

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

DOCKET NO. SJC - 09391

IN RE: CHINS PETITION OF D.G.

ON DIRECT APPELLATE REVIEW

BRIEF OF AMICI CURIAE

COMMITTEE FOR PUBLIC COUNSEL SERVICES,
NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, and
CHILDREN'S LAW CENTER OF MASSACHUSETTS

Impounded

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Issues Presented

I. The CHINS statute requires the court to hold a hearing and issue findings before extending an initial CHINS order. Courts cannot make findings unless they take evidence at the hearing to support such findings. Does the statute therefore require that the court take evidence before extending a CHINS order?

II. A CHINS proceeding is an adversarial action brought by a petitioner against a child. A court order in a CHINS proceeding expires after six months unless the court makes affirmative findings that the order should be extended. Should the party seeking extension of the order bear the burden of proving the facts needed to justify the extension?

III. The statute provides that a court may not extend a CHINS order for an additional six months unless it finds that the "purpose of the order has not been achieved." The purpose of a CHINS truancy order is to ensure that a child attends school. Once a child's school attendance has improved, and she is no longer "in need of services," should the court nevertheless extend the CHINS order?

IV. The petitioner must prove the elements of a CHINS status offense "beyond a reasonable doubt." At each six-month readjudication hearing the court has the same dispositional alternatives - remain at home, custody to DSS, custody to a third person - which it has at the initial adjudication. Should the standard of proof at such readjudication hearing therefore be the same as it is at the initial adjudication hearing?

Statement of Amici

The Committee for Public Counsel Services, the National Association of Counsel for Children and the Children's Law Center of Massachusetts have filed a joint motion for leave to file this *amici curiae* brief. The *amici's* interests in this matter are set forth in that motion.

Statement of the Case

The *Amici* adopt the statement of facts of the child.

Summary of the Argument

Section 39G of chapter 119 provides that an order in a CHINS case may not continue in force for more than six months. To extend it beyond six months, the court must hold a hearing and make findings. Because the findings must be supported by evidence, the six-month readjudication hearing required by 39G must be an evidentiary hearing. The Court must not take evidence in an unfair or "whimsical" manner. The plain language of chapter 119, due process and fundamental fairness require

that the court take evidence in accordance with the common law and statutory rules of evidence at all CHINS hearings. (See pages 11 - 23 below).

The purpose of the CHINS statute is to provide help to a child so that the child will change certain problematic behaviors that are defined as status offenses. In truancy cases, for example, a truant child would be expected to resume regular attendance at school. CHINS orders are not permanent. They expire after six months unless the court makes affirmative findings that extension of the order is justified. Someone must bear the burden of proving that the extension is necessary. The only parties to a CHINS case are the petitioner and the child. The child cannot be made to show that the extension is necessary. Therefore, at readjudication hearings the petitioner must bear the burden of proving that the purpose of the CHINS order has not been accomplished. (See pages 23 - 30 below).

In determining whether the purposes of the CHINS order have been accomplished such that the child is no longer a "child in need of services," the court must reapply the objective criteria of

the definitions section of the CHINS law. A CHINS order may be extended if the child's problematic behaviors that provided the basis for the initial CHINS adjudication have not improved. However, if the child's behaviors have improved and he or she is no longer "in need of services," then the court should dismiss the petition. (See pages 30 - 34 below).

The Legislature established strong due process protections when it wrote the CHINS statute in 1973. It gave children rights to a jury trial, a *de novo* appeal to a jury, and to counsel at all hearings. Additionally, the CHINS statute provides that a child must be proven in need of services "beyond a reasonable doubt." The heightened protections, including the "beyond a reasonable doubt" standard, reflect the Legislature's awareness of the importance of the substantive rights at risk in CHINS cases. The dispositional options available to the court after a six-month hearing, including entering an order committing a child to DSS custody, are identical to the options available at the initial hearing. Maintaining the "beyond a reasonable doubt" standard at the six-

month readjudication hearing strikes the proper balance among the competing interests of the State and the child at stake at every CHINS hearing.

(See pages 34 - 37 below).

Argument

Introduction

In 1973, Massachusetts enacted the "child in need of services" (CHINS) statute. St. 1973, c. 1073. It was the intent of the Legislature to decriminalized truancy and other "status" offenses and to provide services to children who were status offenders instead of punishment or incarceration.¹

See Roderick Ireland, 44 Massachusetts Practice, Juvenile Law, ch. 4, "Children in Need of Services," § 142 "Statutory Background," (West 1993 & supp. 2004).

The CHINS statute authorizes court intervention into private family life when a child exhibits certain defined, undesirable behaviors. G.L. c.

¹ For information about this reform movement, see Julie Zatz, "Problems and Issues in Deinstitutionalization: Historic Overview and Current Attitudes," in Neither Angels nor Thieves: Studies in Deinstitutionalization of Status Offenders 19, 27-29, 31 and 36 (Joel Handler and Julie Zatz, eds., National Academy Press 1982); Hon. Irving R. Kaufman, "Introduction," in Standards Relating to Noncriminal Misbehavior 5-12 Institute of Judicial Administration, American Bar Association, Juvenile Justice Project, Chair, Ballinger Publishing Company, Cambridge, Massachusetts (1982).

119, §§ 21, 39E-I. Section 21, the definition section of the CHINS statute, spells out the elements that must be proved in a CHINS case before a court may find that a child is "in need of services." A child "in need of services" is a:

- Child under 17 who persistently runs away from home;
- Child under 17 who persistently refuses to obey the lawful and reasonable commands of his parent;
- Child between the ages of 6-16 who persistently and willfully fails to attend school; or
- Child between the ages of 6-16 who persistently violates lawful and reasonable school regulations.

G.L. c. 119, § 21. These behaviors are sometimes referred to as the four status offenses:

"runaways," "stubborns," "truants," and "school offenders." See Commonwealth v. Florence F., 429 Mass. 523, 527 (1999); Ireland, "Types of Behaviors Which May Be Basis for CHINS Jurisdiction," Massachusetts Practice, Juvenile Law § 143 (West 1993 & Supp. 2004).

The statute defines the individuals who have standing to apply for a CHINS petition ("petitioners"). Only supervisors of school attendance may initiate truancy and school offender cases. Only the child's parent, guardian or the

police may file stubborn and runaway cases. G.L. c. 119, § 39E.

In most cases, after the petitioner files an application for a CHINS petition, a probation officer "informally" assists the child and his or her parents. G.L. c. 119, § 39E. If informal assistance is unsuccessful at changing the child's behaviors, the court holds a probable cause hearing to determine whether to issue the CHINS petition. Id. If the petition issues, the court schedules a hearing on the merits, and issues a summons for the child and his or her parents to attend. Id.

The CHINS statute provides a number of extraordinary procedural safeguards that are unusual for a civil proceeding. It gives the child the right to counsel at all hearings. G.L. c. 119, § 39F. It gives a child the right to a trial "by a jury of six, unless the child files a written waiver." G.L. c. 119, § 39E. If the child waives that right and chooses to have a judge as fact-finder in the first instance, he or she has the right to a *de novo* appeal to a jury of six. Id. Finally, the petitioner must prove the statutory elements of the applicable status offense and

persuade the fact-finder that child is "a child in need of services" beyond a reasonable doubt. G.L. c. 119, § 39G, par. 1.

If the petitioner succeeds, the court has the basis "to adjudge" the child to be "a child in need of services." Id. The statute gives the court specific, time-limited dispositional options. It may permit the child to remain at home but impose conditions. Or, it may transfer a child's care to a qualified adult or agency. Or, it may commit the child to the custody of the Department of Social Services ("DSS"). Id.; In the Matter of Vincent, 408 Mass. 527, 531 (1990).² The court may order DSS to place the child out of his or her home. G.L. c. 119, § 39G.

² There is a common misunderstanding that custody given to DSS in a CHINS cases under G.L. c. 119, § 39G is somehow less intrusive on fundamental rights than custody given to DSS in care and protection cases under G.L. c. 119, § 26. However, this Court has held that under G.L. c. 119 the custody DSS receives in a CHINS case is the legal equivalent of the custody it receives in a care and protection case. See D.L. v. Commissioner of Dept. of Social Services, 412 Mass. 558, 565 (1992). The only difference is that DSS "relegates back" to parents the authority to make extraordinary medical care decisions for CHINS children in its custody. (110 C.M.R. § 11.02).

Section 21 of chapter 119 lists the custodial powers included within the definition of custody that are removed from the parent and given to the state when there is an order of commitment. When a child is committed to DSS's custody, it has the authority:

- "to determine the child's place of abode, medical care and education;"
- "to control visits to the child;" and
- "to consent to enlistments marriages and other contracts otherwise requiring parental consent."

G.L. c. 119, § 21.

This Court has consistently limited the grant of Juvenile Court authority in CHINS matters to the plain language of the statute, rejecting any judicial orders not expressly authorized by law.

See Oscar F. v. County of Worcester, 412 Mass. 38, 40-41 (1992) (no authority to order school to provide services); Vincent, 408 Mass. at 530-532 (no authority to order child to attend school); Florence, 429 Mass. at 525-526 & n.4 (no authority to issue order directly to child or hold child in contempt).

By the express terms of the statute, no CHINS order may remain in force for more than six months. Section 39G provides that:

[a]ny order of disposition pursuant to this section shall continue in force for not more than six months; provided, however, that the court which entered the order may, after a hearing, extend its duration for additional periods, each such period not to exceed six months if the court finds that the purposes of the order have not been accomplished and that such extension would be reasonably likely to further those purposes.

G.L. c. 119, § 39G, par. 3 (emphasis added). No CHINS order may continue after a child turns eighteen if the child is a "stubborn child" or "runaway." No "truant" or "school offender" CHINS order may continue after a child is sixteen. G.L. c. 119, § 39G, par. 4.

I. The CHINS statute requires courts to hold an evidentiary hearing before a judge may extend a CHINS order.

A. The plain language of the CHINS statute requires the court to have a "hearing" prior to readjudicating the child.

The court can only extend a CHINS order "after a hearing." G.L. c. 119, § 39G, par. 3. Juvenile Courts call these six-month extension hearings

“readjudication” hearings.³ A readjudication hearing is an opportunity for the petitioner to attempt to show the CHINS order has not accomplished its purpose and should be extended. It is also the opportunity for the respondent child to oppose the petitioner’s effort to extend a CHINS order. To determine what procedural protections attach to readjudication hearings, this Court must look “first to the language of the CHINS statute.” Florence, 429 Mass. at 526.

B. CHINS readjudication hearings must be evidentiary hearings where the child has the right to present evidence and cross-examine witnesses.

That readjudication hearings must be evidentiary is plain from the statute. The court can only extend the CHINS order if it makes findings that the “purposes of the [initial] order have not been accomplished,” and that an “extension would be reasonably likely to further those purposes.” G.L. c. 119, § 39G, par. 3. A court cannot make the statutory findings that are the

³ The Juvenile Court below used this term. (A. 7, 8, 29).

preconditions for extending an order unless it has evidence to support those findings.⁴ See Custody of Eleanor, 414 Mass. 795, 799 (1993) (a finding that has no evidence to support it is clearly erroneous) and Commonwealth v. DeBella, 442 Mass. 683, 689 (2004) (a finding must not "simply repeat the wording of the statute," it must be "based on supporting evidence").

Moreover, in one of the few cases this Court has decided involving the CHINS statute, the readjudication hearing for a runaway child was evidentiary. See In the Matter of Gail, 417 Mass. 321 (1994). During Gail's readjudication hearing, the Juvenile Court heard testimony and took evidence. Id. at 323. "A representative from the department [of social services] and a probation officer were called to testify. A report of the court appointed special advocate was entered into evidence." Id. Based on this evidence, the judge made detailed and specific subsidiary findings

⁴ The child does not claim that she has a right to have a jury as a fact-finder at a readjudication hearing. The statute expressly provides that "the court" will hold the hearing and "the court" will make the findings. G.L. c. 119, § 39G, par. 3.

about the runaway child's recent runs from her home and DSS placements. The judge "ruled that Gail was still in need of services." Id. The judge concluded, in accordance with the statute, that "the purposes of the CHINS petition had not yet been accomplished," and she continued the child's commitment to DSS for an additional six-month period.⁵ Id.

C. Chapter 119 requires that the rules of evidence be followed in all CHINS hearings, including readjudication hearings.

The Legislature specified the manner of taking evidence in CHINS proceedings. Section 21 of chapter 119, entitled "Definitions applicable to §§ 22 to 51," applies to all § 39G CHINS hearings, including the initial hearing on the merits and readjudication hearings. "Evidence," according to § 21, "shall be admissible according to the rules of the common law and the General Laws[.]" Thus, a plain reading of the statute requires courts to

⁵ The Juvenile Court judge below somehow misread Gail for the proposition that there should only be one evidentiary hearing -- the initial hearing on the merits -- in CHINS cases. (A. 9).

follow the rules of evidence during CHINS readjudication hearings.⁶

Chapter 119, read as a whole, supports the conclusion that courts must follow the common law and statutory rules of evidence in CHINS hearings. Section 29D of chapter 119 gives foster parents the right to notice and an opportunity to be heard in CHINS hearings concerning children in their care.⁷ This Court has interpreted § 29D to mean that a foster parent's right to be heard means to be heard in accordance with the rules of evidence. In Adoption of Sherry, 435 Mass. 331, 338 (2001) this Court held that § 29D does not give foster parents

⁶ While, in some other civil hearings, the rules of evidence "need not be followed" in the taking of evidence, there must be "fairness in what evidence is admitted and relied on." Frizado v. Frizado, 420 Mass. 592, 597, 598 (1995) ("The Legislature devised a procedure in G.L. 209A that is intended to be expeditious and as comfortable as it reasonably can be ... for a lay person to pursue"). CHINS hearings are different from 209A hearings in one significant respect. The abuse prevention statute does not require that the rules of evidence be followed. The CHINS statute - in particular G.L. c. 119, § 21 - does. Hearings to extend CHINS orders can thus be distinguished from hearings to extend abuse prevention orders.

⁷ Foster parents have also this right in care and protection hearings under G.L. c. 119, § 26 and permanency hearings under G.L. c. 119, § 29B.

"the right to submit information . . . unconstrained by the usual evidentiary rules (i.e., relevance, personal knowledge, oath or affirmation and cross-examination)." Id. Rather, "[t]he rules of evidence stand guard to ensure that only relevant, reliable, noninflammatory considerations may shape fact finding."⁸ Requiring application of the rules of evidence ensures that children are not labeled as "status offenders" and removed from their homes based on the ill feelings or personal biases of judges, probation officers, DSS social workers, or others. See id. ("Without the[] rules [of evidence], there would be nothing to prevent trials from being resolved on whim, personal affections or prejudice.")

D. Due process requires an evidentiary hearing before courts may extend an order that impinges on a child's liberty interests.

It is well established that parents have due process rights to family integrity protected by

⁸ The Amici note, for example, the inflammatory remarks about D.G.'s sister at the end of the findings issued on March 26, 2004. (A. 10-11). Such information was not before the court and would have been inadmissible as irrelevant in D.G.'s CHINS case had the rules of evidence been followed.

both the Fourteenth Amendment to the Federal Constitution and articles 1, 10 and 12 of the Massachusetts Declaration of Rights. See Troxel v. Granville, 530 U.S. 57, 66 (2000); Blixt v. Blixt, 437 Mass. 649, 655 (2002). "'The rights to conceive and to raise one's children' are 'essential . . . basic civil rights of man . . . far more precious . . . than property rights.'"

Department of Pub. Welfare v. J.K.B., 379 Mass. 1, 3 (1979) (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972)). Equally fundamental is the substantive due process right of a child to be raised and nurtured by his parents. See Care and Protection of Manuel, 428 Mass. 527, 535 (1998) (children have "vital interests at stake" in child welfare proceedings); Gail, 417 Mass. at 327 (children have a fundamental interest in the parent-child relationship).

Before the State may deprive a parent of the custody of a child, or deprive a child of his or her parent, "the requirements of due process must be met." See J.K.B., 379 Mass. at 3-4. CHINS cases may result in the child being committed to DSS's custody, removed from his or her home and

deprived of his or her parents for months, even years. This deprivation may occur after the initial CHINS adjudication hearing, or, as was the case here, at a subsequent readjudication hearing. (A. 1, 2, 5). Accordingly, children must be afforded due process protections at all stages of CHINS proceedings.

Due process requires notice and the opportunity to be heard at a meaningful time and in a meaningful manner. See Manuel, 428 Mass. at 535. CHINS orders affect children's fundamental rights. A child's right to be heard in a meaningful manner requires that the child be permitted to challenge and present evidence relevant to that child's alleged status offense at all hearings where the court order may deprive the child of rights.

The child in this case requested an evidentiary hearing, but was denied one by the Juvenile Court. (A. 31). Instead, the court took information in a "whimsical," unfair manner at the readjudication hearing. Cf. Sherry, 435 Mass. at 338. There were no witnesses examined and no exhibits entered into evidence. (A. 26). Rather, the Juvenile Court "received reports from Juvenile Probation and the

Department's two workers" over the child's objections. (A. 7). No one called the DSS worker and probation officer to testify. They were not put under oath. The court simply invited them to speak. (A. 27, 29).

The child was denied any opportunity to cross-examine individuals who gave the court information adverse to her position that she was no longer a child in need of services. (A. 31-33). Cf.

Sherry, 435 Mass. at 338 n. 6 (parties have a right to cross-examine a foster parent who wishes to be heard even if the foster parent is not called by anyone on direct); Care and Protection of Rebecca, 419 Mass. 67, 79 (1994) (sexual abuse hearsay statute satisfies due process in part because person to whom child's statement was made must be subject to cross-examination). The court denied her a meaningful opportunity to be heard.

The child's right to be meaningfully heard on the question of extending the CHINS order includes not just the right to cross-examine adverse witnesses, but also the right to present his or her own evidence. See C.O. v. M.M., 442 Mass. 648, 656 (2004) (holding that there was "no question that the

defendant was denied a meaningful opportunity to be heard" when he was denied opportunity to present evidence at hearing to extend abuse prevention order).

If the child opposes an order placing him or her in DSS's custody, or an order extending his or her placement in DSS's custody (as the child did in this case), the child should be entitled, through cross-examination and the presentation of credible evidence, to rebut any adverse allegations. Here, the child contested that she was still a truant "in need of services." She opposed the extension of the order making her live in a foster home. (A. 7). Child's counsel argued that D.G. had a right to "her day in court" and that she wanted "an evidentiary hearing." (A. 30). The court denied that request. (A. 8, 9).

Child's counsel was permitted to argue. He asked for the case to be dismissed. (A. 30). In support he pointed out, "There hasn't been any evidence that she continues to be a child in need of services." (A. 33). However, allowing defense counsel to make arguments is not the functional equivalent of an evidentiary hearing. As this

Court acknowledged in C.O v. M.M., "[t]he fact that defense counsel was permitted to argue on behalf of his client does not substitute for the opportunity to present evidence through the testimony of witnesses, to cross-examine adverse witnesses, and to have the judge take this testimony and cross-examination into account in making his findings."

442 Mass. at 657; cf. Adoption of Helen, 429 Mass. 856, 863 (1999) (judge should not have relied on attorney's oral proffers for his findings because the proffers were not admitted in evidence).

Readjudication hearings pursuant to G.L. c. 119, § 39G may -- and, in this case, did -- have a serious impact on the child's liberty interest in family integrity. Due process therefore requires that judges take evidence in accordance with the rules during a hearing to extend a CHINS order.

A holding by this Court requiring Juvenile Courts to take evidence at CHINS readjudication hearings would have little or no impact on CHINS cases. Most courts already observe the rules of evidence when there are contested issues at a CHINS hearing.

A holding that the child has no right to an evidentiary hearing, on the other hand, would have extraordinary ramifications. At the outset of a CHINS case children often do not put on a defense to the petitioner's allegation that they have committed a status offense. Many children do what the child in this case did -- they admit to sufficient facts of the status offense involved, giving the court evidentiary support for a finding that they are "in need of services." (A. 4). There is a printed Juvenile Court form specifically for CHINS trial waivers and stipulations. (A. 39). In Fiscal Year 2003 Juvenile Courts issued 5,467 CHINS petitions. Only 17 requests for jury trials were made in CHINS cases. See <<http://www.mass.gov/courtsandjudges/courts/juvenilecourt/2003stats.html>>. According to the Juvenile Court, requests for *de novo* jury trials are "exceedingly rare." Jay Blitzman, et al., Massachusetts Juvenile Court Bench Book, II-21 (MCLE 2003).

If, at the six-month readjudication hearing, the court need not give the child a meaningful opportunity to demonstrate that the CHINS case should be dismissed, then the child's sole

opportunity for an evidentiary hearing will be the initial hearing on the merits. If that is the case, the initial adjudication will take on heightened legal significance. The current statistics will likely reverse. More children will contest initial hearings. Requests for jury trials and *de novo* appeals will increase. Stipulations will be the exception.

II. The petitioner must bear the burden of proving the necessity for extending a CHINS order.

A CHINS order cannot continue in effect for more than six months without a hearing and specific findings by the court. G.L. c. 119, § 39G, par. 3. This means that someone must prosecute the case and present evidence against the child sufficient for the court to make the required findings.⁹ There are only two parties to a CHINS proceeding, the child

⁹ The statute limited the categories of persons who can act as petitioner and "prosecute" the case. G.L. c. 119, § 39E. In truancy cases, the petitioner is the superintendent of attendance. G.L. c. 119, § 39E. Here the court substituted a new supervisor of attendance for the initial petitioner when D.G. changed schools. (A. 6).

and the petitioner.¹⁰ The proceeding is an adversarial proceeding, that is, "an action *against* a child." Jay Blitzman, *et al.*, Massachusetts Juvenile Court Bench Book, II-2 (MCLE 2003).

The statute is not worded in a way that requires the child to prove he or she is no longer a "child in need of services" in order to have the case dismissed. Rather, the statute requires affirmative findings that the child is still "in need of services" in order to continue the order. Evidence supporting such finding cannot come from the child. At a readjudication hearing, such evidence can only come from the one who seeks an extension of the CHINS order. In other words, the petitioner must bear the burden of proving facts that justify an extension of the CHINS order.

In this case, no petitioner appeared at the hearing to seek an extension of the order.

According to the Juvenile Court, "[m]issing was anyone from the Mashpee Schools, including the

¹⁰ In CHINS cases DSS is not a party. See 110 C.M.R. § 4.67. If the Juvenile Court had substituted DSS for the initial petitioner, then the parents would have had the right to counsel. G.L. c. 119, § 29 (parent is entitled to counsel in any proceeding regarding child custody where DSS is a party).

substituted petitioner, Mr. Babbitt." (A. 7). The court admitted, "the petitioner kind of walked away." (A. 32). Nevertheless, without a "prosecuting party," the judge proceeded with the readjudication hearing, continued the order committing the child to DSS's custody and ordered out-of-home placement for another six months. (A. 36).

By statute, a time-limited CHINS order expires unless a petitioner seeks its extension. In this regard, the CHINS statute is analogous to statutes governing other civil proceedings involving time-limited court orders. In civil commitment cases, for example, individuals lose their liberty when courts order the state to confine them at a mental health facility for treatment. Such orders of confinement may last only six months, unless, like CHINS orders, they are renewed after a hearing. G.L. c. 123, §§ 15(e) & 8(d). At the renewal hearing, the mental health facility seeking the commitment bears the burden of showing why the court should continue the order. G.L. c. 123,

§ 8(d). If the petitioner cannot justify continuation of the order, or fails to appear, the commitment order ceases. Thompson v. Commonwealth, 386 Mass. 811, 816 (1982) ("[O]nce the conditions justifying confinement cease to exist, the State's power to confine terminates, and the person is entitled to be released")

Similarly, abuse prevention orders issued pursuant to G.L. c. 209A, § 4 are not self-renewing. They expire if the petitioner cannot satisfy its burden of proving the need for extension of the order. Those proceedings, "are no different than any other adversarial hearing in that each party has a right to present evidence, and the moving party must satisfy the burden of proof and subject its witnesses to cross-examination." C.O. v. M.M., 442 Mass. at 654 (citing Frizado, 420 Mass. at 586, 597). If the court makes a temporary abuse prevention order without notice to the defendant, it must schedule a continuation hearing within ten days. G.L. c. 209A, § 4. At that hearing the person wishing continuation of the order bears the burden of proof. Id. at 654 (quoting Frizado, 420 Mass. at

596). If the plaintiff fails to sustain its burden, the court may not extend the abuse prevention order. Id. at 654, 655-656.

Like the conditions of mentally ill persons, or the circumstances giving rise to the need for a restraining order, a child's needs and behaviors change over time. At a CHINS readjudication proceeding, if the petitioner cannot prove that the child's behaviors remain problematic, then the court lacks evidence to find that the "purposes of the order have not been accomplished" and that an "extension would be reasonably likely to further those purposes." G.L. c. 119, § 39G, par. 3. If the petitioner does not bother to appear in order to seek the extension, or fails to present sufficient credible evidence against the child, then the court should not extend the CHINS order.

CHINS "review" hearings under G.L. c. 119, § 39G are distinguishable from care and protection review and redetermination hearings with respect to the burden of proof. In CHINS cases the "readjudication" hearing is a mandatory one the Juvenile Court must hold before it can extend a temporary order. G.L. c. 119, § 39G, par. 3. In

care and protection cases, a "review and redetermination" hearing under § 26 is a discretionary one; a moving party must request one and show that circumstances have changed such that the court should modify a permanent custody order. G.L. c. 119, § 26.

The care and protection statute provides that a court may commit the child to the custody of DSS until the child is age eighteen. G.L. c. 119, § 26. This is known as a "permanent custody" order.

After such a commitment,

the department, parents, person having legal custody of, counsel for a child, the probation officer, guardian or guardian ad litem may petition the court not more than once every six months for a review and redetermination of the current needs of such child whose case has come before the court.

G.L. c. 119, § 26. A party seeking a "review and redetermination" bears the burden of showing that circumstances have changed and might "warrant reconsideration or modification of the original order" See Helen, 429 Mass. at 861 (citing

Care and Protection of Isaac, 419 Mass. 602, 611-612 (1995)).¹¹

There are no "permanent custody" orders in CHINS cases. In 1973 the Legislature expressly limited CHINS orders to only six months. G.L. c. 119, § 39G, par. 3. No one need request a readjudication hearing, the court must hold it every six months or the CHINS order expires. The burden never shifts to the child to request the review hearing or to prove that the order should not be extended.

The care and protection "review and redetermination" procedures of § 26 were in place when the CHINS statute was written. The Legislature could have made the CHINS review procedures like the care and protection review and redetermination procedures. It chose not to do so.

Thus, if a CHINS order is to be extended, a petitioner (or another party substituted for the petitioner) bears the burden of proof at a

¹¹ A case involving the procedure to be followed at the review and redetermination hearing is now pending in this Court. Care and Protection of K.S., SJC Docket No. 09330.

readjudication hearing. That party must prove that the order against the child should be extended beyond six months.

III. The statute and due process require that courts extend CHINS orders only when the child continues to be "in need of services" as defined by G.L. c. 119, § 21.

To extend a CHINS order, the court must find that "the purpose of the [initial] order has not been accomplished." G.L. c. 119, § 39G, par. 3. While the statute does not define the "purpose" of a CHINS order, this Court has determined that the purpose of a CHINS order is to help the child change problematic behaviors. Florence, 429 Mass. at 527 (public policy of the CHINS statute was to decriminalize status offenses and to allow Juvenile Courts to focus on providing services to "address the problem[s] of certain children."). The language at issue must be construed as being synonymous with determining whether, despite the court's efforts, the child is still "in need of services." See Gail, 417 Mass. at 325 (after the initial six-month period, "the court must conduct another hearing to determine whether the child is still in need of services" (emphasis added)).

Accordingly, at the readjudication hearing the court's inquiry must again focus on the statutory factors for the appropriate status offense in determining whether the child is still "in need of services." G.L. c. 119, § 21.

The purpose of a CHINS order in a truancy case is to get the child to resume attending school regularly. If the child continues to be persistently and willfully truant, then the purpose of the order has not been accomplished. Continuing state intervention is justified. If, however, the child is attending school regularly, then the purpose of the order has been accomplished. The court should dismiss the petition.

Due process considerations also require that the court apply the statutory criteria defining "in need of services" at readjudication hearings. A statute that infringes on the fundamental rights of children -- as G.L. c. 119, § 39G clearly does -- must furnish the judge "with sufficient objective criteria to make reasonable decisions based on facts, not idiosyncratic choices based on undefined, amorphous standards." Blixt, 437 Mass. at 656 (citing Troxel v. Granville, 530 U.S. 57, 73

(2000), Manuel 428 Mass. at 535, Gail 417 Mass. at 327.

Fortunately, the CHINS statute provides objective criteria for determining if a child is "in need of services." G.L. c. 119, § 21. If the same statutory criteria were not applied in all CHINS hearings, similarly situated children might be treated differently depending on the "idiosyncratic choices" of a given judge. Cf. Blixt, 437 Mass. at 656. This would undermine the fundamental fairness of the Juvenile Court proceeding and violate the child's due process rights.

This Court recently examined the use of statutory criteria that provide the basis for abuse prevention orders under chapter 209A. The issue was whether a woman who had been involved in a "substantial dating relationship" with the defendant, one of the factors necessary for an abuse prevention order. C.O. v. M.M., 442 Mass. at 651. Section 1 of the statute defines "substantial dating relationship." G.L. c. 209A, § 1. In C.O. the plaintiff failed to prove the existence of a "substantial dating relationship" but the trial

court nevertheless entered an abuse prevention order against the defendant. This Court vacated the order because the judge "ignored the factors [of the statutory definition] and instead improperly relied upon judicially constructed factors" Id. at 655.

Similarly, in CHINS readjudication hearings, where the court must decide if the grounds for extending its order are met, the court cannot rely on "judicially constructed factors." It is obliged to reapply the factors the CHINS law uses to define "in need of services." G.L. c. 119, § 21. If, after six months, the truant child's behavior changed and he or she has been attending school regularly, an extension of a CHINS order would not be warranted. Cf. C.O v. M.M., 442 Mass. at 659 ("[W]e must resist a culture of summarily issuing and extending [abuse prevention] orders."). At readjudication hearings, therefore, due process requires that judges base their findings on the statutory criteria, not newly invented factors.

In the absence of evidence that the child continues to be "in need of services," a Juvenile Court's judgment that a child might "benefit from"

or "need" continued services is an insufficient legal basis for continuing a CHINS order.

IV. The standard of proof for CHINS adjudication and readjudication hearings is "beyond a reasonable doubt."

A. The statute specifies that the "beyond a reasonable doubt" standard of proof applies to all CHINS adjudications.

The Legislature provided that "at any hearing to determine whether a child is in need of services," the allegations in the petition must be proved "beyond a reasonable doubt." G.L. c. 119, § 39G, par. 1 (emphasis added). The use of the term "any hearing" suggests that the Legislature did not limit application of the standard solely to the initial adjudication. Similarly, the statute provides that the child has a right to counsel at "any hearing" to determine whether he or she is "in need of services." G.L. c. 119, § 39F. Surely, "any hearing" in this context means that children have a right to counsel at readjudication hearings. The standard of proof that applies to "any hearing" should therefore apply at readjudication hearings.

The standard of proof tells courts what quantum of evidence is necessary for deciding certain

questions. It "instruct[s] the fact finder concerning the degree of confidence our society thinks [it] should have in the correctness of factual conclusions for a particular type of adjudication." C.C. v. A.B., 406 Mass. 679, 686-687 (1990) (quoting In the Matter of Winship, 397 U.S. 358, 370 (1970)). This Court has said that "the higher standard of proof is invoked when the State seeks to interfere with a person's liberty" In the Matter of Mary Moe, 385 Mass. 555, 572 (1982).

When the Legislature created the CHINS statute in 1973, it imported the high standard of proof from the predecessor criminal statute, G.L. c. 272, § 53. If the standard specified by the CHINS statute applied to the initial hearing, but not for subsequent hearings, judges could apply whatever standard of proof they wished at readjudication hearings. Disparate outcomes might result from similar facts. Due process does not tolerate such arbitrariness in the administration of justice, especially where fundamental rights are at stake. See Blixt, 437 Mass. at 656; Gail at 327.

The stakes at a readjudication hearing are identical to the stakes at an initial hearing. The court has the same dispositional options: allowing the child to remain at home with or without conditions, placing the child in the care of a third person, or transferring custody to DSS. In CHINS cases a court may begin with one and change to another. In this case, at the initial hearing the court's order allowed the child to remain at home with conditions. (A. 1). At a readjudication hearing the court changed the order and committed the child to DSS's custody. (A. 1).

Here, if the Legislature had wanted to remove this safeguard and have a different, lower standard of proof at readjudication hearings, it could have done so. The higher standard reflects an awareness of the substantive rights at risk and strikes the proper balance among the competing interests at stake. The Legislature provided procedural safeguards in the CHINS statute of the highest order: the right to a jury trial, the right to a *de novo* appeal to a jury, and the right to counsel. G.L. c. 119, §§ 39E, 39F, & 39G. Having a high standard of proof at readjudication hearings is

consistent with the other due process protections given to the child in CHINS proceedings.

B. If the higher standard does not apply, due process requires a clear and convincing standard of proof

The Amici adopt and incorporate the Child's Brief at pp. 9-17 for this argument.

Conclusion

Based on the foregoing, the Amici respectfully request that this Court hold that (a) CHINS readjudication hearings must be evidentiary, (b) the rules of evidence apply to such hearings, (c) the petitioner must prove that that child is still a "child in need of services" before a court may extend a CHINS order and (d) the standard of proof at all hearings is "beyond a reasonable doubt."

Respectfully submitted,

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