

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

In Matter of Y.D.R., 567 N.E. 2d 872, 875 (Ind. Ct. App. 1991), the mother appealed the trial court's order terminating the parent-child relationship, arguing that a dispositional hearing was never held and therefore one of the statutory elements for termination of the parent-child relationship had not been met. The Court of Appeals acknowledged that the trial court never entered an order labeled "Dispositional Decree;" however, the Court found that the trial court had held a hearing immediately after the mother's admission to the CHINS petition and the hearing complied with the disposition statute. In Matter of Robinson, 538 N.E. 2d 1385 (Ind. 1989), the Indiana Supreme Court similarly found that the absence of a specific removal order was not error, if the record clearly reflected that the children had been removed from the father's care. The Court stated that:

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

Id. at 1387.

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

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

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

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

Termination judgments were reversed in Platz v. Elkhart County Dept. of Welfare, 631 N.E. 2d 16, 19 (Ind. Ct. App. 1994), and in Parent-Child Relationship of L.B. & S.C., 616 N.E. 2d 406, 407 (Ind. Ct. App. 1993), because the termination petitions were filed earlier than six months after the children's removal from their parents under a dispositional decree.

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

There has long been an issue as to whether the six month removal period must occur immediately before the termination petition is filed, and what effect the time a child spends on "extended visits" or "trial periods" at home has on the filing of the termination petition. In Matter of Miedl, 425 N.E. 2d 137 (Ind. 1981), the Supreme Court of Indiana discussed the meaning of the statutory requirement that the child be removed from the custody of the parent for six months under a dispositional decree before a termination petition may be filed. In Miedl, the trial court on its own motion had made a verbal order to the welfare department to place the children with their mother under the continued wardship of the department in February, 1979. The trial placement was unsuccessful, and the court ordered the children returned to foster care in May, 1979. The petition for termination of the parent-child relationship was filed in June, 1979. The children had resided under the care, supervision, and custody of the welfare department for a period of more than one year preceding the termination judgment, and the Supreme Court held that the six months removal requirement had been met. Id. at 140. The Court emphasized that the "temporary, unofficial" placement with the mother during which she was not given court-ordered custody of the children, did not break the chain of events such that a new six month period must be completed to fulfill the requirements of the law. See also In Re Wardship of M.H., 490 N.E. 2d 1119, 1122 (Ind. Ct. App. 1985) (trial period at home does not initiate a new six month period). In Matter of A.N.J. 690 N.E. 2d 716, 721 (Ind. Ct. App. 1997), the Court found that two to three years had passed since the dispositional order and therefore the six month requirement was satisfied even though the children had been returned to their parents for two different periods of time during that two to three year stretch.

In In Re M.M., 733 N.E. 2d 6 (Ind. Ct. App. 2000), the Court acknowledged the unusual situation in which the fourteen year old mother (who was herself a CHINS) had been placed in foster care with her CHINS infant. In that case the court had placed the child and mother together in several different foster home placements, but in the six months prior to the filing of the termination petition the mother had not been with the child due to her running away from the foster placement and her multiple placements in detention, residential care, and in the Indiana Girls School. The Court stated that the "removal" requirement of the termination statute applies to a dispositional decree "which authorizes an out-of-home" placement. Id. at 12. The Court noted that mother had never provided the child with a home from which the child could be removed, and the child had always been under the supervision of foster parents and the office of family and children. The Court noted that the child had resided in court ordered foster care without the mother for more than six months, and the Court ruled that the statutory criteria for six months removal had been met. Id.

5. Effect of Out-Of-State Dispositional Orders

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

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

IC 31-35-2-4(b)(2)(B)(i) requires proof that "there is a reasonable probability that: (i) the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied." Note, that the office of family and children is required to prove either this element, or the element stated in IC 31-35-2-4(b)(2)(B)(ii) discussed in VIII. C. of this Chapter below, but not both.

The case law reflects the myriad of factors the courts have taken into consideration in determining whether the reasons for the child's removal from the parent, or placement outside the home of the parent, will be remedied. Two cases are listed in subsection 1. below as examples of the range of factors considered on this element, but practitioners should look to section IX. in this Chapter for listing of cases dealing with specific parenting factors or conditions relevant to the issue of whether the problems can be remedied, such as criminal activity, sexual abuse, substance use, etc.

1. Examples of Range of Factors Considered

In Ferbert v. Marion County OFC, N.E. 2d (Ind. Ct. App. 2001), the Court found that the following evidence supported the finding that there was a reasonable probability that the conditions that resulted in the removal of the children from the home would not be remedied: (1) the continued and consistent denial that the father was responsible for hitting the child; (2) the unsafe and life endangering condition that the mother placed the children in by continuing to cohabit with the father despite an order from the criminal court that the father was to have no contact with the children; and (3) the uncleanness of the home and failure of the parents to demonstrate a safe and clean home environment.

In Matter of A.M., 596 N.E. 2d 236 (Ind. Ct. App. 1992), the Court found the following evidence sufficient to support the finding that mother could not remedy the reasons the children were removed from her care: (1) mother made progress for short periods of time but would always regress; (2) mother's characterological problems made her unable to think about her future actions, causing her to repeat the same mistakes; (3) mother had been arrested three times for writing bad checks and shoplifting; (4) mother had neglected the older child's medical needs; (5) mother had changed residences eight or nine times in a two year period; (6) mother failed to visit the children consistently or to supervise them during visits; (7) mother allowed her children to have contact with a known abuser; and (8) mother moved out of town without giving notice to the welfare department resulting in no visits with the children for eight months. Id. at 239. The Court also noted that all of the mother's counselors agreed that as a result of her characterological problems she would never change.

2. Proof of Service Delivery Not Required Element, But Relevant

The involuntary termination statute, now recodified at IC 31-35-2-4(b)(2), originally required that the office of family and children prove that services were offered or provided to the parent and that the parent either failed to accept the services or the services were ineffective. This provision was deleted from the statute in 1982. See In Re E.E., 736 N.E. 2d 791, 796 (Ind. Ct. App. 2000) (provision of services not a requisite element of termination statute); Jackson v. Madison County Dept. of Family, 690 N.E. 2d 792, 793 (Ind. Ct. App. 1998) (a primary function of Department of Family and Children is to encourage and support integrity and stability of existing family; however, provision of services and counseling designed to further that purpose is not absolute requirement to termination of parental rights); Stone v. Daviess Co. Div. Child Serv., 656 N.E. 2d 824, 830 (Ind. Ct. App. 1995) (Indiana termination law "does not require agency to prove that any services have been offered to parent to assist in fulfilling parental obligations" and even "complete failure to provide services cannot serve as basis to attack termination of parental rights"); Wardship of J.C. v. Allen Cty. Office, 646 N.E. 2d 693, 695 (Ind. Ct. App. 1995) (legislature deleted in 1982 requirement that welfare department must prove it offered "reasonable services" to assist parents as element of termination case).

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

Also, although proof of services is not a required element for the termination hearing, most child welfare practitioners believe that a good termination case is based upon proof that services were offered to the parents. This is consistent with statutory law and policy in the CHINS case that the state must exert reasonable efforts toward reunification, unless the court has ruled that reunification services are not required (reasonable efforts exception) in a specific case. See IC 31-10-2-1(4); IC 31-34-21-5.5(b); IC 31-34-21-5.6; In Re E.E., at 796 (Court clarified in termination case that office of family and children was not required to provide services necessary to reunification in CHINS case where parent had her rights involuntarily terminated as to her other children and therefore fit within reasonable efforts exception). Another reason for the office of family and children to document delivery of services for the termination hearing is the 1998 statute allowing a party to file a motion to dismiss a mandatory termination of parental rights petition on the grounds of failure of the office of family and children to provide necessary reunification services under IC 31-35-2-4.5(d)(2) and (3). But see In Re E.E., at 796

(notwithstanding the grounds for motion to dismiss under IC 31-35-2-4.5(d) provision of family services is not requisite element of termination statute).

3. What Conditions Must Noncustodial Parent Remedy?

Several cases involved the claim that the reasons for the removal of the child from the home should not apply to the parent who was not living with the children at the time of the removal. In those cases, the Court found that the trial court must look to evidence as to why the child was not placed with the noncustodial parent after removal from the custodial parent. In In Re B.D.J., 728 N.E. 2d 195, 201-203 (Ind. Ct. App. 2000), the Court said that because the children were not in the custody of the father at the time of the removal, the State was required to show that the reason the children were not placed with the father would not be remedied. The trial court must determine what conditions led the office of family and children to place the children in foster care rather than placing with the father, and the court must then consider whether there is reasonable probability that those conditions will not be remedied. In affirming the termination judgment, the Court found that the children were not placed with the father upon removal of the children from the mother because of the father's inability to provide housing for the children, to maintain contact with the children, and to provide support for the children.

In Matter of C.D., 614 N.E. 2d 591 (Ind. Ct. App. 1993), the father similarly alleged that the reasons for removal of the children from the mother had nothing to do with him. Id. at 593. The Court acknowledged the father's argument, but stated: "The grounds necessitating the emergency detention of the children from Mother's home would not have been applicable to Father, but further psychological examinations of the children and Father revealed other grounds justifying removal of the children from Father. These grounds were brought out at the CHINS hearing and became the basis of the dispositional decree." Id. The termination judgment was affirmed.

In In Re A.A.C., 682 N.E. 2d 542 (Ind. Ct. App. 1997), the father argued that the reasons the child was removed from the mother had been remedied. But as to the father, who had not been in the home at the time of the children's removal, the Court found that the focus was not on the reasons for removal of the child from the mother's home, but the reasons for the continued "placement outside of the home" of the father. The Court found that those conditions (lack of child support payments and father's continued criminal activity and incarceration) showed father was still unable to care or provide for the child and the evidence did not show a likelihood that father would change. Id. at 544-545.

In Matter of A.M., 596 N.E. 2d 236 (Ind. Ct. App. 1992), the trial court's order terminating the parent-child relationship between one of the children and his father was reversed because the child had not been removed from the father's care under a dispositional order. Evidence in the CHINS proceeding indicated that the child was neglected and endangered while in the care of the mother. The father had not established paternity at the time of the child's removal, but had attempted visitation. The father later established paternity and completed three of four tasks which the welfare department requested as part of the CHINS proceeding, but the father was never given custody of the child. In reversing the trial court's judgment of termination, the Court opined that the evidence indicated the child was removed from the mother's care, not the father's, and that the father was not forced to relinquish care under a dispositional decree. Id. at 240. The Court ruled that the father had not been given an opportunity to parent and it was error to terminate his rights.

In Matter of Y.D.R., 567 N.E. 2d 872 (Ind. Ct. App. 1991), the mother argued that she was denied due process by the trial court's failure to specify in the record the conditions prompting removal of the children from her, when the children had initially be removed from the care of the father. The facts show that mother left the children in Indiana with their alcoholic and abusive father. At the time the children were removed from the father and taken into protective custody, the mother was living in a shelter for battered women in Louisville, Kentucky. While the children were in protective care, psychological evaluations of the children revealed new grounds justifying continued removal of the children from the mother. These evaluations stated that one of the children suffered from profound childhood depression and was in extreme emotional pain. Id. at 874. Improving the child's condition "would require a great deal of counseling, warmth, positive but firm responses from his caretakers, consistency, and positive interaction between adults." Id. The other child was under-nourished and showed signs of emotional and social deprivation and reflected severe expressive motor and cognitive language delay. This child was first diagnosed to be mildly mentally handicapped, but when re-tested after a brief period in foster care

showed significant gains. The Court noted that the grounds for the original removal of the children from the father were not applicable to the mother; however, the new grounds supporting removal of the children from the mother were fully and completely identified in the case plan and became the basis of the court's dispositional decree with regard to the mother. Id. at 875, 876.

See also this Chapter above Roman Numeral V. at B. for termination petitions involving noncustodial or alleged fathers.

4. Did Parent Have Adequate Notice of Problems to be Remedied and Effect of Case Plan on Termination? In Matter of D.T., 547 N.E. 2d 278 (Ind. Ct. App. 1989), the mother argued on appeal that the welfare department's petitions and the court's detention orders did not provide her with notice of all the conditions that had to be remedied to prevent termination of her rights, thus denying her due process of law. The facts show that one of mother's four children was initially removed from the mother's home due to sexual abuse by the mother's husband, but neglect was alleged as to the other three children who were allowed to remain in the home. Later, the disposition was modified by the court and the remaining three children were removed from the mother's home because they were at risk due to the mother's psychological problems. The Court stated that it was not necessary that new CHINS proceedings be initiated once new grounds for intervention by the welfare department were discovered. Citing the dispositional modification order, which included the case plan, the Court held that the mother had adequate notice that the reason for the court's adjudication was her inability to care for and provide for her children, including but not limited to her lack of income and housing. The Court affirmed the termination judgment. See also Matter of Y.D.R., 567 N.E. 2d 872, 875-876 (Ind. Ct. App. 1991) (new CHINS proceedings need not be initiated each time additional grounds for intervention are discovered: new grounds supporting removal of children from mother were fully and completely identified in case plan and became basis of court's dispositional decree with regard to mother).

In two recent cases the parents appealed the judgments terminating their parental rights on the grounds that they had not received original and updated case plans from the office of family and children during the CHINS proceedings, and therefore they did not have notice of what they must do to obtain reunification with their children and avoid termination of parental rights. In A.P. v. PCOFC, 734 N.E. 2d 1107 (Ind. Ct. App. 2000), petition for transfer pending, the Court found that the CHINS and termination cases were "interlocking" and failure to provide parents with a copy of the case plan reflecting requirements not contained in court orders was error, id. at 1112-1114, which combined with a multiplicity of other procedural errors in the CHINS and termination cases, demanded reversal of the termination judgment, id. at 1118. In Ferbert v. Marion County OFC, N.E. 2d (Ind. Ct. App. 2001), the Court recognized the significance of providing copies of the case plan to the parents, but did not find reversible error because the record did not reflect if there were differences between what was expected of the parents in the case plan as opposed to the court orders, the record indicated the parents were fully informed regarding what they needed to do to avoid termination, and the case did not reflect any other procedural errors. See Chapter 8 Roman Numeral I. at F. for detailed discussion on case plans and these cases.

C. Reasonable Probability That Continuation of Parent-Children Relationship Poses Threat to Well-Being of Child

IC 31-35-2-4(b)(2)(B)(ii) provides that there must be proof that "there is a reasonable probability that: (ii) the continuation of the parent-child relationship poses a threat to the well-being of the child." Note, that the office of family and children is required to prove either this element, or the element stated in IC 31-35-2-4(b)(2)(B)(i) discussed in VIII. B. above, but not both.

In In Re L.S., 717 N.E. 2d 204, 210-211 (Ind. Ct. App. 2000), the Court upheld the termination judgment, finding that the following evidence was sufficient to show the reasons for removal would not be remedied and continuation of parent-child relationship posed a threat to the well-being of the children: the parents were constantly at "war" with each other and this conflict was emotionally hard on the children; the parents had dysfunctional personalities and an inability to relate in relationships; father chose to place his own need for gender change over the needs of his children and failed to recognize the emotional impact and adjustment needs of his children; father chose to move out of state and thereby end his contact with his children.

In Jackson v. Madison County Dept. of Family, 690 N.E. 2d 792 (Ind. Ct. App. 1998), the Court found the following evidence sufficient to prove that continuation of the parent-child relationship posed a threat to the well-being of the children: (1) the mother was disabled because she suffered from a manic-depressive illness; (2) the mother was uncooperative and portrayed herself unrealistically in psychological examinations and was not truthful or candid about her marriage; (3) the mother had not held significant employment in the last ten years; (4) the mother had never demonstrated any interest or ability to care for the children; (5) the mother's house was unfit for the children, given its size and safety hazards; (6) the mother made unfulfilled promises to one of the children and that child stated he wanted to kill the mother; and (7) the influence of the mother and her associates was detrimental to the other child. Id. at 794.

In Matter of M.B., 666 N.E. 2d 73, 77 (Ind. Ct. App. 1996), the Court noted caseworker testimony that the father's substance abuse and criminal history posed a threat to the children and testimony of the paternal grandmother that the father had a pattern of broken promises and refused or was unable to change. The father's argument that he currently had his substance abuse under control and wanted to "get his life together," did not outweigh evidence that his habitual pattern of conduct posed a substantial probability of future neglect or deprivation.

In Adams v. Office of Fam. & Children, 659 N.E. 2d 202, 206 (Ind. Ct. App. 1995), evidence that the parents did not complete sexual abuse treatment created a likelihood that the abuse would reoccur and was sufficient to prove that the parents presented a continuing threat to the well-being of the children.

In Tipton v. Marion County DPW, 629 N.E. 2d 1262 (Ind. Ct. App. 1994), the Court affirmed the termination judgment regarding one father, Boster, but not the other father, Tipton. The Court found that Boster's MMPI results suggested an inability to function as a parent and that he needed to resolve his own problems before parenting. Id. at 1270. The Court also noted that Boster had not sought counseling on his own and found that with regard to Boster only, there was clear and convincing evidence of a reasonable probability that the conditions which resulted in removal would not be remedied or that the parent-child relationship as it existed at the time of the final hearing posed a threat to the child's well-being. Id.

In B.R.F. v. Allen County D.P.W., 570 N.E. 2d 1350 (Ind. Ct. App. 1991), the Court of Appeals affirmed the decision of the Allen Superior Court terminating the father's parental rights. The facts of the case show that the child was adjudged a CHINS on a 1987 CHINS petition alleging that the father was unable to provide appropriate housing. In 1988, the father served two months in jail for possessing stolen license plates, and in 1989 he was convicted of possessing a controlled substance. The termination petition was filed in December of 1989. Evidence was presented at the termination hearing that the father was expected to be released from incarceration in October of 1991. The trial court entered a judgment terminating the parent-child relationship. The Court found that the father's inability to provide the child with adequate housing, along with the father's convictions and present incarceration, demonstrated clearly and convincingly that continuation of the parent-child relationship posed a threat to the well-being of the child. Id. at 1352.

See also the following cases on threat to well-being: Ferbert v. Marion County OFC, N.E. 2d (Ind. Ct. App. 2001); In Re E.E., 736 N.E. 2d 791, 795 (Ind. Ct. App. 2000); Ramsey v. Madison County Dept. of Family and Children, 707 N.E. 2d 814 (Ind. Ct. App. 1999); Matter of D.G., 702 N.E. 2d 777 (Ind. Ct. App. 1998); Jackson v. Madison County Dept. of Family, 680 N.E. 2d 792 (Ind. Ct. App. 1998); Matter of C.M., 675 N.E. 2d 1134 (Ind. Ct. App. 1997); Matter of Relationship of M.B., 638 N.E. 2d 804 (Ind. Ct. App. 1994); Kern v. Wolf, 622 N.E. 2d 201 (Ind. Ct. App. 1993).

D. Termination in Best Interests of Child

IC 31-35-2-4(b)(2)(C) requires proof that the "termination is in the best interests of the child." In In Re M.M., 733 N.E. 2d 6, 13-14 (Ind. Ct. App. 2000), the Court found that testimony of the CASA and the child's therapist that termination was in the best interest of child, combined with evidence that the conditions that resulted in placement of the child away from the teenage mother would not be remedied and that continuation of the parent-children relationship posed a threat to well-being of child, was sufficient to show that termination was in the best interest of the child.

In Matter of A.N.J., 690 N.E. 2d 716, 722 (Ind. Ct. App. 1997), the Court affirmed that termination was in the best interest of the children upon evidence that the father was unable to remedy the reasons for removal of the

children from the home, and evidence that the father was historically unable to provide adequate housing, stability and supervision, and was currently unable to provide for the children.

In Matter of M.B., 666 N.E. 2d 73 (Ind. Ct. App. 1996), the Court found the evidence sufficient to prove that termination was in the best interest of the children. The Court relied on expert testimony from a clinical psychologist that the children would suffer permanent psychological damage if maintained an additional two years or longer in foster care awaiting reunification with the father. The Court summarized the expert testimony on the effects of long-term foster care:

She [the psychologist] explained that the children needed to have a sense of permanency which is virtually impossible in foster care settings. The anxiety resulting from not knowing where they would be living tomorrow and who would be their parents detracts from their ability to learn the other things children normally learn during their preschool years. ...the longer the uncertainty continued, the more delayed the children become in psychological development and the more vulnerable they become to long-term personality disorders.

Id. at 78.

In Matter of Relationship of M.B., 638 N.E. 2d 804, 808 (Ind. Ct. App. 1994), the Court rejected the father's argument that it was in the best interest of the children to place them with the paternal grandparents, rather than terminate the parent-child relationship. The Court noted that the trial court had found that adoptive placement was in the children's best interests, and that placement with the paternal grandparents would have the potential for contact between the father and children, which the trial court had determined was not in the children's best interests.

In In Re Termination of Parental Rights of V.A., 632 N.E. 2d 752 (Ind. Ct. App. 1994), the Court ruled that the following supported the trial court's finding that termination was in the children's best interests: (1) mother's parenting abilities had not significantly improved since the children's removal; (2) two psychologists had concluded that the mother could not adequately parent two of the three children and it was unlikely that the mother would be able to do so in the foreseeable future; and (3) mother's historical and present inability to provide the children with adequate housing, stability and supervision. Id. at 756, 757.

In Tipton v. Marion County DPW, 629 N.E. 2d 1262 (Ind. Ct. App. 1994), the Court affirmed that termination of one of the father's (Boster's) rights was in the best interests of his child. The record showed the father was unable to make choices which placed his child's interests before his own, and that the child had an opportunity for adoption with a sibling. The Court went on to state: "[w]hen an individual is truly unfit to parent, the child evinces the harmful nature of the relationship, and the State can easily meet its burden of proving that termination is in the child's best interest." Id. at 1270.

In Matter of Adoption of D.V.H., 604 N.E. 2d 634, 637-638 (Ind. Ct. App. 1992), the Court found the following evidence sufficient to support the best interest element: the testimony of two psychologists as to the risks posed by long term foster care; the primary parental bond being between the child and the foster mother; and the testimony of the guardian ad litem that termination was in the best interest of the child.

In S.E.S. v. Grant County Dept. of Welfare, 582 N.E. 2d 886 (Ind. Ct. App. 1991), adopted and incorporated at 594 N.E. 2d 447 (Ind. 1992), the mother argued on appeal that the best interest finding was not supported by substantial evidence. This argument was based on the mother's allegation that the children had the same behavioral problems in foster care that they exhibited while in her custody. The Court rejected this argument, noting that there was strong evidence at trial that the children had improved in foster care, although they still had many problems at the time of the hearing, and that the children had regressed after visits with their mother. The mother also cited several cases where courts had found that termination of the parent-child relationship was in the child's best interests, and argued that since her case was not comprised of the same characteristics (such as children who progressed greatly in foster care, parents who failed to visit or communicate with their children, and parents who remained unemployed or transient), termination was not in her children's best interests. The Court held that while her observation was correct, it did not mandate reversal. The Court explained that each case has unique facts and that there is no exclusive list of factors which must be present for a ruling that termination of the parent-child relationship is in the child's best interests. Id. at 889.

In R.M. v. Tippecanoe County DPW, 582 N.E. 2d 417, 420-421 (Ind. Ct. App. 1991), the mother argued that mental retardation itself was insufficient to terminate the parent-child relationship. The Court appeared to interpret this argument as a claim that the parent-child relationship was terminated based solely on the best interests of the child. The Court agreed that termination of the parent-child relationship is not to be based upon the best interests of the child, but stated that mental retardation is relevant in determining whether parents have the capacity to care properly for their child. The Court applied a two part test: once a finding of parental deprivation is made, the best interests test is used to determine whether termination of the parent-child relationship is proper. Here, the mother was unable to provide the stability and care needed by her child. Thus, the Court held that the trial court properly turned to the question of whether termination of the parent-child relationship was in the best interest of the child and found that there was sufficient evidence that termination was in the best interest of the child.

In Page v. Greene County Dept. of Welfare, 564 N.E. 2d 956 (Ind. Ct. App. 1991), the Court affirmed the trial court's termination of the parent-child relationship. The Court indicated that the parents' personal problems were relevant to determine the best interests of the children. The problems specifically mentioned in the case are as follows: father's failure to overcome his problems with alcohol abuse and violence; mother's failure to follow through with welfare referral to a developmental center to learn work habits and life skills; and mother's choice to move in with an abusive boyfriend, which resulted in cessation of visitation. The Court noted the mother's choice between her boyfriend and her children, and mother's statement that the children would be better off adopted by someone else. Id. at 961.

In Matter of Campbell, 534 N.E. 2d 273 (Ind. Ct. App. 1989), the Court of Appeals noted the following evidence as sufficient to support the juvenile court's ruling on best interests: (1) the testimony of the caseworker and the guardian ad litem that it was unfair for the child to wait in "limbo" in a foster home and that "foster homes are not permanent, and that children can sense the impermanency [sic] and (2) that the child had been "behind socially and mentally but has improved since she has been in her foster home." Id. at 276.

See also the following cases dealing with the "best interest" issue: Ferbert v. Marion County OFC, N.E. 2d (Ind. Ct. App. 2001); In Re E.E., 736 N.E. 2d 791, 795 (Ind. Ct. App. 2000); In Re B.D.J., 728 N. E. 2d 195, 203 (Ind. Ct. App. 2000); Matter of K.H., 688 N.E. 2d 1303, 1305 (Ind. Ct. App. 1997); In Re A.A.C., 682 N. E. 2d 542, 545 (Ind. Ct. App. 1997); Matter of C.M., 675 N.E. 2d 1134, 1140 (Ind. Ct. App. 1997); Wagner v. Grant County Dept. Public Wel., 653 N.E. 2d 531, 534 (Ind. Ct. App. 1995); Wardship of J. C. v. Allen Cty. Office, 646 N.E. 2d 693, 696 (Ind. Ct. App. 1995).

E. Satisfactory Plan for Care of Child

IC 31-35-2-4(b)(2)(D) requires proof that "there is a satisfactory plan for the care and treatment of the child." The case law is clear that the plan does not have to be detailed, as long as it offers a general sense of the plan for the child. The plan does not have to state a specific adoptive family, but may list the foster parent as a possible adoptive placement. The plan does not have to guarantee that the child will be adopted, and can include other permanent options for the child besides adoption.

The case law does not require evidence that there is a specific adoptive family or placement immediately available for the child. In Matter of D.G., 702 N.E. 2d 777, 781 (Ind. Ct. App. 1998), the Court found that the caseworker's testimony that the child is "highly adoptable and OFC intends to seek adoptive parents for her" sufficiently demonstrated that the office had a satisfactory plan for child. In Page v. Greene County Dept. of Welfare, 564 N.E. 2d 956, 961 (Ind. Ct. App. 1991), the Court clarified that the welfare department is not required to completely detail the child's future, but only to point out in a general sense the general direction of its plan. In J.K.C. v. Fountain County Dept. of Pub. Wel., 470 N.E. 2d 88, 93 (Ind. Ct. App. 1984), the Court did not require identification of a specific adoptive family to prove a satisfactory plan existed. See also Matter of Tucker, 578 N.E. 2d 774, 780 (Ind. Ct. App. 1991); Matter of Miedl, 425 N.E. 2d 137, 141.

Identification of foster parents as potential adoptive parents may be relevant to a finding that the proposed plan for the child is satisfactory. In In Re B.D.J., 728 N.E. 2d 195, 203 (Ind. Ct. App. 2000), the Court found that the plan of the office of family and children to have the children adopted by foster parents or to pursue other placement for the special needs children was adequate. The Court relied on the following testimony of the office of family and children caseworker in affirming the trial court's ruling that the plan for the children was satisfactory: "The foster parents have expressed some interest. If that does not work out, the children's -

the children have already been turned over to the special needs adoption team and their names have been placed there.” *Id.* at 204. See also *In Re E.E.*, 736 N.E. 2d 791, 795 (Court found evidence that child had improved in foster care and his foster parents had adopted his sibling and were desirous to adopt him supported termination judgment); *Adams v. Office of Fam. & Children*, 659 N.E. 2d 202, 207 (Ind. Ct. App. 1995) (evidence that foster parents expressed desire to adopt children and could provide safe nurturing environment for children supported finding that there was a satisfactory plan for the children and that termination was in their best interest); *R.G. v. MCOFC*, 647 N.E. 2d 326, 329-330 (Ind. Ct. App. 1995) (termination was in best interest of child in that parents would not be able to provide "even minimally sufficient care," child would "not reach his full potential" in parents' care, foster parents had provided stable home and desired to adopt child, and child had bonded with foster parents); *Matter of Adoption of D.V.H.*, 604 N.E. 2d 634, 638 (Ind. Ct. App. 1992) (child's adoption by long-term foster parent was a satisfactory plan).

The plan for the child does not have to include adoption, and evidence that adoption is unlikely does not make the plan for the child unsatisfactory. In *Ramsey v. Madison County Dept. of Family*, 707 N.E. 2d 814, 817 n. 3, the Court affirmed the plan of the office of family and children to continue the child's counseling and to attempt to reunify the child with the mother. In *Doe v. Daviess County*, 669 N.E. 2d 192 (Ind. Ct. App. 1996), the Court affirmed the finding that long term foster care was a satisfactory permanent plan for the child (who was fourteen years old at the time of the termination hearing) despite the mother's argument that the child would have no permanent parent after her rights were terminated. The Court stated that the Division's plan for long term foster care was satisfactory because the child "is not of an adoptable age, has a history of behavioral and psychiatric problems, and has special needs." *Id.* at 196. In *Stone v. Daviess Co. Div. Child Serv.*, 656 N.E. 2d 824 (Ind. Ct. App. 1995), the father claimed that the DCFS did not offer an acceptable long term plan for the children if termination was granted. He argued that adoption of all five children by one family was unlikely, and that separation of the siblings in different long term foster homes was a probable result. The Court rejected the claim and stated, "we cannot conclude that the DCFS plan is unsatisfactory. The best interests of the children dictate termination of parental rights." *Id.* at 829. In *B.R.F. v. Allen County D.P.W.*, 570 N.E. 2d 1350 (Ind. Ct. App. 1991), the Court found that the welfare department had adequately established a satisfactory plan for the care and treatment of the child as part of its petition to terminate the parent-child relationship. The caseworker's plan was to place the child in a foster home, provide him with medical care and schooling, and transfer the case to the adoption division of the welfare department. Although the father emphasized the caseworker's inability to recall the last time the welfare department had successfully placed a child five years of age for adoption, the Court stated that this evidence did not negate the finding that the welfare department was able to "point out in a general sense to the trial court the direction in which its plans were going." *Id.* at 1353. In *Shaw v. Shelby Cty. D. of Public Welfare*, 584 N.E. 2d 595 (Ind. Ct. App. 1992), the Court affirmed the trial court's finding that the welfare department had devised an adequate plan for the child's care and treatment. *Id.* at 601. The child in question had been placed in a residential treatment center for children with emotional problems. The child's behavioral problems included violent outbursts, physical abuse of himself and others, suicide threats and attempts, and sexual acting out. The child had not improved as anticipated after his mental health placement. Nevertheless, the Court found that an adequate plan for care and treatment had been devised and stated that the welfare department had no obligation to present evidence of a specific adoptive home demonstrably superior to the natural parents' home. *Id.* at 601.

IX. CASE LAW ON SPECIFIC SUBJECT AREAS

A. Criminal Activity and Incarceration

In *J.T. v. Marion County OFC*, 740 N.E. 2d 1261 (Ind. Ct. App. 2000), the Court ruled that an incarcerated parent did not have an absolute right to be present for the termination hearing, and the trial court (which appointed counsel for the parent) did not abuse its discretion in failing to transport father from the Florida prison to the Indiana hearing. In *A.P. v. PCOFC*, 734 N.E. 2d 1107 (Ind. Ct. App. 2000), petition for transfer pending, the Court ruled that CHINS and termination proceedings were interlocking and failure to transport an incarcerated father to review hearings was error, which combined with other significant procedural errors, denied father due process of law in the termination case. See also *Foster v. Adoption of Federspiel*, 560 N.E. 2d 691 (Ind. Ct. App. 1990) (father's alleged error in refusal of trial court to transport him from Westville Correctional Center for adoption hearing was waived by failure to present argument on appeal). See this Chapter above Roman Numeral V. at L. on presence of incarcerated parents at termination hearings.

In Matter of N.B., 731 N.E. 2d 492, 493-494 (Ind. Ct. App. 2000), the Court affirmed the termination on findings that: father was incarcerated for all but one day of the child's life; father would not be released from prison until 2003; father had a lengthy juvenile and adult criminal record and pled guilty to battery of the child's mother; father did not establish paternity; father did not pay child support; and father did not comply with the conditions of the parental participation petition. In Young v. Elkhart County Office of Family and Children, 704 N.E. 2d 1065, 1068 (Ind. Ct. App. 1999), the Court affirmed the termination on evidence that father had been incarcerated most of the children's lives, had little contact with the children, and didn't know where the children were when they were removed from the mother. In Matter of K.H., 688 N.E. 2d 1303, 1305 (Ind. Ct. App. 1997), the Court found that father's efforts while in prison (i.e. received GED, tutored inmates, enrolled in college classes, and held prison jobs) did not overcome evidence of his failure to support the child or lack of contact with the child. In In Re A.A.C., 682 N.E. 2d 542, 544-545 (Ind. Ct. App. 1997), the Court found that the following evidence about the father was sufficient to support the termination judgment: (1) continued criminal activity and incarceration for all but eight months of the child's three years of life; (2) violence toward the child's mother; (3) drug and alcohol use; (4) inability to maintain stable housing and employment; and (5) refusal to support the child.

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

In Wardship of J.C. v. Allen Cty. Office, 646 N.E. 2d 693 (Ind. Ct. App. 1995), the welfare department intervened when the child was discovered living in a car with the father and the father was anticipating arrest. The court adjudicated the child a CHINS on the father's admission that he was unemployed and unable to provide food, shelter, and medical care for the child. Id. at 694. When the father did not cooperate with rehabilitation efforts, the office of family and children filed the termination petition which was granted by the court. The Court of Appeals noted the following evidence in affirming the termination judgment: father failed to attend scheduled visits with the child; father lost his employment after one month due to his arrest for criminal activity; father was evicted from his housing; father failed to obtain required substance abuse and psychological assessment and continued to use drugs and alcohol; father had a pattern of criminal activity and his current incarceration made it unlikely that he could participate in the child's upbringing in the future. Id. at 695-696.

In Wagner v. Grant County Dept. of Public Wel., 653 N.E. 2d 531 (Ind. Ct. App. 1995), the Court cited the evidence from the record that the father had been convicted of several crimes, had spent the majority of the child's life in jail, had criminal charges pending at the time of the termination trial, and had recently committed a crime to obtain money to support the child, in affirming the trial court's ruling that the father had a "pattern of criminal activity which rendered him incapable of caring for S.S. [the child] and that there was a reasonable probability that the condition would not be remedied." Id. at 533. The Court rejected the father's argument that termination was not in the child's best interest, based on evidence that the father's continuing pattern of criminal activity and incarceration rendered him incapable of caring for his child. Id. at 534.

In Matter of A.C.B., 598 N.E. 2d 570 (Ind. Ct. App. 1992), the Court of Appeals affirmed the termination judgment against an adjudicated father who was serving a twenty-three year sentence for armed robbery. The father had been incarcerated at the time of the child's birth, and his earliest anticipated release date was in three years. Although the father did not raise his incarceration as an issue on appeal, he did complain that visitation had been denied him. The Court responded:

Further, St. John's inability to bond and visit with A.B. is due more to his own actions which resulted in his incarceration, than with his failure to establish legal paternity. Individuals who pursue criminal activity run the risk of being denied the opportunity to develop positive and meaningful relationships with their children.

Id. at 572.

In B.R.F. v. Allen County DPW, 570 N.E. 2d 1350 (Ind. Ct. App. 1991), the Court found that the father's inability to provide the child with adequate housing, along with the father's convictions and present incarceration, demonstrated clearly and convincingly that continuation of the parent-child relationship posed a threat to the well-being of the child. Id. at 1352. The Court did not find the father's assertion that other family members were willing to care for the child until the father was released from prison convincing.

In Matter of Danforth, 542 N.E. 2d 1330 (Ind. 1989), the facts showed that the children visited their father in prison and thereafter the father attempted to stay in touch through letters and cards sent through the caseworker. The termination petition was filed shortly after the father's release from prison, and granted after a hearing. The Indiana Supreme Court set aside the Court of Appeals opinion at 512 N. E. 2d 228 and affirmed the juvenile court's judgment of termination, listing the following evidence as sufficient to support the judgment: the father had recently been released from five years of incarceration; the father had "repeatedly" committed armed robberies and one burglary; the father had left the children in the getaway vehicle while he perpetrated a robbery; the father told his wife he would kill her and the caseworker when released from prison; the children had not been under the care of the father for six and a half years; and the father's visits upset the children. The Supreme Court accepted Judge Buchanan's analysis of the situation in his dissent to the Court of Appeals opinion:

The trial court must evaluate the parent's habitual patterns of conduct to determine whether there is a reasonable probability of future deprivation of the children. (citation omitted). The trial court need not wait until the children are irreversibly influenced such that their physical, mental and social growth is permanently impaired before terminating the parent-child relationship... Surely we need not wait for bleeding victims before we find sufficient evidence of the likelihood of Danforth's [father's] future conviction.

Id. at 1331

In Matter of D.L.W., 485 N.E. 2d 139, 143 (Ind. Ct. App. 1985), the wardship of the child was established while the mother was in the Indiana Women's Prison. Prior to wardship, the welfare department had offered a service plan and outlined goals for the mother to improve her own situation and the situation of the child. After the mother was released from prison, she never maintained a permanent address so that the caseworker could offer services to her. The mother was again arrested, and spent eight more months in prison. A petition for termination of parental rights was filed one month after her release, but the court delayed setting a hearing on the matter at the petitioner's request. Instead, the court issued specific rehabilitation orders to the mother. The mother failed to comply with those orders, and, after a hearing, the court entered the order terminating the parent-child relationship. The Court held that the mother's improvements which coincided with immediate threats to her parental rights had been temporary in nature, and also that the mother had at least three "second chances" while her child had waited for five years in foster care. The Court felt that the child should be made to wait no longer for her mother to improve.

B. Low IQ and Mental Disability

In Matter of J.T., N.E. 2d (Ind. Ct. App. 2001), the mother had a borderline low IQ of 79 and suffered from adult attention deficit disorder. The Court of Appeals affirmed the termination judgment on the following evidence: mother did not understand basic child care concepts of child development and nutrition; mother lacked capacity to understand, appreciate, and provide a safe environment for the child; mother's tendency to be impatient, impulsive, intolerant, immature, and highly motivated by her feelings interfered with her ability to parent; and mother's prognosis for change was low because she did not believe she had problems and therefore was not likely to benefit from help. In rejecting mother's claim that her parental rights were terminated because of her low IQ and attention deficit disorder, the Court noted that mother's rights were terminated because of her persistent inability to provide the child with care and ensure his safety. Mother's intellectual level was not the basis of the termination, but an explanation for why mother, in spite of the services offered to her, was unable to understand the supervision and safety needs of the child and to develop the necessary safe parenting practices.

In Stone v. Daviess Co. Div. Child Serv., 656 N.E. 2d 824 (Ind. Ct. App. 1995), the mother had cognitive and personality deficiencies, a dependent personality, and an IQ of 67; the father had an IQ of 71. Both parents participated in services provided by the office of family and children, including parenting classes, homemaker services, visitation, and family and individual counseling, but made little progress in solving their parenting problems. On appeal of the termination judgment, the Court found the evidence was sufficient based on the facts from the CHINS case stated above and the following evidence: the father's belief that hitting and use of a belt were acceptable and his unwillingness to consider different means of discipline; the testimony of the clinical social worker that the parents denied psychological or parenting skills problems; the opinion of the social worker that the children would be at high risk of regression if returned to the home; the testimony of the caseworker regarding the parents' continued denial of problems or need to change; the testimony of the homemaker regarding lack of progress on safety and cleanliness issues in the home; and testimony regarding emotional and psychological harm suffered by the children in parents' custody. Id. at 828-829.

The parents alleged the office of family and children violated the Americans with Disabilities Act (ADA) by failing to provide rehabilitation and reunification services based upon their special needs. The Court found that compliance with ADA was not an issue in the termination case because Indiana's termination statute does not require the State to prove that services were offered to assist parents to fulfill their parental obligations. Although ADA compliance was not relevant to the termination case, the Court chose to discuss the application of the ADA to CHINS proceedings, noting that once an agency opts to provide services during the CHINS proceeding to assist parents in developing parental skills, the agency must reasonably accommodate the parents' disabilities in compliance with the ADA. Id. at 830. See also In Re E.E., 736 N.E. 2d 791, 796 (Ind. Ct. App. 2000) (non-compliance with ADA not relevant to termination case).

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

In J.L.L. v. Madison County DPW, 628 N.E. 2d 1223 (Ind. Ct. App. 1994), the Court affirmed the trial court's order granting termination. The Court noted, inter alia, the following evidence as supportive of the trial court's finding that there was a reasonable probability that the conditions that resulted in removal would not be remedied: (1) mother had an IQ of 68, was mildly retarded, and very angry; (2) mother lacked ability to focus her attention for any period of time; (3) mother had problems with basic communication and acted belligerently toward anyone attempting to help her; and (4) mother suffered from "personality disorder and arrest," a condition distinguishable from mental retardation, which is characterized by a strong dependency need, passive aggressive and excessively compulsive tendencies. Id. at 1226.

In Egly v. Blackford County DPW, 592 N.E. 2d 1232, 1235 (Ind. 1992), the Supreme Court vacated the Court of Appeals opinion at 572 N.E. 2d 312 and affirmed the trial court's decision terminating the parent-child relationship. The mother had an IQ of 57 and the father had an IQ of 73, and caseworkers providing services to the parents concluded that the parents lacked the capacity to comprehend and retain the parenting information provided. The parents argued that their parental rights had been terminated because of their intellect. The Court opined that mental retardation of the parents, standing alone, is not a proper ground for terminating parental rights. Id. at 1234. However, the Court quoted In Re Wardship of B.C., 441 N.E. 2d 208, 211 (Ind. 1982), for the principle that where parents are incapable of or unwilling to fulfill their legal obligations in caring for their children, then mental illness may be considered. Egly at 1234. See also R.M. v. Tippecanoe County DPW, 582 N.E. 2d 417 (Ind. Ct. App. 1991) (mental retardation itself is not sufficient to

terminate parent-child relationship, but is relevant in determining whether parents have capacity to care properly for child).

In Matter of R.R., 587 N.E. 2d 1341 (Ind. Ct. App. 1992), the Court reversed the trial court's CHINS and termination orders due to multiple procedural omissions. In footnote 4 of its opinion the Court noted that the mother had an IQ of 75 and was considered "learning disabled." Id. at 343. The Court opined that the multiplicity of procedural omissions, which was exacerbated by the mother's "diminished mental capacity" clearly operated to deny her due process. Id.

In Matter of M.J.G., 542 N.E. 2d 1385 (Ind. Ct. App. 1989), the parents argued on appeal that the termination proceeding was initiated because the parents were "low functioning" or "limited intellectually" rather than because the survival and stability of the children was at stake. The Court noted that the juvenile court cannot terminate parental rights solely on the basis of the mental condition of the parents. However, the abilities and intellect of the parents, "as they relate to the parents' capacity to care for the children are factors which may be considered when a court determines whether the parental rights should be terminated." Id. at 1389. Aside from the intellectual functioning of the parents, the Court found evidence of alcohol abuse, unsanitary conditions, poor housekeeping, and an inability to deal with the special needs of the children, sufficient to support the judgment terminating parental rights. Additionally, the Court noted the unwillingness of the parents to "deal with their problems and to cooperate with counselors and those providing social services." Id. The parents also argued that the evidence on the termination petition could not be clear and convincing, if their home was adequately safe for two of their four children. The Court found that this argument went to the credibility of the caseworker, not to the sufficiency of the evidence. The Court accepted the caseworker's opinion that the parents could not handle the stress of additional children in the home.

In Matter of Dull, 521 N.E. 2d 972 (Ind. Ct. App. 1988), the mother and father had IQs of 62 and 72 respectively. The reasons for removal of the children from the home included a filthy house, inability to provide proper supervision, and the fact that the children's diagnoses as developmentally delayed were related to the parents' retardation. The evidence at the termination hearing showed that, despite participation in social services, the parents' condition could be expected to continue for the foreseeable future. Evidence also showed that the children had made significant developmental progress since removal from the parents, that there was little parent-child interaction during the visits, and that the parents were unable to comprehend or learn basic parenting skills. The Court found that retardation of a parent by itself is not a ground for termination of parental rights, but the parents' continued inability to provide for the children's well-being was clearly demonstrated. Id. at 976-977. The Court stated that the trial court properly considered the parents' mental retardation as a factor in deciding whether or not to terminate their parental rights. Id. at 977.

C. Mental Illness

In In Re E.E., 736 N.E. 2d 791 (Ind. Ct. App. 2000), the Court affirmed the order terminating the parent-child relationship between a paranoid-schizophrenic mother and her child. The following evidence showed that the mother's mental illness adversely affected her ability to parent the child: mother had paranoid and delusional thought processes and an inability to appreciate the child's need for safety and stability; a psychologist testified that the mother would need at least one year of successful psychotherapy and medication therapy before she could reliably parent; the mother sporadically rejected prescribed medications in favor of herbal remedies and had refused outpatient therapy for two years; the mother thought the child was chanting her siblings' names and asking to go home when the child was merely crying during a visit; the mother repeatedly changed her telephone number without informing the caseworker due to the mother's delusional fear that the telephone line was tapped; the mother's medical records reflected homicidal ideation toward her children and her parents; and the services provided to the mother had not enabled her to bond with the child. Id. at 794-795. The Court found that the office of family and children had established a reasonable probability that the conditions that led to the child's removal would not be remedied and that continuation of the parent-child relationship would pose a threat to the child's well-being. Id. at 795.

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

We are not unsympathetic to the severe emotional problems that Danielle [father] has faced, and her efforts to overcome them. Nor are we insensitive to the stigma attached to mental illness and

transsexualism. However, we are also not unmindful that the best interests of the child are paramount in termination proceedings and that children should not be compelled to suffer emotional injury, psychological adjustments, and instability to preserve parental rights. Moreover, when the evidence shows that the child's emotional and physical development is threatened, termination of the parent-child relationship is appropriate.

Id. at 210-211.

In Jackson v. Madison County Dept. of Family, 690 N.E. 2d 792 (Ind. Ct. App. 1998), the Court found the following evidence sufficient to prove that continuation of the parent-child relationship posed a threat to the well-being of the children: (1) the mother was disabled because she suffered from a manic-depressive illness; (2) the mother was uncooperative and portrayed herself unrealistically in psychological examinations and was not truthful or candid about her marriage; (3) the mother had not held significant employment in the last ten years; (4) mother had never demonstrated any interest or ability to care for the children; (5) mother's house was unfit for the children, given its size and safety hazards; (6) mother made unfulfilled promises to one of the children and that child stated that he wanted to kill the mother; and (7) the influence of the mother and her associates was detrimental to the other child. Id. at 793-794.

In Matter of Adoption of D.V.H., 604 N.E. 2d 634 (Ind. Ct. App. 1992), the mother appealed the termination of the parent-child relationship judgment citing insufficient evidence. The Court considered the following evidence, inter alia, as supportive of the trial court's judgment: (1) mother was diagnosed as having borderline personality disorder with unstable moods, unprecipitated severe anxiety, and severe depression; (2) mother's secondary diagnoses included bulimia, major depression and obsessive compulsive neurosis; (3) mother engaged in self-mutilation despite treatment; (4) mother's recommended treatment span was "years in duration" and she would "very likely" require brief periods of hospitalization in the future due to "overwhelming depression or suicidal urges;" and (5) mother's symptoms had remained the same during her years of treatment. Id. at 637.

In Matter of A.M., 596 N.E. 2d 236, 238-239 (Ind. Ct. App. 1992), the Court found that the following evidence of mother's mental health, together with other evidence, was sufficient to support the termination judgment as to her: (1) mother's characterological problems made her unable to think about her future actions, causing her to repeat the same mistakes, and (2) all of the mother's counselors agreed that as a result of her characterological problems she would never change. See also M.B. v. Dept. of Public Welfare, 570 N.E. 2d 78, 83 (Ind. Ct. App. 1991) (the opinion noted testimony that mother with moderate to severe borderline personality disorder was not a "good parent" and was not likely to improve).

In R.M. v. Tippecanoe County DPW, 582 N.E. 2d 417 (Ind. Ct. App. 1991), the mother had been hospitalized for mental health treatment both before and after her child's birth. She had an IQ of 75 and her most recent diagnosis was schizophrenia, disorganized type. The Court affirmed the trial court's determination that the conditions resulting in the child's removal could not reasonably be expected to improve, citing the following: (1) mother refused to take medication prescribed for her psychosis on a regular, on-going basis; (2) mother believed parenting programs were unnecessary because she already had adequate parenting skills; (3) mother failed to convince her caseworkers and a clinical psychologist of her ability to meet the child's needs; (4) mother was unstable when not hospitalized and failed to cooperate with counseling; and (5) the child's unnatural and erratic behavior toward the mother raised questions as to the possibility of normal bonding. Id. at 420-421. The Court held that the evidence of failure to take medication regularly or participate in counseling was "ample" to establish that the mother's mental illness would not be remedied. Id. at 420.

In Matter of Tucker, 578 N.E. 2d 774 (Ind. Ct. App. 1991), the Court affirmed the trial court's order terminating the mother's parental rights despite her contention of insufficient evidence. The facts indicated that the mother had schizophrenic symptoms with strong paranoia and was unable to develop a bond with her child. The mother's counselor testified that in time the child would begin to model the mother's behavior, developing further emotional difficulties, depression and neurotic characteristics. The mother also claimed on appeal that her rights had been terminated solely because of her mental illness. The Court disagreed with her analysis and found that the termination was proper. Id. at 780. The Court stated that Indiana's termination statute, as interpreted by case law, does not allow termination simply on the basis of mental illness and does not classify all mentally ill persons as unfit solely upon their status. The Court also opined that the mother's mental and emotional condition resulted in emotional and developmental damage to her child, and that the

chance of the mother ever resolving the problems which led to the damage to her child was virtually nonexistent. Id. at 779.

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

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

Id. at 950-951.

In In Re Wardship of B.C., 441 N.E. 2d 208 (Ind. 1982), the Indiana Supreme Court vacated the Court of Appeals opinion at 433 N.E. 2d 19 and affirmed the trial court's order terminating the mentally ill mother's parental rights. The mother had given her twenty month old child to a couple whom she did not know while in a department store parking lot. The mother had been provided counseling, medication, hospitalization, and assistance in finding a stable home and employment, but the mother failed to take the medication, cooperate with the group home placement for herself, or visit the child. The Court stated, "[w]e find no reason to reverse the trial court on the mere claim that some medical program might exist which might possibly cure the mother." Id. at 211.

D. Sexual Abuse

In Ramsey v. Madison County Dept. of Family, 707 N.E. 2d 814, 817 (Ind. Ct. App. 1999), the Court ruled that prima facie evidence of the father's conviction for sexually molesting the child, together with evidence that the child feared being abused by the father, and exhibited behavioral and emotion problems including encopresis, running away, setting fires, and sexual acting out, was sufficient to support the termination judgment.

In Adams v. Office of Fam. & Children, 659 N.E. 2d 202 (Ind. Ct. App. 1995), the Marion County Office of Family and Children (OFC) removed three children from the home and filed a CHINS petition alleging the children were sexually abused by the father. The court granted the CHINS petition. The dispositional plan required the parents to complete psychological evaluations, participate in parenting classes, complete substance abuse evaluations, and participate in anger control counseling and in sexual abuse counseling. The court subsequently suspended the mother's visitation with the children because of her attempt to persuade the two oldest daughters to retract the sexual abuse allegations. OFC filed a petition to terminate the parent-child relationship and the petition was granted after a hearing. On appeal, the Court found the evidence was sufficient on each element of the termination statute. Evidence of the sexual abuse of the children, the parents' lack of treatment and counseling regarding the sexual abuse, the father's history of alcohol abuse, and the length of time the children were placed outside the home, supported the finding that there was a reasonable probability that the parents could not remedy the conditions that resulted in placing the children outside the home.

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

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

Id.

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

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

In Ferbert v. Marion County OFC, N.E. 2d (Ind. Ct. App. 2001) the Court affirmed the termination on evidence that the father had been arrested for battery and criminal neglect of the children, the mother endangered the children by denying the father abused the children and by continuing to cohabit with the father despite a criminal order that the children were to have no contact with the father, and the parents failed to demonstrate a safe and clean home environment. In Matter of D.G., 702 N.E. 2d 777, 781 (Ind. Ct. App. 1998), the Court affirmed the termination on evidence that the father battered the mother, father struck the child, father's inability to control his substance abuse and anger, mother's lifestyle was unstable and potentially dangerous for the child, mother did not attend the classes for battered women, mother missed visitation for a month when she traveled out of state, mother did not have job or permanent residence, and mother's choice of mates posed a threat to the child. In In Re J.J., 711 N.E. 2d 872 (Ind. Ct. App. 1999), the child had been removed from the home because mother was continually in a state of crisis and entered into abusive relationships with men, the child suffered from Shaken Baby Syndrome, and the parents were unable to provide a safe and stable environment for the child. Id. at 873. The Court affirmed the termination on the following evidence: father's history of abusive behavior, child suffered from the Shaken Baby Syndrome, and father's failure to complete the evaluations and services designed to facilitate reunification as ordered by the court. Id. at 874-875.

In In Re Children: T.C. and Parents: P.C., 630 N.E. 2d 1368 (Ind. Ct. App. 1994), the mother admitted in the CHINS case that she struck her five-year-old child with a belt causing welts on his buttocks and face, she lacked financial means to support the child, and the child attended kindergarten sporadically. A later born child was removed a few days after the birth based on the caseworker's assessment that the mother would be unable to care for him. The mother received psychological and psychiatric evaluations, therapy, and visitation with the children. A termination petition was filed and granted for both children. The Court of Appeals reversed the termination judgment. As to the termination of the younger child, the Court found that basing that child's removal from the home on a single incident of abuse which occurred with a sibling two years previously did not warrant termination. Id. at 1374. The incident was remote in time and of limited applicability to the younger child. The Court stated that the "vague reference to the possibility of inappropriate conduct with C.F. [younger child] is not clear and convincing evidence of the factors" in the termination statute. Id. As to the older child the Court ruled that the one incident of unreasonable punishment, combined with the record in this case, did not support a termination order. On the record of mother's efforts during the CHINS period the Court stated:

Despite evidence that P.C. [mother] did not flawlessly comply with the amended P.P.P. [parental participation petition], the evidence of P.C.'s participation and compliance with DPW conditions which she sustained over the course of approximately three and one-half years demonstrates adequate effort to stave off a judgment of termination of parental rights.

Id.

Regarding the issue of physical discipline the Court noted the juvenile code provision that parents are not prohibited from using reasonable corporal punishment for discipline (recodified at IC 31-34-1-15), and the Court stated: "The evidence amply supports a finding that P.C. engaged in a single incident of unreasonable

harsh corporal punishment which left welts on T.C. However, the DPW's overt goal to require P.C. to renounce corporal punishment in favor of other methods of discipline is not required of a parent." Id.

In Kern v. Wolf, 622 N.E. 2d 201 (Ind. Ct. App. 1993), the Noble County Department of Public Welfare (department) became involved when the four-year-old child was required to ride in the back of a pickup truck with wet pants. Later, the child was adjudicated CHINS after suffering second degree burns to her lower extremities, a large bruise under her eye, a bite wound, and a hand imprint on her ribs. The child was placed in foster care, the mother participated in parenting classes and visited the child, and the mother's boyfriend was enjoined from any contact with the child. The mother married the boyfriend. The CASA and the department subsequently filed separate petitions to terminate, alleging that the conditions that resulted in the child's removal from the home had not been remedied given the mother's failure to take any action to protect the child from the husband. The Court of Appeals affirmed the judgment of termination. The Court ruled the following evidence supported the finding of the trial court that the husband was a threat to the child's physical and emotional well-being: expert testimony on the husband's psychological profile (significant emotional and anger control problems) and guarded prognosis for therapy; evidence that the child suffered nightmares and fears from exposure to the husband; and evidence of the husband's acts of sexually touching the child. The Court ruled the following evidence supported the finding of the trial court that the reasons for the removal from the mother's home would not be remedied: the child's safety in the home was dependent upon long-term counseling for the mother; the mother was not making satisfactory progress in therapy; and the mother denied that her husband was abusive and therefore the mother was unable to protect the child.

In Matter of C.D., 614 N.E. 2d 591 (Ind. Ct. App. 1993), the Court of Appeals noted father's violent behavior and use of physical discipline, and found the following evidence sufficient to show that the parents could not remedy the reasons for the removal of the children from their home and to affirm the termination judgment: (1) a clinical psychologist found it unlikely that the mother could adequately parent the children; (2) the mother failed to complete a parenting class; (3) the mother did not contact the children for three years and failed to inform the welfare department or her children of her new address and remarriage; (4) the mother failed to take steps to improve her parenting skills during her absence; (5) the psychologist concluded that the mother's ability to bond with children was questionable due to her long absence; (6) the father lacked contact with the children and failed to visit or phone them; (7) father failed to follow through with recommendations for improvement of his deteriorating relationship with the children; (8) father had a potential for violent behavior and an inability to ascertain or attend to the children's needs; and (9) father intended to resume physical discipline of the children. Id. at 594-595.

In Matter of Y.D.R., 567 N.E. 2d 872 (Ind. Ct. App. 1991), the mother argued that the trial court gave undue weight to the fact that she was cohabiting with a man suspected of being a convicted child molester. The trial court's findings showed that it did consider the welfare department's concern about the mother's relationship with a person whom the mother admitted to her therapist had been convicted of child molesting, and the Court found nothing inappropriate about the trial court's action. The Court noted that the mother had chosen to deny the potentially abusive environment, had taken no action to alleviate the welfare department's concerns, and the boyfriend refused suggested counseling. See also Alexander v. LaPorte Co. Welfare Dept., 465 N.E. 2d 223, 226 (Ind. Ct. App. 1984) (mother was unable to protect the child from an abusive boyfriend); Matter of A.M., 596 N.E. 2d 236, 239 (Ind. Ct. App. 1992) (mother allowed children to have contact with known abuser).

In Waltz v. Daviess County Dept. of Public Welfare, 579 N.E. 2d 138 (Ind. Ct. App. 1991), the parents agreed that the child was a CHINS based on an incident of Shaken Baby Syndrome, but there was no ruling in the CHINS proceeding regarding which parent performed the shaking. The mother subsequently separated from the father and remarried, and had another child. A termination petition was filed and granted. The Court of Appeals reversed the termination on insufficient evidence. At the outset of the opinion the Court noted that the child was injured during one incident of shaking, but that there was no direct evidence that the mother committed the shaking and only "suspicion" that she was responsible since the child was in her custody at that time and she refused to blame her husband for the shaking. The Court accepted the mother's position that the one distinct episode of shaking the child could not alone support the termination since the child was now of an age that there was "no peril of repetition." Id. 141. However, the Court deemed it necessary to additionally consider whether return of the child to the mother's home would place the child in jeopardy of further violence. The Court determined that the record did not support the trial court's finding that mother willfully failed to comply with DPW's program of service delivery. The Court also concluded that other

findings of the trial court inaccurately reflected that the younger child had been mistreated by the mother, and otherwise mischaracterized the evidence. Id. at 142-143. Although the evidence showed the mother had a "temper" with adults, there was no evidence that she was aggressive, violent, or abusive toward her children. Id. at 143. The Court concluded that it was "left with a definite and firm conviction the evidence does not clearly and convincingly show that the conditions leading to Ashley's [child's] removal have not been remedied." Id.

See also Matter of Robinson, 538 N.E. 2d 1385, 1388 (Ind. 1989) (Court affirmed termination on evidence that father was convicted of abusing two of the girls, the girls were terrified of father and one girl was in psychiatric care, and father had not complied with dispositional orders and had resisted all efforts toward rehabilitation).

F. Drug Abuse

In In Re Wardship of R.B., 615 N.E. 2d 494, 498 (Ind. Ct. App. 1993), the Court of Appeals affirmed the termination of the parent-child relationship of a cocaine-using mother with her five children, noting the following: mother couldn't provide the children with necessary food, clothing, shelter, medical care, education or supervision; mother failed to regularly attend counseling for her drug problem and to complete parenting classes; mother did not obtain stable housing or employment; mother missed scheduled visits with the children; and mother showed a "total lack of commitment" to have her children returned to her care.

In Odom v. Allen County DPW, 582 N.E. 2d 393, 396 (Ind. Ct. App. 1991), the Court noted the following evidence as sufficient to prove that the conditions resulting in removal would not be remedied: (1) mother had a long history of drug and alcohol abuse that caused the child to be born addicted to cocaine and mother's drug use continued after the child's birth; (2) mother did not seek help for her drug and alcohol problem until forced to do so when incarcerated; (3) mother had a history of moving around constantly and was unable to provide a stable home; and (4) mother had absolutely no contact with the child, and the child was thriving in foster care. The Court opined that it was the trial court's prerogative to conclude that the mother might be drug free while in prison, but that based on her pattern of conduct this condition would not last once she was released. Id. at 396.

See also Matter of A.N.J., 690 N.E. 2d 716, 721 (Ind. Ct. App. 1997) (father did not provide documentation to office of family and children that he completed substance treatment, and evidence showed that if children were returned to father they would live in halfway house for substance addicts); In Re A.A.C., 682 N.E. 2d 542, 545 (Ind. Ct. App. 1997) (father's drug and alcohol use noted as supporting termination).

G. Alcohol Abuse

In S.E.S. v. Grant County Dept. of Welfare, 582 N.E. 2d 886, 887 (Ind. Ct. App. 1991), adopted and incorporated in 594 N.E. 2d 447 (Ind. 1992), testimony was presented at the termination hearing that the mother had been sober for six months, the longest period in her life. The case manager of the treatment center also testified that the mother was doing very well in treatment. This was the only testimony regarding the mother's condition at the time of the termination hearing. Thus, the mother argued, the department had failed to demonstrate that there was a reasonable probability that the conditions that resulted in the removal of the children would not be remedied. The Court rejected her argument and affirmed the termination. The Court found that the trial court properly concluded that the mother was likely to relapse after she left the treatment center in light of the mother's previous history of sobriety followed by relapse. In addition, the trial court's determination that the conditions resulting in removal were unlikely to be remedied was supported by the trial court's finding that the mother had not confronted her children's special problems because she failed to acknowledge her role in creating those problems.

In Page v. Greene County Dept. of Welfare, 564 N.E. 2d 956, 960 (Ind. Ct. App. 1991), the Court rejected the father's argument that the welfare department did not provide reasonable services to help him obtain adequate housing and employment so that the children could be returned to his care. The Court noted that the father had a pattern of alcohol abuse and violence and had failed to accept services arranged by the welfare department to overcome these problems. The Court noted that although, "the evidence does not indicate DPW [Department of Public Welfare] offered Gary [father] assistance with obtaining adequate housing or employment, the evidence indicates that such assistance would probably not have been a priority in the provision of reasonable services until Gary had overcome his problems with alcohol abuse and violence." Id. at 960. The Court also noted the testimony of psychologists who tested the parents that the father would be

unable to overcome his alcohol abuse and anti-social behavior except in a prison environment and that the mother had no parenting skills and demonstrated no basis upon which to build them.

In Matter of Campbell, 534 N.E. 2d 273 (Ind. Ct. App. 1989), the Court of Appeals found sufficient the evidence that the father continued to have a "drinking problem" and that the parents "did not progress in the case plan the caseworker prepared for them" over a period of two years. Id. at 275. The Court affirmed the termination. "The Welfare Department does not have to rule out any possibility of change; the Welfare Department just has to show that there is a reasonable probability the Campbells' behavior will not change." Id. The Court concluded, "[w]e are unwilling to put Yvonne [child] on a shelf until her parents are capable of caring for her appropriately. Two years without improvement is long enough." Id.

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

Parents cannot claim failure to provide services as a ground for reversing the termination if they did not actively seek services. In Jackson v. Madison County Dept. of Family, 690 N.E. 2d 792, 793 (Ind. Ct. App. 1998), the Court stated that a parent may not "sit idly by" for an extended period without asserting a need and desire for services and then argue that she was denied services to assist with her parenting. Id. at 793. When a parent claims the Department failed to establish that she cannot remedy the conditions for which the child was removed, "the burden was upon her [the parent] to show that, prior to the filing of a termination petition, she sought services from the department and was denied." Id. See also this Chapter above at VIII. B. 2. for discussion that office of family and children not required to prove delivery of services to parent as element of termination case.

Parents must make appropriate and timely efforts to obtain assessments or evaluations, and to participate in rehabilitation services. In In Re B.D.J., 728 N.E. 2d 195, 201, 202 (Ind. Ct. App. 2000), the Court affirmed the termination judgment on evidence that the father sought no services and failed to appear for assessments, parenting classes, and court hearings, which reflected father's ambivalence and unwillingness to change existing conditions. The children were placed in foster care rather than with the father because of father's inability to provide housing, maintain contact with the children, and failure to support the children. In Matter of A.N.J., 690 N.E. 2d 716, 721 (Ind. Ct. App. 1997), the Court noted the failure of the parent to provide documentation that he had completed substance abuse evaluations and parenting classes. In Matter of C.M., 675 N.E. 2d 1134, 1139-1140 (Ind. Ct. App. 1997), the mother failed to comply with court orders to participate in individual therapy and the child's treatment "until just before the termination hearing," made no progress in counseling, and failed to work toward reunification. The trial court can "ignore or discredit" evidence from the parent that she started to comply with dispositional orders shortly before the termination hearing. Id. at 1140. See also In Re J.J., 711 N.E. 2d 872, 875 (Ind. Ct. App. 1999) (father failed to complete evaluations and services designed to facilitate reunification as ordered by the court with no explanation for such failure).

Failure to cooperate with service providers may be a significant factor in termination. In S.J.J. v. Madison Cty. Dept. of Welfare, 629 N.E. 2d 866 (Ind. Ct. App. 1994), the court found that mother's refusal to allow an investigation of her home was significant, along with her failure to cooperate with service providers. In S.J.J., the thirteen and ten-year-old children were adjudicated CHINS, and the court issued dispositional orders that the mother maintain custody of the children, obtain counseling, provide adequate and stable housing, and "see" that the children attend school daily. The children were later removed from mother's care due to her failure to follow orders regarding stable housing, counseling, and school attendance. The termination petition was filed and granted after a hearing. On appeal, the Court found the following evidence, and inferences to be drawn therefrom, sufficient to show the conditions would not be remedied: (1) mother's inability to maintain consistent schedules for visitation with the children and therapy, and mother's refusal to modify the household situation by asking her roommate (known to have been involved in child pornography) to leave during child visitation, supported the inference that mother would not remedy the school attendance and other problems; (2) mother's refusal to allow welfare to investigate her living arrangements permits the trial court to discount mother's uncontroverted evidence that her home situation had significantly changed; (3) evidence of mother's failure in the past to attend counseling for treatment of a character disorder allowed the trial court to infer that further therapy would not remedy mother's problems, despite mother's protestation that she was now willing to commit to counseling and "there was no evidence that further counseling would be ineffective;" and (4) evidence of mother's refusal to attend court ordered counseling, lack of cooperation and inconsistency regarding visitation, failure to keep caseworkers informed of her residence, and refusal to allow welfare to

investigate her current living situation supported the finding that the mother was unwilling to cooperate with the system. *Id.* at 869. The judgment of termination was affirmed. *See also Ferbert v. Marion County OFC*, N.E. 2d (Ind. Ct. App. 2001) (although mother made extreme improvement in cleanliness in November, mother's refusal two months later to allow the case manager access to check the house because it was unclean, supports the conclusion that parent failed to provide a safe and clean environment). In *R.M. v. Tippecanoe County DPW*, 582 N.E. 2d 417 (Ind. Ct. App. 1991), the Court ruled that failure to cooperate with service providers and failure to improve unacceptable home conditions supported a finding that there was a reasonable probability that the conditions that led to the children's removal would not be remedied. *Id.* at 420. Similarly, in *M.B. v. Dept. of Public Welfare*, 570 N.E. 2d 78 (Ind. Ct. App. 1991), the Court affirmed the order terminating the parent-child relationship and held that the trial court's order was supported by evidence of the mother's failure to cooperate with the welfare department and service providers, and mother's failure to improve her care of the children. *Id.* at 82. The facts in that case showed that the mother returned the children from visits in poor condition, dirty, hungry, ill and exhausted, despite welfare department suggestions to help mother improve care of children during visits; mother attended twelve of fifteen parent nurturing classes, but the teacher found that mother did not benefit from them; mother did not read the materials or accept the recommendations of the in-home homemaker service provider; mother changed her residence eleven times in four months; mother had a moderate to severe borderline personality disorder and the doctor testified that she was not a good parent and not likely to improve. *Id.* at 83.

A series of cases indicate that receiving services alone is not sufficient, if the services do not result in the needed change, or only temporary change, or the parents do not acknowledge a need for change. *See In Re M.M.*, 733 N.E. 2d 6, 12 (Ind. Ct. App. 2000) (mother's failure to participate or benefit from services offered and provided to her was a factor in the termination); *In Re Wardship of M.H.*, 490 N.E. 2d 1119, 1123 (Ind. Ct. App. 1985) (parent received help from Catholic Social Services and took advantage of services offered, but agency personnel saw no improvement in mother during years of assistance, and professionals concluded counseling would be of no benefit to mother as she did not realize or accept she was source of her own difficulties); *Matter of D.L.W.*, 485 N.E. 2d 139, 143 (Ind. Ct. App. 1985) (Court affirmed termination when parent demonstrated pattern of temporary improvements, but no consistent or permanent change: "improvements" have coincided with similar immediate threats to her rights as a parent and have tended to last only as long as threat is perceived as immediate); *Matter of V.M.S.*, 446 N.E. 2d 632, 640-641 (Ind. Ct. App. 1983) (parents saw no need for any assistance, so offered services were not accepted or were ineffective; welfare department need not offer laundry list of all available community services to parent, but only services most needed to remedy problem); *Matter of Fries*, 416 N.E. 2d 908, 910 (Ind. Ct. App. 1981) (welfare department had done all it could reasonably be expected to do under circumstances).

Failure to visit the children and problems with the visitation have frequently been a factor in granting a termination petition. *See Matter of C.M.*, 675 N.E. 2d 1134, 1139 (Ind. Ct. App. 1997) (mother failed to appear for half of scheduled visits and exhibited inappropriate behavior during visits; visits were suspended until mother sought therapy). In *Matter of K.H.*, 688 N.E. 2d 1303, 1305-1306 (Ind. Ct. App. 1997), father's lack of contact with the child was a significant factor in the termination. The Court rejected father's argument that the mother refused to let him see the child, noting that the father had not seen or contacted the child for three years, never attempted to call or write the child, nor asked members of his family to communicate with the child, until the welfare department asked the father if he wanted to voluntarily terminate his parental rights. *See also Matter of Leckrone*, 413 N.E. 2d 977, 981 (Ind. Ct. App. 1980) (lack of parental supervision during home visits and children's physical illness both during and after visits were significant in showing lack of positive change by parent).

Visitation may be suspended until the parents comply with assessments or services to insure the child's safety, and in some situations visitation may not be consistent with the safety or well being of the child. In *In Re L.S.*, 717 N.E. 2d 204, 207-208 (Ind. Ct. App. 1999), the Court affirmed the termination judgment against a sufficiency of the evidence claim. In that case, visitation between the children and parents had been suspended because the extreme parental conflict during visits caused the children emotional distress. Reinstigating visitation was conditioned upon the parents writing to the children and the transsexual father had to stop dressing as a woman during visitation. The Court ruled there was no impropriety in the visitation suspension. Similarly in *In Re J.J.*, 711 N.E. 2d 872 (Ind. Ct. App. 1999), the father was prohibited from visiting the children until he completed a court ordered evaluation, and attended educational and counseling programs. *Id.* at 873. The father claimed that the court's restriction of his visitation pending a psychiatric examination affected his failure to progress toward reunification, and that it was unfair to attribute the failure

to visit as a factor in the termination judgment. The Court rejected these claims and affirmed the termination judgment, noting that under the dispositional statutes the court "should fashion a judgment that is first and foremost in the child's best interest," and, given father's history of violent behavior and violent outbursts toward the child, it was the least restrictive intervention that was still in the child's best interest to restrict visitation until the evaluation was completed. *Id.* at 875. Further, it was the father's choice to choose to delay the evaluation for nine months and to fail to complete the anger management services. *Id.* See also *Matter of C.D.*, 614 N.E. 2d 591, 595 (Ind. Ct. App. 1993) (children's interaction with father during visits was increasingly negative and children regressed after visits); *Matter of J.T.*, N.E. 2d (Ind. Ct. App. 2001) (social worker testified that child had night terrors, could not sleep through the night and became aggressive and withdrawn after visits with mother, and social worker recommended stopping visits due to these adverse effects).

The Court addressed visitation issues and non-cooperation with service providers in *Tipton v. Marion County DPW*, 629 N.E. 2d 1262 (Ind. Ct. App. 1994). In *Tipton* the office of family and children petitioned to terminate the parent-child relationship of two different fathers. The Court of Appeals found that the fathers' failure to comply with the requirements established by the welfare department were not sufficient to support the termination judgment, although other evidence was sufficient to support the termination judgment as to one of the fathers. *Id.* at 1269-1270. The Court noted that the fathers had been denied visitation by the welfare department until parenting and drug/alcohol assessments had been completed, even though the fathers had visited the children regularly and frequently while the children lived with their mother prior to foster care placement. The Court stated that the evidence did not support the trial court's finding that the fathers had been offered visitation or failed to take advantage of visitation. *Id.* at 1269. The Court stated: "[t]he fathers' failure to appear for assessments and court hearings reflect ambivalence, the failure to attend parenting classes an unwillingness to change existing conditions; but, the fathers' refusal to permit the DPW to further investigate their circumstances in and of itself is not the statutory ground for termination." *Id.* at 1269. The Court opined that the termination statute requires a showing that the parent-child relationship poses a threat to the child's well-being, not simply that it is less than optimal. *Id.*

For additional termination cases dealing with visitation issues, see *Adams v. Office of Fam. & Children*, 659 N.E. 2d 202, 203 (Ind. Ct. App. 1995) (during CHINS proceeding court suspended mother's visitation with children because of mother's attempt to persuade oldest daughters to retract sexual abuse allegations); *Matter of A.M.*, 596 N.E. 2d 236, 239 (Ind. Ct. App. 1992) (termination affirmed in part on evidence that mother failed to visit children consistently or to supervise them during visits, and mother's move out of town without notice to department resulted in no visits for eight months); *Matter of A.C.B.*, 598 N.E. 2d 570, 572 (Ind. Ct. App. 1992) (Court noted that trial court's denial of visitation to incarcerated alleged father was based on court's determination that visitation was not in child's best interests).

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

Failure to provide safe and adequate housing may be a factor in termination. See *In Re B.D.J.*, 728 N.E. 2d 195, 201, 202 (Ind. Ct. App. 2000) (father's inability to provide housing was a factor in the termination); *In Re M.M.*, 733 N.E. 2d 6, 12 (Ind. Ct. App. 2000) (teenage mother was never able to provide housing for child); *Matter of D.J.*, 702 N.E. 2d 777, 781 (Ind. Ct. App. 1998) (Court noted that mother's lifestyle was unstable, she did not have a job or permanent residence, and mother's choice of mates posed a threat to the child).

Failure to supervise a child or to insure school attendance, and failure to provide a safe, stable and adequately clean environment are significant factors in termination. Several cases dealing with these multiple issues are discussed in detail here, and several more recent cases on the subject are summarized at the end of this section.

In *In Re Termination of Parental Rights of V.A.*, 632 N.E. 2d 752 (Ind. Ct. App. 1994), the evidence showed that the mother was consistently unable to supervise more than one of her two daughters at a time, despite therapy. *Id.* at 756. Two psychologists opined that it was unlikely that the mother's ability to parent her children would improve. The Court further noted problems with cleanliness and safety in the mother's home, which resulted in a massive infection in the eye socket of the younger child's artificial eye after visits with the mother. *Id.*

In J.J.L. v. Madison County DPW, 628 N.E. 2d 1223 (Ind. Ct. App. 1994), the Court affirmed the termination judgment. The children had been sleeping on urine soaked mattresses in an extremely dirty house which reeked of rotten food and contained hazards such as broken objects and glass. The children were observed by the caseworker to be extremely small in stature, they were infested with head lice, and one child had a severe rash in her vaginal area. Upon removal, both children were also found to be developmentally delayed, but improved after placement outside the parents' care. The department recommended therapy for the mother's "personality disorder and arrest" condition, participation by the father in a drug and alcohol abuse treatment program, parenting classes, a living skills program, and weekly supervised visits with the children. The parents failed to comply with the vast majority of the caseworker's recommendations. The parents' occasional visits with the children resulted in violent and nervous behavior on the children's part. The Court opined that, although the parents claimed they had demonstrated that they were capable of change, the parents were in fact unwilling to do so. Id. at 1227. The evidence showed no improvement in the parents' patterns of conduct and supported the trial court's finding that there was a substantial probability of future neglect if the children were returned to the parents' care.

In Shaw v. Shelby Cty. D. of Public Welfare, 584 N.E. 2d 595 (Ind. Ct. App. 1992), the Court's review of the record disclosed the following as evidentiary support for the termination judgment: (1) the parents failed to follow through with parent/teacher plans to address the child's academic performance, hygiene, and behavior; (2) the parents' cooperation in meeting the child's treatment goals was very inconsistent; (3) the child's in-home visits were at times chaotic and volatile; (4) the child reported to his therapist that he and his sister had engaged in sex play during a home visit; (5) a treatment provider concluded that the parents had not demonstrated an ability over a long period of time to meet the child's needs; (6) the mother stated she was unable to care for her children on a full-time basis or provide for them financially; (7) the parents had both permitted overnight guests in their home in violation of agreements to protect the child and his sibling from sexual abuse; and (8) the father had worked toward reunification with the child but then decided he did not want custody. Id. at 599, 600.

In Matter of D.B., 561 N.E. 2d 844 (Ind. Ct. App. 1990), the following problems were identified in the dispositional hearing: lack of supervision, educational neglect of elder siblings, unstable living conditions, too many people (particularly young men) coming and going from the home at all hours, mother's emotional problems due to past abuse by her husband, lack of parental skills, heavy child care responsibility, mental health problems, and mother's inability to institute or enforce rules for her household. Services were offered and later a petition to terminate was filed and granted. The Court of Appeals found the following evidence was sufficient to prove that the conditions that resulted in the child's removal would not be remedied and that termination of the parent-child relationship was in the child's best interests: (1) strangers, especially men, continued to visit and live in the home and the child was left in their care; (2) the child was occasionally locked out of the apartment, sometimes in winter, and was exposed to strangers engaging in sexual intercourse in the home, and (3) there was often insufficient food. The mother failed to reapply for ADC or food stamps as suggested by the homemaker and did not follow through with counseling.

For additional cases on safety, stability, supervision, school attendance, and hygiene, see Ferbert v. Marion County OFC, N.E. 2d (Ind. Ct. App. 2001) (uncleanliness of home and repeated failure to demonstrate safe and clean home environment, along with other factors, supported termination); Matter of J.T., N.E. 2d (Ind. Ct. App. 2001) (evidence that low IQ mother lacked capacity to understand and provide safe and supervised environment for child supported termination judgment); In Re E.E., 736 N.E. 2d 791 (Ind. Ct. App. 2000) (mother's paranoid and delusional thought processes and her inability to appreciate child's basic needs for safety and stability supported termination judgment); Jackson v. Madison County Dept. of Family, 690 N.E. 2d 792, 794 (Ind. Ct. App. 1998) (mother's house was unfit for children, given its size and safety hazards); S.J.J. Madison Cty. Dept. of Welfare, 629 N.E. 2d 866, 869 (Ind. Ct. App. 1994) (termination judgment affirmed on evidence that conditions of inadequate and unstable housing and poor school attendance would not be remedied); Matter of M.J.G., 542 N.E. 2d 1385, 1386 (Ind. Ct. App. 1989) (children removed from home because they were dirty and suffering from insect and rat bites and because of following conditions in the home: rat infestation, trash and dirty dishes, non-functioning toilet, and rotting food).

J. Poverty, Low Income, Failure to Support

Failure of a parent to provide financial support for the child is often listed as a factor supporting the termination judgment. See In Re M.M., 733 N.E. 2d 6, 12 (Ind. Ct. App. 2000) (teenage mother had not contributed to support of child and was unable to provide food, clothing, shelter, or medical care for the

child); Matter of N.B., 731 N.E. 2d 492, 493 (Ind. Ct. App. 2000) (incarcerated putative father did not pay child support and was unable to provide necessary care and supervision for the child); Jackson v. Madison County Dept. of Family, 690 N.E. 2d 792, 793 (Ind. Ct. App. 1998) (one factor in the termination was the mother's failure to maintain significant employment in the last ten years); Matter of A.N.J., 690 N.E. 2d 716, 721 (Ind. Ct. App. 1997) (father's failure to pay anything toward court ordered support was listed as one of the factors supporting the termination judgment); Matter of K.H., 688 N.E. 2d 1303, 1305 (Ind. Ct. App. 1997) (father provided no support for child except for a few diapers even though continuously employed before his incarceration); In Re A.A.C., 682 N.E. 2d 542, 545 (Ind. Ct. App. 1991) (father's inability to maintain stable housing and employment and refusal to support the child were significant factors in the termination).

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

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

Id. at 203.

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

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

Id. at 285 (citations omitted).

After reviewing evidence of mother's unstable living arrangements, unstable personality, refusal to continue professional help, and inability to meet the special needs of the children, the Court concluded in D.T. that while "certain factors alone--Lola's smoking, inadequate housing, low income--would not justify termination of parental rights, all the factors are substantial evidence justifying termination." Id. at 286. The Court affirmed the termination judgment.

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

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

Id.

In Matter of A.M., 596 N.E. 2d 236 (Ind. Ct. App. 1992), the Court reversed the trial court's order terminating the parent-child relationship between the younger child and her father, stating that there was a total lack of evidence to establish the elements required by the statute. Id. at 240. The father had followed the department's requirements of establishing paternity, child-proofing his home, completing a home study and submitting to a substance abuse evaluation, but had failed to complete and pay for a parent evaluation. The Court noted that the welfare department's evidence of the incomplete parent evaluation, four missed visits in one year's time, and the father's youth and poverty were insufficient to support termination of the father's rights. The Court also stated that the welfare department had no reason to doubt the father's ability to parent effectively other than his age, which was twenty years. The Court noted that the welfare department was aware that the father and his fiancé were parenting another child. Id.

K. Terminating as to Some, But Not All Children in the Home

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

L. Inability of Parent to Bond with Child

The inability of the parent to bond with the child is often mentioned in termination opinions as part of the expert testimony regarding the parent, or more specifically in support of a finding that the parent cannot remedy the conditions that resulted in the removal of the child from the home or that termination is in the best interest of the child. See In Re E.E., 736 N.E. 2d 791, 795 (Ind. Ct. App. 2000) (Court noted testimony of social worker that there was no parent-child bond between mother and child); Matter of M.B., 666 N.E. 2d 73, 78 (caseworker testified that incarcerated father had no bond with child); Matter of A.C.B., 598 N.E. 2d 570, 572 (Ind. Ct. App. 1992) (inability of incarcerated father to bond with child was due to father's own choice to participate in criminal activity and resulting incarceration); R.M. V. Tippecanoe County DPW, 582 N.E. 2d 417, 420 (child's unnatural and erratic behavior toward mother raised questions as to the possibility of normal bonding); Matter of Tucker, 578 N.E. 2d 774, 779 (Ind. Ct. App. 1991) (inability of mentally ill mother to bond with child or give emotional support to child was a factor in affirming termination judgment).

M. Medical or Special Needs of Child

In R.G. v. MCOFC, 647 N.E. 2d 326 (Ind. Ct. App. 1995), the Court ruled that past failure and future inability of the mentally impaired parents to meet the specialized needs of the child born with hydrocephalus supported the termination judgment. The Court noted that the parents would not be able to provide "even minimally sufficient care," and the child would "not reach his full potential" in the parents' care. The Court also found that the foster parents had provided a stable home and desired to adopt the child, and that the child had bonded with the foster parents. Id. at 329-330. In Shaw v. Shelby Cty. D. of Public Welfare, 584 N.E. 2d 595, 599 (Ind. Ct. App. 1992), the child was self abusive, physically aggressive toward others, and needed structure and consistency. The Court found that the parents were unable to meet his specialized needs. In Matter of Y.D.R., 567 N.E. 2d 872 (Ind. Ct. App. 1991), the Court found that evidence of mother's inability to meet the needs of her children supported the termination. The facts showed that improving the condition of one of the children "would require a great deal of counseling, warmth, positive but firm responses from his caretakers, consistency, and positive interaction between adults." Id. at 874. The other child was under-nourished and showed signs of emotional and social deprivation and reflected severe expressive motor and cognitive language delay. This child was first diagnosed to be mildly mentally handicapped, but when re-tested after a brief period in foster care showed significant gains.

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

Children should not be taken from their parents because there is a better place for them than in the custody of their parent.... The law recognizes that some children have different and sometimes more demanding needs for their survival. The evidence in this case clearly shows that because of the history of abuse and family instability, Lola's [mother's] children need stability and special care to overcome the psychological harm already inflicted on them... The children continue to grow up quickly; their physical,

mental and emotional development cannot be put on hold while their recalcitrant parent fails to improve the conditions that led to their being harmed and that would harm them further. Id. at 286.

See also Matter of V.M.S., 446 N.E. 2d 632, 638 (Ind. Ct. App. 1983) (in affirming termination the court noted caseworker testimony that children had not received immunizations and parents had not kept medical appointments for children or given prescribed medicines).

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

In S.E.S. v. Grant County Dept. of Welfare, 582 N.E. 2d 886 (Ind. Ct. App. 1991), adopted and incorporated at 594 N.E. 2d 447 (Ind. 1992), the Court rejected mother's argument that termination was not in the best interest of the children because the children exhibited the same behavioral problems in foster care that they exhibited while in her custody. The Court noted evidence that the children had improved in foster care, though they still had many problems at the time of the hearing, and the children had regressed after visits with their mother. The Court noted that a child's "enormous progress" in foster care, and other situations, could be factors in termination, but each case has unique facts and there is no exclusive list of factors which must be present for a determination that termination of the parent-child relationship is in the child's best interest. S.E.S., 582 N.E. 2d at 889. See also Matter of Y.D.R., 567 N.E. 2d 872 (Ind. Ct. App. 1991) (facts showed one of the children had significant gains in foster care); Matter of Tucker, 578 N.E. 2d 774, 778 (Ind. Ct. App. 1991) (child's anger and wildness subsided in foster care, his emotional state improved dramatically, and he did not exhibit any self-abuse after being established in foster care); Matter of Campbell, 534 N.E. 2d 273, 726 (Ind. Ct. App. 1989) (child had been "behind socially and mentally but has improved since she has been in her foster home").

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

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

In Matter of K.H., 688 N.E. 2d 1303, 1306 (Ind. Ct. App. 1997), the Court affirmed the finding that termination was in the best interest of the child upon (1) testimony of the guardian ad litem that the "transitory nature of foster care" adversely affects the child and "weighs against continuation of foster care" while awaiting father's release from prison; (2) termination of the parent-child relationship would allow the child to be adopted with her half-brother, and (3) inability of the father to provide for the child. In Matter of C.M., 675 N.E. 2d 1134, 1140 (Ind. Ct. App. 1997), the Court relied in part on the following testimony in affirming the termination: (1) termination was necessary for the child to move forward in his social and emotional development; (2) the child had improved physically and become more independent since going into foster care; (3) permanency was essential to the continued emotional growth of the child, and (4) extended foster care would be detrimental.

In Matter of M.B., 666 N.E. 2d 73 (Ind. Ct. App. 1996), the Court found the evidence sufficient to prove that termination was in the best interest of the children. The Court relied on expert testimony from a clinical psychologist that the children would suffer permanent psychological damage if maintained an additional two

years or longer in foster care awaiting reunification with the father. The Court summarized the expert testimony on the effects of long-term foster care:

She [the psychologist] explained that the children needed to have a sense of permanency which is virtually impossible in foster care settings. The anxiety resulting from not knowing where they would be living tomorrow and who would be their parents detracts from their ability to learn the other things children normally learn during their preschool years. ...the longer the uncertainty continued, the more delayed the children become in psychological development and the more vulnerable they become to long-term personality disorders.

Id. at 78.

The Court also relied on the caseworker's testimony on the lack of bonding between one of the children and the father, the length of time needed for father's rehabilitation, and the possibility that reunification might never be possible. The Court noted the testimony of the court appointed special advocate (CASA) on the need of the children for stability and permanence and failure of the father to cooperate with the case plan or to obtain needed services. Id. at 79.

In Matter of Adoption of D.V.H., 604 N.E. 2d 634 (Ind. Ct. App. 1992), the Court noted the testimony of the psychologist that long term foster care posed risks for a child, and that repetitive court proceeding involving a child were disruptive and provoke anxiety, especially in a child age seven or older. Id. at 637, 638. In affirming the termination, the Court rejected the mother's argument that the trial court should have elected to continue the child in foster care rather than terminating the parent-child relationship because the child's foster mother had stated she would be willing to continue to provide foster care for him if parental rights were not terminated. Id. at 638. See also Matter of Campbell, 534 N.E. 2d 273, 276 (Ind. Ct. App. 1989) (Court noted testimony of caseworker and guardian ad litem that child should not have to wait in "limbo" and "foster homes are not permanent, and that children can sense the impermanency").

P. Child's Desires and Fears

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

Arguably, termination may be appropriate even when the child does not express a desire for this legal separation, if the service providers strongly recommend that termination is essential to the safety and permanency of the child. Loyalty to parents may make it impossible for some children to state a desire for termination, even though they may understand (at some level) that the parent is incapable or unwilling to ever provide a safe place for them, and they may desire the normalcy and security of a permanent family. In Stone v. Daviess Co. Div. Child Serv., 656 N.E. 2d 824, 831-832 (Ind. Ct. App. 1995), the Court was unpersuaded by father's argument that it was error to terminate the parent-child relationship against the wishes of one of the children. The facts showed that the thirteen-year-old child had been deposed with his parents present when he was eleven years old. The child stated in the deposition that he did not want the parent-child relationship to be terminated. Analogizing termination proceedings to custody proceedings pursuant to IC 31-1-11.5-21(a) (recodified at IC 31-17-2-8), the Court noted that the child's wishes in a custody dispute are merely one of the six factors enumerated by statute that the trial court must consider in making a best interests determination. Id. at 832. In termination proceedings, as in custody cases, the wishes of the child are only one of the many factors the trial court must consider in determining the best interests of the child. The Court concluded that other evidence that the child had bonded with the foster parents and wanted to stay with them, coupled with the circumstances of the child's deposition, could have reasonably led the trial court to afford little or no weight to the child's stated wishes. The two court appointed special advocates and the

guardian ad litem did not raise any issue regarding the child's wishes, and all three recommended termination. The Court found that the representation by the court appointed special advocates and guardian ad litem was sufficient to protect the rights of the children.

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