# CHAPTER 12
# PATERNITY

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## I. OVERVIEW OF LEGAL PROCEEDINGS TO DETERMINE PATERNITY

When a child is born during the marriage of the mother and the mother's husband it is presumed that the child is the biological and legal child of the mother and the husband. See IC 31-14-7-1 (presumed fathers); IC 31-9-2-15 (definition of child born in wedlock). It is generally not necessary to obtain a legal determination of this presumed fatherhood unless paternity is challenged, or challengeable, in a legal proceeding. The mother and father share in the right to the custody and care of the child.

When a child is born outside of a marriage, or paternity is otherwise disputed, a legal proceeding may be required to clarify the rights and obligations of the alleged father. See IC 31-9-2-16 for the definition of a child born out of wedlock. Statutory law provides that paternity may be legally established through a paternity affidavit or through a court proceeding. Individuals can initiate paternity proceedings in court, but federal and Indiana child support enforcement legislation also provide that the state can initiate proceedings to establish paternity and child support for children born outside of marriage.

### I. A. Methods of Establishing Paternity

IC 31-14-2-1 provides that a man's paternity may only be established by one of the following methods: (1) in a paternity action under IC 31-14 or (2) by executing a paternity affidavit. IC 16-37-2-2.1(j) states that the paternity affidavit establishes paternity. A paternity affidavit also gives rise to parental rights and responsibilities, including the responsibility to pay child support and possibly to provide health insurance coverage for the child and reasonable parenting time rights unless another determination is made by a court. A paternity affidavit may be filed with a court by DCS. See this Chapter at VII. for a more detailed discussion regarding establishing paternity by paternity affidavit.

Listing a father on the birth certificate of a child born out of wedlock does not establish paternity or entitle the man to visitation or custody rights. A listing with the putative father registry also does not establish paternity, but it allows a putative father to receive notice of an adoption petition.

### I. B. Paternity Proceeding in Juvenile Court

A paternity petition can be filed in juvenile court pursuant to IC 31-14 when a party with standing alleges that a man is the biological father of a child. The term "alleged father" is defined for purposes of the juvenile court paternity law at IC 31-9-2-9 as being any man claiming to be or charged with being a child's biological father. The paternity proceeding results in a determination of whether the man is the legal father of the child, and establishes rights and responsibilities with regard to custody, parenting time, and child support.

### I. C. Paternity Issues in Divorce Custody Cases

Paternity can be litigated in the context of a dissolution proceeding if the husband or wife contends that a child was not born of the marriage. Several divorce cases address the paternity of a child born during a marriage who is the biological child of the husband; these cases provide that the husband's paternity may in some circumstances be legally established or disestablished in the dissolution proceeding, although the child or an alleged father may be able to pursue the matter in a separate juvenile court paternity proceeding.

In **In Re Marriage of Huss**, 888 N.E.2d 1238, 1242-44 (Ind. 2008), which is discussed in more detail at IV.R.6., this Chapter, the Court affirmed the dissolution trial court's award to Husband of the custody of all four of Mother's children, including the youngest child who was not the biological child of Husband. The Court held, among other things, that (1) the dissolution trial court did not err by failing to give effect to the intervening paternity judgment by the paternity court, where the subject matter of child custody of all four children, including the child who was the subject of the paternity judgment, was before the dissolution court from the inception of the dissolution action whom was pending prior to Mother's initiation of the paternity proceedings; (2) despite Mother's contention to the contrary, the dissolution trial court had jurisdiction over the child of whom Husband was not the biological father; and (3) also contrary to Mother's contentions, the dissolution trial court's authority to determine custody of all four children, including the child of whom Husband was not the biological father, was not impaired by the paternity statute's general presumption of sole custody for the biological mother; and, even if Mother were to be considered sole custodian of the child by reason of the paternity judgment or the operation of the paternity statute, the dissolution court in this case would be authorized to consider whether to make a superseding award of child custody to Husband as a non-biological parent of the child.

In **Varble v. Varble**, 55 N.E.3d 879, 886 (Ind. Ct. App. 2016), the Court affirmed the circuit court's denial of Alleged Father's motion for relief from judgment which he had filed in the dissolution case of Mother and Legal Father. The Settlement Agreement and Dissolution Decree stated that there were two children born of the marriage, one of whom is A.C. Mother and Legal Father agreed to share joint legal and joint physical custody of the children. Four years later, Alleged Father filed a Verified Petition to Establish Paternity of A.C. The Court concluded that the trial court did not abuse its discretion in denying Alleged Father's motion for relief from judgment in the dissolution case. Alleged Father argued that a child who is not the child of both parties to a dissolution is not a child born of the marriage, that a dissolution court does not have subject matter jurisdiction over that child, and that orders issued without subject matter jurisdiction are void. Legal Father maintained that a dissolution decree in which a child is stipulated to be a child of the marriage has the effect of establishing legal paternity, and that such orders are not void but are voidable and retain their legal force and effect until successfully challenged or reversed. The Court concluded that the matter of the custody of A.C. was before the dissolution court from the inception of the dissolution action between Mother and Legal Father. To the extent Alleged Father cited Russell in asserting the dissolution court did not have jurisdiction over A.C., the Court observed that the parties did not dispute at the time of the dissolution that the court had authority to enter the decree containing terms of custody, parenting time, and support of A.C.

**Driskill v. Driskill**, 739 N.E.2d 161, 164 (Ind. Ct. App. 2000), *trans. denied,* affirmed the trial court's finding that Mother was judicially estopped from attacking her Husband's status as the father of a child born when Husband and Mother were living together but before they married. Husband was listed as the father on the child's birth certificate and the child was acknowledged in the dissolution decree and in three subsequent agreed entries signed by Mother as a "child of the marriage." The trial court denied Mother's motion to set aside the provisions of the dissolution decree granting visitation to Husband in which Mother alleged that there was a legal dispute as to the child's paternity.

The Driskill Court relied on and quoted from Russell v. Russell, 682 N.E.2d 513, 518 (Ind. 1997), in which the Indiana Supreme Court stated:

> In many cases, the parties to the dissolution will stipulate or otherwise explicitly agree that the child is a child of the marriage. In such cases, although the dissolution court does not

identify the child's biological father, the determination is the legal equivalent of a paternity determination in the sense that the parties to the dissolution – the divorcing husband and wife – will be precluded from later challenging that determination, except in extraordinary circumstances.

No such extraordinary circumstances were found in Driskill. The Court held that the effect of granting the relief the ex-wife sought would be to bastardize the child, "and the record before us reflects no extraordinary circumstances that would justify such a horrendous result for the only innocent party before the court."

See also **Russell v. Russell**, 682 N.E.2d 513 (Ind. 1997) (indicating that a "child of the marriage" includes the biological and adopted children of both the husband and wife, but may not include children conceived by someone other than the husband before or during the marriage; opining that the husband's paternity may in some circumstances be legally established or disestablished in the dissolution proceeding, although the child or an alleged father may be able to pursue the matter in a separate juvenile court paternity proceeding); **In Re Paternity of P.S.S.**, 913 N.E.2d 765, 769 (Ind. Ct. App. 2009) (Court affirmed dismissal of child's paternity petition filed by Father as next friend, where Court concluded that child and her next friend Father had full and fair opportunity to take part in resolution of paternity issue during mediation in earlier dissolution proceeding in which trial court approved mediated settlement agreement stating that Mother and Father agreed to share joint custody of child, but acknowledged that another child born during marriage was biological child of third person; Court distinguished In Re Paternity of J.W.L., 672 N.E.2d 966, 968-69 (Ind. Ct. App. 1996), *aff'd by* In Re Paternity of J.W.L., 682 N.E.2d 519, 521 (Ind. 1997) (summarily affirming Court of Appeals opinion) noting that in contrast, here, GAL was appointed during dissolution proceedings for sole reason of protecting child's interest during resolution of issue of child's paternity); **In Re Paternity of B.W.M. v. Bradley**, 826 N.E.2d 706 (Ind. Ct. App. 2005) (Court held trial court violated public policy of correctly identifying parents and their offspring when it dismissed child's petition to establish paternity in alleged Father where child was born to Mother during marriage, and birth record showed husband as father, but after dissolution of marriage, on husband's petition, and based on DNA testing, trial court found husband not to be child's biological father), *trans. denied*; and **L.M.A. v. M.L.A.**, 755 N.E.2d 1172 (Ind. Ct. App. 2001) (Court held (1) trial court had subject matter jurisdiction to consider modifications to its previous dissolution decree as to custody and support; and, (2) because Wife had stipulated to trial court that child was child of marriage, she was precluded from later challenging that determination in dissolution court, where probate court had found another man to be child's "legal father" but deferred any decisions regarding custody and visitation to trial court herein).

I. D. Paternity Issues in Adoption

Paternity may be an issue in adoption cases when a child is born out of wedlock, although the paternity of a child may not be legally determined in the context of the adoption proceeding. The issue in an adoption case is the right of the biological father to receive notice of the adoption proceeding and to block the adoption by refusing to consent. See this Chapter at VI. and Chapter 13 generally, as well as specifically at II.A., V.I., V.K., and VIII.G.

I. E. Title IV-D and the Child Support Bureau

Indiana established the Child Support Bureau within the department of child services as the agency to administer the provisions of Title IV-D of the federal Social Security Act at 42 U.S.C. 651 through 669. See IC 31-9-2-130. The responsibilities of the Bureau are set out at IC 31-25-4

(Child Support Provisions of Title IV-D). IC 31-25-3-1 establishes the child support bureau within DCS and establishes the state central collection unit within the child support bureau.

The responsibilities include but are not limited to: (1) assist in establishing paternity for children born out of wedlock, and establishing child support orders and health insurance coverage; (2) collecting child support payments; and (3) implementing income withholding orders. The Bureau may contract with the prosecutor of each county, a private attorney or entity if the Bureau determines that a reasonable contract cannot be entered into with the prosecutor, or a collection agency if certain requirements are met, to provide these IV-D services. IC 31-25-4-13.1. The prosecutor provides parent locator services and the other identified services to individuals who receive public assistance at no charge. A slight fee may be charged to other persons. See **Collier v. Collier**, 702 N.E.2d 351 (Ind. Ct. App. 1998) (discussion on child support enforcement and holding that the prosecutor may represent parents in child support modifications).

The IV-D prosecutor does not provide legal assistance in custody and visitation issues.

In **In Re Paternity of S.J.S.**, 818 N.E.2d 104, 108-09 (Ind. Ct. App. 2004), the Court reversed the trial court's determination setting aside an Order/Notice to Withhold Income for Child Support, issued by a county child support division to Father's bank in order to attach funds. The trial court's determination was based, *inter alia*, on its finding that assets are not income. The Court, quoting from IC 31-18-1-6 that "'Income' means anything of value owed to an obligor," held that it was "patently clear" that "assets" constitute "income" for purposes of implementing Title IV-D, and that here the assets within an account held by the obligor (Father) constituted "income for the purposes of an income withholding order." See also **In Re Paternity of C.E.B.**, 751 N.E.2d 329, 331 (Ind. Ct. App. 2001) (holding that prosecutor's obligation under IC 31-14-4-2 to file paternity action and represent child in that action upon request of mother or expectant mother (among others), does not require prosecutor to represent child through continuing phases of custody case after finding regarding paternity is entered; *NOTE*: IC 31-14-4-2 is now repealed).

For case law on the Child Support Bureau's ability to establish paternity when child is still born, see **In Re Paternity of D.M.**, 9 N.E.3d 202 (Ind. Ct. App. 2014) (Court reversed the trial court and concluded that because there were no custody, support, or other issues to determine regarding a stillborn child, the State had no authority to bring the action to establish paternity).

## II. RIGHTS OF ALLEGED FATHERS IN CHINS AND TEMINATION CASES

II. A. Alleged Father Qualifies as "Parent"

The CHINS notice and definition statutes make no special provision for alleged fathers. However, the notice statute, IC 31-34-10-2, authorizes the court to summons the child's "parent" and "any other person necessary for the proceedings" to the CHINS initial hearing. An alleged father may qualify as a person necessary to the proceedings.

IC 31-9-2-88(b) provides that for purposes of IC 31-34-1, IC 31-34-8, IC 31-34-16, IC 31-34-19, IC 31-34-20 and IC 31-35-2, a "parent" includes an alleged father. Note that these statutes do not include IC 31-34-10. However, case law has provided that an alleged father has standing to challenge the termination of parental rights, which gives support to the notion that he is entitled to notice. See below, In Re Parent-Child Relationship of S.M., 840 N.E.2d 865, 871-72 (Ind. Ct. App. 2006).

In **In Re Parent-Child Relationship of S.M.**, 840 N.E.2d 865, 871-72 (Ind. Ct. App. 2006), the Court held that an alleged father has standing to challenge the decision of the juvenile court which terminated his parental rights. The Court found that none of the involuntary termination statutes at IC 31-35-2 "require that a putative father take any steps to establish his paternity in order to contest a termination action where an adoption is not pending." The Court was unpersuaded by DCS's arguments concerning the rights of alleged fathers in adoption proceedings, and emphasized that DCS could have initiated adoption proceedings and sought to divest the alleged father of his standing pursuant to IC 31-35-1-4.5, but instead chose to seek involuntary termination of the alleged father's rights under IC 31-35-2.

See this Chapter at VII. for a more detailed discussion regarding establishing paternity by paternity affidavit. See also Chapter 2 at I.D.1. For more discussion on putative fathers' rights and obligations when an adoption is contemplated, see Chapter 13 at V.I., VI., and VIII.G.

II. B. CHINS and Termination Case Law

The Court ruled in **In Re A.B.**, 332 N.E.2d 226 (Ind. Ct. App. 1975), that if a putative father appears at a neglect proceeding he is entitled to be heard and cannot be excluded from the proceeding, even if he has not established his paternity. Relying on Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208 (1972), the Court noted that on due process and equal protection grounds:

> ...the fathers of illegitimate children who appear and contest dependency proceedings, such as the instant one, are entitled to a fitness determination upon the merits. Under the policy and provision of our act, and in view of that principle, we are forced to conclude that the trial court abused its discretion in wholly denying [putative father] any opportunity to participate in the proceedings upon the facts presented.

A.B. 365 N.E.2d at 228.

In **Matter of Laney**, 489 N.E.2d 551 (Ind. Ct. App. 1986), the Court of Appeals ruled that if a putative father appears at the termination of parent-child relationship proceeding he has standing to participate in the proceeding and is entitled to court appointed counsel.

In **In Re C.S.**, 863 N.E.2d 413, 418-19 (Ind. Ct. App. 2007), *trans. denied sub nom.* Montgomery v. Marion County OFC, 869 N.E.2d 461 (Ind. 2007), the Court reversed the juvenile court's judgment determining the child to be a CHINS as to Father. The Court held that there was insufficient evidence to support the juvenile court's determination that the child was a CHINS with regard to Father, where the evidence regarding Father focused on his "failure" to establish paternity before the fact-finding hearing. The Court distinguished In Re S.M., 840 N.E.2d 865 (Ind. Ct. App. 2006) and held that Father's "failure" to establish paternity before the fact-finding hearing was not evidence of neglect on his part that would seriously impair or endanger the child. The Court concluded that the only evidence before the juvenile court relating to Father was that he would be an acceptable parent to the child.

In the termination of parent-child relationship case, **Matter of A.C.B.**, 598 N.E.2d 570, 572 (Ind. Ct. App. 1992), a putative father alleged that in the underlying CHINS case he did not receive the rights normally afforded to fathers whose paternities were legally established. The Court rejected this argument, finding that the father was notified of the CHINS proceeding, transported from the prison to the court for each hearing, given the opportunity to be heard and admit to the CHINS petition, and his request for court appointed counsel "was treated no differently than that of any other parent." The Court also noted that the denial of father's visitation was not inappropriate, because visitation was not in the child's best interest.

In **In Re Parent-Child Relationship of S.M.**, 840 N.E.2d 865, 871-72 (Ind. Ct. App. 2006), the Court held that an alleged father has standing to challenge the decision of the juvenile court which terminated his parental rights. The Court found that none of the involuntary termination statutes at IC 31-35-2 "require that a putative father take any steps to establish his paternity in order to contest a termination action where an adoption is not pending."

Paternity does not have to be legally established before terminating the parent-child relationship. In **Matter of K.H.**, 688 N.E.2d 1303, 1305 (Ind. Ct. App. 1997), the Court indicated that the alleged father has standing in the termination case even though he has not established his paternity. The number of termination cases dealing with the rights of alleged fathers in termination cases indicates that alleged fathers have parental rights and are entitled to notice and party status in the termination cases even if they have not established their paternity. See also **Matter of N.B.**, 731 N.E.2d 492, 494 (Ind. Ct. App. 2000) (father had not established paternity at the time of the termination petition); **Young v. Elkhart County Office of Family and Children**, 704 N.E.2d 1065, 1067 (putative father challenged sufficiency of evidence in termination case); **Matter of A.C.B.**, 598 N.E.2d 570, 572 (Ind. Ct. App. 1992) (statutes governing termination of parental rights do not require an adjudication of paternity prior to termination).

See also **Bester v. Lake County Office of Family**, 839 N.E.2d 143 (Ind. 2005) (Court reversed judgment terminating Father's parental rights where Father established paternity and complied with all other elements of reunification plan and for three years prior to termination hearing had conducted himself in manner consistent with assuring that his son would be exposed to healthy drug free environment, despite determination of Illinois authorities that child could not be placed with Father in Illinois at that time); **Rowlett v. Office of Family and Children**, 841 N.E.2d 615 (Ind. Ct. App. 2006) (Kirsch, C.J., dissenting) (Court reversed order terminating parental rights of incarcerated Father who established paternity, where Court held Father was entitled to chance to prove himself fit parent for children upon his release), *trans. denied*; and **In Re C.C.**, 788 N.E.2d 847, 854 (Ind. Ct. App. 2003) (affirming trial court's termination of putative Father's parental rights where, among other things, he failed to establish paternity and to comply with all other services he was required to complete in order to be reunited with child), *trans. denied*.

Jurisdiction issues may arise between a juvenile court and a paternity court, if an alleged father in a juvenile case seeks to establish paternity in paternity court. See **Reynolds v. Dewees**, 797 N.E.2d 798, 800-802 (Ind. Ct. App. 2003), which deals with the implementation of IC 31-30-1-13, the statute that accords concurrent original jurisdiction to the paternity and another juvenile court over a child's custody under certain circumstances. The Court found that IC 31-30-1-13 vested the paternity court with the requisite jurisdiction to enter the order modifying the child's custody and awarding it to Father, but, because of limitations placed on the paternity court by the statute and the limited information available to the Court, it could not determine whether or when that modification became effective. But see **In Re J.B.**, 55 N.E.3d 903, 906 (Ind. Ct. App. 2016), which was affirmed upon rehearing on different grounds at **In Re J.B.**, 61 N.E.3d 308 (Ind. Ct. App. 2016). In **In Re J.B.**, 55 N.E.3d 903, 905-6 (Ind. Ct. App. 2016) (both calling into question the utility of IC 31-30-1-13 and declining to guess what the legislature meant when it said in IC 31-30-1-13(d) that "[a]n order establishing or modifying paternity of a child by a juvenile court survives the termination of the [CHINS] proceeding" (emphasis in original).

*Practice Note*: IC 31-30-1-13 was amended in 2017, subsequent to both Reynolds v. Dewees, 797 N.E.2d 798, 800-802 (Ind. Ct. App. 2003) and In Re J.B., 55 N.E.3d 903, 906 (Ind. Ct. App. 2016). See this Chapter at IV.A. for a more detailed discussion of this jurisdictional issue.

II. C. Custody and Parenting Time Rights

IC 31-14-13-1 provides that a mother of a child born out of wedlock has sole legal custody of that child, except for some specific circumstances. One instance in which a mother would not have sole legal custody of her child born out of wedlock is if, under IC 16-37-2-2.1(h), the mother and the father who signs the paternity affidavit agree to share joint legal custody, meet all the requirements to share joint legal custody, and follow all the proper procedures.

IC 31-14-13-1 also lists other circumstances which are exceptions to the general rule that a mother of a child born out of wedlock has sole legal custody of that child. These exceptions generally provide that a court can give the alleged father, the legally established father, or another person custody of the child in a CHINS, paternity, or guardianship proceeding, or other specific situations.

Although no statute addresses the right of an alleged father to visit with the child, IC 16-37-2-2.1(j) provides that the signing of a valid paternity affidavit gives rise to both rights and responsibilities on the part of both parents. IC 16-37-2-2.1(j) gives the paternity affiant father parenting time in accordance with the Indiana Parenting Time Guidelines, unless another determination is made by a court. For a case on an alleged father being denied parenting time until he established paternity, see In Re A.A.C., 682 N.E.2d 541 (Ind. Ct. App. 1997).

## III. INVOLVING ALLEGED FATHERS IN CHINS PROCEEDING

III. A. Best Practice to Give Notice to Alleged Fathers

It is recommended in both CHINS and termination proceedings that DCS give notice to any man (or all men) whom the mother identifies as the father or who are otherwise alleged to be the father, regardless of whether the father has made any efforts to identify himself as the father or had any contact with the child. See this Chapter above at II.A. on rights of alleged fathers. This is the better practice and such efforts safeguard the trial court's decision upon appeal. Despite this recommendation, there is some case law indicating that a man who takes no action to establish paternity or makes no effort to develop a relationship with the child is not entitled to notice of legal proceedings affecting his relationship with the child. See Lehr v. Robertson, 463 U.S. 248, 103 S. Ct. 2985 (1983); B.G.v. H.S. 509 N.E.2d 214 (Ind. Ct. App. 1987); and M.R. by Ratliff v. Meltzer, 487 N.E.2d 836 (Ind. Ct. App. 1986). DCS should search its program and financial assistance records (Food Stamps, Medicaid, Temporary Assistance to Needy Families, etc.) to identify alleged fathers.

III. B. Benefits/Detriments of Establishing Paternity

Jurisdiction over the alleged father may be highly advantageous to DCS and may be in the best interest of the child in a CHINS proceeding. Involving the father in the CHINS case and obtaining an independent judgment of paternity facilitates the following:

- court orders for participation of the alleged father in the care and treatment of the child and in the rehabilitation of the family, IC 31-34-20-3;
- and court orders to the father for the financial support of the child and the cost of services for the child and family, IC 31-40-1.

Involving the alleged father in the CHINS proceeding may create additional placement options for the child, including relative placements with paternal relatives. Failure to identify and

involve the alleged father in the CHINS proceeding and to offer him rehabilitation and reunification services may defeat future efforts to terminate the parent-child relationship so that the child can be made available for adoption.

For the alleged father who wants to be awarded custody in a CHINS proceeding, the benefits of establishing his paternity in a separate legal paternity proceeding are obvious. Once paternity is legally established, the father must be afforded party status in CHINS and termination proceedings, should be entitled to rehabilitation services and visitation, and may be considered for placement of the child. See Chapter 2 at I.D. for additional discussion of rights of alleged fathers.

For case law regarding a biological father not be given custody of a child before his parental rights were terminated, see **Matter of A.M.**, 596 N.E.2d 236 (Ind. Ct. App. 1992) (Court ruled that the evidence was insufficient to terminate the parent-child relationship of the biological father who was not given custody of the child throughout the CHINS proceeding; father established paternity after the CHINS adjudication and worked with the welfare department to obtain custody of the child; reasons for removal of the child from the mother could not be assigned to a father who had not been allowed to exercise his parental rights as to the child).

However, subsequent termination case law has indicated that the child's placement with the noncustodial parent during the CHINS proceeding is not required, if DCS documents the reasons why the noncustodial parent is not fit for placement of the child. See **In Re B.D.J.**, 728 N.E.2d 195, 200-202 (Ind. Ct. App. 2000) (evidence in termination hearing was sufficient to show that children were not placed with adjudicated noncustodial father when removed from mother because father was unable to provide for their needs, and evidence showed reasonable likelihood that this would not change).

There may be circumstances where establishing paternity is not in the best interests of the child. Establishment of paternity may have positive and negative effects for a child. Establishing paternity enables the child to receive financial support and inheritance from the father, and possibly a greater opportunity to develop a relationship with the father through custody or visitation. On the other hand, establishing the paternity of a dysfunctional or dangerous father may force the child into an undesirable relationship, and there may be other situations in which establishment of paternity is not in the best interest of the child. See **In Re R.P.D. Ex Rel. Dick**, 708 N.E.2d 916 (Ind. Ct. App. 1999) (Court affirmed trial court ruling that establishment of paternity in biological father was not in best interest of six- year-old child).

IC 31-34-15-6 provides that DCS or the local office shall refer a CHINS case to the local prosecutor to initiate paternity proceedings, if DCS or the local office knows the identity of the father and "reasonably believes that establishing the paternity of the child would be beneficial to the child." Under that statute the prosecutor is obligated to file the proceeding if the referral is made.

For case law on paternity determinations affecting CHINS proceedings, see:

**In Re C.S.**, 863 N.E.2d 413 (Ind. Ct. App. 2007) (Court reversed judgment determining child to be CHINS as to Father, distinguishing In Re Parent-Child Relationship of S.M., 840 N.E.2d 865 (Ind. Ct. App. 2006), and holding that, inasmuch as Father's "failure" to establish paternity before fact-finding hearing was not evidence of neglect on his part which would seriously impair or endanger child, the only evidence before juvenile court relating to Father was that he would be an acceptable parent to child) *trans. denied sub nom.* Montgomery v. Marion County OFC, 869 N.E.2d 461 (Ind. 2007)

**In Re Parent-Child Relationship of S.M.**, 840 N.E.2d 865, 870 (Ind. Ct. App. 2006) (finding that most apparent impediment to putative Father's parental relationship with child was his questionable paternity of child, where putative Father failed to take steps to establish paternity)
**Reynolds v. Dewees**, 797 N.E.2d 798, 800-802 (Ind. Ct. App. 2003) (Father, who stipulated to paternity of child in paternity court after CHINS petition filed in another juvenile court, received permanent placement of child in CHINS court about two years later)

For more case law on paternity adjudications affecting TPR proceedings, see:
**Bester v. Lake County Office of Family**, 839 N.E.2d 143 (Ind. 2005) (Court reversed judgment terminating Father's parental rights where Father established paternity and complied with all other elements of reunification plan and for three years prior to termination hearing had conducted himself in manner consistent with assuring that his son would be exposed to healthy drug free environment, despite determination of Illinois authorities that child could not be placed with Father in Illinois at that time)
**Rowlett v. Office of Family and Children**, 841 N.E.2d 615 (Ind. Ct. App. 2006) (Court reversed order terminating parental rights of incarcerated Father who established paternity, where Court held Father was entitled to chance to prove himself fit parent for children upon his release), *trans. denied*
**In Re C.C.**, 788 N.E.2d 847, 854 (Ind. Ct. App. 2003) (affirming trial court's termination of putative Father's parental rights where, among other things, he failed to establish paternity and comply with all other services he was required to complete in order to be reunited with child), *trans. denied*

III. C. Amendment of CHINS Petition to Include Alleged or Adjudicated Father

An alleged father, for purposes of IC 31-14, is defined as any man claiming to be or charged with being a child's biological father. IC 31-9-2-9. Alleged father is also included in the definition of parent, found at IC 31-9-2-88. Parent, for purposes of IC 31-34-1 [Circumstances under which a child is a CHINS], IC 31-34-8 [Program of Informal Adjustment], IC 31-34-16 [Petition for Parental Participation], IC 31-34-19 [Dispositional Hearing], and IC 31-34-20 [Dispositional Decrees], includes an alleged father, as well as a biological or adoptive parent.

It is possible to include an alleged father in a CHINS petition, either at the outset, or by amending the CHINS petition to name the alleged father and then conduct any necessary admission or factfinding hearings to determine the grounds for which the child is not placed with the alleged father, and the identify the conditions under which the child could be placed with the alleged father.

In addition to including the alleged father in the CHINS petition and the CHINS judgment, dispositional or parental participation orders should be issued to identify the evaluations, treatment, or other conditions the alleged father must comply with to obtain visitation with or placement of the child.

In **In Re S.A.**, 15 N.E.3d 602, 608-9, 612 (Ind. Ct. App. 2014), *aff'd on rehearing* at **In Re S.A.**, 27 N.E.3d 287 (Ind. Ct. App. 2015), *trans. denied*, the Court concluded that the trial court erred in adjudicating the child to be a CHINS and reversed the CHINS adjudication. The Court found that the trial court deprived Father of a meaningful opportunity to be heard by adjudicating the child as a CHINS prior to Father's factfinding hearing. Although Father was present for the child's birth, he did not establish paternity until after the commencement of the CHINS proceedings. DCS and Mother submitted an agreement to the court in which Mother admitted to certain allegations in the CHINS petition, and the trial court adjudicated the child to be a CHINS,

all before it was determined that Father was the biological father. The trial court eventually found the child to be a CHINS as to Father in a spate factfinding hearing. Father appealed. The Court observed that, three months after the trial court adjudicated the child to be a CHINS based on Mother's admission, the court held a factfinding hearing and found the child to be a CHINS "as to [F]ather" based on the allegation in the initial petition. The Court said that Mother's admitted drug use could be a sufficient basis for the CHINS adjudication, but while Father might not be able to dispute the factual allegations admitted by Mother, "he has the right to contest the allegation that his [c]hild needs the coercive intervention of the court", and, in these situations, due process requires that the trial court "conduct a fact-finding hearing as to the entire matter." (quoting In Re K.D. 962 N.E.2d 1249, 1259 (Ind. 2012)). The Court held that, because a court cannot issue separate adjudications for each parent, the CHINS determination should be based on a consideration of the evidence in its entirety. The Court, quoting In Re R.S., 987 N.E.2d 155, 159 (Ind. Ct. App. 2013), observed it is well established that "a CHINS adjudication may not be based solely on conditions that no longer exist. The trial court should also consider the parents' situation at the time the case is heard."

See also **In Re C.C.**, 788 N.E.2d 847, 854 (Ind. Ct. App. 2003) (affirming trial court's termination of putative Father's parental rights where, among other things, he failed to comply with all services he was required to complete in order to be reunited with child, including establishment of paternity), *trans. denied*; **Matter of K.H.**, 688 N.E.2d 1303 (Ind. Ct. App. 1997) (Justice Sullivan raising a serious concern that the father was not a party to the CHINS proceeding and therefore had not admitted to the adverse conditions existing in the home when the children were removed).

III. D. Locating Alleged Fathers

The IV-D Child Support Bureau may be helpful in locating alleged fathers, and the prosecutor may initiate paternity proceedings regarding those fathers. See this Chapter at I.E. on parent locator services and this Chapter below IV.D. on obligation of prosecutor to initiate paternity cases.

DCS may attempt to search several listings which pertain to alleged fathers at the time a termination petition is filed or an adoption may be arranged. However, it should be noted that the statutory language in the registries does not specifically provide for searches pursuant to termination of the parent-child relationship, but for adoption. Arguably, it can be assumed that DCS is pursuing the goal of adoption when it initiates the termination petition, and therefore should be given access to the registry information. The Putative Father Registry, codified at IC 31-19-5, allows any attorney or agency arranging an adoption to request the State Department of Health to complete a search of the Registry at IC 31-19-5-15. Paternity judgments are also recorded with the State Department of Health and a search request may be made to the Department for a record of paternity judgments by an attorney or an agency that may arrange an adoption. IC 31-19-6-1. Finally, the State Department of Health and local health departments are to maintain information on paternity affidavits pursuant to IC 16-37-2-14, with the separate provision at IC 16-37-2-2(f) and (g) to provide this information upon request of attorneys or agencies arranging an adoption. The local health department, pursuant to IC 16-37-2-2(d), also must inform the Title IV-D agency (the child support bureau) regarding each paternity affidavit executed, and DCS should request information from the bureau as to paternity affidavits.

## IV. ESTABLISHING PATERNITY WITH A PATERNITY PROCEEDING

IV. A. Jurisdiction and Venue

IC 31-30-1-1(3) provides that the juvenile court has "exclusive original jurisdiction" in "[p]roceedings concerning the paternity of a child under IC 31-14." IC 31-14-3-2 provides that venue lies in the county in which the child, the mother, or the alleged father resides. If a parent or the child resides outside of Indiana, two significant federal laws, codified in Indiana law, may apply: Uniform Interstate Family Support Act (UIFSA) at IC 31-18.5, and the Uniform Child Custody Jurisdiction Act (UCCJA) at IC 31-21.

IC 31-30-1-10 provides that a circuit court and a superior court have concurrent original jurisdiction with the juvenile court for the purpose of establishing the paternity of a child in a proceeding under UIFSA to enforce a duty of support. See also **Egan v. Bass**, 644 N.E.2d 1272 (Ind. Ct. App. 1994) (UIFSA cases, formerly URESA cases, are instituted to establish paternity for purpose of support collection when alleged father lives in another state). In **Matter of Paternity of J.N.**, 643 N.E.2d 913 (Ind. Ct. App. 1994), Florida forwarded mother's petition to establish paternity to Indiana and Indiana had jurisdiction to hear the URESA action.

If a paternity court has jurisdiction over a child in an establishment or modification of paternity, custody, parenting time, or child support proceeding, that court has concurrent original jurisdiction with a 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 because the child is a CHINS. IC 31-30-1-13(a).

If the paternity court modifies child custody and there is a juvenile court who has jurisdiction over a child because the child is a CHINS, the modification only becomes effective when the juvenile court (1) enters an order adopting and approving the child custody modification; or (2) terminates the CHINS proceeding or the juvenile delinquency proceeding. IC 31-30-1-13(b).

Amendments to IC 31-30-1-13 now provide for the survival of a CHINS custody order after a CHINS case in certain circumstances. An order of a CHINS court which establishes or modifies paternity, custody, child support, or parenting time survives the termination of the CHINS proceeding until the paternity court having concurrent original jurisdiction assumes or reassumes primary jurisdiction of the case to address all other issues. IC 31-30-1-13(c).

A paternity court that assumes or reassumes jurisdiction of a case under or IC 31-30-1-13(c) may modify child custody, child support, or parenting time in accordance with applicable modification statutes. IC 31-30-1-13(d).

In **K.T.H. v. M.K.B.**, 670 N.E.2d 118 (Ind. Ct. App. 1996), the Court clarified that URESA actions are limited to the establishment and enforcement of support obligations and cannot involve matters of custody or visitation. See also **State of Virginia Ex. Rel. Bateman v. Foley**, 712 N.E.2d 1094, 1097-1098 (URESA petition should not concern issues of visitation). However, in **Matter of R.L.W.**, 643 N.E.2d 367 (Ind. Ct. App. 1994), the Court ruled that the Indiana trial court had jurisdiction under the Indiana Uniform Child Custody Jurisdiction Law (UCCJL) (now UCCJA) to establish paternity on a petition filed by the alleged father, even though the mother and child had left the state shortly before the filing of the petition. The Court ruled that the putative father qualified as a "parent" for purposes of the UCCJL, based on the following evidence; he resided with the mother and child in Indiana shortly before the mother and child fled the state; he held the child out to be his own by filing the paternity action; and the child bore his full name.

IV. A. 1. Intrastate Court Jurisdiction

In **Varble v. Varble**, 55 N.E.3d 879, 886 (Ind. Ct. App. 2016), the Court affirmed the circuit court's denial of Alleged Father's motion for relief from judgment which he had filed in the dissolution case of Mother and Legal Father. This case involved an Alleged Father wishing to establish paternity over a child who had been recognized by both Mother and Legal Father as a child born of their prior marriage. The Court concluded that the trial court did not abuse its discretion in denying Alleged Father's motion for relief from judgment in the dissolution case. The Court concluded that the matter of the custody of the child was before the dissolution court from the inception of the dissolution action between Mother and Legal Father. To the extent Alleged Father cited prior case law in asserting the dissolution court did not have jurisdiction over the child, the Court observed that the parties did not dispute at the time of the dissolution that the court had authority to enter the decree containing terms of custody, parenting time, and support of the child.

In **In Re J.B.**, 55 N.E.3d 903, 906 (Ind. Ct. App. 2016), which was affirmed upon rehearing on different grounds at **In Re J.B.**, 61 N.E.3d 308 (Ind. Ct. App. 2016). In **In Re J.B.**, 55 N.E.3d 903, 905-6 (Ind. Ct. App. 2016), the Court held that, while Circuit Court could enter a CHINS dispositional decree that removed the children from Mother and authorized DCS to place them with Father, as soon as Circuit Court discharged the parties to the CHINS case, it lost jurisdiction, and Superior Court's joint custody order in the paternity case controlled. The Court looked to IC 31-30-1-1 and IC 31-30-1-13, and observed that Father did not file an independent action for custody in Superior Court (the paternity court), but DCS sought to modify Superior Court's custody order in Circuit Court, which had jurisdiction over the CHINS case. The Court noted that when a child is found to be a CHINS, the court exercising juvenile jurisdiction: (1) must hold a dispositional hearing within thirty days to consider "placement of the child" (IC 31-34-19-1(a)); (2) may remove the child from home and authorize DCS to place the child in another home, shelter care facility, child caring institution, group home, or secure private facility (IC 31-34-20-1(a)(3)); and (3) shall discharge the child and the child's parent when it finds that the objectives of the dispositional decree have been met (IC 31-34-21-11). Citing IC 31-30-2-1(a)(1), the Court said that a juvenile court's jurisdiction over a CHINS and over the child's parent ends when the court discharges the child and parent. The Court concluded that, because it appeared that Circuit Court would not have discharged the parties and terminated the CHINS case unless it thought that Father was awarded full custody, the Court reversed and remanded the case for further proceedings. *Practice Note*: 2017 legislation amended IC 31-30-1-12 and -13 to more clearly provide for the survival of a CHINS order modifying custody after a case closes in these circumstances. Read this case fully before citing to it.

Upon the rehearing in **In Re J.B.**, 61 N.E.3d 308, 312 (Ind. Ct. App. 2016), the Court reached the same result as its original opinion, but for different reasons; the Court reversed that part of the CHINS court's order which discharged the parties and terminated the CHINS case, and remanded for further proceedings consistent with the CHINS statutes, including any appropriate services for Mother. The Court declined to guess what the legislature meant when it said in IC 31-30-1-13(d) that "[a]n order establishing or modifying paternity of a child by a juvenile court survives the termination of the [CHINS] proceeding" (emphasis in original). The Court asked the legislature to take a deeper look at IC 31-30-1-12 and IC 31-30-1-13. DCS argued that according to IC 31-30-1-13(d), the CHINS court's custody modification order survived the termination of the CHINS proceedings. The Court found two ways to read what "[a]n order establishing or modifying the paternity of a child" means. Id. at 311-12. The Court said that one way is to read "paternity" to mean establishing or modifying the identity

of the child's father; the other way is to read "paternity" to include custody modifications, as the article governing the establishment of paternity also addresses determining and modifying custody. The Court observed that the legislature used "an order establishing or modifying paternity" in IC 31-30-1-13(d), while it used "an order modifying child custody, child support, and parenting time" in IC 31-30-1-12(e) [the similar statute concerning dissolution cases]. When the legislature uses particular language in one section of the statute but omits it in another section, the Court presumes that it is intentional. *Practice Note*: 2017 legislation amended IC 31-30-1-12 and -13 to more clearly provide for the survival of a CHINS order modifying custody after a case closes in these circumstances. Read this case fully before citing to it.

In **In Re B.C.**, 9 N.E.3d 745, 751-4 (Ind. Ct. App. 2014), the Court reversed the Montgomery Circuit Court's ("Montgomery Court") paternity custody order, the Marion Superior Court, Probate Division's ("Marion Court") order dismissing the guardianship, and the Marion Superior Court's order dismissing Guardians' petition for adoption, and remanded for proceedings consistent with the opinion. Guardians obtained guardianship of the child in the Marion Court in March 2012, and alleged that the child had no known biological father. In December 2012, the alleged father (Father) filed a petition to establish paternity in the Montgomery Court, and it was approved the next day. Father then filed a motion to dismiss the guardianship in the Marion Court. In the Montgomery Court, Guardians filed a motion to intervene, to set aside the paternity order, and a request for DNA testing. Guardians alleged that all issues should be combined before the Marion Court. The Montgomery Court entered an order granting Guardians' motion to intervene, but denied the other motions. Guardians then filed a Verified Petition for Adoption in the Marion Court, under a separate adoption cause number. Both the adoption petition and the guardianship proceeding were before the same Marion Court trial judge. Father filed a Petition to Establish Custody in the Montgomery Court. Guardians then filed a Motion for Consolidation and Transfer to the Marion Court in the Montgomery Court, alleging that the paternity action should be transferred and consolidated with the guardianship proceeding. Father objected to the transfer, and the Montgomery Court opined that it had jurisdiction because it was a juvenile matter, and denied Guardians' motion. After hearing evidence, including that Guardians had filed a petition to adopt the child, the Montgomery Court entered an order, finding by clear and convincing evidence that Guardians would retain physical custody of the child, that Father and the maternal grandfather would share joint legal custody of the child, that Father would have parenting time with the child, and that Mother, who had been incarcerated since February 2013, would have parenting time upon her release from incarceration. Father filed an objection to the adoption petition and a motion to dismiss the adoption in the Marion Court. The GAL in the Marion Court cases filed a motion to consolidate paternity and guardianship proceedings because the Marion Court took initial cognizance of the child's custody and because Father agreed to submit himself to the Marion Court's jurisdiction. The Marion Court granted Father's motion to dismiss, ordered that the child's guardianship be dismissed, and dismissed Guardians' petition for adoption.

The B.C. Court found that Marion Court had jurisdiction to enter its 2012 order appointing Guardians as guardians of the child. Quoting IC 33-29-1.5-2(1), the Court noted that, generally, all nonstandard superior courts have "original and concurrent jurisdiction in all civil cases". IC 29-3-2-1(a)(1) provides that Indiana courts having probate jurisdiction have jurisdiction over "[t]he business affairs, physical person, and property of every incapacitated person and minor residing in Indiana." The exceptions set forth at IC 29-3-2-1, which include courts with child custody jurisdiction in paternity cases, did not apply at

the time Guardians filed their petition for guardianship because Father had not yet filed his petition to establish paternity.

The B.C. Court also found that the Montgomery Court had jurisdiction to enter the agreed paternity order on December 20, 2012, but not to issue any custody decisions. A juvenile court has exclusive original jurisdiction in proceedings concerning the paternity of a child under IC 31-14 as set forth in the juvenile court jurisdiction statute IC 31-30-1-1(3). The issue of Father's paternity of the child was not an issue pending before the Marion Court. However, because the subject of child custody was properly before the Marion Court due to the prior guardianship action, the Montgomery Circuit Court was precluded from making a custody determination in the subsequently filed paternity action.

The B.C. Court held that because the petition for adoption and the paternity action were pending at the same time, the Marion Court, the court in which the petition for adoption had been filed, had exclusive jurisdiction over the child's custody. IC 31-19-2-14(a) provides that "[i]f a petition for adoption and a petition to establish paternity are pending at the same time for a child sought to be adopted, the court in which the petition for adoption has been filed has exclusive jurisdiction over the child, and the paternity proceeding must be consolidated with the adoption proceeding."

In **In Re Paternity of S.C.**, 966 N.E.2d 143, 147, 149, 151 (Ind. Ct. App. 2012) (Riley, J. dissenting), *aff'd on rehearing*, 970 N.E.2d 248 (Ind. Ct. App. 2012) (Riley, J. dissenting) *trans. denied*, the Court affirmed the Hancock trial court's ("Hancock Court") grant of Presumed Father's Verified Petition for Relief from Judgment for Fraud upon the Court. Hancock Court had concluded that the paternity affidavit and the resulting paternity judgment issued by Hancock Court were void as a matter of law, as Mother knew there was a reasonable probability that Presumed Father was the actual father of the child, not Affiant Father. The Court further concluded that Mother had engaged in an unconscionable plan or scheme to defraud the court.

In S.C., Affiant Father (referred to as Affiant Father because he signed the paternity affidavit relating to the child), with the help of Mother, filed an action in Hancock Court on October 21 that sought to establish paternity in Affiant Father. This action was filed while another paternity action was pending for the child in the Fayette County trial court ("Fayette Court"). The Fayette Court paternity action was filed by Presumed Father (referred to as Presumed Father because under IC 31-14-7-1(3), a man who takes a DNA test that shows a 99% probability that he is the father of a child is presumed to be the father of that child) on July 29. Mother and Affiant Father did not inform Hancock Court of the Fayette Court proceedings, even though they knew of the Fayette Court paternity action, which had been filed before the Hancock Court petition. The Hancock Court granted Affiant Father's petition to establish paternity the day before a hearing in the Fayette Court paternity proceedings. The next day, Presumed Father was served with Affiant Father's paternity order from the Hancock Court at the Fayette Court proceedings. The Fayette Court dismissed Presumed Father's proceedings. Presumed Father later filed a motion in Hancock Court to set aside Hancock Court's paternity order, alleging that fraud had been committed upon Hancock Court in obtaining the order that establish paternity in Legal Father. Hancock Court granted the motion and vacated its earlier paternity judgment.

The S.C. Court stated that the "case implicates the power of the trial court to vacate an order that it later concludes was issued under a fraudulent pretext." In order to prove fraud, Presumed Father had to establish that an unconscionable plan or scheme was used to

improperly influence the court's decision, and that such plan or scheme prevented Presumed Father from fully and fairly presenting his case. The Court deemed these elements to be present.

On rehearing, **In Re Paternity of S.C.**, 970 N.E.2d 248, 250-1 (Ind. Ct. App. 2012) (Riley, J. dissenting), the Court determined that Mother's arguments regarding the validity and admissibility of the paternity test were irrelevant with regards to the Hancock Court's order setting aside the paternity judgment for fraud upon the Court; the Court held that the issue to be determined was whether Mother committed fraud upon the Hancock Court by failing to inform it of the Fayette Court proceedings. The Court further opined that it was enough that there was evidence to support the Hancock Court's finding that Mother did not inform the Hancock Court of the Fayette Court proceedings, and that Mother knew there was a reasonable probability that Presumed father was the biological father of the child.

In **In Re Marriage of Huss**, 888 N.E.2d 1238, 1241-44 (Ind. 2008), which is discussed in more detail at IV.R.6., this Chapter, the Court affirmed the dissolution trial court's award to Husband of the custody of all four of Mother's children, including the youngest child who was not the biological child of Husband. The Court held that the dissolution trial court did not err by failing to give effect to the intervening paternity judgment by a different court, where the subject matter of child custody of all four children, including the child who was the subject of the paternity judgment, was before the dissolution court from the inception of the dissolution action which was pending prior to Mother's initiation of the paternity proceedings. The Court opined that the determinative issue was whether the paternity court was authorized to adjudicate a custody issue that was already pending before another court, rather than whether the dissolution court had improperly failed to honor a judgment of a sister court. The Court concluded that since child custody was properly before the dissolution court first, the paternity court could not properly make a custody determination.

**Reynolds v. Dewees**, 797 N.E.2d 798, 800-802 (Ind. Ct. App. 2003) was a case of first impression regarding implementation of IC 31-30-1-13. In June 1998, the county office of family and children filed a petition in juvenile court alleging the child to be CHINS. When the child was almost two years old, in September 1998, Father stipulated to paternity and the paternity court awarded custody to Mother pursuant to the parties' stipulation. About two years later, the CHINS court temporarily, and then permanently, placed the child with Father. About nine months later, while the CHINS case was still pending in another juvenile court, Father filed a petition for change of custody in the paternity court which, after a trial, awarded Father permanent custody of the child. Mother appealed, arguing that the paternity court's judgment was void in that the paternity court lacked jurisdiction to make a custody determination while the CHINS case was pending in another juvenile court.

The Reynolds Court found that IC 31-30-1-13 vested the paternity court with the requisite jurisdiction to enter the order modifying the child's custody and awarding custody to Father, but, because the record did not indicate whether the conditions required in IC 31-30-1-13(b) had been met, the Court could not determine whether or when that modification became effective. IC 31-30-1-13(b) provides that when there are concurrently pending juvenile and paternity actions, a paternity court's modification of a custody order becomes effective only when the juvenile court with CHINS jurisdiction either (1) enters an order approving the child custody modification; or (2) terminates the CHINS proceeding. *Practice Note*: 2017 legislation amended IC 31-30-1-12 and -13 to more clearly provide for the survival of a CHINS order modifying custody after a case closes in these circumstances. Read this case fully before citing to it.

See also **Trigg v. Al-Khazali**, 881 N.E.2d 699, 702, 703 (Ind. Ct. App. 2008) (Court ratified its holding in Sims v. Beamer, 757 N.E.2d 1021, 1025 n.3 (Ind. Ct. App. 2001), to effect that party who seeks affirmative relief from court voluntarily submits himself to jurisdiction of that court and is thereafter estopped from challenging court's personal jurisdiction).

IV. A. 2. Interstate Jurisdiction

Indiana's Uniform Child Custody Jurisdiction Act (UCCJA) can be found at IC 31-21. The UCCJA replaces the Uniform Child Custody Jurisdiction Law (UCCJL), which was repealed in 2007. Regarding this change and interstate subject matter jurisdiction generally, see Chapter 3 at II.G 1 through 4.

Effective January 1, 2003, Ind. Trial Rule 4.4(A), which serves as Indiana's long-arm provision governing the permissible exercise of personal jurisdiction, was amended to add the following language at the end of the existing list of specific acts which may serve as a basis for assertion of personal jurisdiction: "In addition, a court of this state may exercise jurisdiction on any basis not inconsistent with the Constitutions of this state or the United States." In **LinkAmerica Corp. v. Albert**, 857 N.E.2d 961, 965-66, n.3, 967 (Ind. 2006), the Indiana Supreme Court held that this amendment "was intended to, and does, reduce the analysis of personal jurisdiction to the issue of whether the exercise of personal jurisdiction is consistent with the Federal Due Process Clause." The Court also pointed out regarding its decision in In Re Paternity of A.B., 813 N.E.2d 1173, 1176 (Ind. 2004) that the complaint in A.B. was filed in 2002 when this amendment was not yet effective and the A.B. decision sheds no light on the effect of the 2003 amendment. See **In Re Paternity of A.B.**, 813 N.E.2d 1173, 1175-76 (Ind. 2004) (Court granted transfer and affirmed the trial court's dismissal of Mother's petition to establish paternity where the trial court lacked personal jurisdiction over alleged Father, a non-resident of Indiana, in the absence of the sufficient minimum contacts with Indiana required by the Due Process Clause of the Fourteenth Amendment and Trial Rule 4.4).

In **In Re Paternity of D.T.**, 6 N.E.3d 471, 475-6 (Ind. Ct. App. 2014), the Court held that the custody order was void due to lack of subject matter jurisdiction; therefore, the trial court clearly erred in denying Mother's Trial Rule 60(B)(6) motion to vacate the custody order. Mother, a Mississippi resident, filed an action against Father in Mississippi to establish Father's paternity. Because Father resided in Anderson, Indiana, the Mississippi Department of Human Services transmitted a request for a paternity determination and child support enforcement under the Uniform Interstate Family Support Act (UIFSA) to the Indiana Central Registry Child Support Division. The Madison County Prosecutor, acting as an intervening party, filed a UIFSA action in the Madison Circuit Court (trial court) to support the Mississippi request. Father appeared at a hearing set by the trial court and admitted to paternity. Father refused to return the child after a visit, so Mother retrieved the child. Police located Mother and informed her that Father had been granted custody of the child pursuant to an order issued by the Indiana trial court. Neither Mother nor the Mississippi court had received service of process concerning any proceedings connected with Father's Indiana custody motion. The trial court denied both Mother's motion to correct error and her emergency motion to have custody returned to her. The Court found the trial court's lack of subject matter jurisdiction to be dispositive, as it made the order void. The Court observed that IC 31-18-7-2, which governs subject matter jurisdiction in UIFSA proceedings states, "Nothing in this chapter shall be construed to confer jurisdiction on the court to determine issues of custody, parenting time, or the surname of a child." The Court observed that the cause of action was before the Indiana trial court as a UIFSA action, pursuant to IC 31-18-1-

9, -18, and the cause was clearly listed as a IV-D action. The Court opined that the UIFSA cause of action impermissibly morphed into a custody order that was void for lack of subject matter jurisdiction.

The Court in **Bergman v. Zempel**, 807 N.E.2d 146, 147-49, 155 (Ind. Ct. App. 2004) reversed the trial court's dismissal of Mother's motion to dismiss alleged Father's paternity petition. The Court determined that (1) the trial court should have recognized and enforced a Pennsylvania court's previously entered initial custody decree which conformed with the Parental Kidnapping Prevention Act (PKPA); and (2) the trial court should have dismissed Father's petition because Pennsylvania had continuing jurisdiction over the custody determination in accordance with the PKPA and the UCCJA.

See also **El v. Beard**, 795 N.E.2d 462 (Ind. Ct. App. 2003) (holding that the trial court that established Father's paternity did not have personal jurisdiction over Mother to establish child support, custody, or parenting time); **In Re Paternity of M.R.**, 778 N.E.2d 861, 864-68 (Ind. Ct. App. 2002), *clarified upon rehearing*, 784 N.E.2d 530 (Ind. Ct. App. 2003), *trans. dismissed*, 804 N.E.2d 751 (Ind. 2003) (reversing trial court's assertion of jurisdiction, vacating support order, but affirming establishment of paternity; holding UCCJL applied although Georgia was the child's home state, the UCCJL did not limit the trial court's jurisdiction to rule on non-custodial matters); **In Re Paternity of R.A.F.**, 766 N.E.2d 718, 723-24 (Ind. Ct. App. 2002), *trans. denied* (affirming trial court's order granting emergency temporary custody of the children to Father pursuant to his petition; Indiana court had continuing exclusive jurisdiction of custody matters concerning the children despite their relocation to Arizona with Mother, because the Indiana court entered the original custody determination in the paternity action, and Father continued to reside in Indiana); **Tate v. Fenwick**, 766 N.E.2d 423 (Ind. Ct. App. 2002) (affirming the trial court's finding of a lack of jurisdiction; modification of foreign child support orders may happen only (1) upon written consent or if the child, individual obligee, and obligor do not reside in the issuing state; (2) if the petitioner who is a nonresident of Indiana seeks modification; and (3) if the respondent is subject to the personal jurisdiction of the Indiana tribunal).

IV. B. Civil Trial Rules and Standard of Proof

Paternity actions and related custody and visitation determinations are civil in nature and the civil trial rules apply. IC 31-14-3-1. The standard of proof in paternity actions is preponderance of evidence. See **Humbert v. Smith**, 655 N.E.2d 602, 605 (Ind. Ct. App. 1995), *summarily aff'd* at 664 N.E.2d 365 (Ind. 1996). See also IC 31-34-12-3 (the standard of proof on juvenile proceedings other than delinquency and termination is preponderance of evidence).

IV. C. No Right to Jury Trial

There is no right to a jury trial. The prior right to a jury trial was repealed in 1997. IC 31-32-6-7 provides that all juvenile court matters must "be tried to the court" except as otherwise provided. IC 31-32-6-7(b) provides the exceptions, which deal with adults being charged with crimes.

IV. D. Standing and Legal Responsibility to File Paternity Proceeding

The mother or expectant mother, the child, and the alleged father or alleged expectant father have standing to file a paternity proceeding. IC 31-14-4-1. The mother and alleged father can file alone or jointly. IC 31-14-4-1.

Entities may be able to petition to establish paternity for a child. IC 31-14-4-1(6) provides that DCS may establish paternity in a CHINS proceeding, if paternity has not already been established. DCS may also refer a case to a prosecuting attorney in order to establish paternity. If

paternity of a child has not been established, DCS or a prosecuting attorney under an agreement or contract with DCS described in IC 31-25-4-13.1 has standing to file a petition to establish paternity. IC 31-14-4-1(7). IC 31-25-4-13.1 and 14.1 govern agreements with local government officials and contracting as it pertains to the collection of child support. A DCS or prosecuting attorney operating under an IC 31-25-4-13.1 contract may file a paternity action if either the mother, the person with whom the child resides, or DCS has executed an assignment of support rights under Title IV-D. IC 31-14-4-3. This does not appear to include a putative father unless the child resides with the putative father; however, this does not limit a putative father's ability to file a petition to establish paternity under IC 31-14-4-1.

In **In Re Paternity of S.A.M.**, ___N.E.3d ____ (Ind. Ct. App. 2017) (opinion issued October 13, 2017), the Court vacated the trial court's order enforcing grandparent visitation, and further held that the alleged paternal grandfather ("Alleged Grandfather") lacked standing to file a paternity action for the child. The Court looked to IC 31-14-4-1, which provides that the following persons are permitted to bring a paternity action: (1) the mother or expectant mother; (2) a man alleging he is the child's biological father or he is the expectant father of an unborn child; (3) the mother and a man alleging that he is her child's biological father, filing jointly; (4) the expectant mother and a man alleging that he is the biological father of her unborn child, filing jointly; (5) a child; (6) the Department of Child Services; and (6) the prosecuting attorney under IC 31-14-4-2. The Court noted that IC 31-14-5-2 provides that a person who is otherwise incompetent may file a petition through the person's guardian, guardian ad litem, or next friend. The Court concluded that prior case law indicated that Alleged Grandfather did not qualify as a person qualifying as a next friend. The child's Mother and legally established Father were both alive and share joint custody of the child, so the law has entrusted safe-guarding of the child's interests to Mother and Father. It was the duty of Father and Mother to act in the child's best interest, and it was up to them to decide whether to initiate a paternity proceeding for the child. The Court noted that Father had been the legal father of the child since the child was born because Father executed a paternity affidavit, and the trial court's finding that Father had never established paternity for the child was clearly erroneous.

In **In Re Paternity of D.M.**, 9 N.E.3d 202, 207-8 (Ind. Ct. App. 2014), the Court reversed the trial court and concluded that because there were no custody, support, or other issues to determine regarding a stillborn child, the State had no authority to bring the action to establish paternity. The State had no authority under Indiana statutory law to bring an action to establish paternity, since a stillborn child has none of the interests for which a prosecuting attorney is permitted to establish paternity. Under certain circumstances, paternity could still be established for a stillborn child, just not in an action brought by the State.

In **R.J.S. v. Stockton**, 886 N.E.2d 611, 614-16, n.2, n.5 (Ind. Ct. App. 2008), the Court affirmed the trial court's dismissal of the paternity petition filed as the child's next friends by the parents of the child's alleged father (Petitioners). The alleged father died prior to the child's birth. The Court held that the trial court's dismissal of the paternity petition was proper because Petitioners lacked standing to file such a petition. The Court concluded that (1) IC 31-14-4-1 did not give Petitioners standing to file the petition as alleged grandparents; and (2) if Petitioners were proper next friends of the child, their petition would not have been time-barred. The Court noted that there is no statutory definition of "next friend"; but this definition was recently addressed in Jemerson v. Watterson, 877 N.E.2d 487, 491 (Ind. Ct. App. 2007) (case law supported indicated that only parents, guardians, guardians ad litem, and prosecutors may bring paternity actions as next friends of children). The Court rejected the idea that there was no limit on who may file a paternity petition as a child's next friend, observing that the language must be read in context of the cases, and in those cases the "next friend" was a parent, guardian, or prosecutor. The Court

stated that it did not believe the legislature could have intended absolutely anyone to intervene in the life of a child by filing a paternity petition. The Court also noted that a next friend is required for a child only when there is no parent or general guardian to institute an action on the child's behalf. Although it was conceivable that there could be a situation where a child had no physically present natural parents and no court-appointed guardian, and thus a third party could initiate a paternity proceeding on the child's behalf as a next friend, here, the child had a living mother and two court-appointed guardians with whom the law had entrusted the safeguarding of the child's interests. Petitioners were not entitled to circumvent the authority entrusted in the child's natural and court-appointed guardians by filing a paternity action as his next friend.

See also **In Re Paternity of McGuire-Byers**, 892 N.E.2d 187 (Ind. Ct. App. 2008) (because child was over eighteen when paternity petition was filed, Mother was not permitted to file it, but child could file at any time before he reached age twenty, IC 31-14-5-2(b); and Mother was necessary party, IC 31-14-5-6), *trans. denied*; **J.R.W. ex rel. Jemerson v. Watterson**, 877 N.E.2d 487, 491-92 (Ind. Ct. App. 2007) (Court held that (1) only parents, guardians, guardians ad litem, and prosecutors may bring paternity actions as next friends of children; and (2) in this case, because both Father and biological father bore duty of acting on behalf of child, no proper basis existed upon which Maternal Aunt and Uncle might assert standing as child's next friends); **In Re Paternity of B.W.M. v. Bradley**, 826 N.E.2d 706 (Ind. Ct. App. 2005) (Court held child was entitled to maintain paternity action against alleged father, where child was born to Mother during marriage, and birth record showed husband as father, but, after dissolution of marriage, on husband's petition, and based on DNA testing, trial court found husband not to be child's biological father), *trans. denied*; **In Re Paternity of K.L.O.**, 816 N.E.2d 906 (Ind. Ct. App. 2004) (holding that Mother may file paternity action as child's next friend under IC 31-14-5-2(a) even if time-barred from filing as mother by IC 31-14-5-3 because two years have passed since the child's birth); and **In Re Paternity of C.E.B.**, 751 N.E.2d 329, 331 (Ind. Ct. App. 2001) (holding that prosecutor obligated under IC 31-14-4-2 to file a paternity action and represent the child in that action upon request of the mother or expectant mother (among others), is not required to represent child through continuing phases of custody case after finding regarding paternity is entered; *NOTE*: IC 31-14-4-2 is now repealed).

IV. E. Filing Paternity Proceeding on Child Conceived Outside of Mother's Marriage

Indiana case law has clarified the right to bring paternity actions regarding children who were born during the mother's marriage to her husband, but were conceived by another man. These cases significantly impact CHINS litigation, because it is both necessary and helpful to establish the identity of the correct father of the CHINS for purposes of custody, visitation, and termination of parental rights. Immediately below is a discussion on juvenile court paternity actions filed while the mother is married to her husband (the child's presumed father), or after the dissolution of mother and presumed father's marriage. See also this Chapter below at VIII. for discussion on paternity challenges within the dissolution proceeding, and when a dissolution paternity ruling may be a bar to future juvenile court paternity proceedings.

IV. E. 1. Paternity Proceeding to Establish Paternity of Child Born While Mother's Marriage Still Intact

In **In Re Paternity of V.A.M.C.**, 768 N.E.2d 990 (Ind. Ct. App. 2002), the father of the child born to Mother during her marriage to Husband, established paternity, was awarded visitation, and was ordered to pay child support during that marriage. A rehearing and a remand was granted on other issues, see 773 N.E.2d 359 (Ind. Ct. App. 2002).

In **C.J.C. v. C.B.J.**, 669 N.E.2d 197 (Ind. Ct. App. 1996), a child was conceived outside of Mother's marriage to Husband. Mother remained married and Husband supported the child as

his own even though he knew he was not the biological father. Mother filed a paternity action against Alleged Father, which was dismissed. A court appointed guardian ad litem refiled a petition to establish paternity on behalf of the child, which the trial court again dismissed. The Court of Appeals reversed the dismissal and ruled that the child can maintain a paternity action against Alleged Father. The Court opined that paternity statute favors the public policy of establishing paternity of children born out of wedlock.

In **K.S. v. R.S.**, 669 N.E.2d 399, 403 (Ind. 1996), Mother and Alleged Father conceived a child during Mother's marriage to Husband. The child was born and Mother's marriage remained intact. Alleged Father filed a paternity action in the court with juvenile jurisdiction. The trial court approved the agreed entry of Mother and Alleged Father that he was the biological father and that Mother and Alleged Father should have joint custody. Mother subsequently filed a motion to set aside the entry under Ind. Trial Rule 60(B)(6). On transfer, the Indiana Supreme Court reasoned that a child born to a married woman, but fathered by a man other than her husband, is a "child born out of wedlock." The paternity statute specifically authorizes the biological father to establish paternity. "Nothing in the paternity act precludes a man otherwise authorized from filing a paternity action on the basis of the mother's marital status." This position is also supported in Russell v. Russell, 682 N.E.2d 513, 519 (Ind. 1997).

IV. E. 2. Initiating Paternity Proceeding During Mother's Divorce Proceeding or After Divorce Judgment

In **Varble v. Varble**, 55 N.E.3d 879, 886 (Ind. Ct. App. 2016), the Court affirmed the circuit court's denial of Alleged Father's motion for relief from judgment which he had filed in the dissolution case of Mother and Husband, who was the child's legal father. The dissolution decree stated there were two children of the marriage, one of whom is the subject child of this case. Mother and Husband shared joint legal and physical custody of the children. Four years later, Alleged Father filed a Verified Petition to Establish Paternity of the child. The Court concluded that the trial court did not abuse its discretion in denying Alleged Father's motion for relief from judgment in the dissolution case. Alleged Father argued that a child who is not the biological child of both parties to a dissolution is not a child born of the marriage, that a dissolution court does not have subject matter jurisdiction over that child, and that orders issued without subject matter jurisdiction are void. Husband maintained that a dissolution decree in which a child is stipulated to be a child of the marriage has the effect of establishing paternity, and that such orders are not void but are voidable and retain their legal force and effect until successfully challenged or reversed. The Court concluded that the matter of the custody of the child was before the dissolution court from the inception of the dissolution action between Mother and Husband. To the extent Alleged Father cited Russell in asserting the dissolution court did not have jurisdiction over the child, the Court observed that the parties did not dispute at the time of the dissolution that the court had authority to enter the decree containing terms of custody, parenting time, and support of the child.

In **In Re Marriage of Huss**, 888 N.E.2d 1238, 1242-44 (Ind. 2008), which is discussed in more detail at IV.R.6., this Chapter, the Court affirmed the dissolution trial court's award to Husband of the custody of all four of Mother's children, including the youngest child who was not the biological child of Husband. During the first nine years of their marriage, Husband and Mother had three children. They then separated for eight months, but subsequently reconciled when Mother was four to five months pregnant with another man's child. When the fourth child was born, Mother listed Husband as the father on the birth certificate and gave the child Husband's last name. Four years later, Husband and Mother sought dissolution of their marriage in the dissolution trial court. During pendency of the

dissolution proceeding, Mother filed for, and received a judgment in another county's paternity court, which established paternity of the fourth child in a man other than Husband and awarding her custody of the fourth child. The dissolution trial court granted the divorce and, among other things, awarded custody of all four children to Husband. Mother appealed. The Court held that (1) the dissolution trial court did not err by failing to give effect to the intervening paternity judgment by the paternity court, where the subject matter of child custody of all four children was before the dissolution court from the inception of the dissolution action which was pending prior to Mother's initiation of the paternity proceedings; (2) despite Mother's contention to the contrary, the dissolution trial court had jurisdiction over the child of whom Husband was not the biological father; and (3) also contrary to Mother's contentions, the dissolution trial court's authority to determine custody of all four children, including the child of whom Husband was not the biological father, was not impaired by the paternity statute's general presumption of sole custody for the biological mother; and, even if Mother were to be considered sole custodian of the child by reason of the paternity judgment or the operation of the paternity statute, the dissolution court in this case would be authorized to consider whether to make a superseding award of child custody to Husband as a non-biological parent of the child.

In **In Re Paternity of B.W.M. v. Bradley**, 826 N.E.2d 706 (Ind. Ct. App. 2005), *trans. denied*, the Court reversed and remanded the trial court's decision dismissing the child's paternity suit. Mother and Husband were married in August 1990. The child was born in December 1990 and the birth certificate indicates that the child's parents are Husband and Mother. In June 1999, the marriage was dissolved; Mother was awarded custody of the child as well as another child born during the marriage. In October 2001, Husband filed a Petition to Vacate Child Support Order Pending DNA Testing, or in the Alternative, to Modify Child Support. Pursuant to a February 2002 hearing, the trial court found that DNA Testing determined that Husband was not the child's biological father and vacated Husband's support order with regard to the child. In April 2004, the child filed a petition to establish paternity in Alleged Father. The trial court granted Alleged Father's motion to dismiss. On appeal, the Court (1) found that the dismissal violated the public policy of correctly identifying parents and their offspring; and (2) found that it was error for the trial court to dismiss the paternity action without giving the child the chance to establish whether Alleged Father was his father. The Court held that the child was entitled to financial support from his biological father. The Court further noted that both the Supreme Court and the Appeals Court had previously looked with displeasure on parents attacking their paternity through motions to modify child support, and stated its strong disapproval of the trial court's action in granting Husband's petition to vacate child support. Noting, however, that Mother had chosen not to appeal that decision, the Court opined that there was no reason the child should be made to suffer for the poor decision making of the adults in his life.

In **L.M.A. v. M.L.A.**, 755 N.E.2d 1172 (Ind. Ct. App. 2001), the Court held that the trial court had subject matter jurisdiction to consider modifications to its previous dissolution decree as to custody and support; because Mother stipulated to the trial court that the younger child was a child of the marriage, she was precluded from later challenging that determination in the dissolution court. The parties' marriage was dissolved after they stipulated that there were "two children of the marriage" and the trial court established joint custody of the two children. Later, Mother filed a petition to modify custody. While that petition was pending, Mother filed a petition in probate court alleging that Alleged Father was the younger child's father. The probate court found Alleged Father to be the child's "legal father" but deferred any decisions regarding custody and visitation to the trial court herein. Thereafter, Husband also filed a petition to modify custody. Following an evidentiary hearing the trial court

awarded the custody of both children to Husband after (1) considering the "best interests of the child" pursuant to "the custody statute and the de facto custodian statute;" (2) noting that Alleged Father had had "little or no contact with" the younger child and provided no support for him whatsoever; and (3) concluding that because Husband had "established a meaningful relationship" with the younger child and was "the only father he has ever known," it would not be in the child's best interest to "deprive" him of his relationship with Husband "at this stage in the child's life." On appeal, Mother contended "the trial court erroneously exercised jurisdiction by issuing orders regarding custody and visitation with [the younger child] after [the child] was determined not to be a child of [the] marriage in a collateral paternity action."

In **In Re R.P.D. Ex Rel. Dick**, 708 N.E.2d 916, 920 (Ind. Ct. App. 1999), Mother initiated a paternity petition in the name of the child and herself, as next friend, alleging that someone other than Husband was the father of the child. The paternity proceeding was consolidated with the pending divorce proceeding involving Mother and Husband. Husband, Alleged Father, and the guardian ad litem filed motions to dismiss the paternity proceeding. The trial court dismissed the paternity petition upon its finding that a petition brought by next friend required a determination that the petition was in the best interest of the child, and the trial court ruled after a contested hearing that the petition was not in the best interest of the child. The Court of Appeals affirmed the dismissal of the paternity petition and the trial court's finding that the mother was prohibited from bringing a paternity petition on the child's behalf.

In **In Re the Paternity of J.W.L.**, 682 N.E.2d 519 (Ind. 1997), the Court ruled that *res judicata* did not bar a paternity petition filed by Mother as next friend for the child against Alleged Father, even though Mother had earlier claimed in a separate dissolution proceeding in Florida that the child was born of the marriage to Husband. The Court reasoned that the child was not a party to the dissolution proceeding and therefore was not bound by its ruling on paternity. However, the Court noted that when the issue of paternity is fully litigated in a dissolution proceeding and the ruling is based upon, and consistent with, blood or genetic testing, the paternity ruling will constitute a determination in all but the most extraordinary circumstances and will be binding as to the child.

In **In Re S.R.I.**, 602 N.E.2d 1014 (Ind. 1992), the Court ruled that Alleged Father could bring a paternity action regarding a child that was born during Mother's marriage to another man, even though the child had been ruled a "child of the marriage" in the dissolution of Mother's and Husband's marriage. Neither Alleged Father nor the child were parties to the dissolution case, and thus the dissolution ruling was not res judicata as to Alleged Father's paternity proceeding.

See also **In Re Paternity of P.S.S.**, 913 N.E.2d 765, 769 (Ind. Ct. App. 2009) (Court affirmed dismissal of child's paternity petition filed by Father as next friend, where Court concluded that child and her next friend Father had full and fair opportunity to take part in resolution of paternity issue during mediation in earlier dissolution proceeding in which trial court approved mediated settlement agreement stating that Mother and Father agreed to share joint custody of child, but acknowledged that another child born during marriage was biological child of third person; Court distinguished In Re Paternity of J.W.L., 672 N.E.2d 966, 968-69 (Ind. Ct. App. 1996), *aff'd by* In Re Paternity of J.W.L., 682 N.E.2d 519, 521 (Ind. 1997) (summarily affirming Court of Appeals opinion) noting that in contrast, here, GAL was appointed during dissolution proceedings for sole reason of protecting child's interest during resolution of issue of child's paternity).

IV. E. 3. Attempted Disestablishment of Paternity After Death of Presumptive Father

In **In Re Paternity of R.M.**, 939 N.E.2d 1114, 1119-22 (Ind. Ct. App. 2010) (Najam, J. dissenting), the Court reversed the trial court's grant of Mother's motion to dismiss Putative Father's petition to establish paternity of the twelve-year-old child after Presumptive Father died, and remanded the case for further proceedings. The Court held that a genuine issue of fact existed as to whether Putative Father's delay in establishing paternity after the child was born and Presumptive Father's death prejudiced Mother or the child, and therefore, the evidence before the trial court was insufficient to grant summary judgment. The Court opined that laches may bar a paternity action if the party asserting the defense establishes all of its elements. The Court observed that the trial court's finding in support of the third requirement of laches (a change in circumstances causing prejudice to the adverse party) was not supported by Mother's designated evidence.

**Paternity of H.J.B. ex rel. Sutton v. Boes**, 829 N.E.2d 157, 159-60 (Ind. Ct. App. 2005), holds that the paternity laws of this state may not be used in such a way that a child is legally declared to have no father. The Court affirmed the trial court's dismissal of a petition to disestablish paternity and request for DNA testing which had been filed by child's Maternal Grandmother as his guardian and next friend. The H.J.B. Court (1) noted that the statutes at IC-31-14 which govern paternity actions, assume establishing as opposed to disestablishing paternity; (2) referred to Estate of Lamey, 689 N.E.2d 1265, 1268 (Ind. Ct. App. 1997), *trans. denied*, in which the Lamey Court held that, in the probate framework, IC 29-1-2-7(b) "provides a limited opportunity for an illegitimate child…to establish paternity in a decedent, not an avenue for third parties to disestablish paternity following a presumptive father's death;" and (3) cited Russell v. Russell, 682 N.E.2d 513, 518 (Ind. 1997), in which the Indiana Supreme Court held that in a dissolution proceeding in which Mother and Husband are attempting to stipulate or otherwise agree that a child is not a child of the marriage, "it is well within the discretion of the trial court to withhold approval [of such a stipulation] until paternity has been established in another man." The Court here opined that it would likewise be appropriate for the trial court to withhold the disestablishment of a deceased father's paternity until paternity had been established in another man in order to avoid the creation of a "filius nullius" (son of nobody), with the countless detrimental financial and emotional effects it would carry, which is exactly the result the paternity statutes were created to avoid.

But see **In Re Estate of Long**, 804 N.E.2d 1176 (Ind. Ct. App. 2004) (reversing and remanding trial court's order denying personal representative's petition to determine heirs and for DNA testing of decedent's presumptive child born to decedent's wife within 300 days of decedent's death, where Court held that personal representative had to be able to challenge child's paternity in presumptive father's stead in order for IC 29-1-6-6, statute allowing petition to determine heirship, to have any meaning in this circumstance).

IV. F. Party Status

IC 31-14-5-6 provides that the mother, child, and each person alleged to be the father are necessary parties to the paternity action. See **In Re Paternity of N.R.R.L.**, 846 N.E.2d 1094, 1096-97 (Ind. Ct. App. 2006), *trans. denied* (Adjudicated Father is a necessary party to a paternity action, but any error arising from the failure of the petitioning putative father to name the adjudicated father as a party was remedied when the trial court allowed him to intervene); **In Re Paternity of C.M.R.**, 871 N.E.2d 346, 350 (Ind. Ct. App. 2007) (Court held order for genetic testing was void due to failure to join necessary parties including estate of deceased alleged father); and **In Re Paternity of K.L.O.**, 816 N.E.2d 906, 908-09 (Ind. Ct. App. 2004) (reversing and remanding on interlocutory appeal from trial court's denial of Alleged Father's motion to dismiss where another man, who was still child's legal father, because his previously executed

paternity affidavit had not been rescinded or set aside when results of genetic testing excluded him as child's father, had not been joined as necessary party as is required by IC 31-14-5-6).

The case law is clear that a child is a necessary and indispensable party to a paternity proceeding and must clearly be designated as a party in the pleading to ensure that the paternity judgment is res judicata as to all interested parties. See **Matter of Paternity of H.J.F.**, 634 N.E.2d 551 (Ind. Ct. App. 1994); **In Re Paternity of V.M.E.**, 668 N.E.2d 715 (Ind. Ct. App. 1996); **Marsh v. Paternity of Rodgers by Rodgers**, 659 N.E.2d 171 (Ind. Ct. App. 1995). However, case law has held that failure to name the child as a party does not void the judgment. In **K.S. v. R.S.**, 669 N.E.2d 399 (Ind. 1996), the Indiana Supreme Court ruled that failure to name the child as a party to the paternity action does not render the paternity judgment void, but merely voidable. In that light, practitioners should keep in mind that Ind. Trial Rule 60(B)(6) applies only to judgments that are void, not voidable. See also **K.T.H. v. M.K.B.**, 670 N.E.2d 118, 119 (Ind. Ct. App. 1996) (a judgment against Father on a Uniform Reciprocal Enforcement Support Act [URESA] paternity petition that did not name the child as a party, was voidable rather than void per se); **T.L.G. v. R.J.**, 683 N.E.2d 633 (Ind. Ct. App. 1997) (failure to name the child as a party to paternity action renders paternity judgment voidable as to child, however, child ratified voidable judgment by accepting the agreement to settle the support dispute); **In Re Paternity of McGuire-Byers**, 892 N.E.2d 187 (Ind. Ct. App. 2008) (because child was over eighteen when paternity petition was filed, Mother was not permitted to file it, but child could file at any time before he reached age twenty, IC 31-14-5-2(b); and Mother was necessary party IC 31-14-5-6), *trans. denied*.

If a child over whom a petitioner seeks to establish paternity is also under a guardianship, the guardian may be entitled to notice and involvement in the case. See **White v. White**, 796 N.E.2d 377 (Ind. Ct. App. 2003) (because Guardian of the child was not notified of the petition to change custody and terminate support, the paternity court order that terminated Father's responsibility to pay child support was void; the Court noted that the failure by Mother and Father in this case to give notice to the child rendered the judgment only voidable, but reasoned that a guardian is in a situation distinguishable from a child without a guardian, who presumably lives with the mother or father who must be given notice). See also **In Re Paternity of N.T.**, 961 N.E.2d 1020, 1023 (Ind. Ct. App. 2012) (Court held that paternity court had the inherent power to subject Stepfather, a nonparty, to contempt proceedings for his role in the violation of the court's orders; Court opined that service of Father's application for contempt did not elevate Stepfather to the status of a party in the underlying civil action entitling him to a change of venue from the judge pursuant to T.R. 76).

IC 31-14-5-2 states that a person less than eighteen years of age may file the paternity petition if competent except for age. A person who is incompetent may file a petition through the person's guardian, guardian ad litem, or next friend.

IC 31-14-21-8 provides that prospective adoptive parents in a pending adoption proceeding can intervene as a party in the paternity proceeding involving the same child. However, the rights of the interveners are specifically limited by statute.

IV. G. Statute of Limitations

The mother and alleged father may be barred from filing a paternity suit more than two years after the birth of the child, unless (1) the mother and the alleged father waive the statute of limitations and file jointly; or (2) the alleged father or someone acting on his behalf has given the child support, either voluntarily or by agreement; or (3) the mother, DCS, or a prosecuting attorney acting under a contract described in IC 31-25-4-13.1 files a paternity petition after the

alleged father acknowledged his paternity in writing, (4) the father files a paternity petition after the mother has acknowledged in writing that he is the biological father, (5) the petitioner was incompetent when the child was born, or (6) the responding party could not be served with summons during the two year period. IC 31-14-5-3(b). If any of these conditions exist, the paternity petition must be filed within two years of the condition described. IC 31-14-5-3(c).

IC 31-14-5-2 provides that the child or the child's guardian, guardian ad litem or next friend can bring a paternity suit until the child's twentieth birthday. If incompetent at age eighteen, the child can bring the suit within two years of obtaining competency.

IC 31-14-5-4 provides that the division of family resources or county office of family and children can file a paternity action until the child's nineteenth birthday or the date of the child's graduation from high school (whichever occurs first), in cases in which public assistance has been furnished for the child and there is an assignment of support rights under Title IV-D.

A paternity action must be filed during the lifetime of the alleged father or within five months of his death. IC 31-14-5-5. See **Haas v. Chater**, 79 F. 3d 559 (7th Cir. 1996) (in action for social security benefits for child, Court ruled that statute requires that paternity be established within five months of the father's death).

Statutes of limitations are not jurisdictional; they are affirmative defenses that must be pled and proven. The party pleading that the suit is barred by the statute of limitations bears the burden of proving the suit was commenced beyond the statutory time limit. See **Drake v. McKinney**, 717 N.E.2d 1229 (Ind. Ct. App. 1999); **Matter of Paternity of P.L.M. by Mitchell**, 661 N.E.2d 898 (Ind. Ct. App. 1996).

IV. G. 1. Filing Suit as Next Friend

For case law on parents successful filing to establish paternity as a child's next friend, see:

**In Re Paternity of K.L.O.**, 816 N.E.2d 906 (Ind. Ct. App. 2004) (holding that Mother may file paternity action as child's next friend under IC 31-14-5-2(a) even if time-barred from filing as mother by IC 31-14-5-3 because child is more than two years old)

**Matter of Paternity of P.L.M. by Mitchell**, 661 N.E.2d 898 (Ind. Ct. App. 1996) (Putative Father was a proper next friend through which the child could file her paternity petition, and the two year statute of limitations for fathers did not apply because the petition was brought by the child. There is no statutory or case law restriction on who may serve as the child's next friend. Putative Father had initiated a paternity action as next friend of the child two years after the father's statute of limitations had run)

**Matter of Paternity of J.J.H.**, 638 N.E.2d 815, 818 (Ind. Ct. App. 1994) paternity action could be filed in the child's name by Mother as next friend because the child had until her twentieth birthday to bring suit, even though the statute of limitations had tolled on the rights of Mother and the welfare department. However, because child support had been assigned to the welfare department, and the department's paternity action was barred by the statute of limitations, the trial court could not order the father to pay child support)

For case law on parents unsuccessfully filing to establish paternity as a child's next friend, see:

**In Re Paternity of S.A.M.**, ___N.E.3d ____ (Ind. Ct. App. 2017) (opinion issued on October 13, 2017, the Court held that the alleged paternal grandfather ("Alleged Grandfather") lacked standing to file a paternity action for the child. The Court concluded that prior case law indicated that Alleged Grandfather did not qualify as a person qualifying as a next friend. The child's Mother and legally established Father were both

alive and share joint custody of the child, so the law has entrusted safe-guarding of the child's interests to Mother and Father. It was the duty of Father and Mother to act in the child's best interest, and it was up to them to decide whether to initiate a paternity proceeding for the child. The Court noted that Father had been the legal father of the child since the child was born because Father executed a paternity affidavit, and the trial court's finding that Father had never established paternity for the child was clearly erroneous.

**In Re R.P.D. Ex Rel. Dick**, 708 N.E.2d 916, 919 (Ind. Ct. App. 1999) (affirming the trial court's decision that establishment of paternity was not in the child's best interests. A paternity petition was brought in the name of the six-year-old child by the child's mother, as next friend, alleging that someone other than the mother's current husband was the father of the child. The alleged biological father, mother's husband, and the guardian ad litem filed motions to dismiss the paternity proceeding, and following an evidentiary hearing on whether establishment of paternity was in the best interest of the child, the court dismissed the paternity petition).

For case law on prosecutors filing as a child's next friend, see:

**In Re Paternity of N.D.J.**, 765 N.E.2d 682 (Ind. Ct. App. 2002) (reversing trial court's dismissal of prosecutor's petition to establish paternity as time-barred where prosecutor filed as child's next friend more than two years after child's birth, pursuant to IC 31-14-4-2 and IC 31-14-5-2; *NOTE*: IC 31-14-4-2 is now repealed)

**Clark v. Kenley**, 646 N.E.2d 76 (Ind. Ct. App. 1995) (a prosecutor shall file a paternity action on behalf of a child when requested to do so by Putative Father, even though Putative Father's action to establish paternity is barred by the two year statute of limitations. The prosecutor represents the child on the petition, not the putative father. The petition must be brought in the name of the child, by his next friend the prosecutor)

A man who is barred under IC 31-19 from establishing paternity cannot establish paternity by filing a paternity action as next friend of a child, or requesting a prosecuting attorney to file a paternity action. IC 31-14-5-9. This overrules In Re Adoption of E.L., 913 N.E.2d 1276 (Ind. Ct. App. 2009).

For case law on a putative father attempting to establish paternity as a next friend in the context of a pending adoption, see:

**In Re Adoption of K.G.B.**, 18 N.E.3d 292, 304 (Ind. Ct. App. 2014) (Court affirmed the trial court's orders which (1) dismissed Putative Father's petition to establish paternity; and (2) struck Putative Father's motion to contest the child's adoption. Court held that because Putative Father impliedly consented to the child's adoption, the Court concluded that, pursuant to IC 31-19-9-14 and IC 31-14-5-9, he was also barred from establishing paternity, and the trial court did not err in dismissing his petition)

**In Re Paternity of G.W.**, 983 N.E.2d 1193, 1198 (Ind. Ct. App. 2013) (Court held that a man who is barred under IC 31-19 [adoption statutes] from establishing paternity may not file a paternity action as next friend of a child or request a prosecuting attorney to file a paternity action; Court quoted IC 31-14-5-9 [Barred from establishing paternity] and opined that since Birth Father failed to timely register with the putative father registry, he had impliedly consented to the child's adoption and was now barred from attempting to establish paternity by either filing as the next friend of the child or by requesting the prosecuting attorney to file a paternity action)

For case law on persons other than parents or a prosecutor attempting to file to establish paternity as a child's next friend, see:

**R.J.S. v. Stockton**, 886 N.E.2d 611, 615-16 (Ind. Ct. App. 2008) (Court held that, although it is conceivable there could be situation where, because child had no physically present natural parents and no court-appointed guardian, third party could initiate paternity proceeding on child's behalf as next friend, here, child had living natural mother and two court-appointed guardians with whom law had entrusted safeguarding of child's interests; and Petitioners, parents of child's alleged father who had died prior to child's birth, were not entitled to circumvent authority entrusted in child's natural and court-appointed guardians by filing paternity action as his next friend)
**J.R.W. ex rel. Jemerson v. Watterson**, 877 N.E.2d 487, 491-92 (Ind. Ct. App. 2007) (Court held that (1) its own research supported Father's contention that only parents, guardians, guardians ad litem, and prosecutors may bring paternity actions as next friends of children; and (2) in this case, because both Father and biological father bore duty of acting on behalf of child, no proper basis existed upon which Maternal Aunt and Uncle (Petitioners) might assert standing as child's next friends)
**Paternity of H.J.B. ex rel. Sutton v. Boes**, 829 N.E.2d 157, 159-60 (Ind. Ct. App. 2005) (affirming trial court's dismissal of a petition to disestablish paternity and request for DNA testing which had been filed by child's maternal grandmother as his guardian and next-friend)

IV. G. 2. Furnishing Child Support Tolls Statute of Limitations

One of the circumstances that may allow for a paternity action to be filed past the statute of limitations is if support has been provided by the alleged father or by a person acting on his behalf; this can be done either voluntarily, or under an agreement with the mother, a person acting on the mother's behalf, or a person acting on the child's behalf. IC 31-14-5-3((b)(2).

See also **Matter of Paternity of S.B.A.**, 645 N.E.2d 1103, 1105-6 (Ind. Ct. App. 1995) (it was error to dismiss the putative father's paternity action on summary judgment as barred by the two year statute of limitations; there existed a question of fact as to whether the father voluntarily provided support for the child and thus fit within the statute of limitations exception; case law indicated that minimal payments or provision of small amounts of clothing or "stuff" for a child could be considered "support" for purposes of tolling the statute of limitations); **Drake v. McKinney**, 717 N.E.2d 1229 (Ind. Ct. App. 1999) (material issue of fact as to whether someone acting on father's behalf provided support for child precluded summary judgment).

IV. G. 3. Acknowledgement of Paternity Tolls Statute of Limitations Unless Rescission

One of the circumstances that may allow for a paternity action to be filed past the statute of limitations is if the alleged father files a petition to establish paternity after the mother has acknowledged in writing that he is the child's biological father. IC 31-14-5-3(b)(4).

See also **In Re Paternity of K.H.**, 709 N.E.2d 1033 (Ind. Ct. App. 1999) (the paternity petition filed by Alleged Father under IC 31-14-5-3(b)(4) was timely because the petition was filed within two years of the mother's death, even assuming the mother's death had the effect of rescinding her acknowledgment); **Drake v. McKinney**, 717 N.E.2d 1229 (Ind. Ct. App. 1999) (Stepfather's act of petitioning for adoption of the child two weeks after Alleged Father filed a paternity proceeding, did not infer that the mother's earlier written acknowledgment in a paternity affidavit of alleged father's paternity had been rescinded).

IV. H. Appointment of Counsel or Guardian ad Litem/Court Appointed Special Advocate for Child

The paternity article of family law, IC 31-14, makes no reference to the appointment of a guardian ad litem (GAL) or court appointed special advocate for a child, and does not provide for

a custody or visitation investigation by a GAL or court appointed special advocate. However, paternity actions are within juvenile court jurisdiction and IC 31-32-3-1 provides that the juvenile court may appoint a GAL or court appointed special advocate for a child "at any time." The same statute also provides for the appointment of an early intervention advocate, who is defined by IC 31-9-2-43.2 as a volunteer or staff member of a preventative program who is appointed by the court as an officer of the court to assist, represent, and protect the interests of at-risk children.

Ind. Trial Rule 17(C) provides that when an infant or incompetent is joined as a party to an action and is not represented, or is not adequately represented, the court shall appoint a GAL for the child.

Case law indicates that while a GAL is not required in all cases, a GAL "must be appointed to protect the child's interests in all cases where a party seeks to overcome the presumption that a child born in wedlock is legitimate." **Matter of Paternity of H.J.F.**, 634 N.E.2d 551, 555 (Ind. Ct. App. 1994). See also **In Re Paternity of V.M.E.**, 668 N.E.2d 715, 717 (Ind. Ct. App. 1996) (Court remanded the case and ordered the trial court to appoint a guardian ad litem to represent the children in the establishment of paternity; "in narrow circumstances, such as when the children are not adequately represented, an appointment is required"); **C.J.C. v. C.B.J.**, 669 N.E.2d 197 (Ind. Ct. App. 1996) (trial court appointed a guardian ad litem upon its dismissal of the mother's petition to establish paternity, for the purpose of determining if it would be in the child's best interests to amend the petition and proceed with the paternity action in the child's own name).

For cases on the appointment of a GAL or court appointed special advocate in a paternity proceeding, see:

**In Re Paternity of N.L.P.**, 926 N.E.2d 20 (Ind. 2010) (Supreme Court, in dicta, stated trial court in paternity custody dispute is empowered to appoint a GAL or Court Appointed Special Advocate or both for child, citing IC 31-32-3-1)

**In Re Adoption of B.C.S.**, 793 N.E.2d 1054 (Ind. Ct. App. 2003) (trial court's failure to appoint guardian ad litem in adoption proceeding was not reversible error where a Court Appointed Special Advocate had already been appointed in the paternity proceeding and had filed a report with the trial court)

For more on this topic, see **In Re Paternity of P.S.S.**, 913 N.E.2d 765, 769 (Ind. Ct. App. 2009); **In Re Paternity of G.R.G.**, 829 N.E.2d 114 (Ind. Ct. App. 2005); **In Re Paternity of B.D.D.**, 779 N.E.2d 9 (Ind. Ct. App. 2002); **L.M.A. v. M.L.A.**, 755 N.E.2d 1172 (Ind. Ct. App. 2001); and **In Re Adoption of A.N.S.**, 741 N.E.2d 780 (Ind. Ct. App. 2001).

Regarding Guardian ad Litem fees, see **In Re Paternity of N.L.P.**, 926 N.E.2d 20 (Ind. 2010) (Court reversed trial court's orders which found that an attorney guardian ad litem's fees of $38,000 were unreasonable and reduced the guardian ad litem fees to $20,000; the Court remanded the case for further proceedings, finding that the trial court erred by failing to enforce the parents' written agreements, since the agreements were not void as against public policy). See Chapter 6 at III.D. for further discussion.

A DCS or prosecuting attorney operating under an IC 31-25-4-13.1 contract may file a paternity action if either the mother, the person with whom the child resides, or DCS has executed an assignment of support rights under Title IV-D. IC 31-14-4-3. This does not appear to include a putative father unless the child resides with the putative father; however, this does not limit a putative father's ability to file a petition to establish paternity under IC 31-14-4-1.The statute that provided the prosecutor would "represent the child in that action" has been repealed, and the

language has not been replicated elsewhere. However, IC 31-32-4-2(b) provides that a court may appoint a lawyer to represent a child in any other juvenile proceeding.

IV. I. Right to Counsel for Parents

Neither the juvenile code nor the paternity article in family law, IC 31-14, require the appointment of counsel for the parent in a paternity proceeding.

A parent can request appointment of counsel as an indigent under IC 34-10-1-1. In a case where a parent is the recipient of public assistance and the state has an interest under Title IV-D, due process and fundamental fairness demands that counsel be appointed to represent an indigent respondent. **Kennedy v. Wood**, 439 N.E.2d 1367 (Ind. Ct. App. 1982).

The ability to request appointment of counsel as an indigent is not unlimited, however. IC 34-10-1-2 provides that the court may, under exceptional circumstances, assign an attorney to prosecute or defend a cause if the court is satisfied that the person who applies for leave to prosecute or defend a cause as an indigent person lacks sufficient means. The court may consider the following factors in deciding to appoint counsel: (1) the likelihood of the applicant prevailing on the merits of the claim or defense; and (2) the applicant's ability to investigate and present claims or defenses without an attorney, given the type and complexity of the facts and legal issues in the case. IC 34-10-1-2(d) requires the court to deny an application if the court determines that: (1) the applicant failed to make a diligent effort to obtain an attorney before filing the application or (2) the applicant is unlikely to prevail on his claim or defense. Further, IC 34-10-1-2(f) provides that "reasonable attorney's fees and expenses of an attorney appointed to represent an applicant…shall be paid from the money appropriated to the court…"

For case law on appointment of counsel as an indigent person, see **Sholes v. Sholes**, 760 N.E.2d 156, 157-59, 161-66 (Ind. 2001) (trial court must determine whether the applicant is indigent, and whether the applicant, even if indigent, has means to prosecute or defend the case; if those factors are met, court must determine whether the mandate of expenditure of public funds is appropriate in that case. A decision to appoint counsel for an indigent litigant in a civil case turns on the court's assessment of the nature of the case, the genuineness of the issues, and any other factors that bear on the wisdom of mandating public funds to pay court appointed counsel. If the action is one of the kind often handled by persons with means without employing counsel, such as small claims actions, the court may find that an indigent litigant has sufficient means to proceed without counsel. The Indiana Constitution prevents requiring a specific lawyer to accept employment without compensation in a specific case. The trial court is obligated to consider whether any fiscal or other governmental interests would be severely and adversely affected by a Trial Rule 60.5 order requiring payment of any appointed counsel).

For indigency cases in the paternity context prior to **Sholes v. Sholes**, 760 N.E.2d 156 (Ind. 2001) and the 2002 amendment of IC 34-10-1-2, see **Lattimore v. Amsler**, 758 N.E.2d 568 (Ind. Ct. App. 2001); **In Re Adoption of J.D.C.**, 751 N.E.2d 747 (Ind. Ct. App. 2001); and **Dickson v. D'Angelo**, 749 N.E.2d 96 (Ind. Ct. App. 2001).

IV. J. Paternity Petition and Service of Process

IC 31-14-5-1 provides that the paternity petition shall be verified and captioned "In the Matter of the Paternity of _____." See this Chapter above at IV.F. for effect of failure to name child as party in paternity petition.

IC 31-14-3-1 provides that service of process shall be made in compliance with the civil trial rules. Ind. Trial Rule 4.2(A) requires that service upon an infant (defined as a person under

eighteen) must be made upon the infant's next friend, guardian ad litem, custodial parent, or if there is no parent, upon a person known to be standing in the position of custodian or parent. If the infant is at least fourteen years old, then service must be made on the infant as well. See also **LinkAmerica Corp. v. Albert**, 857 N.E.2d 961, 965-66 (Ind. 2006) (amendment of Trial Rule 4.4(A) in 2003 reduces analysis of personal jurisdiction to issue of whether exercise of personal jurisdiction is consistent with Federal Due Process Clause).

For cases where service was sufficient, see:

**Sims v. Beamer**, 757 N.E.2d 1021, 1025 n.3 (Ind. Ct. App. 2001) (a party who seeks affirmative relief from court voluntarily submits himself to jurisdiction of that court and is thereafter estopped from challenging court's personal jurisdiction)

**Matter of R.L.W.**, 643 N.E.2d 367, 369 (Ind. Ct. App. 1994) (service on the mother by publication was sufficient because the father attempted to effect personal service at mother's last known address, mother had actual notice of the proceedings, and the mother and her counsel deliberately concealed mother's whereabouts. Sufficiency of notice varies with circumstances; if the service is "reasonably calculated to inform," the fact that the party served lacks actual notice does not defeat jurisdiction; Ind. Trial Rule 4.16 (A) states that it "shall be the duty of every person being served under these rules to cooperate, accept service, comply with the provisions of these rules, and, when service is made upon him personally, acknowledge receipt of the papers in writing over his signature")

For cases where service was defective in some manner, see:

**White v. White**, 796 N.E.2d 377 (Ind. Ct. App. 2003) (holding paternity court order that terminated Father's responsibility to pay child support was void rather than only voidable where Guardian of child was not notified of petition to change custody and terminate support, because guardian is in situation distinguishable from child without guardian, who presumably lives with mother or father who must be given notice)

**In Re Paternity of A.B.**, 813 N.E.2d 1173, 1176 (Ind. 2004) (applying 2002 version of Trial Rule 4.4(A), granted transfer and affirmed trial court's dismissal of Mother's petition to establish paternity where trial court lacked personal jurisdiction over alleged Father, non-resident of Indiana, in absence of sufficient minimum contacts with Indiana required by Due Process Clause of Fourteenth Amendment and Trial Rule 4.4)

**Trigg v. Al-Khazali**, 881 N.E.2d 699, 702-03 (Ind. Ct. App. 2008) (Court ratified its holding in Sims v. Beamer, 757 N.E.2d 1021, 1025 n.3 (Ind. Ct. App. 2001), to the effect that party who seeks affirmative relief from court voluntarily submits himself to jurisdiction of that court and is thereafter estopped from challenging court's personal jurisdiction; but, here, because of unique facts of case, Court remanded for determination of whether Father received adequate notice of mother's paternity petition prior to entry of 1996 default judgment against him, and, if notice is found to have been inadequate, trial court must allow Father opportunity to present evidence relevant to determination of his support obligation from November 17, 1995, to present)

**Stidham v. Whelchel**, 698 N.E.2d 1152, 1156 (Ind. 1998) (a judgment is void when issued without personal jurisdiction, and a judgment for support that is "...void for lack of personal jurisdiction may be collaterally attacked at any time and the "reasonable time" limitation under rule 60(B)(6) means no time limit.")

**Gourley v. L.Y.**, 657 N.E.2d 448, 450 (Ind. Ct. App. 1995) (service of the original paternity action was defective; alleged father was a minor, and the next friend was not served. Defect did not deprive the trial court of personal jurisdiction because the minor father actually received the summons and complaint and there was no evidence that he did not understand his obligation under the summons; "personal jurisdiction over a party will obtain by any method of service which comports with due process")

IV. K. Stipulations and Joint Petitions for Paternity

Pursuant to IC 31-14-10-3, the court may make a judgment of paternity and issue orders of support and visitation without a court hearing, if the parents jointly file a verified written stipulation or file a joint petition that resolves the issues of custody, child support, and parenting time.

For case law on this topic, see:

**In Re Paternity of M.R.A.**, 41 N.E.3d 287 (Ind. Ct. App. 2015) (trial court's order approving agreement between Mother and Father constituted a final order, rather than a provisional order)

**In Re Paternity of B.N.C.**, 822 N.E.2d 616 (Ind. Ct. App. 2005) (Court affirmed the trial court's order granting adjudicated Father's Motion to Correct Errors regarding the trial court's granting of another man's petition to intervene and for an order for DNA testing. Trial court ordered that the results of the genetic testing should remain sealed and stated that the other man had waived his opportunity for genetic testing by filing and dismissing a Verified Petition to Establish Paternity nine years earlier. A day after the child's birth, Mother and adjudicated Father had executed a paternity affidavit acknowledging the adjudicated Father as the child's biological father. Further, Mother and adjudicated Father had filed a joint petition for paternity, and about a month after the child's birth, the trial court had entered a judgment establishing the adjudicated Father's paternity of the child)

**In Re Paternity of Z.T.H.**, 839 N.E.2d 246 (Ind. Ct. App. 2005) (paternity, custody, visitation, and child support initially resolved by agreement of parties)

**Thomas v. Orlando**, 834 N.E.2d 1055 (Ind. Ct. App. 2005) (initial visitation set pursuant to parties' agreement)

**In Re Paternity of K.R.H.**, 784 N.E.2d 985 (Ind. Ct. App. 2003) (trial court did not err in refusing to order hearing with respect to agreement between parties regarding, among other things, custody of child, where Mother repudiated agreement prior to trial court's adoption of it)

IV. L. Statutes Regarding Presumed Father

A man is presumed to be a child's father if (1) the man and the child's mother are or were married to each other and the child was born during the marriage or within 300 days of the termination of the marriage; (2) the man and the mother attempted to be married in compliance with the law, even though the marriage is void or voidable, and the child is born during the attempted marriage or within 300 days of the termination of the attempted marriage; or (3) a genetic test indicates with at least ninety-nine percent probability that the man is the child's biological father. IC 31-14-7-1.

If there is no presumed father as described above, IC 31-14-7-2 provides for another method by which a man's fatherhood can be presumed. There is a rebuttable presumption a man is a child's biological father if "with the consent of the child's mother, the man: (1) receives the child into the man's home; and (2) openly holds the child out as the man's biological child. (b) The circumstances under this section do not establish the man's paternity. A man's paternity may only be established as described in IC 31-14-2-1."

If a man has signed a paternity affidavit, his paternity is not presumed; it is legally established. A man is a child's legal father "if the man executed a paternity affidavit in accordance with IC 16-37-2-2.1 and the paternity affidavit has not been rescinded or set aside under IC 16-37-2-2.1." IC 31-14-7-3. Furthermore, IC 16-37-2-2.1(p) states: "Except as provided in this section, if a man has executed a paternity affidavit in accordance with this section, the executed

paternity affidavit conclusively establishes the man as the legal father of a child without any further proceedings by a court."

Presumed paternity (meaning paternity which is presumed under IC 31-14-7-1 and 2) can be rebutted by direct, clear, and convincing evidence. Even though IC 31-14-7-2 is labeled as a rebuttable presumption of paternity, and IC 31-14-7-1 has no reference to the presumption of paternity being rebuttable, case law provides that both statutes providing for presumption of paternity are rebuttable. See **Tarver v. Dix**, 421 N.E.2d 693, 696-97 (Ind. Ct. App. 1981), *trans. denied*.

IV. M. Case Law Regarding Rebuttable Presumption of Fatherhood

For cases where the presumption of paternity was allowed to be litigated and was successfully rebutted, see

**Paternity of Davis v. Trensey**, 862 N.E.2d 308, 311-13 (Ind. Ct. App. 2007) ((1) prosecutor's filing action to establish paternity in man other than Mother's fiancé who had executed paternity affidavit at child's birth, was authorized by IC 31-14-4-1; (2) trial court's ordering of genetic testing was authorized by IC 31-14-6-1 which authorizes "any party" in such a paternity action to petition for genetic testing and compels trial court to grant those motions; and (3) fiancé's paternity affidavit was "implicitly negated" by trial court when, based on genetic testing results, it entered finding of paternity in other man).

**In Re Paternity of B.W.M. v. Bradley**, 826 N.E.2d 706 (Ind. Ct. App. 2005) (child entitled to maintain paternity action against alleged father where child was born to Mother during marriage and birth record showed husband as father, but after dissolution of marriage, on husband's petition, and based on DNA testing, trial court found husband not to be child's biological father) *trans. denied*.

**In Re Estate of Long**, 804 N.E.2d 1176 (Ind. Ct. App. 2004) (reversing and remanding trial court's order denying personal representative's petition to determine heirs and for DNA testing of decedent's presumptive child born to decedent's wife within 300 days of decedent's death; personal representative had to be able to challenge child's paternity in presumptive father's stead in order for IC 29-1-6-6, statute allowing petition to determine heirship, to have any meaning).

**Minton v. Weaver**, 697 N.E.2d 1259 (Ind. Ct. App. 1998) (presumption of paternity in the mother's husband was rebutted by evidence of genetic test results and unprotected sexual relations of mother only with alleged father during period of conception. The Court clarified that the presumption of paternity can be rebutted by types of evidence not specifically listed in the case of Murdock v. Murdock, 480 N.E.2d 243 (Ind. Ct. App. 1985));

**Minton v. Weaver**, 697 N.E.2d 1259 (Ind. Ct. App. 1998) (Court found that clear and convincing evidence rebutted presumption that mother's husband at time of child's birth was child's biological father; child's mother and alleged father engaged in sexual intercourse during months in which child must have been conceived, child's mother and her husband had no sexual intercourse during the year in which the child must have been conceived, and alleged father DNA tested with 99.97% probability of paternity) *trans. denied*.

**C.J.C. v. C.B.J.**, 669 N.E.2d 197 (Ind. Ct. App. 1996) (child is allowed to maintain paternity action against alleged father despite child's birth during currently intact marriage of mother to another man) *trans. denied*.

**K.S. v. R.S.**, 669 N.E.2d 399, 401-02, 406 (Ind. 1996) ((1) cause of action exists under IC 31-6-6.1-2 (now IC 31-14-4) when third party attempts to establish paternity of child born into marriage which remains intact; (2) child born to married woman, but fathered by man other than her husband, is child born out of wedlock for purposes of statute; and (3) man, otherwise authorized by paternity act to file paternity action, is not precluded from doing so because of mother's marital status).

**Fowler v. Napier**, 663 N.E.2d 1197 (Ind. Ct. App. 1996) (mother's testimony that she had sexual intercourse only with alleged father constituted the needed direct, clear, and convincing evidence to rebut presumption of paternity in another man who had claimed paternity in a Indiana State Board of Health affidavit).
**Fowler v. Napier**, 663 N.E.2d 1197 (Ind. Ct. App. 1996) (DNA blood testing revealed a 99.9% probability that the alleged father was the biological father, and a judgment of paternity was issued. The alleged father appealed. The judgment was affirmed, upon finding that the presumption of paternity had been rebutted by direct, clear and convincing evidence);
**Cooper v. Cooper**, 608 N.E.2d 1386 (Ind. Ct. App. 1993) (in dissolution matter, trial court was required under paternity statute and T.R. 35(A), regarding court ordered mental or physical examinations, to order blood group testing requested by husband, where wife and husband had standing to litigate in their divorce proceeding paternity of child born during marriage because wife had standing to bring paternity action and husband, as person alleged to be father, was necessary party to any paternity action).
**In Re Paternity of S.R.I.**, 602 N.E.2d 1014 (Ind. 1992) ((1) putative father may timely establish paternity without regard to mother's marital status; (2) while stability and finality are significant objectives to be served when deciding status of children of divorce, there is substantial public policy in correctly identifying parents and their offspring and such identification should prove to be in best interests of child for medical or psychological reasons; and (3) doctrine of *res judicata* cannot control where petitioner was not party to dissolution action inasmuch as "dissolution findings are binding on the *parties* to the dissolution," which child was not).
**Fairrow v. Fairrow**, 559 N.E.2d 597 (Ind. 1990) ((1) husband entitled to relief from 11-year-old child support order for child born during marriage, where gene testing evidence, which became available independent of court action, constituted direct, clear, and convincing evidence that husband could not be child's father and gave rise to prima facie case for relief; (2) one who comes into court to challenge support order on basis of non-paternity without externally obtained clear medical proof should be rejected as outside equitable discretion of trial court; and (3) justice is substantial public policy which disfavors support order against husband who is not child's father).
**G.A.H. v. L.A.H**, 437 N.E.2d 1016 (Ind. Ct. App. 1982) (Court held that act of intercourse coupled with probability of conception at that time, is sufficient to rebut presumption of legitimacy, citing Roe v. Doe, 289 N.E.2d 528 (Ind. Ct. App. 1972)).

For cases where the presumption of paternity was not permitted to be rebutted or was upheld due to lack of direct, clear, and convincing evidence, see:

**In Re Paternity of H.H.**, 879 N.E.2d 1175, 1178 (Ind. Ct. App. 2008) (once a mother has signed paternity affidavit, she may not use paternity statutes to deprive legal father of his rights even if he is not child's biological father; here, neither Father nor Mother could challenge Father's paternity of child.).
**In Re Paternity of M.M.B.**, 877 N.E.2d 1239 (Ind. Ct. App. 2007) (trial court erred in vacating Father's paternity of children and accompanying support orders. Father's request for relief under Ind. Trial Rule 60(B) was outside equitable discretion of trial court as Father did not stumble upon genetic evidence of his non-paternity inadvertently; he actively sought evidence to address his suspicions that he might not have been children's biological father).
**In Re Paternity of E.M.L.G.**, 863 N.E.2d 867 (Ind. Ct. App. 2007) ((1) trial court erred in granting four putative fathers' requests for genetic testing to disestablish paternity because putative fathers at issue had failed to have their paternity affidavits set aside within sixty day time limit provided for in IC 16-37-2-2.1; therefore, under IC 31-14-7-3, they were deemed legal fathers of children; (2) trial court set aside paternity affidavits based on statutorily invalid reason; (3) Indiana Code has no provision for filing action to disestablish paternity;

and (4) trial court does not have authority to treat child support proceedings as proceedings to disestablish paternity).

**Paternity of H.J.B. Ex Rel. Sutton v. Boes**, 829 N.E.2d 157, 159-60 (Ind. Ct. App. 2005) (affirming trial court's dismissal of petition to disestablish paternity and request for DNA testing which had been filed by child's maternal grandmother as his guardian and next-friend after death of mother and her husband, where child had been born during marriage of mother to husband who, thus, was presumed to be father under IC 31-14-7-1(1)(B)).

**Paternity of H.J.B. Ex Rel. Sutton v. Boes**, 829 N.E.2d 157, 159-60 (Ind. Ct. App. 2005) (affirming trial court's dismissal of petition to disestablish paternity and request for DNA testing which had been filed by child's maternal grandmother as his guardian and next-friend after death of mother and her husband, where child had been born during marriage of mother to husband who, thus, was presumed to be father under IC 31-14-7-1(1)(B)).

**Richard v. Richard**, 812 N.E.2d 222 (Ind. Ct. App. 2004) (presumed father cannot overcome the presumption of paternity by merely presenting testimony of his identical twin brother that the child is his and he is willing to pay child support; presumed father's identical twin tested at a probability greater than ninety-nine percent, but the Court found nothing in the brother's testimony, or elsewhere in the record, that constituted the direct, clear, and convincing proof necessary to overcome the statutory presumption that presumed father was the biological father).

**Driskill v. Driskill**, 739 N.E.2d 161 (Ind. Ct. App. 2000) (ex-wife was judicially estopped from attacking her ex-husband's status as father of child born while ex-husband and ex-wife were living together but before they married, where ex-husband was listed as father on child's birth certificate and child was acknowledged as "child of the marriage" in dissolution decree and in three subsequent agreed entries signed by ex-wife) *trans. denied*.

**In Re R.P.D. Ex Rel. Dick**, 708 N.E.2d 916 (Ind. Ct. App. 1999) ((1) trial court did not err by dismissing mother's petition to establish paternity because it was untimely filed under IC 31-14-5-3(b); (2) trial court did not err by concluding that mother may not deny presumption that husband is child's father; and, (3) since trial court's judgment that paternity petition was not in child's best interest was not clearly erroneous, mother was prohibited from bringing paternity petition on child's behalf, where issue of child's best interest was raised by contrary positions taken by GAL and mother), *trans. denied*.

**Estate of Lamey v. Lamey**, 689 N.E.2d 1265, 1268-70 (Ind. Ct. App. 1997) (uncle not entitled to challenge child's paternity in heirship proceeding, where (1) uncle had no standing under paternity statutes to try to establish or disestablish child's paternity; (2) Court concluded that Supreme Court intended its holding in K.S. v. R.S., 669 N.E.2d 399 (Ind. 1996) to be narrowly construed to mean that only when third party seeks to establish paternity over child born into intact marriage may presumption as to father-husband's paternity be overcome) *trans. denied*.

**Vanderbilt v. Vanderbilt**, 679 N.E.2d 909 (Ind. Ct. App. 1997) (doctrine of laches precluded wife's attempt to rebut husband's status as presumed father in dissolution proceeding by moving for blood group testing, where wife failed to properly establish child's paternity ten years earlier, assured husband of his paternity, and acquiesced in, and encouraged strong father-daughter relationship between husband and child) *trans. denied*.

**Leiter v. Scott**, 654 N.E.2d 742 (Ind. 1995) ((1) affirmed trial court's dismissal of ex-husband's petition to modify several-year-old dissolution decree and order DNA tests because he had reason to believe he was not father of child identified as child of parties in decree; and (2) noted that the opinion was consistent with Supreme Court's opinion in Fairrow v. Fairrow, 559 N.E.2d 597 (Ind. 1990) in which it had granted ex-husband relief from support order based on evidence of non-paternity which was obtained independent of court action, but had advised that "[o]ne who comes into court to challenge a support order on

the basis of non-paternity without externally obtained clear medical proof should be rejected").

For case law on attempting to rebut the presumption of paternity after one parent is deceased, see

**In Re Estate of Long**, 804 N.E.2d 1176 (Ind. Ct. App. 2004) (reversing and remanding trial court's order denying personal representative's petition to determine heirs and for DNA testing of decedent's presumptive child born to decedent's wife within 300 days of decedent's death, where Court held that personal representative had to be able to challenge child's paternity in presumptive father's stead in order for IC 29-1-6-6, statute allowing a petition to determine heirship, to have any meaning in this circumstance).

**Estate of Lamey v. Lamey**, 689 N.E.2d 1265, 1268-70 (Ind. Ct. App. 1997) (uncle not entitled to challenge child's paternity in heirship proceeding, where (1) uncle had no standing under paternity statutes to try to establish or disestablish child's paternity; (2) Indiana laws do not expressly authorize third party who is not asserting paternity in child to petition court for mandatory determination of child's paternity, under guise of "heirship" challenge, when child born into intact marriage; and (3) Court concluded that Supreme Court intended its holding in K.S. v. R.S., 669 N.E.2d 399 (Ind. 1996) to be narrowly construed to mean that only when third party seeks to establish paternity over child born into intact marriage may presumption as to father-husband's paternity be overcome) *trans. denied*.

For cases on disrupting the status of a legal father who established paternity via a paternity affidavit, see

**In Re Paternity of D.L.**, 938 N.E.2d 1221, 1225-6, 1227-8 (Ind. Ct. App. 2010) (Court reversed the trial court's denial of First Father's request for relief from his obligation to pay his child support arrearage and concluded that because First Father's paternity was vacated due to mistake of fact, his child support, including any arrearage must be terminated. Because this case was a matter of first impression as to the application of IC 31-14-11-23, the Court observed: (1) because IC 31-14-11-23 terminates child support, including arrearage, where fraud or mistake of fact occurred in establishing paternity, the trial court's determination that First Father is still responsible for his child support arrearage even if he was deceived is inconsistent with the statute; and (2) IC 31-14-11-23 does not require that genetic testing proving non-paternity be obtained inadvertently as discussed in Fairrow v. Fairrow, 559 N.E.2d 597, 600 (Ind. 1990). The Court clarified that IC 31-14-11-23 governs the remedy to be implemented once a man's paternity has been vacated, not the propriety of vacating paternity. The Court also said that the objective of disestablishing paternity which was established by a proceeding under IC 31-14 may by properly pursued via a motion to disestablish paternity, a motion to vacate paternity order, or a Trial Rule 60(B) motion for relief from judgment) *affirmed on reharing*, **In Re Paternity of D.L.**, 943 N.E.2d 1284 (Ind. Ct. Ap. 2011) (Court reaffirmed its previous opinion in all respects, and held that the proper way for a presumed father to seek a court order vacating paternity is to file a motion to disestablish paternity, a motion to vacate paternity order, or a Trial. Rule 60(B) motion for relief from judgment. First Father had waived his argument that the trial court erred in failing to disestablish paternity because he did not pursue the proper avenues; however, the Court opined that since paternity was already established in Second Father, First Father was now not the child's legal parent).

**In Re Paternity of H.H.**, 879 N.E.2d 1175, 1177-78 (Ind. Ct. App. 2008) (citing IC 16-37-2-2.1(m) [now (p)] and holding that father who executed paternity affidavit was child's legal father).

**Paternity of Davis v. Trensey**, 862 N.E.2d 308, 311-14 (Ind. Ct. App. 2007) (methods of attacking the presumption of paternity created by a paternity affidavit are not limited to the procedure set out in IC 16-37-2-2.1; since Prosecutor's Office filed the paternity action, the

action was governed by IC 31-14-4-1, and by IC 31-14-6-1 which authorizes "any party" in such a paternity action to petition for genetic testing and compels trial courts to grant those motions. Father was now presumed to the child's father, since IC 31-14-7-1(3) provides "[a] man is presumed to be a child's biological father if … the man undergoes a genetic test that indicates with at least a ninety-nine percent (99%) probability that the man is the child's biological father.").

**In Re Paternity of E.M.L.G.**, 863 N.E.2d 867 (Ind. Ct. App. 2007) (holding, in four consolidated cases filed by State to establish child support orders based on paternity affidavits, that (1) trial court erred as matter of law in granting four putative fathers' requests for genetic testing to disestablish paternity in that putative fathers at issue had failed to have their paternity affidavits set aside within sixty-day time limit as provided for under IC 16-37-2-2., and, therefore, under IC 31-14-7-3, men were deemed legal fathers of children; (2) trial court set aside paternity affidavits based on statutorily invalid reason; (3) Indiana Code has no provision for filing action to disestablish paternity; and (4) trial court does not have authority to treat child support proceedings as proceedings to disestablish paternity).

**In Re Paternity of N.R.R.L.**, 846 N.E.2d 1094 (Ind. Ct. App. 2006), (holding that (1) although adjudicated father's execution of paternity affidavit had established him as child's legal father, it did not preclude another man's attempting to establish paternity of child; and (2) genetic testing established petitioner's status as biological father, thus raising the presumption under IC 31-14-7-1(3) that he is child's biological father) *trans. denied*.

**In Re Paternity of K.L.O.**, 816 N.E.2d 906, 908-09 (Ind. Ct. App. 2004) (reversing and remanding on interlocutory appeal from trial court's denial of alleged Father's motion to dismiss where another man, who was still child's legal father because his previously executed paternity affidavit had not been rescinded or set aside when results of genetic testing excluded him as child's father, had not been joined as necessary party as is required by IC 31-14-5-6).

IV. N. Blood or Genetic Tests to Determine Paternity

IC 31-14-6-1 provides that upon the motion of any party to a paternity proceeding, the court shall order all of the parties to undergo blood or genetic testing performed through a qualified expert. See **J.W.L. by J.L.M. v. A.J.P., Jr.**, 693 N.E.2d 959 (Ind. Ct. App. 1998) (court shall grant request for blood test on petition to establish paternity brought by the child and court lacks discretion to deny blood tests on "best interest" standard).

Although the moving party generally pays the costs of the genetic or blood tests, in cases in which the paternity action is filed by the state, the state may be required to initially pay for the tests. See **Kennedy v. Wood**, 439 N.E.2d 1367 (Ind. Ct. App. 1982); **Murdock v. Murdock**, 480 N.E.2d 243 (Ind. Ct. App. 1985). The state may recoup the blood testing costs, and the court shall determine the manner in which reimbursement for the costs is to be made. IC 31-14-6-4.

IC 16-37-2-2.1(k) provides that an action to request an order for a genetic test can be initiated by a man who is party to a paternity affidavit up to sixty days from the date of the affidavit's execution.

IC 16-37-2-2.1(l) provides that to rescind a properly executed paternity affidavit more than sixty days after its execution, not only must a court have "determined that fraud, duress, or material mistake of fact existed in" its execution, but the court must also, at the request of the man who is a party to the affidavit, have ordered a genetic test, the results of which indicate that the man is excluded as the father of the child.

IC 16-37-2-2.1(n) was modified to provide that "The court may not set aside the paternity affidavit unless a genetic test ordered under subsection (k) or (l) excludes the person who executed the paternity affidavit as the child's biological father."

In paternity and dissolution proceedings a parent may be barred from obtaining blood testing. Some reasons include if a parent has pled paternity, if a parents has admitted paternity, or if a parent has allowed too much time to lapse before seeking to establish paternity. See:

**Schmitter v. Fawley**, 929 N.E.2d 859, 863 (Ind. Ct. App. 2010) (Mother and her 35 year-old son were not entitled to compel genetic testing of Putative Father. A mere desire to know the identity of one's biological father, whatever the reason, is insufficient once establishing legal paternity is not possible. In affirming the trial court's decision refusing to compel Putative Father to submit to a DNA test, the Court opined that the legislature could not have intended to allow for compelled genetic testing even in cases where there is no legitimate chance of establishing paternity. Mother and the child's paternity claim was barred by estoppel, making the paternity action and genetic testing of Putative Father "especially pointless")

**In Re Paternity of M.M.B.**, 877 N.E.2d 1239 (Ind. Ct. App. 2007) (trial court erred in vacating Father's paternity of children and accompanying support orders based on genetic tests, where Father's request for relief under Ind. Trial Rule 60(B) was outside equitable discretion of trial court inasmuch as Father did not stumble upon genetic evidence of his non-paternity inadvertently, but rather he actively sought evidence to address his suspicions that he might not have been children's biological father)

**In Re Paternity of C.M.R.**, 871 N.E.2d 346, 350 (Ind. Ct. App. 2007) (Court held order for genetic testing was void due to failure to join necessary parties including estate of deceased alleged father)

**In Re Paternity of E.M.L.G.**, 863 N.E.2d 867 (Ind. Ct. App. 2007) (holding, in four consolidated cases filed by State to establish child support orders based on paternity affidavits, that trial court erred as matter of law in granting putative fathers' requests for genetic testing to disestablish paternity in that putative fathers at issue had failed to have their paternity affidavits set aside within sixty-day time limit as provided for under IC 16-37-2-2.1, and, therefore, under IC 31-14-7-3, men were deemed legal fathers of children)

**Paternity of Davis v. Trensey**, 862 N.E.2d 308, 311 (Ind. Ct. App. 2007) (in action filed by prosecutor to establish paternity in man other than Mother's fiancé who had executed paternity affidavit at child's birth, trial court's ordering of genetic testing was authorized by IC 31-14-6-1 which authorizes "any party" in such paternity action to petition for genetic testing and compels trial court to grant those motions)

**Paternity of H.J.B. Ex Rel. Sutton v. Boes**, 829 N.E.2d 157, 159-60 (Ind. Ct. App. 2005) (affirmed the trial court's dismissal of a petition to disestablish paternity and request for DNA testing which had been filed by the child's maternal grandmother as his guardian and next-friend after the death of the child's mother and her husband. The child had been born during the marriage of mother and her husband, and thus, her husband was presumed to be the child's father under IC 31-14-7-1(1)(B))

**In Re Paternity of B.N.C.**, 822 N.E.2d 616 (Ind. Ct. App. 2005) (affirming trial court's order granting adjudicated Father's Motion to Correct Errors regarding the trial court's granting of another man's petition to intervene and for an order for DNA testing. In its order granting the motion to correct errors, the trial court ordered that the results of the genetic testing should remain sealed and that the other man had waived his opportunity for genetic testing by filing and dismissing a Verified Petition to Establish Paternity nine years earlier)

**Vanderbilt v. Vanderbilt**, 679 N.E.2d 909 (Ind. Ct. App. 1997) (mother who had assured husband of his paternity despite blood tests taken shortly after child's birth which showed 98.6% probability that third party was child's biological father, was barred by latches in

subsequent dissolution case from rebutting husband's presumed paternity and Court affirmed denial of mother's request for blood tests)

IV. N. 1. Admissibility of Test Results

IC 31-14-6-2 provides that if a party fails to file a written objection to the admissibility of genetic test results at least thirty days before a "scheduled hearing at which the test results may be offered as evidence," the test results are admissible as evidence of paternity without foundation testimony or other proof regarding the accuracy of the test results. See **Humbert v. Smith**, 664 N.E.2d 356, 357 (Ind. 1996) (Court held test admissibility statute in paternity code not void because it conflicted with foundational requirements of Ind. Evidence Rule 803(6), but was exception to Evid. R. 803(6) and was "consistent with the special care Indiana's courts have taken toward the expeditious resolution of questions of paternity, custody, and support of children"); see also **Clark v. Gossett**, 656 N.E.2d 550 (Ind. Ct. App. 1995).

IC 31-14-6-3 provides that the results of "tests" and the findings of an expert are admissible in all paternity proceedings, unless the court excludes the results or findings for good cause. IC 31-14-6-5 provides that the chain of custody of blood or genetic specimens may be established through verified documentation of each change of custody if the documentation was made at or around the time of the change of custody, and the documentation was made in the course of a regularly conducted business activity and was made as a regular practice of a business activity. Case law holds that test results may be admissible under the business records exception to the hearsay rule. See **Fowler v. Napier**, 663 N.E.2d 1197 (Ind. Ct. App. 1996); **Baker v. Wagers**, 472 N.E.2d 218, 222 (Ind. Ct. App. 1984) (expert witness may state opinions based upon tests performed by technicians under his direction).

IV. N. 2. Effect of Test Results

IC 31-14-7-1(3) creates a presumption of paternity for a man who undergoes a blood test that indicates with at least a 99% probability that he is the child's biological father. IC 31-14-6-3 provides that the results of the blood or genetic tests and findings of the expert constitute "conclusive evidence if the results and finding exclude a party as the biological father."

For general cases where genetic testing was used in paternity establishment, see**:**

**Bester v. Lake County Office of Family**, 839 N.E.2d 143, 144 (Ind. 2005) (adjudication of paternity based on result of DNA testing)

**Pryor v. Bostwick**, 818 N.E.2d 6, 8 (Ind. Ct. App 2004) (finding of paternity based on DNA test results)

**In Re Paternity of C.R.R.**, 752 N.E.2d 58, 59 (Ind. Ct. App. 2001) (Paternity found based on genetic testing)

**Nunn v. Nunn**, 791 N.E.2d 779, 782 (Ind. Ct. App. 2003) (in dissolution proceeding, DNA testing revealed Husband was not father of child whose custody was in dispute)

For cases where the Court declined to allow a genetic test to disestablish paternity, see:

**In Re Paternity of T.M.**, 953 N.E.2d 96, 99 (Ind. Ct. App. 2011), *trans. denied* (there was no abuse of discretion in the trial court's refusal to admit mail-in kit DNA test results, conducted without the consent of both parents, as support for Father's motion to set aside his paternity affidavit filed approximately fourteen years after Father executed the affidavit; Court affirmed the trial court's denial of Father's motion to set aside the paternity affidavit for a fourteen-year-old child and the trial court's denial of Father's request for DNA testing regarding the child's paternity)

**In Re Paternity of M.M.B.**, 877 N.E.2d 1239 (Ind. Ct. App. 2007) (trial court erred in vacating Father's paternity of children and accompanying support orders based on genetic tests, where Father's request for relief under Trial Rule 60(B) was outside equitable discretion of trial court inasmuch as Father did not stumble upon genetic evidence of his non-paternity inadvertently, but rather he actively sought evidence to address his suspicions that he might not have been children's biological father)
**Richard v. Richard**, 812 N.E.2d 222 (Ind. Ct. App. 2004) (involves paternity DNA testing of identical twins).

For cases where the Court declined to allow a genetic test to establish paternity for various reasons, see:

**In Re Paternity of Baby W.**, 774 N.E.2d 570 (Ind. Ct. App. 2002) (affirming trial court's dismissal of putative Father's paternity action where he failed to file his paternity action within thirty days of his receipt of pre-birth adoption notice which was in substantial compliance with dictates of IC 31-19-3-4, despite his having filed for DNA testing within that time period, which testing ultimately revealed that he was child's father to 99.99% probability), *trans. denied*
**Richard v. Richard**, 812 N.E.2d 222 (Ind. Ct. App. 2004) (involves paternity DNA testing of identical twins)

For cases where the Court permitted genetic testing to disestablish paternity and/or establish paternity in another man, see:

**Paternity of Davis v. Trensey**, 862 N.E.2d 308, 312-13 (Ind. Ct. App. 2007) (trial court properly established paternity in a man other than Mother's fiancé who had executed paternity affidavit at child's birth, and "implicitly negated" the paternity affidavit, where genetic testing indicated 99.9943 percent chance other man was child's biological father and fiancé was excluded as child's biological father)
**In Re Paternity of N.R.R.L.**, 846 N.E.2d 1094 (Ind. Ct. App. 2006) (holding that (1) although adjudicated father's execution of paternity affidavit had established him as child's legal father, it did not preclude another man's attempting to establish paternity; and (2) genetic testing established petitioner's status as biological father, thus raising presumption under IC 31-14-7-1(3) that he is child's biological father), *trans. denied*
**In Re Paternity of B.W.M. v. Bradley**, 826 N.E.2d 706 (Ind. Ct. App. 2005) (ex-husband who was presumed father had been allowed to disestablish his paternity based on results of DNA testing), *trans. denied*
**In Re Paternity of K.L.O.**, 816 N.E.2d 906, 908-09 (Ind. Ct. App. 2004) (reversing and remanding trial court's denial of alleged Father's motion to dismiss paternity action; alleged Father's DNA test revealed 99.99995% chance he was biological father, but motion to dismiss was based on mother-petitioner's failure to join, as required by IC-31-14-5-6, another man, who was still child's legal father because his previously executed paternity affidavit had not been rescinded or set aside when results of genetic testing excluded him as father)

IV. O. Default Judgment

IC 31-14-8-2 provides that a juvenile court "shall" enter a default order in a paternity suit against an alleged father who fails to appear, upon a showing that the alleged father received notice of the hearing.

IV. P. Child Support

IC 31-14-11-1.1 provides that in a paternity proceeding temporary child support "shall" be ordered if there is clear and convincing evidence that the man involved in the proceeding is the biological father. IC 31-14-10-1 provides that once paternity is established, the court "shall" conduct a hearing to determine support, unless the parties have filed a written stipulation or joint petition resolving that issue pursuant to IC 31-14-10-3.

IC 31-14-11-2 provides that a court may order either or both parents to pay any reasonable amount of child support. Multiple statutes in IC 31-14-11 have been repealed. Statutes addressing child support can now be found at IC 31-16. IC 31-16-2 makes general provisions regarding the applicability of the Indiana Rules of Civil Procedure, the format and requirements of the petition, and how service may be made. IC 31-16-6 addresses more detailed aspects of child support, such as the factors to consider, income withholding orders, tax exemptions, termination of child support, emancipation, and other more specific issues.

IC 31-16-6-1 specifically states that it applies to paternity proceedings, and addresses the factors that must be considering when determining child support orders.

IC 31-16-8 deals with modifying child support orders. IC 31-16-8-1 provides that a support order may be modified only "(1) upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable; or (2) upon a showing that: (A) a party has been ordered to pay an amount in child support that differs by more than twenty percent from the amount that would be ordered by applying the child support guidelines; and (B) the order requested to be modified or revoked was issued at least twelve months before the petition requesting modification was filed." Any modification made under this statute is subject to IC 31-25-4-17(a)(6).

Like current and future support obligations, child support arrearages owed to a custodial parent constitute property held in trust for the benefit of the children and the custodial parent has no individual property interest in them. See **In Re Hambright**, 762 N.E.2d 98, 103-104 (Ind. 2002) ((1) a trustee in bankruptcy has no interest in child support arrearages and (2) the parents are precluded, with or without the children's concurrence, from agreeing on a reduction in past support. The Court explicitly left for another day "the issue of whether the nature of the custodial parent's interest in an arrearage changes after a non-custodial parent's duty to support ends.").

For cases dealing with how child support is calculated, see:

**In Re Paternity of S.G.H.**, 913 N.E.2d 1265, 1268-69 (Ind. Ct. App. 2009) (Father's windfall bonus should be included in calculating child support where, in its 2008 child support Order, trial court clearly intended to include these bonuses; applying modification standard of twenty percent change in obligation is improper in this context)

**Fuchs v. Martin**, 836 N.E.2d 1049 (Ind. Ct. App. 2005) (Robb, J., concurring in result with separate opinion) (reversing in part and remanding the trial court's support order with instruction, where trial court had granted custodial parent parenting time credit available only to noncustodial parent), *aff'd in relevant part,* 845 N.E.2d 1038 (Ind. 2006)

**Thomas v. Orlando**, 834 N.E.2d 1055 (Ind. Ct. App. 2005) (affirming trial court's (1) order that Father reimburse Mother for childcare expenses incurred while she was fulltime student based on determination that her pursuit of higher education to increase earning potential was work-related activity; and (2) determination that fact that Mother was living at home and had help from family members to meet her day to day needs while fulltime student, was not imputable to Mother as income)

**In Re Paternity of G.R.G.**, 829 N.E.2d 114 (Ind. Ct. App. 2005) (affirming (1) trial court's calculation of Father's weekly gross income for child support purposes, in that it was not clearly erroneous and (2) trial court's order that Father pay additional weekly support to extinguish arrearage that accumulated after Mother filed her motion to modify paternity order as to Father's parenting time and child support, in that trial court did not abuse its discretion in so ordering)
**Pryor v. Bostwick**, 818 N.E.2d 6 (Ind. Ct. App 2004) (trial court abused its discretion when it ordered Father to pay specified weekly child support without making findings to support that order or completing child support worksheet)
**In Re Paternity of C.R.R.**, 752 N.E.2d 58 (Ind. Ct. App. 2001) (Court reversed and remanded trial court's order phasing-in initial child support order where trial court had properly determined appropriate amount of support under Indiana Child Support Guidelines, but effectively deviated from Guidelines by reducing amount of support child would receive over phase-in year, without establishing in order injustice or inappropriateness of Guideline-based award)
**Railing v. Hawkins**, 746 N.E.2d 980 (Ind. Ct. App. 2001) (Sharpnack, C.J., concurring in part and dissenting in part) (reversing and remanding for trial court (1) to make additional findings with regard to its exclusion of Father's overtime pay in determining amount of Father's gross weekly income; and (2) to recompute Father's support obligation premised upon no less than specific weekly gross income, which is higher than trial court had calculated, and which Court determined to be more reflective of all record evidence)
**In Re D.J.,** 898 N.E.2d 356 (Ind. Ct. App. 2008) (trial court erred in finding that Father was not obligated to reimburse Medicaid for any portion of Mother's pregnancy and childbirth expenses; Court concluded that trial court's decision to deny the request for reimbursement due to the age of the child was error in light of IC 31-14-17-1)

For cases involving jurisdiction and contempt issues with regard to child support, see:
**In Re Paternity of Jo.J.**, 992 N.E.2d 760 (Ind. Ct. App. 2013) (trial court had jurisdiction to enter order recalculating Father's child support obligation, because a trial court is not precluded from entertaining a separate and distinct petition to modify child support even if a previous support order is being appealed; evidence supported the trial court's incarceration of Father for contempt, due to his willful disobedience of the court order, his pattern of accumulating arrearages, and his repeated warnings from the trial court)
**Paternity of L.A. Ex Rel. Eppinger v. Adams**, 803 N.E.2d 1196 (Ind. Ct. App. 2004) (use of contempt to enforce order for child support arrearage after child is emancipated is prohibited by Article One, Section Twenty-Two of Indiana Constitution under reasoning set forth in Corbridge v. Corbridge, 102 N.E.2d 764, 766 (Ind. 1952), despite language of IC 31-16-12-1, as amended in 2002, which explicitly provides that order directing person to pay child support arrearage may be enforced by contempt), *trans. denied*
**Tate v. Fenwick**, 766 N.E.2d 423 (Ind. Ct. App. 2002) (affirmed trial court where it registered Kentucky child support order for enforcement and then dismissed petition to modify that support order filed by Father, resident of Kentucky, for lack of jurisdiction under IC 31-18-6-11(a))

For cases on attempts to disestablish paternity and the underlying child support order, see:
**In Re Paternity of D.L.**, 938 N.E.2d 1221, 1226 (Ind. Ct. App. 2010), *aff'd on rehearing* (trial court erred in denying First Father's request for relief from child support obligation arrearage; First Father's paternity was vacated due to mistake of fact; therefore, his child support and any arrearage must be terminated; referenced IC 31-14-11-23)
**In Re Paternity of M.M.B.**, 877 N.E.2d 1239 (Ind. Ct. App. 2007) (trial court erred in vacating Father's paternity of children and accompanying support orders, where Father's

request for relief under Trial Rule 60(B) was outside equitable discretion of trial court inasmuch as Father did not stumble upon genetic evidence of his non-paternity inadvertently, but rather he actively sought evidence to address his suspicions that he might not have been children's biological father)

**In Re Paternity of E.M.L.G.**, 863 N.E.2d 867 (Ind. Ct. App. 2007) (holding, in four consolidated cases filed by State to establish child support orders based on paternity affidavits, that trial court erred as matter of law in granting putative fathers' requests for genetic testing to disestablish paternity and that trial court does not have authority to treat child support proceedings as proceedings to disestablish paternity)

For cases dealing with retroactive child support, see:

**In Re Paternity of McGuire-Byers**, 892 N.E.2d 187, 191-92 (Ind. Ct. App. 2008) (trial court did not abuse its discretion in ordering Father to make child support payments retroactive to child's birth, where Court noted: (1) award of retroactive child support from date prior to filing of paternity action, is discretionary with trial court; (2) Father's assertion that arrearage would place hardship on Father's four other young children was not supported by evidence in record; and (3) Father was aware that he was child's father from time of his birth and knowingly avoided his responsibility to support him), *trans. denied*

**Paternity of J.A.P. v. Jones**, 857 N.2d 1 (Ind. Ct. App. 2006) (trial court erred in failing to order child support for child retroactive to date when petition was filed in 1993, where its conclusion that petition was dismissed in 2001 and reinstated in 2004 was also in err), *trans. denied*

**C.A.M. Ex Rel. Robles v. Miner**, 835 N.E.2d 602 (Ind. Ct. App. 2005) (pursuant to IC 31-14-11-5, trial court has discretion to award child support effective from date of the child's birth)

For cases dealing with child support arrearage, see:

**In Re Paternity of S.J.J.**, 877 N.E.2d 826, 828-29 (Ind. Ct. App. 2007) (regarding child support arrearage, Court held that (1) period of statute of limitation in effect at time suit is brought governs in action even though it may lengthen or shorten an earlier period of limitation, and (2) new statute of limitation cannot revive a claim which was foregone under prior statute of limitations before passage of new one)

**In Re Paternity of P.W.J.**, 846 N.E.2d 752 (Ind. Ct. App. 2006) (policy behind general rule that laches will not bar parent from collecting child support is not implicated where father attempts to emancipate child merely to reduce amount of child support arrearage he owes to child), *aff'd on rehearing,* 850 N.E.2d 1024 (Ind. Ct. App. 2006)

For a case on when child support can be modified, see **Davis v. Knafel**, 837 N.E.2d 585 (Ind. App. Ct. 2005) (Mathias, J., dissenting) (holding that it would vitiate IC 31-16-8-1(2) to hold change in income that results in less than twenty percent difference in child support, without other converging factors, sufficient to modify parent's child support obligation), *trans. denied*.

Recent divorce cases discuss imputation of pre-incarceration income in calculating the child support obligation of an incarcerated parent. In **Lambert v. Lambert**, 861 N.E.2d 1176 (Ind. 2007), the Indiana Supreme Court reversed the portion of the Court of Appeals decision (839 N.E.2d 708) which affirmed the trial court's child support order requiring Father to pay an amount of child support while incarcerated which was based on his pre-incarceration income. The Court stated at 1176:

When appellant…and his former wife were about to be divorced, it was already apparent that [he] was soon headed for prison. The trial court issued a child support order based on [his] wages from his existing private employment. It was appropriate to base support after

> release on that rate of income, and thus place the burden on [him] to establish after his release, through petition to modify, that his income might be lower than it had been before his conviction. While our Child Support Guidelines obligate every parent to provide some support even when they have no apparent present income, it was error to set support based on employment income that plainly would not be there during incarceration.

For other cases on incarcerated parents and child support, see

**Clark v. Clark**, 902 N.E.2d 813, 817 (Ind. 2009) (incarceration may serve as a changed circumstance so substantial and continuing as to make the terms of the support order unreasonable pursuant to IC 31-16-8-1; a support obligation should be based on the obligated parent's actual earnings while incarcerated as well as other assets available to the incarcerated person. A trial court may order the child support obligation to revert to the preincarceration level upon release, consistent with the modification recommendation, thus, relieving the custodial parent from the burden of obtaining a new modification order when the obligated parent is released)

**Douglas v. State, Family and Social Services**, 954 N.E.2d 1090, 1098 (Ind. Ct. App. 2011) (no exception to the rule set out in Lambert and Clark; held that the trial court erred when it concluded that Father's incarceration for nonsupport of a dependent child did not amount to a change in circumstances so substantial and continuing as to make the terms of an existing child support unreasonable)

**In Re Paternity of J.M.**, 3 N.E.3d 1073 (Ind. Ct. App. 2014) (trial court abused its discretion in denying incarcerated father's motion for hearing to determine amount of child support arrearage and the proprietary of garnishment of his inmate trust fund account)

**Becker v. Becker**, 902 N.E.2d 818, 820-21 (Ind. 2009) (Lambert and Clark do not apply retroactively to modify child support orders already final, but only relate to petitions to modify child support granted after Lambert was decided. A trial court only has the discretion to make a modification of child support due to incarceration effective as of a date no earlier than the date of the petition to modify)

**In Re Paternity of E.C.**, 896 N.E.2d 923, 926 (Ind. Ct. App. 2008), (Court concluded that the reasoning supporting the Supreme Court Decision in Lambert applies equally to requests for modification of child support due to incarceration; and, inasmuch as Father demonstrated a showing of changed circumstances so substantial and continuing as to make the terms of the current child support order unreasonable, the Court found that the trial court erred when it denied Father's request for modification of child support)

**In Re Paternity of N.C.**, 893 N.E.2d 759, 760-61 (Ind. Ct. App. 2008) (Court found support order requiring incarcerated Father to pay $6 per month child support to be consistent with Lambert where Supreme Court held that "in determining support orders, courts should not impute potential income to an imprisoned parent based on pre-incarceration wages or other employment related income, but should rather calculate support based on the actual income and assets available to the parent.")

IV. Q. Costs and Fees

IC 31-14-18-1 provides that the court may tax as costs the reasonable expenses of medical tests. If the state or a political subdivision has paid the initial costs for genetic testing, IC 31-14-6-4 provides that it may recover those costs from an individual found to be the parent in the action, and the court shall determine the manner in which reimbursement is to be made. A court may also assess the costs of attorney fees and other costs under IC 31-14-18-2. See **In Re Paternity of McGuire-Byers**, 892 N.E.2d 187 (Ind. Ct. App. 2008) *trans. denied* (award of appellate fees in favor of child and mother was proper, as was trial court's award of half the attorney fees incurred by mother and child); **Matter of Paternity of A.J.R.**, 702 N.E.2d 355, 364 (Ind. Ct. App. 1998)

(given "closeness" of current income and respective earning abilities of mother and father, it was abuse of discretion for court to order father to pay mother's attorney fees). Contempt proceedings may be used to enforce payment of costs. **Allee v. State**, 462 N.E.2d 1074 (Ind. Ct. App. 1984).

Regarding court ordered payment of attorney's fees, see **In Re Paternity of McGuire-Byers**, 892 N.E.2d 187 (Ind. Ct. App. 2008) *trans. denied* (award of appellate fees in favor of child and mother was proper, as was trial court's award of half the attorney fees incurred by mother and child); **Davis v. Knafel**, 837 N.E.2d 585 (Ind. App. Ct. 2005), *trans. denied*; **Thomas v. Orlando**, 834 N.E.2d 1055 (Ind. Ct. App. 2005); **Pryor v. Bostwick**, 818 N.E.2d 6 (Ind. Ct. App 2004) (reversing trial court's order of attorney's fees as sanction for contempt); **A.G.R. Ex Rel. Conflenti v. Huff**, 815 N.E.2d 120 (Ind. Ct. App. 2004) (trial court did not abuse its discretion in ordering Father to pay $7,500.00 in Mother's attorney fees pursuant to IC 31-14-18-2 where Father's annual income was more than twice that of Mother and trial court found that Father filed multiple, frivolous pleadings and failed to fully cooperate in discovery process), *trans. denied*; **In Re Paternity of K.R.H.**, 784 N.E.2d 985,987 (Ind. Ct. App. 2003); and **In Re Paternity of V.A.M.C.**, 768 N.E.2d 990 (Ind. Ct. App. 2002), *remand modified upon rehearing*, 773 N.E.2d 359 (Ind. Ct. App 2002).

Regarding the requirement of IC 31-14-17-1 that court order father to pay at least fifty percent of reasonable and necessary expenses of mother's pregnancy and childbirth, including cost of prenatal care, deliver, hospitalization and postnatal care, see **In Re D.J.**, 898 N.E.2d 356 (Ind. Ct. App. 2008) (trial court was statutorily required to order Father to reimburse the state for no less than fifty percent of expenses associated with Mother's pregnancy and childbirth, which had been covered by Medicaid); **In Re Paternity of A.R.S.A.**, 876 N.E.2d 1161 (Ind. Ct. App. 2007) (holding IC 31-41-17-1 is constitutional; and trial court properly ordered Father to reimburse Medicaid fifty percent of child's birthing expenses which includes, among other expenses, any expenses incurred by infant during and immediately following birth).

IV. R. Child Custody and Parenting Time

IC 31-14-10-1 requires the juvenile court to conduct a hearing on custody and visitation once paternity is established. The factors for determining the best interest of the child in custody matters are found at IC 31-14-13-2, and are almost identical to the factors for custody determinations in dissolution cases. Dissolution custody cases are "instructive and authoritative" in the context of paternity custody cases. See **In Re Paternity of K.J.L.**, 725 N.E.2d 155, 157 (Ind. Ct. App. 2000); see also **Sills v. Irelan**, 633 N.E.2d 1210, 1214 (Ind. Ct. App. 1996) (paternity and dissolution child custody and visitation statutes are "in pari materia and are appropriately construed together").

There is no presumption favoring either parent in an original determination of custody. The judge may interview a child in chambers to ascertain the child's wishes under IC 31-14-13-3, and the court has the discretion to allow counsel to be present for the interview. If counsel is present, then the matter may be made as part of the record for purposes of appeal.

The parent granted custody of the child has the right under IC 31-14-13-4 to determine the child's upbringing, which includes education, health care, and religious training, unless the court determines that the best interests of the child require a limitation on this authority. If both parents request, or the court determines that the child's physical health, well-being, or emotional development would be endangered or significantly impaired without supervision of the child's custodial placement, the judge may order the probation department or any licensed child placing agency to supervise the placement to ensure that the custodial or parenting time terms of the decree are carried out. IC 31-14-13-5.

IC 31-14-13-2.3 provides for joint legal custody in paternity proceedings, and IC 31-9-2-67 was amended to explicitly extend application of its definition of "joint legal custody" to IC 31-14-13, Custody Following Determination of Paternity. IC 31-14-13-2.3 is very similar to joint legal custody in dissolution proceedings. A court can award joint legal custody if the court finds that it is in the child's best interests. IC 31-14-13-2.3(a). An award of joint legal custody does not require an equal division of physical custody. IC 31-14-13-2.3(b). Factors the court should consider in making such an award include: whether the parties agree; the fitness and suitability of the parties; whether the parties communicate well and cooperate regarding the child's welfare; the wishes of the child, with more weight given if the child is fourteen years old or older; whether the child has a close and beneficial relationship with all parties; whether the parties live close to each other; the nature of the physical and emotional environment in the home of each party; and whether there is a pattern of domestic or family violence. IC 31-14-13-2.3(c).

Once a paternity judgment has been made, a hearing must be conducted on the best interests of the child as it pertains to custody, parenting time, and support issues, unless the parties file an agreement with the court, and the court approves the agreement. Failure to address a child's best interests may make an order appealable. See **In Re Paternity of M.W.**, 949 N.E.2d 839, 842-43 (Ind. Ct. App. 2011) (Court reversed the trial court's custody determination and remanded the case for a new hearing; (1) IC 31-14-10-1 requires a trial court to conduct a hearing for an initial determination of the issues of support, custody, and parenting time once a man is found to be a child's biological father; (2) IC 31-14-13-2 requires a trial court to determine custody in accordance with the best interests of the child; (3) although the trial court conducted a hearing to determine custody, nothing in the record indicated that the trial court considered the child's best interests); **Z.S. v. J.F.**, 918 N.E.2d 636, 640-642 (Ind. Ct. App. 2009) (Court held that: (1) Mother established a case for relief from judgment because of mistake, surprise, or excusable neglect, since Father and his counsel failed to serve Mother, who was pro se, and Mother did not know custody was at issue; (2) Mother presented a meritorious defense in that she and Father had filed a preliminary agreement with the trial court that Mother would retain physical custody of the child; and (3) there were strong policy considerations that required the best interests of the child to be determined either through a hearing at the trial court or through a joint petition as required by IC 31-14-10-1, and neither event or filing occurred).

A court cannot completely delegate decisions about custody and parenting time to a service provider. See **Paternity of J.W. v. Piersimoni**, 79 N.E.3d 975 (Ind. Ct. App. 2017) (Court reversed the trial court's order of contempt against Mother, finding it was an abuse of discretion; trial court infringed upon Mother's custodial rights by delegating decision-making on the child's need for therapy to a service provider).

See also **Fuchs v. Martin**, 836 N.E.2d 1049 (Ind. Ct. App. 2005) (Robb, J., concurring in result with separate opinion) (Court affirmed trial court's grant of joint legal custody to Mother and Father, sole physical custody to Mother, and parenting time for Father in accordance with Indiana Parenting Time Guideline with admonition that they should work together to agree on additional parenting time for Father), *aff'd in relevant part,* 845 N.E.2d 1038 (Ind. 2006); **Hughes v. Rogusta**, 830 N.E.2d 898 (Ind. Ct. App. 2005) (in paternity action, Court held that trial court appropriately used initial custody determination standard rather than custody modification standard to determine custody, and that trial court did not err in awarding custody to Father and liberal parenting time to Mother); **In Re Paternity of K.R.H.**, 784 N.E.2d 985 (Ind. Ct. App. 2003) (trial court did not err in refusing to order hearing with respect to agreement between parties regarding, among other things, custody of child, where Mother repudiated agreement prior to trial court's adoption of it); and **In Re Paternity of V.A.M.C.**, 768 N.E.2d 990 (Ind. Ct. App.

2002) (affirmed award to Mother of care, custody and control of child conceived and born to Mother during marriage to husband who is not child's father, but reversed trial court's order restricting Father's visitation by prohibiting his association with his fiancée during visitation), *remand modified upon rehearing*, 773 N.E.2d 359 (Ind. Ct. App 2002).

IV. R. 1. Custody Reports by Probation Officer

IC 31-14-10-1 provides that the parties may request, or the court may order on its own motion, that a probation officer prepare a report to assist the court in determining support, custody, and parenting time issues. Under IC 31-14-10-2 the probation officer can consult with any person who may have information about the child's custodial arrangements, obtain court approval for professional diagnosis and evaluation of the child, and consult with and obtain information (without consent of the child's parent or guardian) concerning the child from medical, psychiatric, psychological or other persons with knowledge of the child.

There is no provision in the paternity law for admissibility of a written report into evidence; however, analogy may be made to the divorce custody law on this procedural issue. IC 31-17-2-12 in the divorce custody law allows the court to order a probation officer, guardian ad litem/CASA, court social service agency, a private agency employed by the court for that purpose, or a staff member of the juvenile court to conduct an investigation and file a written report with the parties and the court ten days before the hearing. Hearsay in the report may not be excluded if the requirements of IC 31-17-2-12 are satisfied. See **In Re Paternity of K.J.L.**, 725 N.E.2d 155, 157 (Ind. Ct. App. 2000); see also **Sills v. Irelan**, 633 N.E.2d 1210, 1214 (Ind. Ct. App. 1996) (paternity and dissolution child custody and visitation statutes are "in *pari materia* and are appropriately construed together").

IV. R. 2. De Facto Custodian

A de facto custodian is defined at IC 31-9-2-35.5 as a person who has been the primary care giver and the financial support of a child who has resided with the person for six months if the child is under three years of age, and for one year if the child is at least three years of age. IC 31-14-13-2 requires that the court "shall" consider evidence that a child has been cared for by a de facto custodian as a factor in the custody determination. IC 31-14-13-2.5 provides that if the court determines by clear and convincing evidence that the child has been cared for by a de facto custodian, the court shall make the de facto custodian a party to the proceeding. The statute further provides that the court shall award custody to the de facto custodian if, after considering the required factors listed in subsection (b), the court determines that such an award is in the best interest of the child. If the court awards custody to a de facto custodian, the de facto custodian is considered to have legal custody of the child under Indiana law. See Chapter 9 III.E.2. for discussion of de facto custodian laws in **Matter of Guardianship of L.L.**, N.E.2d (Ind. Ct. App. 2001).

Obtaining the status of de facto custodian does not mean that the de facto custodian is able to avoid overcoming the parental presumption in favor of a natural parent having custody of a child. A de facto custodian still must be able to overcome that presumption with clear and convincing evidence. See **T.H. v. R.J.**, 23 N.E.3d 776, 784-6 (Ind. Ct. App. 2014), *trans. denied* (holding, *inter alia*, that the trial court did not err by not considering the best interests and de facto custodian factors provided at IC 31-14-13-2.5; since Grandparents were unable to overcome the presumption in favor of the natural parents, the trial court did not need to address best interests factors. Grandparents argued that the de facto custodian statute played a role in determining whether or not a third party has overcome the presumption in favor of the natural parent. IC 31-14-13-2.5 provides factors a court should consider in determining custody when a de facto custodian is involved with the custody

proceeding. The Court noted that these were all factors that played into a child's best interests; in cases where a third party seeks to obtain custody of a child, that third party must first overcome the presumption in favor of the natural parent by clear and convincing evidence, and then the third party must show that placement with the third party serves the child's best interests. Since the trial court determined that Grandparents failed to overcome the presumption in favor of the natural parents by clear and convincing evidence, the trial court did not need to consider the factors listed at IC 31-14-13-2.5, since Grandparents did not carry their burden to reach the best interests part of the case)

In **In Re Marriage of Huss**, 888 N.E.2d 1238, 1248 n.3 (Ind. 2008), which is discussed in more detail at IV.R.6., this Chapter, the Court affirmed the dissolution trial court's award to Husband of the custody of all four of Wife's children, including the youngest child who was not the biological child of Husband. Although the Court considered the Husband's potential status as a de facto custodian of the youngest child was not a determinative issue in the case, it did observe in a footnote that, generally, there is an unresolved issue "regarding whether 'de facto custodian' status is a necessary prerequisite in a dissolution proceeding to a spouse receiving custody of a child for whom the spouse is not the biological parent." The Court (1) listed non-dissolution cases which have held that a party who is not a natural parent need not allege or claim status as a de facto custodian in order to pursue custody; (2) noted that dicta in Custody of G.J., 796 N.E.2d 756, 762, (Ind. Ct. App. 2003) suggested that, in a dissolution proceeding, the award of custody of a child to a non-biological parent may be restricted to a person who qualifies as a de facto custodian; and (3) this conclusion is not expressly stated in the language of the de facto custody statutes.

See also **In Re Custody of J.V.**, 913 N.E.2d 207 (Ind. Ct. App. 2009) (in paternity proceeding, relying on In Re L.L. & J.L., 745 N.E.2d 222, 230 (Ind. Ct. App. 2001), Court held that evidence supported trial court's conclusion that Grandmother was child's de facto custodian, but remanded award of third-party custody to Grandmother because trial court had failed to make determination that awarding custody of child to Grandmother was in child's best interests as required by In Re Guardianship of B.H., 770 N.E.2d 283, 287 (Ind. 2002)); **Nunn v. Nunn**, 791 N.E.2d 779 (Ind. Ct. App. 2003) (Court found that inclusion in custody statutes of IC 31-17-2-8.5 and IC 31-14-13-2.5, regarding consideration of de facto custodian factors, vested dissolution trial court with jurisdiction to consider awarding custody of stepdaughter to Husband who filed petition to establish paternity, despite DNA results excluding Husband as father); and **L.M.A. v. M.L.A.**, 755 N.E.2d 1172 (Ind. Ct. App. 2001) (trial court considered best interests of child pursuant to custody statute and de facto custodian statute in awarding custody of child to Mother's former husband when probate court had determined another man to be child's "legal father").

IV. R. 3. Issues of Domestic Violence

IC 31-14-13-2(7) provides that the court "shall" consider "[e]vidence of a pattern of domestic violence by either parent" as a factor in the custody determination. Similarly, IC 31-14-13-2.3(7) requires a court to consider whether there is a pattern of domestic violence when considering an award of joint legal custody. IC 31-14-14-5 creates a rebuttable presumption for supervised visitation when the court finds that a noncustodial parent has been convicted of a crime involving domestic or family violence that was witnessed or heard by the child. The rebuttable presumption is for at least one year, but not more than two years immediately following the crime. As a condition for giving the noncustodial parent unsupervised parenting time, the court can require the parent to complete a certified batterer's intervention program.

IV. R. 4. Visitation and Parenting Time Guidelines

The Scope of Indiana Parenting Time Guidelines states that the Guidelines are applicable to paternity cases. The Guidelines are presumptive, and deviations by the parties or court must be accompanied by written explanation. However, the Guidelines are not intended to be applied in situations involving family violence, substance abuse, risk of flight with a child, or any other circumstances a court reasonably believes endanger the child's physical health or safety, or significantly impair the child's emotional development.

IC 31-14-14-1 provides that the noncustodial parent is entitled to reasonable parenting time, unless the court finds at a hearing that parenting time "might endanger the child's physical health and well-being, or significantly impair the child's emotional development." Although the statutes use the term "might", Indiana Appellate Courts have interpreted the statutes to mean that a trial court may not restrict parenting time unless the parenting time would endanger the child's physical health or well-being or significantly impair the child's emotional development. See **Farrell v. Littell**, 790 N.E.2d 612, 616 (Ind. Ct. App. 2003). The court can order that parenting time with the noncustodial parent be supervised.

If a noncustodial parent has been convicted of child molesting (IC 35-42-4-3) or child exploitation (IC 35-42-4-4(b) or (c)), there is a rebuttable presumption that the person might endanger the child's physical health and well-being or significantly impair the child's emotional development, and there is a rebuttable presumption that any parenting time granted to the person must be supervised. IC 31-14-14-1(c) and (d).

In determining the parenting time for the noncustodial parent, the court may (1) interview the child in chambers to assist in determining the child's perception of whether the noncustodial parent's parenting time might endanger the child's physical health or significantly impair the child's emotional development; (2) permit counsel to be present; and (3) if counsel is present, have a record made of the interview and make the interview a part of the record for purposes of appeal. IC 31-14-14-1(b) and (e).

A court cannot completely delegate decisions about custody and parenting time to a service provider. See **Paternity of J.W. v. Piersimoni**, 79 N.E.3d 975 (Ind. Ct. App. 2017) (Court reversed the trial court's order of contempt against Mother, finding it was an abuse of discretion; trial court infringed upon Mother's custodial rights by delegating decision-making on the child's need for therapy to a service provider).

For cases where trial court restricted a parent's parenting time, see:

**In Re Paternity of W.C.**, 952 N.E.2d 810 (Ind. Ct. App. 2011) (Court reversed and remanded the trial court's order suspending Mother's parenting time and any other contact with the autistic child; the Court concluded that the trial court abused its discretion because (1) the trial court initially failed to make the statutory finding required by IC 31-14-14-1(a) of endangerment to the child's health or significant impairment to the child's emotional development; (2) Father did not present evidence justifying terminating Mother's limited supervised parenting time; (3) evidence supporting the trial court's decision was from Father, and there was no evidence from unbiased witnesses such as a guardian ad litem; and (4) the record did not approach the circumstances where the Court had previously found that parenting time could be terminated)

**Farrell v. Littell**, 790 N.E.2d 612 (Ind. Ct. App. 2003) (absent trial court finding that visitation would endanger child's physical health or well-being or significantly impair

child's emotional development, trial court did not have authority to restrict Father's visitation with child)

**In Re Paternity of V.A.M.C.**, 768 N.E.2d 990 (Ind. Ct. App. 2002) *remand modified upon rehearing*, 773 N.E.2d 359 (Ind. Ct. App 2002) (absent trial court finding that exposure of child to Father's fiancée during visitation would endanger child's physical health or well-being or significantly impair child's emotional development, trial court could not prohibit Father from associating with his fiancé during visitation; gave trial court option of entering order (1) containing findings sufficient to support visitation restriction, or (2) containing no visitation restriction).

For other cases on parenting time schedules, see:

**In Re Paternity of C.H.**, 936 N.E.2d 1270, 1273 (Ind. Ct. App. 2010) (no abuse of discretion in establishing a parenting time schedule that deviated from the IPTG by awarding Father additional parenting time; Father was bonded with the child and actively involved in the child's life, and IPTG do not prevent a court from granting reasonable additional parenting time)

**A.G.R. Ex Rel. Conflenti v. Huff**, 815 N.E.2d 120 (Ind. Ct. App. 2004) (no abuse of discretion in setting Father's parenting time schedule; (1) conditions were reasonable; (2) Father failed to show that trial court's order enforcing child's religious observances injured child or were not in child's best interests; and (3) imposed visitation schedule was not a restriction, it merely avoided interference with Mother's choice for child's religious upbringing), *trans. denied*

**Pryor v. Bostwick**, 818 N.E.2d 6 (Ind. Ct. App 2004) (trial court erred in finding Mother in indirect contempt for allegedly violating visitation order before court had entered order determining paternity; Father had no visitation rights until order establishing paternity was entered)

IV. R. 5. Modification of Custody or Parenting Time

Certain information about substantiated reports of child abuse or neglect must be disclosed to the court upon the filing of a petition to establish or modify custody. IC 31-14-13-12. For more information, see Appendix 5, App. 5-22, Form K.

Under IC 31-14-13-6 the paternity court may not modify a custody order unless it is in the best interests of the child and there is a substantial change in the factors that the court had to consider in making the initial custody determination. This is identical to the modification standard in dissolution proceedings. But see **In Re Paternity of Winkler**, 725 N.E.2d 124 (Ind. Ct. App. 2000) (when a child had resided with her mother for more than ten years, a paternity petition for custody by the father would be treated as a petition for modification of custody rather than an original determination of custody). See also **In Re Paternity of K.J.L.**, 725 N.E.2d 155 (Ind. Ct. App. 2000) (Mother could rescind an oral custody modification agreement she and father made in the courtroom, because the judge had directed the parties to reduce the agreement to writing and present it to the court for approval, and the court had not yet received or approved the written agreement; custody determinations are based on the best interest of the child, and no agreement between parties that affects custody is automatically binding upon the court)

IC 31-14-13-9 provides that in a proceeding for custody modification, the court may not hear evidence on a matter occurring before the last custody proceeding unless the matter relates to a change in the factors relating to the best interest of the child.

IC 31-14-14-2 provides that the court may modify an order granting or denying parenting time rights whenever modification would serve the best interests of the child. There is older case law that says that no showing of substantial change of circumstances or endangerment or impairment to the child is required, but this 1998 case is the context of balancing parenting over distance and a child's school schedule, and not the case of a true limiting or restriction of a parent's parenting time. See **Taylor v. Buehler**, 694 N.E.2d 1156 (Ind. Ct. App. 1998).

A court cannot completely delegate decisions about custody and parenting time to a service provider. See **Paternity of J.W. v. Piersimoni**, 79 N.E.3d 975 (Ind. Ct. App. 2017) (Court reversed the trial court's order of contempt against Mother, finding it was an abuse of discretion; trial court infringed upon Mother's custodial rights by delegating decision-making on the child's need for therapy to a service provider).

For cases where the Court approved a trial court's custody modification, see:

**In Re Paternity of C.S.**, 964 N.E.2d 879 (Ind. Ct. App. 2012) (Court affirmed order granting Father's modification petition; trial court (1) did not abuse discretion in finding child's mental and academic growth was a substantial change in circumstances warranting a change in custody; (2) did not misinterpret IC 31-17-2-8 by concluding that the statute contemplates that the custodial parent's military duties are temporary, and Mother's were not; and (3) did not err in relying on the updated custody evaluation, since Mother waived her objection by raising the issue for the first time on appeal)

**In Re Paternity of P.R.**, 940 N.E.2d 346, 351-52 (Ind. Ct. App. 2010) (Court affirmed trial court's decision to modify custody of the children from Mother to Father; there was sufficient evidence to support the trial court's conclusion that Mother had issues relating to her ability to care for the children, including cleanliness, medical needs, exposure to domestic violence, and alcohol abuse)

**In Re Paternity of BA.S.**, 911 N.E.2d 1252, 1257 (Ind. Ct. App. 2009) (no error where trial court found change of custody in child's best interests and changed custody in favor of Father as result of Mother's relocation; Mother failed to present cogent arguments on appeal)

**In Re Paternity of M.P.M.W.**, 908 N.E.2d 1205 (Ind. Ct. App. 2009) (Court held that, although trial court included language regarding punishing Mother for violating court orders, it based its decision to modify custody on proper considerations)

**Rea v. Shroyer**, 797 N.E.2d 1178 (Ind. Ct. App. 2003) (trial court did not abuse its discretion when it modified custody of child from Mother to Father)

**In Re Paternity of M.J.M.**, 766 N.E.2d 1203 (Ind. Ct. App. 2002) (trial court properly denied Mother's request for continuance and granted Father's Petition to Modify Custody)

**In Re Paternity of R.A.F.**, 766 N.E.2d 718, 724 (Ind. Ct. App. 2002) (affirmed trial court's order granting emergency temporary custody of children to Father where (1) allegations contained in Father's emergency petition demonstrated emergency justifying immediate change of custody; (2) notice to Mother was sufficient for purposes of temporary order; and (3) Indiana court had continuing exclusive jurisdiction of custody matters concerning children despite their relocation to Arizona with Mother, because Indiana court entered original custody determination in paternity action, and Father continued to reside in Indiana), *trans. denied*

**In Re Paternity of C.E.B.**, 751 N.E.2d 329, 331 (Ind. Ct. App. 2001) (affirmed trial court's order granting custody of child to Father)

See also **G.G.B.W. v. S.W.**, 80 N.E.3d 264, 271-2 (Ind. Ct. App. 2017), where the Court reversed and remanded the trial court's orders which: (1) denied Father's petition to modify

joint legal custody for the limited purpose of making medical decisions regarding vaccinations; (2) failed to find Mother in contempt; and (3) ordered Father to contribute $10,000 towards Mother's attorney fees. The Court concluded the trial court's failure to find Mother in contempt for submitting the religious exemption form to avoid having the child vaccinated and to circumvent the paternity decree was contrary to law. The Court held the trial court abused its discretion in denying Father's petition to modify legal custody of the child for the limited purpose of making medical decisions concerning vaccinations.

For cases involving custody modifications and relocation, see:

**Milcherska v. Hoerstman**, 56 N.E.3d 634, 283 (Ind. Ct. App. 2016) (Court affirmed the trial court's denial of Mother's request to relocate with the parties' child; Mother argued that trial court had relied too much upon the child's wishes; Court noted that a court may give more or less consideration based on additional factors, such as the child's maturity level, intelligence, emotional health, and the reasons for the child's wishes; Court also noted that trial court's decision was not sole based on in camera interview)

**In Re Paternity of J.G.**, 19 N.E.3d 278 (Ind. Ct. App. 2014), the Court affirmed the trial court's order granting Father's request to modify the child's custody; after Mother moved without court permission, Father successfully sought to modify custody; Court found that the evidence supported the trial court's conclusions that modification of custody was in the child's best interests and that there had been a substantial change in one or more of the statutory factors)

**Gold v. Weather**, 14 N.E.3d 836, 843, 846 (Ind. Ct. App. 2014), trans. denied, the Court affirmed the trial court's order granting Mother's motion to relocate with the child and denying Father's petition to modify custody; there was sufficient evidence to support the trial court's finding that Mother relocated to be close to her immediate and extended family, which is a legitimate purpose; because the trial court's findings indicated that it considered evidence on each statutory relocation factor, the Court could not say that the trial court's denial of Father's motion to modify the child's physical custody was clearly erroneous)

**H.H. v. A.A.**, 3 N.E. 3d 30 (Ind. Ct. App. 2014), the Court affirmed the trial court's denial of Mother's request to relocate with the child to Hawaii. The trial court erred in its conclusion that Mother's proposed relocation was not made in good faith and for a legitimate reason. The Court, citing In Re Paternity of X.A.S., 928 N.E. 2d 222 (Ind. Ct. App. 2010), concluded that Mother's stated reason for her request to relocate, i.e. to live and create a family life with Stepfather, was sufficient to prove that her request was made in good faith and for a legitimate purpose. However, the Court upheld the trial court's determination that such a relocation was not in the best interests of the child. The Court reviewed the evidence on the relocation and custody issues, and found that it supported the trial court's determination that the proposed relocation was not in the child's best interests.

**Paternity of X.A.S. v. S.K.**, 928 N.E.2d 222, 230 (Ind. Ct. App. 2010) (Court reversed and remanded the trial court's judgment denying Father's petition for relocation and granting Mother's petition to modify custody; instructed the trial court to grant Father's petition to relocate, deny Mother's request to modify custody, and set new terms of visitation and support; Court opined that although this was a "close case", the evidence indicated that it was in the child's best interests to continue living with Father, as he had done for the past nine years)

**In Re Paternity of J.J.**, 911 N.E.2d 725 (Ind. Ct. App. 2009) (Court remanded to trial court with instructions to conduct another hearing on Father's motion to modify custody to him because of Mother's intent to relocate, and to hear evidence on each

enumerated factor specified in IC 31-17-2.2-1(b) which trial court is to take into account when considering proposed relocation)

For cases where the Court approved a trial court's custody modification with a heavy emphasis on the parents' inability to co-parent, see:

**In Re Paternity of B.B.**, 1 N.E. 3d 151, 163 (Ind. Ct. App. 2013) (Court affirmed the trial court's order modifying custody, visitation, and support of the parents' four-year-old child to Mother; Father's arguments were merely requests to reweigh the evidence; trial court concluded that the shared custody arrangement was no longer viable was supported by Mother's and Father's inability to communicate, their inability to communicate impacted the child's behaviors and development, the child is approaching the age at which he will be attending school five days per week and needs a primary residence, and, of the two parents, Mother was more likely not to interfere or diminish Father's role with the child)

**In Re Paternity of J.T.**, 988 N.E.2d 398, 400-1 (Ind. Ct. App. 2013) (Court held that the trial court did not err in granting Father full legal and physical custody of the children as a result of Mother's routine denial of Father's parenting time, because this amounted to a substantial change in the interrelationship of the parties which warranted a modification in custody. The Court noted the following findings of the trial court: (1) Mother engaged in a repeated pattern of denying Father parenting time; (2) Father filed three separate contempt petitions; (3) Since December 2011, Mother only allowed Father to speak with the children on the phone once for a few minutes, and see them twice for less than ten minutes each time; (4) Mother denied parenting time on thirty-one separate occasions; (5) Mother had "exhausted her limited coping skills" and "acted in complete defiance of the existing parenting time orders for an extended period of time"; and (6) the trial court believed this behavior was unlikely to change, given her past behavior and her demeanor at the hearing)

**In Re Paternity of A.S.**, 948 N.E.2d 380, 388 (Ind. Ct. App. 2011) (Court affirmed the trial court's decision to modify custody of child from equally divided parenting time to Mother having primary physical custody and Father having parenting time; Court opined that there was overwhelming evidence that the parents were not able to co-parent and noted the findings of the trial court: (1) Father was less willing to cooperate than Mother; (2) Father categorically refused to exchange the child with Mother's relatives; (3) Father refused to respond to many of Mother's letters despite the co-parenting counselor's recommendation that they communicate in writing to reduce hostility; (4) Father continued to try to communicate by telephone and recorded the conversations in violation of the trial court's order; (5) Father's telephone rants displayed a hostile and inflexible attitude; (6) granting primary custody to Mother would allow the child to enjoy educational and gymnastic programs without interruption and Father does not dispute that the child enjoys and benefits from these programs)

For cases involving the standard or factors which a trial court should consider, as well as jurisdiction matters such as UIFSA, see:

**In Re Paternity of D.T.**, 6 N.E.3d 471 (Ind. Ct. App. 2014) (Court reversed and remanded the trial court's order awarding custody of the child to Father; custody order was void due to lack of subject matter jurisdiction; Court observed that the trial court adjudicated Father's pro se custody request as part of the UIFSA cause of action, even though UIFSA specifies that the court lacked jurisdiction to make such a determination absent a stipulation between the parties, the record was devoid of documentation

indicating such stipulation, and Mother had never received notice of the custody hearing)

**Hughes v. Rogusta**, 830 N.E.2d 898 (Ind. Ct. App. 2005) (trial court appropriately used initial custody determination standard rather than custody modification standard to determine custody; trial court did not err in custody and parenting time order)

**In Re Paternity of J.J.**, 911 N.E.2d 725 (Ind. Ct. App. 2009) (Court remanded to trial court with instructions to conduct another hearing on Father's motion to modify custody, and to hear evidence on each factor specified in IC 31-17-2.2-1(b) regarding proposed relocations)

**Reynolds v. Dewees**, 797 N.E.2d 798, 800-802 (Ind. Ct. App. 2003) (despite pending CHINS case, IC 31-30-1-13 vested paternity court with jurisdiction to enter order modifying child's custody; because record did not indicate whether conditions in IC 31-30-1-13(b) had been met, Court could not determine whether modification was effective)

**In Re Paternity of M.P.M.W.**, 908 N.E.2d 1205 (Ind. Ct. App. 2009) (Court held that, although trial court included language regarding punishing Mother for violating previous court orders, it based its decision to modify custody on proper considerations)

For cases involving parenting time or modification of parenting time, see:

**In Re Paternity of P.B.**, 60 N.E.3d 1092, 1100 (Ind. Ct. App. 2016) (Court reversed the trial court's orders which: (1) denied Father's petition to enforce the court's previous parenting time and reunification orders; and (2) denied Father's contempt petition based on Mother's refusal to bring the child to counseling sessions and her refusal to provide parenting time; The Court found the trial court abused its discretion when it concluded Mother was not in contempt for failing to abide by the trial court's previous parenting time and reunification orders; extraordinary circumstances must exist to restrict a noncustodial parent's parenting time, and the trial court did not note any such evidence)

**In Re Paternity of Snyder**, 26 N.E.3d 996, 999 (Ind. Ct. App. 2015), (Court affirmed the trial court's order on Father's parenting time and reversed the trial court's order denying Father's request to tell the child that he is her father; Father had not demonstrated there was a change in circumstances to warrant a modification in parenting time beyond the modification that permitted him to talk to the child via Skype one time each week. While a party requesting a restriction on parenting time initially has the burden to prove endangerment or impairment, Father's petition to remove the restrictions to which he had agreed was a request to modify the original agreement. The Court found no evidence in the record suggesting how the child's physical health or emotional development would be impaired by telling the child that Father is her biological father, and reversed that portion of the trial court's decision)

**Meisberger v. Bishop**, 15 N.E.3d 653 (Ind. Ct. App. 2014) (Court remanded the case to the trial court to determine and make one or more findings on whether the child's physical health or safety would be endangered or whether there would be significant impairment of the child's emotional development by allowing Father, who was incarcerated for murder and theft, to have parenting time)

**In Re Paternity of P.B.**, 932 N.E.2d 712, 720-21 (Ind. Ct. App. 2010) (Court reversed and remanded matter to the trial court; Mother's burden of proof to terminate Father's visitation was preponderance of the evidence; trial court required to weigh the conflicting evidence to determine if visitation with Father would endanger the child's physical health or well-being or significantly impair child's emotional development)

**In Re Paternity of G.R.G**., 829 N.E.2d 114 (Ind. Ct. App. 2005) (trial court did not err in entering parenting time order deviating from IPTG; where order took into account child's best interest and guardian ad litem's recommendation)
**Farrell v. Littell**, 790 N.E.2d 612 (Ind. Ct. App. 2003) (absent finding that visitation would endanger child's physical health or well-being or significantly impair child's emotional development, trial court did not have authority to restrict Father's visitation with child)

See also this Chapter at IV.R.4.

IV. R. 6. Custody Determination or Modification Involving a Third-Party Custodian

For the standard in awarding custody to a third party, see **In Re Guardianship of B.H.**, 770 N. E.2d 283, 285 (Ind. 2002) (Court held the issue in guardianship and third party custody cases is whether the strong presumption that a child's interests are best served by placement with a natural parent is clearly and convincingly overcome by evidence proving that a child's best interests are substantially and significantly served by placement with another person. Before placing a child in the custody of a person other than the natural parent, a trial court must be satisfied by clear and convincing evidence that the best interests of the child require such a placement. The trial court must be convinced that placement with a person other than the natural parent represents a substantial and significant advantage to the child. The three factors enumerated in Hendrickson v. Binkley, 316 N.E.2d 376 (Ind. Ct. App. 1974) [parental unfitness, long acquiescence, or voluntary relinquishment such that the affections of the child and the third party have become so interwoven that to sever them would seriously mar and endanger the future happiness of the child] are important, but the trial court is not limited to those criteria).

For the standard on modifying custody from a guardian back to a parent, see **K.I. ex rel. J.I. v. J.H.**, 903 N.E.2d 453, 459-61 (Ind. 2009). The Indiana Supreme Court held that, when ruling on a parent's petition to modify custody of a child who is already in the custody of a third party, (1) the burden to show there has been a substantial change in one or more of the enumerated factors, as a practical matter is minimal; and (2) once this minimal burden is met, to retain custody of the child, the third party must prove by clear and convincing evidence "that the child's best interests are substantially and significantly served by placement with another person." In Re Guardianship of B.H., 770 N.E.2d 283, 287 (Ind. 2002). If the third party carries this burden, then custody of the child remains in the third party; otherwise, custody must be modified in favor of the child's natural parent.

For cases where custody was ultimately given to a parent, see:

**In Re Guardianship of M.N.S.**, 23 N.E.3d 759, 767 (Ind. Ct. App. 2014) (Court affirmed the trial court's order granting Father's motion to terminate the guardianship over the child; at the time of the hearings, Father was married, employed, and had custody of the child's younger sister. The trial court had (1) specifically recognized the bond between Guardian and the child and the resulting difficulty that would be involved in severing that bond; and (2) addressed and specifically rejected Guardian's argument that Father had voluntarily relinquished custody of the child to Guardian or had acquiesced to the current custody arrangement. The Guardian's arguments were nothing more than a request to reweigh the evidence and reassess the credibility of the witnesses)
**T.H. v. R.J.**, 23 N.E.3d 776, 784-6 (Ind. Ct. App. 2014), *trans. denied* (Court affirmed the trial court's denial of Grandparent's requests for custody of the child and for continued court-ordered visitation. The Court held that the trial court did not err in its findings, that it applied the correct legal standard in reaching its decision by using the standard set forth in In Re Guardianship of B.H., 770 N.E.2d 283 (Ind. 2002), that it did

not err in its determination that Grandparents had failed to overcome the presumption in favor of the natural parent, and that the de facto custodian statutes could not be extended to include visitation rights with the child)

**In Re Paternity of L.J.S.**, 923 N.E.2d 458, 461-2, 465 (Ind. Ct. App. 2010) (Court reversed the trial court's order and remanded the case with instructions to grant sole custody to Father; Court held that the findings did not support the trial court's decision to modify custody to Grandparents and did not clearly and convincingly overcome the strong presumption that the child should be placed in Father's custody; therefore, the trial court erred in granting custody of the child to Grandparents. In a custody dispute between a parent and a third party, the burden is always on the third party; generalized findings of best interests are not sufficient to overcome the parental presumption)

For cases where custody was ultimately awarded to a nonparent, see:

**In Re Paternity of B.J.N.**, 19 N.E.3d 765 (Ind. Ct. App. 2014) (Guardian retained custody of child despite jurisdictional issues because he had consented to the guardianship and there was evidence that he posed a danger to the child)

**In Re Marriage of Huss**, 888 N.E.2d 1238, 1241-44 (Ind. 2008) (Court affirmed the dissolution trial court's award to Husband of the custody of all four of Mother's children, including the youngest child ("the child") who was not the biological child of Husband; the dissolution court's authority to determine custody was not impaired by the paternity statute's general presumption of sole custody for the biological mother)

**In Re Paternity of V.M.**, 790 N.E.2d 1005, 1008-09 (Ind. Ct. App. 2003) (Court affirmed the trial court's denial of Father's petition to modify the custody of his two children who were placed with Grandfather; record supported the conclusion that the parental presumption in favor of Father was rebutted by evidence of Father's past unfitness, voluntary abandonment of the children, long acquiescence in Grandfather's custody, and that the best interests of the children were served by continued placement with Grandfather; Court relied on In Re Guardianship of B.H., 770 N.E.2d 283, 287 (Ind. 2002), which defines the issue as: "whether the important and strong presumption that a child's interests are best served by placement with the natural parent is clearly and convincingly overcome by evidence proving that the child's best interests are substantially and significantly served by placement with another person. This determination falls within the sound discretion of our trial courts, and their judgments must be afforded deferential review.").

For cases addressing jurisdiction issues between a paternity court and a probate court, see:

**In Re Adoption of L.T.**, 9 N.E.3d 172 (Ind. Ct. App. 2014) (Court reversed the trial court's decision dismissing the guardianship for lack of subject matter jurisdiction and granting Father immediate custody, and remanded the matter for further proceedings. The Court held that: (1) although the Hamilton County Court did not lack subject matter jurisdiction, it was the improper venue; (2) the remedy for improper venue was transfer to the correct venue, which was Marion County, whereupon the Marion County Probate Court was required to complete the proceedings that had commenced in Hamilton County; (3) Father did not have an absolute right to custody upon the death of Mother; and (4) the trial court was required to hold a hearing on terminating the guardianship, which included evidence on changed circumstances and the best interests of the child)

**In Re B.C.**, 9 N.E.3d 745, 752-54 (Ind. Ct. App. 2014) (Court found that Marion Superior Court had jurisdiction to enter its order appointing Guardians as guardians of the child; that the Montgomery Circuit Court had jurisdiction to enter the agreed paternity order on December 20, 2012, which established Father's paternity of the child; but because the subject of child custody was properly before the Marion Superior Court,

Probate Division due to the guardianship action, the Montgomery Circuit Court was precluded from making a custody determination in the subsequently filed paternity action. Court also held that because the petition for adoption and the paternity action were pending at the same time, the Marion Superior Court, Probate Division, the court in which the petition for adoption had been filed, had exclusive jurisdiction over the child's custody)

**In Re Paternity of B.J.N.**, 19 N.E.3d 765, 769 (Ind. Ct. App. 2014) (Court held that Decatur Court had subject matter jurisdiction over the guardianship action. Father argued that because he registered his paternity order with the Hendricks Court, that court had exclusive jurisdiction over the "paternity action"; however, Father conceded that he had consented to Guardian being appointed as the child's guardian in the Decatur Court, therefore, Father waived any objection to the Decatur Court's exercise of jurisdiction over this particular matter)

See also **In Re Custody of J.V.**, 913 N.E.2d 207 (Ind. Ct. App. 2009) (in paternity proceeding, relying on In Re L.L. & J.L., 745 N.E.2d 222, 230 (Ind. Ct. App. 2001), Court held that evidence supported trial court's conclusion that Grandmother was child's de facto custodian, but remanded award of third-party custody to Grandmother because trial court had failed to make determination that awarding custody of child to Grandmother was in child's best interests as required by In Re Guardianship of B.H., 770 N.E.2d 283, 287 (Ind. 2002).

For further discussion, see Chapter 14.

IV. R. 7. Custody, Parenting Time, and Military Service

There are several statutes which address parents who serve in the armed forces, and how to handle matters of custody and parenting time when the parent must be deployed. IC 31-14-13-6.1 permits a parent, under certain circumstances, to delegate all or part the parent's parenting time while the parent is deployed. The deploying parent must file a motion requesting this, and the court must find that the person to whom parenting time is delegated has a close and substantial relationship with the deploying parent, and that the delegation is in the child's best interests. The order delegating parenting time automatically terminates upon the parent's return, and the court may terminate the order at any time if it determines that the delegated parenting time is no longer in the child's best interests.

IC 31-14-13-6.2 pertains to parents who have military temporary duty, deployment, or mobilization orders that have a material effect upon the parent's ability to appear in person at a regularly scheduled hearing regarding custody or parenting time. This statute allows for expedited hearings. The parent may present evidence and testimony via telephone, video conference, the Internet, or other electronic means approved by the Court.

IC 31-14-13-6.3 provides that a court may not consider a parent's absence or relocation due to active duty service in determining or permanently modifying custody. If a court temporarily modifies custody due to a parent's active duty service, the order terminates automatically ten days after the parent notifies the temporary custodian in writing that the parent has returned from active duty service. This statute does not prevent a court from otherwise modifying a child custody order after a parent returns from active duty service.

IC 31-14-14-4 allows for a noncustodial parent who misses parenting time due to service in the Indiana National Guard or a reserve component of the United States armed forces to make up the lost parenting time as provided in IC 10-16-7-22.

IV. S. Prior Paternity Adjudication May Bar Relitigation Under Theory of Res Judicata

It is possible that res judicata principles may bar relitigation of a prior paternity adjudication. This would occur in the context of a new paternity case being brought, where a prior paternity case with the exact same parties already made a determination. See **T.R. v. A.W. by Pearson**, 470 N.E.2d 95 (Ind. Ct. App. 1984) (holding that res judicata principles precluded a child's paternity action against the alleged father subsequent to a paternity action brought by the mother in which a full trial occurred on the merits.

For more cases where the matter of paternity was not permitted to be relitigated, see:

**J.D. v. E.W. by C.W.**, 610 N.E.2d 289 (Ind. Ct. App. 1993) (holding that a paternity action may not be filed and maintained by a mother as "next friend" of the child when the mother has fully litigated the paternity issue in her own name in an Illinois court which found no paternity; Mother adequately represented the child's interests in the first paternity action, thus Mother and child were in privy and the paternity judgment could not be relitigated by the child)

**In Re Paternity of P.S.S.**, 913 N.E.2d 765, 769 (Ind. Ct. App. 2009) (Court affirmed dismissal of child's paternity petition filed by Father as next friend, where Court concluded that child and her next friend Father had full and fair opportunity to take part in resolution of paternity issue during mediation in earlier dissolution proceeding in which trial court approved mediated settlement agreement stating that Mother and Father agreed to share joint custody of child, but acknowledged that another child born during marriage was biological child of third person; Court distinguished In Re Paternity of J.W.L., 672 N.E.2d 966, 968-69 (Ind. Ct. App. 1996), *aff'd by* In Re Paternity of J.W.L., 682 N.E.2d 519, 521 (Ind. 1997) (summarily affirming Court of Appeals opinion) noting that in contrast, here, GAL was appointed during dissolution proceedings for sole reason of protecting child's interest during resolution of issue of child's paternity)

**In Re Paternity of B.N.C.**, 822 N.E.2d 616 (Ind. Ct. App. 2005) (affirmed trial court's order granting adjudicated Father's Motion to Correct Errors regarding the trial court's having granted another man's petition to intervene and for order for DNA testing where about one month after child's birth, trial court had entered judgment establishing adjudicated Father's paternity of child)

**L.M.A. v. M.L.A.**, 755 N.E.2d 1172 (Ind. Ct. App. 2001) (Court held (1) trial court had subject matter jurisdiction to consider modifications to its previous dissolution decree as to custody and support; and, (2) because Wife had stipulated to trial court that child was child of marriage, she was precluded from later challenging that determination in dissolution court, where probate court had found another man to be child's "legal father" but deferred any decisions regarding custody and visitation to trial court herein)

However, the result may change when issues of paternity arise in the context of a dissolution case. A child is not a party to the dissolution case; therefore, there is no privy that extends to the child or children involved. As a result, even if paternity is disclaimed by both parents in a dissolution case, a child may be able to later bring a paternity action against the very man who already litigation and disclaimed paternity in the dissolution case. See **In Re Paternity of J.W.L.**, 682 N.E.2d 519 (Ind. 1997) (the child was not barred by an earlier dissolution ruling regarding paternity from initiating a juvenile court paternity proceeding; paternity must be actually litigated for divorce to give rise to preclusive effect against nonparty child); **Hood v. G.D.H. by Elliot**, 599 N.E.2d 237 (Ind. Ct. App. 1992) ((1) prior dissolution decree specifically finding defendant not to be father of minor child did not bar paternity action under doctrine of res judicata; (2) paternity action was not barred by doctrine of laches; (3) trial court properly entered default against defendant for failure to appear in person and submit to blood test; and (4) paternity petition as filed met statutory requirements).

For more cases where the matter of paternity was permitted to be relitigated when it might have been otherwise barred, see:

**In Re Paternity of B.W.M. v. Bradley**, 826 N.E.2d 706 (Ind. Ct. App. 2005) (Court held trial court violated public policy of correctly identifying parents and their offspring when it dismissed child's petition to establish paternity in alleged Father where child was born to Mother during marriage, and birth record showed husband as father, but after dissolution of marriage, on husband's petition, and based on DNA testing, trial court found husband not to be child's biological father), *trans. denied*

**Dickson v. D'Angelo**, 749 N.E.2d 96 (Ind. Ct. App. 2001) (trial court erred by denying putative Father's paternity petition on res judicata grounds (1) without first assigning attorney to represent him as indigent person, and (2) where it appeared likely he was neither party to earlier paternity action, nor in privity with any party in that action)

**In Re Adoption of A.N.S.**, 741 N.E.2d 780 (Ind. Ct. App. 2001) (dismissed as moot, appeal of adoption court's order granting biological Father's motion to reconsider earlier ruling denying his intervention in adoption proceeding because his consent to adoption was irrevocably implied due to his failure to file paternity action within thirty days of his receipt of Mother's notice of intent to place her unborn child for adoption, where (1) Father filed paternity action thirty-eight days after receiving notice and prior to filing of adoption petition; (2) paternity court denied Mother's motion for summary judgment requesting dismissal because of Father's failure to file within thirty days of receiving her notice of intent to place child for adoption and, subsequently, granted Father's petition to establish paternity; and (3) Mother and her new husband, who was seeking to adopt child, did not appeal paternity court's order establishing Father's paternity).

A paternity affidavit can give rise to similar problems. A man who signed a paternity affidavit is the legal father of the child, and if another man seeks to establish paternity of that same child through a court case, the legal father who signed the paternity affidavit should be named and included. See **In Re Paternity of N.R.R.L.**, 846 N.E.2d 1094, 1096-7 (Ind. Ct. App. 2006), *trans. denied* (Court affirmed the trial court's order denying Adjudicated Father's motion to dismiss the paternity petition and joining Adjudicated Father as a party to the proceeding; although Adjudicated Father is a necessary party to a paternity action, any error arising from the failure of Putative Father to name Adjudicated Father as a party was remedied when the trial court allowed him to intervene); but see **Paternity of Davis v. Trensey**, 862 N.E.2d 308, 311-13 (Ind. Ct. App. 2007) (finding: (1) methods of attacking presumption of paternity created by paternity affidavit are not limited to procedure set out in IC 16-37-2-2.1; (2) prosecutor's filing action to establish paternity against man other than Mother's fiancé who had executed paternity affidavit at child's birth, was authorized by IC 31-14-4-1; (3) trial court's ordering of genetic testing was authorized by IC 31-14-6-1 which authorizes "any party" in such a paternity action to petition for genetic testing and compels trial court to grant those motions; and (4) fiancé's paternity affidavit was "implicitly negated" by trial court when, based on genetic testing results, trial court entered finding of paternity in other man).

IV. T. Motion to Set Aside Paternity Judgment

For cases where the Court allowed paternity disestablishment to proceed, see:

**Fairrow v. Fairrow**, 559 N.E.2d 597 (Ind. 1990) (Indiana Supreme Court set aside a support judgment in a dissolution on medical proof of the husband's non- paternity, because the proof was obtained independent of court action for a purpose related to the child's sickle cell anemia, and not for the purpose of determining whether the husband was the biological father of the child)

**In Re Paternity of D.L.**, 938 N.E.2d 1221, 1225-6 (Ind. Ct. App. 2010), *aff'd on rehearing* (Court held that because Second Father had established paternity, First Father's paternity was disestablished and deemed vacated due to mistake of fact; it did not matter that First Father had not properly requested to disestablish paternity by filing motion to disestablish paternity, a motion to vacate a paternity order, or a Trial Rule 60(B) motion for relief from judgment, since First Father was not the legal father to the child anymore as soon as Second Father establish paternity of the child)

**Dickson v. D'Angelo**, 749 N.E.2d 96 (Ind. Ct. App. 2001) (trial court erred by denying putative Father's paternity petition on res judicata grounds (1) without first assigning attorney to represent him as indigent person, and (2) where it appeared likely he was neither party to earlier paternity action, nor in privity with any party in that action)

For cases where the Court declined to allow a man to disestablish paternity, see:

**In Re Paternity of T.M.**, 953 N.E.2d 96, 98-99 (Ind. Ct. App. 2011) (Court affirmed the trial court's denial of Father's motion to set aside the paternity affidavit for a fourteen-year-old child and the trial court's denial of Father's request for DNA testing regarding the child's paternity; Court held: (1) Father had executed a paternity affidavit in accordance with IC 16-37-2-2.1, so Father was the legal father; (2) since the trial court specifically credited Mother's belief that the child was Father's biological child and that she and Father were in an exclusive relationship at the time of the child's conception, Father did not meet the requirements set forth by IC 16-37-2-2.1 to rescind a paternity affidavit after sixty days; and (3) that the trial court did not abuse its discretion in declining to admit the DNA test results from a home testing kit, upon which Father had based his challenge to the paternity affidavit)

**In Re Paternity of M.M.B.**, 877 N.E.2d 1239 (Ind. Ct. App. 2007) (trial court erred in vacating Father's paternity of children and accompanying support orders based on genetic tests, where Father's request for relief under Trial Rule 60(B) was outside equitable discretion of trial court inasmuch as Father did not stumble upon genetic evidence of his non-paternity inadvertently, but rather he actively sought evidence to address his suspicions that he might not have been children's biological father)

**In Re Paternity of B.N.C.**, 822 N.E.2d 616 (Ind. Ct. App. 2005) (affirmed trial court's order granting adjudicated Father's Motion to Correct Errors regarding trial court's having granted another man's petition to intervene and for order for DNA testing, where, about month after child's birth, trial court had entered judgment establishing adjudicated Father's paternity of child)

**Matter of Paternity of K.M.**, 651 N.E.2d 271, 276 (Ind. Ct. App. 1995) (test taken showed that Adjudicated Father was not the biological father, and he filed a motion for relief from judgment under Ind. Trial Rule 60 (B); Court reversed the trial court's order which set aside the paternity judgment, because the blood test was conducted to determine biological fatherhood and therefore was not grounds for setting aside the paternity judgment under the narrow ruling of Fairrow v. Fairrow; "[w]e hold that one who comes into court to challenge an otherwise valid order establishing paternity, without medical proof inadvertently obtained through ordinary medical care, should be denied relief as outside the equitable discretion of the trial court.")

IV. U. The Child's Surname

IC 16-37-2-13 provides that the name of a child born out of wedlock shall be recorded: (1) under the last name of the mother; or (2) as directed in a paternity affidavit. However, IC 16-37-2-15 provides that if the parents of the child born out of wedlock in Indiana later marry, the child shall legally take the last name of the father.

A father and a mother enjoy equal rights with regard to naming their child. See Tibbitts v. Warren, 668 N.E.2d 1266, 1267 (Ind. Ct. App. 1996) ("upon a determination of paternity, both the mother and father potentially enjoy equal legal rights as parents with regard to issues of support, custody, and visitation. IC 31-6-6.1-10 (1993). We have applied this notion of equality to the naming of the child."); T.J.B. v. G.A.H. (In re Name Change of J.N.H.), 659 N.E.2d 644, 646 (Ind. Ct. App. 1995) ("Upon a determination of paternity, both the mother and father potentially enjoy equal legal rights as parents…. Hence, it is only reasonable to allow them equal rights in the naming of the child.").

The procedures for a name change are set forth in IC 34-28-2. It provides that, except for a person confined to a department of correction facility, the circuit, superior, and probate courts in Indiana may change the names of natural persons on application by petition. IC 34-28-2-1, 1.5. A petition for a name change can be filed in the circuit, superior, or probate court of the county in which the person resides. IC 34-28-2-2(a). If a parent or guardian wants to change the name of a minor child, the petition needs to be verified, and must state in detail the reasons for the requested name change. IC 34-28-2-2(b). The written consent of the parents, unless a parent's consent is not required under IC 31-19-9, or the written consent of the guardians if both parents are deceased, must be filed with the petition. IC 34-28-2-2(b). The parents or guardian of the child must be served with a copy of the petition as per the Indiana Trial Rules before a minor child's name can be changed. IC 34-28-2-2(c).

IC 31-19-9 legislates consent in adoption cases. See Chapter 13 at IV. for more detail.

IC 34-28-2-4(d) contains provisions specific to a minor child's name change. When a court is ruling a name change petition, the court must be guided by the child's best interests. However, there is a presumption in favor of a parent who: "(1) has been making support payments and fulfilling other duties in accordance with a decree issued… and (2) objects to the proposed name change of the child." See also **Petersen v. Burton**, 871 N.E.2d 1025, 1028 (Ind. Ct. App. 2007) (holding that, in determining whether to grant petition for name change of minor child, presumption created in IC 34-28-2-4(d) favoring parent who "(1) has been making support payments and fulfilling other duties in accordance with a decree issued under [the dissolution, child support, or custody and parenting time statutes]; and (2) objects to the proposed name change of the child," does not apply to custodial parent).

The last three sections of IC 34-28-2 address additional aspects of the name change process as follows: Section 3 - giving notice of the petition; Section 4 - proof of publication, time of hearing, notice requirements, determination on petition; and Section 5 - court decree as evidence, copy sent to health department, clerk of circuit court, or board.

For cases where a name change was granted, see:

**In Re Paternity of N.C.G.**, 994 N.E.2d 331 (Ind. Ct. App. 2013) (trial court erred by not granting Father's petition to change the child's last name; (1) Father paid child support, exercised regular parenting time, and participated in the child's life; (2) society encourages this conduct; (3) Father began attempting to change the child's name almost at the child's birth, but the relationship between Mother and Father was contentious; (4) Father testified that the name change would cement the bond between himself and the child; and (7) having a father's last name is in a child's best interests because it is a tangible reminder that a child has two parents, which is a particular concern when the father is the noncustodial parent)

**C.B. v. B.W.**, 985 N.E.2d 340, 344-45, 346-7 (Ind. Ct. App. 2013) *trans. denied* (trial court had not abused its discretion when it granted Father's request for the child's surname to be changed to Father's surname; "a father's performance with respect to parent-child

involvement and financial support need not be perfect in order to be credited in a name change". The trial court could draw reasonable inferences about the child's best interests. Father maintained an active role in the child's life; financially supported the child; shared joint legal custody of the child; and Mother had physical custody of the child and was connected to him through custody, while Father was now connected to the child as the noncustodial parent through the surname change)

**Petersen v. Burton**, 871 N.E.2d 1025, 1028 (Ind. Ct. App. 2007) (in determining whether to grant petition for name change of minor child, presumption created in IC 34-28-2-4(d) favoring parent who "(1) has been making support payments and fulfilling other duties in accordance with a decree issued under [the dissolution, child support, or custody and parenting time statutes]; and (2) objects to the proposed name change of the child," does not apply to custodial parent)

For cases where a name change was denied, see:

**Daisy v. Sharp**, 901 N.E.2d 627 (Ind. Ct. App. 2009) (Court found that (1) trial court had determined that Mother had not rebutted IC 34-28-2-4(d)'s presumption in favor of a parent of a minor child who objects to the proposed name change if the parent has been fulfilling his or her obligations set forth in IC 34-28-2-4(d)(1); (2) this implied that trial court found that Father had presented evidence to establish that presumption; (2) trial court had not in fact concluded that Father established that presumption; and (3) as such, the trial court holding was contrary to law when it denied Mother's petition based on Mother's failure to rebut the presumption)

**In Re Change of Name of Fetkavich**, 855 N.E.2d 751, 755-56 (Ind. Ct. App. 2006) (Court reversed and remanded the trial court's order granting Mother's petition to change the name of minor son to his stepfather's surname; Father had a protectable interest in the child's name and a right to participate in any proceeding regarding the change of the child's name. Father was a necessary party. Father also was entitled to IC 34-28-2-4(d)'s presumption in favor of a parent of a minor child who objects to the proposed name change if the parent has been fulfilling his or her obligations set forth in IC 34-28-2-4(d)(1), even though the child never bore the Father's last name and the Father was not the petitioner in a proceeding regarding a change of the child's name and could not be sequestered)

**In Re Paternity of J.C.**, 819 N.E.2d 525, 528-29 (Ind. Ct. App. 2004) (reversed and remanded the trial court's order changing the child's surname to that of Father. The trial court abused its discretion in ignoring the proper standard. In determining whether retaining Mother's name is in the best interest of the child, the trial court could properly consider, *inter alia*, (1) whether the child holds property under a given name; (2) whether the child is identified by public and private entities and community members by a particular name; (3) the degree of confusion likely to be occasioned by a name change; (4) (if the child is of sufficient maturity) the child's desires; and (5) Father's particular concern with Mother having a surname different from that of the child)

## V. ASSISTED REPRODUCTIVE TECHNOLOGY

A. Establishing and Disestablishing Maternity

In **In Re Paternity of Infant T.**, 991 N.E.2d 596, 598-601 (Ind. Ct. App. 2013), *trans. denied*, the Court affirmed in part, reversed in part, and remanded with instructions for the trial court to enter an order establishing Biological Father's paternity. The Court held that the trial court did not err in dismissing Surrogate Mother's petition to disestablish maternity. Biological Father conceived a child with an unknown egg donor. Surrogate Mother was implanted with this embryo and was pregnant with the embryo from Biological Father and the unknown egg donor. During Surrogate Mother's pregnancy, Surrogate Mother, Surrogate Mother's Husband, and Biological

Father jointly filed an agreed petition with the trial court to establish Biological Father's paternity and to "disestablish" Surrogate Mother's maternity, and included affidavits in support of the petition. The trial court denied the agreed petition and certified its order for interlocutory appeal. While the appeal was pending, Surrogate Mother gave birth to the child, and the parties submitted to genetic testing, which the parties assert on appeal confirmed the statements made in their affidavits. The trial court declined to consider the genetic testing results, stating that it lacked jurisdiction due to the pending appeal. The Court of Appeals did not consider the results of the genetic tests, because they were not properly before the Court during the appeal.

The Infant T Court held that Surrogate Mother's petition to disestablish maternity was not cognizable and, as such, the trial court properly dismissed her petition. The Court looked to In Re Paternity & Maternity of Infant R., 922 N.E.2d 59 (Ind. Ct. App. 2010), *trans. denied*, in which the infant's birth mother acted as a surrogate for the biological parents, who were married. In Infant R., the trial court granted the biological father's petition, but denied the biological mother's petition, holding that the birth mother is the legal mother under Indiana law; the Infant R. Court reversed the trial court's decision, holding that: (1) "equity should provide an avenue of relief" for petitions to establish maternity and (2) while Indiana's statutory scheme for the establishment of paternity is not wholly applicable to a petition to establish maternity, it nonetheless "provide[s] a procedural template" for the establishment of maternity.

The Infant T Court said that, considering Indiana paternity statutes as a template for Surrogate Mother's petition to disestablishing maternity, it is well established that the Indiana Code has no provisions for the filing of an action to disestablish paternity. Quoting In Re Paternity of H.J.B. ex rel. Sutton v. Boes, 829 N.E.2d 157, 159-60 (Ind. Ct. App. 2005), the Court observed that paternity may be only "indirectly disestablish[ed] once it "has been established in another man." The Court said that the rationale for this distinction is to avoid having a child declared a "son of nobody," which "would carry with it countless 'detrimental financial and emotional effect[s].'" The Court opined that: (1) it would not be in the best interests of the child and would be contrary to public policy, to allow the birth mother to have the child declared without a mother; and (2) it would be inconsistent to allow for petitions to disestablish maternity when petitions to disestablish paternity are forbidden.

The Infant T Court said that its holding does not exclude the indirect disestablishment of maternity, where a putative mother petitions the court to establish her maternity, proving her maternity by clear and convincing evidence, not simply by affidavit or stipulation. The Court explained that, if the putative mother satisfies her burden of proof, the establishment of her maternity would indirectly disestablish maternity in the birth mother. The Court noted that Indiana law presumes the birth mother is the child's biological mother, and that this presumptive relationship will stand unless another woman establishes that she is in fact the child's biological mother. The Court also acknowledged Biological Father's comment in his appellate brief that his wife will be adopting the child.

In **In Re Paternity and Maternity of Infant R.**, 922 N.E.2d 59, 60-2 (Ind. Ct. App. 2010), the Court reversed the juvenile court's denial of a joint petition to establish paternity and maternity of a child. The Court remanded the case with instructions for the juvenile court to conduct an evidentiary hearing and to grant relief just and proper under the circumstances assuming that Wife is shown to be the child's biological mother by clear and convincing evidence. Husband and Wife purportedly agreed with Wife's Sister that the embryo of Husband and Wife would be implanted into Wife's Sister. On December 24, 2008, Husband, Wife, and Wife's Sister jointly petitioned the juvenile court to establish the paternity and maternity of the unborn child. The child was born to Wife's Sister in February, 2009, and Husband executed a paternity affidavit

to establish his paternity of the child. The juvenile court heard argument on the remaining request for establishment of maternity, but no evidence was taken. On May 26, 2009, the juvenile court denied the petition, finding that Indiana law does not permit a non-birth mother to establish maternity and that Indiana law holds the birth mother is the legal mother.

The Infant R. Court concluded that equity provides an avenue for relief in this case, and found that, in these narrow circumstances, the paternity statutes provide a procedural template to challenge the putative relationship between the child and Wife's Sister. The Court said that Wife must establish her biological motherhood of the child by clear and convincing evidence, which would involve more than simply an affidavit or stipulation between the parties. The presumptive relationship that Wife's Sister is the Mother of the child will stand unless Wife establishes that she is in fact the child's mother.

The Infant R. Court noted IC 31-10-2-1, which states that, "[i]t is the policy of this state…to recognize the importance of family and children in our society…to acknowledge the responsibility each person owes to the other…[and] strengthen family life by assisting parents to fulfill their parental obligations[.]".The Court also opined that it is well-settled that it is in the best interests of a child to have his or her biological parentage established, quoting In Re Paternity of S.R.I., 602 N.E.2d 1014, 1016 (Ind. 1992). The Court also said that "no legislation enacted in this State specifically provides procedurally for the establishment of maternity; it is presumed that a woman who gives birth to a child is the child's biological mother." The Court went on to state that "we are confronted with reproductive technologies not contemplated when our Legislature initially sought to provide for the establishment of legal parentage for biological parents."

The Infant R. Court further opined: (1) if equity ignores technological realities that the law has yet to recognize, a child born in the circumstances alleged herein would denied the opportunity afforded to other children, that is, to be legally linked to those with whom the child shares DNA; (2) a woman who has carried a child but who is not biologically related to that child would be denied a remedy available to putative, but not biological fathers, that is, the removal of incorrect designation on a birth certificate and avoidance of legal responsibilities for another person's child; (3) public policy in correctly identifying a child's birth mother should be no less compelling than correctly identifying a child's biological father; (4) when a legislative purpose is clear, construction to carry out such purpose shall be given to a statute even though such construction is contrary to the strict letter of the statute.

B. Establishment of Paternity After Artificial Insemination

In **In Re Paternity of Infant T.**, 991 N.E.2d 596, 599 (Ind. Ct. App. 2013), the Court affirmed in part, reversed in part, and remanded with instructions for the trial court to enter an order establishing Biological Father's paternity. Biological Father conceived a child with an unknown egg donor. Surrogate Mother was implanted with this embryo and was pregnant with the embryo from Biological Father and the unknown egg donor. During Surrogate Mother's pregnancy, Surrogate Mother, Surrogate Mother's Husband, and Biological Father jointly filed an agreed petition with the trial court to establish Biological Father's paternity and to "disestablish" Surrogate Mother's maternity, and included affidavits in support of the petition. The trial court denied the agreed petition and certified its order for interlocutory appeal. While the appeal was pending, Surrogate Mother gave birth to the child, and the parties submitted to genetic testing, which the parties assert on appeal confirmed the statements made in their affidavits. The trial court declined to consider the genetic testing results, stating that it lacked jurisdiction due to the pending appeal. The Court of Appeals did not consider the results of the genetic tests, because they were not properly before the Court during the appeal.

The Infant T Court opined that the trial court erred when it denied the agreed petition with respect to Biological Father's pre-birth request to be named the child's father. In denying Biological Father's request, the trial court reasoned that Surrogate Mother's Husband was the legal father of the child unless Biological Father could present clear and convincing evidence to the contrary after the child's birth. The Court said that the trial court erred as a matter of law. The Court quoted K.S. v. R.S., 669 N.E.2d 399, 405 (Ind. 1996), and stated that, although Surrogate Mother's Husband was the child's presumptive father, the Indiana Supreme Court has made it clear that a joint stipulation between the birth mother and the putative father "constitute[s] sufficient evidence to rebut the presumption." The Court also looked to IC 31-14-14-1, which states that a paternity action may be jointly filed by the expectant mother and a man alleging that he is the biological father of her unborn child and to IC 31-14-8-1, which states that the court may enter a finding that a man is the child's biological father without first holding a hearing if the parties have filed a joint petition alleging that the man is the child's biological father. The Court observed that, in the instant case, all parties stipulated in their jointly filed agreed petition that Biological Father is the child's father. For further discussion of this case see this Chapter at V.A.

In **In Re Paternity of M.F.**, 938 N.E.2d 1256, 1259-62, 1263-4 (Ind. Ct. App. 2010), the Court affirmed the trial court's denial of Mother's petition to establish Father's paternity of the older child, However, with respect to the younger child, the Court reversed the trial court's holding that a valid, enforceable contract existed which prohibited Mother's petition to establish Father's paternity of the younger child, and remanded with instructions to grant Mother's petition to establish Father's paternity of the younger child. In 1996, Mother and female Partner arranged that Mother's friend, Father, would provide sperm to impregnate Mother so that Mother and Partner could have a child. After the older child was conceived, but a few weeks before the child's birth, the parties signed a Donor Agreement prepared by Mother's attorney. The Donor Agreement, consisting of six pages and twenty-four paragraphs, included: (1) a waiver and release by Mother in which she waived all rights to child support and financial assistance from Father; (2) Father's waiver of all rights to custody and visitation with the child and agreement that Mother shall have sole custody of the child; and (3) a mutual agreement to refrain from initiating, pressing, aiding, or proceeding upon an action to establish legal paternity of the older child due to be born in September 1996. The younger child was born to Mother seven years later. Mother's and Partner's relationship ended around 2008, when the children were approximately twelve and five years old, respectively. Mother filed for financial assistance, which led to the IV-D Prosecutor of Fayette County filing a Verified Petition for Establishment of Paternity on Mother's behalf on March 9, 2009. Father's response to the petition cited the Donor Agreement as the basis of his defenses. DNA testing established that Father was the biological father of both children. Following a hearing on November 13, 2009, the trial court denied the petition to establish paternity as to both children on contract grounds. The trial court held that the contract was valid and did not contravene sound public policy; therefore, Mother was prohibited by contract from seeking to establish paternity in Father.

The M.F. Court opined that Mother failed to prove that insemination with respect to the older child occurred in such a way as to render the Donor Agreement unenforceable and void as against public policy; thus, the trial court did not error in denying Mother's petition to establish paternity for the older child. The Court observed that the parties concede that all of the contract elements, namely an offer, an acceptance, consideration, and a manifestation of mutual assent are present here. The Court opined that a contract of this nature, i.e., one between a sperm donor and a recipient regarding conception of a child, presents a different question with respect to contractual viability. The Court opined that sperm donor contracts may be valid if they conform with the requirements of the Uniform Acts. Jurisdictions which have addressed

support issues arising from artificial insemination have done so through statutes based on the Uniform Parentage Act (UPA) and the Uniform Status of Children of Assisted Conception Act (USCACA). Straub v. B.M.T. by Todd, 645 N.E.2d at 600-1 (Ind. 1994) (holding that (1) "there is no such thing as 'artificial insemination' by intercourse"; (2) the agreement appeared as a "traditional attempt to forego this child's right to support from [the donor]; and (3) the agreement contained "none of the formalities and protections which the legislatures and courts of other jurisdictions have thought necessary to address when enabling childless individuals to bear children"; opining that "[t]he majority of states adopting [similar] legislation…hold that the donor of semen…provided to a licensed physician for use in the artificial fertilization of a woman, is treated under the law as if he…were not the natural parent of the child thereby conceived.").

The M.F. Court opined that if insemination occurred via intercourse, the Donor Agreement would be unenforceable as against public policy. Mother contended that Father failed to prove that insemination did not occur via intercourse. Father contended that Mother failed to prove that insemination occurred via intercourse, thereby rendering the Donor Agreement void and unenforceable. The Court concluded that, because Mother sought to avoid the contract, the case is governed by the rule that a party who seeks to avoid a contract bears the burden of proof on matters of avoidance. The Court opined that Mother bore the burden of proving the manner of insemination rendered the Donor Agreement unenforceable, but there was no indication in the appellate materials or the hearing of the manner in which Mother was inseminated with the first pregnancy.

The M.F. Court held that: (1) a physician must be involved in the process of artificial insemination, and the semen must first be provided to the physician; and (2) a written instrument memorializing the arrangement must be sufficiently thorough and formalized. The Court opined that the requirement that the semen first be provided to a physician obviates the possibility of last-minute decisions. The Court also said that the written instrument "must reflect the parties' careful consideration of the implications of such an agreement and a thorough understanding of its meaning and import." The Court noted the following concerning the Donor Agreement: (1) it was prepared by an attorney; (2) it acknowledged rights and obligations, waiver, mutual consent not to sue, a consent to adopt, a hold-harmless clause, mediation and arbitration, penalties for failure to comply, amending the agreement, severability, a four-corners clause, and a choice-of-laws provision; and (3) it contained a legal construction provision in which each party acknowledged and understood that legal questions may be raised which have not been settled by statute or prior court decisions and that certain provisions may not be enforced by a court. The Court stopped short of endorsing the Donor Agreement as setting a minimum threshold with respect to content and form. The Court added that, due to the lack of statutory law and the paucity of decisional law in this area, parties who execute a less formal and thorough agreement than this one do so at their own peril.

The M.F. Court concluded that the Donor Agreement could not be construed to apply to further children conceived as a result of artificial insemination involving Mother and Father; therefore, the trial court erred in denying Mother's petition to establish Father's paternity of the younger child. The Court found numerous manifestations of intent throughout the Donor Agreement that applied only to the older child. The Court concluded that the Donor Agreement, which specifically and only applied to the child due to be born on September 19, 1996 (the older child), could not be construed to apply to future children conceived as a result of artificial insemination involving Mother and Father. The Court opined that the trial court erred in holding that a valid, enforceable contract existed prohibiting an action to establish paternity of the younger child in Father. In view of the fact that DNA testing established, and Father

concedes, that he is the biological father of the younger child, the Court remanded the case, instructing the trial court to grant Mother's petition to establish the younger child's paternity.

## VI. PATERNITY PROCEEDINGS AND ADOPTION

VI. A. Putative Father Registry

The term "putative father" is primarily applicable to adoption proceedings. IC 31-9-2-100 defines a "putative father" as a male of any age who is alleged to be a child's father, but who has not established his paternity by executing a paternity affidavit or initiating a paternity proceeding, and who is not a presumed father due to his marriage or attempted marriage to the child's mother. A man who knows or believes that he has fathered a child should register with the putative father registry to ensure his notice of any adoption proceeding involving the child, and a man initiating a paternity proceeding has certain other obligations with regard to the putative father registry.

IC 31-14-20 does not apply to men whose paternity has been established before the filing of a petition to adopt the man's child. IC 31-14-20-1 provides that a man who is a party to a paternity proceeding shall register with the putative father registry. IC 31-14-20-2 provides that a man who fails to register with the putative father registry waives the right to notice of an adoption petition regarding the child, if the adoption petition is filed before paternity is established and the child's mother does not disclose the name or address of the father to the agency or attorney arranging the adoption.

A putative father's consent to adoption is irrevocably implied under IC 31-19-9-12(4) if the father was required to register with the putative father registry but failed to do so within the proscribed time frame. The time frame in which a putative father must register with the putative father registry is set forth at IC 31-19-5-12: not later than (1) thirty days after the child's birth; or (2) the earlier of the date of either filing a petition for the child's adoption, or filing a petition to terminate the parent-child relationship between the mother and the child. Of these two options, the putative father has until the later date to register with the putative father registry. See this Chapter at VI.B.

*Practice Note*: IC 31-19-5 may not apply if "on or before the date the child's mother executes a consent to the child's adoption, the child's mother discloses the name and address of the putative father to the attorney or agency that is arranging the child's adoption." IC 31-19-5-1.

In **In Re Adoption of K.G.B.**, 18 N.E.3d 292, 295-95, 299 (Ind. Ct. App. 2014), the Court affirmed the trial court's orders which (1) dismissed Putative Father's petition to establish paternity; and (2) struck Putative Father's motion to contest the child's adoption. Because Putative Father failed to timely register with the Registry, he had irrevocably waived his right to notice of the child's adoption; therefore, he had impliedly consented to the adoption and was barred from contesting the adoption. To be entitled to notice of an adoption, a putative father must register within the time frame set forth in IC 31-19-5-12(a). A putative father who fails to register within that specified period waives notice of an adoption proceeding. The putative father's waiver constitutes an irrevocably implied consent to the child's adoption (IC 31- 19-5-18), and he may not challenge the adoption or establish paternity (IC 31-19-9-13 and -14).

In **In Re Adoption of E.L.**, 913 N.E.2d 1276, 1279-80 (Ind. Ct. App. 2009), the Court affirmed in part, reversed in part, and remanded the trial court's dismissal of the petition to establish paternity filed by Putative Father on his own behalf and on behalf of the child, as next friend. The Court held that, by operation of IC 31-19-5-18, Putative Father's failure to register as a putative father in the time required by IC 31-19-5-12 "constitutes an irrevocably implied consent to the

[child's] adoption;" and because Putative Father's consent is implied, he "is not entitled to establish paternity" while the adoption is pending (IC 31-19-9-14). Contrary to Putative Father's arguments, his timely filing of the paternity petition did not render moot the issues concerning the requirement that he file with the Putative Father Registry, in that IC 31-14-20-1(b) provides that a man who files a paternity action "shall register with the putative father registry ... within the period provided under IC 31-19-5-12," and IC 31-19-5-6(b) provides that "[t]he filing of a paternity action by a putative father does not relieve the putative father from the: (1) obligation of registering; or (2) consequences of failing to register ... unless paternity has been established before the filing of the petition for adoption of the child."

See also **Mathews v. Hansen**, 797 N.E.2d 1168,1173 (Ind. Ct. App. 2003) (finding, among other things, in context of step-parent adoption, that due to Father's failure to timely register with putative father's registry, he could not challenge adoption decree), *trans. denied*; and **In Re Adoption of J.D.C.**, 751 N.E.2d 747 (Ind. Ct. App. 2001) (putative Father not entitled to notice of adoption proceedings because Mother did not disclose his address to adoption agency and he failed to preserve his rights by registering in Indiana Putative Father's Registry).

See Chapter 13 at VI.A. and B.

VI. B. Inability to Pursue Paternity Proceeding

It is no longer necessary for a putative father to file both a motion to contest the adoption and a paternity action. IC 31-19-9-12 provides that a "putative father's consent to adoption is irrevocably implied without further court action if the putative father: (1) fails to file a motion to contest the adoption in accordance with IC 31-19-10 within thirty (30) days after service of notice under IC 31-19-4 in the court in which the adoption is pending... [or] (3) having filed a paternity action under IC 31-14 or in any other jurisdiction, fails to establish paternity in the action; or (4) is required to but fails to register with the putative father registry established by IC 31-19-5 within the period under IC 31-19-5-12. See also Chapter 13 at V.I.3.a.

A putative father whose consent to adoption of a child is implied under IC 31-19-9 or IC 31-19-5-18 is not entitled to establish paternity. IC 31-19-9-14. IC 31-19-9-17(a) also provides that a putative father whose consent to an adoption is implied under IC 31-19-9-15 [When consent of putative father irrevocably implied; additional circumstances] is not entitled to establish paternity by a court proceeding or by executing a paternity affidavit.

A putative father who is barred from establishing paternity under IC 31-19-9-17(a) may establish paternity in a court proceeding if neither a petition for adoption nor placement of the child in a proposed adoptive home is pending and if (1) he submits, with his paternity petition, an affidavit prepared by the licensed child placing agency or attorney that served him with the pre-birth notice; (2) the affidavit states that neither a petition for adoption nor placement of the child in an adoptive home is pending; and (3) the court finds on the record, based on all the information available to it including the affidavit filed with the petition, that neither a petition for adoption, nor placement of the child in a prospective adoptive home is pending. IC 31-19-9-17(b). These requirements are jurisdictional and must be strictly adhered to by the putative father and the court. Thus, it would appear that if the requirements of (b) are not met, the court should dismiss the paternity petition on its own motion or a party's motion.

IC 31-19-9-17(c) permits a person who would otherwise be barred from establishing paternity to do so if an adoption for the child is not pending or contemplated. Furthermore, "[a] petition for adoption that is not filed or a petition for adoption that is dismissed is not a basis for enabling an

individual to establish paternity under this section unless the requirements of subsection (b) are satisfied."

IC 31-19-9-15 provides that if a putative father receives actual pre-birth notice pursuant to IC 31-19-3 of the mother's intention to place the child for adoption, the putative father's consent is irrevocably implied unless he files a paternity action in Indiana or in another state with jurisdiction, within thirty days of receiving the notice, he does not fail to establish paternity. This statute is applicable to IC 31-19-9-17(a).

*Practice Note:* It appears that IC 31-19-9-17(c) extends the benefits of IC 31-19-9-17(b) to putative fathers who are barred from establishing paternity by any provision of IC 31-19. Thus, putative fathers previously foreclosed forever from establishing paternity can now do so under the conditions of IC 31-19-9-17(b). These putative fathers include those who (1) failed to timely register with the Putative Father Registry when required to do so; (2) failed to file a motion to contest adoption in accordance with IC 31-19-10 or a paternity action under IC 31-14 within thirty days after service of notice of the petition for adoption under IC 31-19-4; (3) filed action to contest adoption but failed to appear at the hearing set to contest the adoption; or (4) filed a paternity action, but failed to establish paternity. See **In Re Adoption of E.L.**, 913 N.E.2d 1276, 1280, n.3 (Ind. Ct. App. 2009) in which the Court, stated: "When consent to adoption is implied by failure to timely register, the putative father is precluded from establishing paternity .... If, however, an adoption is no longer 'pending or contemplated,' the bar on establishing paternity is lifted. [IC] 31-19-9-17(c)." The Court followed with footnote 3 in which it noted, "In In Re Adoption of Infant Female Fitz, 778 N.E.2d 432, [438] (Ind. Ct. App. 2002), for example, we interpreted [IC] 31-19-9-17(b) as removing the implied-consent bar to petitioning for paternity if an adoption is dismissed or otherwise 'falls through.'"

For cases where the Court declined to allow someone to seek to establish paternity, see:

**In Re Adoption of K.G.B.**, 18 N.E.3d 292, 304 (Ind. Ct. App. 2014) (Court affirmed the trial court's orders which (1) dismissed Putative Father's petition to establish paternity; and (2) struck Putative Father's motion to contest the child's adoption. Because Putative Father impliedly consented to the child's adoption, he was also barred from establishing paternity pursuant to IC 31-19-9-14 and IC 31-14-5-9)

**In Re Paternity of G.W.**, 983 N.E.2d 1193, 1198 (Ind. Ct. App. 2013) (Court reversed trial court's decision to deny Mother's motions to dismiss the paternity action filed by Birth Father as the child's next friend; a man who is barred under IC 31-19 from establishing paternity may not file a paternity action as next friend of a child or request a prosecuting attorney to file a paternity action; Court quoted IC 31-14-5-9 and opined that since Birth Father failed to timely register with the putative father registry, he had impliedly consented to the child's adoption and was now barred from establishing paternity)

**In Re Adoption of E.L.**,913 N.E.2d 1276, 1280-81 (Ind. Ct. App. 2009) (Court held that, contrary to trial court's finding, because Putative Father timely filed a paternity petition, his failure to file a motion contesting adoption did not imply consent to adoption under IC 31-19-9-12(1), but Putative Father's failure to register as a putative father constituted an irrevocably implied consent to the child's adoption)

**In Re Adoption of Fitz**, 805 N.E.2d 1270 (Ind. Ct. App. 2004) (consent of putative Father to adoption was irrevocably implied in accordance with IC 31-19-9-15 because he filed his paternity action thirty-one days, rather than not more than thirty days, after his receipt of statutory notice informing him that Mother was considering adoptive placement of child, and substitution of adoptive petitioners not relevant where no evidence trial court's determination that he failed to timely file paternity action was procured by fraud)

**In Re Paternity of Baby W.**, 774 N.E.2d 570 (Ind. Ct. App. 2002) (affirming dismissal of putative Father's paternity action where he failed to file his paternity action within thirty days of his receipt of pre-birth adoption notice, despite his having filed for DNA testing within that time period), *trans. denied*

**In Re Paternity of M.G.S.**, 756 N.E.2d 990 (Ind. Ct. App. 2001) (Putative Father is not entitled to contest adoption or to establish paternity of child because he did not file paternity action within thirty days of receiving notice of adoption, resulting in his consent to adoption being irrevocably implied despite putative Father's registering with putative father's registry twenty-three days after child's birth; the pre-birth notice of adoption was valid, and IC 31-19-9-15 is a nonclaim statute which imposes conditions precedent to enforcement of right of action and is not subject to equitable exceptions), *trans. denied*

**In Re Paternity of Baby Doe**, 734 N.E.2d 281 (Ind. Ct. App. 2000) (Court ruled that because Mother did not disclose the father's name, Putative Father was required to register with the putative father registry within thirty days of the birth of the child or the filing of the adoption petition, whichever occurred later; Putative Father's consent to the child's adoption was irrevocably implied by his failure to timely register, and he was not entitled to either challenge the validity of his implied consent or to establish his paternity).

For cases where a man was not necessarily precluded from establishing paternity, see:

**In Re B.W.**, 908 N.E.2d 586, 594 (Ind. 2009) (under IC 31-19-9-12(1), to be deemed to have implied his irrevocable consent to an adoption, a putative father must have failed to file both a paternity action and a motion to contest the adoption)

**In Re Adoption of A.N.S.**, 741 N.E.2d 780 (Ind. Ct. App. 2001) (dismissed as moot appeal of adoption court's order granting biological Father's motion to reconsider earlier ruling denying his intervention in adoption proceeding because his consent to adoption was irrevocably implied due to his failure to file paternity action within thirty days of his receipt of Mother's notice of intent to place her unborn child for adoption, where (1) Father filed paternity action thirty-eight days after receiving notice and prior to filing of adoption petition; (2) paternity court denied Mother's motion for summary judgment requesting dismissal because of Father's failure to file within thirty days of receiving her notice of intent to place child for adoption and, subsequently, granted Father's petition to establish paternity; and (3) Mother and her new husband, who was seeking to adopt child, did not appeal paternity court's order establishing Father's paternity).

See Chapter 13 generally, as well as specifically at II.A., V.I., V.K. VI., and VIII.G., for more information regarding paternity issues in adoption proceedings.

VI. C. Putative Father's Duty to Give Notice and Rights of Prospective Adoptive Parents

IC 31-14-21-1 through IC 31-14-21-5 provide that a putative father who receives notice of an adoption petition involving his child or is otherwise aware of the petition, shall give notice of the pending paternity involving the child to the attorney or agency that gave the putative father notice of the adoption or to the clerk of the court having jurisdiction over the adoption.

If the father fails to give notice of the paternity action and paternity is established, the court shall set aside the judgment upon the motion of the prospective adoptive parents to intervene. IC 31-14-21-6; IC 31-14-21-7. Even if there is no failure of notice, the prospective adoptive parents shall be allowed to intervene in the paternity action under IC 31-14-21-8 for the limited purposes of: receiving notice of the paternity proceedings; attempting to ensure that paternity is not established unless the putative father is the biological father; and objecting to any error that occurs during the paternity proceeding.

VI. D. Expedited Paternity Proceedings and Blood Tests

Subject to IC 31-19-2-14, if a court that has jurisdiction over a paternity case knows about a pending adoption of the same child and the court in which the adoption is pending, the paternity court must establish paternity within the time frames set forth in IC 31-14-21. An initial hearing must be held within thirty days of the filing of the paternity petition or the child's birth, whichever occurs later. IC 31-14-21-9.

Since IC 31-14-21-9 is subject to IC 31-19-2-14, it is important to note that IC 31-19-2-14 provides the following:

(a) If petitions for adoption and paternity establishment are concurrently pending, the adoption court has exclusive jurisdiction over the child. The paternity proceeding must be consolidated with the adoption proceeding.
(b) If the petition for adoption is dismissed, the court hearing the consolidated adoption and paternity proceeding shall determine who has custody of the child.
(c) Following a dismissal of the adoption petition, the adoption court may:
(1) retain jurisdiction over the paternity proceeding; or
(2) return the paternity proceeding to the court in which it was originally filed.
If the paternity proceeding is returned to the paternity court, the paternity court assumes jurisdiction over the child, subject to any provisions of the consolidated court's order.

IC 31-14-21-9 is also subject to IC 31-14-21-13, which provides that when a court where paternity proceedings are pending has notice that an adoption court has assumed jurisdiction of the paternity proceedings under IC 31-19-2-14, the paternity court shall stay all proceedings in the paternity action until further order from the adoption court.

IC 31-14-21-9.1 [Duty of court to order blood or genetic testing] and IC 31-14-21-9.2 [Final hearing to determine paternity and ruling] are also subject to these provisions of IC 31-19-2-14 and IC 31-14-21-13.

## VII. ESTABLISHING PATERNITY WITH A PATERNITY AFFIDAVIT

A paternity affidavit is a legal means by which paternity may be established. IC 31-14-7-1 no longer lists a paternity affidavit as providing a "presumption" of paternity. IC 31-14-7-3 provides: "A man is a child's legal father if the man executed a paternity affidavit in accordance with IC 16-37-2-2.1 and the paternity affidavit has not been rescinded or set aside under IC 16-37-2-2.1."

Furthermore, IC 16-37-2-2.1(p) provides that if a man has executed a paternity affidavit, that paternity affidavit conclusively establishes him as the legal father of a child without any further court proceedings. IC 16-37-2-2.1(j) provides that a paternity affidavit under this section (1) establishes paternity; and (2) results in parental rights and responsibilities. These rights and responsibilities include "(A) the right of the child's mother or the Title IV-D agency to obtain a child support order against the person, which may include an order requiring the provision of health insurance coverage; and (B) parenting time in accordance with the parenting time guidelines adopted by the Indiana supreme court, unless another determination is made by a court in a proceeding under IC 31-14-14. A paternity affidavit executed under this section may be filed with a court by [DCS]."

See also **In Re Paternity of S.A.M.**, ___N.E.3d ____ (Ind. Ct. App. 2017) (opinion issued October 13, 2017) (Court, in footnote 6, noted that Father was the legally established father, since he had executed a paternity affidavit; the trial court's finding that Father had never established paternity for the child was clearly erroneous. The Court found no persuasive reason to treat Father as anything other than the child's natural father); **Lattimore v. Amsler**, 758 N.E.2d 568, 570-71 (Ind. Ct. App.

2001) (Father executing paternity affidavit in accordance with IC 16-37-2-2.1 established paternity in him and gave him standing to seek visitation, mail, and telephone privileges).

VII. A. Requirements for Paternity Affidavit

A paternity affidavit is a document initiated by both the mother and the identified male attesting that the identified male is the biological father of the child. A paternity affidavit must be executed on the form provided for by the state department. If the paternity affidavit is executed through a hospital, then it must be completed within seventy-two hours of the child's birth. IC 16-37-2-2.1(c)(1). If the paternity affidavit is executed through a local health department, it must be completed before the child reaches the age of emancipation. IC 16-37-2-2.1(c)(2).

If the mother of a child has executed a consent to the adoption of the child, and the petition to adopt the child has been filed, a subsequently executed paternity affidavit is not valid. IC 16-37-2-2.1(d).

Right before or after the birth of an out of wedlock child, certain hospital or medical personnel must provide an opportunity for: (A) the child's mother; and (B) a man who reasonably appears to be the child's biological father; to execute an affidavit acknowledging paternity of the child, and verbally explain to them the legal effects of an executed paternity affidavit. IC 16-37-2-2.1(b).

An executed paternity affidavit form must contain the following (IC 16-37-2-2.1(e)):

(1) The mother's: (A) full name; (B) Social Security number; (C) date of birth; and (D) address.
(2) The father's: (A) full name; (B) Social Security number; (C) date of birth; and (D) address.
(3) The child's: (A) full name; (B) date of birth; and (C) birthplace.
(4) A brief explanation of the legal significance of signing a voluntary paternity affidavit.
(5) A statement signed by both parents indicating that:
    (A) they understand that signing a paternity acknowledgment affidavit is voluntary;
    (B) they understand (i) their rights and responsibilities under the affidavit; (ii) the alternatives to signing the affidavit; and (iii) the consequences of signing the affidavit; and
    (C) they have been informed of the alternatives to signing the affidavit.
(6) Separate signature lines for the mother and father.
(7) Separate signature lines for the witness or notary indicating that the witness or notary observed the father or mother signing the affidavit.

Before a paternity affidavit is signed, both the mother and father must be informed of the alternatives to signing the affidavit. IC 16-37-2-2.1(f).

A paternity affidavit must contain or have attached to it the following items (IC 16-37-2-2.1(g)):

(1) The mother's sworn statement asserting the man in IC 16-37-2-2.1(b) is the child's biological father.
(2) A statement by a person identified as the father attesting to a belief that he is the child's biological father.
(3) Written information furnished by the child support bureau that (A) explains the effect of an executed paternity affidavit; and (B) describes the availability of child support enforcement services.
(4) The Social Security number of each parent.

A paternity affidavit must contain all of the following (IC 16-37-2-2.1(h)):

(1) A statement: (A) that, if the mother and the man identified as the father check a box and sign in the appropriate location, the mother and the man identified as the father agree to share joint legal custody of the child; and (B) that joint legal custody means that the persons sharing joint legal custody share authority and responsibility for the major decisions concerning the child's upbringing, including the child's education, health care, and religious training; and have equal access to the child's school and medical records.

(2) Two signature lines located below the statements described above.

(3) A statement that, if the mother and the man identified as the father do not agree to share joint legal custody, the mother has sole legal custody unless another determination is made by a court.

(4) A statement that even if the mother and the man identified as the father share joint legal custody, the mother has primary physical custody of the child unless another determination is made by a court.

(5) A statement that, if the mother and the man identified as the father agree to share joint legal custody, the agreement to share joint legal custody is void unless the result of a genetic test performed by an accredited laboratory (A) indicates that the man identified as the father is the child's biological father; and (B) is submitted to a local health officer not later than sixty (60) days after the child's birth.

(6) A statement with signature lines that affirms that any parent who is themselves a minor has had an opportunity to consult with an adult chosen by the minor parent. See **In Re Paternity of T.H.**, 22 N.E.3d 804, 805, 808-9 (Ind. Ct. App. 2014), this Chapter, at VII.D.

If both the mother and the man identified as the father agree to share joint legal custody described in subsection (h)(1)(A), then they (1) share joint legal custody of the child; and (2) have equal access to the child's school and medical records. This statute also provides that an action to establish custody or parenting time of a party who has agreed under subsection (h) to share joint legal custody shall be tried de novo. IC 16-37-2-2.1(q).

A paternity affidavit must be presented separately to the child's mother and a man who reasonably appears to be the child's father before the paternity affidavit is signed. This is so that each parent and alleged parent can review the affidavit alone and without the presence of the other parent. A signed paternity affidavit is voidable if the requirements of this subsection are not satisfied. IC 16-37-2-2.1(r).

An agreement to share joint legal custody is void if a genetic test performed by an accredited laboratory indicates the man identified as the father is not the biological father of the child. An agreement to share joint legal custody is also void if the man identified as the father fails to submit: (A) to a local health officer; and (B) not later than sixty days after the date of the child's birth; the results of a genetic test performed by an accredited laboratory that indicates the person is the biological father of the child. IC 16-37-2-2.1(s).

An individual who is either the mother or the man identified as the father and is also less than eighteen years old must have an opportunity to consult with any adult chosen by the individual regarding the contents of a paternity affidavit before signing the paternity affidavit. A signed paternity affidavit is voidable if the individual does not have the opportunity to consult with an adult chosen by the individual. IC 16-37-2-2.1(t).

VII. B. Execution of Affidavit with Health Department

A paternity affidavit may be executed as provided in this section through: (1) a hospital; or (2) a local health department. IC 16-37-2-2.1(a). A paternity affidavit must be executed on the form provided for by the state department. If the paternity affidavit is executed through a hospital, then it must be completed within seventy-two hours of the child's birth. IC 16-37-2-2.1(c)(1). If the paternity affidavit is executed through a local health department, it must be completed before the child reaches the age of emancipation. IC 16-37-2-2.1(c)(2).

If a properly executed paternity affidavit is filed with a local health officer, the officer is to correct the local record of birth by adding the name of the father to the certificate of birth. IC 16-37-2-14.

**Seger v. Seger**, 780 N.E.2d 855 (Ind. Ct. App. 2002) (paternity affidavit executed at health department when child was eight years old).

VII. C. Obtaining Child Support with Affidavit

IC 31-14-11-1 provides that if the man who executed the paternity affidavit fails to present evidence rebutting his paternity at a support hearing, the court can issue an order establishing paternity and support, without further proceeding to establish paternity.

IC 16-37-2-2.1(j) provides that a paternity affidavit under this section provides for "(A) the right of the child's mother or the Title IV-D agency to obtain a child support order against the person, which may include an order requiring the provision of health insurance coverage."

See also **In Re Paternity of H.H.**, 879 N.E.2d 1175 (Ind. Ct. App. 2008) (Court reversed trial court's order setting aside paternity affidavit where Father had petitioned to establish custody, support, and parenting time and Mother contested petition on ground that Father not child's biological Father); and **In Re Paternity of E.M.L.G.**, 863 N.E.2d 867 (Ind. Ct. App. 2007) (holding, in four consolidated cases filed by State to establish child support orders based on paternity affidavits, that (1) trial court erred as matter of law in granting four putative fathers' requests for genetic testing to disestablish paternity in that putative fathers at issue had failed to have their paternity affidavits set aside within sixty-day time limit as provided for under IC 16-37-2-2.1 (2001), and, therefore, under IC 31-14-7-3 (2001), men were deemed legal fathers of children; and (2) trial court does not have authority to treat child support proceedings as proceedings to disestablish paternity).

VII. D. Setting Aside a Paternity Affidavit

A court cannot set aside a paternity affidavit unless a genetic test is ordered under IC 16-37-2-2.1(K) or (l), and the test results exclude the man as the father.

A man who is party to a paternity affidavit can, within sixty days of signing the affidavit, file an action in a court with paternity jurisdiction to request genetic testing. IC 16-37-2-2.1(k).

After the sixty days has passed, IC 16-37-2-2.1(l) applies. It provides that a paternity affidavit cannot be rescinded more than sixty days after signing unless: (1) a court determines there is fraud, duress, or material mistake of fact, and (2) at the request of the man who is a party to the paternity affidavit, the court has ordered a genetic test, and the test indicates that the man is excluded as the child's father.

*Practice Note*: Courts may not suspend legal responsibilities of the affiant father to pay child support during a challenge to the paternity affidavit, unless good cause is shown. IC 16-37-2-2.1-(m).

For cases where a petition to vacate paternity was denied, see:

In **In Re Paternity of T.H.**, 22 N.E.3d 804, 805, 808-9 (Ind. Ct. App. 2014), the Court affirmed the trial court's denial of Father's petition to rescind or vacate his paternity affidavit. Mother gave birth to the child. The following day, Father visited Mother at the hospital. Father was seventeen years old and in foster care. He believed himself to be the child's father, so he signed a paternity affidavit. Almost eight years later, after determinations of custody and child support, Father requested a paternity test. The trial court denied this request. The Court concluded that the trial court did not abuse its discretion in denying Father's Petition to Rescind or Vacate Paternity Affidavit. Citing IC 16-37-2-2.1, the Court noted that any request for genetic testing must be made within sixty days after the paternity affidavit is executed, and a properly executed affidavit may not be rescinded more than sixty days after it is executed except in cases of fraud, duress, or material mistake of fact. Father asserted that, at the time of signing the affidavit, he was a minor, acting without legal representation, and was put under duress by Mother and the maternal grandmother; however, the Court noted that Mother's testimony dispelled Father's contentions.

In **In Re Paternity of H.H.**, 879 N.E.2d 1175, 1177-78 (Ind. Ct. App. 2008), the Court held that, once a mother has signed a paternity affidavit, she may not use the paternity statutes to deprive the legal father of his rights even if he is not the biological father; and that, here, neither Father nor Mother could challenge Father's paternity of the child. Mother and Father knew that Father was not the child's biological father but agreed that he would be the father. After Mother and Father separated, Father petitioned to establish custody, support, and parenting time of the child. Mother contested the petition on the ground that Father was not the biological father. Father acknowledged he was not the biological father, but asserted that he had paternal rights pursuant to the paternity affidavit Mother and Father had signed. The Court noted IC 16-37-2-2.1(i) [now subsection (l)] and opined that the legislature did not intend this statute to be used to set aside paternity affidavits executed by a man and a woman who both knew the man was not the biological father of the child, but instead intended it to protect a man who signed a paternity affidavit due to "fraud, duress, or material mistake of fact." The Court concluded for various public policy reasons that this could not be the intent of the legislature and it could not further the public policy of this State where "protecting the welfare of children … is of the utmost importance."

The Court in **In Re Paternity of E.M.L.G.**, 863 N.E.2d 867, 869-71 (Ind. Ct. App. 2007) reversed and remanded the trial court's orders granting the four putative fathers' requests for genetic testing to disestablish paternity. Each of the four putative fathers signed a paternity affidavit at the hospital when the respective child was born. In each case (1) the State brought an action to establish a child support order; (2) the hearing was conducted more than sixty days after the father had executed the affidavit; (3) at the hearing, the father requested the trial court to order genetic testing; and (4) the trial court granted the father's request for genetic testing. The Court held that (1) the trial court erred as matter of law in granting the four putative fathers' requests for genetic testing to disestablish paternity because the putative fathers failed to have their paternity affidavits set aside within the sixty-day time limit as provided for under IC 16-37-2-2.1 (2001), and, therefore, under IC 31-14-7-3 (2001), the men were deemed the legal fathers of the children; (2) the trial court set aside the paternity affidavits based on a statutorily invalid reason - the men's allegations that they were not aware of the legal ramifications of the affidavits when they signed them; (3) the Indiana Code

has no provision for the filing of an action to disestablish paternity; and (4) the trial court does not have the authority to treat child support proceedings as proceedings to disestablish paternity.

In **In Re Paternity of B.N.C**., 822 N.E.2d 616 (Ind. Ct. App. 2005), the Court affirmed the trial court's order granting Adjudicated Father's Motion to Correct Errors regarding the trial court's allowing another man's petition to intervene and for an order for DNA testing. The Court noted that the appellant (1) was prohibited from filing a motion for relief from the 1995 paternity judgment on the grounds of extrinsic fraud under Indiana Trial Rule 60(B)(3), because such a motion must be filed not more than one year after the judgment is entered, but (2) was not constrained by time limitations from alleging fraud upon the court. The Court found, however, that the appellant had failed to establish that Adjudicated Father and Mother had engaged in a "deliberately planned and carefully executed scheme" to improperly influence the trial court to issue the paternity judgment as would be required to prove fraud upon the court. In so finding, the Court noted the testimony (1) of Adjudicated Father that he was "certain" that he was the child's biological father when he executed the paternity affidavit; and (2) of Mother that, at the time the affidavit was executed, she was "pretty sure" Adjudicated Father was the child's biological father although she "did have a doubt."

For cases where paternity affidavits could be litigated or even vacated, see:

In **In Re Paternity of S.C.**, 966 N.E.2d 143, 147-9, 150-3 (Ind. Ct. App. 2012) (Riley, J. dissenting), *aff'd on rehearing*, 970 N.E.2d 248 (Ind. Ct. App. 2012) (Riley, J. dissenting), the Court affirmed the Hancock trial court's ("Hancock Court") granting of Presumed Father's Verified Petition for Relief from Judgment for Fraud Upon the Court. Hancock Court concluded that the paternity affidavit and the resulting paternity judgment issued by Hancock Court were void, as Mother knew there was a reasonable probability that Presumed Father was the actual father of the child, not Affiant Father. The Court further concluded that Mother had engaged in an unconscionable plan or scheme to defraud the court. Affiant Father, with the help of Mother, filed an action in Hancock Court on October 21 that sought to establish paternity in Affiant Father. However, another paternity action was pending for the child in the Fayette County trial court ("Fayette Court"), filed by Presumed Father on July 29. Mother and Affiant Father did not inform Hancock Court of the Fayette Court proceedings, even though they knew of the Fayette Court paternity action. Hancock Court granted Affiant Father's petition to establish paternity the day before a hearing in Fayette Court. The next day, Presumed Father was served with Affiant Father's paternity order from the Hancock Court at the Fayette Court proceedings. Fayette Court dismissed Presumed Father's proceedings. Presumed Father filed a motion in Hancock Court to set aside Hancock Court's paternity order, alleging that fraud. Hancock Court vacated its earlier paternity judgment. The Court of Appeals stated that the correct question was whether the trial court had the power to vacate an order that it later discovered was issued under a fraudulent pretext. In order to prove fraud, Presumed Father had to establish that an unconscionable plan or scheme was used to improperly influence the court's decision, and that such plan or scheme prevented Presumed Father from fully and fairly presenting his case. The Court determined that all three of these elements were present in this case. The Court also addressed public policy, noting that its decision was in line with policy.

**In Re Paternity of S.C.**, 970 N.E.2d 248, 250-1 (Ind. Ct. App. 2012) (Riley, J. dissenting), the Court granted Mother's request for a rehearing, and reaffirmed its original opinion. The Court held that there was sufficient evidence to warrant the Hancock County trial court's vacating of the paternity judgment. Mother's arguments regarding the validity and

admissibility of the paternity test were irrelevant; the issue was whether Mother committed fraud upon Hancock Court. The Court opined that there was evidence to support the Hancock Court's finding that Mother did not inform Hancock Court of the Fayette Court proceedings, and that Mother knew there was a reasonable probability that Presumed father was the biological father of the child.

In **J.M. v. M.A.**, 950 N.E.2d 1191, 1192-3 (Ind. 2011) the Court reversed the trial court's decision as to paternity and remanded the case to give Father the opportunity, as agreed to by the parties at oral argument, to challenge the paternity affidavit in the manner outlined by IC 16-37-2-2.1. Seventeen-year-old Father signed a paternity affidavit, even though Mother was already pregnant when they began dating. The child's guardian received government assistance, so the State sought to obtain child support from Father. The trial court denied Father's request for a continuance, conducted the hearing without his presence, and entered a default judgment and a temporary support order. Father obtained counsel and moved to set aside the paternity affidavit. The trial court declared that Father's "lack of appearance…ratified the previously signed affidavit of paternity." Father appealed. The Indiana Supreme Court granted transfer. In order for a court to rescind a paternity affidavit, paternity testing must exclude the man as the biological father, and the parties' words or agreement cannot supplant the statutory requirements of IC 16-37-2-2.1. The Court quoted IC 16-37-2-2.1, stating that, to set aside a paternity affidavit, the statute requires fraud, duress, or a material mistake of fact at the time of the execution of the paternity affidavit, *and* genetic testing that excludes the man as the child's biological father (emphasis in opinion). Father's petition alleged facts that, if formally proven, could establish that a material mistake of fact might have existed at the time he signed the paternity affidavit.

In **In Re Paternity of M.M.**, 889 N.E.2d 846, 847-50 (Ind. Ct. App. 2008), the Court reversed trial court's dismissal of Legal Father's motion to rescind his paternity affidavit, and remanded for court-ordered genetic testing. Legal Father executed a paternity affidavit. About seven months later, following two genetic tests excluding him as the biological father, Legal Father filed a petition for modification of child support, and moved for rescission of the paternity affidavit and for DNA testing. The motion was denied by the trial court. On appeal, the Court held that extraordinary circumstances will permit a challenge to paternity. The Court opined that Legal Father was the victim of either Mother's intentional deception or misapprehension of the critical fact of paternity. The Court cited IC 16-37-2-2.1(i) [now subsection (l)] and its restrictions on disestablishing paternity, and noted that this statute reflects the legislature's intent to provide assistance to a man who signed a paternity affidavit due to fraud, duress, or material mistake of fact. Although there is public policy in favor of establishing paternity, there is co-existing substantial public policy in correctly identifying parents and their off-spring. Legal fathers may challenge paternity only in rare and specific circumstances, and the challenge must be made by evidence that has become available independently of court action. The Court noted that: (1) Mother advised Legal Father he was the only potential father; (2) two genetic tests showed otherwise; and (3) thus, Legal Father provided unrefuted testimony of circumstances amounting to either fraud or a material mistake of fact. The Court held that this satisfied the first prong of IC 16-37-2-2.1(i) [now subsection (l)], but the affidavit could be rescinded only if the court-ordered genetic test requested by the Legal Father excludes him as the child's biological father.

In **Paternity of Davis v. Trensey**, 862 N.E.2d 308, 312-14 (Ind. Ct. App. 2007), the Court held that methods of attacking the presumption of paternity created by a paternity affidavit are not limited to the procedure set out in IC 16-37-2-2.1. Mother informed Father that he was probably the father of the child, but Mother's fiancée signed a paternity affidavit and the

child took his last name. The County Prosecutor's Office filed a petition to establish paternity in Father. The trial court ordered Mother, Father, and the child to submit to genetic testing, which showed that Father was the biological father. The trial court entered an order establishing paternity in Father, changing the child's last name, and directing Father to pay child support. This paternity action was governed by IC 31-14-4 et seq., pursuant to which the trial court correctly ordered Father's genetic test and entered a finding of paternity against Father. Under IC 16-37-2-2.1(m) [now subsection (p)], executing a paternity affidavit "conclusively establishes the man as the legal father of the child;" but that presumption of paternity can be rebutted. The methods available to negate the paternity affidavit vary depending upon the identity of the party that wishes to rebut paternity. The rebuttal procedures under IC 16-37-2-2.1 are applicable for "a man who is a party to a paternity affidavit under" IC 16-37-2-2.1(h) [now subsection (k)], and that man, the fiancé, had not initiated this paternity action. Therefore, according to the Court, IC 16-37-2-2.1 did not apply. Since the prosecutor filed the paternity action, the action was governed by IC 31-14-4-1 which authorized the Prosecutor's Office to file it, and by IC 31-14-6-1 which authorizes "any party" in such a paternity action to petition for genetic testing and compels trial courts to grant those motions. IC 31-14-7-1(3) provides that "[a] man is presumed to be a child's biological father if … the man undergoes a genetic test that indicates with at least a ninety-nine percent (99%) probability that the man is the child's biological father." The Court also held that, by entering a finding of paternity in Father, the trial court "implicitly negated" the fiancé's paternity affidavit.

In **In Re Paternity of N.R.R.L.**, 846 N.E.2d 1094, 1096-7 (Ind. Ct. App. 2006), *trans. denied*, the Court affirmed the trial court's order denying a motion to dismiss the paternity petition. Although Adjudicated Father is a necessary party to a paternity action, any error arising from the failure of Biological Father to name Adjudicated Father as a party was remedied when the trial court allowed him to intervene. The Court noted that (1) although Adjudicated Father's execution of the paternity affidavit had established him as the child's legal father, it did not preclude another man's attempting to establish paternity of the child; and (2) genetic testing established Biological Father's status as the biological father, thus raising the presumption under IC 31-14-7-1(3) that he is the child's biological father.

VII. E. Use of Paternity Affidavit by Biological Parents Who Marry After Birth of the Child

When the biological parents marry after the birth of the child, they may wish to execute a paternity affidavit to avoid any subsequent legal contest regarding the legal paternity of the child. IC 16-37-2-16 provides that if a man claiming to be the child's biological father marries the mother of a child born out of wedlock, the man and the mother may produce proof of the marriage and execute a paternity affidavit in accordance with IC 16-37-2-2.1. The local health officer receiving this documentation is then to "remove all evidence of the fact that the child was born out of wedlock from the child's record of birth," and forward the information to the State Department of Health for the same corrections to be made on the child's birth certificate. IC 16-37-2-16.

IC 16-37-2-15 provides: "If the parents of the child born out of wedlock in Indiana later marry, the child shall legally take the last name of the father."

In **Seger v. Seger**, 780 N.E.2d 855 (Ind. Ct. App. 2002), the Court affirmed the trial court's order rescinding the paternity affidavit executed by Husband and Mother, and finding that there were no children born of the marriage. Two years after Husband and Mother's marriage, they executed a paternity affidavit regarding the paternity of the Mother's son born seven years prior to the marriage. Mother never advised Husband that he was the father of the child and it was undisputed that Mother had earlier been married to the child's biological father. After about five years of

marriage, Husband filed a petition for dissolution stating that no children were born of the marriage. Following a hearing, the trial court found that the paternity affidavit was executed in a fraudulent manner, because both Husband and Mother knew that Husband was not the child's biological father; ordered the paternity affidavit rescinded; and determined that there were no children born of the marriage. On appeal, the Court (1) affirmed, noting that neither party held any "reasonable belief" that Husband was child's father at the time of execution and both parties agreed that Husband was not child's father; and (2) found, contrary to Mother's urging, that execution of the paternity affidavit was not tantamount to Husband's adoption of the child, noting that there is not equitable adoption in Indiana.

## VIII. ESTABLISHING OR DISESTABLISHING PATERNITY IN DISSOLUTION PROCEEDINGS

The seminal case on establishing and disestablishing paternity in dissolution proceedings is **Russell v. Russell**, 682 N.E.2d 513, 515-8 (Ind. 1997). Mother alleged in one of her divorce filings that Husband was not the biological father of one of the children, and after a series of procedural maneuvers involving motions for DNA testing and agreed entries, the court granted the divorce and awarded custody of all the children to the husband. The Indiana Supreme Court determined that before a divorce court can make a custody judgment it must find that it has jurisdiction to make such a ruling by determining the child is a "child of the marriage", which is defined as including the biological and adopted child of both parties, whether the child was born before or during the marriage, as long as both parties are the natural or adopted parents of the child. A divorce court may accept the stipulation of a husband and a wife that a child is a child of the marriage, and while a ruling on this is binding on the husband and wife, it does not prevent an alleged father from attempting to establish paternity. Furthermore, if either parent disputes that a child is the child of the marriage, that issue can be litigated in the context of the divorce case. The divorce court has the authority to follow the procedures for making paternity determinations, including ordering genetic tests. In situations in which the paternity issue is vigorously litigated, the divorce ruling will generally constitute a binding judgment of paternity in all but the most extraordinary circumstances that will preclude the husband, wife, and also the child and putative father from challenging the judgment in a collateral juvenile court proceeding.

A full trial in a dissolution case on the merits of a paternity issue will have preclusive effect, but the dissolution decree alone (without full litigation of the paternity issue) is not fully binding as to the issue of paternity as to a nonparty to the dissolution proceeding, i.e., a man other than the husband who wishes to establish paternity. **In Re Paternity of J.W.L.**, 682 N.E.2d 519, 520 (Ind. 1997). In J.W.L. the Court ruled that the child was not barred under res judicata from filing a paternity action against her alleged father despite a ruling in a prior dissolution proceeding in Florida that the child was a child of the marriage of his mother and her husband. This is consistent with **In Re S.R.I.**, 602 N.E.2d 1014 (Ind. 1992). For other cases consistent with the Russell opinion, see **Friar v. Taylor**, 545 N.E.2d 599 (Ind. Ct. App. 1989) (dissolution court lacked jurisdiction to determine custody of two children conceived and born during marriage, but whose biological father was not the husband); **Cooper v. Cooper**, 608 N.E.2d 1386 (Ind. Ct. App. 1983) (dissolution court has authority to order blood testing to determine biological father).

### VIII.A. Disestablishing Paternity in Dissolution Proceeding

In **Russell v. Russell**, 682 N.E.2d 513, 518-9 (Ind. 1997), the Court noted that a husband and wife may attempt to stipulate or otherwise agree in the divorce court that the child is not a child of the marriage (an agreement of non-paternity), but it is within the discretion of the court to withhold approval of the agreement until paternity has been established in another man. The

Court stated that in such situations it is not improper to file a paternity action in juvenile court collateral to the pending divorce.

In **Varble v. Varble**, 55 N.E.3d 879, 886 (Ind. Ct. App. 2016), the Court affirmed the circuit court's denial of Alleged Father's motion for relief from judgment which he had filed in the dissolution case of Mother and Legal Father. The Settlement Agreement and Dissolution Decree stated that there were two children born of the marriage, one of whom is A.C. Mother and Legal Father agreed to share joint legal and joint physical custody of the children. Four years later, Alleged Father filed a Verified Petition to Establish Paternity of A.C. The Court concluded that the trial court did not abuse its discretion in denying Alleged Father's motion for relief from judgment in the dissolution case. Alleged Father argued that a child who is not the child of both parties to a dissolution is not a child born of the marriage, that a dissolution court does not have subject matter jurisdiction over that child, and that orders issued without subject matter jurisdiction are void. Legal Father maintained that a dissolution decree in which a child is stipulated to be a child of the marriage has the effect of establishing legal paternity, and that such orders are not void but are voidable and retain their legal force and effect until successfully challenged or reversed. The Court concluded that the matter of the custody of A.C. was before the dissolution court from the inception of the dissolution action between Mother and Legal Father. To the extent Alleged Father cited Russell in asserting the dissolution court did not have jurisdiction over A.C., the Court observed that the parties did not dispute at the time of the dissolution that the court had authority to enter the decree containing terms of custody, parenting time, and support of A.C.

In **Jo.W. v. Je.W.**, 952 N.E.2d 783, 785-7 (Ind. Ct. App. 2011), the Court affirmed the trial court's decision. Since Father only alleged intrinsic fraud, and not extrinsic fraud or fraud upon the court, Father's appeal was governed by T.R. 60(B)(3) and was subject to that rule's time limits. Father's motion to disestablish paternity was not timely under T.R. 60(B)(3), and that the trial court properly denied it. Seven years after the child's birth and four years after Mother's and Father's divorce, Father filed a motion to disestablish paternity alleging that he could not be the father of the child, since he was incarcerated at the time the child was conceived. The trial court denied his motion. Father's motion for relief of judgment alleged fraud by Mother, in that Mother had filed her petition for dissolution stating that the child was a child born of the marriage. According to T.R. 60(B)(3), a motion based on intrinsic fraud, extrinsic fraud, or fraud upon the court must be brought within one year of the judgment. Since Father waited four years to bring his claim, he could not seek relief under T.R. 60(B)(3). However, the Court noted that T.R. 60(B) does not prevent a court from considering an independent action to relieve a party from a judgment; this independent action must be brought within a reasonable time and must allege whether there was extrinsic fraud or fraud upon the court. The Court opined that there was no extrinsic or intrinsic fraud upon the court because of Mother's naming the child in the dissolution petition as a child of the marriage. The Court noted that Mother was required by IC 31-15-2-5 to name the child in the dissolution petition as a child of the marriage because Indiana law presumes that that a man is the father of a child when "(A) [the] man and the child's biological mother are or have been married to each other; and (B) [the] child is born during the marriage or not later than three hundred (300) days after the marriage is terminated by death, annulment, or dissolution." (citing IC 31-14-7-1). Furthermore, the Court noted that Father did not argue or present any evidence that Mother committed fraud upon the court by creating "an unconscionable plan or scheme ... to improperly influence the court's decision." Consequently, the case was properly before the court for determination, and the elements of fraud upon the court were not satisfied. Lastly, the Court briefly opined that Father had committed invited error, since he had not contested any of the issues, responded to Mother's petition, or even attended the hearing.

The Indiana Supreme Court in **In Re Paternity of P.S.S.**, 934 N.E.2d 737, 740-1 (Ind. 2010) affirmed the juvenile court's denial of Father's motion for relief from judgment, concluding that Father's appeal was untimely. Four children were born during the marriage of Father and Mother, but the dissolution court approved the parties' mediated settlement in which they agreed that one child born during the marriage was the biological child of a third person. Seven years later, Father filed a pro se petition in juvenile court to establish another man as the child's father. Father alleged fraud by Mother and Putative Father. The juvenile court dismissed Father's petition because the dissolution court had exclusive jurisdiction in the dissolution proceedings and the issue of paternity had been raised and resolved in the dissolution proceedings. Father appealed. The Indiana Supreme Court affirmed the juvenile court's judgment on grounds of timeliness. The Court declined to entertain Father's attempted but untimely appeal. The Court also observed that Father advanced no argument (such as newly discovered evidence or extraordinary circumstances occurring since the entry of the trial court's dismissal order) explaining how the trial court may have abused its discretion. Instead the substance of Father's claim was a challenge to the merits of the trial court's dismissal order.

In **In Re Marriage of Huss**, 888 N.E.2d 1238, 1241-44 (Ind. 2008), which is discussed in more detail at IV.R.6., this Chapter, the Court affirmed the dissolution trial court's award to Husband of the custody of all four of Mother's children, including the youngest child who was not the biological child of Husband. When the fourth child was born, Mother listed Husband as the father on the birth certificate and gave the child Husband's last name. Four years later, Husband and Mother sought divorce in the dissolution court. During pendency of the dissolution proceeding, Mother filed for, and received a judgment in the paternity court establishing paternity of the fourth child in a man other than Husband, and awarding her custody of the fourth child. The dissolution court granted the divorce and, among other things, awarded custody of all four children to Husband. Mother appealed. The Court held that (1) the dissolution court did not err by failing to give effect to the intervening paternity judgment by the paternity court, where the subject matter of child custody of all four children, including the child who was the subject of the paternity judgment, was before the dissolution court from the inception of the dissolution action which was pending prior to Mother's initiation of the paternity proceedings; (2) despite Mother's contention to the contrary, the dissolution trial court had jurisdiction over the child of whom Husband was not the biological father; and (3) also contrary to Mother's contentions, the dissolution trial court's authority to determine custody of all four children, including the child of whom Husband was not the biological father, was not impaired by the paternity statute's general presumption of sole custody for the biological mother; and, even if Mother were to be considered sole custodian of the child by reason of the paternity judgment or the operation of the paternity statute, the dissolution court in this case would be authorized to consider whether to make a superseding award of child custody to Husband as a non-biological parent of the child.

In **Richard v. Richard**, 812 N.E.2d 222 (Ind. Ct. App. 2004), the Court held that a presumed father cannot overcome the presumption of paternity by merely presenting testimony of his identical twin brother that the child is probably his and he is willing to pay child support. Here, the presumed father met two of the criteria set forth in IC 31-14-7-1: (1) he was married to the biological mother and the child was born not later than three hundred days after the dissolution; and (2) genetic testing indicated a ninety-nine percent or greater probability that he was the child's biological father. The presumed father's identical twin also tested at a probability greater than ninety-nine percent, but the Court found nothing in the brother's testimony, or elsewhere in the record, that constituted the direct, clear, and convincing proof necessary to overcome the statutory presumption that presumed father was the biological father as set forth in the holding in Minton v. Weaver, 697 N.E.2d 1259, 1260 (Ind. Ct. App. 1998), *trans. denied*.

In **Seger v. Seger**, 780 N.E.2d 855 (Ind. Ct. App. 2002), the Court affirmed the trial court's order rescinding the paternity affidavit executed by Husband and Mother and finding that there were no children born of the marriage. Two years after Husband and Mother were married, they executed a paternity affidavit regarding the paternity of Mother's son born seven years prior to the marriage. Mother never advised Husband that he was the father of the child and it was undisputed that Mother had earlier been married to the child's biological father. After about five years of marriage, Husband filed a petition for dissolution stating that no children were born of the marriage. Following a hearing, the trial court found that the paternity affidavit was executed in a fraudulent manner, because both Husband and Mother knew that Husband was not the child's biological father; ordered the paternity affidavit rescinded; and determined that there were no children born of the marriage. On appeal, the Court (1) affirmed, noting that neither party held any "reasonable belief" that Husband was child's father at the time of execution and both parties agreed that Husband was not child's father; and (2) found, contrary to Mother's urging, that execution of the paternity affidavit was not tantamount to Husband's adoption of the child, noting that there is not equitable adoption in Indiana.

In **Cochran v. Cochran**, 717 N.E.2d 892 (Ind. Ct. App. 1999), Father initially listed two children of the marriage in his divorce petition, but later filed a petition to establish paternity requesting DNA testing. Testing revealed that the older child was not Father's biological child. The Court held that the dissolution court correctly found only the younger child to be a child of the marriage. Id. at 894. Mother argued that the trial court granted father's request to "disestablish paternity"; the Court stated:

> [Mother] asserts that the dissolution court created a fatherless child and "disenfranchised U.C. [child]." Yet, under Russell if the dissolution court did not determine if U.C. was a child of the marriage, it would lack the authority to enter support, custody, or visitation orders. Moreover, a child born to a married woman, who is fathered by a man other than her husband is deemed to be a "child born out of wedlock." This longstanding common law rule combined with the fact that a child is presumed to be a child of the marriage unless rebutted, leads us to conclude that this is not a case where a man is seeking to disestablish his own paternity status. Such status never existed in the first place. Id. at 894 (citations omitted).

VIII.B. GAL Appointment Required When Presumed Father Challenged in Divorce Proceeding

In **Pinter v. Pinter**, 641 N.E.2d 101 (Ind. Ct. App. 1994), the Court noted that the divorce court erred in failing to appoint a guardian ad litem for the child because an appointment is required when a party seeks to overcome the presumption that a child born in wedlock is legitimate.

VIII.C. Laches and Equitable Estoppel

It is possible for paternity adjudications to be barred by laches or equitable estoppel. For a case that well lays out laches and how it may play into paternity cases, see **In Re Paternity of R.M.**, 939 N.E.2d 1114, 1119-22 (Ind. Ct. App. 2010) (Najam, J. dissenting), where the Court reversed the trial court's grant of Mother's motion to dismiss Putative Father's petition to establish paternity of the twelve-year-old child, and remanded the case for further proceedings. The Court held that laches may bar a paternity action if the party asserting the defense establishes all of its elements. The Court further concluded that an issue of fact existed as to whether Putative Father's delay in establishing paternity prejudiced Mother or the child; therefore, the evidence before the trial court was insufficient to grant summary judgment. Mother and Presumptive Father married and raised the child together. Presumptive Father suddenly died ten years later, and the child received Social Security survivor benefits. Putative Father filed a petition to establish paternity. Mother alleged that Putative Father's petition was barred by the doctrine of laches. The trial court held that waiting for twelve years to assert a right of which Putative Father was aware and

waiting for over two years after a potential change in circumstances barred Putative Father from initiating an action to overcome the presumption of paternity in favor of Presumptive Father. Putative Father appealed. In reaching its decision, the Court reasoned laches requires: (1) inexcusable delay in asserting a known right; (2) an implied waiver arising from knowing acquiescence in existing conditions; and (3) a change in circumstances causing prejudice to the adverse party. The Court opined that, with regard to paternity actions, disturbance in the child's life that will result from a paternity action is insufficient to establish prejudice from unreasonable delay. The Court observed that the trial court's finding in support of the third requirement of laches (a change in circumstances causing prejudice to the adverse party) was not supported by Mother's designated evidence. The Court said that "prejudice to [the child] is the primary concern and that determination involves a fact-sensitive consideration of the child's best interests, including factors beyond finances and family stability.

For a case that addresses equitable estoppel in paternity matters, see **Driskill v. Driskill**, 739 N.E.2d 161 (Ind. Ct. App. 2000), *trans. denied,* which affirmed the trial court's finding that Mother was judicially estopped from attacking her ex-husband's status as the father of a child born when the ex-husband and Mother were living together but before they married. The ex-husband was listed as the father on the child's birth certificate and the child was acknowledged in the dissolution decree and in three subsequent agreed entries signed by Mother as a "child of the marriage." The dissolution decree had awarded the ex-husband visitation, but Mother failed to allow the visitation despite Mother's having entered into at least three agreed entries pursuant to the ex-husband's filing of informations for contempt. The agreed entries acknowledged the ex-husband as the father of the child. This decision resulted from Mother's appeal of the trial court's denial of Mother's motion to set aside the provisions of the dissolution decree granting visitation to the ex-husband in which she asserted that there was a legal dispute as to the child's paternity.

For more cases where litigating paternity was barred by laches or equitable estoppel, see **L.M.A. v. M.L.A.**, 755 N.E.2d 1172 (Ind. Ct. App. 2001) (Mother precluded from challenging dissolution court's jurisdiction to decide custody of child where Mother had stipulated child was child of marriage during initial dissolution proceeding); **Vanderbilt v. Vanderbilt**, 679 N.E.2d 909 (Ind. Ct. App. 1997) (Mother was barred by latches from rebutting the presumption that her husband was the father of her child in the pending dissolution proceeding, because the mother had assured her husband that he was the biological father of the child, contrary to blood test results, and the mother had not disputed the dismissal of an earlier paternity action filed by a third party); and **Russell v. Russell**, 682 N.E.2d 513, 518-519 (Ind. 1997) (dicta noting that equitable estoppel may prevent a mother from denying the husband's paternity if the mother is not seeking to establish paternity in another man).

For a case that was not barred by laches or equitable estoppel, see **In Re Paternity of J.W.L.**, 682 N.E.2d 519 (Ind. 1997) (Court ruled that a child was not estopped from bringing a paternity action against an alleged father, because the child had not been a party to an earlier dissolution proceeding where the child had been found to be a child of the marriage between the mother and the mother's husband).

VIII.D. Awarding Custody and Visitation to Husband Who is Not Biological Father

It is possible for a husband who is not the biological father of a child to be given custody or visitation or parenting time.

For cases where a husband was given custody of a child who was not his biological child, see:

**L.M.A. v. M.L.A.**, 755 N.E.2d 1172 (Ind. Ct. App. 2001), where the Court affirmed the trial court's order granting custody of the two children to Husband despite a probate court finding

that another man was the biological father of the younger child, where the parties' marriage had been dissolved after they had stipulated that there were "two children of the marriage." The Court held that, because Wife had stipulated to the trial court that the younger child was a child of the marriage, she was precluded from later challenging that determination in the dissolution court. At the time the parties' marriage was dissolved, the trial court had established joint custody of the two children. Later, Wife filed a petition to modify custody, and while that petition was pending, filed a petition in probate court alleging that another man was the younger child's father. The probate court found the other man to be the child's "legal father" but deferred any decisions regarding custody and visitation to the trial court herein. Thereafter, Husband also filed a petition to modify custody. Following an evidentiary hearing the trial court awarded the custody of both children to Husband after (1) considering the "best interests of the child" pursuant to "the custody statute and the de facto custodian statute;" (2) noting that the other man that the probate court had found to be the "legal father" had had "little or no contact with" the younger child and provided no support for him whatsoever; and (3) concluding that because Husband had "established a meaningful relationship" with the younger child and was "the only father he has ever known," it would not be in the child's best interest to "deprive" him of his relationship with Husband "at this stage in the child's life." On appeal, Wife unsuccessfully contended "the trial court erroneously exercised jurisdiction by issuing orders regarding custody and visitation with [the younger child] after [the child] was determined not to be a child of [the] marriage in a collateral paternity action."

**In Re Marriage of Huss**, 888 N.E.2d 1238, 1248-49 (Ind. 2008) where the Court affirmed dissolution trial court's award to Husband of custody of all four of Wife's children, including youngest child who was not biological child of Husband.

**Nunn v. Nunn**, 791 N.E.2d 779 (Ind. Ct. App. 2003), where the Court held that the dissolution trial court vested with jurisdiction to consider awarding custody of stepdaughter to Husband despite DNA results excluding Husband as father, because of inclusion in the custody statutes of IC 31-17-2-8.5 and IC 31-14-13-2.5, regarding consideration of de facto custodian factors.

**In Re the Paternity of L.K.T.**, 665 N.E.2d 910 (Ind. Ct. App. 1996), where the Court of Appeals found that the husband who raised the child, but was not the biological father, could be given custody in the dissolution proceeding, because the husband had overcome the presumption favoring custody in the biological father based on the more flexible standard of Turpen v. Turpen, 537 N.E.2d 537 (Ind. Ct. App. 1989).

For a case where a husband was not given custody of a child who was not his biological child, see **Friar v. Taylor**, 545 N.E.2d 599 (Ind. Ct. App. 1989), where the Court of Appeals ruled that the dissolution court lacked jurisdiction to award the husband custody of the two children not born of the marriage.

For a case addressing granting husbands who are not biological fathers of a child visitation of that child, see **Francis v. Francis**, 654 N.E.2d 4, 7 (Ind. Ct. App. 1995), that the trial court could award visitation to the mother's husband who had raised the children, but who was not the biological father. The Court stated that visitation can be awarded when a third party demonstrates the "existence of a custodial and parental relationship and that visitation would be in the children's best interest." The Court noted that protests by the custodial parent that third party visitation will be harmful to the family is not enough to deny visitation in all cases. The Court further found untenable the custodial mother's argument that she reduced the husband's visitation based on the

advice of a therapist, stating "there is no-advice-of-therapist defense which excuses disobeying a court order."

See also **Varble v. Varble**, 55 N.E.3d 879, 886 (Ind. Ct. App. 2016) (Court affirmed the circuit court's denial of Alleged Father's motion for relief from judgment which he had filed in the dissolution case of Mother and Legal Father; concluded that the matter of the custody of A.C. was before the dissolution court from the inception of the dissolution action between Mother and Legal Father).