

Children's Law Center of Indiana



Reporting Child Abuse and Neglect, the Department of Child Services (DCS) Assessment, and Impact of DCS Assessments on Family Law Cases¹ (Includes statutory changes effective July 1, 2017)

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The Department of Child Services (DCS) may receive a child abuse or neglect report, conduct an assessment, and take other action concerning the children of the client whom you are representing in a dissolution, paternity, or guardianship case or the children whom you are serving as their Guardian ad litem (GAL). The purpose of this paper is to increase attorneys' understanding of Indiana law on reporting child abuse and neglect, and how DCS functions, including how DCS assessments and actions can impact family law cases.

I. Reporting Child Abuse or Neglect

A. What must be reported?

Indiana law requires an individual who has "reason to believe" that a child is a "victim of child abuse or neglect" to make a report. IC 31-33-5-1. "Victim of child abuse or neglect" is defined at IC 31-9-2-133. The definition of "victim of child abuse or neglect", amended effective July 1, 2012, refers to a child in need of services [CHINS] as

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described in IC 31-34-1-1 through IC 31-34-1-5; IC 31-34-1-10; or IC 31-34-1-11, *regardless of whether the child needs care, treatment, rehabilitation, or the coercive intervention of a court.* (Amended language italicized). The applicable child in need of services definitions are:

IC 31-34-1-1: Inability, refusal, or neglect of parent, guardian, or custodian to supply child with necessary food, clothing, shelter, medical care, education, or supervision

Sec. 1. A child is a child in need of services if before the child becomes eighteen (18) years of age:

- (1) the child's physical or mental condition is seriously impaired or seriously endangered as a result of the inability, refusal, or neglect of the child's parent, guardian, or custodian to supply the child with necessary food, clothing, shelter, medical care, education, or supervision; and
- (2) the child needs care, treatment, or rehabilitation that:
 - (A) the child is not receiving; and
 - (B) is unlikely to be provided or accepted without the coercive intervention of the court.

IC 31-34-1-2: Act or omission of parent, guardian, or custodian seriously endangering child's physical or mental health

Sec. 2. (a) A child is a child in need of services if before the child becomes eighteen (18) years of age:

- (1) the child's physical or mental health is seriously endangered due to injury by the act or omission of the child's parent, guardian, or custodian; and
- (2) the child needs care, treatment, or rehabilitation that:
 - (A) the child is not receiving; and
 - (B) is unlikely to be provided or accepted without the coercive intervention of the court.

(b) Evidence that the illegal manufacture of a drug or controlled substance is occurring on property where a child resides creates a rebuttable presumption that the child's physical or mental health is seriously endangered.

IC 31-34-1-3: Victim of offense; living in same household as offender

Sec. 3. (a) A child is a child in need of services if, before the child becomes eighteen (18) years of age:

- (1) the child is the victim of an offense under:
 - (A) IC 35-42-4-1 [rape];
 - (B) IC 35-42-4-2 (before its repeal) [criminal deviate conduct];
 - (C) IC 35-42-4-3 [child molesting];
 - (D) IC 35-42-4-4 [child exploitation; possession of child pornography];
 - (E) IC 35-42-4-5 [vicarious sexual gratification; fondling in the presence of

a minor];

(F) IC 35-42-4-6 [child solicitation];

(G) IC 35-42-4-7 [child seduction];

(H) IC 35-42-4-8 [sexual battery];

(I) IC 35-42-4-9 [sexual misconduct with a minor];

(J) IC 35-45-4-1 [public indecency; indecent exposure];

(K) IC 35-45-4-2 [prostitution];

(L) IC 35-45-4-3 [making unlawful proposition];

(M) IC 35-45-4-4 [promoting prostitution];

(N) IC 35-46-1-3 [incest]; or

(O) the law of another jurisdiction, including a military court, that is substantially equivalent to any of the offenses listed in clauses (A) through (N); and

(2) the child needs care, treatment, or rehabilitation that:

(A) the child is not receiving; and

(B) is unlikely to be provided or accepted without the coercive intervention of the court.

(b) A child is a child in need of services if, before the child becomes eighteen (18) years of age, the child:

(1) lives in the same household as an adult who:

(A) committed an offense described in subsection (a)(1) against a child and the offense resulted in a conviction or a judgment under IC 31-34-11-2; or

(B) has been charged with an offense described in subsection (a)(1) against a child and is awaiting trial; and

(2) needs care, treatment, or rehabilitation that:

(A) the child is not receiving; and

(B) is unlikely to be provided or accepted without the coercive intervention of the court.

(c) A child is a child in need of services if, before the child becomes eighteen (18) years of age:

(1) the child lives in the same household as another child who is the victim of an offense described in subsection (a)(1);

(2) the child needs care treatment, or rehabilitation that:

(A) the child is not receiving; and

(B) is unlikely to be provided or accepted without the coercive intervention of the court; and

(3) a caseworker assigned to provide services to the child:

(A) places the child in a program of informal adjustment or other family or rehabilitative services based on the existence of circumstances described in subdivisions (1) and (2), and the caseworker subsequently determines further intervention is necessary; or

(B) determines that a program of informal adjustment or other family or rehabilitative services is inappropriate.

(d) A child is a child in need of services if, before the child becomes eighteen (18) years of age:

- (1) the child lives in the same household as an adult who:
 - (A) committed a human or sexual trafficking offense under IC 35-42-3.5-1 or the law of another jurisdiction, including federal law, that resulted in a conviction or a judgment under IC 31-34-11-2; or
 - (B) has been charged with a human or sexual trafficking offense under IC 35-42-3.5-1 or the law of another jurisdiction, including federal law, and is awaiting trial; and
- (2) the child needs care, treatment, or rehabilitation that:
 - (A) the child is not receiving; and
 - (B) is unlikely to be provided or accepted without the coercive intervention of the court.

IC 31-34-1-3.5: Victim of human sexual trafficking offense

Sec 3.5. (a) A child is a child in need of services if, before the child becomes eighteen (18) years of age:

- (1) the child is the victim of:
 - (A) human or sexual trafficking (as defined in IC 31-9-2-133.1); or
 - (B) a human or sexual trafficking offense under the law of another jurisdiction, including federal law, that is substantially equivalent to the act described in clause (A); and
- (2) the child needs care, treatment, or rehabilitation that:
 - (A) the child is not receiving; and
 - (B) is unlikely to be provided or accepted without the coercive intervention of the court.

(b) A child is considered a victim of human or sexual trafficking regardless of whether the child consented to the conduct described in subsection (a)(1).

IC 31-34-1-4: Parent, guardian, or custodian allowing child's participation in obscene performance

Sec. 4. A child is a child in need of services if before the child becomes eighteen (18) years of age:

- (1) the child's parent, guardian, or custodian allows the child to participate in an obscene performance (as defined by IC 35-49-2-2 or IC 35-49-3-2); and
- (2) the child needs care, treatment, or rehabilitation that:
 - (A) the child is not receiving; and
 - (B) is unlikely to be provided or accepted without the coercive intervention of the court.

IC 31-34-1-5: Parent, guardian, or custodian allowing child to commit sex offense

Sec. 5. A child is a child in need of services if before the child becomes eighteen (18) years of age:

- (1) the child's parent, guardian, or custodian allows the child to commit a sex offense prohibited by IC 35-45-4 [public indecency, indecent exposure, public nudity, prostitution, patronizing or promoting prostitution, voyeurism]; and
- (2) the child needs care, treatment, or rehabilitation that:
 - (A) the child is not receiving; and
 - (B) is unlikely to be provided or accepted without the coercive intervention of the court.

IC 31-34-1-10: Child born with fetal alcohol syndrome or with controlled substance or legend drug in child's body

Sec. 10. Except as provided in sections 12 and 13 of this chapter, a child is a child in need of services if:

- (1) the child is born with:
 - (A) fetal alcohol syndrome; or
 - (B) neonatal abstinence syndrome, or
 - (C) any amount, including a trace amount, of a controlled substance, a legend drug, or a metabolite of a controlled substance or legend drug in the child's body, including the child's blood, urine, umbilical cord tissue, or meconium; and
- (2) the child needs care, treatment, or rehabilitation that:
 - (A) the child is not receiving; or
 - (B) is unlikely to be provided or accepted without the coercive intervention of the court.

IC 31-34-1-11: Risks or injuries arising from use of alcohol, controlled substance, or legend drug by child's mother during pregnancy

Sec. 11. Except as provided in sections 12 and 13 of this chapter, a child is a child in need of services if:

- (1) the child:
 - (A) has an injury;
 - (B) has abnormal physical or psychological development; or
 - (C) has symptoms of neonatal intoxication or withdrawal; or
 - (D) is at a substantial risk of a life threatening condition;that arises or is substantially aggravated because the child's mother used alcohol, a controlled substance, or a legend drug during pregnancy; and
- (2) the child needs care, treatment, or rehabilitation that:
 - (A) the child is not receiving; or
 - (B) is unlikely to be provided or accepted without the coercive intervention of the court.

IC 31-9-2-88 defines "parent" as a biological or adoptive parent. IC 31-9-2-88(b) includes an alleged father in the definition of "parent" for the purposes of the CHINS statutes, including the statutes regarding the reporting of child abuse or neglect.

IC 31-9-2-49 defines “guardian” as “a person appointed by a court to have the care and custody of a child or the child’s estate or both.” IC 31-9-2-31 defines “custodian” for purposes of IC 31-34-1 [the child in need of services definition] very broadly for child abuse and neglect reporting and assessment. In summary, the term “custodian” includes (1) a member of the household of the child’s noncustodial parent; (2) an individual who has or intends to have direct contact, on a regular and continuing basis, with a child for whom the individual provides care and supervision; (3) a license applicant or licensed foster home, residential child care facility, child care center, or child care home; (4) a person who is responsible for care, supervision, or welfare of children at a foster home, residential child care facility, child care center, child care home, child care ministry, home, center or facility of a child care provider, or a school; (5) a child caregiver as defined by IC 31-9-2-16.4.

B. Who must report?

The individual who has “reason to believe”, defined at IC 31-9-2-101, that the child is a “victim of child abuse or neglect” must report. “Reason to believe” means “evidence that, if presented to individuals of similar background and training, would cause the individuals to believe that a child was abused or neglected.” IC 31-32-11-1 abrogates the privileged communication between husband and wife; health care provider (defined at IC 31-9-2-52) and patient; licensed social worker and client; licensed clinical social worker and client; licensed marriage and family therapist and client; licensed mental health counselor and client; licensed addiction counselor and client; licensed clinical addiction counselor and client; and school counselor or school psychologist and student. The abrogation of the above listed privileges covers both reporting and testifying in any judicial proceeding resulting from a report of a child who may be a victim of child abuse or neglect. IC 35-37-6-8 states that the victim advocate-victim privilege does not relieve a victim advocate of any duty to report suspected abuse or neglect.

Attorneys who are required to maintain privileged information in specified situations are not exempted from child abuse reporting requirements. Child abuse or neglect can be reported by an attorney without the client’s consent because Ind. Professional Conduct Rule 1.6(b)(1) allows disclosure of privileged communications to the

extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm; (2) to prevent a client from committing a crime... ; or (6) to comply with other law or court order. Child abuse or neglect could easily be considered substantial bodily harm and the reporting of child abuse or neglect is required to be in compliance with the law. An attorney could make a child abuse or neglect report without violating the Rules of Professional Conduct. The better practice is for the attorney to encourage the client to report child abuse or neglect after determining whether a report is required by law.

C. To whom and when must the report be made?

IC 31-33-5-4 states that a person who has a duty to report shall immediately make an oral report to DCS or a local law enforcement agency. IC 31-25-2-7 states that DCS is responsible for providing child protection services. IC 31-33-7-1 requires DCS to arrange for receipt, on a twenty-four (24) hour, seven (7) day per week basis, of all reports of suspected abuse or neglect. DCS shall cause to be inserted in each local telephone directory in the county the telephone number of the “child abuse hotline”. IC 31-33-7-3. The Statewide child abuse and neglect hotline number is 1-800-800-5556.

D. What are the immunities and penalties associated with reporting?

IC 31-33-6-1 states that a person, other than a person accused of child abuse or neglect, who makes or causes to be made a report of child abuse or neglect or who participates in any judicial proceeding or other proceeding resulting from such report or relating to the subject matter of the report is immune from any civil or criminal liability that might otherwise be imposed because of such actions. IC 31-33-6-3 provides that a person who reports that a child may be a victim of child abuse or neglect or who assists in any requirement of Article 33 is presumed to have acted in good faith. Immunity does not attach for a person who has acted maliciously or in bad faith. IC 31-33-6-2.

Knowing failure to report child abuse or neglect is a class B misdemeanor. IC 31-33-22-1. In Smith v. State, 8 N.E.3d 668 (Ind. 2014), the Indiana Supreme Court affirmed a high school principal’s misdemeanor conviction for knowing failure to report

child abuse because he failed to make a report immediately to the DCS Hotline or to law enforcement when a sixteen-year-old female student told him that she had been raped at school that day by a sixteen-year-old male student. The Court found that there was sufficient evidence for the principal to believe that the female student was a victim of rape, despite the principal's doubts as to her veracity. The principal made his report to the DCS Hotline about four hours after the female student told him of the rape. The Court noted that rape is one of the predicate sex offenses that supports a CHINS adjudication and therefore constitutes child abuse. The Court opined that it was not the principal's responsibility to investigate, and that the principal's report, made four hours after receiving the student's report, was not immediate, especially because his delay included doing interviews for an administrative position at the high school. The Court opined that the statutory scheme was designed to err on the side of *over*reporting suspected child abuse or neglect (emphasis in opinion). See also Fisher v. State, 548 N.E.2d 1177 (Ind. Ct. App. 1990) (Court affirmed the defendant's conviction for failure to report abuse of child by child's mother who was defendant's temporary house guest, but reversed his criminal neglect of a dependent conviction); Gilliland v. State, 979 N.E.2d 1049 (Ind. Ct. App. 2012) (Court affirmed trial court's denial of defendant high school athletic director's motion to dismiss criminal charge for failure to report; Court held that it was for the jury to determine whether the athletic director had reason to believe the female student was a victim of child abuse or neglect based on the director's knowledge that the coach had given foot rubs to the student and rubbed lotion on her back); and Lebo v. State, 977 N.E.2d 1031 (Ind. Ct. App. 2012) (Court affirmed trial court's denial of defendant high school volleyball coach's motion to dismiss criminal charge for failure to report; Court concluded that Indiana's failure to report statutes contemplate the crime as a continuing offense and that the purpose of the duty to report is to encourage effective reporting of *suspected* or known incidents of child abuse (emphasis in opinion)).

Knowing, intentional false reporting is a Class A misdemeanor, but the offense is a Class D felony if the person has a previous unrelated conviction for knowing, intentional false reporting. IC 31-33-22-3(a). IC 31-33-22-3(b) allows a court to order actual and punitive damages as well as attorney's fees in civil proceedings for knowing, intentional

false reporting. See In Re V.C., 867 N.Ed.2d 167 (Ind. Ct. App. 2007) (Court affirmed order requiring Mother to pay compensatory and punitive damages to Father because Mother coached child to report false sexual allegations about Father to therapist).

IC 31-33-22-5 provides that a person who is accused of committing child abuse or neglect is entitled to access to a report relevant to an alleged false accusation if the court finds that the report was unsubstantiated and was intentionally communicated to the department or law enforcement by a person who knew the report was false. See also Kinder v. Doe, 540 N.E.2d 111 (Ind. Ct. App. 1989) (identity of reporter can be obtained in civil suit for malicious reporting if plaintiff makes preliminary presentation of evidence to rebut presumption of reporter's good faith), and IC 31-33-18-2(13), which states that a person about whom a report has been made shall have access to DCS reports with protection for identity of reporters and other endangered persons.

II. The Department of Child Services Assessment

A. What is the scope and timing of the assessment?

IC 31-33-7-4 states that DCS shall make a written report of a child who may be a victim of abuse or neglect within forty-eight (48) hours after receipt of the oral report. The report, which is made on state form 310, must include the following, if known: (1) the child's name, address, sex, age and the nature of the child's injuries and neglect; (2) the names and addresses of the child's parents, guardian, custodian and care-giver; (3) the name of the alleged perpetrator; (4) the source of the report; (5) information about the abuse or neglect of the child's siblings; (6) the person making the report and how the reporter may be reached; (7) actions taken by the reporter. The 310 report shall immediately be made available to the prosecuting attorney and law enforcement, as well as to the coroner in a case involving a child's death. IC 31-33-7-5. Law enforcement and DCS shall communicate and share information and may investigate jointly. IC 31-33-7-7; IC 31-33-8-2.

IC 31-33-8-6 provides that DCS shall promptly make an appropriately thorough assessment of every report received. The primary purpose of the assessment is to protect the child. IC 31-9-2-9.6 defines assessment as an initial and ongoing investigation or

evaluation in which there is a review and determination of the safety issues that affect a child; an identification of the underlying causes of the safety issues; a determination whether child abuse, neglect, or maltreatment occurred; and a determination of the needs of a child's family in order for the child to either remain in the home safely, be returned to the home safely, or be placed in an alternative living arrangement. IC 31-33-8-1 provides the timeline for DCS to initiate an assessment. IC 31-33-8-1(c) states that the DCS assessment of a child abuse report shall be initiated immediately, but not later than twenty-four (24) hours after receipt of the report if abuse is alleged. IC 31-33-8-1(b) states that if DCS has reason to believe that the child is in imminent danger of serious bodily harm, an immediate onsite assessment shall be initiated within one hour of the receipt of the report. IC 31-33-8-1(d) states that if child neglect is alleged, the assessment shall be initiated within a reasonably prompt time, but not later than five (5) days. If the report alleges that a child lives with a parent, guardian, or custodian who is married to or lives with a person who has either been convicted of neglect of a dependent under IC 35-46-1-4, a battery offense under IC 35-42-4, or is required to register as a sex or violent offender under IC 11-8-8, then DCS shall initiate an assessment within a reasonably prompt time, but not later than five (5) days after DCS receives the report, with the primary consideration being the well-being of the child who is the subject of the report. IC 31-33-8-1(e).

According to IC 31-33-8-7, the DCS assessment must include the following, to the extent that is reasonably possible: (1) the nature, extent and cause of the known or suspected abuse or neglect; (2) the identity of the alleged perpetrator; (3) the names and conditions of other children in the home; (4) an evaluation of the parent, guardian, custodian or other person responsible for the child's care; (5) the home environment and the relationship of the child to the parent, guardian, custodian or other persons responsible for the child's care. The assessment may include a home visit, an interview with the child, and a physical, psychological or psychiatric examination of any child in the home. When feasible, all allegations should be investigated together. The assistance of the juvenile court may be sought by DCS to obtain an interview with the child if the custodial parent, guardian, or custodian refuses to allow an interview. IC 31-33-8-7(d) and (e). See In Re G.W., 977 N.E.2d 381 (Ind. Ct. App. 2012), *trans. denied* (Court affirmed trial court's

order requiring Mother to make child available for interview requested by DCS to assess nine-year-old child's "condition" as part of assessment regarding allegations of sexual abuse of child's twelve-year-old sister); In Re A.H., 992 N.E.2d 960 (Ind. Ct. App. 2013) (Court affirmed trial court's order requiring Mother to make two of her children available for interviews requested by DCS to assess a report alleging that Mother's drug use was negatively impacting the children and further held that this order did not violate Mother's fundamental right to raise her children under the Fourteenth Amendment); and In Re F.S., 53 N.E.3d 582 (Court reversed trial court's order requiring Mother to make two of her children available for interviews requested by DCS to assess multiple reports alleging drug use and domestic violence; Court held that DCS must show some evidence suggesting abuse or neglect, apart from just an anonymous report, before the trial court can order the interviews in order to protect Mother's Fourteenth Amendment fundamental right to parent her children). DCS or law enforcement can request a court order to remove the child from the home prior to the completion of the assessment pursuant to IC 31-33-8-8 and IC 31-32-13-1 et seq.

B. What do the assessment results mean?

After the assessment is completed, DCS shall classify reports as substantiated or unsubstantiated. IC 31-33-8-12. A written report of the assessment is required pursuant to IC 31-33-8-8(b). This report is made on state form 311. IC 31-33-18-4(a) requires DCS to give verbal and written information to each parent, guardian, or custodian of the child informing them that the report relating to the abuse or neglect assessment is available upon request. Parents may be required to sign a written release form and pay reasonable copying costs, but these are the only prerequisites to obtaining a copy of the DCS report. IC 31-33-18-4(b).

"Substantiated" is defined at IC 31-9-2-123 and "means a determination regarding the status of a report [made under IC 31-33] whenever facts obtained during an assessment of the report provide a preponderance of evidence that child abuse or neglect has occurred." "Unsubstantiated" is defined at IC 31-9-2-132 and "means a determination regarding the status of a report [made under IC 31-33] whenever facts obtained during an

assessment of the report provide credible evidence that child abuse or neglect has not occurred.” Practitioners should note the following in determining the relevance of the “substantiated” or “unsubstantiated” designation: (1) DCS is investigating the specific allegations of the 310 report and is not evaluating the best interests of the child; (2) “unsubstantiated” reports are not the same as knowing, intentional false reports; (3) DCS family case managers will not usually substantiate abuse unless the case manager personally sees the bruises or the child reveals details about abuse to the case manager or DCS forensic interviewer; (4) some children may be too scared or too shy to reveal full details of physical or sexual abuse or neglect to the DCS case manager or forensic interviewer; (5) “unsubstantiated” does not mean that your client or the child whom you are serving as a GAL is lying about his abuse or neglect concerns.

C. How can I obtain a copy of a DCS 311 assessment report?

IC 31-33-18-1(a) states that reports of child abuse or neglect and any other information obtained, reports written, or photographs taken concerning the reports which are in the possession of DCS are confidential. IC 31-33-18-2 lists the persons, agencies and institutions to whom the confidential reports shall be made available. These include, inter alia: (1) an individual named in the report who is alleged to be abused or neglected or the individual’s guardian ad litem or court appointed special advocate; (2) each parent, guardian, custodian, or other person responsible for the welfare of a child named in a report and an attorney for the parent, guardian, custodian or responsible person with protection for the identity of reporters and other appropriate individuals; and (3) a person about whom a report has been made, with protection for the identity of reporters and any other person if the person or agency making the information available finds that disclosure of the information would be likely to endanger the life or safety of the person. If the report is unsubstantiated, it is good practice for an attorney to obtain a copy of the unsubstantiated report promptly before the report is expunged. If allegations of abuse or neglect arise in the course of a dissolution, paternity, or guardianship case, it may be necessary to present evidence concerning the unsubstantiated report.

Attorneys should contact the local DCS office in the county where the assessment was conducted to find out the procedure for obtaining copies of the assessment report.

D. What is the child protection index?

The child protection index is established and maintained by DCS for the purpose of organizing and accessing data regarding substantiated child abuse and neglect reports throughout Indiana. IC 31-33-26-2. IC 31-33-26-16(a)(4) states that the index may be accessed by persons or agencies to whom child abuse and neglect reports are available pursuant to IC 31-33-18.

IC 31-33-26-15(a) states that DCS shall expunge a substantiated report within ten (10) working days after the occurrence of any of the following: (1) the court with jurisdiction over the CHINS case determines that child abuse or neglect has not occurred; (2) an administrative hearing officer finds that the child abuse or neglect report is unsubstantiated; or (3) the juvenile court enters an expungement order under IC 31-33-27-5. DCS shall amend a substantiated report in the index by deleting the name of the alleged perpetrator if the court with jurisdiction over the CHINS case or an administrative hearing officer finds that the person was not a perpetrator of the child abuse or neglect. IC 31-33-25-15(b).

IC 31-33-27 governs the expungement of child abuse or neglect information. IC 31-33-27-1 defines “expunge” or “expungement” as: (1) the removal or deletion of all information maintained by DCS concerning a report, assessment, or determination relating to an incident of child abuse or neglect; and (2) the destruction or delivery of the information to a person to whom the information pertains. IC 31-33-27-2 defines “information” as all files and records created and maintained by DCS, including the original and copies of documents, correspondence, messages, photographs, videotapes, audio recordings, and any other material contained in electronic, paper, or digital form or in other media. IC 31-33-27-3(a) deals with expungement of unsubstantiated DCS reports, stating that DCS shall expunge child abuse or neglect information twenty-four (24) years after the date of birth of the youngest child named in the assessment report. IC 31-33-27-3(b) states that DCS may expunge the information relating to an unsubstantiated

assessment upon the request of an interested person at any time if DCS determines that the probative value of the information does not justify its retention. IC 31-33-27-3(c) allows DCS to retain information relating to an unsubstantiated assessment that is accessible only by DCS employees with access rights established by DCS through policy or rule. IC 31-33-27-3(d) provides that information relating to an unsubstantiated assessment may be used by DCS to facilitate its assessment of a subsequent report, but IC 31-33-27-3(e) states that DCS may not rely solely on information available under IC 31-33-27-3(c) to support substantiation of a later report if the information obtained in the assessment of the later report is otherwise insufficient to support a substantiated determination. IC 31-33-27-5(b) allows an individual named as a perpetrator of child abuse or neglect in a substantiated report to petition the court, exercising juvenile jurisdiction in the county where the individual resides, requesting that the court order DCS to expunge the substantiated report and related information. IC 31-33-27-5(c) states DCS shall be named as a respondent in the petition and shall be served with a copy of the petition and a summons. IC 31-33-27-5(d) requires the court to hold a hearing on the petition, unless a hearing is waived by agreement of the parties. IC 31-33-27-5(e) lists what the court must review at the hearing, and IC 31-33-27-5(f) lists the criteria for the court's finding for the expungement order.

E. Can a substantiated determination be appealed?

IC 31-33-26-8(b) provides that no later than thirty (30) days after DCS enters a substantiated child abuse or neglect report into the index, DCS shall notify the parent, guardian or custodian of the child named in the report and any identified perpetrator who is not a parent, guardian, or custodian, that DCS has entered the report into the index. The perpetrator may request an administrative hearing to contest the classification of the substantiated report pursuant to IC 31-33-26-8(c). The request for an administrative hearing must be received by DCS not more than thirty (30) days after the notice is served on the perpetrator. The time period may be extended if the perpetrator demonstrates that the failure to request the administrative hearing was due to excusable neglect or fraud. IC 31-33-26-8(d). IC 31-33-26-9 provides for the administrative hearing at which DCS must prove by a preponderance of credible evidence that the perpetrator is responsible for

the child's abuse or neglect. If DCS fails to carry the burden of proof, DCS shall amend or expunge the child abuse or neglect report as ordered by the administrative hearing officer. IC 31-33-26-9(d). The administrative hearing shall be stayed if a Child in Need of Services hearing is pending, the perpetrator has entered into an informal adjustment, or criminal charges are pending. IC 31-33-26-11(b); IC 31-33-26-12. The determination of the CHINS court is binding. IC 31-33-26-11(a). The alleged perpetrator is not entitled to an administrative hearing if a court has determined that the alleged child abuse or neglect did not occur or the person was not the perpetrator. IC 31-33-26-11(c).

III. Department of Child Services Actions as a Result of Substantiated Child Abuse/Neglect

DCS may take action based on its assessment that child abuse or neglect is substantiated. DCS may refer the matter to law enforcement, initiate a safety plan, or refer the family to community services. DCS may also implement a program of informal adjustment or file a CHINS petition.

A. What is a program of informal adjustment?

IC 31-34-8-1 through 3, IC 31-34-8-6, and IC 31-34-8-7 provide for a program of informal adjustment, which is a signed agreement between DCS, the child, and the child's parent, guardian, custodian, or attorney regarding court ordered services in which the parent, guardian, or custodian will participate to remedy substantiated child abuse or neglect. The program of informal adjustment is submitted to the juvenile court for approval. The court may deny a program of informal adjustment or set a hearing regarding the informal adjustment. IC 31-34-8-1. The program of informal adjustment is considered approved if the court does not deny the informal adjustment program or set it for a hearing within ten days. IC 31-34-8-1(c). If the court sets a hearing and no action is taken to approve or deny the program of informal adjustment within thirty days of its submission, the informal adjustment is considered approved. IC 31-34-8-1(d). IC 31-34-8-6 provides that the program of informal adjustment may not exceed six months, but may be extended for an additional three months by approval of the juvenile court. IC 31-40-1-3 states that a

participant in an informal adjustment program is financially responsible for services provided by DCS.

An informal adjustment may include service participation and compliance with certain rules regarding how a child may be disciplined or cared for or who may have access to the child. Informal adjustment does not involve placing the child in the custody or wardship of DCS. If DCS determines that the informal adjustment is not protecting the child, or subsequent allegations of abuse or neglect are substantiated, DCS may request authorization from the court to file a CHINS petition pursuant to IC 31-34-9-1.

DCS may also file a petition for compliance with the informal adjustment provisions, and a parent, guardian, or custodian who fails to comply may be found in contempt pursuant to IC 31-34-8-3. DCS must file a report with the court indicating the extent of compliance five months after the informal adjustment is implemented. IC 31-34-8-7(a). If the informal adjustment is extended, a second report is required not later than eight months after the informal adjustment is implemented. IC 31-34-8-7(b).

B. What is a CHINS proceeding?

The CHINS petition, filed by the attorney for DCS due to substantiated child abuse or neglect, is discussed at IC 31-34-9-1. A CHINS proceeding may involve the removal of children from their custodial home and placement in foster care, approved relative care, with the noncustodial parent, or institutional placement. The complex statutory scheme for CHINS proceedings begins at IC 31-34-5-1 and continues through many chapters of Title 31. The CHINS adjudication is very serious and may result in the involuntary termination of parental rights. Extensive free information about CHINS and termination law may be found at www.kidsvoicein.org.

IV. Jurisdictional Issues Involving Guardianships and DCS Investigations and Actions

Issues of parental unfitness can be litigated in a guardianship case if there is no pending CHINS proceeding. See Matter of Guardianship of Thompson, 514 N.E.2d 618 (Ind. 1987) (probate court had jurisdiction to appoint a temporary guardian due to evidence that child's adoptive parents were not residents of Indiana and were not properly

performing parental duties; trial court's appointment of guardian did not constitute conflict between juvenile and probate court jurisdiction). IC 31-30-1-6(a) specifically states that Article 30, the jurisdiction article of Title 31, does not prohibit a probate court from exercising its jurisdiction over guardianship of a person who is less than eighteen (18) years of age. IC 31-30-1-6(b) provides that if allegations in the petition for guardianship or in the guardianship proceeding indicate that the child meets the definition of a child in need of services, the probate court, on its own motion or at the request of a party, shall send the guardianship petition and/or the record of guardianship proceedings to DCS and direct DCS to initiate an assessment to determine whether the child is a child in need of services. IC 31-30-1-6(c) states that the probate court retains jurisdiction over the child until the juvenile court authorizes the filing of a CHINS petition. If the juvenile court does not assume jurisdiction, the probate court retains jurisdiction over the child.

If the juvenile court assumes or has assumed jurisdiction over the child, the probate court's guardianship jurisdiction ends because of the juvenile court's original, exclusive jurisdiction over CHINS proceedings. IC 31-30-1-1. See Matter of Guardianship of Bramblett, 495 N.E.2d 798 (Ind. Ct. App. 1986) (probate court lacked jurisdiction to establish a relative guardianship for a child who was the subject of a pending CHINS case due to the juvenile court's exclusive jurisdiction). See also In Re C.S., 713 N.E.2d 863 (Ind. Ct. App. 1999) (probate court was without jurisdiction to accept the grandmother's guardianship petition or to conduct an evidentiary hearing on the guardianship petition for an adjudicated CHINS whose CHINS case was pending).

The juvenile court's jurisdiction includes jurisdiction of guardianship of the person proceedings for a child who has been adjudicated a CHINS; for whom a juvenile court has approved a permanency plan under IC 31-34-21-7 that provides for the appointment of a guardian of the person; and who is the subject of a pending CHINS proceeding. IC 31-30-1-1(10).

V. Jurisdictional Issues Involving Dissolution and Paternity Courts When a CHINS Proceeding is Filed

IC 31-30-1-1, the statute which gives the juvenile court exclusive original jurisdiction in CHINS proceedings, provides some exceptions for jurisdiction of a child of

divorced parents and for a child who is the subject of a paternity proceeding. For dissolution cases, IC 31-30-1-12 provides that a court having jurisdiction under IC 31-17-2 of a child custody proceeding in a marriage dissolution has concurrent original jurisdiction with the juvenile court for the purpose of modifying custody, parenting time, or child support of a child who is under the jurisdiction of the juvenile court due to a CHINS proceeding. Whenever the dissolution court modifies custody, the modification is effective only when the juvenile court enters an order adopting and approving the custody modification order or terminates the CHINS proceeding.

For paternity cases, IC 31-30-1-13 provides that a court having jurisdiction under IC 31-14 over establishment or modification of paternity, child custody, parenting time, or child support has concurrent original jurisdiction with another juvenile court for the purpose of establishing or modifying paternity, custody, parenting time, or child support of a child who is under the jurisdiction of the other juvenile court due to a CHINS proceeding. Whenever the paternity court having child custody jurisdiction under IC 31-14 modifies custody, the modification is effective only when the juvenile court with CHINS jurisdiction enters an order adopting and approving the custody modification or terminates the CHINS proceeding.

IC 31-30-1-12(c) states that if custody, parenting time, or child support is modified by a juvenile court and the CHINS proceeding is terminated, the order modifying custody, child support, or parenting time survives the termination of the CHINS proceeding until the court having concurrent original jurisdiction shall assume or reassume primary jurisdiction of the case to address all issues. IC 31-30-1-12(d) states that the court that assumes or reassumes jurisdiction may modify custody, parenting time, or child support in accordance with the applicable modification statutes. IC 31-30-1-13(c) states that if the juvenile court establishes or modifies paternity, custody, child support, or parenting time of a child and the CHINS proceeding is terminated, the court having concurrent original jurisdiction shall assume or reassume primary jurisdiction of the case to address all other issues. IC 31-30-1-13(d) states that a court that assumes or reassumes jurisdiction of the paternity case may modify child custody, child support, or parenting time in accordance with applicable modification statutes.

Previous cases which held that the dissolution court lacked jurisdiction to modify custody when there was a CHINS proceeding interpreted the former statute and are no longer applicable. Among these cases are Fox v. Arthur, 714 N.E.2d 305 (Ind. Ct. App. 1999); In Re B.W., 709 N.E.2d 370 (Ind. Ct. App. 1999); and Alexander v. Cole, 697 N.E.2d 80 (Ind. Ct. App. 1998). See also Reynolds v. Dewees, 797 N.E.2d 798 (Ind. Ct. App. 2003), in which the Court affirmed the paternity court's jurisdiction over a custody modification petition filed by Father after a CHINS petition had been filed and the child had been removed from Mother's home. The Court opined that IC 31-30-1-13 vested the paternity court with the requisite jurisdiction to enter the order. Id. at 802.

VI. Entering Department of Child Services Records into Evidence

DCS records are confidential. IC 31-33-18-1. Attorneys who subpoena DCS records for evidence in dissolution, paternity, or guardianship cases may receive a Motion to Quash by the DCS attorney in response. The motion may be filed due to confidentiality concerns because dissolution and guardianship cases are not confidential. IC 31-33-18-2(9) states that courts may have access to DCS records if the court finds that "access to the records may be necessary for determination of an issue before the court." The statute goes on to state that access is limited to in camera inspection unless the court determines that public disclosure of the information contained in the records is necessary for the resolution of an issue then pending before the court.

If the court makes the necessary findings so that DCS records can be released, an evidentiary hurdle arises due to hearsay within DCS records. See D.W.S. v. L.D.S., 654 N.E.2d 1170, 1173 (Ind. Ct. App. 1995). In this dissolution case, the records of Allen County Department of Public Welfare regarding physical abuse by Father were admitted into evidence over Father's objection that the records did not fall under any business or official records exceptions to the hearsay rule. Father complained that the preparers of the Welfare Department reports had no first-hand knowledge of the alleged physical abuse and that the records were not properly authenticated under Ind. Evidence Rules 803(6) or 803(8). The Court reasoned that, because the report preparers did not observe Father hitting the child, the reports were based upon accounts of individuals who had no business

duty to observe and report the facts of alleged abuse. If a report is properly attested to or authenticated, it is admissible in total as an exception to the hearsay rule if, and only if, the hearsay statements within the report are also admissible under an exception to the hearsay rule. Although the reports were properly authenticated, Mother did not establish that the preparers had first-hand knowledge of the reported incident of abuse nor did Mother offer any evidence to prove that any other exception to the hearsay rule applied to the statements recorded. Consequently the official record exception to the rule did not apply to the entire proffered report. The exception applied only to the extent that portions of the report indicated that an incident was reported and revealed the preparers' direct observations of the child. The Court concluded that the dissolution court erred in entering the entire welfare reports into evidence. Because there was other ample evidence to support the dissolution court's judgment, the Court affirmed the decision to award custody of the child to Mother and limit Father's visitation. See also Hinkle v. Garret- Keyser- Butler Sch. D., 567 N.E.2d 1173 (Ind. Ct. App. 1991) (trial court erred when it determined the Welfare Department records were admissible as an exception to the hearsay rule; double hearsay is admissible only if an exception exists for each out-of-court declaration). In Page v. Greene County Dept. of Welfare, 564 N.E.2d 956 (Ind. Ct. App. 1991), a contested involuntary termination of the parent-child relationship case, the Court found it was error to admit welfare reports (and testimony concerning the reports) containing children's statements. The children did not testify at the termination hearing and the reports did not qualify under the business records exception because the caseworkers who prepared the reports did not have personal knowledge of the facts reported by the children. See also In Re Relationship of E.T. 808 N.E.2d 639 (Ind. 2004) for an excellent discussion of the qualification of child service provider agency records as business records.

Clearly, attorneys should not rely on the DCS report as the only source of evidence to prove child abuse or neglect in a dissolution, paternity, or guardianship case because the report will frequently contain inadmissible hearsay. The report can be a source of names of witnesses whom the attorney could call to testify.

VII. How DCS Involvement Can Benefit Your Case

DCS involvement can benefit your case by: (1) providing reports from an independent investigation of abuse or neglect; (2) possibly funding needed services through an informal adjustment or a CHINS proceeding; or (3) protecting children through DCS actions, such as an informal adjustment or a CHINS proceeding. Placement of the children with the non-custodial parent or appropriate and willing relatives may be a result of the CHINS proceeding.

The DCS assessment is not the only evidence needed to support requested dissolution, paternity, or guardianship orders because: (1) DCS assessments are usually limited to specific reported allegations; (2) DCS may determine that an assessment of an abuse or neglect report should not be conducted because the report does not meet the criteria for an assessment to be conducted; (3) DCS does not use the dissolution, paternity, or guardianship best interests or modification standards in its assessments; (4) hearsay restrictions may preclude the introduction of DCS records into evidence in your case; (5) the DCS 311 assessment report is not a custody evaluation or a best interests determination. The DCS assessment may provide helpful evidence which you can use in presenting your case or in representing children's best interests as their GAL. Your knowledge of how DCS functions and the implications of a DCS assessment can benefit the outcome of your case.