CHAPTER FOURTEEN
INVOLUNTARY TERMINATION OF PARENTAL RIGHTS
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I. LAW GOVERNING PROCEEDINGS

Pursuant to Ind. Code § 31-35-2-2 and Ind. Code § 31-35-3-2, proceedings under Ind. Code § 31-35-2 are governed by the procedures prescribed by:

(1) Ind. Code § 31-32-1, Ind. Code § 31-32-4 through Ind. Code § 31-32-10, and Ind. Code § 31-32-12 through Ind. Code § 31-32-15;

(2) Ind. Code § 31-34; and

(3) Ind. Code § 31-37;

but are distinct from proceedings under Ind. Code § 31-34 and Ind. Code § 31-37.

II. JURISDICTION

Pursuant to Ind. Code § 31-35-2-3 and Ind. Code § 31-35-3-3, the probate court has concurrent original jurisdiction with the juvenile court in proceedings on a petition to terminate the parent-child relationship involving a delinquent child or a child in need of services under Ind. Code § 31-35-2 and Ind. Code § 31-35-3.

III. PURPOSE OF TERMINATION

Purpose of terminating parental rights is not to punish parents, but to protect the child. In re A.N.J., 690 N.E.2d 716, 720 (Ind. Ct. App. 1997). Children should be removed from parents only when situation is wholly inadequate for child's very survival, not just because there is a better place for them. In re Tucker, 578 N.E.2d 774, 778 (Ind. Ct. App. 1991).

IV. PETITION FOR TERMINATION

A. FILED UNDER NEW CAUSE NUMBER DIFFERENT THAN CHINS CAUSE

The termination of the parent-child relationship is not merely a continuing state of the CHINS proceedings; the termination petition is separate from the CHINS and must be filed as a new case; a CHINS intervention in no way challenges the general competency of a parent to continue a relationship with the child. N.L. v. Indiana Dep't of Child Servs. (In re N.E.), 919 N.E.2d 102, 105 (Ind. 2010).

B. WHO MAY FILE PETITION

1. Who May File General TPR Petition

Pursuant to Ind. Code § 31-35-2-4(a), a petition to terminate the parent-child relationship involving a delinquent child or a child in need of services may be signed and filed with the juvenile or probate court by any of the following: (1) The attorney for the department. (2) The child's court appointed special advocate. (3) The child's guardian ad litem.

The filing of a TPR petition and request for hearing are mandatory under certain circumstances. Pursuant to Ind. Code § 31-35-2-4.5(b)(1), a person described in Ind. Code § 31-35-2-4(a) shall file a petition to terminate the parent-child relationship under Ind. Code § 31-35-2-4 and shall request that the petition be set for hearing if:

(1) a court has made a finding under Ind. Code § 31-34-21-5.6 that reasonable efforts for family preservation or reunification with respect to a child in need of services are not required; or

(2) a child in need of services or a delinquent child:

(A) has been placed in: (i) a foster family home, child caring institution, or group home licensed under Ind. Code § 31-27; or (ii) the home of a relative (as defined in Ind. Code § 31-9-2-107(c)); as directed by a court in a child in need of services proceeding under Ind. Code § 31-34 or a delinquency action under Ind. Code § 31-37; and

(B) has been removed from a parent and has been under the supervision of the department or county probation department for not less than fifteen (15) months of the most recent twenty-two (22) months, beginning with the date the child is removed from the home as a result of the child being alleged to be a child in need of services or a delinquent child.

a. If CASA or GAL Files Petition, DCS Is Joined As Party

If a petition under Ind. Code § 31-35-2-4.5(b) is filed by the child's court appointed special advocate or guardian ad litem, the department shall be joined as a party to the petition. Ind. Code § 31-35-2-4.5(c).

b. CASA May File over DCS Objections

Even if DCS objects to the filing of the petition, CASA may file regardless and may proceed to prosecute a termination proceeding, even when DCS opposes. Z.B. v. Ind. Dep't of Child Servs., 108 N.E.3d 895 (Ind. Ct. App. 2018).

2. Who May File Petition if Person Convicted of Certain Offenses

Pursuant to Ind. Code § 31-35-3-4, if:

(1) An individual is convicted of the offense of:

(A) Murder (Ind. Code § 35-42-1-1); (B) Causing Suicide (Ind. Code § 35-42-1-2); (C) Voluntary Manslaughter (Ind. Code § 35-42-1-3); (D) Involuntary Manslaughter (Ind. Code § 35-42-1-4); (E) Rape (Ind. Code § 35-42-4-1); (F) Criminal Deviate Conduct (Ind. Code § 35-42-4-2) (repealed); (G) Child Molesting (Ind. Code § 35-42-4-3); (H) Child Exploitation (Ind. Code § 35-42-4-4); (I) Sexual Misconduct with a Minor (Ind. Code § 35-42-4-9); or (J) Incest (Ind. Code § 35-46-1-3); and

(2) The victim of the offense:

(A) Was less than sixteen (16) years of age at the time of the offense; and
(B) Is: (i) the individual's biological child or adoptive child; or (ii) the child of a spouse of the individual who has committed the offense;

the attorney for the department, the child's guardian ad litem, or the court appointed special advocate may file a petition with the juvenile or probate court to terminate the parent-child relationship of the individual who has committed the offense with the victim of the offense, the victim's siblings, or any biological or adoptive child of that individual.

C. WHEN MAY THE PETITION BE FILED

1. When May General TPR Petition Be Filed

Pursuant to Ind. Code § 31-35-2-4.5(a), a Petition under § 31-35-2-4 may be filed if:

(1) A court has made a finding under Ind. Code § 31-34-21-5.6 that reasonable efforts for family preservation or reunification with respect to a child in need of services are not required; or

(2) A child in need of services or a delinquent child:

(A) Has been placed in: (i) a foster family home, child caring institution, or group home licensed under Ind. Code 31-27; or (ii) the home of a relative (as defined in Ind. Code 31-9-2-107(c)); as directed by a court in a child in need of services proceeding under Ind. Code 31-34 or a delinquency action under Ind. Code 31-37; and

(B) Has been removed from a parent and has been under the supervision of the department or county probation department for not less than fifteen (15) months of the most recent twenty-two (22) months, beginning with the date the child is removed from the home as a result of the child being alleged to be a child in need of services or a delinquent child.

The requirements of this statute must be true at the time the petition was filed. K.E. v. Ind. Dep't of Child Servs. (In the Matter of the Termination of the Parent-Child Relationship of K.E.), 963 N.E.2d 599, 601 (Ind. Ct. App. 2012). An involuntary termination petition must allege, and the State must prove by clear and convincing evidence, that at least one of the requirements of Ind. Code § 31-35-2-4(b)(2)(A) is true at the time the termination petition was filed. E.J. v. Ind. Dep't of Child Servs. (In re D.D.), 962 N.E.2d 70, 73 (Ind. Ct. App. 2011).

"Few liberties are as central to our society as the right of parents to raise their children. Our General Assembly has thus set a high bar for terminating parental rights—requiring a termination petition to allege four defined elements and commanding dismissal when DCS fails to prove each element by clear and convincing evidence." D.B. v. Ind. Dep't of Child Servs. (In re BI.B), 69 N.E.3d 464, 465 (Ind. 2017).

D.B. v. Ind. Dep't of Child Servs. (In re BI.B), 69 N.E.3d 464, 465 (Ind. 2017). TPR reversed where DCS failed to allege children had been removed from Father for at least six months under Ind. Code § 31-35-2-4(b)(2)(A)(i) and failed to prove that the fifteen-month waiting period had passed under Ind. Code § 31-35-2-4(b)(2)(A)(iii).

In re L.R., 79 N.E.3d 985 (Ind. Ct. App. 2017) (termination of parental rights petition was not premature; although DCS dismissed and refiled CHINS petition during 15-month period while kids were removed from the home, the relevant date is still the date in which the child was initially removed from the home, not the date the CHINS petition was refiled).

PRACTICE POINTER: Prior to 2009 amendments, the time calculation of removal for not less than fifteen (15) months of the most recent twenty-two (22) months excluded any period not exceeding sixty (60) days before the court has entered a finding and judgment under Ind. Code 31-34 that the child is a child in need of services.

PRACTICE POINTER: The time requirements for the filing of a TPR Petition are found in Ind. Code 31-35-2-4(b)(2)(A). Move to dismiss if the TPR Petition is premature. A filing may be premature unless: i) A court has made a finding under Ind. Code 31-34-21-5.6 that reasonable efforts for family preservation or reunification with respect to a child in need of services are not required; or (ii) the child has been removed for at least 6 months pursuant to a disposition Order; or iii) the filing is mandatory because the child has been removed from the parent's home, due to CHINS allegations and is under DCS supervision for 15 of the most recent 22 months.

PRACTICE POINTER: The CHINS proceedings continue despite the filing of a TPR petition. If services are still being offered, document compliance. If DCS has stopped services, including visitation, move under the CHINS proceeding to have services and visitation reinstated. If the court denies services, have the parent pursue services independently, if financially viable, and document. Request a bonding assessment to show that there is a strong bond between the child and the parent to prepare to rebut any evidence of lack of attachment between the parent and child.

a. Petition may not be filed for child voluntarily placed out of home for treatment

Pursuant to Ind. Code § 31-34-1-16(a), the department may not:

(1) Initiate a court proceeding to: (A) Terminate the parental rights concerning; or (B) Transfer legal custody of; or

(2) Require a parent, guardian, or custodian to consent to: (A) The termination of parental rights; or (B) Transfer of legal custody of:

a child with an emotional, a behavioral, or a mental disorder or a developmental or physical disability who is voluntarily placed out of the home for the purpose of obtaining special treatment or care, solely because the parent, guardian, or custodian is unable to provide the treatment or care. Relinquishment of custody of a child described in this subsection may not be made a condition for receipt of services or care delivered or funded by the department or local office.

Collins v. Hamilton, 231 F.Supp. 2d 840, 843 (S.D. Ind. 2002), *opinion corrected*, 231 F.Supp 2d 851, *aff'd*, 349 F.3d 371 (Law was passed after this case was filed that prohibits the State from transferring legal custody as a CHINS for a mentally ill child to receive funding for residential mental health treatment).

Runkel v. Miami County Dep't of Child Servs. (In re B.M.), 875 N.E.2d 369, 374-75 (Ind. Ct. App. 2007) (Where mother was not motivated to place child in out-of-home placement solely because she was unable to provide treatment for the child, but also because of her inability to control child and the possible harm to her other children, the state was not prohibited from filing for involuntary TPR; mother testified that the child needed more care than the mother could give).

D. PETITION CONTENTS

1. Contents of General TPR Petition

Pursuant to Ind. Code § 31-35-2-4(b), the petition must meet the following requirements:

(1) The petition must be entitled "In the Matter of the Termination of the Parent-Child Relationship of _____, a child, and _____, the child's parent (or parents)".

(2) The petition must allege:

(A) That one (1) of the following is true:

(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 Ind. Code § 31-34-21-5.6 that reasonable efforts for family preservation or reunification are not required, including a description of the court's findings, the date of the finding, and the manner in which the finding was made.

(iii) The child has been removed from the parent and has been under the supervision of a local office of family and children or probation department for at least fifteen (15) months of the most recent twenty-two (22) months, beginning with the date the child is removed from the home as a result of the child being alleged to be a child in need of services or a delinquent child;

(B) That one (1) of the following is true:

(i) There is a reasonable probability that the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied.

(ii) There is a reasonable probability that the continuation of the parent-child relationship poses a threat to the well-being of the child.

(iii) The child has, on two (2) separate occasions been adjudicated a child in need of services;

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

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

(3) If the department intends to file a motion to dismiss under Ind. Code § 31-35-2-4.5, the petition must indicate whether at least one (1) of the factors listed in Ind. Code § 31-35-2-4.5(d)(1) through 4.5(d)(4) applies and specify each factor that would apply as the basis for filing a motion to dismiss the petition.

PRACTICE POINTER: In 2009, the juvenile code was modified to *require* that TPR be filed in juvenile delinquency cases, as well as CHINS cases, when the child has been removed from the home for at least fifteen (15) of the last twenty-two (22) months. Ind. Code § 31-35-2-4.

Time child spends in relative placement is included in the 15-month DCS supervision period. Elizabeth G. v. Dep't of Child Servs. (In re G.H.), 906 N.E.2d 248, 251-252 (Ind. Ct. App. 2009).

Statute requiring a TPR petition when the child has been removed for 15 of most recent 22 months brings Indiana statutes into compliance with requirements of federal Adoption Assistance and Child Welfare Act, does not violate equal protection, does not control the executive branch in violation of the separation of powers doctrine, and does not infringe on the Indiana Supreme Court's exclusive constitutional right to regulate attorney conduct. Phelps v. Sybinsky, 736 N.E.2d 809 (Ind. Ct. App. 2000).

Castro v. State Office of Family & Children, 842 N.E.2d 367, 374-75 (Ind. Ct. App. 2006) (Statute did not violate due process, but was rationally related to state's interest in preventing endless foster care placement and promoting adoption of children removed from parental home for extended periods of time).

Eden v. Johnson County Dep't of Child Servs. (In re Kay.L.), 867 N.E.2d 236, 241 (Ind. Ct. App. 2007) (Even if DCS failed to include any references to the factors listed in Ind. Code § 31-35-2-4.5 in the TPR petition, the error was harmless because there was an independent ground for termination in the petition).

In re Q.M., 974 N.E.2d 1021, 1024-25 (Ind. Ct. App. 2012) (The dispositional decree was not filed until after the TPR petition was filed. The children were removed from the home only thirteen months – not fifteen – at the time of the filing of the TPR petition, which "did not satisfy the jurisdictional requirements of Ind. Code § 31-35-2-4(b)(2)(a).").

M.G. v. Ind. Dep't of Child Servs. (In re B.F.), 976 N.E.2d 65, 67 (Ind. Ct. App. 2012) (TPR petition only alleged child removed at least six months under a dispositional decree. TPR petition filed less than four months after entry of the dispositional decree and less than nine months following removal of the child from the mother's home. There was no finding under Ind. Code § 31-34-21-5.6; therefore, the only requirement alleged under Ind. Code § 31-35-2-4(b)(2)(A) was not true. Trial court committed reversible error by granting the TPR.).

2. Contents When Petition If Person Convicted Of Certain Crimes

Pursuant to Ind. Code § 31-35-3-5, the verified petition filed under Ind. Code § 31-35-3-4 must:

(1) Be entitled "In the Matter of the Termination of the Parent-Child Relationship of _____, a child, and _____, the parent (or parents)"; and

(2) Allege:

(A) That the victim of an offense listed in Ind. Code § 31-35-3-4(a) is:
(i) the subject of the petition;
(ii) the biological or adoptive sibling of the subject of the petition; or
(iii) the child of a spouse of the individual whose parent-child relationship is sought to be terminated under Ind. Code § 31-35-3.

(B) That the individual whose parent-child relationship is sought to be terminated under Ind. Code § 31-35-3 was convicted;

(C) That the child has been removed:
(i) from the parent under a dispositional decree; and
(ii) from the parent's custody for at least six (6) months under a court order;

(D) That one (1) of the following is true:
(i) There is a reasonable probability that the conditions that resulted in the child's removal or the reasons for placement outside the parent's home will not be remedied.
(ii) There is a reasonable probability that continuation of the parent-child relationship poses a threat to the well-being of the child.
(iii) The child has, on two (2) separate occasions, been adjudicated a child in need of services;

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

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

Wagner v. Grant County Dept. of Public Welfare, 653 N.E.2d 531 (Ind. Ct. App. 1995) (Petition to terminate father's rights was properly filed where father was incarcerated at time of removal, child was in foster care for 6 months, although mother had legal custody of child.).

Tipton v. Marion County Dept. of Public Welfare, 629 N.E.2d 1262 (Ind. Ct. App. 1994) (6-month removal requirement refers to removal under dispositional decree that authorized out-of-home placement.).

E. MOTION TO DISMISS PETITION

Pursuant to Ind. Code § 31-35-2-4.5(d), a person described in Ind. Code § 31-35-2-4(a) may file a motion to dismiss the petition to terminate the parent-child relationship if any of the following circumstances apply:

(1) That the current case plan prepared by or under the supervision of the department or the probation department under Ind. Code § 31-34-15, Ind. Code § 31-37-19-1.5, or Ind. Code § 31-37-22-4.5 has documented a compelling reason, based on facts and circumstances stated in the petition or motion, for concluding that filing, or proceeding to a final determination of, 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 relative (as defined in Ind. Code § 31-9-2-107(c)).

(2) That:

(A) Ind. Code § 31-34-21-5.6 is not applicable to the child;

(B) The department or the probation department has not provided family services to the child, parent, or family of the child in accordance with a currently effective case plan prepared under Ind. Code § 31-34-15 or Ind. Code § 31-37-19-1.5 or a permanency plan or dispositional decree approved under Ind. Code § 31-34 or Ind. Code § 31-37, for the purpose of permitting and facilitating safe return of the child to the child's home; and

(C) The period for completion of the program of family services, as specified in the current case plan, permanency plan, or decree, has not expired.

(3) That:

(A) Ind. Code § 31-34-21-5.6 is not applicable to the child;

(B) The department has not provided family services to the child, parent, or family of the child, in accordance with applicable provisions of a currently effective case plan prepared under Ind. Code § 31-34-15 or Ind. Code § 31-37-19-1.5, or a permanency plan or dispositional decree approved under Ind. Code § 31-34 or Ind. Code § 31-37; and

(C) The services that the department has not provided are substantial and material in relation to the implementation of a plan to permit safe return of the child to the child's home.

(4) Subject to Ind. Code § 31-35-2-4.5(f), that:

(A) The parent is incarcerated, or the parent's prior incarceration is a significant factor in the child having been under the supervision of the department or a county probation department for at least fifteen (15) of the most recent twenty-two (22) months;

(B) the parents maintain a meaningful role in the child's life; and

(C) the department has not documented a reason to conclude that it would otherwise be in the child's best interests to terminate the parent-child relationship.

The motion to dismiss shall specify which allegations described in subdivisions (1) through (4) apply to the motion. If the court finds that any of the allegations described in subdivisions (1)

through (4) are true, as established by a preponderance of the evidence, the court shall dismiss the petition to terminate the parent-child relationship. In determining whether to dismiss a petition to terminate a parent-child relationship pursuant to a motion to dismiss that specifies allegations described in Ind. Code § 31-35-2-4.5(d)(4), the court may consider the length of time remaining in the incarcerated a parent's sentence and any other factor the court considers relevant.

If any grounds for a dismissal exists, the TPR petition must indicate that a motion to dismiss is forthcoming - however, omission of that reference may be harmless error. Eden v. Johnson County Dep't of Child Servs. (In re Kay L.), 867 N.E.2d 236, 241 (Ind. Ct. App. 2007). Statute requires the attorney to bring forward grounds for dismissal when the attorney's professional judgment suggests that such grounds exist. Phelps v. Sybinsky, 736 N.E.2d 809, 814 (Ind. Ct. App. 2000). One factor for dismissal is when current case plan has compelling reason that proceeding to a final determination of a TPR petition would not be in the best interests of the child. Id.

> Everhart v. Scott County Office of Family & Children, 779 N.E.2d 1225, 1229 (Ind. Ct. App. 2002) (Where TPR petition was based on children's removal for at least six months pursuant to dispositional decree, TPR petition was not defective for failing to reference certain factors, which might be grounds for dismissal that were not applicable.).

DCS is not required as a matter of law to dismiss a TPR petition where the child is placed with a relative. Elizabethe G. v. Dep't of Child Servs. (In re G.H.), 906 N.E.2d 248, 251-52 (Ind. Ct. App. 2009).

1. Who May File a Motion to Dismiss

Only a DCS attorney, a child's court appointed special advocate, or a child's guardian ad litem may file a motion to dismiss a termination of parental rights petition, father and mother are not authorized nor is the trial court allowed to do so *sua sponte*. R.L.P. v. Ind. Dept. of Child Servs., 119 N.E.3d 1098 (Ind. Ct. App. 2019). See also M.E. v. Ind. Dep't of Child Servs., 119 N.E.3d 1098 (Ind. Ct. App. 2019).

PRACTICE POINTER: The mandatory dismissal statute only applies to petitions filed because the child was removed for 15 of last 22 months or the court has found that reasonable efforts are not necessary. For other cases, a motion to dismiss may still be filed, but is discretionary.

PRACTICE POINTER: If the parent did not have an attorney during the CHINS proceedings, consider filing a motion to dismiss the TPR, and perhaps requesting that the CHINS finding be set aside, by alleging a violation of due process or through Indiana Trial Rule 60. Evidence would include how the parent was impacted by the lack of counsel, especially if the parent is mentally ill, mentally handicapped, or learning disabled.

PRACTICE POINTER: The entire CHINS history must be reviewed to determine compliance by both DCS and the parent. In particular, look at the disposition order and case plans. Sample situations leading to a motion to dismiss include: (1) parent is complying with services, (2) parent just released from incarceration and has not had an opportunity to participate in services, (3) child is placed with the parent, (4) child is placed with a relative and guardianship is being or should be pursued, (5) parent was denied due process during CHINS proceedings, (6) services offered were not provided in accordance with the disposition decree or were not material to the removal issues, or (7) time for services has not expired.

PRACTICE POINTER: If child is classified as a special needs child and was voluntarily placed outside the home to receive services, move to dismiss the TPR, pursuant to Ind. Code § 31-34-1-16. See *Section IV(c) above.*

V. DISCOVERY

In re Snyder, 418 N.E.2d 1171, 1177-78 (Ind. Ct. App 1981) (In TPR proceeding, mother was entitled to discovery of caseworker's notes, which were not protected by work product immunity.).

PRACTICE POINTER: Always request all documentation in the CHINS case, as well as the TPR case. Procedural irregularities in the CHINS case can be challenged as due process violations. There is a sample discovery motion available on the IPDC website.

VI. APPOINTMENT OF GUARDIAN AD LITEM/CASA

If a parent objects to the termination of the parent-child relationship, the court shall appoint: (1) a guardian ad litem; (2) a court appointed special advocate; or (3) both; for a child. Ind. Code § 31-35-2-7(a).

S.L. v. Steuben County Dep't of Public Welfare, 599 N.E.2d 227, 229 (Ind. Ct. App. 1992) (Failure to appoint a GAL was not harmless error in TPR proceeding; the interests of the DCS and the interests of the child are not necessarily the same; neither the parent nor the State may waive the child's statutory right to a GAL; the mother's "fundamental right to a parent-child relationship was impacted by the lack of an independent representation of the child's interests.).

A. MAY BE SAME GAL OR CASA AS APPOINTED IN CHINS CASE

If a guardian ad litem or court appointed special advocate has been appointed for the child under Ind. Code § 31-34-10, the court may reappoint the guardian ad litem or court appointed special advocate to represent and protect the best interests of the child in the termination proceedings. Ind. Code § 31-35-2-7(b).

PRACTICE POINTER: If no GAL/CASA is appointed during the TPR proceedings, counsel must object in order to preserve the issue for appeal.

VII. TERMINATION HEARING

A. WHO MAY REQUEST HEARING

1. In General, The Person Filing The Petition May Request The Hearing

Except when a hearing is required after June 30, 1999, under Ind. Code § 31-35-2-4.5, the person filing the petition may request the court to set the petition for hearing. Ind. Code § 31-35-2-6(a)(1).

The person filing the petition may request that the court set the petition for hearing. Ind. Code § 31-35-3-7(a).

2. DCS, CASA, or GAL Must Request the Hearing Under Certain Circumstances

A person described in Ind. Code § 31-35-2-4(a) [DCS, CASA, or GAL] shall request that the petition be set for hearing, [if the petition alleges the child has been removed for 15 of the last 22 months or reunification efforts are not required]. Ind. Code § 31-35-2-4.5(b)(2).

B. WHO REPRESENTS THE STATE

Upon the filing of a petition under Ind. Code § 31-35-2-4 [general TPR petition], the attorney for the department shall represent the interests of the state in all subsequent proceedings on the petition. Ind. Code § 31-35-2-5.

The attorney for the department shall represent the interests of the state in all subsequent proceedings on the petition. Ind. Code § 31-35-3-6(a).

Upon the filing of a petition under Ind. Code § 31-35-3-4, the attorney for the department shall represent the interests of the state in all subsequent proceedings. Ind. Code § 31-35-3-6(b).

C. TIMING FOR TERMINATION HEARING

1. Termination Hearing Must Commence Within 90 Days

Whenever a hearing is requested under Ind. Code § 31-35-2 (TPR Involving a delinquent child or a CHINS), the court shall commence a hearing on the petition not more than ninety (90) days after a petition is filed under Ind. Code § 31-35-2. Ind. Code § 31-35-2-6(a)(1).

Whenever a hearing on the petition is requested under Ind. Code § 31-35-3 (TPR with individual convicted of a criminal offense), the court shall commence the hearing not more than ninety (90) days after a petition is filed under this chapter. Ind. Code § 31-35-3. Ind. Code § 31-35-3-7(b).

Both the filing of a TPR petition and a request for hearing are mandatory if a court has made a finding under Ind. Code § 31-34-21-5.6 that reasonable efforts for family preservation or reunification are not required; or the child has been removed from a parent and has been under the supervision of the department or county probation department for not less than fifteen (15) months of the most recent twenty-two (22) months. Ind. Code § 31-35-2-4.5.

There is no specific time requirement for setting of initial hearing or fact-finding hearing in proceeding seeking involuntary termination of parental rights unless a party specifically requests a hearing. Newby v. Boone County Div. of Family & Children (In re L.V.N.), 799 N.E.2d 63, 67-68 (Ind. Ct. App. 2003). Trial court need not wait until child is irreversibly harmed in his physical, mental, and social growth before terminating the parent-child relationship. Weldishofer v. Dearborn County Div. of Family & Children (In re J.W.), 779 N.E.2d 954, 959 (Ind. Ct. App. 2002).

> Child Advocates, Inc. v. Clark (In re A.D.), 737 N.E.2d 1214, 1217 (Ind. Ct. App. 2000) (Trial court properly granted mother's motion to stay TPR pending adoption hearing, as it was in the interest of judicial economy and stay did not thwart public policy of children being placed in safe and permanent home.).

2. Termination Hearing Must Be Completed Within 180 Days

Whenever a hearing is requested under Ind. Code § 31-35-2, the court shall complete a hearing on the petition not more than one hundred eighty (180) days after a petition is filed under this chapter. Ind. Code § 31-35-2-6(2). In re J.C., 142 N.E.3d 427 (Ind. 2020), having affirmatively waived the 180 day statutory requirement that a hearing on a petition for termination of parental rights be completed within 180 days, parent could not invoke it as a basis for reversal.

3. If Termination Hearing Not Timely Held

If a hearing is not held within the time set forth in Ind. Code § 31-35-2-6(a), upon filing a motion with the court by a party, the court shall dismiss the petition to terminate the parent-child relationship without prejudice. Ind. Code § 31-35-2-6(b). However, a party may waive their right to move to dismiss under this statute if the reason for the delay is attributed to them, such as a continuance. C.G.G. v. Ind. Dep't of Child Servs. (In re N.C.), 83 N.E.3d 1265 (Ind. Ct. App. 2017).

If a hearing is not held within the time set forth in Ind. Code § 31-35-3-7(b), upon filing a motion with the court by a party, the court shall dismiss the petition without prejudice. Ind. Code § 31-35-3-7(c).

D. NOTICE OF TERMINATION HEARING IN CHINS MATTERS

For specifics on the manner of the notice, see Chapter 4 – Constitutional and Statutory Rights, Right to Due Process

1. CHINS Notice Requirements Apply to TPR Hearings

The CHINS procedural statutes concerning notice at Ind. Code § 31-32-9-1 and -2 apply to TPR proceedings. Ind. Code § 31-35-2-2.

2. Notice Sent At Least 10 Days Before Hearing

Pursuant to Ind. Code § 31-35-2-6.5(b), at least ten (10) days before a hearing on a petition or motion under Ind. Code § 31-35-2: (1) The person or entity who filed the petition to terminate the parent-child relationship under Ind. Code § 31-35-2-4; or (2) The person or entity who filed a motion to dismiss the petition to terminate the parent-child relationship under Ind. Code § 31-35-2-4.5(d); shall send notice of the review to the persons listed in Ind. Code § 35-2-6.5(c) and (d).

Adequate notice:

- Published service in county newspaper three times and sent a notice to father at address he provided. Clenna v. Marion County Office of Family & Children (In re A.C.), 770 N.E.2d 947, 949 (Ind. Ct. App. 2002).
- Notice of hearing on petition concerning removal of children from her care, custody, and control "for all purposes including adoption." In re Wardship of Bender, 352 N.E.2d 797, 800-01 (Ind. Ct. App. 1976).
- Last known address. Karma W. v. Marion County Dep't of Child Servs. (In re B.J.), 879 N.E.2d 7, 12-13 (Ind. Ct. App. 2008) and Cobb v. Marion County Office of Family & Children (In re C.C.), 788 N.E.2d 847, 851 (Ind. Ct. App. 2003).
- Last jail facility where father was incarcerated; case manager tried to locate father upon release; father failed to update case manager of changes of address. Bynum v. Marion County Dep't of Child Servs. (In re Q.B.), 873 N.E.2d 1063, 1067 (Ind. Ct. App. 2007).

Inadequate notice:

- Court set two dates designated as "first choice" and "second choice" which was not readily understood by lay people. Secrest v. Marion County Office of Family & Children (In re E.E.), 853 N.E.2d 1037, 1042 (Ind. Ct. App. 2006).
- Notice to parent's attorney alone. In re D.L.M., 725 N.E.2d 981, 983 (Ind. Ct. App. 2000).

3. Who Receives Notice of Hearing

a. In General

Pursuant to Ind. Code § 31-35-2-6.5(c), except as provided in Ind. Code § 31-35-2-6.5(h), the following persons shall receive notice of a hearing on a petition or motion filed under Ind. Code § 31-35-2:

(1) The child's parent, guardian, or custodian.

(2) An attorney who has entered an appearance on behalf of the child's parent, guardian, or custodian.

(3) A prospective adoptive parent named in a petition for the adoption of the child filed under Ind. Code § 31-19-2 if:

(A) Each consent to adoption of the child that is required under Ind. Code § 31-19-9-1 has been executed in the form and manner required by Ind. Code § 31-19-9 and filed with the local office or the department;

(B) The court having jurisdiction in the adoption case has determined under an applicable provision of Ind. Code § 31-19-9 that consent in the adoption is not required from a parent, guardian, or custodian; or

(C) A petition to terminate the parent-child relationship between the child and any parent who has not executed a written consent to adoption under Ind. Code § 31-19-9-2, has been filed under Ind. Code § 31-35, and is pending.

(4) Any other person who:

(A) The department has knowledge is currently providing care for the child; and

(B) Is not required to be licensed under Ind. Code § 12-17.2 or Ind. Code § 31-27 to provide care for the child.

(5) Any other suitable relative or person who the department knows has had a significant or caretaking relationship to the child.

(6) Any other party to the child in need of services proceeding.

b. Foster Parent

At least ten (10) days before a hearing on a petition or motion under Ind. Code § 31-35-2, the department shall provide notice of the hearing to the child's foster parent by: (1) certified mail; or (2) face to face contact by the department caseworker. Ind. Code § 31-35-2-6.5(d).

c. Continuance If No Notice to Foster Parent

The court shall continue the hearing if, at the time of the hearing, the department has not provided the court with signed verification from the foster parent, as obtained through Ind. Code § 31-35-2-6.5(d), that the foster parent has been notified of the hearing at least five (5) business days before the hearing. Ind. Code § 31-35-2-6.5(f).

d. No Continuance If Foster Parent Appears At Hearing

The court is not required to continue the hearing if the child's foster parent appears for the hearing. Ind. Code § 31-35-2-6.5(f).

e. Certain Parents of Abandoned Child

If the parent of an abandoned child does not disclose the parent's name as allowed by Ind. Code § 31-34-2.5-1(c), or indicates that the child is being abandoned under Ind. Code § 31-34-2.5, the parent is not required to be notified of a hearing described in Ind. Code § 31-35-2-6.5(c). Ind. Code § 31-35-2-6.5(h).

f. Indian Tribe, If At Least One Parent is Native American

D.S. v. County Dep't of Public Welfare, 577 N.E.2d 572, 574-75 (Ind. 1991) (Where child was born to native Potawatomi Indian mother and Caucasian father, probate court was required to serve notice of hearing to terminate parental rights to the Potawatomi Tribe in form which conformed with the Indian Child Welfare Act).

g. Notice Requirement Does Not Make the Person a Party

A person described in Ind. Code § 31-35-2-6.5(c)(2) through (c)(5) or (d) does not become a party to the proceeding under Ind. Code § 31-35-2 as the result of the person's

right to notice and the opportunity to be heard under this section. Ind. Code § 31-35-2-6.5(g).

E. BURDEN OF PROOF

Pursuant to Ind. Code § 31-37-14-2, a finding in a proceeding to terminate parental rights must be based upon clear and convincing evidence. See also Matter of C.M., 675 N.E.2d 1134, 1138 (Ind. Ct. App 1997).

"Clear and convincing evidence need not reveal that the continued custody of the parents is wholly inadequate for the child's very survival. Rather, it is sufficient to show by clear and convincing evidence that the child's emotion and physical development are threatened by the respondent parent's custody." Bester v. Lake Cnty. Office of Family & Children, 839 N.E.2d 143, 148 (Ind. 2005).

As a standard of proof, clear and convincing evidence requires that existence of a fact to "be highly probable." D.W. v. Ind. Dep't of Child Servs., 969 N.E.2d 89, 94 (Ind. Ct. App. 2012).

Before placing a child in the custody of a person other than the natural parent, a trial court must be satisfied by clear and convincing evidence that the best interests of the child requires such a placement. A.C. v. Ind. Dep't of Child Servs. (In re B.W.), 17 N.E.3d 299, 310-11 (Ind. Ct. App. 2014). The trial court must be convinced that placement with a person other than the natural parent represents a substantial and significant advantage to the child. Id. The presumption will not be overcome merely because "a third party could provide the better things in life for the child." Hendrickson v. Binkley, 316 N.E.2d 276 (Ind. Ct. App. 1974).

J.C. v. Ind. Dep't of Child Servs., 994 N.E.2d 278, 290 (Ind. Ct. App. 2013) (Recommendations of the case manager and court-appointed advocate, in addition to evidence that the conditions resulting in removal will not be remedied, are sufficient to show by clear and convincing evidence that termination is in the child's best interests.).

C.M. v. Ind. Dep't of Child Servs, 960 N.E.2d 169, 173-74 (Ind. Ct. App. 2011) (Ind. Code § 31-35-2-4 requires the DCS to establish, by clear and convincing evidence, each of the requisite elements to support the termination of parental rights. A prima facie showing necessarily includes some evidence of current conditions. DCS did not present a prima facie case that conditions of removal have not been remedied or that the mother poses a threat to the children, thus, the mother was not required to produce evidence in order to withstand the termination petition.).

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

For information on the basic rights, see *Ch. 4 – Constitutional and Statutory Rights.*

G. DUE PROCESS

1. In General

When the State seeks to terminate the parent-child relationship, it must do so in a manner that meets due process requirements. In the Matter of Involuntary Termination of Parent-Child Relationship of C.G., 954 N.E.2d 910, 917 (Ind. 2011). The process due in a termination case turns on the balancing of three factors: (1) the private interests affected by the proceeding; (2) the risk of error created by the State's chosen procedure; and (3) the countervailing governmental interest supporting use of the challenged procedure. Id. Both a parent's interest in the care, custody, and control of a child, and the State's parens patriae interest in protecting a child's welfare are substantial. Id.

In re A.B., 61 N.E.3d 1182 (Ind. Ct. App. 2016) (trial court did not violate Father's due process rights in terminating his telephonic participation during final hearing; Father was given meaningful opportunity to be heard, but due to his own disruptive actions and his decision not to appear in person despite clear ability to do so, he caused his own absence from the hearing).

Because parents have a constitutionally protected right to establish a home and raise their children, DCS "must strictly comply with the statute terminating parental rights." Platz v. Elkhart Cnty. Dep't of Pub. Works, 631 N.E.2d 16, 18 (Ind. Ct. App. 1994).

2. Impact of Defects in CHINS Case

Any procedural irregularities in a CHINS proceeding may be of such significance that they deprive a parent of procedural due process with respect to the termination of his or her parental rights. In re A.P. v. Porter Cnty. Office of Family & Children, 734 N.E.2d 1107, 1112-13 (Ind. Ct. App. 2000).

3. Determination by same judge who heard evidence

A "party is entitled to a determination of the issues by the judge who heard the evidence, and, where a case is tried to a judge who resigns before determining the issue, a successor judge cannot decide the issues or enter findings without a trial de novo." K.G. v. Marion Cnty. Dep't of Child Servs. (In re S. B.), 5 N.E.3d 1152, 1153 (Ind. 2014). Parties may stipulate to have a successor judge who did not preside at the evidentiary hearing decide the issues based on the record. I.P. v. Ind. Dep't of Child Servs., 5 N.E.3d 750, 752 (Ind. 2014). See also Farner v. Farner, 480 N.E.2d 251, 257-58 (Ind. Ct. App. 1985).

When a successor judge who did not hear the evidence or observe the witnesses' demeanor attempts to weigh evidence and make credibility determinations, the judge "is depriving a party of an essential element of the trial process." In the Matter of the Involuntary Termination of the Parent-Child Relationship of D.P., 994 N.E.2d 1228, 1232 (Ind. Ct. App. 2013). Trial Rule 63(A) permits a successor judge to perform the duties of the predecessor judge, but only after the verdict is returned or the findings or decision of the court is filed. Id.

H. OPPORTUNITY TO BE HEARD AND MAKE RECOMMENDATIONS

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

The court shall provide to a person described in Ind. Code § 31-35-2-6.5(c) or (d) an opportunity to be heard and make recommendations to the court at the hearing. Ind. Code § 31-35-2-6.5(e).

What the State terminates a parent-child relationship, it must do so in a manner that meets the requirements of due process. C.T. v. Marion Cnty. Dep't of Child Servs., 896 N.E.2d 571, 586 (Ind. Ct. App. 2008). A fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. Thompson v. Clark Cnty. Div. of Family & Children, 791 N.E.2d 792, 795 (Ind. Ct. App. 2003).

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. CHINS Cases

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 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. Recommendation May Be In Writing and Become Part of Record

The right to be heard and make recommendations under Ind. Code § 31-35-2-6.5(e) includes the right of a person described in Ind. Code § 31-35-2-6.5(c) or (d) to submit a written statement to the court that, if served upon all parties to the child in need of services proceeding and the persons described in Ind. Code § 31-35-2-6.5(c) or (d), may be made a part of the court record. Ind. Code § 31-35-2-6.5(e).

2. Opportunity to Be Heard Does Not Make Person a Party

A person described in Ind. Code § 31-35-2-6.5(c)(2) through (c)(5) or -6.5(d) does not become a party to a proceeding under Ind. Code § 31-35-2 as a result of the person's right to notice and the opportunity to be heard under this section. Ind. Code § 31-35-2-6.5(g).

3. Incarcerated Parent

Incarceration is an insufficient basis for terminating parental rights. K.E. v. Ind. Dep't of Child Servs., 39 N.E.3d 641, 643 (Ind. 2015). Further, inability of a parent to participate in DCS services due to incarceration should not be held against that parent. A.B. v. Ind. Dep't of Child Servs., 130 N.E.3d 122 (Ind. Ct. App. 2019).

Parents do not have an absolute right to be present at a TPR hearing; however, due process does afford a parent the right to be heard at meaningful time and in a meaningful manner. Tillotson v. Clay County Dep't of Family & Children, 777 N.E.2d 741, 745-46 (Ind. Ct. App. 2002). Incarcerated parents are not denied due process when they are not transported to their termination hearing. Id. Alternative procedures should be used to allow a parent who could not be present in the courtroom to fully participate, which could include using a speaker phone or continuing the hearing after the State has presented its case and allowing the parent time to review a transcript or audio tape of the hearing and then respond to allegations raised by the State's witnesses. Id.

Opportunity to be heard does not create a constitutional right to be present. Karma W. v. Marion County Dep't of Child Servs. (In re B.J.), 879 N.E.2d 7, 15-16 (Ind. Ct. App. 2008). If the parent cannot attend, the trial court may continue the hearing after the State has presented its case and allow the parent time to review a transcript or audio tape of the hearing and then respond to the allegations raised by State's witnesses. C.G. v. Marion County Dep't of Child Servs., 954 N.E.2d 910, 920-21 (Ind. 2011).

S.L. v. Ind. Dep't of Child Servs., 997 N.E.2d 1115, 1120-21 (Ind. Ct. App. 2013) (Father was incarcerated in federal prison and federal authorities refused to allow him to attend the TPR hearing. This decision was completely out of the trial court's control. Father was given a transcript of the first two portions of the fact-finding hearings and the hearing were continued to allow father time to consult with his attorney following each hearing, and father "was ably represented by counsel at all three hearings.").

PRACTICE POINTER: Remember to file a motion to transport an incarcerated parent. If the parent is not transported, object on the record and ask for a continuance. Make a record why the parent must be present. Suggest alternative attendance procedures, such as speakerphone or video conferencing.

I. EVIDENCE

Parental unfitness must be established on the basis of individualized proof. Stanley v. Illinois, 405 U.S. 645, 657-58, 92 S. Ct. 1208, 1216, 31 L.Ed.2d 551 (1972).

Thompson v. Clark County Div. of Family & Children (In re B.T.), 791 N.E.2d 792, 795-96 (Ind. Ct. App. 2003) (Trial court violated mother's due process rights after conducting a final TPR hearing as a summary proceeding at which no witnesses testified and no cross-examination was conducted.).

1. Judicial Notice of CHINS Proceedings

A court may take judicial notice of records of a court of this state. Ind. Evidence R. 201(b).

In re D.K., 968 N.E.2d 792, 796-97 (Ind. Ct. App. 2012) (The trial court did not err in taking judicial notice of the CHINS proceedings at the outset of the TPR hearing. If the court does take judicial notice, there must be an effort to include such "other" records in the record of the current proceeding, and those "other" records should be included on appeal in an appendix submitted to the COA under Indiana Appellate Rule 50.).

2. Certain Convictions Are Prima Facie Evidence

Pursuant to Ind. Code § 31-35-3-8, a showing that an individual has been convicted of an offense described in Ind. Code § 31-35-3-4(1) is prima facie evidence that there is a reasonable probability that: (1) The conditions that resulted in the removal of the child from the parent under a court order will not be remedied; or (2) Continuation of the parent-child relationship poses a threat to the well-being of the child.

Ramsey v. Madison County Dep't of Family & Children, 707 N.E.2d 814, 817 (Ind. Ct. App. 1999) (Evidence supported TPR where father was convicted of Child Molesting and Incest; child feared being abused by father again, and child had emotional and behavioral problems.).

3. Admissibility of Privileged Communications and Medical and Mental Health Records

Psychologist-patient privilege does not apply in parental termination proceedings and, thus, testimony of psychologists who examine parents is admissible in termination hearings. Ross v. Delaware County Dep't of Public Welfare, 661 N.E.2d 1269, 1271 (Ind. Ct. App. 1996).

Carter v. Knox County Office of Family & Children, 761 N.E.2d 431, 438-39 (Ind. Ct. App. 2001) (Admission of parent's mental health records in TPR proceedings did not violate HIPPA, as privacy privilege was waived when the records were introduced in a CHINS proceeding; alternatively, the court's need to protect the best interest of the child outweighed any confidentiality interest of the parent.).

Physician-patient privilege is unavailable in proceedings to terminate parental rights. Shaw v. Shelby County Dep't of Public Welfare, 612 N.E.2d 557, 558 (Ind. 1993).

In re Wardship of R.B., 615 N.E.2d 494, 498 (Ind. Ct. App. 1993) (Error in admission of mother's drug test result was not prejudicial, but merely cumulative, where mother admitted she tested positive for drug use at least once.).

4. Expert Witness

A social worker can be properly qualified as an expert witness to testify in a termination proceeding. T.H. v. Ind. Dep't of Child Servs. (In re B.H.), 989 N.E.2d 355, 361-62 (Ind. Ct. App. 2013).

5. Character Evidence of Prior TPR – 404(b) Evidence

There is express statutory authority for the admission of prior bad acts in CHINS proceedings at Ind. Code § 31-34-12-5; however, the statutory TPR procedures do not contain a similar provision; nevertheless, the Indiana Rules of Evidence provide a means for the admission of character evidence in the absence of express statutory authority. In re Matter of Termination of Parent-Child Relationship of D.B., 702 N.E.2d 777, 780 (Ind. Ct. App. 1998).

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 TPR 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.

6. Child's Previous Statements or Videotaped Testimony

a. Use of Videotaped Testimony on Motion of DCS

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 the parent-child relationship should be terminated. Ind. Code § 31-35-5-3.

S.M. v. Elkhart County Office of Family & Children, 706 N.E.2d 596, 599-600 (Ind. Ct. App. 1999) (Court erred in excluding mother from courtroom during children's testimony where court did not follow statutory methods for presenting testimony outside mother's presence and mother could neither see nor hear children during their testimony.).

b. Admissibility of Statements or Videotapes

Pursuant to Ind. Code § 31-35-4-2, 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 parent-child relationship should be terminated; and

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

is admissible in evidence in an action described in Ind. Code § 31-35-4-1 [TPR] if the requirements of Ind. Code § 31-35-4-3 are met.

c. Requirements for Admissibility Of Statements Or Videotapes

Pursuant to Ind. Code § 31-35-4-3, a statement or videotape described in Ind. Code § 31-35-4-2 is admissible in evidence in an action to determine whether the parent-child relationship should be terminated 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 parent-child relationship should be terminated;

(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.

Roark v. Roark, 551 N.E.2d 865, 869 (Ind. Ct. App. 1990) (GAL's opinion that it would be too traumatic for a child to testify was insufficient to support admitting hearsay statements of child.).

d. Informing Parties of Intention to Use Statement or Videotapes

Pursuant to Ind. Code § 31-35-4-4, a statement or videotape may not be admitted in evidence under Ind. Code § 31-35-4 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.

e. Who May Be Present During Child's Videotaped Testimony

Pursuant to Ind. Code § 31-35-5-6, if the court makes an order under Ind. Code § 31-35-5-3, only the following persons may be in the same room as the child during the child's videotaped testimony:

(1) The judge.

(2) The prosecuting attorney or the attorney for the department.

(3) The attorney for each party.

(4) Persons 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

f. Who May Question the Child during Videotaped Testimony

Pursuant to Ind. Code § 31-35-5-7, if the court makes an order under Ind. Code § 31-35-5-2 or Ind. Code § 31-35-5-3, only the following person may question the child:

(1) The prosecuting attorney or the attorney for the department.

(2) The attorneys for the parties.

(3) The judge.

7. Child's Testimony by Closed Circuit Television

a. Use of Closed Circuit Television Testimony on Motion of DCS

Pursuant to Ind. Code § 31-35-5-2, 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.

b. Requirements for Admissibility of Closed Circuit Television Testimony

Pursuant to Ind. Code § 31-35-5-4, the court may not make an order under Ind. Code § 31-35-5-2 or Ind. Code § 31-35-5-3 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 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 impairment of the child's ability to function normally in society; and (iii) Reflects that 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; and

(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 prosecuting attorney or 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 prosecuting attorney or the attorney for the department informed the parties and their attorneys under Ind. Code § 31-35-5-4(2) at least seven (7) days before the proceedings to the parties and their attorneys a fair opportunity to prepare a response before the proceedings to the motion of the prosecuting attorney or the motion of the attorney for the department to permit the child to testify outside the courtroom.

c. Who May Be in the Room with the Child during Closed-Circuit Television Testimony

Pursuant to Ind. Code § 31-35-5-5, if the court makes an order under Ind. Code § 31-35-5-2, 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.

d. Who May Question Child during Closed-Circuit Television Testimony

Pursuant to Ind. Code § 31-35-5-7, if the court makes an order under Ind. Code § 31-35-5-2 or Ind. Code § 31-35-5-3, only the following persons may question the child:

(1) The prosecuting attorney or the attorney for the department.

(2) The attorneys for the parties.

(3) The judge.

8. Expert Concerning Native American Placement

D.S. v. County Dep't of Public Welfare, 577 N.E.2d 572, 575-76 (Ind. 1991) (In proceeding to terminate parental rights of a Native American child, it was error to fail to question expert witnesses as to their specific qualifications related to the placement of Native American children.).

9. Collateral Estoppel

In re C.M., 675 N.E.2d 1134, 1137-38 (Ind. Ct. App. 1997) (Mother was not collaterally estopped in TPR proceedings from contesting CHINS admissions, where mother claimed that she only admitted to obtain government services for the child.).

Drug Test Results

In Re De. B., 144 N.E. 3d 763 (Ind. 2020), Indiana Supreme Court states trial court in CHINS properly admitted lab reports of parents' drug tests under Ind. R. Evd. 803(6) (busines records exception to hearsay because the lab depended on the lab reports to operate. However, there are ongoing concerns that DCS has subcontracted with drug collection labs that have falsified results. Even though the Indiana Supreme Court has held that drug test results may be admitted a great deal of scrutiny should be given to any lab results, DCS intend to admit into

evidence. If you have concerns about false lab test results contact IPDC for the latest update to challenging false lab drug test results.

J. SATISFACTORY PLAN OF CARE

DCS is not required to present evidence whether there is a pre-adoptive home or who will adopt the child to satisfy the element that "there is a satisfactory plan for the care and treatment of the child." In re D.L.W., 485 N.E.2d 139, 143 (Ind. Ct. App. 1985).

DCS is not required to detail a child's future in order to provide a satisfactory plan of care; DCS need only detail a general direction of its plan. Ramsey v. Madison County Dep't of Family & Children, 707 N.E.2d 814, 817 (Ind. Ct. App. 1999). See also S.J.J. v. Madison County Dep't of Public Welfare, 629 N.E.2d 866, 868 (Ind. Ct. App. 1994). A plan of care for the children can be satisfactory, even if the plan is for the children to have separate adoptive homes. A.J. v. Marion Cnty. Office of Family & Children, 881 N.E.2d 706, 719 (Ind. Ct. App. 2008).

A DCS plan is satisfactory if the plan is to attempt to find suitable parents to adopt the children. There need not be a guarantee that a suitable adoption will take place, only that DCS will attempt to find a suitable adoptive parent. Lang v. Starke Cnty. Office of Family & Children, 861 N.E.2d 366, 375 (Ind. Ct. App. 2007). A plan is not unsatisfactory if DCS has not identified a specific family to adopt the children. Id. It is within the authority of the adoption court, and not the termination court, to determine whether the adoptive placement is appropriate. Id.

Adequate Plan of Care:

- Child would be kept in current foster placement providing food, shelter, clothing, and medical and dental care until permanently adopted. In re D.L.W., 485 N.E.2d 139, 143 (Ind. Ct. App. 1985).
- Following TPR where child was placed in long-term foster care because child was not of adoptable age, had a history of behavioral and psychiatric problems, and had other special needs. "Jane Doe" v. Daviess County Div. of Children & Family Servs., 669 N.E.2d 192, 196 (Ind. Ct. App. 1996).

K. BEST INTEREST OF CHILD

State must show by clear and convincing evidence that best interest of child is served by TPR. J.H. v. Bartholomew County Dep't of Public Welfare, 468 N.E.2d 542, 546 (Ind. Ct. App. 1984). Trial court cannot assume that TPR would be in the child's best interest. Tipton v. Marion County Dep't of Public Welfare, 629 N.E.2d 1262, 1270-71 (Ind. Ct. App. 1994).

> R.M. v. Tippecanoe County Dep't of Public Welfare, 582 N.E.2d 417, 421 (Ind. Ct. App. 1991) (In determining whether to terminate parental rights, the court uses a "best interest" standard as a means of preserving or creating an environment conducive to meeting the "need of every child for unbroken continuity of affectionate and stimulating relationships with an adult.").

In determining the best interests of the child, the court must look beyond the factors identified by DCS and look to the totality of the evidence. Weldishofer v. Dearborn County Div. of Family & Children (In re J.W.), 779 N.E.2d 954, 962-63 (Ind. Ct. App. 2002). Trial court must subordinate the interests of the parents to those of the child. Id. See also Lang v. Starke Cnty. Office of Family & Children, 861 N.E.2d 366, 373 (Ind. Ct. App. 2007).

Children should not be removed from the custody of their parents just because there is a better place for them, but because the situation while in the custody of their parents is wholly inadequate for their very survival. In re Tucker, 578 N.E.2d 774, 778-79 (Ind. Ct. App. 1991). A parent has no absolute right to custody of child and controversy between parent and third party

should be decided with regard to child's best interest alone. Schleuter v. Canatsy, 47 N.E. 825, 827 (Ind. 1897). Children have an interest in terminating parental rights that prevent adoption and inhibit establishing secure, stable, long-term, continuous relationships. Lehman v. Lycoming County Children's Servs. Agency, 458 U.S. 502, 513 (1982) and C.G. v. Marion County Dep't of Child Servs., 954 N.E.2d 910, 917 (Ind. 2011).

TPR is proper when the child's emotional, social, and physical development was threatened while living with the parent, but greatly improved while in foster care. In re C.M., 675 N.E.2d 1134, 1140 (Ind. Ct. App. 1997). See also R.G. v. Marion Cnty. Office Dep't of Family & Children, 647 N.E.2d 326, 328 (Ind. Ct. App. 1995) and Bester v. Lake Cnty. Office of Family & Children, 839 N.E.2d 143, 148 (Ind. 2005). Among those factors, permanency is a central consideration in determining the child's best interests. R.Y. v. Ind. Dep't of Child Servs. (In re G.Y.), 904 N.E.2d 1257, 1265 (Ind. 2009).

M.H. v. Ind. Dep't. of Child Servs. (In re A.P.), 981 N.E.2d 75, 84-85 (Ind. Ct. App. 2012) (Father had a loving bond with the children during unauthorized visits with the children. There was some testimony that termination would be hard on the children. DCS and the GAL testified that termination was in the best interests of the children. Trial court was required to assess the weight, and there was no error.).

L. DETERMINATION BY THE COURT

1. State Must Prove All Statutory Elements

Except as provided in Ind. Code § 31-35-2-4.5(d), if the court finds that the allegations in a petition described in Ind. Code § 31-35-2-4 are true, the court shall terminate the parent-child relationship. Ind. Code § 31-35-2-8(a).

If the court finds that the allegations in a petition described in Ind. Code § 31-35-3-4 are true, the court shall terminate the parent-child relationship. Ind. Code § 31-35-3-9(a).

If the State fails to prove any statutory element of the termination of parental rights petition, the rights shall not be terminated. W.B. v. Ind. Dep't of Child Servs. (In re D.B.), 942 N.E.2d 867, 872 (Ind. 2011). If parent does not appear, unless all of the requirements for a default judgment pursuant to Indiana Trial Rule 55 have been met, DCS must still prove all of the elements of the TPR by clear and convincing evidence. Young v. Elkhart County Office of Family & Children, 704 N.E.2d 1065, 1069 (Ind. Ct. App. 1999).

"Failure to ensure that the State has fully complied with all the conditions precedent to the termination of parental rights constitutes fundamental error." E.J. v. Ind. Dep't of Child Servs. (In re D.D.), 962 N.E.2d 70, 75 (Ind. Ct. App. 2011).

2. Possible to Terminate As to Only Some Children

Different treatment of the differently situated children was not contradictory and was not grounds to vacate the trial court's termination of parental rights of other children. In re V.A., 632 N.E.2d 752 (Ind. Ct. App. 1994).

In re M.J.G., 542 N.E.2d 1385, 1389 (Ind. Ct. App. 1989) (TPR of three children. Fourth child was allowed to remain in home where mother could provide basic needs for child in home, but was unable to handle the stress of having more than one child in the home at a time.).

In re V.A., 632 N.E.2d 752 (Ind. Ct. App. 1994) (Department's election to not seek termination of parental rights to older child was clearly supported by evidence introduced at the termination hearing).

3. Findings of Fact and Conclusions of Law Now Required

Ind. Code § 31-35-2-8 was amended in 2012 to require the court to issue findings in support of a TPR order. The court shall enter findings of fact that support the entry of the conclusions required by Ind. Code § 31-35-2-8(a) and -8(b). Ind. Code § 31-35-2-8(c).

Pursuant to Indiana Trial Rule 52(A), in the case of issues tried upon the facts without a jury or with an advisory jury, the court shall determine the facts and judgment shall be entered thereon pursuant to Trial Rule 58. Upon its own motion, or the written request of any party filed with the court prior to the admission of evidence, the court in all actions tried upon the facts without a jury or with an advisory jury (except as provided in Rule 39(D)) shall find the facts specially and state its conclusions thereon.

Trial court must adopt evidence presented at hearing as fact rather than reiterating testimony in findings of fact and conclusions of law. C.S. v. Ind. Dep't of Child Servs., 123 N.E.3d 699 (Ind. Ct. App. 2019). While statutory findings are not required, the rights involved are of constitutional magnitude, and a judgment terminating the relationship between a parent and child is impossible to review on appeal if it is nothing more than a mere recitation of the conclusions the governing statute requires the trial court to reach. In re M.W., 943 N.E.2d 848, 854 (Ind. Ct. App. 2011). In order for the court to properly reach a conclusion of law, it must have made some factual findings to support the conclusion—those factual findings must rest upon clear and convincing evidence. A.M. v. Ind. Dep't of Child Servs. (In re C.M.), 963 N.E.2d 528, 530 (Ind. Ct. App. 2012).

> In re N.G., 61 N.E.3d 1263 (Ind. Ct. App. 2016) (trial court's sparse findings of fact were insufficient to satisfy statutory mandate of Ind. Code § 31-35-2-8(c), as Court could not discern whether trial court based its termination order on proper statutory considerations; remanded for proper findings that support the judgment terminating Mother's parental rights.).

PRACTICE POINTER: Parent should request specific findings for appellate purposes.

a. Parties May Submit Proposed Findings and Conclusions

In any case where special findings of facts and conclusions thereon are to be made the court shall allow and may require the attorneys of the parties to submit to the court a draft of findings of facts and conclusions thereon which they propose or suggest that the court make in such a case. Indiana Trial Rule 52 (C).

4. No Authority to Delay Ruling

Court lacked statutory authority to delay judgment to give father "one last chance" where statute required court to terminate parental rights if it found that the allegations contained in the TPR petition were true. Bailey v. Dubois County Dep't of Child Servs. (In re S.B.), 896 N.E.2d 1243, 1248 (Ind. Ct. App. 2008).

5. Dismissal of Petition if Allegations Untrue

If the court does not find that the allegations are true, the court shall dismiss the petition. Ind. Code § 31-35-2-8(b).

If the court does not find that the allegations in the petition are true, the court shall dismiss the petition. Ind. Code § 31-35-3-9(b).

6. Judge Who Heard Evidence Should Report Findings and Conclusions

"When a successor judge who did not hear the evidence or observe the witnesses' demeanor

attempts to weigh evidence and make credibility determinations, the judge "is depriving a party of an essential element of the trial process." T.P. v. Child Advocates (In re I.P.), 5 N.E.3d 750, 752 (Ind. 2013).

VIII. CHALLENGES TO TERMINATION FINDING

A. DENIAL OF DUE PROCESS

See also *Ch. 4 – Constitutional Rights*

L.H. v. Ind. Dep't of Child Servs. (In re D.H.), 119 N.E.3d 578 (Ind. Ct. App. 2019) (DCS violated due process rights of mother when they failed to acknowledge mother's request for, and willingness to participate in, any necessary services; before DCS filed termination petition they failed to reassess Mother's needs and adjust and refer services for Mother; yet DCS moved for termination without noting that there were grounds to move to dismiss the termination petition because of DCS's failure to identify and/or provide necessary family services while the CHINS case was open).

Matter of C.M.S.T., 111 N.E.3d 2017 (Ind. Ct. App. 2018) (court again chastised DCS for denying due process in termination cases; here, one DCS case manager filed a false report and another had a sexual relationship with father, among a host of alarming facts).

A.P. v. Porter County Office of Family & Children, 734 N.E.2d 1107, 1117-18 (Ind. Ct. App. 2000) (Termination of parental rights was denied due to: (1) DCS failed to provide parents with copies of case plans, (2) termination petition was missing statutorily required statutes, (3) the CHINS petition was unsigned and unverified, (4) no permanency hearing was held, (5) most of the CHINS and TPR orders lacked written findings and conclusions, (6) no contact order failed to meet statutory requirements, and (7) the father was deprived of right to be present at CHINS review hearings.).

Lang v. Starke County Office of Family & Children, 861 N.E.2d 366, 376-77 (Ind. Ct. App. 2007) (No denial of due process based on father's claim that DCS was making decisions during CHINS proceeding calculated to increase likelihood of success in TPR proceeding. Father did not present evidence of any lack of notice or deprivation of right to be heard.).

Karma W. v. Marion County Dep't of Child Servs. (In re B.J.), 879 N.E.2d 7, 15-16 (Ind. Ct. App. 2008), *trans. denied*, 891 N.E.2d 42 (Court did not violate father's due process rights when it denied father's counsel's motion to continue based on a lack of notice, where DCS sent notice to the last address known to DCS and father did not provide new address information as required by court order.).

C.A. v. Indiana Dept. of Child Services, 15 N.E.3d 85 (Ind. Ct. App. 2014) (failure of DCS to provide Mother with copy of case plan did not violate Mother's right to due process in termination of parental rights because case plan was discussed at regular team meetings, which were attended by Mother, DCS family case manager, Mother's various service providers, and the court-appointed special advocate).

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 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 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.).

B. NOT DCS FAILURE TO PROVIDE SERVICES

H.L. v. Marion County Dep't of Child Servs., 915 N.E.2d 145, 148 n.3 (Ind. Ct. App. 2009) (Failure to provide services does not serve as a basis on which to directly attach a termination order as contrary to law.).

C. PARENT'S FAILURE TO COMPLETE SERVICES

In re R.A., 19 N.E.3d 313 (Ind. Ct. App. 2014) (evidence insufficient to support termination of parent-child relationship even though Father refused to participate in services while incarcerated awaiting trial; he was not ordered to participate in services until after his release, and record did not establish that Father lacks knowledge of parenting or that he was not able to articulate a plan for caring for R.A. upon his release.).

In re. A.W., 62 N.E.3d 1267 (Ind. Ct. App. 2016) (trial court erred in terminating Mother's parental rights as to A.W., a child from a previous relationship, and G.A.S, her child with Father, because DCS failed to prove by clear and convincing evidence that the conditions that resulted in the removal of the children would likely not be remedied. Ind. Code § 31-35-2-4(b)(2)(B)(i). While she was incarcerated, Mother participated in and completed individual therapy, AA meetings, parenting classes, and family classes.).

E.S. v. Miami County Div. of Family & Children, 762 N.E.2d 1287, 1291 (Ind. Ct. App. 2002) (DCS did not provide any services or monitor any services in which parent was voluntarily participating. Thus, there was not clear and convincing evidence that conditions that resulted in removal would not be remedied.).

In re Jones, 436 N.E.2d 849, 854-55 (Ind. Ct. App. 1982) (There must be some relationship between the reason for the child's removal and the types of services offered to the parents. Minimal offerings and lack of monitoring was inadequate for DCS to meet their burden of showing that TPR was proper.).

In re Fries, 416 N.E.2d 908, 910 (Ind. Ct. App. 1981) (DCS met obligation of offering or providing services where DCS attempted to meet mother, but she refused to attend.).

In re Leckrone, 413 N.E.2d 977, 980 (Ind. Ct. App. 1980) (DCS has duty to encourage parent to overcome issues that led to child's removal prior to TPR.).

PRACTICE POINTER: In many cases, TPR is sought because the parents "failed" to complete ordered services. It is important to evaluate whether DCS stopped services, delayed making a referral for services, provided services in such a way that made it difficult or impossible for the parent to fulfill the obligation (for example, too many providers all at once or only one provider at a time such that parent could not complete all services), or refused to provide services for policy reasons that contradicted the dispositional order.

D. CHILD'S NEED FOR PERMANENCY

Santosky v. Kramer, 455 U.S. 745, 763, 102 S.Ct. 1388, 1400, 71 L.Ed.2d 599 (1982) (The

children's interest in permanency is a TPR consideration only after the parent has been shown to be unable to provide that permanency.).

Baker v. Marion County Office of Family & Children, 810 N.E.2d 1035, 1040 (Ind. 2004) ("It is undisputed that children require secure, stable, long-term, continuous relationships with their parents or foster parents; there is little that can be as detrimental to a child's sound development as uncertainty.").

E. CHILD'S BEST INTEREST

In re R.S., 56 N.E.3d 625 (Ind. 2016) (Father's failure to appear for CHINS hearing does not support finding that terminating his parental rights was in the best interests of R.S.; since his release from incarceration, Father repeatedly demonstrated desire to parent R.S. and had made progress by successful completing probation and maintaining clear drug screens; case had not reached "last resort" stage where termination might have been appropriate).

R.Y. v. Ind. Dep't of Child Servs. (In re G.Y.), 904 N.E.2d 1257, 1265 (Ind. 2009) (termination of Mother's parental rights was not in the child's best interests, even though in 2003 Mother sold cocaine to an undercover officer and was arrested for the dealing when the child was 20 months old, because Mother agreed the child was a CHINS to get her placed in foster care, maintained nearly continuous contact with the child, and completed parenting classes, a college course, and drug treatment while incarcerated).

Tipton v. Marion County Dep't of Public Welfare, 629 N.E.2d 1262, 1268 (Ind. Ct. App. 1994) (The child's best interests are not relevant as to the fitness of the father to parent. The State must present evidence of unfitness.).

Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 836-37 (1977) (The probability of a foster child being returned to his biological parents declines markedly after the first year in foster care. It is rare that a foster child achieves a stable home life through final termination of parental ties and adoption into a new permanent family.).

Santosky v. Kramer, 455 U.S. 745, 765, n. 15, 102 S. Ct. 1388, 1401 n.15, 71 L.Ed.2d 599 (1982) (The assumption that TPR will invariably benefit the child is "hazardous at best," weighing the absence of empirical support for such an assumption.).

Quilloin v. Walcott, 434 U.S. 246, 255, 98 S. Ct. 549, 555, 54 L.Ed.2d 511 (1978) (The Due Process Clause would be offended if the state were to attempt to force the breakup of the natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.).

R.M. v. Tippecanoe County Dep't of Public Welfare, 582 N.E.2d 417, 421 (Ind. Ct. App. 1991) (The court would not condone the breakup of a natural family for the sole reason it would be in the child's best interest.).

F. PARENT CHANGED CIRCUMSTANCES THAT LED TO REMOVAL

S.C. v. Ind. Dep't of Child Servs. (In re Z.C.), 13 N.E.3d 464, 469 (Ind. Ct. App. 2014) (Child was born drug addicted and mother was arrested shortly after the birth and faced a long period of federal incarceration on drug charges. A plea agreement had been signed, but the sentencing date and length of the sentence remained unknown. That evidence supported that the conditions of the child's removal from the mother's custody would not be remedied. Mother misled the court as to the identity of the father for months because she was concerned about the negative impact his identity may have on her own case.).

In re W.M.L., 82 N.E.3d 361 (Ind. Ct. App. 2017) (children were removed when mother had used

marijuana during pregnancy and the family was homeless; children were removed again after father battered mother, but subsequently completed substance abuse programs, batterer intervention, probation, no positive drug screens, and consistent employment; denial of termination petition affirmed).

T.Q. v. Ind. Dep't of Child Servs. (In re N.Q.), 996 N.E.2d 385, 395-96 (Ind. Ct. App. 2013) (It was error for the trial court to base its second termination order primarily upon the evidence presented at the initial termination hearing. It was error for the trial court to issue its order which did not adequately consider the evidence presented by the parents of their current conditions at the time of the second TPR hearing. DCS did not investigate the parents' current situation leading up to the TPR hearing.).

K.T.K. v. Ind. Dep't of Child Servs., 989 N.E.2d 1225, 1231 and 1234 (Ind. 2013) (Two-step analysis to determine whether the conditions that led to removal have been remedied. First, what conditions led to the child's placement outside the home and retention in foster care. Second, the court determines "whether there is a reasonable probability that those conditions will not be remedied.").

L.S. v. Ind. Dep't of Child Servs. (In re A.D.S.), 987 N.E.2d 1150, 1158 (Ind. Ct. App. 2013) (Mother tested negative on recent drug screens, but missed several recent screens, and tested positive for cocaine four times while the case was pending, with a long history of substance abuse, treatment, and relapsing. Mother also failed to complete domestic violence classes and violated a no contact order with the father. Thus, there is clear and convincing evidence to support the trial court's findings, and the findings support the conclusion that there is a reasonable probability that the reasons for the placement outside the home will not be remedied.).

Ma.J. v. Ind. Dep't of Child Servs., 972 N.E.2d 394, 404 (Ind. Ct. App. 2012) (Mother has not been in any relationship following release from incarceration, and there were no incidents of domestic violence following removal of the children. Mother terminated her unhealthy relationship. Mother has a positive relationship with the children, and there was no evidence of issues with her ability to parent and provide the children with a safe environment. There were no immediate concerns about the parent's ability to parent. Reunification could cause some disruption to the twins' lives, but so could termination. DCS failed to meet its statutory burden.).

A.M. v. Ind. Dep't of Child Servs. (In re C.M.), 963 N.E.2d 528, 529 (Ind. Ct. App. 2012) (It is incumbent upon the DCS to put forth evidence of lack of remedial measures or evidence of that which poses a threat to the child. There may well be no evidence of "changed" conditions, but there must be evidence of "current" conditions.).

In re D.K., 968 N.E.2d 792, 799 (Ind. Ct. App. 2012) (Child was removed because the mother left the child alone with an inappropriate caregiver and a lack of appropriate food and clothing in the residence. Mother did not complete the recommendations or requirements of the CHINS dispositional order. The finding that there was a reasonable probability the conditions leading to removal would not be remedied was not clearly erroneous.).

In re I.A., 934 N.E.2d 1127, 1134 (Ind. 2010) ("The trial court must consider a parent's habitual pattern of conduct to determine whether there is a substantial probability of future neglect or deprivation.").

A.B. v. Marion County Dep't of Child Servs., 924 N.E.2d 666, 670 (Ind. Ct. App. 2010) (The trial court must judge a parent's fitness to care for his or her child at the time of the termination hearing. However, the trial court must also evaluate the parent's habitual patterns of conduct to determine the probability of future neglect or deprivation of the child.).

A.B. v. Marion County Dep't of Child Servs., 924 N.E.2d 666, 670-71 (Ind. Ct. App. 2010) (Trial court must judge a parent's fitness to care for the child at the time of the termination hearing and take into consideration evidence of changed conditions. Due to the permanency of TPR, the court may consider parent's habitual patterns of behavior to determine future probability of neglect or abuse of child.).

J.S. v. Ind. Dep't of Child Servs. (In re J.S.), 906 N.E.2d 226, 232 (Ind. Ct. App. 2009) (When determining whether the conditions that led to removal will be remedied, the court may consider the parent's response to the services offered.).

Moore v. Jasper County Dep't of Child Servs., 894 N.E.2d 218, 228 (Ind. Ct. App. 2008) (Evidence did not support termination of parental rights where mother made significant strides in accomplishing dispositional goals, mother had remarried, enrolled in school, obtained her driver's license, regained custody of two children, enrolled in counseling, and was living in appropriate housing. GAL testified that termination would be detrimental to children's well-being.).

Latasha J. v. Marion County Office of Family & Children (In re A.J.), 881 N.E.2d 706, 716 (Ind. Ct. App. 2008) (DCS is not required to rule out all possibilities of change; rather, it need establish only that there is a reasonable probability that the parent's behavior will not change.).

Eden v. Johnson County Dep't of Child Servs. (In re Kay.L.), 867 N.E.2d 236, 242 (Ind. Ct. App. 2007) (DCS is not required to provide evidence ruling out all possibilities of change; rather, it need only establish "that there is a reasonable probability that the parent's behavior will not change.).

Lang v. Starke County Office of Family & Children, 861 N.E.2d 366, 372 (Ind. Ct. App. 2007) (Where there are only temporary improvements, and the pattern of conduct shows no overall progress, the court might reasonably infer that under the circumstances, the problematic situation will not improve.).

Bester v. Lake Cnty. Office of Family & Children, 839 N.E.2d 143, 152 (Ind. 2005) (If the court finds a reasonable probability that conditions requiring removal would not be remedied, the trial court was not required to find that continuation of the parent-child relationship posed a threat to the child, since Ind. Code § 31-35-2-4(b)(2)(B) only requires one or the other. Trial court was within its discretion to disregard the efforts of a parent made only shortly before termination (in this case it was 11 and 17 months of good alcohol and drug screens) and to weigh more heavily the parent's history of conduct prior to those efforts.).

Haney v. Adams County Office of Family & Children (In re A.H.), 832 N.E.2d 563, 570 (Ind. Ct. App. 2005) (When determining whether a reasonable probability exists that the conditions justifying a child's removal and continued placement outside the home will not be remedied, the court must judge a parent's fitness to care for the children at the time of the termination hearing, taking into consideration evidence of changed conditions.).

Inkenhaus v. Vanderburgh County Office of Family & Children (In re A.I.), 825 N.E.2d 798, 806 (Ind. Ct. App. 2005) (A court may consider not only the basis for a child's initial removal from the parent's care, but also any reasons for a child's continued placement away from the parent.).

Peterson v. Marion County Office of Family & Children (In re D.D.), 804 N.E.2d 258, 267 (Ind. Ct. App. 2004) (Despite extensive services offered to mother, she failed to adequately demonstrate a change of conditions that triggered the child's continued removal. Evidence demonstrated that mother had extensive history of mental health and substance abuse issues; counselor had concerns that mother placed child in adult role and made inappropriate comments in front of child.).

Weldishofer v. Dearborn County Div. of Family & Children (In re J.W.), 779 N.E.2d 954, 961 (Ind. Ct. App. 2002) (Parent's criminal history is relevant in determining whether conditions that led to removal are likely to be remedied.).

E.S. v. Miami County Div. of Family & Children, 762 N.E.2d 1287, 1290 (Ind. Ct. App. 2002) (As for whether continuation of the parent-child relationship poses a threat to the child's well-being, termination is proper when the evidence shows that the emotional and physical development of a child in need of services is threatened.).

A.F. v. Marion Cnty. Office of Family & Children, 762 N.E.2d 1244, 1251 (Ind. Ct. App. 2002), *trans. denied* (Courts have properly considered evidence of a parent's prior criminal history, drug and alcohol abuse, history of neglect, failure to provide support, and lack of adequate housing and employment. The trial court may also properly consider, as evidence of whether conditions will be remedied, the services offered to the parent by DCS, and the parent's response to those services.).

In re J.T., 742 N.E.2d 509, 512 (Ind. Ct. App. 2001) (The court must evaluate a parent's habitual patterns of conduct to determine whether there is a substantial probability of future neglect or deprivation.).

In re J.T., 742 N.E.2d 509, 512 (Ind. Ct. App. 2001) (The court must also evaluate the parent's habitual patterns of conduct to determine whether there is a substantial probability of future neglect or deprivation.).

M.M. v. Elkhart Office of Family & Children, 733 N.E.2d 6, 13 (Ind. Ct. App. 2000) (The court is entitled to give more weight to the parent's habitual patterns of conduct than to the parent's testimony of recently changed conditions.).

In re B.D.J., 728 N.E.2d 195, 201 (Ind. Ct. App. 2000) (The court need not wait until a child is irreversibly harmed such that his physical, mental, and social development is permanently impaired before terminating a parent-child relationship.).

In re Perkins, 352 N.E.2d 502, 510 (Ind. Ct. App. 1976) (Once a child is found to be dependent and the parental relation is severed, the change of the state of mind, habits, and circumstances of parent essential to provide a fit home for the child is a matter solely up to the parent and the burden going forward with the evidence is upon the parent to show a change of circumstances and reformation so that the best interests of child would be served by returning the child to the parent.).

> But see A.M. v. Ind. Dep't of Child Servs. (In re C.M.), 963 N.E.2d 528, 529 (Ind. Ct. App. 2012) (where this argument is rejected and the Court of Appeals held DCS has the burden of presenting a prima facie showing regarding current conditions before the parent is obliged to come forward with any evidence).

In re Wardship of Bender, 352 N.E.2d 797, 804 (Ind. Ct. App. 1976) (Trial court does not have to make finding that children are currently neglected at time of termination hearing because in most cases the children have been removed from the parents' care and it would be impossible to show that the children are currently neglected by the parents under those circumstances.).

In re C.M., 675 N.E.2d 1134, 1140 (Ind. Ct. App. 1997) ("It [is] within the province of the trial court, as the finder of fact, to ignore or discredit…evidence" of remedial efforts made shortly before the termination hearing.").

G. PARENT UNWILLING OR UNABLE TO MEET RESPONSIBILITIES

R.W. v. Marion County Dep't of Child Servs., 892 N.E.2d 239, 245 (Ind. Ct. App. 2008)

(Parental rights may be terminated when the parents are unable or unwilling to meet their parental responsibilities.).

C.T. v. Marion County Dep't of Child Servs., 896 N.E.2d 571, 585 (Ind. Ct. App. 2008) (A pattern of unwillingness to deal with parenting problems and to cooperate with those providing social services, in conjunction with unchanged conditions, support a finding that there exists no reasonable probability that the conditions will change.).

S.J.J. v. Madison County Dep't of Public Welfare, 629 N.E.2d 866, 869-70 (Ind. Ct. App. 1994) (TPR was appropriate where mother could not maintain visitation schedule or schedule with therapist, which supported inference that mother still could not maintain children's school attendance, which had earlier led to removal of the children.).

Alexander v. LaPorte County Welfare Dep't, 465 N.E.2d 223, 226 (Ind. Ct. App. 1984) (Even if mother did not abuse daughter, TPR was proper where mother failed to protect child from mother's physically abusive boyfriend.).

H. SUBSTANCE ABUSE

A.B. v. Marion County Dep't of Child Servs., 924 N.E.2d 666, 671 (Ind. Ct. App. 2010) (Termination was proper where there was evidence of mother's drug use when child was born, mother failed to participate in assessment and counseling, and some indirect evidence that mother had for cocaine usage after child was born.).

R.Y. v. Ind. Dep't of Child Servs. (In re G.Y.), 904 N.E.2d 1257, 1265 (Ind. 2009) (Termination of mother's parental rights because of her substance was clearly erroneous; in 2003, mother did sell cocaine to an undercover officer and was arrested for the dealing when the child was 20 months old, but mother agreed the child was a CHINS to get her placed in foster care, maintained nearly continuous contact with the child, and completed parenting classes, a college course, and drug treatment while incarcerated).

Wedding v. Vanderburgh County Dep't of Child Servs. (In re A.D.W.), 907 N.E.2d 533, 539 (Ind. Ct. App. 2008) (Termination was not clearly erroneous where mother had habitual pattern of drug abuse and neglect of children, she failed to complete drug treatment and drug tests, the children had been declared wards of DCS on four prior occasions, and mother did not participate in supervised visitation.).

Inkenhaus v. Vanderburgh County Office of Family & Children (In re A.I.), 825 N.E.2d 798, 811 (Ind. Ct. App. 2005) (Parents' constant drug use, sporadic domestic violence, and inability to maintain stable employment and housing rendered child's environment destructive at best and dangerous at worst.).

"Jane Doe" v. Daviess County Div. of Children and Family Services, 669 N.E.2d 192, 195-96 (Ind. Ct. App. 1996) (Mother's medical records were properly admitted into evidence without her consent in TPR proceedings, where trial court protected mother's rights under 42 CFR part 2 (HIPPA), which provides for the confidentiality of alcohol and drug abuse patient records, holding a hearing on the matter and closing the proceedings to public scrutiny.).

S.E.S. v. Grant County Dep't of Welfare, 582 N.E.2d 886, 889-90 (Ind. 1991) (DCS was not required to offer parent services for alcoholism prior to TPR.).

Cf. CHINS cases

> 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).

In re L.P., 6 N.E.3d 1019 (Ind. Ct. App. 2013) (Parent's one-time use of methamphetamine outside the presence of the children was insufficient evidence to support a CHINS finding).

I. INCARCERATED PARENT

In re G.M., 71 N.E.3d 898 (Ind. Ct. App. 2017) (fundamental error terminating incarcerated Father's parental rights because because Child had not been removed from Father under a dispositional decree for at least six months, as required by Indiana Code § 31-35-2-4(b)(2)(A)(i)).

K.E. v. Ind. Dept. of Child Services, 39 N.E.3d 641 (Ind. 2015) (evidence insufficient for termination of Father's parental rights where trial court's findings that Father couldn't remedy conditions and that he posed threat to child were based on Father's incarceration and ignored Father's substantial efforts to better himself).

S.L. v. Ind. Dep't of Child Servs., 997 N.E.2d 1114, 1125 (Ind. Ct. App. 2013) (Father posed a specific threat to his children as a convicted child molester, who had done at least one sexual act near his own children. Father had been incarcerated repeatedly and the concerns about father had not been remedied during his incarceration. Distinguishable from M.W. v. Ind. Dep't of Child Servs., 943 N.E.2d 848 (Ind. Ct. App. 2011).).

H.G. v. Ind. Dep't of Child Servs., 959 N.E.2d 272, 291-92 (Ind. Ct. App. 2011) (TPR reversed because she had strong bond with children, remained involved with the children's cases, took advantage of self-improvement opportunities while incarcerated, was soon to be released, and her ability to parent could be quickly assessed after the release.).

M.W. v. Ind. Dep't of Child Servs., 943 N.E.2d 848, 855 (Ind. Ct. App. 2011) (Father was incarcerated three times during the CHINS and TPR proceedings, with the final period of incarceration ending shortly after the TPR order. Despite the incarceration, lack of parenting-time compliance, and lack of employment and residence, the father had made "many strides" in completing the reunification plan and the father's "ability to establish a stable and appropriate life upon release can be observed and determined within a relatively quick period of time." Father was not a direct threat to the children. TPR reversed.).

Carbonatto v. Marion County Dep't of Child Servs. (In re H.T.), 901 N.E.2d 1118 (Ind. Ct. App. 2009) (Evidence was insufficient for TPR where child was place with grandparents and half-siblings, contact with father would have no negative impact on child, father attempted to contact child while incarcerated and upon release from prison, and father was willing and able to complete services and take custody of child.).

A.Z. v. Marion County Dep't of Child Servs. (In re H.L.), 915 N.E.2d 145, 150 (Ind. Ct. App. 2009) (Absence of services was due to parent's incarceration, rather than DCS' failure to provide visitation or classes; county jails did not provide reunification services.).

C.T. v. Marion County Dep't of Child Servs., 896 N.E.2d 571, 584-85 (Ind. Ct. App. 2008) (Evidence supported termination where father was incarcerated when child was initially removed from mother's care, father was in and out of prison during CHINS proceedings, he had a significant criminal history, and he failed to complete any of the dispositional goals.).

Plumm v. Bartholomew County of Child Servs. (In re E.E.S.), 874 N.E.2d 376, 382 (Ind. Ct. App. 2007) (DCS agreed to support "the family bond" until mother was released from incarceration and had opportunity to carry out case plan requirements. DCS violated the agreement by filing for TPR prior to mother's release.).

Castro v. State Office of Family & Children, 842 N.E.2d 367, 374 and 377 (Ind. Ct. App. 2006) (DCS' failure to provide services to father did not violate his due process rights because father was serving 40-year sentence. DCS was unable to evaluate father to determine what services

were necessary. Father argued that a sentence modification should be considered by the court. "While we applaud Father's efforts to improve himself during his time in prison, we cannot say that the trial court committed clear error when it found that there is a reasonable probability that the conditions leading to the children's removal from Father will not be remedied." The court rejected an argument of the incarcerated parent with multiple felony convictions that conditions leading to child's removal would be remedied by sentence modification.).

Rowlett v. Vanderburgh County Office of Family & Children, 841 N.E.2d 615, 623 (Ind. Ct. App. 2006) (Father was due to be released from prison shortly after TPR hearing. Children were placed with a relative. Case had not reached the "last resort" stage. Father was entitled to opportunity to maintain relationship with children, deemed in fact and in law to be so undeniably important.).

Hancock v. Clay County Div. of Family & Children (In re S.P.H.), 806 N.E.2d 874, 883 (Ind. Ct. App. 2004) (TPR was appropriate where father was incarcerated for eight years on drug-related offenses, which caused father to miss a significant part of the children's developmental years. There was no guarantee that if the father were released, he would be able to care for the children and the children had done well in foster care.).

Bailey v. Tippecanoe County Div. of Family & Children (In re M.B.), 666 N.E.2d 73, 78-79 (Ind. Ct. App. 1996) (TPR was appropriate where father was currently incarcerated and had extensive criminal and substance abuse history, father had relinquished one child to the mother, and direct testimony of mother and children's caseworker supported that continuation of parent-child relationship posed threat to children.).

Wagner v. Grant County Dep't of Public Welfare, 653 N.E.2d 531, 533-34 (Ind. Ct. App. 1995) (Father's criminal history showed reasonable probability that he was incapable of caring for child where father was incarcerated during most of child's life for a series of convictions and there were charges pending on date of TPR hearing.).

D.D. v. Allen County Office of Family & Children (In re J.C.), 646 N.E.2d 693, 695-96 (Ind. Ct. App. 1995) (Evidence supported termination where father refused to comply with procedures to contact child, father's incarceration made it impossible to raise child, and child had developed emotional problems requiring medical attention that father could not provide.).

S.K. v. Ind. Dep't of Child Servs. (In re Termination of the Parent-Child Relationship of S.K.), 2019 Ind. App. LEXIS 210 (Ind. Ct. App. 2019) (father destroyed his relationship with his children when he murdered their mother and burned down their home; father cause significant harm and trauma to his children; trial court's conclusion that termination is in the children's best interests is affirmed).

J. MENTAL DEFICIENCIES OF PARENT

T.B. v. Indiana Dep't of Child Servs., 971 N.E.2d 104, 110 (Ind. Ct. App. 2012) (Mental retardation, standing alone, is not a proper ground for automatically terminating or prohibiting the termination of parental rights.).

In re J.T., 742 N.E.2d 509, 514 (Ind. Ct. App. 2001) (Mother had an IQ of 79 and ADHD. Despite extensive services, she showed little sustained improvement in parenting. Intellectual function was not sole basis of termination, but explained why mother was unable to understand supervision and safety issues.).

In re E.E., 736 N.E.2d 791, 796 (Ind. Ct. App. 2000) (The provision of family services is not a requisite element of the TPR statute, and even a complete failure to provide services that comply with the American with Disabilities Act would not serve to negate a necessary element of the

TPR statute and require reversal. Alleged noncompliance with the ADA would be a matter separate and distinct from the TPR statute.).

Stone v. Daviess County Div. of Children & Family Servs., 656 N.E.2d 824, 830 (Ind. Ct. App. 1995) (TPR may not be based solely on mental disability, which is merely a factor to be considered along with other evidence of parental fitness; once an agency opts to provide services during a CHINS proceeding to assist parents in developing parenting skills, the agency must reasonably accommodate the parents' disabilities in compliance with the Americans with Disabilities Act, but this reasoning does not apply to termination cases.).

Egly v. Blackford County Dep't of Public Welfare, 592 N.E.2d 1232, 1234 (Ind. 1992) (Mental disability alone may not be grounds for TPR, but where parents are unable or unwilling to fulfill their legal obligations to care for their children, mental disability may be considered.).

In re Dull, 521 N.E.2d 972, 976-77 (Ind. Ct. App. 1988) (TPR was appropriate where evidence showed that children's developmental delays were caused by mentally disabled parents who continued to have difficulties with food preparation, budgeting, and cleanliness even after being provided with services, and children improved when they were away from the parents.).

PRACTICE POINTER: If the parent is mentally disabled, question the service providers extensively about how much they knew about the parent's specific issues, especially learning disabilities, and what accommodations were made to address those issues. If none, challenge the services as inadequate to remedy the situation that led to removal.

K. MENTAL ILLNESS OF PARENT

In re O.G., 65 N.E.3d 1080 (Ind. Ct. App. 2016) (termination of each Mother's and Father's parental rights was clearly erroneous because termination was not supported by sufficient evidence; Mother received treatment for mental illness; also, it was inappropriate to terminate her parental rights where she was victim of domestic violence, but took steps to sever that relationship to protect the child; inappropriate to terminate incarcerated Father's parental rights where family case manager never tried to contact or visit him, did not send him the CHINS court's orders, and did not inform him of services he could complete while incarcerated, although Father completed a parenting class on his own initiative).

In re N.G., 51 N.E.3d 1167 (Ind. 2016) (evidence supported termination of Mother's parental rights where cognitive behavioral therapy was not helping her cope with her bi-polar disorder, leading Mother's therapist to conclude that Mother still demonstrated closed thinking patterns and distortion in her perception of events).

N.C. v. Ind. Dept. of Child Servs., 56 N.E.3d 65 (Ind. Ct. App. 2016) (Americans with Disabilities Act (ADA) does not apply in termination proceedings, relying on Stone v. Daviess Cnty. Div. of Children and Family Servs., 656 N.E.2d 824 (Ind. Ct. App. 1995). Deaf father with cognitive and mental health problems contended DCS was required to provide accommodations under the ADA and that DCS's failure to do so gave him a defense in the termination proceeding. Note: Justice David, joined by Justice Rucker, dissented from denial of transfer, disagreeing with Stone and arguing that DCS should always be required to comply with the ADA, not just when providing mandatory services, and that any non-compliance should be grounds for a defense. In re N.C., 74 N.E.3d 1203 (Ind. 2016).).

A.A. v. Dept. of Child Services, 51 N.E.3d 1140 (Ind. 2016) (evidence did not support termination of Father's parental rights where because of Mother's severe mental illness, DCS told Father he would have to choose between living with Mother and with child, and upon his refusal to separate from his wife, DCS sought and the trial court granted termination of Father's parental

rights. “Father’s unwillingness to live separately from a mentally ill spouse, without more, is an insufficient basis upon which to terminate his parental rights.”).

In re S.E., 15 N.E.3d 37 (Ind. Ct. App. 2014) (sufficient evidence supported decision to terminate Mother’s parental rights because evidence showed that Mother’s serious mental health problems did not improve during time that S.E. was removed from the home).

C.T. v. Marion County Dep’t of Child Servs., 896 N.E.2d 571, 584-85 (Ind. Ct. App. 2008), *trans. denied*, 915 N.E.2d 980 (Evidence was sufficient for termination where mother had a habitual pattern of failing to address her mental health issues, had a long-standing addiction to illegal drugs, and continued to be unable to provide a safe and stable home.).

Haney v. Adams County Office of Family & Children (In re A.H.), 832 N.E.2d 563, 569 (Ind. Ct. App. 2005) (Admission of father's psychological evaluation, which included father's inability to maintain stable living environment for children and inability to control his anger, was proper and was sufficient to support order terminating father's parental rights.).

Shaw v. Shelby County Dep’t of Public Welfare, 612 N.E.2d 557, 558 (Ind. 1993) (The physician-patient privilege is unavailable in a proceeding to terminate parental rights.).

R.M. v. Tippecanoe County Dep’t of Public Welfare, 582 N.E.2d 417, 420 (Ind. Ct. App. 1991) (TPR was justified where mother refused to take medication for her mental health diagnosis, complained about participating in parenting program, and failed to convince service providers of her ability to meet needs of the child.).

L. OTHER DISABILITIES

N.C. v. Ind. Dept. of Child Servs., 56 N.E.3d 65 (Ind. Ct. App. 2016), *trans. denied* (Americans with Disabilities Act (ADA) does not apply in termination proceedings, relying on Stone v. Daviess Cnty. Div. of Children and Family Servs., 656 N.E.2d 824 (Ind. Ct. App. 1995). Deaf father with cognitive and mental health problems contended DCS was required to provide accommodations under the ADA and that DCS's failure to do so gave him a defense in the termination proceeding. Note: Justice David, joined by Justice Rucker, dissented from denial of transfer, disagreeing with Stone and arguing that DCS should always be required to comply with the ADA, not just when providing mandatory services, and that any non-compliance should be grounds for a defense. In re N.C., 74 N.E.3d 1203 (Ind. 2016).).

R.G. v. Marion County Dep’t of Family & Children, 647 N.E.2d 326, 330 (Ind. Ct. App. 1995) (Court properly considered parent’s mental disabilities concerning their inability and unwillingness to parent the child, who was moderately to severely developmentally delayed.).

M. POVERTY

Tipton v. Marion County Dep’t of Public Welfare, 629 N.E.2d 1262, 1268 (Ind. Ct. App. 1994) (Unless father’s poverty causes him to neglect child or exposes child to danger, such that removal from his care was warranted, the fact that the father is of low or inconsistent income alone does show unfitness.).

In re D.T., 547 N.E.2d 278, 285 (Ind. Ct. App. 1989) (Initial reason for removal was sexual abuse, but inability to support children was revealed during case. Poverty alone was not reason for TPR.).

N. PHYSICAL ABUSE

Stone v. Daviess County Div. of Family & Children, 656 N.E.2d 824, 828 (Ind. Ct. App. 1995) (Father was raised in an abusive home and believed that discipline with a belt or hitting was acceptable. Both parents lacked parenting skills and abilities, and made little progress in services.

Testimony indicated that if the children were returned to the home, the children would be at very high risk of regressing to their previous behaviors.).

O. SEXUAL ABUSE AND CHILD MOLESTERS

Adams v. Marion County Office of Family & Children, 659 N.E.2d 202, 206 (Ind. Ct. App. 1995) (TPR was supported where father sexually abused two oldest daughters and there was a reasonable probability that abuse would continue if the children were returned home where parents did not satisfactorily complete their required counseling and services.).

In re Y.D.R., 567 N.E.2d 872, 877 (Ind. Ct. App. 1991) (Court appropriately considered fact that mother was living with a man suspected of being a convicted child molester.).

Matter of MA.H., 119 N.E.3d 1076 (Ind. Ct. App. 2019) (requirement that Father participate in sex offender treatment program violated 5th amendment right against self-incrimination; termination for failure to participate in meaningful therapy reversed).

P. HOUSING STABILITY

Tipton v. Marion County Dep't of Public Welfare, 629 N.E.2d 1262, 1267 (Ind. Ct. App. 1994) (During four-year CHINS case, father lived in and paid rent at three residences owned by family. Court did not make finding that the homes were not suitable or that the parent moved too frequently or that the homes would be detrimental to the child.).

Q. OPTIMAL HOME LIFE NOT REQUIRED

Tipton v. Marion County Dep't of Public Welfare, 629 N.E.2d 1262, 1269 (Ind. Ct. App. 1994) (Father's impulse control and low frustration tolerance coupled with his resentment impaired his ability to function optimally as a parent. Statute requires showing that the parent-child relationship poses a threat to the well-being of the child, not simply that it is less than optimal.).

In re V.A., 632 N.E.2d 752, 756 (Ind. Ct. App. 1994) (The rights of parents to raise their children should not be terminated solely because there is a better home available for the children.).

R. CHILD'S MEDICAL CONDITION

Aikens v. Ind. Dep't of Child Servs. (In re I.A.), 903 N.E.2d 146, 154 (Ind. Ct. App. 2009) (Evidence was sufficient for termination where mother used drugs during child's gestation, and mother testified that she did not learn about child's medical conditions and was not aware of the child's doctors, medicines, or therapies.).

In re M.S., 898 N.E.2d 307, 312 (Ind. Ct. App. 2008) (Mother completed all services and made every effort. TPR not appropriate where child suffered from personality disorder causing him to act aggressively towards others and mother asked for help from DCS. Child was in treatment and medication levels were still being adjusted.).

S. LACK OF PARENTING TIME OR CONTACT

In re K.H., 688 N.E.2d 1303, 1305-06 (Ind. Ct. App. 1997) (Mother hampered father's initial attempts to communicate with the child, but he made no effort to contact the child in three years while incarcerated.).

T. TIME OF REMOVAL FROM PARENT

In re BI.B., 69 N.E.3d 464 (Ind. 2017) (termination of parental rights erroneous because DCS failed to prove that child had been removed from parent for at least 15 of the most recent 22 months when the termination petition was filed; see Ind. Code § 31-35-2-4(b)(2)).

In re A.G., 45 N.E.3d 471 (Ind. Ct. App. 2015) (termination of Father's parental rights was not clearly erroneous, even though his paternity was established only four months before termination

proceedings began, because termination requirement that the child has been removed from the parent for at least 15 of the most recent 22 months refers to removal from the child's home, not the home of a particular parent. See Ind. Code § 31-35-2-4(b)(2)(A)(iii)).