

IMPLEMENTATION OF INDIANA CRIMINAL PROCEDURE RULE 25

Appointment of Counsel and the Waiver of the Right to Counsel



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INDIANA CRIMINAL PROCEDURE RULE 25

- (A) **Right to Counsel.** A child charged with a delinquent act is entitled to be represented by counsel in accordance with Ind. Code Section 31-32-4-1.
- (B) **Mandatory Appointment of Counsel in Certain Juvenile Delinquency Proceedings.**
However, counsel for the child must be appointed:
- (1) when there is a request to waive the child to a court having criminal jurisdiction; or
 - (2) when a parent, guardian, or custodian of the child has an interest adverse to the child; or
 - (3) before convening any hearing in which the court may find facts (or the child may admit facts) on the basis of which the court may impose the following:
 - (a) wardship of the child to the Department of Correction;
 - (b) placement of the child in a community based correctional facility for children;
 - (c) confinement or continued confinement of the child in a juvenile detention center following the earlier of an initial or detention hearing;
 - (d) placement or continued placement of the child in a secure private facility following the earlier of an initial or detention hearing;
 - (e) placement or continued placement of the child in a shelter care facility following the earlier of an initial or detention hearing; or
 - (f) placement or continued placement of the child in any other non-relative out of home placement following the earlier of an initial or detention hearing; or
 - (4) when a child is taken into custody and detained pursuant to Ind. Code Section 31-37-4-1 or 2.
- Unless or until a valid waiver has been or is made under subsection (C) below.
- (C) **Waiver.** Following the appointment of counsel under subsection (B), any waiver of the right to counsel shall be made in open court, on the record and confirmed in writing, and in the presence of the child's attorney.
- (D) **Withdrawing Waiver.** Waiver of the right to counsel may be withdrawn at any state of a proceeding, in which event the court shall appoint counsel for the child.
- (E) **Effective Date.** This rule shall become effective January 1, 2015.

MANDATORY APPOINTMENT OF PAUPER COUNSEL

Every child is entitled to be represented by counsel whenever there is an allegation that the child has committed a delinquent act. Ind. Code § 31-32-4-1; Ind. Crim. Pro. R. 25(A). Many counties appoint counsel for every child alleged to be a delinquent child unless the child hires private counsel. In those counties, children rarely, if ever, appear *pro se*.

The American Bar Association and the National Council of Juvenile and Family Court Judges have also endorsed appointment of counsel for children facing juvenile delinquency allegations. "Counsel should be provided for any juvenile subject to delinquency... proceedings." Institute for Judicial Administration-American Bar Association, *Juvenile Justice Standards, Standards Relating to Counsel for Private Parties*, Std. 2.3(a)(i) (1996).

Juvenile delinquency court administrative judges are responsible to ensure that counsel is available to every youth at every hearing, including post-disposition review and reentry hearings. Juvenile delinquency court judges should be extremely reluctant to allow a youth to waive the right to counsel. A waiver of counsel should only be accepted after the youth has consulted with an attorney about the decision and continues to desire to waive the right.

National Council of Juvenile and Family Court Judges, *Juvenile Delinquency Guidelines: Improving Court Practice in Juvenile Delinquency Cases*, Chapter I(C)(7) (2005).

The appointment of counsel process in juvenile court is different than that in criminal court. Appointment of counsel is not dependent on a determination of indigence of the child or the child's parent, guardian, or custodian. *Adams v. State*, 411 N.E.2d 160-162 (Ind.Ct.App. 1980). Determination of who shall ultimately pay the cost for pauper counsel is independent of the determination regarding appointment of counsel. *Id.* The court should consider only whether the child has an attorney and whether the child has waived the right to counsel. *Woolf v. State*, 545 N.E.2d 590, 592 (Ind.Ct.App. 1989). Additionally, if the parent, guardian, or custodian hires private counsel, the child may object to that representation and request pauper counsel. *Lindley v. State*, 426 N.E.2d 398, 400-01 (Ind. 1981). Ultimately, any payment for counsel shall be made under Ind. Code § 31-40. Ind. Code § 31-32-4-4.

The instances when counsel must be appointed are not entirely clear under Criminal Rule 25(B). To ensure that the child's right to counsel is protected, appointment of counsel must be made prior to the first hearing – whether the detention hearing or initial hearing – and no waiver of the right to counsel should occur before that appointment. The rule states the following instances triggering appointment:

- (1) When there is a request to waive the child to a court having criminal jurisdiction. Ind. Crim. Pro. R. 25(B)(1).

The State may request that the juvenile court consider a motion a waive jurisdiction at the detention hearing (*See Partlow v. State*, 453 N.E.2d 259, 264 (Ind. 1983)), during the initial hearing (*See Ind. Code § 31-37-12-4*), and any other time up to the

time the child has admitted to the allegations in the petition at the initial hearing or the first witness has been sworn at the factfinding hearing (*See* Ind. Code § 31-30-3-7). To ensure that the child's rights are protected and that there is adequate time to prepare the child's defense to the waiver petition, counsel should be appointed prior to any hearing during which the State may request that the court consider waiving juvenile court jurisdiction.

(2) When a parent, guardian, or custodian of the child has an interest adverse to the child. Ind. Code § 31-32-5-1(2)(B); Ind. Crim. Pro. R. 25(B)(2).

If an adverse interest exists, the adult cannot act in the role of advising the child whether to waive any constitutional right. Ind. Code § 31-32-5-1(2)(B). Because it may not be clear at the very earliest stages of a case whether an adverse interest exists, the preferred practice would be to appoint counsel prior to any initial hearing at which the waiver of constitutional rights may be discussed. Criminal Rule 25(B)(4) already requires appointment of counsel prior to any detention hearing. In either case, following appointment of counsel, the child may still waive the right to counsel. Ind. Code § 31-32-5-1(1).

Determination of an adverse interest may go beyond a parent, guardian, or custodian who was the victim of the alleged delinquent act and is usually fact specific:

- When the parent, guardian, or custodian may be a witness and resides with the child, there may be a conflict of interest. *Sevion v. State*, 620 N.E.2d 736, 739 (Ind.Ct.App. 1993).
- A conflict may exist because the parent was acting as an agent of law enforcement when the parent spoke with a law enforcement officer who advised the parent prior to the interrogation to encourage the child to confess, and following the waiver of the right to remain silent, the parent told the child to tell the truth. *Garrett v. State*, 265 Ind. 63, 351 N.E.2d 30, 34 (1976).
- An Indiana Department of Child Services (DCS) caseworker may have an adverse interest as an agent of the state when the child is a ward of DCS. *Borum v. State*, 434 N.E.2d 581, 583-84 (Ind.Ct.App. 1982).

(3) Before the court may convene a hearing during which there may be a finding or admission of facts that would result in a specified placements outside of the home. Ind. Crim. Pro. R. 25(B)(3).

- A child may admit to facts alleged in the petition alleging delinquency at an initial hearing, following which the court must enter judgment accordingly. Ind. Code §§ 31-37-12-7 and 31-37-12-8. The child may also admit to one or more allegations at a later admission hearing after entering a preliminary denial to the

allegations at the initial hearing. The court must enter judgment following a true finding at the conclusion of a factfinding hearing. Ind. Code § 31-37-13-2.

- Under the rule, counsel must be appointed before any initial hearing, admission hearing, or factfinding hearing following which the court may:
 - o Impose wardship to the Indiana Department of Correction;
 - o Order placement in a community-based correctional facility for children pursuant to Ind. Code § 31-37-19-6(b)(2)(A);
 - o Order confinement or continued confinement in a juvenile detention center pursuant to Ind. Code §§ 31-37-19-6(b)(2)(B) and 31-37-19-6(b)(2)(C);
 - o Order placement or continued placement in a secure private facility pursuant to Ind. Code § 31-37-19-6(b)(2)(F); or
 - o Order placement or continued placement in any other non-relative placement pursuant to Ind. Code § 31-37-19-6(b)(2)(D).

Ind. Crim. Proc. R. 25(B)(3).

- Because it is often difficult at the earliest stages of a case to predict whether an out-of-home placement of the child may be ordered at the disposition hearing or at later modification or review hearings in the case, the preferred practice is to appoint counsel before the earliest hearing. At the detention hearing and initial hearing, the court has only limited information about the child and the child's education, family, mental health, medical, and social issues from the preliminary inquiry and court participants.
- Caution should be taken when appointment of counsel does not occur until after an initial hearing. Children are considered clients with diminished capacity due to their minority. Ind. Prof. Conduct R. 1.14(a). Certainly, children in juvenile court are allowed to make decisions concerning their case, if, when properly advised and assisted, the child is capable of making those decisions. Ind. Prof. Conduct R. 1.14 Comment 1 and Comment 6. Defense counsel who is appointed following a key point in the case – initial hearing – should review the prior proceedings, discovery, constitutional challenges, and information about the child's mental capacity. If necessary, these prior hearings should be challenged prior to the disposition hearing. A juvenile is entitled to the assistance of counsel “to cope with the problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense to prepare and submit it.” *In re Gault*, 387 U.S. 1, 36, 87 S.Ct. 1428, 1448 (1967).
- If defense counsel is not appointed until after the initial hearing, admission hearing, or factfinding hearing, counsel must request a continuance of any hearing when necessary to act with reasonable diligence, commitment, and dedication to the interests of the client. Ind. Prof. Conduct R. 1.3 and Ind. Prof. Conduct R. 1.3 Comment 1. For example, following a careful review of the case and in order to advocate for the child, it may be necessary to further investigate

the case, take depositions, move to suppress evidence, author an alternative predisposition report, request a mental health evaluation, request a home detention evaluation, and/or seek placement authorization and funding for an out-of-home placement. Counsel who is appointed at the later stages of a case may need to challenge orders that have already been issued in the case while the case remains at the trial level, as well as make a record for appellate purposes concerning the limitations of representation in the proceedings and what could have been done had appointment occurred prior to the earliest hearings.

- In communities that have not traditionally appointed counsel automatically prior to the earliest hearing, the defense bar should work with the county leadership, the prosecutor's office, and the judiciary to seek funding and logistical changes to ensure that each alleged delinquent child has access to trained juvenile defense attorneys prior to any court appearance.

(4) Prior to a detention hearing when a child is taken into custody and detained pursuant to Ind. Code § 31-37-4-1 or 2. Ind. Crim. Pro. R. 25(B)(4).

- A child may be taken into custody by law enforcement under an order of the court. Ind. Code § 31-37-4-1.
- A child may be taken into custody by a law enforcement officer acting with probable cause to believe that the child has committed a delinquent act. Ind. Code § 31-37-4-2.

THE RIGHT TO COUNSEL: **Existing Constitutional Provisions, Statutes, and Case Law**

Any juvenile alleged to be a delinquent child in a petition alleging delinquency has the right to be represented by counsel during every stage of the juvenile proceedings. *D.H. v. State*, 688 N.E.2d 221, 223-24 (Ind.Ct.App. 1997). This right to counsel flows from the Sixth Amendment to the United States (U.S.) Constitution and Article I, Section 13(a) of the Indiana Constitution, both of which provide that the accused has the right to counsel to assist with his defense in criminal prosecutions. These constitutional protections were extended to juveniles in delinquency cases by *In re Gault*, 387 U.S. 1, 42, 87 S.Ct. 1428, 1451 (1967).

A proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the fact, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child 'requires' the guiding hand of counsel at every step in the proceedings against him.

Id. at 36. If there is no record of the assistance of counsel or a knowing and voluntary waiver of counsel, the results of the hearing must be reversed. *D.H. v. State*, 688 N.E.2d at 223-24 (Ind.Ct.App. 1997).

Since the current version of the Indiana juvenile code came into existence in 1997, a child charged with a delinquent act has been entitled to be represented by counsel under Ind. Code § 31-32-4. Ind. Code § 31-32-2-2(1). If the child is alleged to be a delinquent child and does not have an attorney and the child has not lawfully waived the right to counsel under Ind. Code § 31-32-5, the juvenile court shall appoint counsel for the child at the detention hearing or at the initial hearing, whichever comes first, or at any earlier time. Ind. Code § 31-32-4-2(a). The juvenile court may also appoint counsel to represent the child at any other proceeding. Ind. Code § 31-32-4-2(b).

The new Indiana Criminal Procedure Rule 25 is meant to provide further guidance about when the appointment of counsel must be made, details about how any waiver of the right to counsel must be made, and when a withdrawal of the waiver of the right to counsel may be requested by the juvenile.

ADVISEMENT OF THE RIGHT TO COUNSEL AND DANGERS OF PROCEEDING *PRO SE*

Practice Tips: The juvenile court judge must:

- (1) advise the child and the custodial parent, guardian, custodian, or guardian ad litem of their rights, including the dangers of proceeding pro se,
 - (2) question whether they understood those rights.
-

The nature of the juvenile court procedure itself requires that the juvenile court judge ensure that the juvenile understands the nature of the proceedings, the allegations, and the rights. *Bridges v. State*, 260 Ind. 651, 654, 299 N.E.2d 616, 618 (1973). “[T]he Due Process clause of the Fourteenth Amendment [to the U.S. Constitution] requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile’s freedom is curtailed, the child and his parents must be notified of the child right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel be appointed to represent the child.” *In re Gault*, 387 U.S. at 41. The advisement concerning the right to counsel also requires an advisement that counsel would be appointed at public expense if the child and parent could not afford one. *N.M. v. State*, 791 N.E.2d 802, 807 (Ind.Ct.App. 2003). Failure to advise a juvenile in a delinquency proceeding of his right to counsel is fundamental error. *A.S. v. State*, 929 N.E.2d 881, 887 (Ind.Ct.App. 2010).

The child must also be warned by the juvenile court of the dangers and pitfalls of self-representation. *J.W. v. State*, 763 N.E.2d 464, 467 (Ind.Ct.App. 2002); *A.A.Q. v. State*, 958 N.E.2d 808, 812 (Ind.Ct.App. 2011); *Poynter v. State*, 749 N.E.2d 1122, 1125-26 (Ind. 2001); *Faretta v. California*, 422 U.S. 806, 835 (1975). The advisement concerning self-representation should also include the nature and importance of the right to counsel. *J.W. v. State*, 763 N.E.2d at 467.

The preferred method is for the juvenile court judge to advise each child and his or her parents of their rights at the same time the judge questions whether they understand those rights. *N.M. v. State*, 791 N.E.2d at 806, fn. 3. A written advisement of rights as the sole advisement of the rights was deemed adequate when both the child and the parent signed it. *J.M. v. State*, 727 N.E.2d 703, 704 (Ind. 2000). However, an *en masse* advisement of rights for several juveniles is more problematic. If the *en masse* advisement of rights is coupled with the juvenile court’s personal interrogation of the juvenile, that advisement would pass constitutional muster. *M.R. v. State*, 605 N.E.2d 204, 206 (Ind.Ct.App. 1992). Where the child listened to the *en masse* advisement of rights and then signed the waiver of rights form without the presence of counsel, parent, or guardian, the waiver of rights was improper. *Beldon v. State*, 657 N.E.2d 1241, 1244 (Ind.Ct.App. 1995). A videotaped *en masse* advisement of rights alone would be inadequate because of the special status of juveniles and the extra protection afforded them. *N.M. v. State*, 791 N.E.2d at 807 fn. 3.

SPECIAL CONSIDERATIONS CONCERNING THE CHILD'S DEVELOPMENT AND IMMATURITY

Special caution should be taken with any waiver of rights by a child because of their immaturity. *In re Gault*, 387 U.S. 1, 28-29, 87 S.Ct. 1428, 18 L.Ed.2d 257 (1967); *Patton v. State*, 588 N.E.2d 494 (Ind. 1992). “The law has historically reflected...that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them.” *J.D.B. v. North Carolina*, 131 S.Ct. 2394, 2403 (2011). Therefore, generally, a request to waive counsel should prompt the court to conduct a pretrial hearing to determine the child’s competence to proceed without counsel and to establish a record of the child’s waiver of the right to counsel. *J.W. v. State*, 763 N.E.2d 464, 467 (Ind.Ct.App. 2002); *citing Dobbins v. State*, 721 N.E.2d 867, 873 (Ind. 1999).

Even at the preliminary stages of the juvenile delinquency case, the juvenile court has some information about the child to assist in ascertaining any developmental or competency issues that may impact the child’s ability to understand his or her rights. An intake officer must complete a preliminary inquiry once the prosecuting attorney has reason to believe that the child has committed a delinquent act. Ind. Code § 31-37-8-1(c). Minimally, the preliminary inquiry must include potentially helpful information about the child’s background, the child’s current status, and the child’s school performance. Ind. Code § 31-37-8-2.

Since 2005, the United States Supreme Court has focused on adolescent development and neuroscience in a series of decisions about juvenile offenders in criminal cases. In *Roper v. Simmons*, the Court noted three general differences between juveniles under the age of eighteen and adults. *Roper v. Simmons*, 543 U.S. 551, 569, 125 S.Ct. 1183 (2005).

First, as any parent knows and as the scientific and sociological studies...confirm, “[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.”

Id., *citing Johnson v. Texas*, 509 U.S. 350, 359-62, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993). “The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure....The third broad difference is that the character of a juvenile is not well formed as that of an adult.” *Id.* “[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult mind. For example, parts of the brain involved in behavior control continue to mature through late adolescence.” *Graham v. Florida*, 560 U.S. 48, 68, 130 S.Ct. 2011 (2010).

Of particular relevance to the waiver of counsel issue is the U.S. Supreme Court’s recognition of the features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings. Juveniles mistrust adults and have limited understanding of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense. [citations omitted] Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust

defense counsel seen as part of the adult world a rebellious youth rejects, all can lead to poor decisions by one charged with a juvenile offense.

Id. at 78. “[A]dolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance.” *Miller v. Alabama*, 132 S.Ct. 2455, 2465 fn. 5 (2012). Juveniles are arguably unlikely to understand the juvenile court proceedings, which in many ways now mirror the criminal court proceedings, and the potential long-term consequences of their decisions related to constitutional rights.

Despite all of these scientific developments, “judges need no imaginative powers, knowledge of developmental psychology, training in cognitive science, or expertise in social and cultural anthropology to account for a child’s age. They simply need the common sense to know that a 7-year-old is not a 13-year-old and neither is an adult.” *J.D.B. v. North Carolina*, 131 S.Ct. 2394, 2407 (2011). These juveniles must be advised of their rights, the risks of self-representation, the potential real and collateral consequences of an adjudication in developmentally-appropriate language that accounts for their lack of maturity. The court must then decide whether the child is competent to waive the right to counsel, if the child has requested a waiver of that right, or appoint counsel for the child.

WAIVER OF THE RIGHT TO COUNSEL BY THE CHILD AND COUNSEL

Practice Tips: The juvenile court judge must:

- (1) Advise the child of his or her rights, including the dangers of proceeding *pro se*,
- (2) Ensure that the child has had an opportunity for a meaningful consultation with defense counsel concerning those rights, and
- (3) Accept any waiver of the right to counsel in open court, on the record and confirmed in writing, and in the presence of the child's attorney.

Any rights guaranteed to a child under the Constitution of the United States, the Constitution of the State of Indiana, or any other law may be waived only by counsel retained or appointed to represent the child if the child knowingly and voluntarily joins with the waiver. Ind. Code § 31-32-5-1(1). Following the mandatory appointment of counsel under Ind. Crim. Proc. R. 25(B), any waiver of the right to counsel shall:

- (1) be made in open court,
- (2) on the record and confirmed in writing, and
- (3) in the presence of the child's attorney.

Ind. Crim Proc. R. 25(C). For this type of waiver, there is no requirement that the custodial parent, guardian, custodian, or guardian ad litem join in the waiver of the right to counsel.

Defense counsel has many responsibilities concerning educating the child about the right to counsel and providing a meaningful consultation concerning waiver of that right:

(1) Defense counsel's role prior to the child's first appearance in court:

- Obtain any and all documents that have been filed in the case, including the affidavit of probable cause supporting a request for detention and/or a petition alleging delinquency and any supporting documents, and any discovery that is available.
- Speak with the child prior to the first appearance in court. Meetings with the child should be one-on-one. Although a juvenile is a client with diminished capacity, as much as reasonably possible, the child has all of the same rights to a normal attorney-client relationship as any other client. Ind. Prof. Conduct R. 1.14(a). If the child is detained, ideally the defense counsel should speak with the child at the juvenile detention facility or shelter care facility. If a meeting at the juvenile detention center or shelter care facility is not possible, counsel should ensure that the child is brought to the juvenile court at least one hour prior to the hearing.
- Explain the defense attorney's role, the prosecutor's role, and the judge's role.

- Advise the child that every child who is alleged to be a delinquent child in Indiana is entitled to have an attorney appointed to help him or her at little or no cost to the child or the child's family.
- Explain the attorney-client privilege.
- Explain what an attorney can do to help the child with the pending case:
 - Explain that the attorney can talk to the judge and prosecutor for the juvenile.
 - Explain that the attorney can write and file motions to help with the juvenile's case and send out subpoenas to make witnesses come to court to testify.
 - Explain that the attorney will tell the court whether the child wants to admit or deny the allegations in the petition alleging delinquency, and if adjudicated, what the child wants for the disposition.
- Explain the petition alleging delinquency, if one has been filed.
- Explain the other rights the child has at the detention hearing or the initial hearing.
- Explain the possible disposition options and collateral consequences of adjudication, if a petition alleging delinquency has been filed.
- Confirm that the child wants an attorney to represent him or her.

(2) If the child does not want to be represented by an attorney:

- Evaluate whether there are any competency issues.
- Talk to the parent, guardian, or custodian about whether the child has any mental health, developmental, or educational issues, including an Individual Education Plan (IEP) and whether the child is taking any prescribed medication.
- Ask the child why an attorney is being declined and answer those concerns.
- Explain that the parent, guardian, or custodian cannot waive the child's right to an attorney. The child must join in any waiver of the right to counsel.
- Confirm whether the child wants to proceed with defense counsel or chooses to waive the right to counsel.
- If the child chooses to waive the right to counsel, advise the court and appear at any subsequent hearing concerning that waiver request.

WAIVER OF THE RIGHT TO COUNSEL BY THE CHILD AND THE CUSTODIAL PARENT, GUARDIAN, CUSTODIAN, OR GUARDIAN AD LITEM

Practice Tips: The juvenile court judge must:

- (1) Advise the child of his or her rights, including the dangers of proceeding *pro se*;
 - (2) Provide the child with the opportunity to have a meaningful consultation with the custodial parent, guardian, custodian, or guardian ad litem who has no adverse interest to the child;
 - (3) Inquire into the voluntariness of the waiver of the right to counsel by both the child and the custodial parent, guardian, custodian, or guardian ad litem; and
 - (4) Accept any waiver of the right to counsel in open court, on the record and confirmed in writing.
-

Any rights guaranteed to a child under the Constitution of the United States, the Constitution of the State of Indiana, or any other law may be waived by the child's custodial parent, guardian, custodian, or guardian ad litem if:

- (A) That person knowingly or voluntarily waives the right;
- (B) That person has no interest adverse to the child;
- (C) Meaningful consultation has occurred between that parent and the child; and
- (D) The child knowingly and voluntarily joins with the waiver.

Ind. Code § 31-32-5-1(2).

To determine voluntariness:

Both the child and the custodial parent, guardian, custodian, or guardian ad litem must knowingly or voluntarily waive the right to counsel. In assessing the validity of the juvenile's waiver, the juvenile court must conduct two separate analyses – the voluntariness of the child's waiver and the voluntariness of the adult's waiver. *D.M. v. State*, 949 N.E.2d 327, 338 (Ind. 2011).

Factors for knowing and voluntary waiver of the right to counsel:

- (1) The extent of the court's inquiry into the defendant's decision;
- (2) Other evidence in the record that establishes whether the defendant understood the dangers and disadvantages of self-representation;
- (3) The background and experience of the defendant; and
- (4) The context of the defendant's decision to proceed *pro se*.

Poynter v. State, 749 N.E.2d 1122, 1127-28 (Ind. 2001); quoting *U.S. v. Hoskins*, 243 F.3d 407, 410 (7th Cir. 2001).

Adverse interest:

Determination of an adverse interest may go beyond a parent, guardian, or custodian who was the victim of the alleged delinquent act and is usually fact specific. For instance, when the parent, guardian, or custodian may be a witness and resides with the child, there may be a conflict of interest. *Sevion v. State*, 620 N.E.2d 736, 739 (Ind.Ct.App. 1993); *see also K.F. v State*, 961 N.E.2d 501, fn. 11 (Ind.Ct.App. 2012) (The court expressed concern over whether a parent who is also a victim can provide meaningful consultation prior to a child's waiver of rights.). A conflict may exist because the parent was acting as an agent of law enforcement when the parent spoke with a law enforcement officer who advised the parent prior to the interrogation to encourage the child to confess, and following the waiver of the right to remain silent, the parent told the child to tell the truth. *Garrett v. State*, 265 Ind. 63, 351 N.E.2d 30, 34 (1976).

Meaningful consultation:

If the child does not have counsel and is not emancipated, prior to any waiver of the right to counsel, the child must be given the opportunity to consult with a parent or other qualifying mature person who has the best interest of the child uppermost in his thoughts and does not have an adverse interest to the child. *Taylor v. State*, 438 N.E.2d 275, 283 (Ind. 1982); *quoting Buchanan v. State*, 268 Ind. 503, 507, 376 N.E.2d 1131, 1134 (1978). It is preferable that the consultation occurs after the child and the custodial parent, guardian, custodian, or guardian ad litem are advised of the rights that may be waived. *Brown v. State*, 751 N.E.2d 664, 670-71 (Ind. 2001); *R.W. v. State*, 901 N.E.2d 539, 544 (Ind.Ct.App. 2009). Failure to provide the opportunity for meaningful consultation following the advisement of the right to counsel and the dangers of proceeding *pro se* may result in the adjudications being voided. *A.S. v. State*, 923 N.E.2d 486, 492-93 (Ind.Ct.App. 2010).

Just as an opportunity for a meaningful consultation prior to an interrogation requires that the child be left alone with his parent or other qualifying mature advisor, so should the court provide an opportunity for frank, private discussion concerning the waiver of the right to counsel. Neither representatives of the State of Indiana nor the probation officer should be present during the meaningful consultation.

The child must join in the waiver

The parent alone may not waive the child's right to counsel. The child must knowingly and voluntarily join in the waiver. Therefore, the juvenile court should make a separate inquiry by questioning the child on the record.

WAIVER OF THE RIGHT TO COUNSEL BY THE EMANCIPATED CHILD ALONE

Practice Tips: The juvenile court judge must:

- (1) Advise the child of his or her rights, including the dangers of proceeding *pro se*,
 - (2) Determine whether the child qualifies as an emancipated child, and
 - (3) Accept any waiver of the right to counsel in open court, on the record and confirmed in writing.
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Any rights guaranteed to a child under the Constitution of the United States, the Constitution of the State of Indiana, or any other law may be waived only by the child, without the presence of a custodial parent, guardian, or guardian ad litem if:

- (A) the child knowingly and voluntarily consents to the waiver; and
- (B) the child has been emancipated under Ind. Code § 31-34-20-6 or Ind. Code § 31-37-19-27, by virtue of having married, or in accordance with the laws of another state or jurisdiction.

Ind. Code § 31-32-5-1(3).

It would be the best practice that prior to accepting a waiver of the right to counsel by a child who was emancipated pursuant to Ind. Code §§ 31-34-20-6 or 31-37-19-27, the juvenile court should examine the findings of the juvenile court that ordered the emancipation to determine whether it was a partial or complete emancipation and the specific terms of the emancipation. *See* Ind. Code §§ 31-34-20-6(b); 31-37-19-27(b).

Similarly, it would be best practice that prior to accepting a waiver of the right to counsel by a child who is married, the court should examine the marriage certificate for validity. In Indiana, the minimum age for marriage is eighteen (18) years of age. Ind. Code § 31-11-1-4. It is possible for children who are at least seventeen (17) years old to marry with the consent of designated persons. Ind. Code §§ 31-11-1-5; 31-11-2. Finally, if both children are at least fifteen (15) years of age and the female is pregnant or has a child, it is possible for the children to marry with consent of designated persons and with a court order authorizing the clerk of circuit court to issue a marriage license. Ind. Code § 31-11-1-6.

Two types of emancipation are not included within the waiver of rights statute: emancipation due to military service (*See* Ind. Code § 31-16-6-6(b)(1)) and emancipation of child support because the child is not under the care and control of either parent or an individual or agency approved by the court (*See* Ind. Code § 31-16-6-6(b)(3)).

COLLATERAL CONSEQUENCES OF ADJUDICATIONS¹

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| Education | <ul style="list-style-type: none"> • Suspension or expulsion from school, even if the delinquent act was unrelated to school employees, students, or school property.² • To qualify for the Twenty-First Century Scholars Program, the child must not have committed any delinquent acts.³ • Questions on certain college applications may require an applicant to reveal a history of delinquency, which may impact admission.⁴ |
| Public Housing | <ul style="list-style-type: none"> • A juvenile will be banned from public housing: if a lifetime sex offender registry is required,⁵ if the child is involved with manufacturing methamphetamine on the premises of a federally-approved housing program,⁶ or if evicted for drug-related activity.⁷ • The juvenile’s family may be evicted from public housing or subsidized housing as a result of the juvenile’s delinquent behavior.⁸ |
| Driving Privileges | <ul style="list-style-type: none"> • A variety of adjudications include mandatory or discretionary suspension of the child’s driving privileges. |
| Sex Offender Registry | <ul style="list-style-type: none"> • A child may be placed on the sex offender registry for ten years or for life if the juvenile court determines that there is a high risk of recidivism following completion of rehabilitative services.⁹ |
| Employment | <ul style="list-style-type: none"> • Children often confuse adjudication with conviction on job applications. • Military recruiters routinely access the child’s juvenile court records. |
| Criminal Sentencing | <ul style="list-style-type: none"> • The child’s complete juvenile delinquency history will be included in presentence reports used for criminal sentencing determinations. • A history of juvenile adjudications may cause an increase in punishment by a criminal court for subsequent criminal behavior.¹⁰ |
| Adoption, Foster Parent, Guardianship | <ul style="list-style-type: none"> • Certain adjudications may impact the ability to adopt, act as a foster parent, be appointed guardian, or have a juvenile placed in the home by a juvenile court.¹¹ |

¹ For a detailed discussion of collateral consequences, see American Bar Association, Juvenile Collateral Consequences Project. (*Available at* <http://www.beforeyouplea.com>).

² Ind. Code § 20-33-8-15.

³ Ind. Code § 21-12-6-6.

⁴ Some criminal activity disclosures include “Have you engaged in behavior that resulted in mental or physical injury to person(s) or personal property?”

⁵ 42 U.S.C. § 13663(a).

⁶ 42 U.S.C. § 1437n(f); 24 C.F.R. § 966.4(I)(iii)(A).

⁷ 42 U.S.C. § 13661(a); 42 U.S.C. § 13361(b); 24 C.F.R. § 982.553.

⁸ 42 U.S.C. § 1437d(I)(6); 42 U.S.C. § 1437f(d)(1)(B)(iii); 42 U.S.C. § 13662; 42 U.S.C. § 1437f(d)(1)(B)(v); 24 C.F.R. 966.4(f)(12)(i).

⁹ Ind. Code § 11-8-8-4.5(b); Ind. Code § 11-8-8-5(b).

¹⁰ Ind. Code § 35-50-2-2.1.

¹¹ Ind. Code §§ 31-19-2-6; 31-19-7-1(b); 31-9-2-22.5; 31-19-2.5-3; 31-19-9-1(a)(3); 31-19-10-1(a); 31-27-4-13; 31-4-20-1.5; 31-37-19-6.5(d).

ADDITIONAL RESOURCES

American Bar Association, *Think Before You Plea: Juvenile Collateral Consequences in the United States*. Indiana data available at: <http://www.beforeyouplea.com/in>.

Ashley Nellis, *Addressing the Collateral Consequences of Convictions for Young Offenders*, THE CHAMPION (July/August 2011). Available at: <http://sentencingproject.org/doc/publications/Collateral%20Consequences%20NACDL%20011.pdf>.

Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 LEWIS & CLARK L. REV. 771 (2010). Available at: <http://www.lclark.edu/live/files/4802>

Kristin Henning, *Denial of the Child's Right to Counsel, Voice, and Participation in Juvenile Delinquency Proceedings*, 89 CHILD WELFARE 121 (Sept./Oct. 2010). Available at: <http://connection.ebscohost.com/c/articles/56646282/denial-childs-right-counsel-voice-participation-juvenile-delinquency-proceedings>

Kristin Henning, *It Takes a Lawyer to Raise a Child?: Allocating Responsibilities Among Parents, Children, and Lawyers in Delinquency Cases*, 6 NEV. L.J. 836 (2006). Available at: <http://scholars.law.unlv.edu/nlj/vol6/iss3/17/>

Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245 (2005). Available at: <http://scholarship.law.georgetown.edu/facpub/539/>

Norman Lefstein and Robert L. Spangenberg, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, THE CONSTITUTION PROJECT (April 2009). Available at: <http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf>.

Michael Pinard, *The Logistical and Ethical Difficulties of Informing Juveniles About the Collateral Consequences of Adjudications*, 6 NEV. L.J. 1111 (2006). Available at: <http://scholars.law.unlv.edu/nlj/vol6/iss3/22/>.

Jennier K. Pokempner, Riya Saha Shah, et. al., *The Legal Significance of Adolescent Development on the Right to Counsel: Establishing the Constitutional Right to Counsel for Teens in Child Welfare Matters and Assuring a Meaningful Right to Counsel in Delinquency Matters*, 47 HARV. C.R.-C.L. L. REV. 529 (Summer 2012). Available at: <http://harvardcrcl.org/wp-content/uploads/2009/06/Schwartz.pdf>

Robert E. Shepherd, Jr., *Institute of Judicial Administration of the American Bar Association, Juvenile Justice Standards Annotated, A Balanced Approach* (1996). Available at: <http://www.ncjrs.gov/pdffiles1/ojdp/16673.pdf>.