

# CHAPTER TEN

## CHINS FACT-FINDING HEARING

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# CHAPTER TEN

## CHINS FACT-FINDING HEARING

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### I. FACT-FINDING HEARING PROCEDURES

#### A. HEARING TIME LIMITS

##### 1. Hearing Held Within 60 Days of Filing Petition

Except as provided in Ind. Code § 31-34-11-1(b), unless the allegations of a petition have been admitted, the juvenile court shall complete a fact-finding hearing not more than sixty (60) days after a petition alleging that a child is a child in need of services is filed in accordance with Ind. Code § 31-34-9. Ind. Code § 31-34-11-1(a).

Only after petition is authorized to adjudicate the matter whether the child is in need of services does court engage in dispositional or fact-finding hearings which potentially can result in decree which terminates or alters parental rights to custody of child. Wardship of Nahrwold v. Dep't of Public Welfare of Allen County, 427 N.E.2d 474, 479 (Ind. Ct. App. 1981).

##### 2. Additional 60 days Possible With Parties' Consent

The juvenile court may extend the time to complete a fact-finding hearing, as described in Ind. Code § 31-34-11-1(a), for an additional sixty (60) days if all parties in the action consent to the additional time. Ind. Code § 31-34-11-1(b).

##### 3. If Hearing Not Timely Held, the Case Shall be Dismissed

If the fact-finding hearing is not held within the time set forth in Ind. Code § 31-34-11-1(a) or -1(b), upon motion with the court, the court shall dismiss the case without prejudice. Ind. Code § 31-34-11-1(d). When Ind. Code § 31-34-11-1(d) was added it removed the previous ambiguity in the statute and the term "shall" is no longer capable of being "directory." D.R. v. Ind. Dep't of Child Servs. (In re J.R.), 98 N.E.3d 652 (Ind. Ct. App. 2018) (overruling previous holding in Parameter v. Cass County Dep't of Child Servs., 878 N.E.2d 444, 448 (Ind. Ct. App. 2007)).

Motion to dismiss MUST be filed with the court before the fact finding hearing has concluded and the court has ruled on the issue, otherwise the issue is waived. K.S. v. Ind. Dep't of Child Servs. (In re J.S.), 2019 Ind. App. LEXIS 266 (Ind. Ct. App. 2019).

##### 4. Case May Be Continued Past 120 Days with showing of good cause

Although Ind. Code § 31-34-11-1(b) allows a CHINS fact-finding hearing to be continued an additional 60 days, the parties may not continue the hearing past the statutory 120-day maximum without a showing of good cause. M.S. v. DCS, 140 N.E.3d 279 (Ind. 2020). Indiana Supreme Court states that trial courts should carefully consider if there is good cause to continue hearing and best practice is to hold a hearing on the motion and make a record of the court's findings

#### B. NOTICE OF HEARING

*For specifics on the manner of the notice, see Chapter Four – Constitutional and Statutory Rights, Right to Due Process.*

If the fact-finding hearing is not held immediately after the initial hearing as provided under Ind. Code § 31-34-10-9, the department shall provide notice of any fact-finding hearing to each foster parent or other caretaker with whom the child has been placed for temporary care. Ind. Code § 31-34-11-1(c).

Hallberg v. Hendricks County Office of Family & Children, 662 N.E.2d 639, 645-46 (Ind. Ct. App. 1996) (Father failed to show good cause for granting motions for continuance in CHINS proceeding despite his assertion that hearing should be continued until he was served a copy of the CHINS petition. Father received notice of the substance of allegations contained in a court order more than three months prior to hearing and was not prejudiced by failure to serve him with copy of CHINS petition.).

S.O. v. Ind. Dep't of Child Servs. (In re J.S.O.), 938 N.E.2d 271, 277 (Ind. Ct. App. 2010) (Father's due process rights were violated when DCS and trial court failed to notify him of CHINS proceedings when DCS had actual knowledge of father's name and whereabouts).

In re S.A., 15 N.E.3d 602 (Ind. Ct. App. 2014) (in adjudicating S.A. as a CHINS before Father's fact-finding hearing, trial court denied Father's due process right to be heard).

In re K.D., 962 N.E.2d 1249 (Ind. 2012) (trial court denied stepfather's right to due process when it denied his request for a fact-finding hearing on CHINS allegations, even though Mother had already admitted the allegations).

In re S.E., 15 N.E.3d 37 (Ind. Ct. App. 2014) (requiring deaf mother to testify by signing to an interpret did not violate mother's right to due process).

In re A.M.B., 922 N.E.2d 740 (Ind. Ct. App. 2010) (Mother, who was twenty minutes late to termination hearing, was denied her right to due process when the trial court would not let her testify; trial court should have afforded her an opportunity to testify).

Cf.

In re J.K., 30 N.E.3d 695 (Ind. 2015) (in CHINS case, trial court's derogatory remarks to Father and pressuring of Father to admit that J.K. was a CHINS denied father's due process right to a fair tribunal).

### **C. BURDEN OF PROOF**

A finding not covered by Ind. Code § 31-34-12-1 [child committed a delinquent act or adult committed a crime] or Ind. Code § 31-34-12-2 [termination of parental rights] must be based upon a preponderance of the evidence. Ind. Code § 31-34-12-3.

A CHINS proceeding is a civil action, and thus, the state (DCS) must prove by a preponderance of the evidence that a child is a CHINS as defined by the juvenile code. In re S.W., 920 N.E.2d 783 (Ind. Ct. App. 2010); and E.B. v. Ind. Dep't of Child Servs. (In re Des.B.), 2 N.E.3d 828, 835-36 (Ind. Ct. App. 2014).

Speculation is not enough for a CHINS finding. D.H. v. Marion County Office of Family & Children, 859 N.E.2d 737, 744 (Ind. Ct. App. 2007).

### **D. FUNDAMENTAL RIGHT TO PARENT**

*For more on the right to parent, see Ch. 4 – Constitutional and Statutory Rights.*

Parent's fundamental right to direct the upbringing of the child is balanced against the parent's corresponding duty to protect the child and do whatever may be necessary for the child's care, maintenance, and preservation; it is only when parent is unable to fulfill the duty that state has authority to intervene. J.W. v. Hendricks County Office of Family & Children, 697 N.E.2d 480, 482-83 (Ind. Ct. App. 1998).

F.S. v. Indiana Dept. of Child Services, 53 N.E.3d 582 (Ind. Ct. App. 2016) (Ind. Code § 31-33-8-7 lets DCS interview children to classify reports of neglect as substantiated or unsubstantiated, but trial court erred in compelling Mother to consent to DCS interviewing two of her children without evidence suggesting abuse or neglect; order violated Mother's 14<sup>th</sup> Amendment due process right to raise her family without undue interference by the State).

#### **E. ACTION IS ADVERSARIAL**

A statutory action to restore child to custody of his/her parents is an adversarial proceeding. State ex rel. Bryant v. Warrick Circuit Court, 115 N.E.2d 742, 743 (Ind. 1953).

#### **F. REBUTTABLE PRESUMPTION THAT CHILD IS CHINS**

##### **1. If Child Was Injured**

Pursuant to Ind. Code § 31-34-12-4, a rebuttable presumption is raised that the child is a child in need of services because of an act or omission of the child's parent, guardian, or custodian if the state introduces competent evidence of probative value that:

- (1) The child has been injured;
- (2) At the time the child was injured, the parent, guardian, or custodian:
  - (A) Had the care, custody, or control of the child; or
  - (B) Had legal responsibility for the care, custody or control of the child;
- (3) The injury would not ordinarily be sustained except for the act or omission of a parent, guardian, or custodian; and
- (4) There is a reasonable probability that the injury was not accidental.

For example:

Bateman v. Adams County Dep't of Child Servs. (In re C.B.), 865 N.E.2d 1068, 1073 (Ind. Ct. App. 2007) (Evidence was sufficient to show that child's physical well-being was seriously endangered and that child needed care and treatment he was not receiving from mother. While it was not certain that mother inflicted multiple injuries, the injuries occurred while the child was under the mother's care and custody, and the record suggested that mother was slow to seek medical treatment.).

Ind. Dep't of Child Servs. v. J.D., 77 N.E.3d 801 (Ind. Ct. App. 2017) (trial court erroneously concluded that physicians were unqualified to opine as to the nature of the child's injuries, and thus the evidence was competent and probative, and therefore sufficient to trigger the application of the presumption statute contained in Ind. Code § 31-34-12-4 and shift the burden of producing evidence to rebut the presumption to the child's parents).

##### **2. If Child Was Living With a Sex Offender and the Victim**

Pursuant to Ind. Code 31-34-12-4.5(a), there is a rebuttable presumption that a child is a child in need of services if the state establishes that the child lives in the same household as an adult who:

- (1) Committed an offense described in Ind. Code § 31-34-1-2, Ind. Code § 31-34-1-3, or Ind. Code § 31-34-1-3.5 against a child and the offense resulted in a conviction or a judgement under Ind. Code § 31-34-11-2; or

- (2) Has been charged with an offense described in Ind. Code § 31-34-1-2, Ind. Code § 31-34-1-3, or Ind. Code § 31-34-1-3.5 against a child and is awaiting trial.

For example:

Slater v. Marion County Dep't. of Child Servs., 865 N.E.2d 1043, 1048-49 (Ind. Ct. App. 2007) (In CHINS proceeding, DCS met statutory requirement that it show a sex offense perpetrated by father resulted in either a conviction or the entry of a judgment after a CHINS fact-finding hearing. Trial court entered judgment determining child to be a CHINS based on allegations of father's sexual abuse against child's older sibling.).

**a. Grounds Not Available to Rebut Presumption**

Pursuant to Ind. Code § 31-34-12-4.5(b), the following may not be used as grounds to rebut the presumption under Ind. Code § 31-34-12-4.5(a):

- (1) The child who is the victim of the sex offense described in Ind. Code § 31-34-1-2 or Ind. Code § 31-34-1-3 is not genetically related to the adult who committed the act, but the child presumed to be the child in need of services under this section is genetically related to the adult who committed the act.
- (2) The child who is the victim of the sex offense described in Ind. Code § 31-34-1-2 or Ind. Code § 31-34-1-3 differs in age from the child presumed to be the child in need of services under this section.

**G. RIGHTS TO COUNSEL, CONFRONT WITNESSES, REMAIN SILENT, COMPULSORY PROCESS, JURY, ETC.**

*For a discussion of the basic rights, see Ch. 4 – Constitutional and Statutory Rights.*

**H. OPPORTUNITY TO BE HEARD**

The court shall provide a person who is required to be notified under Ind. Code § 31-34-11-1(c) [each foster parent or other caretaker with whom the child has been placed for temporary care] an opportunity to be heard at the fact-finding hearing. Ind. Code § 31-34-11-1(c).

In re A.B., 332 N.E.2d 226, 228 (Ind. Ct. App. 1975) (Where natural father of child born out of wedlock went to hearing on petition to have child declared to be a dependent and neglected child, and, although father's paternity was not legally established, it was not disputed, it was an abuse of discretion to deny father any opportunity to be heard.).

In re S.A., 15 N.E.3d 602 (Ind. Ct. App. 2014) (in adjudicating S.A. as a CHINS before Father's fact-finding hearing, trial court denied Father's due process right to be heard).

In re K.D., 962 N.E.2d 1249 (Ind. 2012) (trial court denied stepfather's right to due process when it denied his request for a fact-finding hearing on CHINS allegations, even though Mother had already admitted the allegations).

In re S.E., 15 N.E.3d 37 (Ind. Ct. App. 2014) (requiring deaf mother to testify by signing to an interpret did not violate mother's right to due process).

In re A.M.B., 922 N.E.2d 740 (Ind. Ct. App. 2010) (Mother, who was twenty minutes late to termination hearing, was denied her right to due process when the trial court would not let her testify; trial court should have afforded her an opportunity to testify).

Cf.

In re J.K., 30 N.E.3d 695 (Ind. 2015) (in CHINS case, trial court's derogatory remarks to Father and pressuring of Father to admit that J.K. was a CHINS denied father's due process right to a fair tribunal).

## 1. Incarcerated Parent

In general, the decision whether to permit an incarcerated parent to attend such a hearing rests in the sound discretion of the trial court. J.T. v. Marion County Office of Family & Children, 740 N.E.2d 1261, 1265 (Ind. Ct. App. 2000).

Although the Indiana Supreme Court acknowledged whether to permit an incarcerated parent to attend a termination of parental rights hearing is within the trial court's discretion, the Court adopted West Virginia's test identifying 11 factors the trial court should consider when making the determination: (1) The delay resulting from parental attendance; (2) the need for an early determination of the matter; (3) the elapsed time during which the proceeding has been pending; (4) the best interests of the child(ren) in reference to the parent's physical attendance at the termination hearing; (5) the reasonable availability of the parent's testimony through a means other than his or her attendance at the hearing; (6) the interests of the incarcerated parent in presenting his or her testimony in person rather than by alternate means; (7) the effect of the parent's presence and personal participation in the proceedings upon the probability of his or her ultimate success on the merits; (8) the cost and inconvenience of transporting a parent from his or her place of incarceration to the courtroom; (9) any potential danger or security risk which may accompany the incarcerated parent's transportation to or presence at the proceedings; (10) the inconvenience or detriment to parties or witnesses; and (11) any other relevant factors. C.G. v. Marion County Dep't of Child Servs., 954 N.E.2d 910, 922-923 (Ind. 2011).

**PRACTICE POINTER:** The factors identified in C.G. should be addressed in a motion to have the incarcerated parent transported for the fact-finding hearing. It is important to make a record of why other means, such as appearing by telephone, are not available or are not adequate and how your client will be prejudiced by not being able to appear in person.

## I. EVIDENCE

### 1. Admissibility of Prior or Subsequent Acts or Omissions – 404(b) Evidence

Pursuant to Ind. Code § 31-34-12-5, evidence that a prior or subsequent act or omission by a parent, guardian, or custodian injured or neglected a child is admissible in proceedings alleging that a child is a child in need of services to show the following:

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

Standards set forth in CHINS statutes contemplate parent's past, present, and future ability to provide sufficient care for the child and the parent's character; evidence of mother's prior involvement with county social services agency regarding *any* child, including CHINS petitions filed on behalf of those children, was admissible character evidence in CHINS proceedings. Matter of J.L.V., Jr., 667 N.E.2d 186, 190-91 (Ind. Ct. App. 1996).

Court may consider past neglect in making its decision to terminate parental rights; however, adjudication that child is dependent and neglected may not be based solely on conditions which existed in distant past and no longer exist. In re Bender's Wardship, 352 N.E.2d 797, 804 (Ind. Ct. App. 1976).

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. In re Matter of Termination of Parent-Child Relationship of D.G., 702 N.E.2d 777, 780 (Ind. Ct. App. 1998).

**Possible Argument:** Ind. Code § 31-34-12-5 is without effect because it conflicts with the Indiana Rules of Evidence. By permitting admission of previous acts without consideration of possible prejudicial impact required by Ind. Evidence Rule 403, and by admitting prior bad acts to show the likelihood the act or omission of the parent is responsible for the child's current injury or condition, the statute admits evidence not necessarily admissible under the Indiana Rules of Evidence, thereby creating two different standards. Because the statute's substantive requirements for admissibility conflict with the Indiana Rules of Evidence, the statute is a nullity. See McEwen v. State, 695 N.E.2d 79, 89 (Ind. 1998) (*citing* Humbert v. Smith, 664 N.E.2d 356, 357 (Ind. 1996)).

**PRACTICE POINTER:** Indiana Rule of Evidence 404(b) states that in a criminal case, upon request of the accused, the prosecution "shall provide notice in advance of trial, or during trial if the court excuses pre-trial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial." In a civil CHINS proceeding, there is no such requirement, but the evidence should be requested as part of the normal discovery process. If not produced prior to the fact-finding hearing, object on the basis of failure to comply with discovery.

## 2. Admissibility of Cumulative Evidence

Hallberg v. Hendricks County Office of Family & Children, 662 N.E.2d 639, 647 fn. 9 (Ind. Ct. App. 1996) (In CHINS proceeding, father suffered no prejudice from testimony of caseworker for OFC that minor child had told her during interview that father had touched and kissed her private parts, as such testimony was merely cumulative of child's testimony at hearing.).

## 3. Evidence Concerning Non-Custodial Parent (Relevancy)

McCarthy v. McCarthy, 401 N.E.2d 759, 762-63 (Ind. Ct. App. 1980) (In action against mother to declare child a neglected child, evidence concerning father's fitness as parent was admissible, since such information was clearly relevant to decision on placement of child.).

Montgomery v. Marion County Office of Family & Children (In re C.S.), 863 N.E.2d 413, 419 (Ind. Ct. App. 2007) (Determination that child was CHINS was not supported by sufficient evidence. Trial court's findings focused on mother's drug use during pregnancy, which resulted in child being born with drugs in her system. There was no allegation or evidence that alleged father was responsible for the circumstances of the CHINS allegation. Alleged father's "failure" to establish paternity before fact-finding hearing was not evidence of neglect on his part that would seriously impair or endanger child. The only evidence before trial court relating to alleged father was that he would be an acceptable parent to child.).

N.L. v. Ind. Dep't of Child Servs. (In re N.E.), 919 N.E.2d 102, 104 (Ind. 2010) (CHINS petition only alleged that mother, not father, was unable to protect the child from domestic violence; under most circumstances, there are allegations as to both parents, yet a separate analysis as to each parent is not always required, but it may sometimes be necessary; CHINS adjudication does not establish culpability on the part of a particular parent.).

S.S. v. Ind. Dep't of Child Servs. (In re K.D.), 962 N.E.2d 1249, 1256 (Ind. Ct. App. 2012) (References In re N.E. v. DCS, 919 N.E.2d 102 (Ind. 2010)) (based on trial court's interpretation of N.E. (only one parent was accused in N.E., not both). After the mother admitted to the CHINS petition, the father's fact-finding hearing was incorrectly canceled.).

**Note:** A CHINS adjudication reflects the status of a child without establishing the culpability of a particular parent. A CHINS adjudication is simply a determination that a



child is in need of services and is unlikely to receive those services without the court's intervention. It is not a determination of parental fault. A child may be found a CHINS based on the action or inaction of both parents or only one parent, or even where neither parent has committed any wrongdoing. See In re S.A., 15 N.E.3d 602 (Ind. Ct. App. 2014).

#### **4. Admissibility of Hearsay**

Hearsay is not admissible in a CHINS fact finding unless it falls within a recognized hearsay exception under Indiana Rules of Evidence or within a statutory hearsay exception. Roark v. Roark, 551 N.E. 2d 865, 869 (Ind. Ct. App. 1990) and Page v. Greene County Dept. Of Welfare, 564 N.E. 2d 956, 959 (Ind. Ct. App. 1991).

Ford v. State, 104 N.E.2d 406, 406 (Ind. Ct. App. 1952) (Only evidence heard was an unverified report of chief probation officer, which was not legal evidence in proceedings in which child was made ward of court.).

Matter of M.B., 638 N.E.2d 804, 810 (Ind. Ct. App. 1994) (Affidavit provided by child psychologist, which indicated children would be traumatized if forced to recount their abuse, was properly admitted in CHINS proceeding; discretion afforded to trial court allowed it to admit psychologist's "certification" based on actual examination of children, and in part, on hearsay.).

H.B. v. Ind. Dep't of Child Servs (In re D.B.M), 20 N.E.3d 174, 179 (Ind. Ct. App. 2014) (DCS supervisor testified to the contents of reports of a caseworker, which was hearsay, but error was harmless because testimony was cumulative. Court found it likely would have been admissible under the public or business record exception – see Ind. Evidence Rule 803(6), (8), - as long as the custodian or other qualified witness laid a proper foundation by testifying that the records are regularly made; J.L. v. State, 789 N.E.2d 961, 965 (Ind. Ct. App. 2003), *citing* Ground v. State, 702 N.E.2d 728, 731 (Ind. Ct. App. 1998).).

#### **5. Admissibility of Privileged Communications**

Neither: (1) the physician-patient privilege; nor (2) the husband-wife privilege; is grounds for excluding evidence in a proceeding in which the child is alleged to be a child in need of services. Ind. Code § 31-34-12-6.

#### **6. Admissibility of Child Statements or Videotapes**

This section only applies to an action initiated to determine if a child is a child in need of services under: (1) Ind. Code § 31-34-1-1 through Ind. Code § 31-34-1-6; (2) Ind. Code § 31-34-1-10; or Ind. Code § 31-34-1-11. Ind. Code § 31-34-13-1 and Ind. Code § 31-34-14-1.

##### **a. No Protected Person Statute**

Ind. Code § 35-37-4-6 applies to criminal proceedings where the introduction of statements by the child victim is at issue; the Protected Person Statute is not applicable in a CHINS proceeding. J.Q. v. Ind. Dep't of Child Servs., 836 N.E.2d 961, 964 n.3 (Ind. Ct. App. 2005).

##### **b. Circumstances for Admissibility of Child Statements or Videotapes**

Pursuant to Ind. Code § 31-34-13-2, a statement or videotape that:

(1) Is made by a child who at the time of the statement or videotape:

(A) Is less than fourteen (14) years of age; or

- (B) Is at least fourteen (14) years of age but less than eighteen (18) years of age and has a disability attributable to an impairment of general intellectual functioning or adaptive behavior that:
  - (i) Is likely to continue indefinitely;
  - (ii) Constitutes a substantial disability to the child's ability to function normally in society; and
  - (iii) Reflects the child's need for a combination and sequence of special interdisciplinary, or generic care, treatment, or other services that are of lifelong or extended duration and are individually planned and coordinated;

(2) Concerns an act that is a material element in determining whether a child is a child in need of services; and

(3) Is not otherwise admissible in evidence under statute or court rule;

is admissible in evidence in an action described in Ind. Code § 31-34-13-1 if the requirements of Ind. Code § 31-34-13-3 are met.

**c. Requirements for Admissibility of Child Statements or Videotapes**

Pursuant to Ind. Code § 31-34-13-3, a statement or videotape described in Ind. Code § 31-34-13-2 is admissible in evidence in an action to determine whether a child or a whole or half-blood sibling of the child is a child in need of services if, after notice to the parties of a hearing and of their right to be present;

- (1) The court finds that the time, content, and circumstances of the statement or videotape and any other evidence provide sufficient indications of reliability; and
- (2) The child:
  - (A) Testifies at the proceeding to determine whether the child or a half blood sibling of the child is a child in need of services;
  - (B) Was available for face-to-face cross-examination when the statement or videotape was made; or
  - (C) Is found by the court to be unavailable as a witness because:
    - (i) A psychiatrist, physician, or psychologist has certified that the child's participation in the proceeding creates a substantial likelihood of emotional or mental harm to the child;
    - (ii) A physician has certified that the child cannot participate in the proceeding for medical reasons; or
    - (iii) The court has determined that the child is incapable of understanding the nature and obligation of an oath.

Ind. Code § 31-34-13-3 required some separation of admissibility determination and CHINS determination in order to give effect to statute's notice and hearing requirements. Townsley v. Marion County Dept. of Child Services, 848 N.E.2d 684, 689 (Ind. Ct. App. 2006).

Ind. Code § 31-34-13-3 requires some separation of the child hearsay determination and the CHINS determination in order to give effect to the statute's notice and hearing requirements. J.Q. v. Ind. Dep't of Child Servs. (In re J.Q.), 836 N.E.2d 961, 965 (Ind. Ct. App. 2005).

M.B. v. Marshall County Dep't of Pub. Welfare, 638 N.E.2d 804 (Ind. Ct. App. 1994) (Out-of-court statements of children to counselor and foster parent were properly admitted in proceeding on CHINS petition, even though children were deemed "available." Trial judge accepted "availability" of children as opposed to their actual presence. No objection was made by defense counsel, and child psychologist submitted affidavit which indicated that children would be traumatized if forced to recount their abuse.).

Roark v. Roark, 551 N.E.2d 865, 869 (Ind. Ct. App. 1990) (GAL's opinion that it would be too traumatic for children to testify in CHINS proceeding was insufficient to support admission of hearsay statements of child under ten years of age, to admit statements, a hearing was necessary where court would determine whether statement contained sufficient indicia of reliability and either that child would testify at CHINS proceeding or that child was unavailable as a witness due to trauma, medical difficulties, or legal incompetence.).

**d. Notice of Intention to Use Statement or Videotape**

A statement or videotape may not be admitted in evidence under Ind. Code § 31-34-13 unless the attorney for the department informs the parties of: (1) an intention to introduce the statement or videotape in evidence; and (2) the content of the statement or videotape; at least seven (7) days before the proceedings to give the parties a fair opportunity to prepare a response to the statement or videotape before the proceeding. Ind. Code § 31-34-13-4.

**e. Child Testimony by Closed Circuit Television and Videotaping**

**(1) Court Order for Closed Circuit Television**

Pursuant to Ind. Code § 31-34-14-2, on the motion of the attorney for the department, the court may order that:

- (1) The testimony of a child be taken in a room other than the courtroom and be transmitted to the courtroom by closed circuit television; and
- (2) The questioning of the child by the parties be transmitted to the child by closed circuit television.

**(2) Court Order for Use of Videotapes**

On the motion of the attorney for the department, the court may order that the testimony of a child be videotaped for use at proceedings to determine whether a child or a whole or half-blood sibling of the child is a child in need of services. Ind. Code § 31-34-14-3.

**(3) Circumstances for Use of Closed Circuit Television or Videotaping**

Pursuant to Ind. Code § 31-34-14-4, the court may not make an order under Ind. Code § 31-34-14-2 or Ind. Code § 31-34-14-3 unless:

- (1) The testimony to be taken is the testimony of a child who at the time of the trial is:
  - (A) Less than fourteen (14) years of age; or
  - (B) At last fourteen (14) years of age but less than eighteen (18) years of age and has a disability attributable to an impairment of general intellectual functioning or adaptive behavior that:

- (i) Is likely to continue indefinitely;
  - (ii) Constitutes a substantial disability to the child's ability to function normally in society; and
  - (iii) Reflects the child's need for a combination and sequence of special interdisciplinary, or generic care, treatment, or other services that are of lifelong or extended duration and are individually planned and coordinated;
- (C) Found by the court to be a child who should be permitted to testify outside the courtroom because:
- (i) A psychiatrist, physician, or psychologist has certified that the child's testifying in the courtroom creates a substantial likelihood of emotional or mental harm to the child;
  - (ii) A physician has certified that the child cannot be present in the courtroom for medical reasons; or
  - (iii) Evidence has been introduced concerning the effect of the child's testifying in the courtroom and the court finds that it is more likely than not that the child's testifying in the courtroom creates a substantial likelihood of emotional or mental harm to the child;
- (2) The attorney for the department has informed the parties and their attorneys by written notice of the intention to have the child testify outside the courtroom; and
- (3) The attorney for the department informed the parties and their attorneys under Ind. Code § 31-34-14-4(2) at least seven (7) days before the proceedings to give the parties and their attorneys a fair opportunity to prepare a response before the proceedings to the motion of the attorney for the department to permit the child to testify outside the courtroom.

**(4) Persons Who May be Present During Closed Circuit Testimony**

Pursuant to Ind. Code § 31-34-14-5, if the court makes an order under Ind. Code § 31-34-14-2, only the following persons may be in the same room as the child during the child's testimony:

- (1) Persons necessary to operate the closed circuit television equipment.
- (2) Persons whose presence the court finds will contribute to the child's well-being.
- (3) A court bailiff or court representative.

**(5) Persons Who May be Present during Videotaped Testimony**

Pursuant to Ind. Code § 31-34-14-6, if the court makes an order under Ind. Code § 31-34-14-3, only the following persons may be in the same room as the child during the child's videotaped testimony: (1) The judge. (2) The attorney for the department. (3) The attorney for each party. (4) Person necessary to operate the electronic equipment. (5) The court reporter. (6) Persons whose presence the court finds will contribute to the child's well-being. (7) The parties, who can observe and hear the testimony of the child without the child being able to observe or hear the parties. However, if a party is not represented by an attorney, the party may question the child.

**(6) Persons Who May Question Child during Closed Circuit Television Testimony or Videotaping**

If the court makes an order under Ind. Code § 31-34-14-2 or Ind. Code § 31-34-14-3, only the following persons may question the child: (1) the attorney for the department, (2) the attorneys for the parties, (3) the judge. Ind. Code § 31-34-14-7.

If a party is not represented by an attorney, the party may question the child. Ind. Code § 31-34-14-6(7).

**7. Polygraph Examinations**

“Though the degree of reliability of polygraph evidence may depend upon a variety of identifiable factors, there is simply no way to know in a particular case whether a polygraph examiner’s conclusion is accurate, because certain doubts and uncertainties plague even the best polygraph exams.” U.S. v. Scheffer, 523 U.S. 303, 312 (1998). See also Hubbard v. State, 742 N.E.2d 919, 923 (Ind. 2001).

A.C. v. Ind. Dep’t of Child Servs. (In re B.W.), 17 N.E.3d 299, 309-10 (Ind. Ct. App. 2014) (“[I]t is well settled that polygraph examinations are notoriously unreliable.... Mother’s refusal to take a polygraph examination is, therefore, justified... [and] the court did not require Mother to take a polygraph examination as part of her parental participation plan; thus, DCS’s assertion that Mother’s refusal to take a polygraph demonstrates that she is incapable of providing safe home for the children is unfounded.”).

**8. Judicial Notice of Preliminary Filings**

Taking notice of substantive facts contained in preliminary filings in other cases exceeds the proper bounds of judicial notice principles and thus may not be used as substantive evidence to support a CHINS determination. Matter of D.P., 72 N.E.3d 976 (Ind. Ct. App. 2017).

**9. Res Judicata**

Because of the heightened due process protections given to children and parents involved in CHINS proceedings, the claim preclusion branch of res judicata applies to CHINS proceedings. V.B. v. Ind. Dep’t of Child Servs. (In re Eq.W.), 124 N.E.3d 1201 (Ind. 2019). In order to escape the preclusive effect of res judicata in a CHINS proceeding, the State’s subsequent petition must include new allegations of material fact separate from what was available to DCS to use at the original fact-finding hearing, which will necessarily take place in time after the relevant CHINS petition was dismissed. Id. See also, In Re R.L. v. DCS, 144 N.E.3d 686 (Ind. 2020)

**II. FACT-FINDING HEARING FINDINGS**

Finding of child neglect rests in sound discretion of trial court. McCarthy v. McCarthy, 401 N.E.2d 759, 761 (Ind. Ct. App. 1980).

**A. NO FORMAL FINDINGS REQUIRED**

CHINS statute does not stipulate that formal findings must accompany a CHINS determination. J.B. v. Ind. Dep’t of Child Servs. (In re S.D.), 2 N.E.3d 1283, 1287 (Ind. 2014).

**B. BASIC ELEMENTS OF FINDINGS**

The three elements that DCS must prove for a juvenile court to adjudicate a child a CHINS are: (1) the child is under the age of eighteen, (2) that one of the eleven different statutory circumstances exist that would make the child a CHINS, and (3) that the child needs care,

treatment, or rehabilitation that he or she is not receiving and that he or she is unlikely to be provided or accepted without the coercive intervention of the court. N.L. v Ind. Dep’t of Child Servs. (In re N.E.), 919 N.E.2d 102, 105-06 (Ind. 2010).

### **1. Findings Must be Based on Evidence Presented**

M.C v. Marion County Dep’t of Child Servs. (In re B.N.), 969 N.E.2d 1021, 1026 (Ind. Ct. App. 2012) (Juvenile court’s determination that the children are CHINS was clearly erroneous; some findings were not supported by the evidence presented, and there was no evidence of neglect.).

## **C. ENTRY OF JUDGMENT TIME LIMITS**

### **1. 30-Day Limit if Requested by Parties**

If the: (1) child; (2) child’s parent, guardian, or custodian; or (3) department; requests that judgment be entered, the judgment shall be entered not later than thirty (30) days after the request is made. Ind. Code § 31-34-11-4(b).

Whether a party moves for findings of fact and conclusions of law prior to a fact-finding hearing or during it, the trial court should issue them for purposes of appellate review. M.D. v. B.D., 906 N.E.2d 931, 932 (Ind. Ct. App. 2009).

### **2. 12-Month Limit After Close of Evidence**

Except as provided in Ind. Code § 31-34-11-4(b), at the close of all the evidence and before judgment is entered, the court may continue the case for not more than twelve (12) months. Ind. Code § 31-34-11-4(a).

## **D. CHILD’S NEEDS, NOT PARENTAL FAULT**

Issue of CHINS adjudication is not parental fault, but the condition of the child and whether the child needs services. N.L. v. Indiana Dep’t of Child Servs. (In re N.E.), 919 N.E.2d 102, 105 (Ind. 2010).

A child may be adjudicated a CHINS through no fault of a parent, for instance, where a child is missing or is endangering his own health, or where only one parent’s conduct makes a child a CHINS. S.S. v. Ind. Dep’t of Child Servs. (In re K.D.), 962 N.E.2d 1249, 1255 (Ind. 2012).

Issue is whether the child is in need of services and not whether the parent is “guilty” or “deserves” a CHINS adjudication. J.B. v. Ind. Dep’t of Child Servs. (In re S.D.), 2 N.E.3d 1283, 1285 (Ind. 2014). “The intrusion of a CHINS judgment, then, must be reserved for families who *cannot* meet those needs without coercion—not those who merely have *difficulty* doing so.” Id.

J.B. v. Ind. Dep’t of Child Servs. (In re S.D.), 2 N.E.3d 1283, 1285 (Ind. 2014) (“...Mother had difficulty meeting the demands of a situation that would test the mettle of any parent – but not that she would be unable to correct her one lingering issue without the “coercive intervention of the court.”).

M.K. v. Ind. Dep’t of Child Servs., 964 N.E.2d 240, 246-47 (Ind. Ct. App. 2012) (while the family came to Indiana after a series of “unfortunate and unforeseen events[,]” the record does not support the conclusion that the children were endangered by any neglect or that the parents were unable or unwilling to supply stable housing, food, clothing, care, or supervision).

M.W. v. DCS, 119 N.E.3d 15 (Ind.Ct.App. 2019) Teen sisters got in physical altercation. Mom called police to de-escalate the situation. DCS became involved. Mother had suitable housing, reliable income and was an engaged and loving parent. In scathing rebuke the Court

of Appeals states evidence was insufficient to support a finding of CHINS and coercive intervention of the court was not warranted.

The trial court must subordinate the interests of the parent to those of the child. In re J.C., 994 N.E.2d 278, 290 (Ind. Ct. App. 2013).

“If it were sufficient for the purposes of CHINS adjudications that a parent has no prior parenting experience or training, then all new parents would necessarily be subject to DCS intervention.” In re S.A., 15 N.E.3d 602, 612 (Ind. Ct. App. 2014).

It is an unfortunate instance for any child to experience the emotional turmoil and difficulties of living with apparent suffering from mental illness, but that does not mean that a parent’s mental illness necessarily presents a danger to the child. E.Y. v. Ind. Dep’t of Child Servs., 93 N.E.3d 1141 (Ind. Ct. App. 2018). A parent’s mental illness, without more, is not grounds for terminating parental rights. A.A. v. Ind. Dep’t of Child Servs. (In re V.A.), 51 N.E.3d 1140, 1148 (Ind. 2016).

#### **E. CHINS AS TO A SPECIFIC CHILD, NOT WHOLE FAMILY**

A.K.C. v. Ind. Dep’t of Child Servs. (In re J.C.), 3 N.E.3d 980, 984-85 (Ind. Ct. App. 2013) (COA affirmed CHINS finding as to one child, J.C.; sibling A.M.C. was alleged to be a CHINS solely because of truancy and because of the acts of the sibling and of the acts of the parent as to the sibling; brief period of truancy without more information about how that endangered the child or that it is an ongoing problem or a showing of how the acts of the sibling have impacted A.M.C. were sufficient to support CHINS adjudication of A.M.C.; finding vacated because DCS failed to meet its burden that A.M.C.’s condition was seriously endangered under Ind. Code § 31-34-1-1.).

#### **F. WHEN NONCUSTODIAL PARENT NOT RELATED TO CHINS ALLEGATION**

A separate analysis as to each parent is not required in making a CHINS determination because a CHINS adjudication reflects the status of a child without establishing the culpability of a particular parent. N.L. v. Ind. Dep’t of Child Servs. (In re N.E.), 919 N.E.2d 102, 106 (Ind. 2010).

In re S.A., 15 N.E.3d 602 (Ind. Ct. App. 2014) (Father was in the Navy stationed out of state when the children were pulled into the CHINS system because of the mother’s heroin use. Father had been in the hospital for issues with PTSD. Children were removed from the mother and placed with grandparents. Court had issue with Father’s inability to care for children during his out-of-state military service, his delay in establishing paternity, and Father’s inability to precisely recall when he was released from the PTSD program. If possible, “when the [CHINS] adjudication can involve both parents at the same time, it should involve both parents at the same time as to all facts pertaining to the entire matter.”).

A separate analysis may sometimes be necessary if the allegations have been made against both parents, and where one parent wishes to admit that the child is a CHINS while the other denies it. S.S. v. Ind. Dep’t of Child Servs. (In re K.D.), 962 N.E.2d 1249, 1256-57 (Ind. 2012). Thus, where one parent may not be able to dispute the factual allegations admitted by one parent, the parent has the right to contest the allegation that his child needs the coercive intervention of the court. Id.

#### **G. CHINS FINDING MUST BE BASED ON CURRENT CONDITIONS**

CHINS adjudication may not be based solely on conditions that no longer exist; the trial court should also consider the parents’ situation at the time case is heard. R.S. v. Indiana Dep’t of Child Servs., 987 N.E.2d 155, 159 (Ind. Ct. App. 2013). “Doing so avoids punishing parents for

past mistakes when they have already corrected them." Gr.J. v. Ind. Dep't of Child Servs. (In re D.J.), 68 N.E.3d 574, 580-81 (Ind. 2017).

CHINS finding must be based upon facts and reasonable inferences from facts, not future concerns or past acts. Matter of L.N., 118 N.E.3d 43 (Ind. Ct. App. 2019).

M.M. v. Ind. Dep't of Child Servs., 118 N.E.3d 70 (Ind. Ct. App. 2019) (children had been in non-custodial Father's care for several months at the time of the CHINS adjudication; needs of children were met by Father, and legal possibility of children returning to Mother's case does not alone mean that the children required services).

A.R. v. Ind. Dep't of Child Servs., 121 N.E.3d 598 (Ind. Ct. App. 2019) (DCS failed to present sufficient evidence that Mother needed the coercive intervention of the court to protect the children from the homelessness that may occur if mother were to fail a background check and lose her new job or relapse into methamphetamine use where baby testified positive for meth at birth, mother was living in hotel, but had secured housing by the time of the hearing, and mother had a history of drug abuse).

#### **H. CHILD MUST BE RELEASED FROM JUVENILE DETENTION CENTER WITHIN 48 HOURS PENDING ENTRY OF JUDGMENT.**

If the child is in a juvenile detention facility, the child shall be released not later than forty-eight (48) hours, excluding Saturdays, Sundays, and legal holidays, pending the entry of judgment. Ind. Code § 31-34-11-4(c).

##### **1. Child May Be Moved to Shelter Care Facility Pending Judgment**

A child released from a juvenile detention facility pending the entry of judgment may be detained in a shelter care facility. Ind. Code § 31-34-11-4(c).

#### **I. IF CHILD IS ADJUDICATED A CHINS**

If the court finds that a child is a child in need of services, the court shall: (1) enter judgment accordingly; (2) order a predisposition report; and (3) schedule a dispositional hearing. Ind. Code § 31-34-11-2.

Parmeter v. Cass County Dep't of Child Servs., 878 N.E.2d 444, 453 (Ind. Ct. App. 2007) (Remand required for trial court to make findings and conclusions of law in support of CHINS determination where only one fact-specific finding was entered.).

##### **1. Sufficiency**

Children cannot become CHINS by mere happenstance of family's economic misfortune. S.K. v. Ind. Dept. of Child Servs., 57 N.E.3d 878 (Ind. Ct. App. 2016).

Substance Abuse Examples:

K.B. v. Ind. Dept. of Child Services, 24 N.E.3d 997 (Ind. Ct. App. 2015) (sufficient evidence supported trial court's CHINS finding where father and live-in girlfriend failed to address their substance abuse and domestic violence problems).

A.M. v. DCS, 45 N.E.3d 1252 (Ind. Ct. App. 2015) (CHINS finding reversed because State failed to show that Mother 1) endangered her children, 2) failed to meet their needs, and 3) is unlikely to meet those needs without State's coercive intervention; Mother had sporadically used marijuana but stopped using once she learned she was pregnant; there was no evidence she was ever impaired in presence of children and she passed all drug screens during the CHINS case).



In re L.P., 6 N.E.3d 1019 (Ind. Ct. App. 2014) (Parent's one-time use of methamphetamine outside presence of the children was insufficient evidence to support a CHINS finding).

J.M. v. DCS (In re N.C.), 72 N.E.3d 519 (Ind. Ct. App. 2017) (trial court erred in declaring N.C. to be a CHINS, where the neglect N.C. experienced due to Mother's drug use and domestic violence issues at the outset of the case was rectified by being placed in father's home by the time of the factfinding hearing).

#### Abandonment Examples:

Orr v. State, 123 N.E. 470, 474 (Ind. Ct. App. 1919) (A finding of abandonment or neglect is required to declare a child as a dependent or neglected child; here, mother did not desert or abandon child as she left home due to the abnormal demands and abusive treatment of an insane husband.).

#### Interstate Compact on Child Custody Examples:

In re D.B., 43 N.E.3d 599 (Ind. Ct. App. 2015) (Interstate Compact on Placement of Children (ICPC) does not apply when the contemplated placement is with the biological parent; plain language of Ind. Code § 31-28-4-1, art. III, makes clear that ICPC applies only to placement of a child in foster care or as a preliminary to a possible adoption; to the extent juvenile court's CHINS determination rested on fact that the ICPC process had not yet been completed with respect to father, Court discounted that basis of the adjudication).

S.R. v. DCS, 130 N.E.3d 114 (Ind. Ct. App. 2020), trial court stated it was well aware of Court of Appeals position that Interstate Compact does not apply to natural parents yet trial court ignored law and applied it to parent anyway. CHINS reversed due to trial court's failure to follow the law.

#### General Examples:

In re A.H., 58 N.E.3d 951 (Ind. Ct. App. 2016) (in finding that Mother could provide adequate mental health services without the coercive intervention of juvenile court, COA excoriated DCS for not complying with five orders to schedule psychological evaluation and blasted juvenile court for failing to sanction DCS).

In re D.B., 43 N.E.3d 599 (Ind. Ct. App. 2015) (evidence was insufficient to support CHINS finding; even though DCS's ability to gather information about Father was hampered by his infrequent contact with Mother and his failure to regularly pay child support, DCS still carried the burden to show Father was unfit as a parent).

## **2. DCS Entry of Findings to Child Protection Index**

Whenever a court finds that a child is a child in need of services on the basis of a child abuse or neglect report classified as substantiated under Ind. Code § 31-33-8-12, the department shall enter into the child protection index established under Ind. Code § 31-33-26-2 identifiable information concerning the court's judgment. Ind. Code § 31-33-8-13.

## **J. IF CHILD IS NOT ADJUDICATED A CHINS**

If the court finds that a child is not a child in need of services, the court shall discharge the child. Ind. Code § 31-34-11-3.

## **K. CHINS DETERMINATION IS NOT APPEALABLE ORDER**

CHINS determination is not final, appealable judgment prior to entry of dispositional decree.

Matter of J.L.V., 667 N.E.2d 186, 188 (Ind. Ct. App. 1996). See also D.J. & G.J. v. DCS, 68 N.E.3d 574 (Ind. 2017).