

CHAPTER FOUR

CONSTITUTIONAL AND STATUTORY RIGHTS

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CHAPTER FOUR

CONSTITUTIONAL AND STATUTORY RIGHTS

I. RIGHT TO PARENT CHILD

A. FEDERAL ANALYSIS

The concept of parental autonomy has been incorporated into the modern rights of privacy, which is considered part of the First Amendment to the U.S. Constitution's penumbra of associational privacy. The parent's rights are also protected under the Fourteenth Amendment's Due Process and Equal Protection Clauses, as well as the Ninth Amendment.

A parent's interest in his child was described as "perhaps the oldest of the fundamental liberty interests." Troxel v. Granville, 530 U.S. 57, 65 (2000). See also Wisconsin v. Yoder, 406 U.S. 205, 232 (1972). Parental rights are one of the basic civil rights of man and a right far more precious than property rights. May v. Anderson, 345 U.S. 528, 533 (1953). See also Moore v. City of East Cleveland, 431 U.S. 494, 511 (1977).

A parent's desire for and right to the companionship, custody, and management of his or her children is an important interest that "undeniably warrants deference and, absent a powerful countervailing interest, protection." Stanley v. Illinois, 405 U.S. 645, 651 (1972). The fundamental liberty interest of natural parents in the care, custody, and management of their children does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the state. Santosky v. Kramer, 455 U.S. 745, 753 (1982).

Matter of S.G. v. Ind. Dept. of Child Services (S.S. v. DCS), 67 N.E.3d 1138 (Ind. Ct. App. 2017) (Ind. Code § 31-34-21-5.6, which relieves DCS of requirement to make reasonable efforts to reunify a child with parents if their rights to siblings were previously terminated, does not deny substantive due process and is not unconstitutional as applied to Mother; statute serves compelling State interest in protecting children from abuse and neglect of their parents and is narrowly tailored to serve that interest; here, between 1999 and 2016, DCS substantiated at least 13 instances of child abuse or neglect against Mother, which resulted in 11 separate CHINS cases involving all of her children at various points, as well as termination of parental rights to two children).

The traditional right of parents to establish a home and raise their children is protected by the Fourteenth Amendment. Bailey v. Tippecanoe County Div. of Family & Children (In re M.B.), 666 N.E.2d 73, 76 (Ind. Ct. App. 1996).

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

B. STATE ANALYSIS

Pursuant to Ind. Code § 31-10-2-1, it is the policy of the state and the purpose of the juvenile law to:

- (1) recognize the importance of family and children in our society;

- (2) recognize the responsibility of the state to enhance the viability of children and family in our society;
- (3) acknowledge the responsibility each person owes to the other;
- (4) strengthen family life by assisting parents to fulfill their parental obligations;
- (6) remove children from families only when it is in the child's best interest or in the best interest of public safety;
- (7) provide for adoption as a viable permanency plan for children who are adjudicated children in need of services; . . .
- (10) provide a judicial procedure that: (A). ensures fair hearings; (B). recognizes and enforces the legal rights of children and their parents; and (C). recognizes and enforces the accountability of children and parents; [and] . . .
- (12) provide a continuum of services developed in a cooperative effort by local governments and the state.

1. 14th Amendment

The right to raise one's children is essential, basic and more precious than property rights and is within the protection of the Fourteenth Amendment. In re Adoption of Hewitt, 396 N.E.2d 938, 940 (Ind. Ct. App. 1979). Choices about marriage, family life, and the upbringing of children are among associational rights the United States Supreme Court has ranked as of basic importance in our society and are rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect. M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996). See also Bester v. Lake Cnty. Office of Family & Children, 839 N.E.2d 143, 147 (Ind. 2005); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534, 35 (1925); and Meyer v. Neb., 262 U.S. 390, 399 (1923).

2. State Interest in Protecting Welfare of Child

In the event of neglect, the State has the authority and a compelling interest to protect the welfare of the child, despite the fundamental federal constitutional right to family integrity, which, as a matter of substantive due process, protects the family from government intrusion. In re Joseph, 416 N.E.2d 857, 859 (Ind. Ct. App. 1981). The statute serves the compelling State interest in protecting children from abuse and neglect of their parents and is narrowly tailored to serve that interest. Matter of S.G. v. Ind. Dept. of Child Services (S.S. v. DCS), 67 N.E.3d 1138 (Ind. Ct. App. 2017). See also Tucker v. Marion County Dept. of Public Welfare, 408 N.E.2d 814, 820 (Ind. Ct. App. 1980).

A primary purpose and function of the State is to encourage and support the integrity and stability of an existing family environment and relationship. N.L. v. Ind. Dep't of Child Servs. (In re N.E.), 919 N.E.2d 102, 108 (Ind. 2010).

3. Importance of Parent-Child Relationship

"The parent-child relationship is 'one of the most valued relationships in our culture.'" J.H. v. Ind. Dep't of Child Servs. (In re I.A.), 934 N.E.2d 1127, 1132 (Ind. 2010). "Parental rights may be terminated when the parents are unable or unwilling to meet their parental responsibilities" by failing to provide for the child's immediate and long-term needs." In re D.D., 804 N.E.2d 258, 265 (Ind. Ct. App. 2004). "The result of a CHINS proceeding is temporary in nature and enables the parent and child to receive government services, with the ultimate goal of reunification of the parent and child. In contrast, the termination of parental rights is a permanent condition, completely severing the parent-child relationship." In re C.M., 675 N.E.2d 1134, 1138 (Ind. Ct. App. 1997). In re K.D. & K.S., S.S. v. Ind. Dep't of

Child Servs., 962 N.E.2d 1249, 1259 (Ind. 2012) (An abundance of caution should be used when interfering with the makeup of a family and entering a legal world [the CHINS case] that could end up in a separate proceeding with parental rights being terminated.). C.G. v. Marion County Dep’t of Child Servs., 954 N.E.2d 910, 917 (Ind. 2011), *citing* Lehman v. Lycoming Cnty. Children’s Servs. Agency, 458 U.S. 502, 513 (1982) (“Children have an interest in terminating parental rights that prevent adoption and inhibit establishing secure, stable, long-term, continuous relationships.”).

4. Termination of Parental Rights Disfavored

The involuntary termination of parental rights is most the most extreme sanction a court can impose on a parent because termination severs all rights of that parent to his or her children. In re R.H., 892 N.E.2d 144, 149 (Ind. Ct. App. 2008). A parent’s constitutional right to raise his or her own child may not be terminated solely because there may be a better home available for that child. In re K.S., 750 N.E.2d 832, 836 (Ind. Ct. App. 2001). The purpose of terminating parental rights is not to punish the parent but to protect the children involved. J.B. v. Ind. Dep’t of Child Servs. (In re S.D.), 2 N.E.3d 1283, 1285 (Ind. 2014). *See also* W.B. v. Ind. Dep’t of Child Servs. (In re D.B.), 942 N.E.2d 867, 872 (Ind. Ct. App. 2011).

Although parental rights are of a constitutional dimension, the law provides for the termination of these rights when the parents are unable or unwilling to meet their parental responsibilities. Perez v. Marion County Dep’t of Child Servs. (In re A.P.), 882 N.E.2d 799, 805 (Ind. Ct. App. 2008) (Termination is intended as a last resort, available only when all other reasonable efforts have failed. Although parental rights are of a constitutional dimension, the law provides for the termination of these rights when the parents are unable or unwilling to meet their parental responsibilities.).

II. RIGHT TO COUNSEL

A. APPOINTMENT OF COUNSEL FOR PARENT

1. Entitled to Counsel in TPR Proceeding

A parent is entitled to representation of counsel in proceedings to terminate the parent-child relationship. Ind. Code § 31-32-2-5. *See also* Ind. Code § 31-32-4-1(2); and J.T. v. Marion County Office of Family & Children, 740 N.E.2d 1261, 1265 (Ind. Ct. App. 2000)

Inherent in that entitlement is the right to effective assistance of counsel. Callis v. State, 684 N.E.2d 233, 240 (Ind. Ct. App. 1997).

Tillotson v. Clay Cnty. Dep’t of Family & Children, 777 N.E.2d 741, 746 (Ind. Ct. App. 2002) (Proper representation by counsel in a termination proceeding significantly decreases the risk of an inaccurate result).

Andrews v. Monroe County Dep’t of Child Services (In re D.A.), 869 N.E.2d 501, 512 (Ind. Ct. App. 2007) (Termination of father’s rights where father did not appear at final termination hearing and was not notified that counsel had been allowed to withdraw created a substantial risk of error in granting the termination.).

Baker v. Marion County Office of Family & Children, 810 N.E.2d 1035, 1038 (Ind. 2004) (Right to counsel in every termination case is not constitutionally guaranteed. The constitutional guarantee of due process may require counsel where the trial court’s assessment of factors like “the complexity of the proceeding and the capacity of the uncounseled parent” indicates appointment of counsel is necessary. However, in Indiana, the right is provided by statute. “[R]ather than incur the time and money to litigate eligibility for public counsel in each case, Indiana has chosen to provide counsel in

termination proceedings to all parents who are indigent. Ind. Code Ann. §§ 31-32-4-1 and 31-32-2-5 (West 1998)). J.A. v. Ind. Dep't of Child Servs. (In re G.P.), 4 N.E.3d 1158, 1163-65 (Ind. 2014) Failure to appoint counsel in CHINS proceedings upon request of indigent parent denied mother due process, requiring reversal of the subsequent involuntary termination of her parental rights. (fundamentally unfair to tell the mother that she would receive counsel, as she was entitled to by statute, and then not follow through with the appointment but instead continue with proceedings challenging her fitness as a parent; Mother initially waived right to counsel, but subsequently requested counsel and was found to qualify for pauper counsel; pursuant to Ind. Code 31-34-4-6(a)(2), parent has the right to be represented by court-appointed counsel upon the request of the parent if the court finds that the parent does not have sufficient financial means for obtaining representation as described in Ind. Code 34-10-1; indigent parent is entitled to the assistance of appointed counsel not only in the parental termination proceedings, but also in dependency and neglect proceedings as well.).

a. Appointment at Initial Hearing or Any Earlier Time

If: (1) a parent in proceedings to terminate the parent-child relationship does not have an attorney who may represent the parent without a conflict of interest; and (2) the parent has not lawfully waived the parent's right to counsel under Ind. Code § 31-32-5; the juvenile court shall appoint counsel for the parent at the initial hearing or at any earlier time. Ind. Code § 31-32-4-3(a).

b. Applies Only to Indigent Parents

The statutory right to court-appointed counsel in TPR cases applies only to indigent parents. Krovitch v. Stull (In re A.M.K.), 698 N.E.2d 845, 847 (Ind. Ct. App. 1998).

2. Statutory Right to Appointment in CHINS Proceedings for Indigent Parent upon Request

Indigent parent has a right to appointed counsel in CHINS proceedings if requested

In re G.P., 4 N.E.3d 1158, 1163-65 (Ind. 2014) (Pursuant to Ind. Code § 31-34-4-6(a)(2), parent has the right to be represented by court-appointed counsel upon the request of the parent if the court finds that the parent does not have sufficient financial means for obtaining representation as described in Ind. Code § 34-10-1; indigent parent is entitled to the assistance of appointed counsel not only in the parental termination proceedings, but also in dependency and neglect proceedings as well.)

Ind. Code Section § 31-32-4-1 provides that parents in TPR proceedings are entitled to be represented by counsel, along with "[a]ny other person designated by law." An indigent parent who requests court appointed counsel is one such person "designated by law" because Ind. Code § 31-34-4-6 provides the right to court appointed counsel in that circumstance. The Court, in in re G.P., held the trial court does not have discretion in a circumstance falling under Ind. Code § 31-34-4-6 and "to the extent any case law hold that a trial court has discretion to appoint counsel for an indigent parent in a CHINS proceeding, those cases are not correct on that point." In re G.P., 4 NE3d at 1163.

The court may appoint counsel to represent any parent in any other proceeding). To the extent the trial court "may" appoint counsel to represent a parent in another proceeding, it would be pursuant to Ind. Code § 31-32-4-3.

In re G.P., 4 N.E.3d 1158, 1164 (Ind. 2014) (Under Ind. Code § 31-32-4-3, the trial court has discretion to appoint counsel, "for example, for a parent who perhaps fails to meet the statutory requirements for being indigent but for whom appointed counsel might still be

appropriate. Or a trial court could appoint counsel to serve as stand-by counsel for the parent who decides to proceed pro se.”)

a. Federal Analysis in CHINS Cases

Although the U.S. Supreme Court has not mandated a right to counsel, when determining if there is a right to counsel in CHINS cases under federal law, the U.S. Supreme Court has used the Fourteenth Amendment Due Process analysis laid out in Mathews v. Eldridge, 519 U.S. 102, 104 (1996). Mathews requires the balancing of three (3) factors: (1) the private interests that will be affected by the state action; (2) the risk of an erroneous deprivation of the private interest caused by the action at issue; and (3) the government’s interest. Id.

Due process analysis in TPR cases has noted that termination of parental rights is irretrievably destructive to the most fundamental family relationship; in contrast, in CHINS cases, the parental rights are only temporarily affected by conditions imposed by the state on the custody of the children. M.L.B. v. S.L.J., 519 U.S. 102, 104 (1996).

Although the parent must affirmatively request the right to counsel in the CHINS case, the trial court is not required to inquire at every hearing whether the right to counsel is still waived; but, once the parent waives the right to counsel, it is not permanently waived and once a parent requests counsel, at subsequent hearings, the parent is no longer a pro se litigant, but a client standing alone without their requested attorney. Lassiter v. Dep’t. of Social Servs. Of Durham Cnty., N.C., 452 U.S. 18, 33-34 (1981).

b. State of Indiana Policy

It is the policy of the state and the purpose of the juvenile law to provide a judicial procedure that: (A) ensures fair hearings; (B) recognizes and enforces the legal rights of children and their parents; and (C) recognizes and enforces the accountability of children and parents. Ind. Code § 31-10-2-1(10).

c. Effective Assistance of Counsel

Although Ind. Code § 31-34-4-6 entitles a parent to an attorney at each court proceeding on a CHINS petition, that statute does not create a cause of action for ineffective assistance of counsel in a CHINS proceeding, nor does it create a standard under which such a claim might be determined. Q.J. v. Department of Child Services, 92 N.E.3d 1092 (Ind. Ct. App. 2018).

3. Mandatory Appointment for Appeal

A parent’s statutory right to counsel pursuant to Ind. Code § 31-32-2-5 continues through all stages of the CHINS and/or TPR proceeding, which includes the direct appeal. In re I.B., 933 N.E.2d 1264, 1267 (2010).

4. Waiver of Right to Counsel

A parent who is entitled to representation by counsel may waive that right if the parent does so knowingly and voluntarily. Ind. Code § 31-32-5-5.

Brooks v. McGee (In re G.W.B.), 776 N.E.2d 952, 954 (Ind. Ct. App. 2002) (Father did not knowingly, intelligently, and voluntarily waive his right to counsel in TPR proceeding where trial court did not advise father of his right to counsel, the right to pauper counsel, and the serious consequences of self-representation.).

Keen v. Marion County Dept. of Public Welfare, 523 N.E.2d 452, 456 (Ind. Ct. App. 1988) (Mother voluntarily waived right to counsel at TPR proceedings where she

requested a continuance to hire private counsel after expressing dissatisfaction with court-appointed counsel; court advised mother that request would result in waiver of court-appointed counsel after explaining importance of counsel and risk of self-representation.).

B. APPOINTMENT OF COUNSEL FOR CHILD

The court may appoint counsel to represent any child in any other proceeding. Ind. Code § 31-32-4-2(b).

C. PAYMENT FOR COUNSEL

Payment of counsel shall be made under Ind. Code § 31-40. Ind. Code § 31-32-4-4.

III. RIGHT TO DUE PROCESS

When the State seeks to terminate the parent-child relationship, it must do so in a manner that meets the requirements of due process. Lawson v. Marion County Office of Family & Children, 835 N.E.2d 577, 579 (Ind. Ct. App. 2005). Due process protections at all stages of CHINS proceedings are “vital” because “every CHINS proceeding ‘has the potential to interfere with the rights of parents in the upbringing of their children.’” In re K.D. & K.S., S.S. v. Ind. Dep’t of Child Servs., 962 N.E.2d 1249, 1257 (Ind. 2012). See also J.A. v. Ind. Dep’t of Child Servs. (In re G.P.), 4 N.E.3d 1158, 1165 (Ind. 2014).

Due Process has never been defined, but the phrase embodies a requirement of “fundamental fairness.” Lassiter v. Dept. of Soc. Servs., 452 U.S. 18, 26 (1981). See also E.P. v. Marion County O.F.C., 653 N.E.2d 1026, 1031 (Ind. Ct. App. 1995). The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Santosky v. Kramer, 455 U.S. 745, 753-54 (1982). Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. Id. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state interventions into ongoing family affairs. Id. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures. Id.

Statutes dealing with children must be strictly construed especially at the commencement of the action and notice, since CHINS proceedings are highly penal in nature and may deprive natural parents of all of their rights. Shupe v. Bell, 141 N.E.2d 351 (Ind. Ct. App. 1957). When an individual is truly unfit, the State can easily meet its burden of proof that termination is in the child’s best interest; but the State cannot ask the court to assume that termination is in the child’s best interest. Tipton v. Marion County Dept. of Public Welfare, 629 N.E.2d 1262, 1270 (Ind. Ct. App. 1994).

A. CONSTITUTIONAL PROVISIONS

1. U.S. Constitution Fifth Amendment

No person shall...be deprived of life, liberty, or property, without due process of law.

2. U.S. Constitution Fourteenth Amendment

...nor shall any state deprive any person of life, liberty, or property, without due process of law...

The Due Process Clause of the U.S. Constitution prohibits state action that deprives a person of life, liberty, or property without a fair proceeding. Thompson v. Clark County Div. of Family and Children (In re B.T.), 791 N.E.2d 792, 794-95 (Ind. Ct. App. 2003).

a. Due Process Analysis

Although the U.S. Supreme Court has not mandated a right to counsel, when determining if there is a right to counsel in CHINS cases under federal law, the U.S. Supreme Court has used the Fourteenth Amendment Due Process analysis laid out in Mathews v. Eldridge, 519 U.S. 102, 104 (1996). Mathews requires the balancing of three (3) factors: (1) the private interests that will be affected by the state action; (2) the risk of an erroneous deprivation of the private interest caused by the action at issue; and (3) the government's interest. Id.

Procedural irregularities in a CHINS proceeding may be so important as to deprive a parent of procedural due process with respect to TPR—the reviewing court must determine whether the increased risk of error balanced with the other factors amounted to a deprivation of due process. Santosky v. Kramer, 455 U.S. 745, 758 (1982). A.P. v. Porter County Office of Family and Children, 734 N.E.2d 1107, 1113 (Ind. Ct. App. 2000).

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).

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 at termination hearing by signing to an interpreter 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).

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).

3. Indiana Constitution Article I, Section 12

...every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law.

B. SERVICE OF HEARING NOTICE

1. DCS Is Responsible For Giving All Hearing Notices

Except as provided in Ind. Code § 31-32-1-4(d), the department is responsible for giving all notices of a hearing or proceeding in a child in need of services case under Ind. Code § 31-34. Ind. Code § 31-32-1-4(f)(1).

2. Manner of Written Hearing Notice

a. Notice to a Party

Any written notice of a hearing or other court proceeding in a CHINS case under Ind. Code § 31-34 shall be given to a party in the manner provided by Rule 5 of the Indiana Rules of Trial Procedure. Ind. Code § 31-32-1-4(a) (1).

b. Notice to a Non-Party

Pursuant to Ind. Code § 31-32-1-4(a)(2), any written notice of a hearing or other court proceeding in a CHINS case under Ind. Code § 31-34 shall be given to an individual who is not a party by: (A) Personal delivery to the individual; or (B) Mail as provided by Rule 5(B)(2) of the Indiana Rules of Trial Procedure.

c. Content of Written Notice

Pursuant to Ind. Code § 31-32-1-4(c), written notice may be given by either: (1) A copy of a court order or docket entry; or (2) A letter addressed to the individual required to be notified that states the date, time, and purpose of the hearing or proceeding.

Statutory notice of hearing is a procedural precedent that must be performed prior to commencing an action. R.T. v. Dep't of Child Servs. (In re H.T.), 911 N.E.2d 577 (Ind. Ct. App. 2008). Notice that does not include date, time, and location of the termination hearing is inadequate. Id.

Hough v. Allen County Dep't of Child Servs. (In re J.H.), 898 N.E.2d 1265, 1270-71 (Ind. Ct. App. 2009) (Summons commanding father to appear at TPR fact-finding hearing was reasonably calculated to inform father of fact-finding hearing and potential consequences of failing to appear, and thus did not violate his due process rights. Summons that did not include father's address, court's address, or DCS attorney's information was still adequate where summons was personally handed to father at the courthouse where fact-finding hearing was to occur and listed date and time of hearing and subject matter.).

d. Notice by Mail At Least 5 Days Before Hearing

Notice by mail must be deposited in the U.S. mail not less than five (5) calendar days (excluding Saturdays, Sundays, and national legal holidays recognized by the federal government) before the date of the scheduled hearing or proceeding. Ind. Code § 31-32-1-4(b).

3. When Written Hearing Notice Is Not Required

a. No Written Notice Required if Court Gives Verbal Notice

Written notice is not required if verbal notice of the date, time, place, and purpose of the hearing or proceeding is given by the court at an earlier hearing or proceeding at which the individual to be notified is present. Ind. Code § 31-32-1-4(d).

b. No Written Notice if DCS Gives Verified Verbal Notice

Pursuant to Ind. Code § 31-32-1-4(e), written notice is not required if:

- (1) The hearing or proceeding is scheduled to be held at a time within forty-eight (48) hours (excluding Saturdays, Sundays, and any day on which a legal holiday is observed by state employees) after the court sets the time for the hearing or proceedings; and
- (2) The individual responsible for giving the notice under this section: (A) Provides

verbal notice of the date, time, place, and purpose of the hearing or proceeding directly to the person required to be notified; and (B) Verifies by affidavit or testimony at the hearing that verbal notice was given as required under this subsection.

C. SERVICE OF SUMMONS

1. Manner of Service of Summons

a. Rule 4.1 of Indiana Rules of Trial Procedure

Service may be made upon any person under Rule 4.1 of the Indiana Rules of Trial Procedure. Ind. Code § 31-32-9-1(a).

b. Service to Incarcerated Parent

Pursuant to Indiana Trial Rule 4.3, service of summons upon a person who is imprisoned or restrained in an institution shall be made by delivering or mailing a copy of the summons and complaint to the official in charge of the institution. It shall be the duty of said official to immediately deliver the summons and complaint to the person being served and allow him to make provisions for adequate representation by counsel. The official shall indicate upon the return whether the person has received the summons and been allowed an opportunity to retain counsel.

c. Service by Publication

A TPR proceeding is basically an in rem proceeding and is governed by Trial Rule 4.13 permitting service of summons by publication; but service must be made in the best possible manner reasonably calculated to inform of the pending action. Abell v. Clark County Dep't of Public Welfare, 407 N.E.2d 1209, 1210 (Ind. Ct. App. 1980).

Abell v. Clark County Dep't of Public Welfare, 407 N.E.2d 1209, 1210 (Ind. Ct. App. 1980) (Service by publication was not constitutionally sufficient where welfare department had knowledge of the parent's whereabouts and address).

d. Discretionary Service if Person Cannot Otherwise be Served

If any person other than the child cannot be served in accordance with Rule 4.1 of the Indiana Rules of Trial Procedure, the juvenile court may order service by publication in accordance with Rule 4.13 of the Indiana Rules of Trial Procedure. However, the summons must clearly inform the person being served that the person must respond not later than ten (10) days after the last publication. Ind. Code § 31-32-9-2(a).

e. When Service by Publication Mandatory in TPR Case

If: (1) the action is to terminate the parent-child relationship; and (2) the parent cannot be served in accordance with Rule 4.1 of the Indiana Rules of Trial Procedure; service must be made by publication. Ind. Code § 31-32-9-2(b).

Abell v. Clark County Dep't of Public Welfare, 407 N.E.2d 1209, 1211 (Ind. Ct. App. 1980) (Where DCS had knowledge of mother's address at time of filing TPR petition, service of process by publication was not constitutionally sufficient to inform mother of the pending proceedings).

f. Praecipe and Affidavit Required

Pursuant to Indiana Trial Rule 4.13, when notice by publication is to be used, the person or entity seeking service by publication shall submit to the court a request for such service in a praecipe. The praecipe shall be supported by an affidavit stating that a diligent search has been made and that the defendant cannot be found, has concealed his

whereabouts, or has left the state.

H.R. v. R.C. (In re D.C.), 887 N.E.2d 950, 957-58 (Ind. Ct. App. 2008) (Because adoptive mother did not diligently search for biological mother as required by TR. 4.13, service by publication was not reasonably calculated to notify the mother. Thus, there was no personal jurisdiction.).

Harris v. Delaware County Division of Family & Children Servs., 732 N.E.2d 248, 249 (Ind. Ct. App. 2000) (No proper notice of TPR hearing where DCS did not submit a request for service by publication in a praecipe, and did not submit an affidavit stating that a diligent search had been made and that father could not be found.).

g. DCS Procedures to Locate Absent Parent

Pursuant to DCS procedures (available at http://www.in.gov/dcs/files/5.6_Locating_Absent_ParentsF.pdf), the Family Case Manager (“FCM”) is required to make efforts to identify and locate an absent parent and be prepared to submit an Affidavit of Diligent Inquiry of those efforts, which may include: (1) Ensure a letter is sent to the Department of Health requesting a search of the Putative Father Registry; (2) Utilize the Family Network Diagram and present a copy to the court; (3) At the first court hearing, request the judge to place the custodial parent or other individuals under oath to answer questions regarding the noncustodial parent and extended family; (4) Obtain and review a copy of the birth certificates of the child(ren) to ascertain date of birth and the names of parents listed; (5) Inquire as to persons who were present at the time of the child’s birth; (6) Ask the child, if age-appropriate, about the absent parent or extended family; (7) Inquire as to who is listed as the emergency contact at school or with a medical provider; (8) Review the child’s health records for names of parents; (9) Request service providers to assist DCS in obtaining information about the absent parent; (10) Search the databases available to the FCM including the Indiana Support Enforcement Tracking System (ISETS); Management Gateway for Indiana’s Kids (MaGIK); (11) Search the white pages website; (12) Search the Bureau of Motor Vehicles; (13) Contact the county jail to see if absent parent is being held; and (14) Search the Indiana Department of Corrections (DOC) offender locator.

2. Timeframes for Service

a. Personal Service Three Days Before Hearing

Personal service must be made at least three (3) days before the hearing to which the person is summoned. Ind. Code. § 31-32-9-1(b).

b. Mail Service Ten Days Before Hearing

Service by mail must be sent at least ten (10) days before the hearing. Ind. Code § 31-32-9-1(c).

3. When Service of Summons Not Required

Service of summons is not required if the person entitled to be served attends the hearing. Ind. Code § 31-32-9-1(d).

4. Waiver of Service of Summons

Any person other than the child may waive service of summons if the person does so in writing. Ind. Code § 31-32-5-6.

5. Defective Service Prevents Personal Jurisdiction

“Ineffective service of process” prevents a trial court from acquiring personal jurisdiction over a respondent; a judgment rendered without personal jurisdiction violates due process, is void, and may be attacked at any time; and DCS is required to comply with Indiana Trial Rule 4(C) in issuing summons to acquire personal jurisdiction. Hough v. Allen County Dep’t of Child Servs. (In re J.H.), 898 N.E.2d 1265, 1268; 1271 (Ind. Ct. App. 2009).

Hough v. Allen County Dep’t of Child Servs. (In re J.H.), 898 N.E.2d 1265, 1268; 1271 (Ind. Ct. App. 2009) (however, the Court found no due process violation in the J.H. case because father was informed of the termination action and of his time for response despite the defects in the summons.).

R.T. v. Dep’t of Child Servs. (In re H.T.), 911 N.E.2d 577, 580-81 (Ind. Ct. App. 2008) (TPR reversed where DCS failed to provide Mother with essential information including the date, time, and location of the termination hearing. Only notice provided to Mother was a general notice of the TPR proceedings.).

D. RIGHT TO BE PRESENT AT HEARINGS

1. Waiver of Parent’s Right to be Present at Hearing

The right of a parent, guardian, or custodian to be present at any hearing concerning the person’s child is waived by the person’s failure to appear after lawful notice. Ind. Code § 31-32-5-7.

2. Child May be Excluded from Hearings

Pursuant to Ind. Code § 31-32-6-8, in proceedings involving: (1) The termination of the parent-child relationship; or (2) A child in need of services; the child may be excluded from any part of any hearing for good cause shown upon the record.

E. RES JUDICATA

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

F. NO DUE PROCESS RIGHTS IN NON-PARENTS

Only the parents of the child, not foster parents, have due process rights in CHINS proceedings. C.R. v. Ind. Dep’t of Child Servs. (In re Ale.P.), 80 N.E.3d 279 (Ind. Ct. App. 2017).

IV. NO RIGHT TO JURY TRIAL

All matters in juvenile court shall be tried to the court. Ind. Code § 31-32-6-7(a).

Statute providing that all matters in juvenile court shall be tried to the court, except an adult charged with a crime, is sufficiently specific to deny parents in CHINS proceedings the right to trial by jury. Gray v. Monroe County Department of Public Welfare, 529 N.E.2d 860 (Ind. Ct. App. 1988). No right to jury trial under 7th Amendment to U.S. Constitution, or under Indiana Constitution in juvenile law cases. Id. There is no right to jury trial under common law because no special judicial system for juveniles existed at common law. Id. See also Dunn v. Marion County Office of Family & Children (In re E.P.), 653 N.E.2d 1026, 1030 (Ind. Ct. App. 1995).

Article 1, Section 20 of the Indiana Constitution applies only to civil actions triable by jury under the common law and consequently, creation of the juvenile courts is not unconstitutional on the ground that it does not provide for jury trial. State ex rel. Gannon v. Lake Circuit Court, 61 N. E. 2d 168 (Ind. 1945). See also Bible v. State, 254 N.E.2d 319, 322 (Ind. 1970).

V. LIMITED RIGHT TO REMAIN SILENT

A. NO GENERAL RIGHT TO REMAIN SILENT

Pursuant to the Indiana Evidence Rule 501, except as provided by constitution or statute as enacted or interpreted by the courts of this State or by these or other rules promulgated by the Indiana Supreme Court or by principles of common law in light of reason and experience, no person has the privilege to: (1) Refuse to be a witness; (2) Refuse to disclose any matter; (3) Refuse to produce any object or writing; or (4) Prevent another person from being a witness or disclosing any matter or producing any object or writing.

Refusal to testify in a civil case cannot be used against the one asserting the privilege in a subsequent criminal proceeding; the privilege against self-incrimination does not prohibit the trier of fact in a civil case from drawing adverse inferences from a witness' refusal to testify. Gash v. Kohm, 476 N.E.2d 910, 913 (Ind. Ct. App. 1985).

M.K. v. Ind. Dep't of Child Servs. (In re A.G.), 6 N.E.3d 952, 957 (Ind. Ct. App. 2014) (Physicians believed that mother was causing the child's cyanotic episodes, such as obstructing the airway. A pediatrician specializing in child abuse believed that if the child continued to be placed with the mother, death could result. Mother was evaluated and found to be highly likely to be suffering from factitious disorder by proxy (causing harm to their children for attention). Mother refused to testify during the State's case in chief. Mother argued that the court should not be allowed to draw adverse inferences from a witness's refusal to testify because the case involves a parent's constitutionally protected right to parent. The court held that defense counsel did not support the argument adequately).

B. CONSTITUTIONAL PROVISIONS IF PARENT ALSO CHARGED WITH A CRIME

If the parent, guardian, or custodian is accused of a crime in a separate cause related to the CHINS or TPR case, the parent, guardian, or custodian enjoys the right to remain silent concerning those pending criminal charges.

1. U.S. Constitution Fifth Amendment

...No person. ... shall be compelled in any criminal case to be a witness against himself...

The Fifth Amendment privilege against self-incrimination (and Art. I, Sec. 14 of the Indiana Constitution) protects a parent from being compelled to be a witness against themselves in a CHINS/TPR quasi-criminal proceeding where their statements could incriminate them in future criminal proceedings. Lefkowitz v. Turley, 414 U.S. 70, 77 (1973). The privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used; it applies alike to civil and criminal proceedings wherever the answer might tend to subject to criminal responsibility him who gives it. McCarthy v. Arndstein, 266 U.S. 34, 40 (1924).

2. Indiana Constitution Article I, Section 14

No person, in any criminal prosecution, shall be compelled to testify against himself.

VI. RIGHT TO CONFRONT WITNESSES

A. RIGHT OF THE PARENT, GUARDIAN, OR CUSTODIAN

A parent, guardian, or custodian is entitled to cross-examine witnesses. Ind. Code § 31-32-2-3(b)(1).

Farley v. Allen County Child Servs. (In re S.F.), 883 N.E.2d 830, 836 (Ind. Ct. App. 2008) (A parent must be permitted to view the evidence used to support TPR and must be given an opportunity to respond to the evidence.).

Andrews v. Monroe County Dep't of Child Servs. (In re D.A.), 869 N.E.2d 501, 511-12 (Ind. Ct. App. 2007) (Where father was not present at hearing and was unrepresented at the TPR hearing because he was not notified that his attorney had withdrawn, TPR order violated father's due process rights and right to cross-examine witnesses and present evidence. Father was unable to present evidence or cross-examine witnesses because he was not present.).

Parker v. State, 773 N.E.2d 867, 869 (Ind. Ct. App. 2002) (Cross-examination is "fundamental and essential to a fair trial.").

B. RIGHT OF THE CHILD

Except when a child may be excluded from a hearing under Ind. Code § 31-32-6, a child is entitled to cross-examine witnesses. Ind. Code § 31-32-2-1(1).

VII. RIGHT TO COMPULSORY PROCESS FOR OBTAINING WITNESSES

A. RIGHT OF THE PARENT, GUARDIAN, OR CUSTODIAN

A parent, guardian, or custodian is entitled to obtain witnesses or tangible evidence by compulsory process. Ind. Code § 31-32-2-3(b)(2).

B. RIGHT OF THE CHILD

Except when a child may be excluded from a hearing under Ind. Code § 31-32-6, a child is entitled to obtain witnesses or tangible evidence by compulsory process. Ind. Code § 31-32-2-1(2).

VIII. RIGHT TO INTRODUCE EVIDENCE

A. RIGHT OF THE PARENT, GUARDIAN, OR CUSTODIAN

A parent, guardian, or custodian is entitled to introduce evidence on behalf of the parent, guardian, or custodian. Ind. Code § 31-32-2-3(b)(3).

B. RIGHT OF THE CHILD

Except when a child may be excluded from a hearing under Ind. Code § 31-32-6, a child is entitled to introduce evidence on the child's own behalf. Ind. Code § 31-32-2-1(3).

C. DISCOVERY PROCEDURES

The law of discovery for civil cases applies. Ind. Code § 31-32-10-3.

D. NO EXCLUSIONARY RULE

Applying the exclusionary rule to CHINS proceedings would be unlikely to deter future government violations and that application of the exclusionary rule to CHINS would undermine important State interests including strengthening families, encouraging reporting of suspected child abuse or neglect, and providing rehabilitation services for an abused or neglected child and the child's parent, guardian, or custodian. Vega v. Allen County Dep't of Family & Children

Servs. (In re J.V.), 875 N.E.2d 395, 399 (Ind. Ct. App. 2007).

E. ADMISSIBILITY OF PRIVILEGED COMMUNICATIONS

Pursuant to Ind. Code § 31-32-11-1, it is not a ground for excluding evidence in any judicial proceeding resulting from a report of a child who may be a victim of child abuse or neglect or relating to the subject matter of the report or failing to report as required by Ind. Code § 31-33 if the privileged communication is between:

- (1) A husband and a wife;
- (2) A healthcare provider and the healthcare provider's patient;
- (3) a: (A) Licensed social worker; (B) Licensed clinical social worker; (C) Licensed marriage and family therapist; (D) Licensed mental health counselor; (E) Licensed addiction counselor; or (F) Licensed clinical addiction counselor; and a client of any of the professionals described in clauses (A) through (F);
- (4) A school counselor and a student; or
- (5) A school psychologist and a student;

Statute abrogating physician-patient privilege with respect to child abuse does not apply only when the abused child reported the abuse; the statute is to be liberally construed. Hayes v. State, 667 N.E.2d 222, 225 (Ind. Ct. App. 1996).

Hunter v. State, 360 N.E.2d 588, 598 (Ind. Ct. App. 1977) (Physician was not precluded from testifying despite contention that only parents have right to waive physician-patient privilege).