

CHAPTER 18
CHILDREN IN NEED OF SERVICES (CHINS) PROCEEDINGS

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INTRODUCTION

The child in need of services (CHINS) statute authorizes court intervention in cases where a child or youth exhibits certain identified undesirable behaviors, including running away from home, disobeying parental rules, truancy, and violating school rules. *See* G.L. c. 119, §§ 21 & 39E-J. They are sometimes referred to as “status offenses.” *See Commonwealth v. Florence F.*, 429 Mass. 523, 529 (1999). A CHINS case is a civil proceeding. *See* G.L. c. 119, § 39E. CHINS proceedings are closed to the public. *See* G.L. c. 119, § 65. The CHINS statute authorizes the appointment of counsel only for the child. G.L. c. 119, § 39F. *But see In re Angela*, 445 Mass. 55, 62 n.5 (2005) (suggesting a judge may appoint counsel for a parent where custody is at issue).

Unlike care and protection and termination of parental rights cases, the focus of a CHINS proceeding is on the child’s and not the parent’s behavior. Notwithstanding the different focus, CHINS families often present similar problems and needs and in some cases it may be fortuitous that the case starts out as a CHINS rather than a care and protection proceeding. Because the court can grant custody to DSS, CHINS cases implicate the “child’s fundamental liberty interest in the parent-child relationship.” *In re Angela*, 445 Mass. at 61.

While children involved in CHINS proceedings may appear simply stubborn or rebellious, often the child’s behavior results from some underlying mental health problem, unmet educational need or family dysfunction. Typically, the adults (e.g., parents, truant officers, probation officers, judges) involved in the case will try to cajole, threaten, or order the child to behave. However, this approach is rarely successful until the underlying problems are addressed.

Therefore, one effective strategy for the CHINS attorney is to shift the focus of the case away from punitive responses and advocate for the provision of appropriate services consistent with the child's interests and needs.

This chapter reviews the CHINS statute and strategies for representing child clients in CHINS proceedings. In addition, many other chapters in this manual are relevant to CHINS practice, including the chapters on the DSS administrative process; services, placement and visitation; court investigators and guardian ad litem; experts; privilege and confidentiality; evidence; education; and permanency planning, among others.

HISTORY OF THE CHINS STATUTE

Prior to 1973, a “stubborn child” who “refused to submit to [a] command” from a “person having authority to give a child ... lawful and reasonable commands” was deemed a criminal in violation of G.L. c. 272, § 53 (as amended through St. 1959, c. 304, § 1). *See Commonwealth v. Brasher*, 359 Mass. 550, 555 (1971). Similarly, children “convicted” of the “offence” of being a “habitual truant” or other “habitual school offender” were subject to incarceration in “county training schools” under the authority of then G.L. c. 77. *See Commonwealth v. Johnson*, 309 Mass. 476, 481 (1941).

Opposition to the incarceration of children as status offenders began to emerge at both the state and federal levels as early as the 1960s. *See R. Spangenburg et al., History of the CHINS Program*, 8-13 (1977). Opponents of juvenile incarceration criticized the emphasis on custody over treatment, including the absence of diagnosis and classification procedures, the lack of clinical services, the inadequacy of educational programs, and the juvenile's isolation from the community at juvenile facilities. *See Spangenberg, supra*, at 12-14; Arnaud and Mack, “The Deinstitutionalization of Status Offenders in Massachusetts: The Role of the Private Sector,” in

Neither Angels nor Thieves: Studies in Deinstitutionalization of Status Offenders, 336-338 (J. Handler and J. Zatz, eds. 1982). In Massachusetts, reform efforts focused on "separating status offenders from delinquents, on diverting status offenders from the courts, and on providing them with special services." Arnaud and Mack, *supra*, at 340.

In 1973, Massachusetts enacted the CHINS statute, St. 1973, c. 1073, to accomplish five essential and interrelated reforms:

- It decriminalized status offenses and instead created an alternative civil proceeding in the juvenile court to address the unmet needs of these children. *See* G.L. c. 119, § 39E.
- It provided non-institutionalized, non-punitive, community-based services to status offenders through a newly created CHINS program. G.L. c. 119, § 39G.
- It transferred responsibility for status offenders from the Department of Youth Services to the Department of Public Welfare (now the Department of Social Services). *Id.*
- It prohibited the placement of status offenders in facilities operated for juvenile delinquents. *Id.*
- It required consideration of the "best interests of the child" and "the physical and emotional welfare of the child." G.L. c. 119, §§ 39E & 39G.

In contrast to the prior legislative scheme of punishment and incarceration for truants and other status offenders, the goal of CHINS proceedings is "to protect the welfare of children by providing treatment and care for them when their particular needs warrant attention outside of the home." *In re Gail*, 417 Mass. 321, 327 (1994).

Since enactment of the CHINS statute, numerous studies have been conducted to evaluate its effectiveness. Recommended reforms have included abolishing the statute altogether, providing courts with greater authority over children, including parents as parties to the proceeding, expanding the use of diversion and mediation, and permitting secure confinement of

CHINS children in certain limited circumstances. (See Appendix for list of reports.) The Massachusetts SJC also has invited the Legislature to consider making changes to the CHINS statute that would give the juvenile court greater enforcement powers. *See, e.g., Commonwealth v. Florence F.*, 429 Mass. 523, 527-529 (1999). To date, none of these recommendations have been enacted and the CHINS statute remains largely unchanged since its promulgation in 1973.

DEFINITION OF CHINS

G.L. c. 119, § 21 defines a child in need of services as:

- a child under seventeen who persistently runs away from the home of his parents or legal guardian (“runaway”);
- a child under seventeen who refuses to obey the lawful and reasonable commands of his parents or legal guardian, thereby resulting in the parents' or guardian's inability to adequately care for and protect the child (“stubborn child”);
- a child between the ages of six and sixteen who persistently and willfully fails to attend school (“truant”); or
- a child between the ages of six and sixteen who persistently violates the lawful and reasonable regulations of the school (“school offender”).

A truancy or school offender petition can only be filed against a child who is between the ages of six and sixteen and it must be dismissed when the child turns sixteen. *See* G.L. c. 119, §§ 21 & 39E. A runaway or stubborn child petition must be filed before the child’s seventeenth birthday. *See* G.L. c. 119, § 21. Thereafter, it may remain open until the child's eighteenth birthday. *See* G.L. c. 119, § 39E.

Practice Note: The statute is silent as to whether a runaway or stubborn child petition must be *adjudicated* (as opposed to just filed) before the child’s 17th birthday. If a client turns 17 before adjudication, counsel should consider filing a motion to dismiss the petition. Section 21 defines a CHINS runaway or stubborn child “as a child below the age of 17 ... who persistently runs away,” or who “persistently refuses to obey ...” his parents. Counsel should argue that because age is an element in the definition, and because the statute uses the present tense, the child must be under 17 at the time of trial. *See* Massachusetts Juvenile Court Bench Book II-48 (MCLE 2003) (“no dispositional

order...can continue after the child's eighteenth birthday, as long as the child has been *adjudicated* a "child in need of services" by his or her seventeenth birthday;" emphasis added).

JURISDICTION AND VENUE

The Juvenile Court has exclusive jurisdiction over CHINS cases, with the exception of the Gloucester and Brookline District Courts, which continue to hear CHINS and care and protection cases. *See* St. 1992, c. 379. All CHINS matters in Suffolk County are heard in the Boston Juvenile Court.

The venue for CHINS matters is not specified in the statute. Typically, a CHINS petition is filed in the court where the child resides. Venue may be an issue if a child is in the joint custody of two parents who live in different counties. Venue may also become an issue if a family moves, as there is no formal mechanism for transferring a case to a new court. In most cases, the petition in the old location is dismissed and a new CHINS case is opened in the new court. Where consistent with the client's interests, counsel should argue that the case in the new court must be treated as a new application, and that the child has the right to a preliminary hearing and a trial on the merits on the new petition.

APPOINTMENT OF COUNSEL

In a CHINS proceeding, only the child has a statutory right to court-appointed counsel. *See* G.L. c. 119, § 39F. Some courts do not appoint a lawyer until after the preliminary hearing when the petition issues. However, the statute expressly provides that the child has a right to counsel "at all hearings," *id.*, and therefore, the child should be represented by counsel at the preliminary hearing in order to challenge the issuance of the petition. *See Massachusetts Juvenile Court Benchbook*, II-17 (MCLE 2003).

In some instances, parents may be required to contribute to the cost of the child's court-

appointed attorney. If the parent is not indigent, the court “shall” assess a \$300 fee against the parent. *Id.* If the court determines that the parent is indigent but is nonetheless able to contribute, the court “shall” order the parent to pay a “reasonable amount.” *Id.*

There is no provision in the CHINS statute providing court-appointed counsel for parents. In *In re Angela*, the SJC commented that judges appoint counsel for parents when custody is at issue. 445 Mass. at 62 n. 5 (citations omitted). However, that has not been the practice and historically CPCS has not paid for counsel for parents in CHINS cases.

A child client involved in multiple state intervention proceedings may only have one court-appointed trial attorney. *See* G.L. c. 211D, § 6A. Therefore, if the child is already the subject of an open care and protection or G.L. c. 119, § 23(C) case at the time the CHINS petition is filed, the child’s attorney in that case should be appointed to the CHINS matter as well. CPCS may permit an exception in extraordinary circumstances, for example if a second case involving the client is filed in a court a great distance from the attorney’s office. *Id.* In these circumstances, counsel must contact CPCS to request approval for a second attorney to be appointed for the client. There is no similar prohibition against the child being appointed a separate delinquency attorney.

CHINS PROCEDURE

The procedure for CHINS cases is spelled out in great detail in the statute. *See* G.L. c. 119, §§ 39E-39I. In addition, the Juvenile Court has issued a standing order governing the filing and disposition of CHINS matters. *See* Juv. Ct. Standing Order 1-04. CHINS counsel should also review the standards for probation officers issued by the Commissioner of Probation. *See* Standards and Forms for Children in Need of Services (CHINS) for Probation Officers of the District Court Department and the Juvenile Court Department.

Actual practice varies among the courts and even among the judges handling CHINS cases within the same court. Hearings can vary greatly in their level of formality or informality. Some courts and judges permit formal hearings with sworn testimony under the rules of evidence while others limit hearings to oral reports or arguments to the court. Attorneys must familiarize themselves with the practices and procedures of the individual courts in which they practice and be prepared to object to deviations from the law whenever necessary and appropriate to advance their client's interests, keeping in mind that there may be occasions where the level of informality and flexibility benefits the client.

The SJC has repeatedly limited the trial court's authority in CHINS cases to the plain language of the statute and rejected any actions not expressly authorized by the statute. *See, e.g., Oscar F. v. County of Worcester*, 412 Mass. 38, 40-41 (1992) (no authority to order school to provide services); *In re Vincent*, 408 Mass. 527, 530-532 (1990) (no authority to order child to attend school); *see also Commonwealth v. Florence F.*, 429 Mass. 523, 525-526 & n.4. (1999). Counsel should object to any action taken by the court that is adverse to the child's position and is not authorized by the CHINS statute or by some other applicable rule.

Application

A CHINS case begins with the filing of an application. *See* G.L. c. 119, § 39E. A parent, legal guardian, or a police officer may apply for a runaway or stubborn child petition. *Id.* A school supervisor of attendance may apply for a truancy or school offender petition. *Id.*

The statute expressly limits those who may file an application to "a parent or legal guardian of a child *having custody of such child.*" G.L. c. 119, § 39E (emphasis added). The statute does not distinguish between legal and physical custody and in the appropriate case counsel might argue for dismissal if the application is filed by a parent who does not have

physical custody. Sometimes a stepparent or other relative with whom the child is living attempts to file a CHINS application. Child's counsel should confirm the petitioner's legal relationship to the child and, if appropriate, move to dismiss the application. In addition, while the statute does not expressly authorize DSS to file an application against a child in its custody, the court is likely to treat DSS as a legal guardian for purposes of filing the application.

Application for a truancy or school offender petition may only be filed by a "supervisor of attendance, duly appointed" under G.L. c. 76, § 19. If the application is filed by another school official, such as an assistant principal, school adjustment counselor or guidance counselor, child's counsel may move to dismiss. *See* Juvenile Court Bench Book, at II-7.

The petitioner must file an affidavit disclosing any prior care or custody proceedings, although this does not always occur. *See* Trial Court Rule IV (Uniform Rule Requiring Disclosure of Pending and Concluded Care or Custody Matters). The child may have been the subject of a prior divorce, paternity, guardianship or child protection proceeding. While the affidavit may contain helpful information, child's counsel should not necessarily rely on its accuracy or completeness, and further investigation may be necessary.

Upon receipt of a CHINS application, the juvenile court clerk must set a date for a preliminary hearing to determine whether the court should issue the petition. *See* G.L. c. 119, § 39E. The clerk must notify the child of the hearing. *Id.* The clerk will also ask the probation department to conduct a preliminary inquiry into whether the child's best interests would be served by issuing the petition or whether the child might benefit from a referral to probation for informal assistance. *Id.* The probation officer should attempt to verify the information provided by the petitioner. *See* Standard 2:02-2:03. The probation officer's report must include a written recommendation. Standard 2:01.

Practice Note: According to the Probation Officer Standards, after completing an initial screening, the probation officer “shall refer the applicant to the clerk/magistrate if he/she believes that the best interests of the child would be served by a more formal process.” Standard 1:04. This appears to allow the probation office to screen some applicants into informal assistance before any application is filed with the clerk. However, the practice is for all applicants to fill out a petition in the clerk’s office so as to have a file on each case.

If informal assistance is recommended, the probation officer should meet with the parties to negotiate the specific terms of a CHINS agreement. *See* Standard 2:04. This agreement will be written down, signed by all parties as a contract, and presented to the court. *See* Standard 3:01. The probation officer is required to inform the parties of the possible consequences of non-compliance with the agreement. *See* Standard 3:03.

Preliminary Hearing/Arraignment

The initial court hearing in a CHINS matter is held before a judge in order to determine whether a formal petition should issue. *See* G.L. c. 119, § 39E. The judge typically hears the sworn testimony of the petitioner and will also often hear oral reports or arguments from the probation officer, parents and other involved persons. If a CHINS agreement has been reached by the parties, the terms of the contract will be presented to the court.

Practice Note: Although the statute contemplates that a preliminary hearing be held in every case, actual practice differs. In the past, if all parties agreed (including the parent, child, probation and the clerk) the case could be referred to probation for informal assistance and the preliminary hearing continued without the involvement of the court. However, Juvenile Court time standards now require that the preliminary hearing be held within 90 days of filing of the application. *See* Juv. Ct. Standing Order 1-04. It is not clear whether enforcement of these time standards will change the practice in some courts of continuing CHINS matters without a hearing when an agreement has been reached.

At the conclusion of the preliminary hearing, the judge may:

- decline to issue the petition if the court finds there is no probable cause to believe the child is in need of services;
- decline to issue the petition if the court determines that the child can best be served through informal assistance and both the parent and child agree; or

- issue the petition and schedule a hearing on the merits (trial).

See G.L. c. 119, § 39E.

As discussed above, although the statute requires that the child be represented by counsel at all hearings, often counsel is not appointed unless and until the petition issues after the preliminary hearing. In addition, while the statute requires that the preliminary hearing be held before a judge, in some courts the preliminary hearing is conducted by a clerk, or even by a probation officer. The failure of the court to appoint counsel for the child prior to the preliminary hearing and the failure of the court to conduct a preliminary hearing before a judge are both defects that establish grounds for moving to dismiss the petition.

On occasion, a judge at the preliminary hearing will award temporary custody to DSS pending a trial on the merits. This action is not authorized by the statute and child's counsel should object if consistent with the client's position. See *In Re Child in Need of Services*, Nos. SJ-2001-0075, 0076, 0077. (Mar. 12, 2001). (A copy of the opinion is included as an exhibit.) See also *Massachusetts Juvenile Court Bench Book* II-28 (MCLE 2003). If the judge declines to reconsider the temporary order of custody to DSS, counsel should seek interlocutory relief from a single justice of the SJC under G.L. c. 211, § 3. See chapter _ concerning interlocutory appeals.

However, there may be occasions where a child prefers placement in foster care to remaining at home, in which case the attorney would request, assent to, or at least not object to a temporary custody order to DSS. Alternatively, if there is a relative or other appropriate adult with whom the child wishes to live, the juvenile court may grant temporary guardianship to that person instead of placing the child in DSS custody. See G.L. c. 201, § 1. See also chapter _ (Collateral Family Law Proceedings) for a discussion of guardianship proceedings.

At the preliminary hearing, the court typically will set conditions or limitations on the child's behavior. This is often written out in the form of a CHINS agreement, which is signed by the parties, including the child, and also by the parent or legal guardian even if the parent or legal guardian is not the petitioner. (A sample agreement is attached.) The CHINS agreement can be helpful in delineating for all parties exactly what is expected of them.

Practice Note: Despite this routine practice, the CHINS statute does not grant the court authority to set conditions or limitations on the child prior to an adjudication (except as provided in the bail section discussed below). If the child objects to a particular condition, counsel may argue that the court does not have authority to impose conditions on the child. Of course, the CHINS attorney should advise the client of the possible ramifications of refusing to agree to conditions or limitations suggested by the court, including the likelihood of the court adjudicating the child in order for the court to impose conditions.

Informal Assistance

After the preliminary hearing, the judge may decline to issue the petition and instead refer the matter to probation for informal assistance. *See* G.L. c. 119, § 39E. In addition, in some courts, probation and the clerk will agree prior to the preliminary hearing that the child can best be served by informal assistance. The probation officer's role here is twofold: to refer the child to needed services in the community, and to hold meetings with the child and the family to facilitate a resolution of the problems that led to the filing of the CHINS application. *Id.* While the CHINS statute contemplates the availability of a wide range of services for the child, including psychological, educational, medical and social services, there is no funding attached to the statute. A probation officer may refer a family to DSS for services but this simply means that the family is requesting voluntary services from DSS and will be treated by DSS like any other voluntary application for services. *See* 110 C.M.R. § 4.62. In some courts, a DSS social worker acts as a court liaison to assist families in requesting voluntary services. However, the availability of services will depend upon the family's health insurance, any services DSS is

willing to provide, and resources existing in the community.

Practice Note: G.L. c. 119, § 39J appears to authorize the court to order the county to pay for needed services. This section was never funded by the legislature and has become obsolete since the abolishment of counties in Massachusetts.

Informal assistance can only be provided with the agreement of the child and the family. *See* G.L. c. 119, § 39E. Neither the child nor the parents can be compelled to attend conferences with the probation officer or follow through with referrals for services. *Id.* However, the statute provides that if the child and family “fail to participate in good faith,” probation must certify this in writing and the clerk “shall issue the petition” and set a date for trial on the merits. Usually the clerk will not directly issue the petition, but will bring the matter before the court to request that the judge issue the petition and schedule a trial on the merits.

Informal assistance cannot continue for more than 12 months, beginning with an initial six month contract that can be extended one time by agreement of all parties for an additional six months. *See* G.L. c. 119, § 39E. At the conclusion of the informal assistance period, the court must either dismiss the case or issue the petition and schedule a trial on the merits. *Id.*

Statements made by the child or family during the period of informal assistance cannot be admitted at trial for the purpose of adjudicating the child in need of services. *See* G.L. c. 119, § 39E. However, the child and family’s statements can be used by the court after adjudication to determine the appropriate disposition. *Id.*

Summons, Arrest & Bail

Upon the filing of a petition, the court may issue a summons to the child and his parents. *See* G.L. c. 119, § 39E. If the child fails to appear, the court can then issue a CHINS precept or warrant. *Id.* The warrant authorizes the police to arrest the child and bring him to the next sitting of the court. *Id.* The only other situation in which a child can be arrested on a CHINS

matter is “if the arresting law enforcement officer has probable cause to believe that such child has run away from the home of his parents or guardian and will not respond to a summons.” *See* G.L. c. 119, § 39H. Although not authorized by the statute, the juvenile court routinely issues an arrest warrant whenever a child is reported to be a runaway by a parent, guardian, DSS, or a probation officer. *See* Report of CHINS Discussion Group, Child in Need of Services Proposed Amendments (2000).

If court is not in session when a child is picked up on a CHINS warrant, the law enforcement officer must notify probation. *See* G.L. c. 119, § 39H. DSS may also be notified if the officer has reason to believe the child is in the care or custody of the Department. *Id.* The law enforcement officer will confer with the probation officer to determine where the child should be placed until court is next in session. The statute requires that preference be given to placement with a parent, legal guardian, other responsible person known to the child, or DSS if it has custody. *Id.* If none of these options are available, the child may be placed in a temporary shelter. *Id.* The child may also be brought to a medical facility for treatment or observation if necessary. *Id.* The statute expressly prohibits holding a child arrested on a CHINS warrant at a police station or town lockup. *Id.* Federal law also prohibits the placement of status offenders in secure detention or secure correctional facilities. *See* The 1974 Federal Juvenile Justice and Delinquency Prevention Act, 42 USC § 5633(a)(11)-(12); 28 C.F.R. § 31.304(b).

However, children arrested on CHINS warrants are sometimes placed in facilities operated by the Department of Youth Services. In addition, some courts treat CHINS arrestees in the same manner as juveniles who are brought before the court on delinquency charges. They may be secured by handcuffs and leg irons while being transported, held in juvenile lockups until they are brought into the courtroom, and not released from custody until the warrant is formally

recalled by the judge. These procedures appear to violate the CHINS statute as well as federal law.

If a child is brought to court under an arrest warrant, the petition automatically issues without need for a preliminary hearing. *See* G.L. c. 119, § 39E. However, at the hearing to recall the warrant the court still has the option to refer the child to probation for informal assistance, presumably with the consent of the child and the parent. *Id.*

Practice Note: It sometimes takes several days for the warrant management system to be updated to reflect the recall of a CHINS warrant. Counsel should make sure the client receives a copy of the form memorializing the recall of the warrant. The child should be advised to keep the form with him at all times in case he is stopped by the police again.

The CHINS statute also contains a somewhat confusing bail provision, which is seldom used in practice. *See* G.L. c. 119, § 39H. This section provides that in a “stubborn child” case the court may impose bail or release a child subject to conditions, but only if the court finds the child is not likely to appear at the preliminary hearing or at the hearing on the merits. *Id.* If the child does not or cannot post bail, he may be detained in a facility operated by or under contract with DSS. *See* G.L. c. 119, § 39H. DSS regulations require it to place a CHINS child held on bail in the least restrictive setting possible, which may be placement in the child’s own home. *See* 110 C.M.R. § 4.63(3).

A child may be held on bail for no more than 15 days, after which the child must be brought back before the court. The court may continue the bail for additional 15-day periods, not to exceed a total of 45 days. *Id.* Whenever a child is held on bail pursuant to the CHINS statute, the child has the right to an immediate bail review hearing in Superior Court. *Id.*

Section 39H further provides that if a child fails without good cause to respond to a summons, the court may similarly hold the child on bail or release the child on conditions. It is unclear whether this sentence applies only to “stubborn child” petitions, or to any type of CHINS

case where the child fails to appear in response to a summons.

On occasion, and most typically when other avenues have been exhausted, the parents or police or probation may make use of any possible delinquency charge in order to hold the child on bail and/or in a secure facility. For example, an altercation between the child and the parent may result in a charge of domestic assault and battery being filed against the child. Even non-secure residential facilities may sometimes call the police to arrest child residents who are involved in altercations with staff or other residents or who will not comply with the rules of the program. In these situations, CHINS counsel should work closely with the child's delinquency attorney to explore other appropriate placement options for the child if the child cannot return home.

Practice Note: On occasion, the court in a delinquency case will improperly use the delinquency bail statute to hold a CHINS child on "DSS only" bail. The court may set a \$1 cash bail that can only be posted by DSS. Both the CHINS lawyer and the delinquency lawyer should vigorously oppose this since DSS will not post bail under any circumstances, therefore, the effect is to hold the child without any bail.

Hearing on the Merits

A child in a CHINS proceeding has the right to a trial by a jury of six. *See* G.L. c. 119, § 39E. Alternatively, the child may waive his right to a jury trial and have the case heard by a judge. *See* G.L. c. 119, §§ 39E & 39I. According to the statute, the trial may not be held before the same judge that presided over the preliminary hearing. *See* G.L. c. 119, § 39E. However, this provision is frequently overlooked or waived. Before proceeding with a bench trial, the judge should conduct a jury waiver colloquy with the child. The petitioner's burden of proof at trial is to put forth evidence to establish beyond a reasonable doubt that the child is in need of services. *See* G.L. c. 119, § 39G. The child and his attorney must be present for the trial. *Id.*

A contested trial in a CHINS matter should be a formal proceeding akin to a delinquency

trial, utilizing applicable rules of evidence and procedure. *See* G.L. c. 119, § 21 (“‘evidence’, shall be admissible according to the rules of the common law and the General Laws”).

However, actual practice varies and, in some courts, a jury-waived trial may be a relatively informal proceeding. Counsel should object and request a formal evidentiary hearing whenever consistent with the client’s interests and position.

Under the Juvenile Court Time Standards, the adjudication and disposition should take place within 6 months after the petition issues. *See* Juv. Ct. Standing Order 1-04, II.B.

However, the standards recognize that in some cases a final disposition may be delayed due to lack of services or other reasons. *Id.*

If the child loses at the bench trial and is adjudicated a child in need of services, he may seek a de novo appeal to a jury of six by filing a written notice by the end of the next business day after entry of the judgment or adjudication, or within such further time as the court may allow. *See* G.L. c. 119 § 39I. Even on a de novo appeal, the child has the option to waive his right to a jury and have the case reheard by a new judge. *Id.* If the case is tried before a jury of six, the verdict must be unanimous. *See* G.L. c. 119, § 39I. Appeal from the jury trial is to the Appeals Court. *Id.*

Neither a de novo appeal nor an appeal to the Appeals Court automatically stays the judgment and disposition. *Id.* Counsel must file a motion for a stay, which may be granted “if suitable provision is made for the care and custody of the child.” *Id.*

Statements made by the child and the child’s family during informal assistance are not admissible at trial but may be admissible for purposes of determining an appropriate disposition once the child is adjudicated a child in need of services. *See* G.L. c. 119, § 39E. Counsel should object if the probation officer attempts to testify to the child’s or parents’ statements at the trial

on the merits of the petition.

It is not clear who prosecutes the case. Ordinarily in civil proceedings, the plaintiff or petitioner presents the case. In a CHINS proceeding the petitioner will most likely be a parent or other lay person. In some courts, the probation officer may take on the responsibility of introducing evidence to the court. However, at the initial adjudication, the petitioner should be the party prosecuting the case. *Compare In re Angela*, 445 Mass. at 66 (a probation officer may prosecute an extension of a dispositional order). As the petitioner may be pro se, the court may relax some of the trial rules to allow the case to proceed in a reasonable fashion. Typically, the child's attorney is the only lawyer in the courtroom and this provides child's counsel a significant opportunity to direct the course of the proceedings. The Juvenile Court Bench Book suggests that, in rare cases where an attorney is needed to prosecute the case, the district attorney's office or the attorney general's office should be contacted. *See Massachusetts Juvenile Court Bench Book*, II-19. If those offices decline to prosecute the CHINS, the Bench Book suggests that private counsel may be appointed to prosecute the case, with counsel being paid by the Administrative Office of the Trial Court. *Id.* Rarely, if ever, do DSS attorneys participate in CHINS proceedings. *See* 110 CMR 4.67.

Frequently in CHINS cases a child will admit or stipulate to the allegations of the petition. Although this practice is common, counsel must seriously consider the pros and cons of this strategy and advise the client accordingly. While the stipulation may permit the child to remain at home at least initially, the judge can later modify the dispositional order if the child's needs change, and can commit the child to DSS. *See In re Angela*, 445 Mass. at 60-61. Although the commitment order is only for six months, it may be extended for additional six month periods if the purposes of the order have not been accomplished. *Id.* at 59. Thus, after an

initial stipulation or adjudication, a child can be placed in DSS custody until age 18 in a runaway or stubborn child case, and age 16 in a truancy or school offender case. *See* G.L. c. 119, §§ 21 & 39E.

Practice Note: Once a child is adjudicated in need of services and custody is awarded to DSS, a parent, even if the parent is the petitioner, does not have authority to withdraw the petition and seek return of custody. *See In re Gail*, 417 Mass. 321, 326 (1994).

In situations where the child does admit to being a child in need of services, the best practice is for the child and counsel to sign a waiver of trial form and for the judge to conduct a colloquy with the child to ensure the child has knowingly, intelligently, and voluntarily waived his right to trial.

Occasionally the CHINS attorney may stipulate to the facts, but argue that the facts do not support a finding beyond a reasonable doubt that the client is a child in need of services. For example, counsel may stipulate to the child's attendance records but argue that the child's truancy was not persistent and willful. Similarly, in a stubborn child case, the child might admit to not following a parent's rules but argue that the parent's rules are unreasonable.

Given the risks inherent in an adjudication, in some cases, the best strategy may simply be to have the matter continued. In a stubborn child case, the family might have recently begun counseling and all parties may agree to postpone the trial. In a truancy case, it may be appropriate to continue the matter pending the outcome of a special education evaluation. Delay of the proceeding can serve the client's interests in many ways. The longer the CHINS continues without adjudication, the longer the child is shielded from the possibility of being committed to the custody of DSS. If the petition is filed based upon allegations of the child's truancy or other misconduct at school, the petition must be dismissed once the child turns sixteen. Similarly, if the child turns 17 before being adjudicated on a runaway or stubborn child petition, counsel can

move to dismiss the petition. (See practice note above at III, Definition of CHINS.)

Alternatives

The juvenile courts have at various times developed alternatives to formal adjudications under the CHINS law. In some courts, diversion programs have been made available either by DSS or private agencies. Mediation is also available in some courts and can be useful in all types of CHINS cases. The SJC Standing Committee on Dispute Resolution has approved fifteen CHINS mediation programs. A current list of approved programs can be found on the Massachusetts Court System website at www.mass.gov/courts/admin/legal/redbook25.html.

DISPOSITION

After adjudicating a child in need of services, the court has several dispositional alternatives available. Subject to any conditions or limitations prescribed by the judge, the court may:

- Permit the child to remain at home;
- Place the child in the care of a qualified relative or other adult;
- Place the child in the care of a licensed childcare agency or other qualified private organization; or
- Commit the child to the Department of Social Services.

See G.L. c. 119, § 39G; *see also* G.L. c. 119, § 23(D) (requiring DSS to “accept on commitment” ... any child under eighteen years of age declared ... to be a child in need of services under section 39G”). “The purposes of the dispositional order include (a) preventing delinquency involvement; (b) fostering the pursuit of education; and (c) providing support to families....” *In re Angela*, 445 Mass. at 59 (quoting R.L. Ireland, *Juvenile Law*, § 145 (1993 & Supp. 2004)).

If the child intends to waive his right to trial and stipulate to a disposition, counsel should ensure that the child fully understands the terms of the agreement and is willing and able to comply with the agreed upon conditions. Often probation uses a standard form and the same

conditions are imposed on all juveniles. It is imperative that counsel and the child negotiate with probation to ensure the imposition of conditions that are specific to the child's needs, reasonable under the circumstances, and realistic for the particular client to achieve. For example, if a child is frequently truant because of depression, counsel should negotiate a realistic condition such as the child will attend school 80% or 90% of the time rather than "every day". In that case, as long as the child is making an effort to attend and improvement in attendance is documented, the child is less likely to be brought before the court for violating the condition.

The initial dispositional order may be imposed for a maximum term of 6 months. *See* G.L. c. 119, § 39G. Under the Probation Officer Standards, the probation officer is required to reduce the court's order to writing, review it with the child and parents, and have them sign the order. *See* Probation Officer Standard 3:01. This order is then reflected in a written supervision plan that is developed by the probation officer and approved by the Assistant Chief Probation Officer. *See* Probation Officer Standard 5:01-5:06. The probation officer should have contact with the child, the parents, and other appropriate individuals at least once every 30 calendar days. *See* Standard 6:03. "The probation officer should act as a resource broker with appropriate individuals/agencies to ensure that ... services are provided." Standard 6, Commentary.

Pursuant to the Probation Officer Standards, an Assistant Chief Probation Officer should review each CHINS case at least once every 90 days. *See* Standard 7:00. Also, if the probation officer assigned to the case believes the child or parents have not complied with either a dispositional order or informal assistance, or that some other person or agency has not complied, the probation officer must bring the matter to the attention of the Assistant Chief Probation Officer. *See* Standard 7:03. If further action is determined to be appropriate, the probation officer must notify the parties in writing that the case is being advanced for review by the court,

including the basis for the requested review. A copy of this notice must be filed with the clerk-magistrate. *Id.* Before the review hearing, the CHINS attorney should review a copy of this notice and any other information relating to the probation officer's contacts with the client, the family and collaterals.

Placement at Home

When adjudicating a child in need of services, the court has the option to allow the child to stay at home, while using the threat of a future change in custody to persuade the child to comply with the court's conditions. Examples of conditions might include attending counseling, attending school consistently, or participating in a court clinic evaluation. However, the court has no authority to order the child to attend school or participate in particular services except as conditions of remaining in the home. *See In re Vincent*, 408 Mass. 527, 531-532 (1990); *see also Commonwealth v. Florence F.*, 429 Mass. 523, 524-526 (1999). (See discussion of contempt below.)

Presumably the court's conditions can also include actions that need to be taken by the child's parents, such as participating in family counseling or bringing the child to recommended medical or other appointments. However, while the court may encourage parents to cooperate, the court has no authority to order parents to do anything. *See, id.* Nonetheless, a parent's failure to comply with the conditions of the child's disposition may result in the court removing the child from the home. Moreover, the parent's failure to send a child to school or ensure the child receives necessary medical care may result in the filing of a 51A report or a care and protection petition. *See* G.L. c. 119, §§ 24 & 51A.

In a truancy case, a supervisor of attendance can file a criminal complaint against a parent in Juvenile Court for failure to send a child to school. *See* G.L. c. 76, § 2. However, the

maximum penalty is a \$20 fine. These complaints are filed infrequently.

For children adjudicated in need of services but not committed to DSS custody, DSS regulations require that it provide services ordered by the court “if the services are available ... and to the extent the Department is reasonably able to comply.” 110 CMR 4.64(3).

Placement in Care of Individual or Agency

Before the court may place a child adjudicated in need of services in the care of a relative or other adult, the probation department or an approved agency must conduct an investigation to determine whether the proposed caretaker is “qualified to receive and care for the child.” G.L. c. 119, § 39G. Counsel proposing a caretaker should inquire about the person’s criminal record and any prior involvement with DSS, as these may be grounds for the court to disapprove the placement. If the caretaker resides out of state, counsel will need to be familiar with the procedures required by the Interstate Compact on the Placement of Children. *See* G.L. c. 119, App. § 2-1 et seq.; 110 C.M.R. § 7.500 et seq. (See chapter on permanency planning for a further discussion of the Interstate Compact.)

Presumably the court has the authority to place the child in the care of a non-custodial parent under this provision of the statute. However, the non-custodial parent will eventually need to obtain a custody order from the Probate and Family Court if the child will remain with that parent beyond the 6 months dispositional order. (See chapter __ on collateral family law proceedings.) Although this section also permits placement of the child in the care of a private agency or organization, this rarely if ever occurs.

Commitment to DSS

If the child is committed to the custody of DSS pursuant to a CHINS proceeding, the court may “recommend” that the child be placed out of the home. *See* G.L. c. 119, § 39G. DSS

is required to comply with this “recommendation;” however, the type and length of the placement is within DSS’s discretion. *Id.* Absent such a recommendation from the court, DSS has the discretion to either allow the child to remain home or to place the child in a foster home or group care setting. *See* 110 CMR 4.65(3). DSS must give “due consideration” to the wishes of the child if the child was abused or neglected in the home and wants to be placed outside of home. *See* G.L. c. 119, § 39G.

Whenever a child is “committed” to DSS custody pursuant to a CHINS proceeding, the Department has all of the custodial rights and responsibilities delineated in G.L. c. 119, § 21 with respect to the child. *See* 110 CMR 2.00, Glossary. These include the right to determine where the child will live (subject to the authority of the court to “recommend” out-of-home placement), the right to control the child’s visits with the parents and others, and the right to consent to routine medical treatment for the child. *See* G.L. c. 119, §§ 21 & 39G. Challenges to DSS’s exercise of its custodial discretion are subject to review by the court applying the abuse of discretion standard. *See Care and Protection of Isaac*, 419 Mass. 602 (1995); *Care and Protection of Jeremy*, 419 Mass. 616 (1995). (See chapter __ on services, placement and visitation.)

However, DSS’s custodial authority in CHINS cases differs from its custodial authority in care and protection proceedings in two significant respects. First, in a CHINS proceeding, the parent retains the right to make decisions on behalf of the child concerning extraordinary medical treatment. *See* 110 CMR 11.02. Second, in a CHINS proceeding, DSS routinely permits parents to continue to make special education decisions on behalf of the child although DSS is not required to do so by any statute or regulation. *See* Guidance on Appointment of Educational Surrogates (Oct. 28, 2002) (included as exhibit to chapter _ on education).

Once a child is committed to DSS, the DSS social worker assigned to the case must prepare a service plan for the child and family. *See* 110 CMR 4.66 & 6.00 et. seq. Foster care reviews are also held for children who remain in substitute care for longer than six months. *See* 110 CMR 6.10(2). Area based case reviews are held for children in DSS custody but living at home. *See* 110 CMR 6.10(1)(b). DSS social workers vary greatly in their skills and interest in CHINS matters. Some area offices have CHINS units where the social workers are assigned only cases involving adolescents.

A child adjudicated in need of services may not be committed to the Department of Youth Services (DYS). *See* G.L. c. 119, § 39G. However, if DSS has custody, DSS may place the child in a group care facility where DYS committed youth are also placed. *Id.* In addition, the CHINS statute allows the court to refer children to DYS for foster care placement, although this rarely occurs. *Id.*

When the court commits a CHINS child to DSS custody, it must make the certifications and determinations required under c. 119, § 29C. *See* G.L. c. 119, § 39G. Thus, the court must find that leaving the child at home is contrary to his best interests. *See* G.L. c. 119, § 29C. In addition, the court must determine whether or not DSS made reasonable efforts to prevent the child's removal from home. *Id.* A finding that DSS has not made reasonable efforts can result in DSS not receiving federal reimbursement for the child's placement. *See* 45 C.F.R. § 1356.21(b)(1). As is the case in care and protection matters, the "reasonable efforts" findings are generally pro forma procedures because the courts are reluctant to take any action that may reduce DSS's financial resources. In addition, in many cases, DSS has had no involvement with the child or family prior to receiving custody. Nonetheless, in the appropriate case, counsel may argue that DSS has not made reasonable efforts and that the child should first be referred to DSS

for services as a condition of remaining in the home rather than being placed in the custody of DSS.

The formal duties of the probation officer may end upon the commitment of the child to DSS. "Upon the court's adjudicating a child and committing to DSS, the probation officer's responsibility terminates as it relates to the supervision contact level. However the probation officer may, at the court's direction, continue to monitor compliance with the order, including any conditions and limitations prescribed by the court." Standard 6, Commentary. In practice, probation typically remains involved with CHINS cases even after a commitment to DSS by monitoring the case and maintaining collateral contacts.

Commitment to DSS and the Indian Child Welfare Act

The federal Indian Child Welfare Act (ICWA) applies in CHINS cases where an "Indian child" is removed from his parent's home and committed to DSS. 25 U.S.C. § 1903(1). An "Indian child" is defined under the Act as a child who: (1) is a member of a federally recognized Indian tribe; or (2) is the biological child of a member of federally recognized tribe and the child is eligible for membership in the tribe. 25 U.S.C. § 1903(4). ICWA contains a number of important provisions:

- The tribe has a right to notice and to intervene in the proceeding. *See* 25 U.S.C. §1912(a) & 1911(c).
- No hearing may be held until at least 10 days after notice is received by the tribe and the parent. *See* 25 U.S.C. §1912(a).
- The parent has a right to counsel. *See* 25 U.S.C. § 1912(b).
- Before granting custody to DSS the court must find by *clear and convincing evidence* (including the testimony of a qualified expert witness) that continued custody by the parent is likely to result in serious emotional or physical damage to the child. *See* 25 U.S.C. §1912(e).

- Before granting DSS custody, the court must also find that DSS made active efforts to provide remedial and rehabilitative services to prevent the child's removal from home and that those efforts were unsuccessful. *See* U.S.C. § 1912(d).
- When selecting the child's placement, DSS must give preference to: (1) the child's extended family; (2) a foster home approved by the tribe; (3) an Indian foster home approved by a non-Indian authority; or (4) a residential program approved by the tribe or operated by an Indian organization. *See* 25 U.S.C. §1915(b).
- If the parent consents to DSS custody, the judge must certify that the terms and consequences were fully explained and fully understood by the parent. *See* 25 U.S.C. §1913(a).
- The custody order may be vacated by the tribe, parent or the child upon a showing that ICWA was violated. *See* 25 U.S.C. §1914; *see also* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989).

ICWA is discussed in a number of other chapters including chapter _ (Initiation of the Proceedings); chapter _ (Trial Preparation and Conduct); chapter _ (Adjudication and Disposition); and chapter _ (Permanency Planning).

Other Dispositional Options

The Juvenile Court also has jurisdiction to grant a guardianship petition on behalf of a child who is the subject of a CHINS petition in the same manner that a care and protection proceeding can be concluded by a guardianship. *See* G.L. c. 201, § 1. If the child wishes to be placed with a guardian, counsel may draft and file the necessary documents. The guardianship statute provides that a child age fourteen or older may nominate his own guardian. *See* G.L. c. 201, § 2. (See chapter _ on collateral family law proceedings.) The court may appoint a guardian ad litem to investigate the proposed guardian, although this may not be necessary in all cases. *See* Juvenile Court Bench Book, II-42.

Other dispositional alternatives available to the court include committing the child to a mental health facility provided the child qualifies under G.L. c. 123, §§ 7 & 8. Similarly, a

parent may commit the child to a mental health facility for treatment if agreed to by the facility and the child's insurer. *See* G.L. c. 123, § 10. Children with substance abuse problems may be referred to the Department of Public Health for an evaluation to determine whether the child is drug dependent and would benefit from treatment. *See* G.L. c. 111E, § 13A. (See chapter __, medical treatment decisions for children in DSS custody.) Children experiencing problems in school may be referred for a special education evaluation by the school department and/or the court may appoint a guardian ad litem to act as the child's educational advocate.

The court may also refer the child to the court clinic for an evaluation or appoint a guardian ad litem investigator or evaluator. Counsel should advise the client of the advantages and disadvantages of cooperating with the evaluator or investigator and should be present during all interviews of the child. In addition, some courts use volunteer court appointed special advocates (CASAs) in CHINS cases whose role is similar to that of a guardian ad litem for the child.

EXTENSION HEARINGS

A dispositional order issued by the court upon adjudication of the CHINS petition is limited to a maximum term of 6 months. *See* G.L. c. 119, § 39G. At that time, the court must either dismiss the petition or conduct a hearing to determine whether to extend the order an additional 6 months. The court may extend the order if it finds, after hearing, that the purpose of the order has not been accomplished and that an extension would be reasonably likely to further the purposes of the order. *Id.*; *see also In re Angela*, 445 Mass. at 59-61. "Whether the purposes of the dispositional order have not been accomplished is not determined by the misconduct that gave rise to the CHINS petition, but by the needs of the child." *In re Angela*, 445 Mass. at 59. Thus, the inquiry for the judge is not whether the child is still truant, or is still a runaway, but

whether an extension is necessary to meet the child's needs. *Id.* at 60-61. The judge may extend and/or modify the prior order. *Id.*

Unlike the initial adjudication, the CHINS statute is silent regarding the standard of proof at an extension hearing. However, in *In re Angela*, the SJC held that the burden is on the petitioner to prove by a fair preponderance of the evidence that the purposes of the order have not been met and that an extension is necessary. *Id.* at 64-66. The SJC analogized to probation surrender hearings in determining the burden of proof. *Id.* at 65-66. (Two Justices dissented from this portion of the decision, one advocating for a clear and convincing standard and the second for a beyond a reasonable doubt standard. *Id.* at 66-71.)

The SJC also addressed the type of hearing required for an extension of a dispositional order. The Court noted that many extension hearings can proceed "on the papers." *Id.* at 64. However, if the requested extension involves an out-of-home placement or commitment to DSS, the child is entitled to an evidentiary hearing. *Id.*

The SJC in dicta also dealt with the problem of who should prosecute extension hearings. "[W]e think it is appropriate for a probation officer to have primary, but not necessarily exclusive, responsibility for prosecuting a request for an extension of the dispositional order." *Id.* at 66.

REVIEWS AND PERMANENCY HEARINGS

In addition to the six-month extension hearings, the court may also schedule periodic review hearings as needed to monitor the child's progress.

If a child has been in DSS custody for 12 months pursuant to the CHINS petition, the court is required to hold a permanency hearing to determine if and when the child should be returned home or placed in another permanent setting. *See* G.L. c. 119, § 29B. At that time, the

court must also determine whether DSS has made reasonable efforts to reunify the family. *See* G.L. c. 119, §§ 29B & 29C. However, permanency hearings are not consistently held in all CHINS cases. Counsel should request a hearing as necessary to ensure DSS is providing appropriate services and planning for the child. For example, at a permanency hearing for a child over 16 DSS must submit a permanency plan that includes a description of services DSS will provide to assist the child with making the transition from foster care to independent living. Services of this type are crucial for CHINS children who are unlikely to return home. (See chapter __ for a further discussion of permanency hearings and services for children aging out of DSS custody.)

Whenever a child is committed to DSS custody, DSS must provide notice to foster parents of all dispositional and permanency hearings under § 39G. *See* G.L. c. 119, § 29D. However, this may not routinely occur and, in appropriate cases, the CHINS attorney should notify the foster parent directly of their right to be heard at the CHINS hearing. If intending to call the foster parent as a witness, counsel should issue a subpoena to secure the foster parent's attendance at the hearing.

CONTEMPT

Over the years judges have attempted to enforce the school attendance and other mandates of the CHINS statute through contempt proceedings. For example, a Juvenile Court judge might order a child to attend school and, if the child disobeys, hold him in contempt and commit him to DYS. This practice has been rejected by the SJC on the ground that the CHINS statute does not authorize the court to enter a direct order against the child except as a condition of custody. *See In re Vincent*, 408 Mass. 527, 531-532 (1990), *see also Commonwealth v. Florence F.*, 429 Mass. 523, 524-526 (1999). The judge has no authority to order the child to

attend school, to stay in a placement, or to obey his parents and thus cannot be held in contempt for violating such an order. *See Florence F., supra*. The judge's only authority is to enter an order of custody subject to certain conditions and, if the child does not comply with those conditions, the judge may enter a new custody order. *Id.* at 527.

Despite the clear holding of the SJC, counsel must be vigilant and object to entry of any CHINS order that could be used to hold the child in contempt of court. Similarly, CHINS counsel must be alert to the court's use of its summary contempt powers against children who behave inappropriately in the courtroom. For example, some judges will use their summary contempt power to place children in lockup at the court for several hours for behaviors such as not listening, being wise or smirking committed in the presence of the judge. It is not uncommon for children to behave in inappropriate ways when they are nervous or due to cultural factors or emotional problems that may need to be explained to the court.

REPRESENTING CHILDREN IN CHINS PROCEEDINGS

Role of the CHINS Attorney

The role of an attorney representing a child in a CHINS matter is to be a zealous advocate for the child. *See* Mass. R. Prof. C. 1.3. The CHINS attorney must pursue the client's goals and wishes in the litigation. *See* Mass. R. Prof. C. 1.2. It is not the role of the attorney to advocate for what counsel or any other party believes is in the child's best interests. Also, when representing older children, deference to their wishes is pragmatic. A teen who is opposed to a particular disposition is unlikely to cooperate, and may run from a placement or refuse to participate in a service.

Of course, the CHINS attorney must also counsel and advise the client. *See* Mass. R. Prof. C. 1.4. This includes explaining to the child his rights and responsibilities and the nature of

the proceedings. It also includes advising the client about the available options and the likelihood of achieving the client's stated goals. For example, while a teen client may wish to live with her 19-year old boyfriend, counsel should advise her that the court is unlikely to concur with this disposition. Counsel should also explore alternative ways to meet the client's overall goals. In the above example, counsel might investigate an alternative placement with a relative or the parents of a school friend who would permit the teen to spend time with her boyfriend.

In rare cases, an attorney may determine that the client is not competent to make adequately reasoned decisions about the litigation. *See* Mass. R. Prof. C. 1.14. In that case, counsel must still maintain as normal an attorney-client relationship as possible. *Id.* If a CHINS client is not competent to direct the litigation, this obviously raises issues about the client's competency to stand trial. Further, the client may not have the requisite intent under the statute to be adjudicated in need of services. For example, in a truancy case, the client's failure to attend school requires a finding by the court that the child's truancy is "willful." *See* G.L. c. 119, § 21.

Attorney-Client Confidentiality & Privilege

Counsel must be vigilant in maintaining the confidentiality of the attorney-client relationship. *See* Mass. R. Prof. C. 1.6. The attorney must explain to the CHINS client the rules regarding attorney-client confidentiality and privilege, including the limits of the rules. **See chapter __ on privilege and confidentiality.** In three rare circumstances, counsel may divulge confidential client communications. First, if the client is incompetent and the client is personally at risk of substantial harm, the CHINS attorney *may* disclose confidential information if it is reasonably necessary to protect the child's interests. *See* Mass. R. Prof. C. 1.14. Second, the attorney *may* disclose information to prevent the commission of a criminal act that is likely to

result in death or serious bodily harm. *See* Mass. R. Prof. C. 1.6(b)(1). However, unlike the former rules of professional responsibility in effect prior to 1999, Rule 1.6(b)(1) does not require that the client be the perpetrator of the criminal act (i.e., the client may be the victim or simply be in possession of knowledge of the impending act). Third, if either the client or a witness on behalf of the client has presented false testimony to the court, counsel must rectify the fraud even if it requires disclosure of a confidential client communication. *See* Mass. R. Prof. C. 1.6(b)(3) & 3.3(a)(4).

Due to the confidential nature of the attorney-client relationship, the CHINS attorney may have information about the client that no else has. For example, if the child has run away from home or a placement, counsel may be the only person who knows the child's location. In this situation, DSS, the court or the child's parents may attempt to pressure counsel to reveal the child's whereabouts. Counsel may also be aware that the client is engaging in dangerous behavior, such as prostitution or substance abuse. In these situations, counsel must use his role as advisor and counselor to try to assist the client without revealing confidential information to the court or others. If the client's behavior puts him or her at risk of delinquency or criminal charges, counsel should advise the client about the legal risks of engaging in such conduct.

Communicating with Parents and Other Caregivers

The quality and quantity of communication with the client's parents will vary depending upon the facts and circumstances of the case and the position of the parties. The parent may be an ally or adversary. The parent's position and child's position may initially be aligned but subsequently diverge as the case progresses. Conversely, a parent who starts the CHINS process wanting the court or DSS to "take care of the problem" may quickly become disillusioned by the system. Moreover, the parent's posture in the case is not necessarily determined by whether or

not the parent is the petitioner. For example, a parent in a truancy case filed by the school may be in favor of having the child committed to DSS, whereas a parent who files a CHINS petition may be doing so in order to obtain necessary services to keep the child at home.

Regardless of the parent's position, he or she is often the best source of information about the child's history and current situation, therefore, some level of communication with the parent is likely to be necessary in most cases. Similarly, the child's foster parent or caregiver is likely to have information about the child that will require communication between the CHINS attorney and the foster parent or caregiver. Given this reality, counsel must be alert to the numerous ethical and practical pitfalls of communicating with the child client's parents and other caregivers.

When communicating with parents, counsel must be clear that he represents the child and not the parents. *See* Mass. R. Prof. C. 4.3. In addition, child's counsel must refrain from offering legal advice to the parents if there is a reasonable possibility that the interests of the child and the parents may be in conflict. *Id.* In the rare case where a parent has hired his own attorney to represent his interests in the CHINS proceeding, counsel must obtain the lawyer's permission before communicating directly with the parent. *See* Mass. R. Prof. C. 4.2.

Counsel should also be aware that parents and other caregivers for the child may not understand the role of the CHINS attorney. They may assume that the CHINS attorney will advocate for the child's best interests and counsel may need to explain that he is ethically obligated to represent the child's wishes and not what the parent or others think is in the child's best interests.

Counsel must obtain the client's permission before revealing any confidential or privileged information about the client or the client's case to the parents or caregivers. *See* Mass.

R. Prof. C. 1.6(a). In addition, counsel should advise the client that sharing confidential or privileged information with the parent or caregiver may waive any privilege the child might otherwise have under the law. See chapter __ on privilege and confidentiality.

Investigation and Discovery

When representing the CHINS client, counsel will want to obtain as much information as possible about the child's history and current situation. This should include reviewing the probation file and obtaining medical, educational, DSS and other social service records pertaining to the child. Counsel should also talk with the child's parents, school personnel, therapists and other collaterals. Counsel should determine whether there have been any prior court proceedings, such as an earlier CHINS, care and protection or delinquency proceeding, and, if so, review any relevant records pertaining to those cases. Counsel should also obtain any investigations or evaluations that may have been conducted by the court clinic, a guardian ad litem, or the school.

One vexing issue in CHINS cases is who may consent to the release of confidential information about the child. If the child is not in DSS custody, generally the parent has the authority to authorize or withhold consent and the parent will need to sign releases for the attorney to access confidential information about the client. If the child is in DSS custody, with some exceptions, DSS can authorize the release of the child's confidential information to the attorney. In both situations, however, the best practice is to obtain the child's written consent as well. If either DSS or the parent refuses to consent to releasing confidential information about the child, counsel should consider seeking assistance from the court. *See Adoption of Diane*, 400 Mass. 196, 201-202 (1987). In practice, many treatment providers will disclose information to child's counsel if the attorney provides documentation that he or she has been appointed by the

court to represent the child. See chapter _ for a further discussion about obtaining access to confidential information about the child.

In certain limited circumstances, minors have the right to consent to the disclosure of their confidential information. See G.L. c. 112, §§ 12E & 12F. For example, children over 14 may request copies of their school records and authorize the school to release the information to third parties. See 603 C.M.R. §§ 23.02; 23.07(2) & (4).

As part of the investigation process, the CHINS attorney should also spend adequate time talking with the child about his experiences at school and home to try to determine the cause of the child's behavior. The child may be skipping school because he is the victim of bullying or is caring for a younger sibling at home. Similarly, counsel may learn that a child is running away from home because of domestic violence or substance abuse in the home. The courts are overburdened and probation officers often do not have the time for this level of in-depth inquiry. In addition, there is a propensity on the part of some judges and other adults to simply tell the child to go to school or stop running away instead of investigating and addressing the underlying problems. A zealous attorney will attempt to determine the cause of the child's behavior and advise the child about possible solutions.

Services and Placement Issues

Depending upon the client's goals, counsel may need to vigorously advocate for appropriate services. If the child is committed to DSS, all the remedies available in care and protection cases are available to the CHINS client, including grievances, fair hearings and abuse of discretion motions. See chapter __ on services, placement and visitation. It is important for CHINS attorneys to be familiar with the services available for teens in the areas where they practice. If the goal is to keep the child home, successful advocacy may include presenting to

the court a realistic plan for services and supervision of the child.

Unfortunately, there is a severe shortage of placement resources for teens. Many children spend long periods in “temporary” shelters or bounce from one hotline home to another before a more permanent placement can be located. Given this reality, the best strategy for the client may be to advocate that the child remain at home with his family with available services. Some states have had success utilizing respite services that allow the child and the family a needed break from one another thereby reducing the level of family stress and conflict in the home. Although not widely used in Massachusetts, counsel should consider advocating for respite where consistent with the client’s goals. The Vera Institute has published two reports on the use of respite in CHINS cases that are available at www.vera.org. For more information about respite and to locate local programs, visit the Arch National Respite Network and Resource Center website at www.archrespice.org.

When a child cannot remain home, the CHINS attorney should proactively investigate alternative placement options. Counsel may be able to identify relatives or friends to care for the child as either an approved DSS foster placement or pursuant to a court order granting custody or temporary guardianship to the relative or friend. If a client requires a group home or residential setting, counsel should assess the appropriateness of the recommended placement. Ideally, programs should be selected that are in close proximity to the child's home community so that family ties can be maintained and family counseling pursued if appropriate.

Occasionally, a CHINS client may be suspected of setting fires or sexually abusing another child. In this circumstance, DSS is required to conduct a risk evaluation before placing the child. *See* G.L. c. 119, § 33B. These evaluations pose numerous concerns, including the possibility of criminal charges, and counsel should carefully assess whether or not it is in the

child's interests to participate in the evaluation. For a further discussion of this issue see chapter _ on representing child clients.

For children in need of substance abuse treatment, a little known statute provides a procedure for DSS or the Juvenile Court to refer a child to the Department of Public Health for services. *See* G.L. c. 111E, § 13A. In most cases, DSS or a probation officer will refer the child directly to a substance abuse treatment program. Unfortunately, there is a severe shortage of beds for inpatient substance abuse treatment for minors and the programs that do exist vary in their suitability and willingness to work with drug dependent youth.

Youth needing outpatient mental health services may be referred to community-based or school-based services. On occasion a child will require inpatient treatment. The parent, DSS, or a child 16 or older, may consent to hospitalization. *See* G.L. c. 123, § 10. Alternatively, the child may be the subject of an involuntary commitment proceeding. *See* G.L. c. 123, §§ 7 & 8. See chapter _ regarding medical treatment for children in DSS custody.

Confidentiality and Privilege

Counsel must be careful to protect the child client's privacy rights at all times. State law protects the confidentiality of the child's communications with various treatment providers including social workers, psychologists and other mental health professionals. Federal law protects the confidentiality of the client's health and substance abuse treatment records.

Educational and DSS records are protected under both state and federal law. See chapter _ for a detailed discussion of privilege and confidentiality issues.

CHINS and Related Delinquency Proceedings

In many cases, a child involved in a CHINS proceeding will also be charged with a delinquency offense. The delinquency charge may be related to the CHINS case or it may be a

completely separate matter. Children who do not attend school regularly and roam the streets during the day are good candidates to be arrested for criminal behavior. A child who fights with his parents at home may be charged with domestic assault and battery on a family member. In a school offender case, the school might file a CHINS petition as well as pursue delinquency charges against a child for throwing an eraser or pushing another student at school.

Whether or not the CHINS attorney is handling the child's CHINS and delinquency matters or just the CHINS case, it may be in the child's interests to propose DSS custody as an alternative to commitment to DYS on the delinquency charge. Therefore, it is imperative that the CHINS attorney work closely with the child's delinquency attorney to advance the client's interests if CHINS counsel is not handling all matters. Sometimes the court will agree to hold the child on bail at a DYS facility until DSS locates a suitable placement. In that case, counsel should verify that the terms of the bail mittimus allow for the child's release from DYS detention to the custody of a DSS social worker or parent for purposes of participating in interviews at placements and, ultimately, for placement by DSS. Occasionally DYS will have a better placement option for a child than DSS and the judge will order the child committed to DYS while also inviting the delinquency attorney to file a motion to revise and revoke the commitment order upon the child's successful completion of the DYS program.

Unfortunately, on too many occasions, children get stuck in DYS detention while DYS and DSS both wait for the other agency to take the lead in locating a placement for the child. Moreover, if DSS believes the child is headed for a DYS commitment, the social worker may be less motivated to locate a suitable placement for the child. Counsel should work vigorously to resolve this impasse between the agencies when it occurs and, where appropriate, bring the matter to the attention of the court.

If a child in DSS custody is subsequently committed to DYS, the DYS commitment supersedes the DSS custody order. *See* DSS Policy #88-002, “DSS Children Committed to DYS.” However, DSS does not have discretion to close the child’s case unless and until the court dismisses the DSS custody order. *Id.* Depending upon the circumstances, CHINS counsel might oppose or support DSS’s request to dismiss the custody order and close the CHINS case.

CHINS and Care and Protection Proceedings

In some cases, it may be to the child’s advantage if a care and protection petition is filed in lieu of or in addition to the CHINS. For example, what might appear as a runaway case might actually be a situation where the parent has thrown the child out of the house. Similarly, a child may be truant from school due to serious problems at home such as domestic violence, parental substance abuse or mental illness. A care and protection petition places the court’s focus on the parent’s conduct rather than the child’s behavior.

With the client’s consent, counsel can encourage another party, perhaps probation or a guardian ad litem or even DSS, to file the care and protection petition. Also, during the course of a CHINS hearing counsel may present evidence about the family situation that will result in the judge directing probation to file a care and protection petition. If someone other than DSS files the petition, the court will typically substitute DSS as the petitioner sua sponte or upon motion by any party. Alternatively, probation, a guardian ad litem or even a school official may file a report of abuse or neglect under G.L. c. 119, § 51A. DSS will then conduct an investigation and determine whether the filing of a care and protection petition is warranted. *See* G.L. c. 119, § 51B; 110 C.M.R. §§ 4.20-4.35.

Infrequently, a CHINS petition is filed on behalf of a child who is already in DSS custody under a care and protection case. Typically this occurs when the child is truant from

school or runs away from a DSS placement.

Use of Experts, Guardians ad Litem and the Court Clinic

Often in a CHINS case, some type of evaluation is necessary to determine the underlying cause of the child's behavior or to recommend appropriate treatment and services. An evaluation may be conducted by an expert hired by counsel, by a guardian ad litem evaluator appointed by the court, or by the court clinic. In some circumstances, an evaluation may also be performed by the school or through a DSS referral.

An expert hired by the CHINS attorney works for counsel and can address specific questions posed by the attorney. The expert's results and conclusions are protected by the attorney work product doctrine. *See Adoption of Sherry*, 435 Mass. 331, 335-336 (2001). If the evaluation is not helpful to the client's position, counsel is under no obligation to share its contents with anyone else. *Id.* See chapter __ for a discussion of experts.

When the court refers the child to the court clinic for an evaluation, the report is made available to the court and to the parties. The evaluator is required to warn the child that anything he or she says during the evaluation is not confidential and can be shared with other parties and the court. This is commonly referred to as a *Lamb* warning. *See Commonwealth v. Lamb*, 365 Mass. 265, 270 (1974). If no warning is given to the child, the child may assert his privilege to prevent disclosure of the evaluation to the court and other parties. *Id.* If a child is ordered to participate in an evaluation but does not wish to, the child must nonetheless appear at the scheduled time for the evaluation and then assert his privilege thereby preventing the evaluation from proceeding. *See In re Sheridan*, 412 Mass. 599, 604-605 (1992). If the child simply fails to appear for the court-ordered evaluation, the child risks a contempt finding by the court. *Id.* See also chapter __ in this manual discussing confidentiality and privilege.

Once a court clinic evaluation is complete, the court determines who may have access to the report. Counsel should ensure that a copy of the report is not kept in the probation file, as the probation department generally takes the position that anything in its files may be shared with other agencies, such as DYS or the Sex Offender Registry Board, when required by law.

Alternatively, the court may appoint a guardian ad litem as an evaluator. This typically occurs when the court clinic is backlogged or when expertise in a specific area is required. In situations where a proposed placement or custodian must be investigated, the court will most likely appoint a guardian ad litem investigator unless a probation officer is available to conduct the investigation. In some courts, volunteer CASAs (court appointed special advocates) are also appointed to conduct placement investigations in CHINS matters. See chapter __ concerning court investigators and guardians ad litem.

School-Based Advocacy

Schools play an integral role in many CHINS cases, therefore, effective advocacy of clients in CHINS proceedings often requires familiarity with education law. Chapter _ of this manual discusses the client's rights under special education, school discipline and other education laws.

School-based advocacy takes place primarily outside of the courtroom because Juvenile Courts do not have the authority to order schools to provide services pursuant to the CHINS statute. See *Oscar F. v. City of Worcester*, 412 Mass. 38, 40-42 (1992); *School Comm. of Worcester v. Worcester Div. of the Juvenile Court Dep't*, 410 Mass. 831, 836-838 (1991). However, particularly when the school is the party initiating the CHINS proceeding, the Juvenile Court often will attempt to persuade school officials to provide the child with needed services.

Many children who regularly skip school have unidentified learning difficulties and

should be receiving special education services. Child's counsel, a probation officer, a parent or a DSS social worker may refer the child for an evaluation by the school to determine the child's eligibility for special education services. *See* 603 C.M.R. 28.04(1). Alternatively, a child may already be receiving special education services but the child's current educational plan is not appropriate to meet the child's educational needs.

In most CHINS cases, the parent retains the right to make special education decisions on behalf of the child, including consenting to the evaluation and signing the child's individualized education plan (IEP). *See* Guidance on Appointment of Educational Surrogates (Oct. 28, 2002) (included as exhibit to chapter ____ on education.) Occasionally, a foster parent or an educational surrogate will be appointed to make educational decisions on the child's behalf. *Id.* In either case, the CHINS attorney should work closely with the parent or educational surrogate to ensure that the parent or educational surrogate is making educational decisions consistent with the child's desired outcome.

For some students, truancy problems can be resolved by the provision of needed services or through other means. For example, a teen parent may be in need of child care so that she can attend school. A depressed child may need counseling and perhaps medication. A child who is chronically late for school may need assistance in getting to school on time. If the child is repeatedly tardy for a good reason (e.g., taking care of a younger sibling), the CHINS attorney should advocate that the school make an exception to its tardy policy for the client.

Other reasons for truancy may include homelessness, family conflict, harassment or bullying, chronic fatigue, substance abuse, untreated medical problems, or financial problems. In some cases, rigid school policies can push students out of school, including policies that require students to be suspended for excessive absences; policies that forbid students to make up

missed work; and policies that require teachers to fail students or lower grades automatically after a specified number of unexcused or even excused absences from class even if all classroom and homework assignments were completed by the student. An effective CHINS attorney is adept at determining the underlying problem and suggesting creative solutions.

In some CHINS cases, the court appoints a guardian ad litem to act as an educational advocate for the child and to investigate and report back to the court concerning the educational status of the child. In special education cases, the GAL-educational advocate may play an advocacy role by attending school meetings and pressuring the school to provide needed services. However, the GAL-educational advocate does not have authority to sign the IEP or make other educational decisions on the child's behalf unless this authority is expressly stated in the court's written order of appointment. *See* Guidance on Appointment of Educational Surrogates (Oct. 28, 2002).

In a school offender case, the child might also be subject to school disciplinary proceedings. The presence of an attorney to advocate for the child at a suspension or expulsion hearing can have a substantial impact on the outcome.

CONCLUSION

Representing CHINS clients can be both a frustrating and rewarding experience. The often informal nature of the proceedings and the lack of services available for adolescents, as well as the fact that many teens are, at best, difficult to work with, all combine to make CHINS cases particularly challenging for the assigned attorney. Nonetheless, since CHINS counsel is often the only practicing lawyer in the courtroom, counsel can often be highly effective in advancing the client's position and achieving the desired outcome. Moreover, counsel can be available to assist the child outside the courtroom by advocating for needed services, negotiating

with other parties, and counseling the CHINS client about available options and resources that will hopefully set the child on the path to becoming a healthy and productive adult.

APPENDICES

Standards and Forms for Children in Need of Services for Probation Officers of the District Court Department and the Juvenile Court Department. Commissioner of Probation (Donald Cochran) 1990.

CHINS flow chart

Checklist of procedure

Checklist of disposition

Client interview form

Court chins forms, probation and clerk.

Motion to dismiss (over 17)

Motion to vacate temporary custody order

Bibliography