# Indiana Law Review

Volume 15 1982 Number 4

## Implementing the Indiana Juvenile Code

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The new Indiana Juvenile Code, enacted in 1978,[1] has been the subject of substantial legislative revision and significant judicial interpretation. This Article updates and analyzes the major changes which have occurred since the juvenile code became effective in 1979.[2] The affected provisions of the juvenile code that are discussed in this Article include: Chapter 1—General Provisions; Chapter 2—Jurisdiction; Chapter 3—Rights and Effect of Adjudication; Chapter 4—Delinquent Children and Children in Need of Services; Chapter 5—Termination of the Parent-Child Relationship; Chapter 6—Paternity; and Chapter 7—Procedure in Juvenile Court.

### I. GENERAL PROVISIONS

Chapter one of the juvenile code (code) contains general provisions regarding purposes and policies of the juvenile law in Indiana.[3] These provisions act as a guide for the application of the other provisions of the code. The policy and purpose section of the code focuses on the diverse and often conflicting rights and obligations of society, families, and juveniles to each other. It seeks to balance the various obligations involved while protecting "constitutional and other legal rights of children and their parents."[4] Several recent Indiana decisions address these interests in two different areas: decisions that concern the effective date of the code, and decisions that deal with the remedies against and rights of juveniles provided in other chapters of the code.

The new juvenile code took effect October 1, 1979.[5] Specifically,

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[1]Act of Mar. 10, 1978, Pub. L. No. 136, § 1, 1978 Ind. Acts 1196 (codified at IND. CODE §§ 31-6-1-1 to -10-4 (Supp. 1978)).

[2]Act of Mar. 10, 1978, Pub. L. No. 136, § 59, 1978 Ind. Acts 1196 (1978).

[3]IND. CODE § 31-6-1-1 (Supp. 1981).

[4]*Id.* § 31-6-1-1(2).

[5]Act of Mar. 10, 1978, Pub. L. No. 136, § 59, 1978 Ind. Acts 1196 (1978).

the code was not to apply to "matters in which a court has entered a dispositional decree before October 1, 1979 . . . ."[6] Some confusion arose about the time the new code was to take effect regarding the scope of "matters" to which the code would apply. The issue has been resolved in two different contexts.

The court of appeals in both *In re Miedl*[7] and *In re Myers*[8] applied the new code in proceedings to terminate parental rights in cases in which the children concerned had been made wards of the state prior to the effective date of the code. The court in both cases found that the wardship proceedings were separate "matters" from the termination proceedings for the purpose of applying the code. Therefore, the new juvenile code was applicable to the termination proceedings, because no dispositional decree was entered in that matter prior to October 1, 1979.[9]

In another context, the court of appeals in *Washington County Department of Public Welfare v. Konar*[10] found that a petition to terminate parental rights, which was filed by the Washington County Welfare Department well before the effective date of the code, had to comply with the new code because no dispositional decree had been entered before the new code became applicable.[11] In upholding the trial court's determination to grant the motion to dismiss the Welfare Department's petition, the court of appeals cited *Miedl* as holding that the new code applies to matters still pending.[12] The court further noted that the Welfare Department should have

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[6]*Id.*

[7]416 N.E.2d 491 (Ind. Ct. App.), *rev'd on other grounds*, 425 N.E.2d 137 (Ind. 1981). *Miedl* was primarily concerned with the sufficiency of evidence in support of the trial court's termination of the parent-child relationship which will be discussed under the Chapter 5 section of this Article. The court of appeals reversed the trial court's determination, suggesting that the new code required a different standard than was previously necessary and that the evidence was insufficient under the new code.

The Indiana Supreme Court reversed the finding that there was insufficient evidence to support the trial court's determination. 425 N.E.2d at 138. The court noted that the standards set down in Perkins v. Allen County Dep't of Pub. Welfare, 170 Ind. App. 171, 352 N.E.2d 502 (1976) as well as the standards espoused by the new code were met in *Miedl*. Therefore, the trial court's determination was correct under both the old and new law. 425 N.E.2d at 140. While the court did not address the issue of which law applied to the termination proceedings, it did warn against subjecting the trial court's judgment to a "seesaw-tug of war" between the two statutes. *Id.*

[8]417 N.E.2d 926 (Ind. Ct. App. 1981).

[9]*In re* Myers, 417 N.E.2d at 929; *In re* Miedl, 416 N.E.2d at 493-94. The court's holding in *Miedl* was based on the belief that the legislature intended the code to affect the rights of children in the juvenile justice system as soon as possible. 416 N.E.2d at 493-94.

[10]416 N.E.2d 1334 (Ind. Ct. App. 1981).

[11]*Id.* at 1335.

[12]*Id.*

known of the impending changes in the applicable law and conformed its petition to the provisions of the new code.[13] In determining that the new code was applicable to "matters" still pending, the court, in the above cases, noted that the policy and purpose section of the code was an explication of the legislature's intention.

One recent Indiana decision employed the policy and purpose section of the code in an attempt to balance the rights of a juvenile affected by the juvenile justice system with the interests of the state in the effective operation of that system. In *Madaras v. State*,[14] the court of appeals noted that "[o]f primary importance to the policies behind our juvenile justice system is the flexibility the system provides in dealing with juvenile problems."[15] The court noted that the code favors disposing of juvenile matters in the least severe manner available, but the flexibility in dealing with juvenile problems created by the code allows a juvenile court to choose an alternative best suited to the unique circumstances of a particular case.[16] In effect, it appears that a court is free to impose any available disposition if it is in the best interest of the child and society. A dispositional decree may not, however, be purely punitive in nature, because such a punitive decree would violate the spirit and purpose of the code.[17]

Numerous alternatives are thus available under the code for the resolution of problems to ensure that the ultimate resolution is in the best interest of the child. This "best interests" standard, present in the purpose and policy section of the code,[18] pervades the other chapters of the code and acts as a guide for the application of other code provisions. At the point where the best interests of the child interfere with the integrity of the family unit, serious constitutional questions arise. However, this best interests standard as an underlying policy of the code has been held constitutional.[19]

*In re Joseph*[20] dealt with a challenge of the best interests standard by a father whose visitation rights with his daughter were terminated because the visitation rights were found not to be in the best interests of the child. The father attacked the best interests standard as meaningless and claimed that the standard could be used to advance a less than compelling state interest while interfering with his fundamental rights to family integrity and parent-child

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[13]*Id.*
[14]425 N.E.2d 670 (Ind. Ct. App. 1981).
[15]*Id.* at 672.
[16]*Id.* at 671.
[17]*See* IND. CODE § 31-6-1-1 (Supp. 1981).
[18]*Id.* § 31-6-1-1(6).
[19]*In re* Joseph, 416 N.E.2d 857 (Ind. Ct. App. 1981).
[20]*Id.*

communication.[21] The thrust of the father's argument was that the standard violated due process.[22]

The court of appeals held that the standard was not meaningless because the standard had not been employed to "make vague moral judgments about alternative lifestyles and parental fitness."[23] The court found that the purpose for the standard, contrary to the father's contention, was to preserve an environment conducive to the mental and physical development of the child.[24] The father also opposed the best interests standard by arguing that reasonable visitation rights should be granted absent a showing that such rights would pose a substantial threat to the child's emotional or physical well-being.[25] The court of appeals held, however, that the best interests standard was constitutionally permissible in determining visitation rights of a father when, as in the case before the court, the child has been found to be neglected and dependent under Indiana law.[26]

The court acknowledged that there is a fundamental right to family integrity and that the state cannot interfere with this right unless a compelling state interest is advanced.[27] The court found, however, that the required compelling state interest was advanced by the two-step process evinced in the case before the court.[28]

The first step is the initial state intrusion into the family unit pursuant to the state's *parens patriae* power "to intervene when parental neglect, abuse or abandonment has been established."[29] The court then found that the compelling state interest in protecting the welfare of the child was clear.[30] Once the finding of abuse and neglect has been made, the second step is to balance the rights of the biological parent with the best interests of the child, keeping in mind that the rights of the biological parent are no longer paramount once the initial step has been properly taken.[31] By the time the best interests standard is liberally applied in the second stage, the state has already demonstrated the requisite compelling interest and courts may then fashion a remedy most conducive to the emotional and physical development of the child.

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[21] 416 N.E.2d at 858-60.
[22] *Id.*
[23] *Id.* at 861.
[24] *Id.*
[25] *Id.* at 858.
[26] *Id.* at 862.
[27] *Id.* at 859.
[28] *Id.* at 860.
[29] *Id.*
[30] *Id.*
[31] *Id.*

## II. JURISDICTION

Indiana Code section 31-6-2-4, which provides for waiver of jurisdiction by the juvenile court, was amended in 1981 to accommodate the addition of subsection (d) to section 31-6-2-4.[32] The amendment also added subsection (e) which compels the juvenile court to waive jurisdiction, upon proper motion by the prosecutor, if it finds that the offender is charged with a felony[33] and has previously been convicted of either a felony or a non-traffic misdemeanor.[34]

Waiver of jurisdiction by the juvenile court was recently addressed by the Supreme Court of Indiana in *Trotter v. State*.[35] The defendant in that case was a seventeen-year-old juvenile who was arrested for murder, robbery, and theft. The juvenile court waived jurisdiction pursuant to subsection 31-6-2-4(c), which provides for waiver when there is probable cause to believe that a child, at least ten years of age, has committed murder. The defendant appealed his murder conviction, contending that there must be proof beyond a reasonable doubt that he committed the offense before a waiver could be effectuated. The defendant also argued that the juvenile court committed error by failing to make a statement of specific reasons to justify the waiver as is required by subsection 31-6-2-4(h).[36] The Indiana Supreme Court rejected these arguments, reasoning that such a high standard of proof would effectively turn a waiver hearing into a trial on the merits of the case.[37] All that must be shown is that the act would be murder if committed by an adult and that there is probable cause to believe that the offender committed the act when he was over ten years of age.[38] When these standards are met, the statute "creates a presumption of waiver with respect to juveniles charged with murder."[39]

In *Strosnider v. State*,[40] a minor was tried as an adult for attempted burglary of a dwelling, burglary, criminal trespass, and criminal mischief. The juvenile court waived jurisdiction pursuant to subsection 31-6-2-4(b), finding that the defendant was beyond rehabilitation under the juvenile system. The defendant appealed his convictions alleging, *inter alia*, that there was no probable cause

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[32]IND. CODE § 31-6-2-4(d) (Supp. 1981).
[33]*Id.* § 31-6-2-4(e)(1).
[34]*Id.* § 31-6-2-4(e)(2).
[35]429 N.E.2d 637 (Ind. 1981).
[36]*Id.* at 642.
[37]*Id.* at 641.
[38]*Id.* at 642.
[39]*Id.*
[40]422 N.E.2d 1325 (Ind. Ct. App. 1981).

to support the charge of attempted burglary, and that the waiver was therefore improper.[41]

A mandatory waiver under subsection 31-6-2-4(d) requires a showing of probable cause that the juvenile offender committed at least a class B felony. Although attempted burglary of a dwelling is a class B felony, that charge against the defendant was dropped. Instead, the defendant was charged with and convicted of burglary, a class C felony. Thus, the defendant argued, the juvenile court's waiver could not be sustained.[42] The court of appeals affirmed his convictions, holding that even if there was not probable cause to charge the defendant with attempted burglary, the juvenile court could make a discretionary waiver based upon the defendant's prior record of numerous juvenile offenses.[43]

The court apparently relied upon subsection 31-6-2-4(b) which allows the juvenile court discretionary waiver of its jurisdiction when a child of at least fourteen years of age commits an act that is heinous or aggravated, or commits a repetitive pattern of delinquent acts, and the child is beyond rehabilitation under the juvenile system.[44] When these requisites are met, the juvenile court *may* waive its jurisdiction if it also finds that the interests and safety of the community would be best served if the juvenile were tried as an adult.[45]

For adoption proceedings, the Indiana Court of Appeals made it clear in the case of *In re Gray*[46] that juvenile courts do not have exclusive, original jurisdiction. The court noted that a juvenile court may terminate a parent-child relationship when the action stems from an adjudication that the child was delinquent or in need of services.[47] However, to adopt a child outside of the provisions of section 31-6-2-1, the prospective parent must comply with the procedural steps of section 31-3-1-6 and must file the action in a probate court pursuant to section 31-3-1-1.[48]

Several amendments were added to section 31-6-2-1 that further limited the jurisdiction of the juvenile court.[49] One change was a 1981 amendment, subsection (b)(1), which added a provision that ex-

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[41]*Id.* at 1326.

[42]*Id.*

[43]*Id.* at 1329.

[44]*Id.* at 1327, 1329.

[45]IND. CODE § 31-6-2-4(b) (Supp. 1981).

[46]425 N.E.2d 728 (Ind. Ct. App. 1981).

[47]*Id.* at 729 n.2. *See* IND. CODE § 31-6-2-1(a)(3).

[48]425 N.E.2d at 729. Judge Hoffman's concurring opinion played down the distinction between a juvenile court and a probate court, but he agreed with the court's reversal based on lack of notice to the biological mother. *Id.* at 730-31.

[49]*See* Kerr, *Foreword: Indiana's New Juvenile Code*, 12 IND. L. REV. 1 (1979).

cepts from the jurisdiction of the juvenile court any traffic law violation committed by a juvenile unless the violation is a felony or a violation of section 9-4-1-54.[50] As a result, the juvenile courts do not have jurisdiction over children sixteen years of age or older for violating traffic laws, unless the violation is of Indiana's drunk driving statute,[51] or the violation constitutes a felony.[52]

The same 1981 amendment to section 31-6-2-1 added subsection (d) which precludes juvenile court jurisdiction over an individual sixteen years or older who allegedly commits murder,[53] kidnapping,[54] rape,[55] or robbery,[56] if the act was committed while the offender was armed with a deadly weapon,[57] or if the act resulted in bodily injury.[58] Subsection (d) further provides that the juvenile court does not acquire jurisdiction in the circumstances mentioned above, even though the offender pleads guilty to or is convicted of a lesser included offense.[59]

## III. Rights and Effect of Adjudication

Indiana Code section 31-6-3-4[60] gives the juvenile court power to appoint a guardian ad litem. Active consideration of such an appointment was recently characterized as a duty in the special circumstances surrounding a paternity suit. In *Crayne v. M.K.R.L.*,[61] the trial court did not consider appointment of a guardian ad litem before entering judgment against an infant who appeared at trial only with his mother.[62] The Indiana Court of Appeals reversed the judgment, noting that "it *is mandatory* that the trial judge *consider* the *necessity* of appointing a guardian ad litem before permitting a minor defendant to proceed without one."[63]

This conclusion rests upon the special applicability of the Indiana Rules of Trial Procedure to paternity actions.[64] Trial Rule 17(C)

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[50]Ind. Code § 31-6-2-1(b)(1) (Supp. 1981).

[51]*Id.* § 9-4-1-54.

[52]*Id.* § 31-6-2-1(b)(1).

[53]*Id.* § 31-6-2-1(d)(1).

[54]*Id.* § 31-6-2-1(d)(2).

[55]*Id.* § 31-6-2-1(d)(3).

[56]*Id.* § 31-6-2-1(d)(4).

[57]*Id.* § 31-6-2-1(d)(4)(A).

[58]*Id.* § 31-6-2-1(d).

[59]*Id.*

[60]Ind. Code § 31-6-3-4 (Supp. 1981). For a brief discussion of the positive aspect of this provision, see Griffis, *A Judicial Response to the New Juvenile Code*, 54 Ind. L. J. 639, 649 (1979).

[61]413 N.E.2d 311 (Ind. Ct. App. 1980).

[62]*Id.* at 312-13.

[63]*Id.* at 313 (emphasis in the original).

[64]*Id.* at 313-14. Ind. Code § 31-6-6.1-19 (Supp. 1981) provides that paternity actions shall be governed by the Indiana Rules of Trial Procedures.

provides that the court shall appoint a guardian ad litem for an infant not represented or not adequately represented.[65] Although the appellate court found that the appointment of a guardian ad litem is not mandated by Trial Rule 17(C), it reasoned that considerations of justice and the protection of minors necessitate consideration of such an appointment.[66] The court tempered its conclusion by suggesting that if a minor were adequately represented at trial, failure to consider the appointment of a guardian ad litem might be harmless.[67] The court, however, did not define "adequately"; the court merely suggested that "enthusiastic" representation would be considered a sufficient criterion.[68]

The necessity of considering appointment of a guardian ad litem in non-paternity actions against a juvenile was not addressed by the court. Because the court based its conclusion upon Trial Rule 17(C) which is not applicable to criminal proceedings, this decision is apparently limited to civil suits against juveniles. It remains to be determined whether the duty to consider the appointment of a guardian ad litem is expanded beyond the special circumstances of a paternity suit.

## IV. Delinquent Children and Children in Need of Services

Chapter four[69] of the 1978 juvenile code outlines juvenile court proceedings for delinquents and children in need of services.[70] This chapter redefines children who had been considered neglected under the previous code as children in need of services (CHINS),[71] and outlines new procedures to care for these children.[72] Since 1978, when the current juvenile code was adopted,[73] the Indiana General Assembly has continued to refine the CHINS provisions.[74] The courts, however, have only had limited opportunities to review and interpret these provisions.[75]

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[65]Ind. R. Tr. P. 17(C).

[66]413 N.E.2d at 313-14.

[67]*Id.* at 314.

[68]*Id.*

[69]Ind. Code §§ 31-6-4-1 to -19 (Supp. 1981).

[70]*See* Kerr, *supra* note 49, at 9-20.

[71]Ind. Code Ann. § 31-6-4-3 commentary at 112-13 (West 1979); Kerr, *supra* note 49, at 11, 12. For the definition of a neglected child under the old juvenile code, see Ind. Code § 31-5-7-6 (1976) (repealed 1978).

[72]*See* Kerr, *supra* note 49, at 9-20. *See* Ind. Code §§ 31-6-4-4, -6, -6.5, -8, -10, -11, -12, -13.5 to -19 (Supp. 1981).

[73]The juvenile code was enacted by Act of Mar. 10, 1978, Pub. L. No. 136, § 1, 1978 Ind. Acts 1196 (codified at Ind. Code §§ 31-6-1-1 to -10-4 (Supp. 1981)).

[74]*See, e.g.*, notes 76-89 *infra* and accompanying text.

[75]*See* notes 90-129 *infra* and accompanying text.

### *A. Legislative Refinements Concerning CHINS*

The most significant action taken by the Indiana General Assembly in regard to the CHINS provisions affects the definition of a child in need of services.[76] When the juvenile code was adopted, a child in need of services was defined as including: a child whose physical or mental health was impaired due to a lack of life's basic necessities; a child whose physical health was endangered due to the act or omission of his parents, guardian, or custodian; and a child who endangered his own health or the health of another.[77] In 1979, the legislature expanded the definition to include children who were victims of sex crimes, children who were allowed by parent, guardian, or custodian to participate in obscene performances, and children who were allowed to commit sex offenses.[78] These definitional provisions were added to tie the CHINS provisions to the child abuse provisions of the juvenile code.[79]

After the definition of a child in need of services was expanded to include the described acts of child abuse, the administrator of the Indiana Department of Public Welfare sought from the attorney general an official interpretation of the CHINS definitional provision, Indiana Code subsection 31-6-4-3(a)(3).[80] The attorney general elaborated on the definition of a child who is a victim of a sex offense.[81] The attorney general indicated that under this subsection, a child in need of services includes a child who has been sexually abused by *anyone*, including, but not limited to, a parent, guardian, or custodian.[82] Thus, the attorney general, following the precedent set by the legislature, interpreted broadly the definition of CHINS and, as a result, expanded the juvenile court's jurisdiction.

While broadening the CHINS definition during its 1979 session, the legislature also took a step toward limiting the application of CHINS by adding subsection 31-6-4-3(d).[83] Subsection 3(d) creates a rebuttable presumption that a child is not a child in need of services if the parent, guardian, or custodian fails to provide specific medical

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[76]*See* IND. CODE § 31-6-4-3(a) (Supp. 1981).

[77]Act of Mar. 10, 1978, Pub. L. No. 136, § 1, 1978 Ind. Acts 1196, 1204 (1978) (codified at IND. CODE § 31-6-4-3(a)(1), (2), (6) (Supp. 1981)).

[78]Act of Apr. 11, 1979, Pub. L. No. 276, § 13, 1979 Ind. Acts 1379, 1387 (1979) (codified at IND. CODE § 31-6-4-3(a)(3)-(5) (Supp. 1981)).

[79]IND. CODE ANN. § 31-6-4-3 commentary at 113 (West 1979).

[80]79 Op. Att'y Gen. 89 (1979).

[81]IND. CODE § 31-6-4-3(a)(3) (Supp. 1981) provides that a child is "a child in need of services" if before his eighteenth birthday "he is the victim of a sex offense under IC 35-42-4-1 [Rape], IC 35-42-4-2 [Unlawful Deviate Conduct], IC 35-42-4-3(a), IC 35-42-4-3(b) [Child Molesting], IC 35-42-4-4 [Child Exploitation], IC 35-45-4-1 [Public Indecency], IC 35-45-4-2 [Prostitution], or IC 35-46-1-3 [Incest]."

[82]79 Op. Att'y Gen. at 90.

[83]*See* Act of Apr. 11, 1979, Pub. L. No. 276, § 13, 1979 Ind. Acts 1379, 1388; IND.

treatment for the child because of legitimate and genuine religious belief. Although a juvenile court may order treatment for the child, unless the presumption created by subsection 3(d) is overcome, this action may not be the basis for declaring the child to be a child in need of services and for implementing CHINS procedures allowing the state to step in as *parens patriae*. Shifting the burden of proof under subsection 3(d), therefore, limits the jurisdiction of the state in this particular situation.

Prior to 1980, in order for a child to be classified as a child in need of services, it was necessary to show that the child came within one of the six categories of need.[84] It was also necessary to show that the child needed care, treatment, or rehabilitation that he was not receiving, that he was unlikely to accept voluntarily, and that he was unlikely to accept or be provided with unless the court intervened.[85] In 1980, however, the legislature dropped this latter requirement for showing a child to be in need of services.[86] This definitional amendment was in accord with the 1979 legislature's move

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CODE ANN. § 31-6-4-3(d) commentary at 113-14 (West 1979). IND. CODE § 31-6-4-3(d) (Supp. 1981) provides:

> When a parent, guardian, or custodian fails to provide specific medical treatment for a child because of the legitimate and genuine practice of his religious beliefs, a rebuttable presumption arises that the child is not a child in need of services because of such a failure. However, this presumption does not prevent a juvenile court from ordering, when the health of a child requires, medical services from a physician licensed to practice medicine in Indiana.

[84] *See* Act of Apr. 11, 1979, Pub. L. No. 276, § 13, 1979 Ind. Acts 1379, 1387 (1979).

[85] *Id.* Prior to 1980, Indiana Code section 31-6-4-3(a) read as follows:

> Sec. 3.(a) A child is a child in need of services if before his eighteenth birthday:
> (1) his physical or mental condition is seriously impaired or seriously endangered as a result of the inability, refusal, or neglect of his parent, guardian, or custodian to supply the child with necessary food, clothing, shelter, medical care, education, or supervision;
> (2) his physical or mental health is seriously endangered due to injury by the act or omission of his parent, guardian, or custodian;
> (3) he is the victim of a sex offense under IC 35-42-4, IC 35-45-4-1, or IC 35-46-1-3;
> (4) his parent, guardian, or custodian allows him to participate in an obscene performance defined by IC 35-30-10.1-3 or IC 35-30-10.1;
> (5) his parent, guardian, or custodian allows him to commit a sex offense prohibited by IC 35-45-4; or
> (6) he substantially endangers his own health or the health of another;
> *and needs care, treatment, or rehabilitation that he is not receiving, that he is unlikely to accept voluntarily, and that is unlikely to be provided or accepted without the coercive intervention of the court.*

*Id.* (emphasis added)

[86] Act of Mar. 3, 1980, Pub. L. No. 182, § 5, 1980 Ind. Acts 1576, 1581 (1980) (deleting the former concluding provision following clause 6).

toward opening the door for CHINS proceedings. In 1981, however, the legislature reinserted the previously deleted paragraph in the definition. As a result, it is again necessary to prove that a child will not receive the needed treatment without the court's intervention.[87]

In 1981, the General Assembly again limited and refined the definition of CHINS by adding subsection 31-6-4-3(e) to the definitional section.[88] Subsection 3(e) states that reasonable corporal punishment administered by a parent, guardian or custodian to discipline a child is *not* controlled by the CHINS statute. This subsection and subsection 3(d) emphasize the policy that the CHINS chapter should not be used to limit the lawful practice or teaching of religious beliefs.[89]

From the 1981 amendments it appears that if the legislature was attempting to expand the scope of CHINS adjudication in 1979 and 1980, it has limited the scope of CHINS in 1981.

### *B. Court Application and Interpretation of CHINS*

The most significant case decided thus far under the CHINS provisions is *Wardship of Nahrwold v. Department of Public Welfare of Allen County*.[90] In *Nahrwold*, a caseworker, acting on information from an anonymous source, went to the Nahrwold residence and found eight-year-old Stefanie Nahrwold at home alone. After questioning Stefanie and examining her for evidence of physical abuse, the caseworker took Stefanie into custody.[91] The next day a hearing was held under subsection 31-6-4-6(e) to determine whether the court had probable cause to keep the child in custody.[92]

At the hearing, the child's mother, Betty Nahrwold, requested a written record and an opportunity to present witnesses. The trial court denied both motions noting that the hearing was merely an informal hearing to establish probable cause rather than a fact-finding adjudication.[93] The trial court first heard testimony from Stefanie, Betty Nahrwold, and the caseworker, and then determined that if Betty would agree to an informal adjustment, the court would

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[87]Act of May 5, 1981, Pub. L. No. 266, § 5, 1981 Ind. Acts 2182, 2187 (1981).

[88]*Id.*

[89]IND. CODE § 31-6-4-3(e) (Supp. 1981). Subsection 3(e) provides that "[n]othing in this chapter limits the right of a person to use reasonable corporal punishment when disciplining a child if the person is the parent, guardian, or custodian of the child. In addition, nothing in this chapter limits the lawful practice or teaching of religious beliefs."

[90]427 N.E.2d 474 (Ind. Ct. App. 1981).

[91]*Id.* at 476.

[92]*Id.*

[93]*Id.*

release Stefanie to her.[94] Betty consented to the adjustment and regained custody of the child. Then Betty appealed the decision of the trial court,[95] claiming that the restriction on presenting witnesses denied her due process and that the consent to the adjustment was coerced.

On appeal, the Third District Court of Appeals affirmed the judgment of the trial court.[96] The court held that neither the chapter four statutory scheme nor the fourteenth amendment due process clause required the court to allow a parent to present witnesses or have a written record at a probable cause hearing for detention pursuant to Indiana Code subsection 31-6-4-6(e).[97] The statutory scheme did not require a written record because the trial court decided to release the child.[98] According to the statutory scheme, there was no right to present witnesses at the detention hearing because that opportunity would be available in subsequent fact-finding proceedings,[99] such as the initial hearing on the petition to declare the child to be a child in need of services.

The court also found that although Betty's parental rights had undoubtedly been affected, due process requirements did not provide her with the opportunity to present witnesses at a probable cause hearing.[100] In reaching this conclusion, the court noted that the due process rights of alleged criminals do not include a right to an adversary hearing when determining probable cause for arrest and incarceration. The court concluded that the due process clause does not require a parent to be given a full adversary hearing when probable cause for temporary custody of a child is being adjudicated.[101]

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[94]427 N.E.2d at 476.

[95]*Id.*

[96]*Id.* at 481.

[97]*Id.* at 477-81.

[98]*See id.* at 476; IND. CODE § 31-6-4-6(e), (f) (Supp. 1981). Subsections 6(e) and 6(f) read as follows:

> (e) If the child is not released, a detention hearing must be held within seventy-two (72) hours (excluding Saturdays, Sundays, and legal holidays) after he is taken into custody; otherwise he shall be released . . . .
>
> (f) The juvenile court shall release the child to his parent, guardian, or custodian; however, *the court may order the child detained if it makes written findings of fact upon the record* of probable cause to believe that the child is a child in need of services . . . .

*Id.* (emphasis added). The language of subsection 6(f) indicates that a written record is only required when the court decides to detain the child. The reason for this distinction between decisions to release and decisions to detain could be that an appeal is more likely when a court has decided to detain a child.

[99]*See* 427 N.E.2d at 480; IND. CODE § 31-6-3-2(a) (Supp. 1981) (noting the rights of parents in subsequent proceedings).

[100]427 N.E.2d at 479.

[101]*Id.* at 480.

At first glance, the court's analysis may appear logical; however, it breaks down when the different standards of proof in each type of subsequent adversary hearing are considered. In criminal adversary proceedings, the state is required to prove that the accused is guilty beyond a reasonable doubt, but in proceedings concerning the parent-child relationship, the state was required to prove its case only by a preponderance of the evidence.[102] Since subsequent parent-child proceedings require a lesser standard of proof than criminal proceedings, it is arguable that the preliminary probable cause proceedings for temporary custody of a child should require greater procedural safeguards to protect parents' rights.

Although the state's burden of proof in detention hearings and later fact-finding hearings is minimal,[103] the burden will be easier for the state to meet at detention hearings if the opponents do not have an opportunity to present witnesses. The unfairness in allowing the state to make its case without adversarial confrontation at detention hearings is that the state may establish probable cause for detention and then use the detention ruling as evidence in subsequent fact-finding hearings to establish its best interest burden of proof. If the probable cause determination may be used against the parent in subsequent proceedings where a non-criminal burden of proof is required, the parent should have a right to the same due process at the time of the probable cause hearing that he has in the subsequent hearings. Providing parents with greater due process assurances through each step of a CHINS proceeding is the best way to ensure that the parent will receive due process in the later hearings which may culminate in the termination of a parent-child relationship.[104]

Betty also claimed that she was coerced into signing the consent to an informal adjustment program.[105] The appellate court acknowledged that the trial court made Betty's custody of Stefanie contingent upon Betty's agreement to the informal adjustment, but said that Betty had other options available to her and thus was not coerced.[106] Betty could have refused to sign the consent, thereby

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[102]Puntney v. Puntney, 420 N.E.2d 1283, 1285-86 (Ind. Ct. App. 1981) (citing IND. CODE § 31-6-7-13(a) (Supp. 1979)).

[103]*See* Myers v. Jennings County Dep't of Pub. Welfare, 417 N.E.2d 926, 931 (Ind. Ct. App. 1981) (terminating parent-child relationship by the best interest of child standard); *In re* Fries, 416 N.E.2d 908, 910 (Ind. Ct. App. 1981) (terminating parent-child relationship by best interest of child standard); *In re* Joseph, 416 N.E.2d 857, 859-61 (Ind. Ct. App. 1981) (upholding constitutionality of best interest standard in determining parental visitation rights of biological father).

[104]For an example of how the state may use past proceedings to prove that it is in the child's best interest to terminate the parent-child relationship, see *In re* Miedl, 425 N.E.2d 137 (Ind. 1981), *rev'g* 416 N.E.2d 491 (Ind. Ct. App. 1981).

[105]427 N.E.2d at 480.

[106]*Id.*

temporarily giving up custody of Stefanie in order to obtain unconditional custody through the remaining CHINS procedures, or to petition for a writ of habeas corpus.[107]

Judge Staton wrote an insightful dissent in which he claimed that the statutory scheme required the trial court to provide Betty Nahrwold with a full hearing.[108] Judge Staton noted that by making Betty's custody conditional upon her agreement to an informal adjustment, the hearing was really determining whether the parent should participate in a program of care or treatment. Therefore, according to Indiana Code section 31-6-3-2, Betty Nahrwold was entitled to introduce evidence on her behalf.[109] Although Judge Staton presents a persuasive argument, the hearing referred to in subsection 31-6-3-2(b)(2) is actually the hearing discussed in section 31-6-4-17.[110] That section requires the filing of a petition for participation *before* the hearing. It also presumes that the child has already been adjudicated a child in need of services.[111] That section was not, however, applicable to Stefanie Nahrwold's case. Her case had not yet progressed to the point where section 31-6-4-17 would be of any import.

Judge Staton also noted that by requiring Betty to participate in a program of informal adjustment, the court was in essence requiring her to admit that Stefanie was a child in need of services.[112] Judge Staton pointed out that such an admission could be devastating in later proceedings, such as in a proceeding to terminate parental rights. Judge Staton did not, however, draw the logical conclusion from these circumstances; that is, by requiring the parent to agree to an informal adjustment or to forego custody temporarily, the court is placing parents in a no-win situation. If the parent agrees to an informal adjustment, the parent risks a fatal admission; if the parent does not agree, the failure to agree to conditional custody could be interpreted in later proceedings as evidence that the parent is indifferent, uncaring, and "unmotherly."[113] Although Judge Staton's construction of the statutory scheme is subject to question, he did make a strong argument for reversing the trial court on the basis of its coercion in obtaining Betty Nahrwold's agreement to the informal adjustment.[114]

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[107]*Id.*

[108]427 N.E.2d at 481 (Staton, J., dissenting).

[109]*Id.*

[110]*Compare* IND. CODE § 31-6-3-2(b)(2) (Supp. 1981) *with* IND. CODE § 31-6-4-17 (Supp. 1981).

[111]IND. CODE § 31-6-4-17 (Supp. 1981).

[112]427 N.E.2d at 482.

[113]For examples of how courts interpret the actions of parents in making decisions, see Puntney v. Puntney, 420 N.E.2d at 1285-87; *In re* Fries, 416 N.E.2d at 909-11.

[114]*See* 427 N.E.2d at 481-83.

In summary, *Nahrwold* indicates that the courts will probably be lenient in determining the adequacy of due process safeguards in detention hearings pursuant to subsection 31-6-4-6(e).[115] *Nahrwold* also provides support for the practice of conditioning parental custody upon agreement to informal adjustment programs.[116] In addition to these specific holdings of *Nahrwold*, the case could stand for the general proposition that the appellate courts will continue to give broad discretion to trial courts despite the specific procedural guidelines provided in the statute for reviewing CHINS cases.[117] Judge Staton's strong dissent, however, indicates that rubber-stamping trial court decisions may not become a pattern under the CHINS provisions.[118]

The Indiana Supreme Court also had occasion to review the new CHINS provisions in the case of *In re Lemond*.[119] *Lemond* involved a child custody battle under the Uniform Child Custody Jurisdiction Act (UCCJA).[120] According to the divorce decree, Earl Lemond was to have custody of his daughter Michelle as long as he lived in Hawaii; if he moved, however, the child was to stay with her mother in Hawaii. Lemond moved to Indiana. When his daughter visited him in Indiana, he refused to return her to her mother in Hawaii.[121] The mother filed a petition for a writ of habeas corpus to have the child returned, and the Supreme Court of Indiana ordered the writ enforced.[122] As a last resort to maintain the custody of his daughter, the father filed a petition alleging that Michelle Lemond was a child in need of services.[123] The Indiana Supreme Court refused to exercise its emergency jurisdiction under the UCCJA and re-open the provisions of the Hawaiian divorce decree in this case because the CHINS petition was filed in bad faith and had no merit.[124] The court seemed to indicate, however, that the emergency powers under the UCCJA could be invoked if a valid CHINS petition was filed.[125]

Earl Lemond also claimed that the court had emergency jurisdiction under the CHINS statutes without invoking the emergency jurisdiction provisions of the UCCJA.[126] In dicta, the court stated that it could invoke the emergency jurisdiction pursuant to the

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[115]*See id.* at 477-80.
[116]*See id.* at 480.
[117]*See id.* at 476-80.
[118]*See id.* at 481-83 (Staton, J., dissenting).
[119]413 N.E.2d 228 (Ind. 1980).
[120]IND. CODE §§ 31-1-11.6-1 to -24 (Supp. 1981).
[121]413 N.E.2d at 231.
[122]*Id.* at 232.
[123]*See id.* at 233.
[124]*See id.* at 244-45.
[125]*See id.* at 245.
[126]*Id.*

CHINS statutes, but in order to do so, the procedures described in the statute must be followed exactly.[127] The court then reviewed the procedures of the CHINS statute and referred to them as "jurisdictional prerequisites."[128] The court's careful treatment of these provisions indicates that the court may follow the procedures outlined in the CHINS statutes very closely when reviewing cases in the future. At least this will be the standard of review when a CHINS claim appears to be made in bad faith.[129]

### C. *Judicial Consideration of Delinquent Children Provisions*

In *In re Tacy*,[130] the court of appeals determined when a petition alleging delinquency must be "filed" for purposes of tolling the twenty day limitation on detention of a child.[131] The appellant argued that the petition alleging delinquency was filed April 18, 1980, so that the waiver hearing which occurred twenty-eight working days later on May 28, 1980, was untimely. An ambiguity arose in view of a statutory mandate directing the juvenile court to "authorize" the filing of a petition.[132] In *Tacy*, the juvenile court had authorized the filing of the petition alleging delinquency on April 29, 1980, resulting in a timely waiver hearing on May 28, 1980.[133] The court recognized the issue as one of first impression and called upon the general rules of statutory construction.[134] Because the authorization by the

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[127]*Id.* at 245-47.

[128]*Id.* at 245-49.

[129]*See id.* at 249.

[130]427 N.E.2d 919 (Ind. Ct. App. 1981).

[131]IND. CODE § 31-6-7-6(b) (Supp. 1981) provides:

If the child is in detention and a petition has been filed, either a fact-finding hearing or a waiver hearing must be commenced within twenty (20) days (excluding Saturdays, Sundays, and legal holidays) after the petition is filed. If the child is not in detention, the hearing must be commenced within sixty (60) days (excluding Saturdays, Sundays, and legal holidays) after the petition is filed.

[132]IND. CODE § 31-6-4-9 (Supp. 1981) provides in part:

(a) The prosecutor may request the juvenile court to authorize the filing of a petition alleging that a child is a delinquent child; the attorney for the county department may request the juvenile court to authorize the filing of a petition alleging that a child is a delinquent child defined by section 1(b)(2) of this chapter. The person requesting the authorization shall represent the interests of the state at this proceeding and at all subsequent proceedings on the petition.

(b) The juvenile court shall consider the preliminary inquiry and the evidence of probable cause. The court shall authorize the filing of a petition if it finds probable cause to believe that the child is a delinquent child and that it is in the best interests of the child or the public that the petition be filed.

[133]427 N.E.2d at 921.

[134]*Id.*

juvenile court of the filing of the petition alleging delinquency had traditionally been an essential step in the juvenile process,[135] the court concluded that "it only seems logical that the 'filing' of the petition alleging delinquency does not actually occur until it is authorized by the juvenile court."[136] Thus, the juvenile court had acted within the twenty day period and had not lost jurisdiction.

The appellant next argued that the failure to hold a detention hearing within the forty-eight hour period following his arrest, and the failure to release him after the forty-eight hour period[137] constituted error.[138] The court agreed with the appellant that there had clearly been no hearing within forty-eight hours but went on to hold, without citation to authority, that such error was harmless. The court, again without citation to authority, reasoned that the statute in question required only the child's release and was silent as to effect on jurisdiction and charges. As a result, should a child be detained beyond the forty-eight hour period in contravention of the explicit statutory mandate, the juvenile court will not lose jurisdiction, nor will the charges against the juvenile be dismissed.[139] The court concluded by stating: "Tacy's detention was regrettable; however, he was not without recourse. His proper remedy under the circumstances would have been to seek a writ of habeas corpus."[140] In reaching its holding, the court seemed to ignore the prophylactic intent of the statute. While a juvenile may have a remedy available in the form of a writ of habeas corpus, the court's opinion disregards the express language of the statute and apparently allows a child to be retained beyond the forty-eight hour period set by the statute.

## V. Termination of the Parent-Child Relationship

In Indiana, the termination of the parent-child relationship is governed by two distinct statutes. If the termination is in connection with an adoption, the adoption statute[141] applies, but if the termination is a result of abandonment, neglect, or abuse, the juvenile code[142] applies. Both statutes outline different requirements for vol-

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[135]*Id.* (citing Duty v. State, 169 Ind. App. 621, 623; 349 N.E.2d 729, 731 (1976)).

[136]427 N.E.2d at 921. *See also* Kerr, *Foreword: Indiana's New Juvenile Code*, 12 Ind. L. Rev. 1, 14-15 (1979) (discussing the initiation of formal action).

[137]Ind. Code § 31-6-4-5(f) (Supp. 1981) provides in part: "If the child is not released, a detention hearing must be held within forty-eight (48) hours (excluding Saturdays, Sundays, and legal holidays) after he is taken into custody; otherwise he shall be released."

[138]427 N.E.2d at 921.

[139]*Id.*

[140]*Id.*

[141]Ind. Code § 31-3-1-6 (Supp. 1981).

[142]*Id.* § 31-6-5-4.

untary and involuntary terminations thus providing four different sets of requirements for termination.[143]

Chapter five of the juvenile code sets out the requirements for both voluntary and involuntary terminations. Voluntary termination necessarily requires parental consent, and the code explicitly states that a valid, informed consent must be given. The consenting parents must give their consent *in court* after being advised of their parental rights and of the effect that a termination will have on those rights.[144] If the parents do not attend the hearing on the petition to terminate, the relationship can still be terminated if the court finds that: "(1) the parents gave their consent in writing before a person authorized by law to take acknowledgements; (2) they were notified of their constitutional and other legal rights and of the consequences of their actions under section 3 of this chapter; and (3) they failed to appear."[145]

This third requirement implicitly gives parents the right to recant a written consent any time before a court ruling is entered on the termination petition by simply attending the hearing and refusing to give consent in court.[146] Such parental refusal to give consent would then force the agency seeking termination to proceed under the involuntary termination provisions.

To terminate the parent-child relationship involuntarily under the juvenile code, the child must first have been adjudicated a delinquent child or a child in need of services.[147] In addition to this requirement, the petitioner must show further that:

> (1) the child has been removed from the parent for at least six (6) months under a dispositional decree;
> (2) there is a reasonable probability that the conditions that resulted in the child's removal will not be remedied;
> (3) termination is in the best interest of the child; and
> (4) the county department has a satisfactory plan for the care and treatment of the child.[148]

Although these requirements are strict, the new code has lowered the standard of proof which must be met from "clear and

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[143]*See id.* §§ 31-3-1-6(a), (g) & 31-6-5-2, -4.

[144]*Id.* § 31-6-5-2(c), (d).

[145]*Id.* § 31-6-5-2(c).

[146]*See* Washington County Dep't of Pub. Welfare v. Konar, 416 N.E.2d 1334, 1335 (Ind. Ct. App. 1981); Rhine & Weinheimer, *Domestic Relations, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 203, 205 (1981).

[147]IND. CODE §§ 31-6-5-3(6)(A), -4(1) (Supp. 1981). *See* notes 76-89 *supra* and accompanying text.

[148]Act of Feb. 25, 1982, Pub. L. No. 183, 1982 Ind. Acts 1350.

convincing" to a "preponderance of the evidence."[149] Prior to the new code, Indiana courts had held that the higher, intermediate level of proof was proper due to the fact that a fundamental right was being affected.[150] However, the Indiana legislature has provided that the lower "preponderance of the evidence" standard will be applied in juvenile proceedings unless the adjudication of a crime is involved.[151]

The parent in *Puntney v. Puntney*[152] questioned the constitutionality of this change in standards, but the court did not resolve the issue because the question had not been raised at the trial court level and could not, therefore, be raised on appeal.[153] The court dealt with the problem in dicta, however, and stated that this was a civil case requiring the ordinary standard of proof, a preponderance of the evidence.[154] The court stated that the clear, cogent, convincing standard of proof announced in *In re Adoption of Bryant*[155] and *In re Adoption of Anonymous*[156] was changed by the new provision in the code.[157]

The court might well have deferred to the reasoning of *In re Joseph*[158] in addressing this issue. In that case the "preponderance of the evidence" standard was applied when a parent was denied visitation rights under the code. When the standard was challenged as being insufficient because the fundamental right to visitation was being affected, the court reasoned that once a child has been found to be in need of services, the parents' fundamental right to visita-

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[149]IND CODE § 31-6-7-13(a). It is important to note, however, that a recent United States Supreme Court decision, Santosky v. Kramer, 102 S. Ct. 1388 (1982), may render this section of the code unconstitutional. In *Santosky*, the New York law in dispute allowed the State to terminate parental rights upon a finding that the child was "permanently neglected." The New York courts required only a preponderance of the evidence to support this finding. The Supreme Court held that the due process clause of the fourteenth amendment requires that the proof be at least by clear and convincing evidence. *Santosky* was recently followed in Indiana in the case of Ellis v. Knox County Dep't of Pub. Welfare, 433 N.E.2d 847 (Ind. Ct. App. 1982).

[150]*See In re* Adoption of Anonymous, 158 Ind. App. 238, 302 N.E.2d 507 (1973). *But see In re* Leckrone, 413 N.E.2d 977 (Ind. Ct. App. 1980) (applying the same high standard to an involuntary termination in connection with an adoption proceeding after the effective date of the new juvenile code).

[151]IND. CODE § 31-6-7-13(a) (Supp. 1981).

[152]420 N.E.2d 1283 (Ind. Ct. App. 1981).

[153]*Id.* at 1286.

[154]*Id.*

[155]134 Ind. App. 480, 189 N.E.2d 593 (1963).

[156]158 Ind. App. 238, 302 N.E.2d 507 (1973).

[157]420 N.E.2d at 1286. *But see In re* Leckrone, 413 N.E.2d 977 (Ind. Ct. App. 1980); Graham v. Starr, 415 N.E.2d 772 (Ind. Ct. App. 1981) (both cases applying the clear and convincing standard to "post juvenile code" adoption cases).

[158]416 N.E.2d 857 (Ind. Ct. App. 1981).

tion is outweighed by the state's compelling interest in the welfare of the child.[159] This analysis would not change the standard of proof announced in the adoption cases cited by the court. Involuntary termination proceedings initiated under the adoption statute[160] would continue to require "clear and convincing" evidence because of the fundamental parental right involved. Only the cases initiated under the juvenile code that necessarily concern a delinquent child or a child in need of services would apply a "preponderance of the evidence" standard.

In the 1981 case *Puntney v. Puntney*,[161] the children involved in the involuntary termination proceeding had been adjudicated dependent and neglected children under the old juvenile code.[162] Permanent wardship was established at that time. In 1980, the county welfare department petitioned the court to terminate the parent-child relationship. The parent claimed that the new code requires a prior adjudication that the children were in need of services,[163] and since the department had failed to return to court under the new code and get such adjudication, it was barred from proceeding under the code.[164] The parent further contended that the new code does not apply to matters in which the court has entered a dispositional decree before October 1979.[165] The court held that the permanent wardship under the old code was equivalent to an adjudication of a child in need of services under the code and that the termination proceeding was a new and separate matter, thus making the new code applicable in this case.[166]

In *In re Miedl*,[167] the Indiana Supreme Court affirmed the trial court decision and vacated the appellate court's reversal. In *Miedl*, the two children involved in the termination proceeding had been wards of the county for most of their lives due to their mother's inability to care for them. The mother had constant and continuing mental and emotional problems and could not retain a job or maintain a home.[168] In February of 1979, the trial court issued an informal order that the children be returned to the mother for a trial period. When the mother entered the hospital in May, the children were returned to their foster parents and the trial period was deemed a

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[159]*Id.* at 858-59.
[160]IND. CODE § 31-3-1-6(g) (Supp. 1981).
[161]420 N.E.2d 1283 (Ind. Ct. App. 1981).
[162]*Id.* at 1284.
[163]*See* IND. CODE § 31-6-5-3(6)(A) (Supp. 1981).
[164]420 N.E.2d at 1284.
[165]*Id.*
[166]*Id.* at 1285.
[167]425 N.E.2d 137 (Ind. 1981).
[168]*Id.* at 138-39.

failure.[169] On May 30, the mother filed for termination of the wardship, and in response, the county filed for termination of the parent-child relationship.

The trial court granted the county's petition to terminate the parent-child relationship, but the appellate court reversed the decision.[170] The court based its reversal on the statutory requirement that "the child has been removed from the parent for at least six (6) months under a dispositional decree . . . ."[171] The court interpreted this to mean *physical* removal for the "six months *immediately preceding* the filing of the petition."[172] Since the mother had the children for two of the previous six months, the requirement was not met and the termination could not be granted. In refusing to accept this interpretation, the Indiana Supreme Court stated: "Not only had the children been removed from their mother for *much* of the previous six months but they had been under the care and supervision of the Welfare Department for most of their lives."[173] The court further stated that "[c]ustody had not changed in the orders of the court to give the mother physical custody. This was merely a temporary unofficial placement . . . ."[174] The court emphasized, as an additional requirement, that such terminations be in the best interests of the children involved,[175] but that it was "not the intention of the legislature that the future plans for the children would be detailed in the evidence so that the Court could choose the 'best' alternative for the children involved."[176] Prior to determining the future of the child, "it must first be found that the circumstances are such that the parental tie must be severed and a different direction found that gives some chance to the child . . . ."[177]

*In re Myers*[178] is another case in which the new code was applied in termination of parental rights. In *Myers*, the mother's two sons were adjudged to be children in need of services and placed in foster homes because the mother had failed to properly care for them.[179] In the sixteen months following this adjudication, the mother failed to hold a steady job, joined the air force but was discharged for medical reasons, and attempted suicide.[180] At the time

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[169]*Id.* at 139.
[170]*In re* Miedl, 416 N.E.2d 491 (Ind. Ct. App.), *rev'd*, 425 N.E.2d 137 (Ind. 1981).
[171]Act of Feb. 25, 1982, Pub. L. No. 183, 1982 Ind. Acts 1350.
[172]416 N.E.2d at 494.
[173]425 N.E.2d at 140 (emphasis added).
[174]*Id.*
[175]*See* Act of Feb. 25, 1982, Pub. L. No. 183, 1982 Ind. Acts 1350.
[176]425 N.E.2d at 141.
[177]*Id.*
[178]417 N.E.2d 926 (Ind. Ct. App. 1981).
[179]*Id.* at 927.
[180]*Id.* at 928.

of the hearing to terminate her parental rights, she was pregnant and living in a halfway house. At the hearing, she expressed her love for her children but stated that she was not prepared to assume parental duties.[181] The trial court terminated the mother's parental rights and she appealed the decision.[182]

The court of appeals evaluated the sufficiency of the evidence using the five criteria set out in the 1981 amendments to the code.[183] In assessing the probability that the conditions which resulted in the removal of the children would not be remedied, the second criterion set out in the code, the court stated that "[a]lthough there is no direct testimony that conditions will not be remedied, we find that such a conclusion could be reasonably inferred from the evidence presented."[184]

The court of appeals in *Myers* was also called upon to interpret the third criterion in the 1981 amendments to the code; what constitutes "reasonable services" to assist a parent in fulfilling his parental obligations.[185] The court stated that "what constitutes 'reasonable services' is one that cannot be answered by a definitive statement. Instead, it must be answered on the basis of any given factual situation, for it is clear that services which might be reasonable in one set of circumstances would not be reasonable in a different set of circumstances."[186]

*Puntney, Myers, Joseph,* and *Miedl* indicate that the courts will adhere to the requirements of the code while retaining a certain flexibility. This approach will allow a case-by-case determination in this sensitive area of termination of parental rights. The fundamental consideration applicable in this area is the best interests of the children involved.

## VI. PATERNITY

### *A. Presumption of Legitimacy*

The code[187] provides that if a child is born while the mother is married, the husband is presumed to be the father.[188] The statutory

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[181]*Id.*

[182]*Id.*

[183]IND. CODE § 31-6-5-4 (Supp. 1981).

[184]417 N.E.2d at 930.

[185]IND. CODE § 31-6-5-4(3) (Supp. 1981). This statute has been superseded by Act of Feb. 25, 1982, Pub. L. No. 183, 1982 Ind. Acts 1350 which is effective September 1, 1982.

[186]417 N.E.2d at 931.

[187]IND. CODE §§ 31-6-6.1-1 to -19 (Supp. 1981).

[188]IND. CODE § 31-6-6.1-9 (Supp. 1981) provides in part that:

(a) A man is presumed to be a child's biological father if:

presumption has been interpreted as merely the codification of the common law as it existed prior to the passage of the code.[189] Although the presumption is rebuttable, Indiana courts have called the presumption of legitimacy "one of the strongest known to the law and may only be rebutted by direct, clear, and convincing evidence."[190]

Since the passage of the code, there have been several cases decided which elucidate the type of evidence which is required to rebut the presumption.[191] In *Tarver v. Dix*,[192] the mother brought a paternity suit to have the defendant, Tarver, adjudicated the father of her child. At the time her child was born, the mother was married to another man. Although her husband lived in the same city, the mother testified she had not seen him for years and at the time of conception she had had sexual intercourse exclusively with Tarver.[193] Evidence was presented that the only men seen entering her apartment during the time of conception were Tarver and her brother. Tarver argued that this evidence did not rebut the presumption of legitimacy because the mother's husband lived in the same city and thus had access to his wife.[194] Past Indiana decisions had held that in order to overcome the presumption it would have to

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(1) he and the child's biological mother are or have been married to each other and the child is born during the marriage or within three hundred (300) days after the marriage is terminated by death, annulment, or dissolution;

(2) he and the child's biological mother attempted to marry each other by a marriage solemnized in apparent compliance with the law, even though the marriage is void . . . or voidable . . . and the child is born during the attempted marriage or within three hundred (300) days after the attempted marriage is terminated by death, annulment, or dissolution; or

(3) after the child's birth, he and the child's biological mother marry, or attempt to marry, each other, by a marriage solemnized in apparent compliance with the law, even though the marriage is void . . . or voidable . . . and he acknowledged his paternity in a writing filed with the registrar of vital statistics of the Indiana state board of health or with a local board of health.

[189]Tarver v. Dix, 421 N.E.2d 693, 696 (Ind. Ct. App. 1981).

[190]H.W.K. v. M.A.G., 426 N.E.2d 129, 131 (Ind. Ct. App. 1981).

[191]H.W.K. v. M.A.G., 426 N.E.2d 129 (Ind. Ct. App. 1981); Tarver v. Dix, 421 N.E.2d 693 (Ind. Ct. App. 1981); Johnson v. Ross, 405 N.E.2d 569 (Ind. Ct. App. 1980).

[192]421 N.E.2d 693 (Ind. Ct. App. 1981).

[193]*Id.* at 694.

[194]*Id.* at 697. The court in *Tarver* cited the case of Phillips v. State *ex rel.* Hathcock, 82 Ind. App. 356, 145 N.E. 895, (1925) which stated that:

[T]he presumption could be overcome by proof that the husband was impotent; or that he was entirely absent so as to have had no access to the mother; or was entirely absent at the time the child in the course of nature must have been begotten; or was present only under such circumstances as to afford clear and satisfactory proof that there was no sexual intercourse.

*Id.* at 360, 145 N.E. at 897.

be shown that the husband did not have access to his wife.[195] Access means physical access to and sexual intercourse with the wife during the time conception occurred. In view of the trial court's findings that the mother had not seen her husband during the time of conception,[196] the *Tarver* court concluded that the legal presumption of legitimacy had been overcome by clear and convincing evidence.

The *Tarver* court placed great emphasis on the fact that there was corroborating evidence to the mother's testimony.[197] However, in *H.W.K. v. M.A.G.*[198] the only testimony presented was by the mother and the alleged father. The court of appeals examined the long stated rule that "statements and admissions made by the parties standing alone are insufficient to rebut the presumption of legitimacy"[199] and found that this rule only applied to cases in which "the husband had access to the mother during the period of conception."[200] In cases where the evidence is uncontradicted that the husband did not have access to or sexual relations with the mother, the court held that the parties' statements standing alone may rebut the presumption of legitimacy.[201] The alleged father then argued that the evidence presented was insufficient to sustain the trial court's determination that he was the father. The court of appeals responded that "[p]aternity actions are civil proceedings and the alleged father must be proved to be such by a preponderance of the evidence."[202]

The code also provides that a man is presumed to be the biological father of the child if "he acknowledges his paternity in writing with the registrar of vital statistics of the Indiana State Board of Health or with a local board of health."[203] The case of *Johnson v. Ross*[204] illustrates the strength of this presumption. In *Johnson* both the mother and the alleged father testified that he was not the father.[205] Furthermore, the alleged father testified that he was out of the country and did not return to the United States

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[195]421 N.E.2d at 696.

[196]*Id.* at 697.

[197]*Id.* at 696.

[198]426 N.E.2d 129 (Ind. Ct. App. 1981).

[199]*Id.* at 132 (citing L.R.F. v. R.A.R., 269 Ind. 97, 378 N.E.2d 855 (1978); Buchanan v. Buchanan, 256 Ind. 199, 267 N.E.2d 155 (1971)).

[200]426 N.E.2d at 132.

[201]*Id.*

[202]*Id.* at 133 (citing Beaman v. Hedrick, 146 Ind. App. 404, 225 N.E.2d 828 (1970)). The court in *H.W.K.* held that the mother's testimony that she had had sexual relations only with the alleged father, coupled with the probability of conception at such time, was sufficient to support the trial court's finding. 426 N.E.2d at 133.

[203]IND. CODE § 31-6-6.1-9(b)(2) (Supp. 1981).

[204]405 N.E.2d 569 (Ind. Ct. App. 1980).

[205]*Id.* at 572.

during the period of conception.[206] However, he failed to testify that the mother did not come to see him during this time.[207] Therefore, the court of appeals refused to reverse the trial court's determination of paternity.[208] This result indicates that the presumption created by this section of the code appears to be nearly irrebuttable.[209]

### *B. Statute of Limitations*

As a general rule, a paternity proceeding must be filed within two years after the child is born.[210] The code, however, provides several exceptions to the two year requirement.[211] One exception is when the alleged father provides support for the child; this support payment extends the statute of limitations until two years after support payments are discontinued.[212] The court of appeals in *H.W.K. v. M.A.G.*[213] placed the burden of showing that support had been furnished within two years of the filing of the paternity proceedings on

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[206]*Id.* at 570 n.2.

[207]*Id.*

[208]*Id.* at 573.

[209]The court in *Johnson* noted that it could not reverse if there was any set of facts or inferences which would sustain the trial court's determination. *Id.* at 572. The court went on to say that the trial court could reasonably infer that the putative father was the biological father from the fact that he had signed the affidavit acknowledging that he was the father. *Id.* at 573.

[210]IND. CODE § 31-6-6.1-6(a) (Supp. 1981).

[211]IND. CODE § 31-6-6.1-6(a) (Supp. 1981) provides in part that:

> Except for an action filed by the state department of public welfare or the county department of public welfare under subsection (c), the mother, a man alleging to be the child's father, the state department of public welfare, or the county department of public welfare must file an action within two (2) years after the child is born, unless: (1) both the mother and the alleged father waive the limitation on actions and file jointly; (2) support has been furnished by the alleged father or by a person acting on his behalf, either voluntarily, or under an agreement with: (A) the mother; (B) a person acting on the mother's behalf; or (C) a person acting on the child's behalf; (3) the mother, the state department of public welfare, or the county department of public welfare, files a petition after the alleged father has acknowledged in writing that he is the child's biological father; (4) the alleged father files a petition after the mother has acknowledged in writing that he is the child's biological father; (5) the petitioner was incompetent at the time the child was born; or (6) a responding party cannot be served with summons during the two (2) year period. A petition must be filed within two (2) years after any of the above conditions ceases to exist.

[212]IND. CODE § 31-6-6.1-6(a)(2) (Supp. 1981). *But cf.* Mills v. Harbluetzel, 102 S. Ct. 1549, 1557-58 (1982) (O'Connor, J., concurring) (implicitly questioning the constitutionality of such a provision).

[213]426 N.E.2d 129 (Ind. Ct. App. 1981).

the party who seeks the advantage of this exception.[214] Apparently, the alleged father must provide little support in order to fall within this exception. In *H.W.K.*, the burden was sustained by a showing that the father had furnished forty dollars for the child's support and had purchased various items of clothing.[215]

### *C. Support*

After the trial court finds that the "man is the child's biological father, the court shall . . . conduct a hearing to determine the issues of support, custody, and visitation."[216] The court of appeals in *Tarver v. Dix*[217] found that the trial court committed reversible error by failing to conduct such a hearing.[218] Absent a hearing, the trial court judge could not have determined properly the amount of support the father should provide.[219]

The court of appeals in *Tarver* found that the trial court acted improperly by imposing upon Tarver a one year suspended sentence and probation for failure to secure bond to guarantee performance of the support obligation.[220] Although the code provides that the trial court can require the posting of a bond,[221] it does not authorize probation or a jail sentence for failure to comply. The proper procedure for the trial court to enforce its order for a bond is for the judge to utilize his contempt power.[222]

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[214]*Id.* at 133.

[215]*Id.* at 135.

[216]IND. CODE § 31-6-6.1-10(a) (Supp. 1981).

[217]421 N.E.2d 693 (Ind. Ct. App. 1981).

[218]*Id.* at 698.

[219]*Id.* IND. CODE § 31-6-6.1-13(a) (Supp. 1981) provides in part that:

> The court may order either or both parents to pay any reasonable amount for child support after considering all relevant factors, including the following: (1) the financial resources of the custodial parent; (2) the standard of living the child would have enjoyed had the parents been married and remained married to each other; (3) the physical and mental condition of the child and his educational needs; and (4) the financial resources and needs of the noncustodial parent.

[220]421 N.E.2d at 698.

[221]IND. CODE § 31-6-6.1-14 (Supp. 1981) provides: "The court may require that the parent obligated to make support payments provide appropriate security, bond, or other guarantee to insure that he will fulfill his obligation." The prior statute, IND. CODE § 31-4-1-22 (1971) (repealed 1978), provided in part:

> On failure to furnish such bond the court may commit the father to jail for not more than one (1) year. . . . Instead of committing the father to jail, or as a condition of his release therefrom, the court may commit him to a probation officer, upon such terms and conditions regarding payments and personal reports as the court may direct.

[222]421 N.E.2d at 698.

### *D. Change of Name*

The court of appeals in *D.R.S. v. R.S.H.*[223] was presented with the issue of whether a child's surname could be changed in a paternity proceeding against the wishes of one of the parents.[224] In a split decision, the majority opinion held that in cases where the "natural father acknowledges and supports his child born out of wedlock, takes an interest in the child's welfare, and is not guilty of such wrongdoing as would render retention of his name positively deleterious to the child" the trial court judge would not abuse his discretion by giving the child his father's surname.[225] Both the concurrence[226] and the dissent[227] in *D.R.S.*, however, stated that the standard for this issue should be the best interests of the child.

The best interests of the child standard was applied in *J.L.A. v. T.B.S.*[228] The court of appeals in *J.L.A.* recognized that the trial court judge had "the power to order the surname of an illegitimate child changed, however, to do so the court must determine such a change is in the best interest of the child."[229] In *J.L.A.*, the trial court judge had said that the general rule is that if the father pays support, the surname of the child will be changed "to that of the father in the absence of good reasons shown to the contrary."[230] The court of appeals reversed and remanded the case to the trial court, stating that the correct standard would be "whether the change is in the best interest of the child."[231] The majority listed several factors which will help determine what is in the best interest of the child. First, the name by which the child is currently known; second, the convenience of keeping or changing the child's name; third, whether the child owns property, and if so, under what name the property is held; fourth, whether any confusion would result if the child's name were to be changed; and finally, if the child is old enough to offer a reasoned preference, the name the child desires.[232]

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[223]412 N.E.2d 1257 (Ind. Ct. App. 1980).

[224]For a discussion of the case, see Rhine & Weinheimer, *Domestic Relations, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 203, 222-23 (1982).

[225]412 N.E.2d at 1266. The majority emphasized that the father has a significant "interest in having his child bear the paternal surname in accordance with tradition." *Id.* at 1263. Also, if the child bears his mother's maiden name, then there is a "fair indication that the child is illegitimate." *Id.* (quoting Petition of Harris, 236 S.W.2d 426, 429 (W. Va. 1977)).

[226]412 N.E.2d at 1266-67 (Sullivan, J., concurring).

[227]*Id.* at 1267 (Shields, J., dissenting).

[228]430 N.E.2d 433 (Ind. Ct. App. 1982).

[229]*Id.*

[230]*Id.* at 434.

[231]*Id.*

[232]*Id.* n.3.

## VII. Procedure in Juvenile Court

The juvenile code of 1978 altered several important aspects of Indiana juvenile law procedure. The procedure sections of the new code are in sections 31-6-7-1 to -17[233] of the Indiana Code and contain provisions affecting a wide range of juvenile procedural rights. While there have been several articles dealing with the revisions in the juvenile code,[234] the focus of this section will be on several recent Indiana court cases interpreting the new code provisions.

In the area of procedure, two major concerns have emerged from recent court interpretations of the new code. There is first the standard of proof for juvenile acts. While the "beyond a reasonable doubt" standard has been maintained for proof "that a child committed a delinquent act, or that an adult committed a crime,"[235] all other offenses need only meet a "preponderance of the evidence" test.[236] This judicial construction concerning burden of proof has been questioned in light of *In re Winship*,[237] and *In re Gault*,[238] the two major United States Supreme Court decisions affecting juvenile rights.

The second major concern involving the procedure sections of the new code regards waiver of rights in a criminal setting. The code establishes a new, strict formula that must be met before admissions of a juvenile defendant may be used against him. The new code requires an intelligent waiver by the child's parent, guardian, or attorney.[239] The child also must knowingly and voluntarily waive his rights guaranteed by law.[240] Two major decisions have been handed down in this area interpreting the correct procedure for the state to obtain admissions of a juvenile defendant.[241]

### *A. Burden of Proof*

The new Indiana Code section dealing with burdens of proof in juvenile matters states: "A finding by a juvenile court that a child committed a delinquent act, or that an adult committed a crime, must be based upon proof beyond a reasonable doubt. Any other

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[233]Ind. Code §§ 31-6-7-1 to -17 (Supp. 1981).

[234]*See* Kerr, *Foreword: Indiana's New Juvenile Code*, 12 Ind. L. Rev. 1 (1979); Kiefer, *This Code is Rated "R"—Second-Class Citizenship Under Indiana's New Juvenile Code*, 54 Ind. L.J. 621 (1979).

[235]Ind. Code § 31-6-7-13(a) (Supp. 1981).

[236]*Id.*

[237]397 U.S. 358 (1970).

[238]387 U.S. 1 (1967).

[239]Ind. Code § 31-6-7-3 (Supp. 1981).

[240]*Id.*

[241]Deckard v. State, 425 N.E.2d 256 (Ind. Ct. App. 1981); Adams v. State, 411 N.E.2d 160 (Ind. Ct. App. 1980).

finding must be based upon a preponderance of the evidence."[242] This codification of the requisite burdens was seen as potentially conflicting with the standard mandated by the Indiana Supreme Court.[243] The court in *Warner v. State*[244] expressly stated that the "beyond a reasonable doubt" standard only applied in situations in which the act committed by the juvenile could be tried as a crime if the act was committed by an adult. The court reasoned that "[t]he application of this standard [reasonable doubt] in the determination of delinquency . . . is patently impractical, and we believe that it would seriously interfere with the juvenile court's effectiveness in carrying out its purposes."[245] Though the court's decision in *Warner* has been criticized as evading the real issue of legislative authority,[246] a recent Indiana Court of Appeals decision has confirmed the legislature's power in this area. In the case of *Puntney v. Puntney*,[247] the court held that the legislature has the ability to set out standards of proof as a procedural matter. It stated that because burdens of proof in civil matters are of common law origin, the legislature may vary the standard of proof necessary to carry the argument.[248]

> It is true that in some cases . . . the courts have developed a higher intermediate standard of proof. That rule does not appear to have a constitutional basis, but rather, seems to have been founded in the common law. Therefore, at the will of the legislature, it can be changed, as was done.[249]

Because the court failed to question the validity of the change in the standard of proof pursuant to the supreme court decision in *Warner*,[250] the legislative standard of proof will be used by the courts in future proceedings.

### *B. Waiver*

The provision in the code that allows a juvenile to waive rights guaranteed by the United States Constitution, the Indiana Constitution, and all other applicable statutes has caused the greatest controversy in the procedural sections of the code. The waiver provision of the code states in part:

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[242]IND. CODE § 31-6-7-13(a) (Supp. 1981).
[243]*See* Kerr, *supra* note 49, at 26.
[244]254 Ind. 209, 258 N.E.2d 860 (1970).
[245]*Id.* at 214, 258 N.E.2d at 864-65.
[246]*See* Kerr, *supra* note 49, at 23.
[247]420 N.E.2d 1283 (Ind. Ct. App. 1981).
[248]*Id.* at 1286.
[249]*Id.*
[250]254 Ind. 209, 258 N.E.2d 860 (1970).

> (a) Any rights guaranteed to the child under the Constitution of the United States, the Constitution of Indiana, or any other law may be waived only:
> (1) by counsel retained or appointed to represent the child, if the child knowingly and voluntarily joins with the waiver; or
> (2) by the child's custodial parent, guardian, custodian, or guardian ad litem if:
> (A) that person knowingly and voluntarily waives the right;
> (B) that person has no interest adverse to the child;
> (C) meaningful consultation has occurred between that person and the child; and
> (D) the child knowingly and voluntarily joins with the waiver.[251]

The waiver provision of the code arises out of the Indiana Supreme Court case of *Lewis v. State*.[252] In *Lewis*, the court noted the absence of a valid method for determining whether a juvenile had been adequately informed of his rights prior to a waiver.[253] The court set out a very specific test in order to assure that juveniles made a fair and knowing waiver of their rights:

> [A] juvenile's statement or confession cannot be used against him at a subsequent trial or hearing unless both he and his parents or guardian were informed of his rights to an attorney, and to remain silent. Furthermore, the child must be given an opportunity to consult with his parents, guardian or an attorney representing the juvenile as to whether or not he wishes to waive those rights. After such consultation the child may waive his rights if he so chooses provided of course that there are no elements of coercion, force or inducement present.[254]

The juvenile code attempted to incorporate nearly all of the provisions in *Lewis* but added a section that has been the cause of two recent Indiana court cases. Specifically, the legislature, instead of putting the parents in a consulting role regarding the child's waiver, placed the emphasis of the waiver on the parents by allowing them an absolute veto to a voluntary waiver of the child's rights.

In *Deckard v. State*,[255] the Indiana Court of Appeals held that there must be strict compliance with the waiver provisions of the new code. The code provides that a juvenile's rights may be waived

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[251] IND. CODE § 31-6-7-3(a) (Supp. 1981).
[252] 259 Ind. 431, 288 N.E.2d 138 (1972).
[253] *Id.* at 436, 288 N.E.2d at 141.
[254] *Id.* at 439, 288 N.E.2d at 142.
[255] 425 N.E.2d 256 (Ind. Ct. App. 1981).

by a parent or guardian but does not authorize a minor to waive his own rights.[256] Although Deckard's mother was with him when he allegedly waived his fourth amendment rights, the subsequent search and seizure by police was held to be invalid because the mother had not signed any document purporting to have waived the child's rights. The court held that because the letter of the law was not met,[257] the incriminating evidence could not be admitted.[258] This decision appears to indicate the court's unwillingness to accept a waiver argument based solely on the fact that there was an opportunity for meaningful counsel.

In another recent case, the court of appeals dealt with a waiver by default when a minor, charged with a crime, requested counsel and was denied appointment of an attorney because of his parents' ability to pay. In *Adams v. State*,[259] the court ruled that the state's failure to provide an attorney in the matter constituted an illegal waiver of the child's right to counsel and the conviction was therefore reversed.[260] While the state in *Adams* contended that the juvenile had constructively waived his right to an attorney because the mother could afford counsel and therefore the state need not supply an attorney, the court found that the "waiver" was invalid under the statute and reversed the conviction. "If the juvenile court determines that the child is without an attorney and the child has not waived his right to counsel, the court must appoint counsel to represent the child."[261] The court in *Adams* again upheld the stringent waiver standards of the code and rejected the theory that a constructive waiver of rights may be made.

A review of the recent decisions in the area of juvenile procedure under the new code would suggest that Indiana courts are willing to follow the strict mandates set out by the Indiana legislature. Both *Deckard*[262] and *Adams*[263] show that the court of appeals will strictly construe the new waiver statute so as to provide an effective and meaningful limitation on juvenile waiver of rights. *Puntney*[264] clearly indicates that the court is willing to use the standards of proof set out in the code provisions. In the area of juvenile procedure, Indiana cases since the enactment of the code have upheld both the meaning and the spirit of the statute.

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[256] *Id.* at 257.
[257] *Id.*
[258] *Id.*
[259] 411 N.E.2d 160 (Ind. Ct. App. 1980).
[260] *Id.* at 163.
[261] *Id.* at 162.
[262] 425 N.E.2d at 256.
[263] 411 N.E.2d at 160.
[264] 420 N.E.2d at 1283.

## VIII. CONCLUSION

Since its enactment in 1978, the juvenile code has undergone various revisions by the legislature and interpretation by the courts. Both branches of the state government, however, have adhered to the general purposes espoused by the 1978 code in ensuring that the "best interests" of the child are preserved. Major refinements include clarifying the definition of a child in need of services, establishing a standard for termination of the parent-child relationship, determining the type of evidence necessary to rebut the presumption of paternity, and defining the type of waiver acceptable for later court proceedings. Although further interpretations and refinements may be necessary to make the code a complete juvenile justice plan,[265] the clarifications made by the legislature and courts to date have upheld the meaning and spirit envisioned for the new juvenile code.

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[265]*See* Kerr, *supra* note 49, at 29.