# CHAPTER 14
# GUARDIANSHIP/THIRD-PARTY CUSTODY

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# CHAPTER 14
# GUARDIANSHIP/THIRD-PARTY CUSTODY

## I. DEFINITIONS

### I. A. Statutory Definitions

#### I. A. 1. Guardian

The definition of guardian for purposes of juvenile law is set forth at IC 31-9-2-49(b), and means a person appointed by a court to have care and custody of a child, the child's estate, or both. Title 29, which governs guardianships of a minor, provides its own definition of guardian. A guardian as defined by IC 29-3-1-6, is a person who is a fiduciary and is appointed by a court to be a guardian or conservator responsible for the person or property of a minor, as the court directs. This definition includes a temporary guardian, a limited guardian, and a successor guardian, but does not include a guardian ad litem. The terms guardian and conservator are interchangeable.

#### I. A. 2. Guardianship/Third-Party Custody

Guardianship is not formally legally defined by Indiana Code. IC 31-34-21-7.5(c)(1)(C) and (D) provide a description of legal guardianship in the context of dispositional decrees in CHINS cases. In that context, a legal guardian is a caretaker in a judicially created relationship. The relationship is intended to be permanent and self-sustaining; some parental rights with respect to the child, including care, custody, and control of the child, as well as decision making concerning the child's upbringing.

This definition of guardianship differs from other Indiana statutes and case law which provide that guardianship is not permanent, and indeed can be terminated by filing a petition to terminate the guardianship when it is no longer necessary. IC 29-3-12-1(c). See **Matter of Guardianship of R.B.**, 619 N.E.2d 952 (Ind. Ct. App. 1993), and this Chapter at IX. for detailed discussion of termination of guardianship.

Third-party custody does not have a statutory definition. It is used herein to refer to situations, other than guardianships, in which a child is legally placed in the custody of a person(s) who is not the child's parent. Guardianships are actually third-party custodianships created pursuant to, and governed by Title 29.

#### I. A. 3. Minor

Because guardianship law refers to a person under the age of eighteen as a minor rather than a child, the term minor, rather than child, will be used throughout this chapter to more accurately reflect Title 29 statutes and case law. In discussing statutes throughout this chapter, the term "minor" instead of the broader term "incapacitated person", which is frequently used in the guardianship statues, will be employed.

A guardian may be appointed for an incapacitated person or a minor. IC 29-3-1-10 defines "minor" as an individual who is less than eighteen years of age and who is not emancipated. Before the court appoints a guardian, the court must adjudicate either minority or incapacity. IC 29-3-5-2.

Guardianship terminates by operation of law when the minor reaches the age of eighteen years. IC 29-3-12-1. However, there are some exceptions to that rule, found at IC 29-3-12-6 and IC 29-3-12-7. IC 29-3-12-6(a) provides that if a protected person is a minor who has

been adjudicated an incapacitated person, the court may not terminate the guardianship when the minor turns eighteen years old. IC 29-2-12-6(b) provides that if a minor is a protected person who is also a recipient or beneficiary of financial assistance provided by DCS through a guardianship described in IC 31-9-2-17.8(1)(E), the court may not terminate the guardianship when the minor turns eighteen years old.

IC 29-3-12-7 applies to the guardianship of a minor who has not been adjudicated an incapacitated person. IC 29-2-12-7(b) provides that a protected person who is at least seventeen years old and the guardian of the protected person may jointly petition the court to extend the duration of the guardianship beyond the date on which the protected person turns eighteen years old earlier of the following: (1) a termination date, if any, set forth in the petition; or (2) the date the protected person attains twenty-two (22) years of age. IC 29-2-12-7(c) requires that this petition must be verified. IC 29-2-12-7(d) states that the court, after notice and hearing, may extend a guardianship under this section if the court finds that extending the guardianship is in the best interests of the protected person. This extension of a guardianship does not place the protected person under a legal disability.

I. B. Case Law

Indiana case law has reinforced the principle that guardianship is a judicially created means of providing care for a child. In **Matter of Guardianship of Thompson**, 514 N.E.2d 618, 621 (Ind. 1987), the Indiana Supreme Court opined that it was necessary to have someone in legal control of the child's custody to be responsible for providing her day to day care. The Court stated that this was the purpose of the guardianship procedures in our law. The Court further noted that a final determination of the child's fate was yet to be made. In **Goltry v. Goltry**, 140 Ind. App. 76, 222 N.E.2d 407 (1966), the Court of Appeals stated that a guardianship is for the protection and benefit of its ward, not its guardian. In **E.N. Ex. Rel. Nesbitt v. Rising Sun-Ohio**, 720 N.E.2d 447, 451 (Ind. Ct. App. 1999), the Court concluded that the best interest of the child or incapacitated person is implicit in the guardianship statute.

See this Chapter at VI.D.2 and VI.D.3 for a discussion of the case law currently applicable to the creation of guardianship and third-party custody; see this Chapter at IX.D for detailed discussion of case law on termination of guardianship.

## II. SCOPE AND PURPOSE OF CHAPTER

The purpose of this Chapter is to provide basic information concerning children's guardianship law, including statutes and case law governing appointment, removal, and termination of guardianship. CHINS practitioners should have an understanding of guardianship law for two reasons. The first reason is that some children for whom CHINS petitions have been filed have judicially appointed guardians who are parties to the CHINS proceeding. See IC 31-34-9-7. In these situations, the guardian as well as the parents may need services so that all possible options for the child's safety and permanency can be fully explored. Counsel should determine whether any limitations have been placed on the guardian's authority by the appointing court. The second reason why knowledge of guardianship law is essential for CHINS practitioners is that appointment of a guardian is a permanency option delineated at IC 31-34-21-7.5(c)(1)(C) and (D). Counsel for DCS may be requested to facilitate the appointment of a guardian. See 465 IAC 2-8-4 and this Chapter at X. for further discussion of assisted guardianship. Defense counsel may decide to propose guardianship appointment as an alternative to a CHINS adjudication or a termination of the parent-child relationship proceedings. Because very few CHINS have financial resources, this Chapter does not provide information concerning guardian's accounting duties or responsibility for children's property.

## III. JURISDICTION AND VENUE

III. A. Statutes Concerning Jurisdiction

The court which has probate jurisdiction in the county has exclusive original jurisdiction over all matters concerning guardians. IC 29-3-1-3, IC 29-3-2-1(b).

Exclusive original jurisdiction does not apply in several situations. IC 31-30-1-1 and IC 29-3-2-1 give the juvenile court exclusive original jurisdiction (1) in guardianship of the person proceedings for a child adjudicated as a CHINS who is the subject of (a) an approved permanency plan providing for the appointment of a guardian of the person and (b) a pending CHINS proceeding; and (2) over matters related to those guardians and guardianships. See this Chapter at III.B.3. for a more detailed discussion.

Courts with jurisdiction over a child custody action under IC 31-14-10 [Hearing to Determine Support, Custody, and Parenting Time Following Determination of Paternity], IC 31-17-2-1 [Actions for Child Custody and Modification of Child Custody Orders; Jurisdiction]; or IC 31-21-5 [Uniform Child Custody Jurisdiction Act; Jurisdiction] have original and continuing jurisdiction over custody matters relating to minors. IC 29-3-2-1. Regarding interstate subject matter jurisdiction generally, see Chapter 3 at II.G.1, 2, 3, and 4.

Lastly, a mental health court under IC 33-33-49 has jurisdiction concurrent with the court in mental health proceedings under IC 12-26 relating to guardianship and protective orders. IC 29-3-2-1.

III. B. Case Law Concerning Jurisdiction

**In Re Paternity of B.J.N.**, 19 N.E.3d 765, 769 (Ind. Ct. App. 2014), is a consolidated appeal arising from orders issued by the Decatur Circuit Court (Decatur Court) and the Hendricks Circuit Court (Hendricks Court). The Court found that the Decatur Court had subject matter jurisdiction over the guardianship action; the Court disagreed with Father's arguments that, because he registered his out of state paternity determination with the Hendricks Court, that court had exclusive jurisdiction over the "paternity action", and the Decatur Court lacked jurisdiction to determine who would receive custody of the child at the time the Decatur Court issued its guardianship order. Guardian had previously filed the petition to obtain guardianship of the child Because Father conceded that he had consented to Guardian being appointed as the child's guardian in the Decatur Court, the Court of Appeals held that Father had therefore waived any objection to the Decatur Court's exercise of jurisdiction over this particular matter.

In **In Re Guardianship S.M.**, 918 N.E.2d 746, 749-50 (Ind. Ct. App. 2009), the Court reversed and remanded the trial court's order appointing Aunt permanent guardian of two children. The children's parents had divorced in Vermillion County, Illinois (Illinois court), in 2002. The Court determined that the trial court lacked subject matter jurisdiction to modify the Illinois court's child custody order; therefore, its order appointing Aunt the children's permanent guardian was void *ab initio*. The Court found that IC 31-21-5-3(1) did not apply because neither party suggested that the Illinois court had determined that it lacked jurisdiction or that Indiana would be a more convenient forum. The Court found that IC 31-21-5-3(2) did not apply because it requires a determination that the parents and others "do not presently reside in the other state" and it was undisputed that Father resides in Illinois. The Court opined that Father was entitled to custody of the children as a matter of law upon Mother's death.

In **In Re Guardianship of M.E.T.**, 888 N.E.2d 197, 198-99 (Ind. Ct. App. 2008), an adult guardianship case, the Court held that the trial court did not have subject matter jurisdiction to

determine the guardianship of a nonresident of Indiana. The Court based its finding on IC 29-3-2-1(a)(1) which provides that the probate court has jurisdiction of "[t]he business affairs, physical person, and property of every incapacitated person and minor residing in Indiana," and IC 29-3-2-5 which provides that "[t]he residence of a person shall be determined by actual presence rather than technical domicile."

In **In Re Guardianship of K.T.**, 743 N.E.2d 348 (Ind. Ct. App. 2001) the Court affirmed the modification of the former guardians' visitation with the child, made by the trial court which had lost jurisdiction when the guardianship was terminated. The former guardians had waived any objection to the trial court's exercise of jurisdiction over the case by failing to raise the issue at the earliest available opportunity.

See also **In Re Guardianship of J.E.M.**, 870 N.E.2d 517 (Ind. Ct. App. 2007) (finding that any right to visitation with child which Maternal Grandmother may have is provided by Grandparent Visitation Act (GVA), IC 31-17-5, and, although her visitation was not originally granted in accordance with GVA, inasmuch as no party objected to original order, it cannot now be challenged on basis that it was not issued in compliance with the GVA).

In **Comm. Hosp. of Ind. v. Estate of North**, 661 N.E.2d 1235, 1239 (Ind. Ct. App. 1996), the Court defined jurisdiction over the subject matter as the power to hear and determine cases of the general class to which the proceedings then before the court belong. The Court further stated that if a tribunal possesses the power to determine cases of the general class to which the particular case belongs, then it possesses subject matter jurisdiction to consider the particular case, absent specific and timely objections to the jurisdiction over the particular case. The Court opined that "when the legislature has intended a particular court to have exclusive jurisdiction, it has said so."

For more information on specific jurisdiction issues as it pertains to guardianship, see this Chapter at III.B.1 (dissolution/paternity custody and guardianship); this Chapter at III.B.2 (UCCJA); and this Chapter at III.B.3 (CHINS and guardianship).

III. B. 1. Dissolution/Paternity Custody and Guardianship Jurisdiction

The jurisdictional exceptions in statutes and case law are significant in considering the appointment of a guardian because if paternity has been established judicially or if the marriage of the child's parents has been dissolved, statutes and case law indicate that probate court will not have jurisdiction to appoint a guardian. A guardianship so established could be voidable. Establishing a third party custodianship in the dissolution or paternity court which has ongoing jurisdiction over the child will be needed instead of guardianship. One exception to this rule is when the parents' marriage has been dissolved and one parent subsequently dies. The dissolution court does not retain jurisdiction over the child after a parent's death, see **Atteberry v. Atteberry**, 597 N.E.2d 355 (Ind. Ct. App. 1992), so the probate court would have jurisdiction to appoint a guardian if one of the child's parents is dead.

Unlike dissolution proceedings, paternity actions and paternity jurisdiction survive the death of a parent. IC 31-30-1-1; IC 29-3-2-1.

Case law indicates that IC 29-3-2-1 may not, in some cases, be a bar to obtaining guardianship in cases when the child is the subject of a paternity establishment, but there has been no litigation of custody matters in the case. See **In Re Adoption of L.T.**, 9 N.E.3d 172, 176-77 (Ind. Ct. App. 2014) (Court reversed the trial court's decision which dismissed the guardianship for lack of subject matter jurisdiction and granted Father immediate custody of

the child; for further discussion of this case see this Chapter at III.D.2. and IX.D); see also **In Re B.C.**, 9 N.E.3d 745, 752 (Ind. Ct. App. 2014) (Marion Probate Court had jurisdiction to enter its guardianship order; Montgomery Circuit Court had jurisdiction to enter the later occurring agreed paternity order, but not to make any order regarding custody, which had first been addressed by Marion Probate Court).

Case law addressing the conflict between paternity proceeding or a dissolution proceeding and a guardianship proceeding includes:

In **In Re Adoption of L.T.**, 9 N.E.3d 172, 176-77 (Ind. Ct. App. 2014), the Court reversed the trial court's decision which dismissed the guardianship for lack of subject matter jurisdiction and granted Father immediate custody of the child. The Court remanded the case with instructions to conduct a hearing in the best interests of the child. The Court held that (1) although Hamilton County Superior Court did not lack subject matter jurisdiction, the issue was improper venue; (2) the remedy for improper venue was to transfer the case to the correct venue, which was Marion County; (3) upon transfer, Marion Superior Court, Probate Division, was required to complete the proceedings that had commenced in Hamilton County. See this Chapter at III.D.2. and IX.D for further discussion.

In **In Re B.C.**, 9 N.E.3d 745, 752-4 (Ind. Ct. App. 2014), the Court reversed the Montgomery Circuit Court's paternity custody order, the Marion Probate Court's order dismissing the guardianship, and the Marion Probate Court's order dismissing Guardians' petition for adoption, and remanded for proceedings consistent with the opinion. A guardianship was first sought for the out of wedlock born child in Marion Probate Court; later, an agreed entry was approved by Montgomery Circuit Court, which also made orders regarding custody, and then a petition for adoption was filed in the Marion Probate Court. The Court found that Marion Probate Court had jurisdiction to enter its July 31, 2012 order appointing Guardians as guardians of the child. The Court found that the Montgomery Circuit Court had jurisdiction to enter the agreed paternity order, which established Father's paternity of the child. However, the Court 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 **Fry v. Fry**, 8 N.E.3d 209, 215-17 (Ind. Ct. App. 2014), the Court affirmed the trial court's order which modified the custody of Mother's daughter (Daughter) to Mother's former Husband. The Court opined that a trial court adjudicating a dissolution case may award custody of a child to a natural or adoptive parent of a child or to a de facto custodian. The Court opined that the trial court not only has subject matter jurisdiction over a child custody determination for a child of the marriage, but also over a child custody determination involving a third party outside the marriage. Noting that Mother had raised no issue over the trial court's personal jurisdiction over the parties, the Court concluded that the trial court therefore possessed the two forms of jurisdiction required to render a valid judgment. The Court gave the following reasoning for its order: (1) IC 31-17-2-25 allows for emergency placement of a child with a person other than a parent; therefore, Husband had a legal right pursuant to this statute to seek such relief; (2) a trial court adjudicating a dissolution may award custody to a de facto custodian, citing In Re Custody of G.J., 796 N.E.2d 756, 762 (Ind. Ct. App. 2003), *trans. denied*, and IC 31-9-2-35.5; (3) Husband was entitled to consideration in custody matters as a de facto custodian; (4) instead of appealing the trial court's order which gave emergency custody to Husband as erroneous, Mother acquiesced in the custody order, seeking only to exercise parenting time as the court ordered.

In **Christian v. Durm**, 866 N.E.2d 826, 829 (Ind. Ct. App. 2007), *trans. denied*, the Court held that the trial court had not erred by proceeding with the merits of the third party custodian's claim despite the dismissal of the underlying dissolution petition and affirmed the trial court's award of custody of the child to the custodian rather than the parents. Father and Mother asserted that the trial court "lacked jurisdiction" to hear the custody petition because the petition for marital dissolution had been dismissed. Here, according to the Court, both subject matter and personal jurisdiction were satisfied, thus the issue was not "jurisdictional," but rather whether the trial court committed legal error by refusing to dismiss the intervenor's claim after the presentation of her case because the underlying claim had been voluntarily dismissed. The Court held that, as an intervenor, the custodian enjoyed equal standing with the other parties, Father and Mother, and she had a pending claim to pursue.

In **In Re Custody of G.J.**, 796 N.E.2d 756, 761-64 (Ind. Ct. App. 2003), *trans. denied*, the Court reversed and remanded the trial court's dismissal of the paternal uncle's petition seeking custody of the child. On review, the Court held that IC 31-17-2-3(2) means that any person "other than a parent" may seek custody of a child by initiating an independent cause of action for custody that is not incidental to a marital dissolution, legal separation, or child support action. The Court opined that IC 31-17-2-3 appeared unambiguous on its face, but was rendered ambiguous by other parts of Title 31 and cases. IC 31-9-2-13 defines "'Child', for the purposes of … IC 31-17, [as] a child or children of both parties to the marriage." Indiana courts have construed the predecessor to this section in conjunction with the predecessor to IC 31-17-2-3, as meaning that a court in a dissolution action had no jurisdiction to award custody of a child to one who is not the child's parent. See Russell v. Russell, 682 N.E.2d 513, 515-516 (Ind. 1997). The Court observed that the placement of Section 31-17-2-3(2) in the child custody article, with no mention of marital dissolution in subsection (2), suggested that it is relevant not just to dissolution proceedings. The Court also observed that a "child" with respect to a person "other than a parent" is not a "child" as defined in IC 31-9-2-13(a) or Russell. But, if a trial court lacked jurisdiction at all times to award custody to someone other than a parent under Chapter 31-17-2, then Section 31-17-2-3(2) would appear to be entirely meaningless. Such a construction of the statute would be absurd and would effectively amount to ignoring the existence and plain language of Section 31-17-2-3(2). Accordingly, the Court concluded that the uncle had standing to file a direct action for custody of the child under IC 31-17-2-3(2).

**In Re Paternity of J.C.**, 734 N.E.2d 1057, 1061 (Ind. Ct. App. 2000) (because paternity affidavit had been executed, paternity was established, and the child should have been immediately turned over to paternity affiant father upon the mother's death; therefore, previous decision of the probate court to appoint maternal aunt as guardian was in error).

**Matter of Paternity of Fox**, 514 N.E.2d 638 (Ind. Ct. App. 1987) (Court opined that, because the paternity petition had been filed ten days before the guardianship petition, the juvenile court properly exercised its exclusive jurisdiction over the child under the paternity cause; once jurisdiction over the parties and the subject matter has been secured, it is retained to the exclusion of other courts of equal competence until the case is resolved, and the rule applies where the subject matter before the two courts is the same, but the actions are in different forms.

See also **In Re Marriage of Huss**, 888 N.E.2d 1238, 1241-44, 1248, n.3 (Ind. 2008) (discussing at length the jurisdictional conflicts between a dissolution case and a subsequently filed paternity case); **Nunn v. Nunn**, 791 N.E.2d 779 (Ind. Ct. App. 2003) (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 custody statutes of IC 31-14-13-2.5 and IC 31-17-2-8.5, regarding consideration of de facto custodian factors).

See also IC 29-3-1-3.5, which notes that de facto custodian has the same meaning as set forth in IC 31-9-2-35.5.

III. B. 2. Uniform Child Custody Jurisdiction Act and Guardianship/Third-Party Custody Jurisdiction

Indiana's Uniform Child Custody Jurisdiction Law, (UCCJL), IC 31-17-3-1 to -25, was repealed effective August 15, 2007, and supplanted by the Uniform Child Custody Jurisdiction Act (UCCJA), at IC 31-21. Regarding this change and interstate subject matter jurisdiction generally, see Chapter 3 at II.G.1, 2, 3, and 4.

In **Meyer v. Meyer**, 756 N.E.2d 1049 (Ind. Ct. App. 2001), the Court affirmed the trial court's dismissal of the stepfather's petition for custody of his ex-wife's child who had been born prior to their marriage. The Appeals Court held that the petition for custody was not a continuation of the previous dissolution action because the child whose custody the stepfather was seeking was not a child of the marriage, and her custody had not been previously litigated in Indiana or anywhere else. Further, the Court held that Indiana courts did not have jurisdiction over the custody matter pursuant to the Uniform Child Custody Jurisdiction Act (UCCJA, recodified at IC 31-21). In its analysis, the Court explained that Indiana was not the child's home state so Indiana did not have jurisdiction pursuant to IC 31-17-3-3(1)(A). Further, the Court found that there was not "substantial evidence concerning the child's present or future care, protection, training, and personal relationships" available in Indiana such that IC 31-17-3-3(2) would provide the needed jurisdiction.

The Court in **In Re Guardianship of C.M.W.**, 755 N.E.2d 644, 647-49 (Ind. Ct. App. 2001) affirmed the trial court's order dismissing the grandfather's petition for guardianship. The Court agreed that Indiana courts did not have jurisdiction under the guardianship statute (IC 29-3-2-1(a)(1)) because the child did not reside in Indiana. Further, jurisdiction was not found pursuant to the Uniform Child Custody Jurisdiction Act (UCCJA) (recodified at IC 31-21) because Indiana was not the child's home state and Indiana did not have a significant connection to this controversy to establish personal and subject matter jurisdiction.

In **Matter of Guardianship of Mayes**, 523 N.E.2d 249, 251 (Ind. Ct. App. 1988), the Howard Circuit Court appointed Indiana relatives as guardians of three children whose parents lived in Illinois. The guardianship appointment was vacated by the Court of Appeals due to the Uniform Child Custody Jurisdiction Law, which is another statutory exception to guardianship jurisdiction. In Mayes, the Court found that Illinois satisfied the home state test and significant connection test of the U.C.C.J.L. because the children had all been born in Illinois, had resided in Illinois until six weeks prior to the guardianship proceedings, and the natural parents still lived in Illinois.

III. B. 3. CHINS Conflict With Guardianship Jurisdiction

III. B. 3. a. Statutory Obligation to Refer to Juvenile Court

IC 31-30-1-6(b)(2) provides that if the allegations in a guardianship petition or allegations at guardianship proceedings indicate that the child for whom the guardianship is requested meets the definition of a CHINS, the probate court shall: (1) send the petition for guardianship or the record of guardianship to DCS; and (2) direct DCS to initiate an assessment to determine whether the child is a CHINS.

IC 31-30-1-6(d) provides that if a juvenile court "(1) issues an order establishing or modifying a guardianship of a minor; and (2) requests additional proceedings regarding the guardianship of the minor; the probate court that retains jurisdiction over the case or another appropriate court shall conduct additional proceedings."

The Indiana Supreme Court has opined that a child is not necessarily a CHINS "every time a custodial problem involving a child arises or by circumstances a child is not with its natural parents or legal guardians." **Matter of Guardianship of Thompson**, 514 N.E.2d 618, 620 (Ind. 1987).

III. B. 3. b. Concurrent Jurisdiction

Concerns over concurrent jurisdiction between a guardianship court and a juvenile court have been addressed. IC 31-30-1-1(10) gives the juvenile court exclusive original jurisdiction in a guardianship proceeding for a child who has been adjudicated as a CHINS, who has a court approved permanency plan that provides for the appointment of a guardian, and who is the subject of a pending CHINS proceeding. IC 29-3-2-1(b) and (c) reflect this, by providing that a juvenile court has exclusive original jurisdiction over matters related to guardians and guardianships of a minor described in IC 31-30-1-1(10).

The jurisdiction of a juvenile court over a proceeding set forth in IC 31-30-1-1(10) continues to whichever comes first: the juvenile court terminates the guardianship of the person; or the child turns eighteen years old, unless, at age eighteen, the child is a full-time student in a secondary school or the equivalent level of vocational or career and technical education, in which case, it terminates at age nineteen. IC 31-30-2-1(d). If the guardianship continues after the child reaches this age, the juvenile court should transfer the guardianship proceedings to the court with probate jurisdiction. IC 31-30-2-1(d). However, the juvenile court may transfer the guardianship proceedings to the court with probate jurisdiction at any time, with the probate court's consent. IC 31-30-2-1(f). While the juvenile court has jurisdiction over the guardianship proceeding, it has the ability to enter, modify, or enforce a support order under IC 31-40-1-5. IC 31-30-2-1(e).

If a juvenile court approves guardianship as a permanency plan for a child, the juvenile court may appoint a guardian of the person and administer a guardianship for the child under IC 29-3. IC 31-34-21-7.7(a). If there is a guardianship proceeding pending in a probate court, the probate court must transfer the proceeding to juvenile court. IC 31-34-21-7.7(b). Juvenile court has the same ability as probate court to include in an order creating a guardianship terms and requirements that a parent must meet before seeking to terminate or modify a guardianship. IC 31-34-21-7.7(c); see also IC 29-3-8-9(a); this Chapter at IX.A.1. If the juvenile court closes a [CHINS] case after creating a guardianship, the juvenile court order creating the guardianship survives the closure of the [CHINS] case. IC 31-34-21-7.7(d). The probate court would then assume or reassume jurisdiction of the guardianship and take further action as necessary. IC 31-34-21-7.7(e).

IC 31-34-21-4(a) provides that DCS must give notice of a periodic case review, including a case review that is a permanency hearing, to guardians or their attorneys. Guardians also have the right to be heard and make a recommendation in a periodic case review, including a permanency hearing. IC 31-34-21-4(d). This right to be heard and make recommendations includes the right to submit a written statement to the court that may be made a part of the court record; and the right to present oral testimony to the court and cross examine any of the witnesses at the hearing. IC 31-34-21-4(d).

IC 31-35-2-6.5(c) also provides that a child's custodian, guardian, or their attorney must receive notice of a hearing on a termination petition or motion filed under IC 31-35. Other persons entitled to notice are "Any other suitable relative or person who [DCS] knows has had a significant or caretaking relationship to the child." IC 31-35-2-6.5(c)(5). This could include present or past guardians. However, IC 31-35-2-6.5(g) provides that "A person described in subsection (c)(2) through (c)(5) or subsection (d) does not become a party to a proceeding under this chapter as the result of the person's right to notice and the opportunity to be heard under this section."

It is possible for a juvenile court to retain jurisdiction over an older youth as defined in IC 31-28-5.8-4. IC 31-30-2-1(g). In order to qualify for this continuing jurisdiction, the older youth must be a recipient of kinship guardianship assistance under Title IV-E of the federal Social Security Act (42 U.S.C. 673), as amended; or other financial assistance which is listed at IC 31-30-2-1(g).

Similarly, if there is a third party custody case pending in either a court with dissolution or paternity jurisdiction, IC 31-30-1-12 (dissolution) and IC 31-30-1-13 (paternity) apply. In general terms, these statutes allow for concurrent jurisdiction between a dissolution or paternity court and a juvenile court, but while the juvenile case is open, all orders from a dissolution or paternity court must be approved and adopted by the juvenile court.

Just prior to these statutes being amended, **In Re J.B.**, 61 N.E.3d 308, 311-3 (Ind. Ct. App. 2016) was issued. 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, and since both were valid, needed clarification from the legislature. The Court ultimately reversed that part of the CHINS court's order which discharged the parties and terminated the CHINS case because the goal of the CHINS statutory scheme was not furthered in this case.

IC 31-30-1-1(12) gives the juvenile court exclusive original jurisdiction in proceedings under the interstate compact for juveniles (IC 11-13-4.5-1.5). IC 31-30-1-1(13) also gives the juvenile court exclusive original jurisdiction in proceedings under IC 31-28-5.8 (collaborative care).

For a recent case concerning the topic of concurrent jurisdiction, see **In Re Custody of M.B.**, 51 N.E.3d 230, 231, 233, 236 (Ind. 2016), in which the Court reversed the circuit court's dismissal of Aunt and Uncle's petition seeking custody of the child, finding the circuit court's determinations that (1) Aunt and Uncle lacked standing to file the custody action; and (2) the circuit court lacked subject matter jurisdiction to hear the custody proceeding, were both incorrect. The Court held that Aunt and Uncle had standing to bring an independent custody action with respect to the child. Citing IC 31-17-2-3(2), the Court observed that any person "other than a parent" has standing to initiate a cause of action for custody, so long as the question of custody over the child is not incidental to dissolution of marriage, legal separation, or an action for child support. Noting that no such action was pending and that neither Aunt nor Uncle was a parent to the child, the

Court determined that Aunt and Uncle had statutory standing to bring an independent action for custody of the child. The Court further held that the circuit court had subject matter jurisdiction over Aunt and Uncle's petition for custody, but must stay its jurisdiction pending the conclusion of the CHINS case regarding the child. The Court determined that, although the CHINS and custody proceedings differed in form, they related to the same subject matter, namely custody and care of the child. Noting a possible exception for a motion pursuant to Ind. Tr. R. 12(b)(8), the Court advised that a circuit court "may allow the parties to file an independent custody action while a CHINS proceeding is pending in juvenile court", but that court is required by law to abstain from the exercise of that jurisdiction until the CHINS proceeding has concluded, absent an applicable exception to the juvenile court's exclusive jurisdiction.

For more case law on the topic of concurrent or exclusive jurisdiction, see **In Re C.S.**, 713 N.E.2d 863, 864-5 (Ind. Ct. App. 1999) (Court opined that due to the open CHINS case the trial court could not properly accept the guardianship petition and the evidence yielded by the two hearings could not provide a basis for the granting of the guardianship petition. The Court also held that the Putnam Circuit Court had improperly relinquished its CHINS jurisdiction over the child to the extent that action was premised on the grant of the guardianship order. The Court reversed the guardianship order and the order terminating the CHINS case, stating that the guardianship proceeding which took place while the child was the subject of a CHINS proceeding was conducted in the absence of subject matter jurisdiction); **Matter of Guardianship of Bramblett**, 495 N.E.2d 798, 799 (Ind. Ct. App. 1986) (Relatives' guardianship petition was dismissed and the dismissal was affirmed on appeal; the Court opined that no other Indiana court had jurisdiction to entertain any proceeding which in any way conflicted with the exclusive jurisdiction vested in the juvenile court by the commencement of a CHINS proceeding).

III. B. 3. c. Practical Considerations to Resolve CHINS and Guardianship Jurisdiction

For a discussion of temporary or emergency guardianship and its attendant notice requirements, see IC 29-3-3-4 and this Chapter at V.

One way for practitioners to obtain the appointment of a relative guardian is to prepare the guardianship petition, secure consents and waivers of notice from all persons who are willing to sign consents and waivers and then file the guardianship petition the same day the CHINS case is closed. The guardianship petition should request temporary guardianship for the relative, follow all notice requirements properly, and include the emergency elements delineated at IC 29-3-3-4. The court with probate jurisdiction can appoint the relative as temporary guardian pending a hearing if a hearing is necessary due to lack of parental consent. This procedure requires excellent timing and may incur some risk to the child which should be balanced against the risk of a voidable guardianship.

There has also been case law regarding the ethical duties of attorneys attempting to obtain temporary or emergency guardianships. See **In the Matter of Anonymous**, 43 N.E.3d 568 (Ind. 2015) (Court found that Respondent engaged in attorney misconduct by communicating *ex parte* with a judge without authorization to do so; Respondent prepared an emergency petition for her clients to be named as temporary guardians but did not follow proper notice requirements as to Mother, and presented the petition to the judge who reviewed and signed the order; Respondent violated Indiana Professional Conduct Rule 3.5(b)); **Matter of Drendall**, 53 N.E.3d 405 (Ind. 2015) (Respondent violated Indiana Professional Conduct Rule 3.5(b), *ex parte* communication with a

judge, when he sought intervention and third party custody for his clients without serving Father with the petitions or notice of the hearing).

See this Chapter at III.D.1. below for a discussion of transfer of venue pursuant to IC 29-3-2-2(d). See this Chapter at V. for further discussion of temporary guardianship.

III. C. Continuing Jurisdiction Over Guardian and Guardian's Attorney

The court retains control over a guardian after appointment. When a guardian is appointed, both the guardian and the guardian's attorney submit personally to the jurisdiction of the court in any proceeding relating to the guardianship. IC 29-3-7-4. The attorney for the guardian continues on the case until the attorney withdraws with the Court's approval or the guardianship is terminated. IC 29-3-9-10. Because of these statutes, if an attorney for DCS, or an attorney for a court appointed special advocate or guardian ad litem files a guardianship petition independently or under an assisted guardianship program should make sure all pleadings clearly reflect that the attorney does not represent the guardian. See this Chapter at X.C. for further discussion of DCS responsibilities and duties in assisted guardianship matters.

Problems in CHINS and Guardianship jurisdiction were alleviated by 2001 legislation; see this Chapter at III.B.3.

III. D. Venue

III. D. 1. Statutes

IC 29-3-2-2(a)(1) provides that a petition for appointment of a guardian of an Indiana resident should be filed in the county where the minor resides. If the minor does not reside in Indiana, then the proper venue could be anywhere the property of the minor is located. IC 29-3-2-2(a)(2). A temporary guardianship petition for a minor in need of medical care may be filed in the county where the medical facility that is providing or attempting to provide care is located. IC 29-3-2-2(a)(2).

If proceedings are commenced in more than one county, they shall be stayed except in the county where first commenced until the court in the county where proceedings were first commenced determines proper venue. IC 29-3-2-2(b). One proper venue is determined, then all the other proceedings in the improper venues shall be dismissed. If the proper venue is another county from the first proceeding filed, then the proceeding shall be transmitted to the proper venue.

IC 29-3-2-2(c) allows the court to transfer the guardianship proceeding to another court in Indiana if any one of the following exists: (1) the proceeding was commenced in the wrong county; (2) the minor's residence has changed to another county; (3) proper venue under the Indiana Rules of Trial Procedure has been determined to be in another county; (4) transfer is in the best interests of the minor and the minor's property. The new, proper court shall complete the proceeding as if originally commenced in that court. A hearing pursuant to notice shall be held prior to transferring the case.

IC 29-3-2-2(d) provides that where a guardian has been appointed by a court that does not have probate jurisdiction, the case shall be transferred to the court with proper jurisdiction and venue for qualification of the guardian and further guardianship proceedings. The above statute may be useful in CHINS guardianship situations discussed in this Chapter at III.B.3.

III. D. 2. Case Law

In **In Re Adoption of L.T.**, 9 N.E.3d 172, 177-9 (Ind. Ct. App. 2014), the Court reversed the Marion Superior Court, Probate Division's order dismissing or terminating Maternal Grandparents' guardianship of their three-year-old granddaughter for lack of subject matter jurisdiction and granting immediate custody of the child to adjudicated Father, her only living parent. The Court remanded with instructions to conduct a hearing on the best interests of the child. Mother had been granted custody of the child in the Marion Circuit Court, Paternity Division. After Mother's death, Maternal Grandparents filed a petition in the Hamilton Superior Court seeking guardianship of the child. Attached to the petition was a waiver of notice of hearing and consent to the guardianship, purportedly bearing Father's notarized signature. Two months later, Father filed his motion to dismiss the guardianship in Hamilton Superior Court due to lack of subject matter and personal jurisdiction. The Marion Circuit Court, Paternity Division, then entered an order to transfer the guardianship matter and consolidate it with paternity proceedings in Marion Circuit Court; thereafter, the Hamilton Superior Court entered an order of transfer. Meanwhile, Maternal Grandparents had filed a petition to adopt the child in the Marion Superior Court, Probate Division. The Marion Circuit Court transferred the matter to the Marion Superior Court, Probate Division; all proceedings were then consolidated in the probate court. After hearing argument, the Marion Superior Court, Probate Division, issued its order providing that the Hamilton Superior Court lacked subject matter jurisdiction to enter any guardianship orders, terminated the guardianship, and ordered the child to be return to her father immediately.

The L.T. Court observed that Father was not litigating custody in Marion County when the authority of the Hamilton Superior Court was invoked, as he had relinquished his right to physical custody of the child by signing a consent to guardianship. The Court said that the filing of a case in a county in which venue does not properly reside does not divest the trial court of subject matter jurisdiction. The Court looked at IC 29-3-2-2(c), which directs that a guardianship proceeding that was commenced in the wrong county may be transferred by the court in which the matter was filed to another court in Indiana, upon which the receiving court shall *complete* the proceeding as if it were originally commenced in that court (emphasis in opinion). The Court also noted that Indiana Trial Rule 75(B) also provides that whenever a proceeding is filed in an improper venue, the action is not to be dismissed, but instead, should be transferred to the correct venue and court. The Court opined that to decide otherwise would result in courts not giving proper effect to existing valid orders, allowing an "end run" around previous lawful orders.

In **Allen v. Proksch**, 832 N.E.2d 1080, 1095-97, (Ind. Ct. App. 2005), the Court held that Father was estopped from challenging the trial court's jurisdiction (venue) over the particular case because he filed various motions with the trial court which "constituted acts of seeking affirmative relief from the trial court." The Court noted that Father went beyond the matters of defense and sought the benefit of the trial court's jurisdiction. The case had been transferred to the trial court from another county pursuant to an unverified petition and without notice to Father or a hearing, all of which are contrary to the requirements of IC 31-16-20-3 regarding a petition to transfer the jurisdiction of a child support order between counties.

See also **MacLeod v. Guardianship of Hunter**, 671 N.E.2d 177 (Ind. Ct. App. 1996) (Court found that IC 29-3-2-2 provided an adequate and complete mode of determining the proper county of venue in two guardianship petitions filed in two different Indiana counties; therefore, Indiana Trial Rule 75 did not apply); **Matter of Lawrance**, 579 N.E.2d 32 (Ind. 1991), where the Indiana Supreme Court held that because a proceeding had already begun in

Hamilton County, any Marion County proceedings should have been stayed until the Hamilton County judge determined whether transfer of the case was proper.

## IV. INITIATING A GUARDIANSHIP PROCEEDING

### IV. A. Petition

A guardianship proceeding is initiated by the filing of a signed and verified petition for appointment of guardian as provided by IC 29-3-5-1 and IC 29-1-1-9. A separate petition need not be filed for minor siblings who are children of a common parent. IC 29-3-5-6. However, Indiana Administrative Rule 1(B)(4)(d) provides that each child over whom a guardianship is sought must have a separate cause number. Even if separate cause numbers are required, if two or more minors are children of a common parent, there shall only be one probate filing fee and the cases may be joined for hearing. On its face, this appears to not require separate petitions; however, practically, courts may need separate petitions in order to assign separate cause numbers. Practitioners should consult their local courts and court rules for further guidance.

IC 29-3-4-1 provides that in addition to filing for a guardianship, a person may also file for a protective order to be issued under IC 29-3-4 on behalf of a minor. The requirements of filing for a protective order are substantially similar to filing a guardianship petition and are addressed in IC 29-3-5-1.

#### IV. A. 1. Who May File Petition

IC 29-3-5-1(a) allows "any person" to file a petition for a protective order on behalf of a minor pursuant to IC 29-3-4, as well as appointment of guardian. IC 29-3-1-12 defines "person" as follows: an individual, an organization, an association, a nonprofit corporation, a corporation for profit, a limited liability company, a partnership, a financial institution, a trust, the division of family resources or other governmental entity, or other legal entity. DCS falls within the definition of "person" and call file a guardianship petition to have a guardian appointed for a child. The DCS attorney should be certain that both the petition and the attorney's appearance form accurately reflect that the attorney is not the attorney for the guardian. Failure to do so could result in ongoing probate jurisdiction over the attorney as attorney for the guardian.

#### IV. A. 2. Contents of Petition

IC 29-3-5-1(a) provides that the following information must be stated in the petition for appointment of guardian:

(1) The name, age, residence, and post office address of the alleged minor for whom the guardian is sought to be appointed or the protective order issued.
(2) The nature of the incapacity.
(3) The approximate value and description of the property of the minor, including any compensation, pension, insurance, or allowance to which the minor may be entitled.
(4) If a limited guardianship is sought, the particular limitations requested.
(5) Whether a protective order has been issued or a guardian has been appointed or is acting for the minor in any state.
(6) The residence and post office address of the proposed guardian or person to carry out the protective order and the relationship to the alleged incapacitated person of:
    (A) the proposed guardian; or
    (B) the person proposed to carry out the protective order.
(7) The names and addresses, as far as known or as can reasonably be ascertained, of the persons most closely related by blood or marriage to the person for whom the guardian is sought to be appointed or the protective order is issued.

(8) The name and address of the person or institution having the care and custody of the person for whom the guardian is sought to be appointed or the protective order is issued.
(9) The names and addresses of any other incapacitated persons or minors for whom the proposed guardian or person to carry out the protective order is acting if the proposed guardian or person is an individual.
(10) The reasons the appointment of a guardian or issuance of a protective order is sought and the interest of the petitioner in the appointment or issuance.
(11) The name and business address of the attorney who is to represent the guardian or person to carry out the protective order.
(12) Whether a CHINS petition or a program of informal adjustment has been filed regarding the minor for whom a guardianship is being sought, and, if so, whether the case regarding the minor is open at the time the guardianship petition is filed.

IV. B. Notice

IC 29-3-5-1(b) provides that notice of a petition and the hearing on the petition shall be given under IC 29-3-6. After the petition is filed, the court must schedule a hearing pursuant to IC 29-3-5-1(c). The petitioner has the duty to provide notice to the persons who are required to receive notice by the statutorily required methods of notice.

IV. B. 1. Who Must Be Notified

IC 29-3-6-1 provides that notice of the petition and notice of hearing on the petition must be given to:
(1) A prior guardian, if the petition is for the appointment of a successor guardian, unless the court has ordered that notice is not necessary;
(2) Those entitled to notice under IC 29-3-3-4, if the petition is for the appointment of a temporary guardian;
(3) the minor who is at least fourteen years old unless the minor has signed the petition;
(4) Any living parent of the minor, unless parental rights have been terminated by a court order (note that IC 29-3-1-11 defines parent as a biological or adoptive parent);
(5) Any person alleged to have had the principal care and custody of the minor during the sixty days preceding the filing of the petition;
(6) any other person whom the court directs.

A copy of the guardianship petition shall be attached to the notice. The form for the notice is delineated at IC 29-3-6-2. A temporary guardian may be appointed without notice in certain emergency situations pursuant to IC 29-3-3-4. See this Chapter at V. for discussion of temporary guardianship.

IV. B. 2. Notifying Putative Fathers

IC 29-3-6-1 states that notice must be given to "any living parent" of a child for whom guardianship is sought. Parent is defined as a biological or adoptive parent, and does not make mention of any legal establishment of paternity. IC 29-3-1-11. Neither the guardianship notice statutes nor the guardianship definition statutes specifically address putative fathers, meaning, fathers who have not legally established paternity; consequently, Indiana law is unclear as to whether putative fathers should be given notice of a petition for appointment of guardian of a minor.

Practitioners should consider notifying a putative father who fits into the following categories:

- A putative father who is listed on the child's birth certificate; in this case, it may also be likely that the putative father is in fact a legally established father, if he also signed a paternity affidavit.
- A putative father who has visited or supported the child financially.
- A putative father whose petition to establish paternity is pending.
- A putative father with whom the child has resided during the 60 days immediately preceding the filing of the petition.

Please note that a man who has signed a paternity affidavit pursuant to IC 16-37-2-2.1 is legally established as a child's father, and should be given notice of any guardianship petitions. See also **In Re Paternity of J.C.**, 734 N.E.2d 1057, 1061 (Ind. Ct. App. 2000), where dicta in a concurring opinion stated that a guardian should not have been appointed on the death of the child's mother when paternity affidavit had been executed.

Counsel should consult with the local court which has jurisdiction over guardianships regarding the existence of any local rule or policy regarding notification of putative fathers.

IV. B. 3. Methods of Notification

IC 29-3-6-1 provides that "notice of the petition and the hearing on the petition shall to be given by first class postage prepaid mail."

IC 29-1-1-12 states that unless waived or otherwise provided all notices must be served by either (1) delivering a copy to the person by leaving a copy at the person's last and usual residence ten days before a hearing, if the person is an Indiana resident; (2) publication as provided for in the statute if the person is not an Indiana resident or the person's location is unknown; (3) first class mail properly addressed to the person, at least fourteen days before the hearing; (4) personal service on nonresidents, at least fourteen days before the hearing, by an officer authorized to do so; or (5) any combination of two or more of the above.

If service by publication was ordered, but not by mail, but the person who must be notified has a known address or their address can be ascertained through reasonable diligence, the person who must give notice must mail notice to the person at least fourteen days before the hearing. IC 29-1-1-12(b).

The personal representative or party charged with the duty of giving notice must give the clerk copies of the notice, prepared for mailing, and the clerk shall mail the same. IC 29-1-1-12(c).

IC 29-1-1-13 requires the clerk to make service by publication or mail at the instance of the party who requires service to be made. Personal service may be made by any competent person. IC 29-1-1-14 allows service to be made on the person's attorney if a written appearance has been entered in the pending guardianship proceeding.

IV. C. Case Law on Effect of Lack of Notice

In **In Re Adoption of J.L.J.**, 4 N.E.3d 1189, 1198 (Ind. Ct. App. 2014), the Court found that the trial court had not abused its discretion in concluding that the paternal grandmother, who had cared for the children occasionally, was not entitled to notice of the guardianship proceedings pursuant to IC 29-3-6-1(a)(3). The trial court had determined that the children were only in the grandmother's care for one day of the sixty days that preceded the filing of the guardianship

petition. The Court said that the evidence did not support a finding that the grandmother was the children's primary caregiver and thus entitled to notice. The Court, quoting Wells v. Guardianship of Wells, 737 N.E.2d 1047, 1050 (Ind. Ct. App. 2000), *trans. denied,* said that there is "no authority for the proposition that the failure to comply with the notice requirements of IC 29-3-6-1 automatically invalidates an appointment of permanent guardianship." See Chapter 3 at II.G.2, and Chapter 13 at III.A.3. for further discussion.

In **Wells v. Guardianship of Wells**, 731 N.E.2d 1047, 1050 (Ind. Ct. App. 2000), the Court affirmed the appointment of an elderly, incapacitated woman's eldest daughter as permanent guardian despite the argument concerning lack of notice made by the woman's son. The Court opined that it found no authority for the son's proposition that failure to comply with the notice requirements of IC 29-3-6-1 invalidated the guardianship.

In **Trook v. Lafayette Bank and Trust Co.**, 581 N.E.2d 941 (Ind. Ct. App. 1991), the Court opined that lack of notice in a guardianship proceeding is a waivable defect which renders the proceeding voidable but not void *ab initio*.

In **Bristow v. Konopka**, 166 Ind. App. 357, 336 N.E.2d 397 (1975), relatives who were caring for the child after the adoptive mother's death moved to set aside the birth mother's guardianship appointment. The trial court denied the relatives' request. The Court of Appeals, noting that in such matters the courts are more inclined to look at the material welfare of the child than to the rights of the natural parents, reversed and remanded with instructions to dissolve the birth mother's guardianship and conduct a guardianship hearing after due notice to the relatives.

IV. D. Consents and Waiver of Notice

The parent or custodian may consent to the appointment of a guardian of the minor. IC 29-3-3-3(5) provides that unless otherwise provided a parent has the power to execute any consents, waivers of notice, or powers of attorneys under any Indiana statute. The consent should be notarized and should include the guardian's full name. The consent should also include a written waiver of notice of hearing permitted by IC 29-1-1-19 if the consenting person is willing to waive notice.

IV. E. Guardian ad Litem Appointment

IV. E. 1. Statutes

IC 29-3-2-3(a) requires the court to appoint a guardian ad litem to represent the minor, unless the court makes the written findings outlined at IC 29-3-2-3(b) which waive guardian ad litem appointment. The reasons for waiver of guardian ad litem appointment by the court are as follows: the proposed guardian is capable of representing and managing the minor's property; no other petition for the appointment of a guardian has been filed; and the petition for appointment of the guardian is uncontested. The court shall appoint a guardian ad litem if the minor is not represented or is not adequately represented by counsel. IC 29-3-2-3(a). The court shall include its reasons for appointing a guardian ad litem as part of the record of the proceeding. IC 29-3-2-3(a). A guardian ad litem may be appointed to represent several persons or interests unless precluded by a conflict of interest. IC 29-3-2-3(a).

Practitioners should be alert to conflicts of interest in guardian ad litem appointments. The guardian ad litem may need to file a motion with the court requesting to be relieved from a multiple appointment if a conflict of interest arises.

IC 29-3-3-6(c) provides for the required appointment of guardian ad litem or court appointed special advocate when a guardianship petition is filed by a temporary custodian appointed pursuant to the dissolution statute, IC 31-17-2-11. The guardian ad litem or court appointed special advocate shall serve until removed by the court.

IV. E. 2. Guardian ad Litem Duties and Report

No guardianship statute delineates the guardian ad litem's duties in a guardianship proceeding. Arguably, practitioners can look to the CHINS and dissolution statutes concerning guardians ad litem for guidance. See IC 31-9-2-50; IC 31-33-15-1 through 3; IC 31-17-6-1 through 9; see also **Sills v. Irelan**, 663 N.E.2d 1210 (Ind. Ct. App. 1996) (making *in pari materia* arguments regarding analogous custody proceedings).

Despite the potential arguments to made for the use of dissolution or CHINS statutes in a guardianship proceeding, practitioners are cautioned that, unlike CHINS or dissolution proceedings, no guardianship statute allows a guardian ad litem report which contains hearsay to be admitted into evidence over objection. Practitioners should ascertain the individual court's policy on this issue. Some courts allow the guardian ad litem's report in a guardianship case to come into evidence if the dissolution statutory requirements for guardian ad litem reports, outlined at IC 31-17-2-12(c), are met. These statutory provisions require the report to be filed with the court and sent to the parties at least ten days prior to the hearing and that the names and addresses of interviewees and underlying reports and data be made available to counsel upon request. If the appointing court has no policy for the introduction of guardian ad litem reports, the guardian ad litem should seek a stipulation from counsel for the parties regarding the admissibility of the report. If no stipulation can be negotiated, it may be necessary for the guardian ad litem or one of the parties to present witnesses at trial who have personal knowledge of the information in the guardian ad litem's report.

Case law on a Guardian ad Litem's duties and a Guardian ad Litem report includes:

**Allen v. Proksch**, 832 N.E.2d 1080, 1101, (Ind. Ct. App. 2005) (Guardian ad litem's recommendation that, despite presumption in favor of natural parent, custody of child should remain with Grandmother with future goal of reunification with Father, was cited by Court as one of factors which Court found provided ample support for trial court's judgment granting Grandmother third-party custody of child);

**Hinkley v. Chapman**, 817 N.E.2d 1288 (Ind. Ct. App. 2004) (cites testimony of guardian ad litem, who had reviewed child's psychological evaluation, as well as other information, that because of child's educational deficiency it was in his best interests to be placed with his adult sister and her husband who were seeking guardianship of child);

**In Re Guardianship of Hickman**, 805 N.E.2d 808, 821-24 (Ind. Ct. App. 2004), *trans. denied* (Court addressed whether the trial court abused its discretion by admitting certain testimony of the guardian ad litem (GAL); appellant waived the argument of this issue by failing to make a contemporaneous objection to the admission of the evidence at trial on those grounds. Notwithstanding waiver, however, the Court noted that Indiana courts had not addressed the admissibility of a GAL's opinion. After discussing statutory provisions regarding GALs in child custody matters and the guardianship statutes' lack of provisions regarding the admissibility of the GAL's recommendations, the Court found that it did not need to decide the admissibility of a GAL's opinion in this case. The Court stated that, even assuming the trial court abused its discretion by admitting the evidence, any error in the advisory jury hearing the guardian ad litem's testimony was harmless and that, when a case is tried to the bench, it is presumed on appeal that the trial court ignored inadmissible evidence in reaching its judgment. The Court noted, however, that it did not mean to suggest that statements and other submissions from a GAL made before a

nonadvisory jury were not completely subject to the rules of evidence for their admissibility);
**In Re Guardianship of B.H.**, 770 N.E.2d 283 (Ind. 2002) (recommendations of Court Appointed Special Advocate report cited by Court as one of factors noted in trial court's detailed findings of facts which Court found provided ample support for trial court's judgment granting stepfather's guardianship petition);
**Francies v. Francies**, 759 N.E.2d 1106, 1116-17 (Ind. Ct. App. 2001) (trial court and Court referred to guardian ad litem's report as supporting evidence for finding that Grandmother who sought custody and child had become strongly emotionally attached), *trans. denied*;
**Carr v. Carr**, 685 N.E.2d 92, 94-95 (Ind. Ct. App. 1997) (Guardian ad Litem appointed for incapacitated adult made observations and determinations which were noted by the Court);
**State Ex Rel. Keating v. Bingham**, 233 Ind. 504, 121 N.E.2d 727, 729-30 (1954) (Indiana Supreme Court distinguished a guardian ad litem from the attorney for the guardian, stating that a guardian ad litem is appointed to represent the ward in some particular litigation and further that the guardian ad litem is not a party to the main action but is an officer of the court brought into the case by the appointment and order of the court to render services pursuant to the duty imposed on him by the court).

IV. E. 3. Guardian ad Litem Fees

Indiana case law supports a court order for a guardian ad litem fee in a guardianship proceeding.

In **Whinery v. Hammond Trust and Savings Bank**, 140 N.E.451 (1923), the Court opined that an officer of the court, selected by the court to protect the interests of minors, should not be expected to perform his duties without compensation, and that it is incidental to the court's appointment power to allow the guardian ad litem suitable compensation to be paid as the equity of the case shall require.

In **State Ex Rel. Keating v. Bingham**, 121 N.E.2d 727, 730 (1954), the Court opined that the compensation of a guardian ad litem for services rendered may be allowed as an expense of administration or out of the ward's interest in the proceedings in an amount determined by the court in its discretion. The Court noted that a court may hear evidence to assist in determining the amount of compensation to be paid or the court may summarily fix the amount of compensation upon the knowledge of the judge as to the work done by the guardian ad litem.

**In United Farm Bureau Family Life Ins. v. Fultz**, 375 N.E.2d 601, 613 (1978), the Court stated that the probate laws empower the trial court to compensate a guardian ad litem for his services either from the ward's interest in the estate, or from the body of the estate. The Court stated that the policy reason behind such is to ensure that an officer of the court, who has been appointed by the court, will not have to render services without compensation. Where the ward recovers nothing, the guardian ad litem fee shall be taken from the core of the litigation, such as the insurance policy proceeds.

## V. TEMPORARY GUARDIANSHIP/THIRD-PARTY CUSTODY

V. A. Statutory Requirements For Appointment

Two Indiana statutes, IC 29-3-3-4 and IC 29-3-3-6, provide for the appointment of a temporary guardian for a specified time period, pursuant to the petition of any person or on the court's own motion.

V. A. 1. Statutes Regarding Temporary Guardianship

IC 29-3-3-4 covers more general situations that might necessitate the appointment of a temporary guardian. The following must be pled and proven: (1) that a guardian has not been appointed for the minor; (2) that an emergency exists; (3) that the welfare of the minor requires immediate action; and (4) that no other person has the authority to act to remedy the emergency. The court must then find that immediate and irreparable injury may occur to the minor, or injury, loss or damage may occur to the minor's property may result before the minor or other interested parties can be heard in response to the petition. IC 29-3-3-4(a).

Any person may the file such a petitions, or the court may appoint a temporary guardian on its own motion. The time period for a temporary guardianship is not to exceed ninety days. IC 29-3-3-4(a).

If a temporary guardian is appointed without any proper advance notice, and the minor or other interested party files a petition to terminate the temporary guardianship or to have the court order modified, the court must hear the motion and make a determination as soon as possible. IC 29-3-3-4(a).

If a petition is filed under IC 29-3-3-4 for a temporary guardian and each person who is entitled to notice under IC 29-3-6-1(a) has not received a proper copy of the petition and notice before the court acts on the petition, or has not received actual notice of the petition and specifically waived in writing the need for service before the court acts on the petition, the person seeking temporary guardianship must serve complete copies and give proper notice on every person entitled to receive notice, and any additional person to whom the court requires the petition be given. IC 29-3-3-4(b). The petitioner must give this notice on the earlier date of: the day the court enters an order scheduling a hearing on the petition, or the day on which the court appoints a temporary guardian. IC 29-3-3-4(b).

The notice requirements of temporary guardianship in IC 29-3-3-4(b) are in addition to the petitioner's obligations under Trial Rule 65, meaning the petitioner must make a specific showing of the petitioner's efforts to provide advance notice to all interested persons, or the reasons why the advance notice cannot or should not be given. IC 29-3-3-4(b).

A temporary guardian who is appointed under this section only has the responsibilities and powers which are ordered by the court, and the court can only grant the powers which are necessary to prevent immediate and substantial injury or loss to the person or property of the minor.

The parents and persons who have had principal care and custody of the minor for the immediately preceding sixty days may consent to the temporary guardianship and waive notice of the hearing, in which case no formal court hearing may be required. See IV.D. of this Chapter concerning consents and waivers of notice. If consents and waivers of notice cannot be secured, notice should be given as dictated by IC 29-3-3-4(b) to the persons listed at

IC 29-3-6-1 and a hearing should be held on the temporary guardianship petition. See IV.B. of this Chapter concerning notice requirements.

It is recommended that the temporary guardianship hearing be conducted on the record for the parties' and court's future reference. Practitioners should also note that the Indiana Supreme Court found the appointment of a temporary guardian under IC 29-3-3-4 was invalid because an incapacitated adult's parents had legal authority to make medical decisions for her under the Health Care Consent Law codified at IC 16-36-1. See **Matter of Lawrance**, 579 N.E.2d 32 (Ind. 1991).

A court may suspend the authority of a previously appointed guardian and appoint a temporary guardian under IC 29-3-3-4(c). In order to do so, a court must find that the previously appointed guardian is not effectively performing judiciary duties and the welfare of the minor requires immediate action. The duration of this order may be for any time period determined by the court, and the previous guardian's authority is suspended as long as the temporary guardian under this section has the authority to act. IC 29-3-3-4(c). See VIII. of this Chapter for additional information on removal of guardian and appointment of successor guardian.

Temporary guardianship proceedings under IC 29-3-3-4 are not subject to the provisions of IC 29-3-4, and may be joined with proceedings under IC 29-3-4 or IC 29-3-5.

IC 29-3-7-7 and IC 31-30-1-2.5 limit whom a court may appoint as a child's guardian or custodian. Please note that there are differing versions of this statute with different effective dates, with changes made to reflect the changes in criminal code classifications. See this Chapter at VI.A.1. for further discussion.

V. A. 2. Temporary Guardianship Statute in Restricted Visitation Cases

The second temporary guardianship statute, IC 29-3-3-6, is effective only in situations where the custodial parent in a dissolution proceeding dies and the surviving parent's visitation had been suspended or restricted to supervised visitation under the dissolution decree. The surviving parent in this circumstance does not have the right to custody of the minor without a proceeding authorized by law. IC 29-3-3-6(a).

At the time the dissolution court enters its order restricting visitation, the dissolution court shall appoint a temporary custodian pursuant to IC 31-17-2-11 who receives custody of the child upon the custodial parent's death. This temporary custodian may also petition the court with probate jurisdiction for an order of temporary guardianship, which is not to last longer than sixty days. IC 29-3-3-6(b) and IC 31-17-2-11(d). The temporary custodian is not the only person who may petition the court; the court may appoint someone as temporary guardian on its own motion, or may accept such a petition from any person, including the temporary custodian who was named under IC 31-17-2-11. IC 29-3-3-6(b).

A court must appoint a temporary guardian for the if the court finds that the surviving parent is not entitled to custody of the child. IC 29-3-3-6(g). This proceeding may be joined with a proceeding under IC 29-3-4 or IC 29-3-5. IC 29-3-3-6(f).

In situations where IC 29-3-3-6 applies, a guardian ad litem or court appointed special advocate shall be appointed for the child pursuant to IC 29-3-3-6(c), and serves until removed by the court. See IV.E. of this Chapter for a detailed discussion of the guardian ad litem's role, powers and fees in guardianship proceedings.

If a temporary guardian is appointed without notice under these circumstances, and the child files a petition that the guardianship be terminated or the other order otherwise modified, the court must hold a hearing and make a determination on the petition as soon as possible. IC 29-3-3-6(d). Although this does not reference the surviving noncustodial parent, courts do routinely entertain such petitions from surviving parents or other parties as well. See **In Re Adoption of L.T.**, 9 N.E.3d 172, 177-9 (Ind. Ct. App. 2014).

A temporary guardian appointed under this section has only the responsibilities and powers that are given to the temporary guardian by the court. IC 29-3-3-6(e).

V. A. 3. Delegation by Power of Attorney

IC 29-3-9-1 provides a means of delegating guardian-like powers without a court proceeding.

Except as otherwise provided in subsequent subsections, a parent or a guardian may delegate any powers regarding health care, support, custody, or property of the minor to another person. They may do this for any period during which the care and custody of the minor is entrusted to an institution giving care, custody, education, or training, or generally, for twelve months or less. This does not apply to temporary guardians, meaning that a temporary guardian may not delegate his or her duties, and a delegation of this nature is effective immediately unless otherwise stated in the power of attorney. IC 29-3-9-1(c).

One of the exceptions the above ability to delegate is found at IC 29-3-9-1(d). A parent or guardian cannot delegate under a power of attorney the power to consent to the marriage or adoption of a minor, and cannot delegate the power to petition the court to request the authority to petition for dissolution of marriage, legal separation, or annulment of marriage on behalf of the minor. That ability is governed by IC 29-3-9-12.2.

The other exception to the ability to delegate is found at IC 29-3-9-1(h). A licensed foster family who is providing care to a child placed with them by DCS or other juvenile court order cannot provide overnight or regular and continuous care and supervision to a child for whom an IC 29-3-9-1(c) power of attorney was executed. However, DCS may grant exceptions to this limitation upon request.

A person who has a power of attorney executed according to IC 29-3-9-1(c) has all the authority of the parent or guardian as it pertains to the health care, support, custody, or property of the minor. Any limitations must be expressly written in the document in order to be effective. The parent or guardian is responsible for any act or omission of the person having the power of attorney with respect to the affairs, property, and person of the minor.

This type of delegation of powers does not subject any of the parties to any laws, rules, or regulations concerning the licensing or regulation of foster family homes, child placing agencies, or child caring institutions under IC 31-27. IC 29-3-9-1(f). The parties to this type of delegation are also not subject to any foster care requirements or foster care licensing regulations. IC 29-3-9-1(g). A child who is the subject of this type of delegation of powers is not considered to be placed in foster care. IC 29-3-9-1(g).

IC 29-3-9-1(i) makes special provisions relating to a power of attorney in the context of a parent who is a member in the United States military. It applies to parents who are members in the active or reserve component of the United States armed forces, or parents who are in the commissioned corps of various enumerated administration and departments that have

been detailed for duty with the Army or Navy. It also applies to parents who are required to enter or serve in active military service under a call or order from the President of the United States, or required to serve on state active duty. Parents who fit these descriptions may delegate the powers described in IC 29-3-9-1(c) for longer than twelve months if the parent is on active duty service. The term of delegation cannot exceed the term of active duty service plus thirty days. The power of attorney needs to indicate that the parent is required to enter or serve in the active military service of the United States, and must also include the estimated beginning and ending dates of the active duty service.

A delegation of powers under this section can be revoked at any time by a written instrument of revocation. This written document must (1) identify the power of attorney that is being revoked; and (2) be signed by the parent or guardian who executed the power of the attorney in the first place. IC 29-3-9-1(j).

V. B. Joinder With Other Proceedings

Both IC 29-3-3-4(f) and IC 29-3-3-6(f) allow for temporary guardianship proceedings to be joined with proceedings for appointment of a guardian pursuant to IC 29-3-5-1 et. seq. See this Chapter at IV. concerning initiating a guardianship proceeding. A person seeking guardianship under IC 29-3-5-1 may, at the same time, also request to be appointed as a temporary guardian, if all proper conditions exist and proper procedures are followed. This may be an advisable course of action to use to protect a child when CHINS jurisdiction has been terminated with relative guardianship as the goal. See **In Re C.S.**, 713 N.E.2d 863 (Ind. Ct. App. 1999); see this Chapter at III.B.3.b. and c. for a more detailed discussion of the jurisdictional issues.

V. C. Powers and Duties of Temporary Guardian/Third-Party Custodian

Because of the emergency nature of a temporary guardian's appointment, a temporary guardian's role may be limited. IC 29-3-3-4(d) provides that a temporary guardian only has the powers and responsibilities that are ordered by the court.

Practitioners who submit proposed temporary guardianship orders are advised to delineate specific duties for the temporary guardian in the order. Examples include the authority to seek medical, dental, and mental health care; the authority to consent to surgery; the authority to enroll the minor in school or a day care center; the authority to discipline the minor; the authority to select a babysitter; the authority to apply for health insurance and any county, state, or federal government benefits on the minor's behalf; the authority to provide safe and reasonable visitation to the minor's parents. Duties should relate to the need for which the temporary guardianship was sought.

IC 29-3-3-4(e) provides that proceedings of this nature are not subject to IC 29-3-4 (Protective Proceedings and Single Transactions).

V. D. Case Law Regarding Temporary Guardianship

The Court in **Francies v. Francies**, 759 N.E.2d 1106, 1110-12 (Ind. Ct. App. 2001), *trans. denied,* found that the period of more than two years between the emergency order granting temporary third-party custody of the child to paternal Grandmother and the trial court's final custody determination did not deprive Mother of due process requiring reversal of the final custody determination. The Court distinguished cases relied upon by Mother. In this case, a hearing was set the day the emergency order was entered and, at this hearing which was held thirteen days later, Mother was represented by counsel and the trial court heard evidence and determined that the child should remain in Grandmother's custody. The Court also noted that, immediately before the hearing, the trial court conducted an in-depth *in camera* interview of the

child. More importantly, according to the Court, part of the delay was attributable to Mother's request for a continuance and request for further hearing. Also, other irregularities alleged by Mother either were not attributable to the trial court or were waived by Mother by failing to object to the trial court. Moreover, Mother's visitation was not limited to supervised visitation during the period, as it was in one of the cases Mother used as supporting authority.

In **Matter of Lawrance**, 579 N.E.2d 32 (Ind. 1991), the Indiana Supreme Court found the appointment of a temporary guardian under IC 29-3-3-4 was invalid because an incapacitated adult's parents had legal authority to make medical decisions for her under the Health Care Consent Law codified at IC 16-36-1.

See also **Wells v. Guardianship of Wells**, 731 N.E.2d 1047, 1050 (Ind. Ct. App. 2000) (addressing a son's argument that he was not given proper notice of a temporary guardianship over his mother; at the time, no specific notice requirements were set forth in Indiana Code. Now, notice requirements have been codified at IC 29-3-3-4, and may change the outcome of this case, were similar facts to reoccur).

## VI. APPOINTMENT OF GUARDIAN/THIRD-PARTY CUSTODIAN

### VI. A. Legal Requirements

#### VI. A. 1. Statutes

IC 29-3-5-3(a) requires the court to appoint a guardian for a minor if the court finds that the appointment of a guardian is necessary as a means of providing care and supervision of the physical person or property of the minor.

If the court finds that it is not in the best interests of the minor to appoint a guardian, the court may do one of the following: (1) treat the petition as a petition for protective order and proceed accordingly; (2) enter any other appropriate order; or (3) dismiss the guardianship proceedings. IC 29-3-5-3(c).

IC 29-3-8-9(a) provides that, in an order creating a guardianship, a probate or juvenile court can include a requirement that the minor must reside with the guardian until the guardianship is terminated or modified, and any terms and conditions that a parent must meet in order to terminate or modify the guardianship. This affects the ability of a parent to terminate the guardianship by creating extra legal requirements that a parent must meet, and for details on legal requirements created by an order of this nature, see this chapter at IX.A.

IC 29-3-8-9(e) provides that if a minor who is the subject of a guardianship petition was also either the subject of a CHINS petition or an informal adjustment, the court must, at any hearing of the guardianship petition, consider the position of DCS, allow DCS to present evidence if they so request regarding whether the guardianship should be modified or terminated, the fitness of the parent at the time of the hearing, the appropriate care and placement of the child, and the best interests of the child.

If IC 29-3-8-9 applies to a child, then the guardianship petitioner must submit all necessary forms and information in order for DCS to conduct a criminal history check as is defined in IC 31-9-2-22.5 and IC 29-3-1-2.5. IC 29-3-5-1.5. This criminal check is required of the petitioner and any other household members before the court appoints the guardian. IC 29-3-5-1.5.

IC 29-3-7-7 and IC 31-30-1-2.5 both limit whom a juvenile court may appoint as a child's guardian or custodian, and contain the same provisions with similar language. Both have been amended since their addition to the Indiana Code. Both statues prevent the following people from serving as guardians or third party custodians of a child:

(1) sexually violent predators (IC 35-38-1-7.5);
(2) a person who was at least eighteen at the time the person committed child molesting (IC 35-42-4-3) or sexual misconduct with a minor (IC 35-42-4-9) against a child less than sixteen years old, and did so by using or threatening the use of deadly force, or while armed with a deadly weapon, or that resulted in serious bodily injury;
(3) a person who was less than eighteen years old but was tried and convicted as an adult for rape [IC 35-42-4-1], criminal deviate conduct [IC 35-42-4-2 before its repeal], child molesting as a Class B or B felony, or Level 2 or 4 felony [IC 35-42-4-3], or vicarious sexual gratification [IC 35-42-4-5(a)(1) through (3), IC 35-42-4-5(b)(1) as a Class A or B felony, or Level 2, 3, or 4 felony, IC 35-42-4-5(b)(2), and IC 35-42-4-5(b)(3) as a Class A or B felony, or Level 2, 3, or 4 felony] [*practice note*: IC 35-42-4-5(a)(3) no longer exists, but appears to have been incorporated into IC 35-42-4-5(a)(2) as part of 2013 amendments; see IC 35-42-4-5(a)(2)(C)];
(4) a person who attempts to commit or conspires to commit any of the crimes listed in number (3); or
(5) a person who commits, attempts to commit, or conspires to commit any of these crimes under the laws of another jurisdiction, including a military court, that is substantially the same as the above listed offenses.

Legislation added IC 31-17-2-25 which provides that, if a custodial parent or guardian of a child dies or becomes unable to care for the child and a person other than a parent files a petition to determine or modify custody of the child, the person filing may request an initial hearing by alleging facts and circumstances warranting emergency placement with a person other than the noncustodial parent pending a final determination of custody. If a hearing is so requested, unless specific conditions appear to exist, the court must set an initial hearing not later that four business days after filing to determine whether such emergency placement of the child should be granted. The court is not required to set an initial hearing under any of these specific conditions: (1) it appears from the pleadings that no emergency requiring placement with a person other than the noncustodial parent exists; (2) it appears from the pleading that the petitioner does not have a reasonable likelihood of success on the merits; or (3) manifest injustice would result.

If a temporary conditional custodian has been named under IC 31-17-2-11, IC 31-17-2-11(c) provides that if the custodial parent dies, the temporary custodian named by the court may petition the court having probate jurisdiction over the estate of the child's custodial parent for an order under IC 29-3-3-6 naming the temporary custodian as the temporary guardian of the child.

VI. A. 2. Case Law

In **Fry v. Fry**, 8 N.E.3d 209 (Ind. Ct. App. 2014), the Court affirmed the dissolution court's order which appointed Mother's former Husband as the custodian of Mother's daughter. Husband was not the biological or adoptive father of Mother's daughter, but Husband was awarded parenting time with the child by the agreement of Mother and Husband in their dissolution. Husband exercised parenting time with the child when he had parenting time with his and Mother's son. Although Mother argued that the dissolution court's order was void for want of jurisdiction, the Court concluded that the dissolution court had jurisdiction and committed no error. See this Chapter at III.B.1 for further discussion.

In **M.S. v. C.S.**, 938 N.E.2d 278, 282-3 (Ind. Ct. App. 2010), the Court affirmed the trial court's order vacating an order granting Domestic Partner joint legal custody of and parenting time with Mother's child. The Court observed that Mother's and Domestic Partner's "Joint Petition to Determine Custody" sought to establish a shared custody arrangement. The Court concluded that IC 31-17-2-3 does not contemplate the creation of a shared custody arrangement between a parent and a nonparent, regardless of the consent of the parties. The Court opined that the General Assembly did not intend to allow parents to establish joint custody with third parties by simply filing a joint petition with the trial court, because to do so would allow parents and third parties to circumvent the requirements of the Adoption Act.

In **Hinkley v. Chapman**, 817 N.E.2d 1288, 1291 (Ind. Ct. App. 2004), the Court held that, although the trial court did not make the finding contemplated by IC 29-3-5-3(a)(2), the guardianship appointment was "necessary as a means of providing care and supervision of the physical person or property of the … minor," and such a finding was implicit in the trial court's extensive findings in support of its conclusion that the appointment was in the child's best interests. Thus, the statutory requirement for such a finding of necessity was met.

In **E.N. Ex. Rel. Nesbitt v. Rising Sun-Ohio**, 720 N.E.2d 447, 451-2 (Ind. Ct. App. 1999), the Court stated that because the term "necessary" is not defined by the guardianship statute, courts are bound to apply its common and everyday meaning. The Court noted that "necessary" is defined as "absolutely essential" and "needed to achieve a certain result or effect." The Court further concluded that the best interest of the child is implicit in the guardianship statute and that the trial court had properly included the best interest standard in determining whether to appoint a guardian.

VI. A. 3. Considerations For Selection of Guardian

IC 29-3-5-4 states that the court shall appoint as guardian a qualified person or persons who are most suitable and willing to serve as a guardian or guardians. When making this selection as it pertains to minor children, the court must consider the following: (1) designations in a durable power of attorney under IC 30-5-3-4(a); (2) any request made for the minor by the minor's parent or the minor's de facto custodian, which includes a designation in a power of attorney under IC 30-5-3-4(b) or (c); (3) a request made in a will or other written instrument; (4) a designation of a standby guardian under IC 29-3-3-7; (5) a request by a minor who is at least fourteen years old; (6) relationship of proposed guardian to the minor; (7) the best interest of the minor's person and property.

There may be an order of priority for who shall be considered as guardians; IC 29-3-5-5 provides such a list of prioritized people, an amongst people of equal priority, the court must select the person it considers to be best qualified to serve as guardian. IC 29-3-5-5(b). However, the court, acting in the child best's interests, has the authority to select the best qualified guardian, regardless of priority. IC 29-3-5-5(b).

People who are entitled to more priority in determining who to appoint as guardian for a minor include: (1) A person designated in a durable power of attorney. (2) A person designated as a standby guardian under IC 29-3-3-7. (3) A person nominated by will of a deceased parent or de facto custodian or by a power of attorney f a living parent or de facto custodian; (4) Any person related to the minor by blood or marriage with whom the minor has resided for more than six months before the filing of the petition. IC 29-3-5-5.

In **In Re Guardianship of J.Y.**, 942 N.E.2d 148, 153-4 (Ind. Ct. App. 2011), an adult guardianship case, the Court held that the requirements of a personal representative of an estate are not the same as the requirements for a guardian, and, as a result, a nonprofit corporation not authorized as a corporate fiduciary in Indiana may serve as guardian. The Court concluded that the trial court was within its discretion to appoint a domestic nonprofit corporation as guardian of the person of the incapacitated adult. The nonprofit corporation specialized in support services for persons with disabilities and had provided daytime care for the incapacitated adult for fifty years.

**In Re Guardianship of A.L.C.**, 902 N.E.2d 343, 353-355 (Ind. Ct. App. 2009), held that Paternal Grandparents are not "entitled" to be appointed co-guardians as a matter of law by virtue of IC 29-3-5-5 and -5, and Father's Nomination requesting that they be appointed guardians of the child and his estate, because the best interest of the child is the overriding factor the trial court must consider when appointing a guardian. After Mother's death, three couples vied for guardianship of the child: Maternal Grandfather and Step-Grandmother, Maternal Grandmother and Step-Grandfather, and Paternal Grandparents. During the guardianship proceedings, Paternal Grandparents submitted Father's Nomination of Paternal Grandparents. The trial court granted guardianship of the child to Maternal Grandmother and Step-Grandfather. IC 29-3-5-5(a)(4) did give Paternal Grandparents priority consideration because of Father's written Nomination of them to be the guardians; however, IC 29-3-5-5(b) also provides that a court may override this priority list in order to adhere to a child's best interests. Citing to IC 29-3-5-4(7) and IC 29-3-5-5(b), the Court found that, while Paternal Grandparents fell within one of the priority categories in IC 29-3-5-5(a) entitling them to priority consideration for appointment as the child's guardian, that status did not entitle them to the appointment, inasmuch as the best interest of the child is the overriding factor the trial court must consider when appointing a guardian.

In **In Re Guardianship of Stackhouse**, 538 N.E.2d 990, 992 (Ind. Ct. App. 1989), the Court opined that case law does not actually create a presumption in favor of the blood relationship in child custody matters apart from the presumption favoring a natural parent. The Court further stated that once the search for a custodian extends beyond the child's natural parents a host of other factors, including the personal attributes of the proposed guardian, become relevant in determining the person most suitable.

VI. A 4. Investigation by DCS or Office of the Secretary of Family and Social Services

IC 29-3-9-11 provides that the "office of the secretary of family and social services shall investigate and report to the court concerning the conditions and circumstances of a minor … and the fitness and conduct of the guardian or the proposed guardian whenever ordered to do so by the court."

If IC 29-3-8-9 applies to a child, then the guardianship petitioner must submit all necessary forms and information in order for DCS to conduct a criminal history check as is defined in IC 31-9-2-22.5 and IC 29-3-1-2.5. IC 29-3-5-1.5. This criminal check is required of the petitioner and any other household members before the court appoints the guardian. IC 29-3-5-1.5.

If a child who is the subject of a guardianship petition or a petition or terminate a guardianship was also the subject of a CHINS petition or an informal adjustment, DCS may also be entitled to be contacted about, notified of, investigate, and present evidence for the guardianship petition. See IC 29-3-8-9(c), (d), and (e).

IC 29-3-8-9(c) applies in circumstances where a court, when it established a guardianship, also set terms and conditions that a parent must meet before petitioning to terminate the guardianship (IC 29-3-8-9(a)(2)). If a petition is subsequently filed to terminate or modify the guardianship before the parent meets those terms and conditions, and the child was the subject of a CHINS petition or an informal adjustment, the court shall refer the petition to DCS for DCS to determine the placement of the child in accordance with the best interests of the child.

IC 29-3-8-9(d) provides that if a court appointed a guardian for a child who was the subject of a CHINS petition or an informal adjustment, and subsequently to appointing a guardian for that child, a petition to modify or terminate the guardianship is filed, the court must notify DCS of any hearings related to the petitions.

IC 29-3-8-9(e) provides items that the court must perform at any hearing on a petition to terminate or modify a guardianship of a child was the subject of a CHINS petition or an informal adjustment: (1) Consider the position of DCS; (2) If requested by DCS, allow DCS to present evidence regarding: (A) whether the guardianship should be modified or terminated; (B) the fitness of the parent to provide for the care and supervision of the minor at the time of the hearing; (C) the appropriate care and placement of the child; and (D) the best interests of the child.

## VI. B. Limited Guardianship

### VI. B. 1. Statutes

IC 29-3-5-3(b) allows the court to limit the scope of the guardianship if it is alleged and the court finds that the welfare of the minor would be best served by limiting the guardianship. The court shall make the appointive or other orders to encourage the minor's self-improvement, self-reliance, and independence and contribute to the minor's living as normal a life as possible without physical or psychological harm. If the court limits the guardianship, the guardianship letters must so state. IC 29-3-7-3. If a limitation is removed or modified, the appropriate revised letters shall be issued. IC 29-3-8-8(b). The court may create a limited guardianship at the time of the appointment or later on petition of anyone of the following: the minor's own petition; the petition of any other person approved by the court; the court's own motion. IC 29-3-8-8(a).

### VI. B. 2. Case Law

In **E.N. Ex Rel. Nesbitt v. Rising Sun-Ohio**, 720 N.E.2d 447, 451 (Ind. Ct. App. 2000), the school system sought the appointment of a limited educational guardian for a sixteen-year-old special education student for the purposes of making educational decisions on the minor student's behalf. The Court, in reversing the trial court's appointment of a limited guardian, opined that the best interest of the minor is implicit in the guardianship appointment statute, IC 29-3-5-3, whether the guardianship is custodial or non-custodial.

## VI. C. Guardianship/Third-Party Custody Proceedings With Parental Consent and Waiver

A guardian may be appointed with the written consents and waivers of notice signed by the minor's parents. If there are no contested issues, the courts in some counties may not require a formal guardianship hearing on the record. The prospective guardians and their counsel may be permitted to appear before the judge informally with all of the required legal documents discussed at IV.A. and B. of this Chapter, including the proposed appointment order for the judge's signature and letters of guardianship for the probate clerk. The judge will wish to be certain that the prospective guardians understand their duties and obligations and the court's ongoing

jurisdiction over the guardians. However, many counties will still require that a hearing be set and all parties and their counsel appear for a formal hearing, unless waiver of notice of a hearing applies to a party.

The guardians may be required to file a bond to protect the minor's property unless the court finds that a bond is unnecessary and enters an order to that effect. See IC 29-3-7-1, which provides the formula for the amount of the bond and the court's other directives to the guardian concerning financial matters. If the judge signs the proposed order appointing the guardian, practitioners should assist the newly appointed guardian in securing letters of guardianship subscribed before the clerk of the court or other officer authorized to take acknowledgments as required by IC 29-3-7-3. Practitioners should familiarize themselves with the local jurisdiction's probate rules.

VI. D. Guardianship/Third-Party Custody Proceedings Without Parental Consent and Waiver

Case law, rather than statutes, forms the basis for standard of proof and burden of proof in non-consensual minor's guardianships.

The court with proper probate jurisdiction has the authority to appoint a guardian for a minor without the parents' or most recent custodians' consent if the court finds, pursuant to IC 29-3-5-3(a) that the appointment of a guardian is necessary as a means of providing care and supervision of the minor. See **E.N. Ex. Rel. Nesbitt v. Rising Sun-Ohio**, 720 N.E.2d 447 (Ind. Ct. App. 1997) for discussion of the term necessary.

VI. D. 1. Appointment of Counsel for Non-Consenting Parents

No guardianship statute requires appointment of counsel for parents who object to the appointment of a guardian for their child. Arguably, an indigent parent can request court appointed counsel pursuant to IC 34-10-1-1. Courts have required appointment of counsel for indigents in a variety of civil legal actions. See **Sholes v. Sholes**, 760 N.E.2d 156 (Ind. 2001) (in a dissolution case, statute required appointment of counsel; trial courts have power to order payment of appointed counsel; court must perform an indigency consideration to see if an applicant qualifies for appointed counsel); **Holmes v. Jones**, 719 N.E. 2d 843 (Ind. Ct. App. 1999) (court's decision to deny appointment of pauper counsel in protective order case was reversed and remanded with instructions to appoint counsel or conduct an indigency hearing); **Campbell v. Criterion Group**, 605 N.E.2d 150, 159 (Ind. 1992) (indigency determinations present a subject for the sound discretion of the trial court and a very clear case of abuse must be shown before this discretionary power can be interfered with); **Elliott v. Elliott**, 634 N.E.2d 1345, 1350 (Ind. Ct. App. 1994) (indigency does not mean the person is totally without means; a person is indigent if he legitimately lacks financial resources without imposing a hardship on himself or his family).

Since guardianship is not permanent and does not have the legal effect of an adoption in that a parent's rights to a child are not permanently ended, parents' rights to counsel in adoptions as described in **Taylor v. Scott**, 523 N.E.2d 452 (Ind. Ct. App. 1988), do not apply to guardianships.

VI. D. 2. Case Law on Standard of Proof and Burden of Proof

If the parent contests the appointment of a guardian, Indiana law states that the person who seeks the appointment of a guardian must overcome the strong presumption that it is in the child's best interest to reside in the custody of a parent. See **In Re Guardianship of B.H.**, 770 N.E.2d 283 (Ind. 2002).

It is presumed that the best interests of the child are best served by being in the custody of a natural parent; to rebut this presumption, the party seeking guardianship must show (a) unfitness, (b) long acquiescence, or (c) voluntary relinquishment such that the affections of the child and third party have become so interwoven that to sever them would seriously mar and endanger the future happiness of the child. See **Hendrickson v. Binkley**, 316 N.E.2d 376, 380 (Ind. Ct. App. 1974). A trial court is not limited to this criteria, however. See **In Re Guardianship of B.H.**, 770 N.E.2d 283, 287 (Ind. 2002). Once these factors are proved, then the best interests of the child must require placement with the third party. See **In Re Guardianship of B.H.**, 770 N.E.2d 283, 287 (Ind. 2002).

In a contested guardianship between a third party and a parent, the third party seeking guardianship has the burden of proof. See **In Re Guardianship of L.L.**, 745 N.E.2d 222 (Ind. Ct. App. 2001), *trans. denied*. The third party seeking guardianship must meet their burden of proof with clear and convincing evidence. See **In Re Guardianship of B.H.**, 770 N.E.2d 283, 287 (Ind. 2002).

Case law discussing the standard and burden of proof includes:

**In Re Custody of J.V.**, 913 N.E.2d 207, 210-11 (Ind. Ct. App. 2009) (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).

**A.J.L. v. D.A.L.**, 912 N.E.2d 866, 875 (Ind. Ct. App. 2009) (Court held trial court did not err when it concluded that Aunt and Uncle were children's de facto custodians and awarded them custody of the children, where clear and convincing evidence (1) showed that Mother had relinquished care and control of children to Aunt and Uncle for significant periods of time and that affections between children and Aunt and Uncle were interwoven, and (2) supported trial court's conclusion that Aunt and Uncle had rebutted presumption that Mother, as natural parent, should have custody of children);

**Christian v. Durm**, 866 N.E.2d 826, 829-30 (Ind. Ct. App. 2007) (Court applied B.H., 770 N.E.2d 283 standard), *trans. denied*.

**Blasius v. Wilhoff**, 863 N.E.2d 1223, 1231 (Ind. Ct. App. 2007) (trial court applied standard set out in B.H., 770 N.E.2d 283, 287) *trans. denied*.

**Allen v. Proksch**, 832 N.E.2d 1080, 1093, 1099-100 (Ind. Ct. App. 2005) (using clear and convincing evidence standard from In Re Guardianship of B.H., 770 N.E.2d 283 (Ind. 2002) regarding requirement of clear and convincing standard of proof).

**Hinkley v. Chapman**, 817 N.E.2d 1288, 1294 (Ind. Ct. App. 2004) (Court found trial court did not abuse its discretion in appointing guardians; noted that trial court could have concluded that the judgment was established by clear and convincing evidence; and noted trial court's conclusion that parties seeking guardianship had met their burden of proof).

**In Re Guardianship of B.H.**, 770 N.E.2d 283 (Ind. 2002) (to overcome strong presumption child's best interests are ordinarily served by placement in custody of natural parent, before placing child in custody of person other than natural parent, trial court must be satisfied by clear and convincing evidence that best interests of child require such placement and that such placement represents a substantial and significant advantage to child).

VI. D. 3. Statute and Case Law Regarding Rebuttable Presumption for Parental Custody

IC 29-3-3-3 states that except as otherwise determined in a dissolution of marriage proceeding, custody proceeding, guardianship proceeding, or other proceeding authorized by

law, the parents of a minor have the right to custody of the minor's person. The parents also have the statutory right to execute legal documents concerning the minor and to consent to medical care or other professional care, treatment or advice for the minor's health and welfare. IC 29-3-3-3(8).

There is a strong presumption that it is in the child's best interests to be in the custody of a parent; however, this presumption is rebuttable. Indiana case law provides that in order to overcome the rebuttable presumption, the party seeking guardianship must show (a) unfitness, (b) long acquiescence, or (c) voluntary relinquishment such that the affections of the child and third party have become so interwoven that to sever them would seriously mar and endanger the future happiness of the child. See **Hendrickson v. Binkley**, 316 N.E.2d 376, 380 (Ind. Ct. App. 1974). See also **Matter of Guardianship of Riley**, 597 N.E.2d 995 (Ind. Ct. App. 1992) (Maternal grandmother's guardianship petition denied due to lack of evidence that divorced, non- custodial father was an unfit parent or had abandoned the children); **Styck v. Karnes**, 462 N.E.2d 1327 (Ind. Ct. App. 1984) (Mother's request to terminate guardianship denied due to her failure to support or communicate with the child and psychological harm to child if bond between him and paternal grandparent guardian were severed); **In Re Guardianship of Phillips**, 178 Ind. App. 220, 383 N.E.2d 1056 (1978) (joint petition for guardianship filed by maternal grandmother and uncle denied because there was no evidence that the father was unfit).

A trial court is not limited to these three criteria, however. See **In Re Guardianship of B.H.**, 770 N.E.2d 283, 287 (Ind. 2002). Once these factors are proved, then the best interests of the child must require placement with the third party. See **In Re Guardianship of B.H.**, 770 N.E.2d 283, 287 (Ind. 2002).

Practitioners should be aware that appellate decisions on guardianship without parental consent frequently quote third party custody cases, and vice versa. Indiana case law concerning children being awarded to the custody of third party non-parents has been applied by our appellate courts to both guardianship and third party custody proceedings.

The seminal and often cited case regarding the standard to be applied in guardianship and third party custody cases is **In Re Guardianship of B.H.**, 770 N.E.2d 283, 287-90 (Ind. 2002). The Indiana Supreme Court resolved the then existing dispute in the case law regarding the nature and quantum of evidence required to overcome the strong presumption that the child's best interests are ordinarily served by placement in the custody of the natural parent. This dispute was defined by the Appeals Court's holdings in Hendrickson v. Binkley, 316 N.E.2d 376 (Ind. Ct. App. 1974), (restating the considerations set forth by the Supreme Court in Gilmore v. Kitson, 74 N.E. 1083 (Ind. 1905)) and Turpen v. Turpen, 537 N.E.2d 537 (Ind. Ct. App. 1989), as well as their progeny. To resolve this dispute, the B.H. Court held:

> [T]hat, 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 presumption will not be overcome merely because "a third-party could provide the better things in life for the child." B.H. at 287.

The Court found the Turpen approach to be inadequate. Regarding the Hendrickson approach, it stated that the criteria laid forth was important, but that a trial curt was not

limited to considering only those criteria. The Court reasoned, "The issue is not merely the 'fault' of the natural parent. Rather, it is 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." The Court also held that "this determination falls within the sound discretion of our trial courts, and their judgments must be afforded deferential review." But the Court noted that, "A generalized finding that a placement other than with the natural parent is in the child's best interests, however, will not be adequate to support such determination, and detailed and specific findings are required."

In **Matter of Guardianship of B.W.**, 45 N.E.3d 860, 866-7 (Ind. Ct. App. 2015), the Court reversed the trial court's order awarding custody of the child to Great Aunt. The Court held that Great Aunt had not overcome the strong presumption in favor of a child's placement with her natural parent. Great Aunt had alleged unfitness as the grounds for the guardianship, but the Court determined that the record did not support a finding that Mother was unfit at the time of the hearing. The Court opined that the trial court's findings were inadequate to rebut the presumption in favor of the natural parent because the findings did not specifically state: (1) why placement with Great Aunt was necessary or (2) how the child's best interests would be substantially and significantly served by placement with Great Aunt. The Court noted that, although the character of Great Aunt's relationship with the child would undoubtedly change, this fact alone did not mean that their bond would be severed.

In **In Re Adoption of L.T.**, 9 N.E.3d 172, 177-9 (Ind. Ct. App. 2014), the Court reversed the Marion Superior Court, Probate Division's order dismissing or terminating Maternal Grandparents' guardianship of their three-year-old granddaughter for lack of subject matter jurisdiction and granting immediate custody of the child to adjudicated Father, her only living parent. The Court remanded with instructions to conduct a hearing on the best interests of the child. The Court was not persuaded that Father had an absolute right to custody upon the death of Mother, and determined that the trial court erred in not conducting a hearing on the best interests of the child and on changed circumstances that would warrant a modification of custody. Father relied upon IC 29-3-3-3, which provides that parents or a surviving parent have the right to custody of a minor without the appointment of a guardian; however, this statute provides for several exceptions, such as court orders from other custody proceedings or other proceedings authorized by law. The Court determined that the plain language in this statute did not give Father an absolute right to physical custody of the child regardless of a prior court order. The Court opined that case law, while indicating that the factor of a substantial change in circumstances is almost always met at the outset in a custody dispute between a parent seeking to regain custody and a non-parent seeking to retain custody because of the strong parental presumption, does not "summarily dispense" with the necessary inquiry into a child's best interests in a custody dispute between a parent and a non-parent. (citing In re Paternity of K.I., 903 N.E.2d 453, 457 (Ind. 2009)).

In **T.H. v. R.J.**, 23 N.E.3d 776, 784-7 (Ind. Ct. App. 2014), *trans. denied*, the 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, 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. The Court held that the evidence supported the trial court's findings regarding both Stepfather's stabilized mental health and the medical attention given to the child. The Court determined that the trial court could not err by failing to apply the

Hendrickson factors because it was not required to use those factors at all. The Court held that the trial court did not err in concluding that Grandparents failed to overcome the presumption in favor of the natural parents. Furthermore, 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. Lastly, the Court declined to extend the de facto custodian statute to provide visitation rights with a child who has been removed from the custody of a de facto custodian; prior case law had determined that since the de facto custodian statute did not address visitation, it therefore did not provide for visitation between a child and the de facto custodian who lost custody of that child.

In **In Re Paternity of A.S.**, 984 N.E.2d 646, 651-3 (Ind. Ct. App. 2013), *trans. denied*, the Court reversed and remanded the trial court's award of physical custody of the nine-year-old child to Grandmother, thereby returning custody to Mother. The Court instructed the trial court to determine the details of Father's visitation and to determine what, if any, visitation rights are due to Grandmother under the Grandparent Visitation Act. The Court noted that, in a dispute between a parent and a third party, the Court cannot ignore the constitutional implications. The Court, quoting In Re Paternity of T.P., 920 N.E.2d 726, 731 (Ind. Ct. App. 2010), *trans. denied*, said that the parental presumption will not be overcome merely because "a third party could provide the better things in life for the child." The Court observed that the third party has the burden to rebut the presumption that a child should be in the custody of her natural parent.

In **Parks v. Grube**, 934 N.E.2d 111,113-118 (Ind. Ct. App. 2010), the Court affirmed the trial court's order granting custody of Mother's three children to Paternal Grandparents despite Mother's argument that there was insufficient evidence to support the order. The Court opined that Paternal Grandparents were not required to prove that Mother is unfit. The Court noted that in custody disputes between natural parents and third parties, a presumption exists that it is in the best interest of the child to be placed in the custody of the natural parent. The Court said: (1) third parties can rebut the parental presumption by presenting clear and convincing evidence that the best interests of the child will be served by placing the child in the custody of the third party; (2) the trial court must be convinced that placement with a third party represents a substantial and significant advantage to the child; (3) evidence establishing the natural parent's unfitness or acquiescence, or demonstrating that a strong emotional bond has formed between the child and the third parties is not limited to these criteria; (4) the issue is whether the important and strong presumption that 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. Although evidence that a natural parent is unfit is important, it is not the only criteria the trial court may consider. The trial court did not impermissibly rely on Mother's previous alcohol-related arrests or her history of alcohol abuse, and did not err when it considered the children's preference to live with Paternal Grandparents. The Court did not agree with Mother's argument that the trial court based its decision solely on the preferences of the two older children. The Court also cited IC 31-17-2-8(3), which states that "[t]he wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age," is a relevant factor when determining a child's best interests.

In **In Re Paternity of L.J.S.**, 923 N.E.2d 458,464-5 (Ind. Ct. App. 2010), *trans. denied,* the Court reversed the trial court's order which modified custody of the child from Mother to Grandparents. Mother had consented to the Grandparents having custody of the child, but Father requested that he have custody. The Court remanded the case with instructions to the

trial court to grant sole custody to Father and to order appropriate visitation and child support. The Court opined that the findings do not support the trial court's judgment which modified custody to Grandparents and do 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. The Court opined that the findings said nothing about Father's fitness as a parent nor do they suggest that Father abandoned the child, relinquished his rights, or otherwise abdicated his authority and were inadequate to clearly and convincingly overcome the important and strong presumption that the child's interests are best served by placement with Father. The Court opined that the specific findings of the trial court are nothing more than "[a] generalized finding that a placement other than with the natural parent is in [the] child's best interests", which our Supreme Court has held will "not be adequate to support such [a] determination."

In **In Re Paternity of T.P.**, 920 N.E.2d 726, 731-4, 736 (Ind. Ct. App. 2010), the Court affirmed the trial court's conclusion that Caretakers did not qualify as the child's de facto custodians. The Court also affirmed the trial court's denial of Caretakers' petition seeking joint legal custody and permanent physical custody of the child. The Court held that Caretakers did not present clear and convincing evidence to overcome the presumption that the child's interests were best served by placement with Mother. The Court found no clear error by the trial court based upon the factors of acquiescence and strong emotional bond. The Court found no clear error in the trial court's declining to use the factor of Mother's unfitness due to allegedly improper influences of drug use, sexual activity, and crime in Mother's neighborhood.

In **In Re Marriage of Huss**, 888 N.E.2d 1238, 1242-44, 1248, n.3 (Ind. 2008), which is discussed in more detail at III.B.1., 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. The Court found that the evidence was not insufficient to support the dissolution trial court's award of custody to Husband, a "non-parent third party," rather than to Wife as the child's biological mother.

In **King v. S.B.**, 837 N.E.2d 965, 967 (Ind. 2005) (Dickson, J., dissenting) there was an appeal from a Trial Rule 12(B)(6) dismissal of a declaratory judgment request filed by Mother's former domestic partner. The declaratory judgment request sought a judicial declaration that she was entitled to parenting time rights, child support obligations, and certain other parental rights and responsibilities with respect to Mother's child who Mother and she jointly decided to bear and raise together, and who was conceived by artificial insemination using semen donated by domestic partner's brother. The Court reversed and remanded, holding that at least some of the relief sought in the case fell within that which In Re Guardianship of B.H., 770 N.E.2d 283 (Ind. 2002) "grants persons other than natural parents to seek and Indiana trial courts, where appropriate, discretion to award."

In **Truelove v. Truelove**, 855 N.E.2d 311, 314-15 (Ind. Ct. App. 2006), the Court affirmed the dissolution trial court's award of the custody of the two children of the marriage to their paternal grandparents. The Court held that there was clear and convincing evidence that the children's best interests were substantially served by placement with the paternal grandparents, and the trial court was not required to make specific findings of Mother's unfitness or her acquiescence in the children's living arrangements.

In **Allen v. Proksch**, 832 N.E.2d 1080, 1095-97 (Ind. Ct. App. 2005), the Court affirmed the trial court's order granting custody of the child to Maternal Grandmother as third-party

custodian. It found that the trial court's findings provided ample support for its order in granting Grandmother custody of the child.

In **Hinkley v. Chapman**, 817 N.E.2d 1288, 1293-94 (Ind. Ct. App. 2004), the Court (1) cited the standard in In Re Guardianship of B.H., 770 N.E.2d 283 (Ind. 2002); (2) held that based upon the facts delineated by the trial court, the trial court had concluded that the parties seeking guardianship had met their burden; (3) determined that the trial court could have concluded that the judgment was established by clear and convincing evidence; and (4) therefore, held that the trial court did not abuse its discretion in appointing the guardians.

In **Nunn v. Nunn**, 791 N.E.2d 779, 784-85 (Ind. Ct. App. 2003), the Court found that the trial court had jurisdiction to decide the custody dispute between Wife and Husband, who was not the child's father, and remanded the case for resolution. It cited prior case law for the proposition that, in cases involving a custody dispute between a natural parent and a third-party, there is a presumption that the natural parent should have custody of the child, and the third-party bears the burden of overcoming this presumption by clear and cogent evidence. The Court remanded this issue to the trial court for consideration under the proper framework.

In **In Re Custody of J.V.**, 913 N.E.2d 207, 210-11 (Ind. Ct. App. 2009), a paternity proceeding, the 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).

See also **Fry v. Fry**, 8 N.E.3d 209 (Ind. Ct. App. 2014), discussed in detail at III.B., this Chapter (Court affirmed the dissolution court's order awarding custody of Mother's Daughter to Mother's former Husband); **A.J.L. v. D.A.L.**, 912 N.E.2d 866, 875 (Ind. Ct. App. 2009) (in dissolution proceeding, relying on In Re L.L. & J.L., 745 N.E.2d 222, 230 (Ind. Ct. App. 2001), Court held trial court did not err when it concluded that paternal great aunt and great uncle (Aunt and Uncle) were children's de facto custodians and awarded them custody of the children, where clear and convincing evidence showed that (1) Mother had relinquished care and control of children to Aunt and Uncle for significant periods of time and that affections between children and Aunt and Uncle were completely interwoven, and (2) supported trial court's conclusion that Aunt and Uncle had rebutted presumption that Mother, as natural parent, should have custody of children); **Christian v. Durm**, 866 N.E.2d 826, 829-30 (Ind. Ct. App. 2007) (Court quoted and applied In Re Guardianship of B.H., 770 N.E.2d 283 (Ind. 2002) language regarding rebuttable presumption in favor of parents and held trial court not required to make specific finding of unfitness or abandonment), *trans. denied*; **Blasius v. Wilhoff**, 863 N.E.2d 1223, 1229 (Ind. Ct. App. 2007) (Court held that trial court applied B.H. standard regarding rebuttable presumption and, although evidence establishing biological parent's unfitness or acquiescence, or demonstrating that strong emotional bond had formed between child and third party seeking custody would be important, trial court is not limited to these criteria), *trans. denied*.

VI. D. 4. Parenting Time For Parents in Guardianship/Third-Party Custodianship Cases

No guardianship statutes govern the type or amount of parenting time which the guardian must provide. IC 29-3-8-1(a) grants a guardian "all of the responsibilities and authority of a parent." Guardians of minors are often vested with a great deal of discretion in determining a parent's parenting time. The court appointing the guardian may order specific parenting time

to be provided to the parents by the guardian. Indiana case law has characterized parenting time as a "sacred, precious privilege." See **Matter of Adoption of Topel**, 571 N.E.2d 1295, 1299 (Ind. Ct. App. 1991) and **Stewart v. Stewart**, 521 N.E.2d 956, 960 (Ind. Ct. App. 1988).

Courts must balance the right of a parent to parenting time against the reasons for the necessity of the guardianship, in order to properly account for the child's right to safety and stability.

The Indiana Parenting Time Guidelines have a "Scope" section, which provides that the Guidelines are applicable to all child custody situations (emphasis added). Although the scope does not specifically mention guardianships, guardianships are a child custody situation. Awarding a parent full Indiana Parenting Time Guidelines may not be advisable in some situations, depending on why the guardianship was necessary. The Scope of the Indiana Parenting Time Guidelines states that they are "not applicable to situations involving family violence, substance abuse, risk of flight with a child, or any other circumstances the court reasonably believes endanger the child's physical health or safety, or significantly impair the child's emotional development." These are often reasons for why a guardianship is created, and as such, full parenting time may not be advisable.

The type and amount of visitation which the proposed guardian should provide when guardianship is the designated CHINS permanency plan should be carefully considered by DCS and fully discussed with the guardian. Optimally, the guardianship appointment order should include specific guidelines for parental visitation which are tailored to the child's need for protection and the parents' situation.

See **In Re Paternity of Z.T.H**., 839 N.E.2d 246, 248, 253 (Ind. Ct. App. 2005) (Crone, J., dissenting) (throughout the third-party custodianship, Father telephoned the child regularly, attended a majority of the child's sporting events and school activities, and consistently exercised visitation); **Allen v. Proksch**, 832 N.E.2d 1080, 1095-97 (Ind. Ct. App. 2005) (trial court granted Father parenting time with child as provided in Indiana Parenting Time Guidelines for non-custodial parent where Grandmother was awarded custody of child as third-party custodian); **In Re Guardianship of A.R.S.**, 816 N.E.2d 1160, 1162-63 (Ind. Ct. App. 2004) (Crone, J., dissenting) (Mother abandoned earlier effort to terminate guardianship of her children after establishing a fixed visitation schedule); **Roydes v. Cappy**, 762 N.E.2d 1268, 1270 (Ind. Ct. App. 2002) (Riley, J., dissenting) (trial court entered an order requiring Mother and Guardian, who was maternal grandmother, to follow a visitation schedule); and **Harris v. Smith**, 752 N.E.2d 1283, 1288-90 (Ind. Ct. App. 2001) (order granting third parties custody of child stated Mother and Father "shall be entitled to visit [the child] at all reasonable and proper times agreeable to [third-party custodians]").

See Chapter 8 at VI. for more in-depth discussion of statutes and case law regarding parenting time and visitation generally.

VI. E. Appellate Review Standard

IC 29-1-1-22 states that any person considering himself aggrieved by any decision of a court having probate jurisdiction may prosecute an appeal to the court having jurisdiction of such appeal. Such appeal shall be taken as appeals are taken in civil cases. Findings and orders of a trial court in a guardianship proceeding are within the trial court's discretion and will be reviewed by an appellate court under an abuse of discretion standard. See IC 29-3-2-4; **E.N. Ex. Rel. Nesbitt v. Rising Sun-Ohio**, 720 N.E.2d 447, 450 (Ind. Ct. App. 1999) (Court stated

that all findings and orders of the trial court in guardianship proceedings are within the trial court's discretion and will be reviewed by an appellate court under an abuse of discretion standard).

An abuse of discretion will only be found when the decision of the trial court is clearly against the logic and effect of the facts and circumstances before the court, or if the court has misinterpreted the law. See **In Re Guardianship of V.S.D.**, 660 N.E.2d 1064, 1066 (Ind. Ct. App. 1996); see also **Carr v. Carr**, 685 N.E.2d 92, 96 (Ind. Ct. App. 1997) (co-guardian argued that the clear and convincing evidentiary standard should have been used by the trial court; the Court opined that the standard of review for sufficiency of the evidence with respect to a judgment requiring proof by clear and convincing evidence imposes neither greater nor lesser judicial scrutiny than other sufficiency questions. Such judgments will be affirmed if, considering only the probative evidence and the reasonable inferences supporting it and without reweighing evidence or assessing witness credibility, a reasonable trier of fact could find the matter proven by clear and convincing evidence).

Regarding appellate review, the Indiana Supreme Court in **In Re Guardianship of B.H.**, 770 N.E.2d 283, 287-88 (Ind. 2002) said:

> In deference to the trial court's proximity to the issues, 'we disturb the judgment only where there is no evidence supporting the judgment.' [multiple citations omitted]. We do not reweigh the evidence, but consider only the evidence favorable to the trial court's judgment. A challenger thus labors under a heavy burden, and must show that the trial court's findings are clearly erroneous. [multiple citations omitted]. Child custody determinations fall squarely within the discretion of the trial court and will not be disturbed except for an abuse of discretion. Clark v. Clark, 726 N.E.2d 854, 856 (Ind. Ct. App. 2000). Reversal is appropriate only if we find the trial court's decision is against the logic and effect of the facts and circumstances before the Court or the reasonable inferences drawn therefrom. We also note that, in reviewing a judgment requiring proof by clear and convincing evidence, an appellate court may not impose its own view as to whether the evidence is clear and convincing but must determine, by considering only the probative evidence and reasonable inferences supporting the judgment and without weighing evidence or assessing witness credibility, whether a reasonable trier of fact could conclude that the judgment was established by clear and convincing evidence. [citation omitted].

See also **In Re Marriage of Huss**,, 888 N.E.2d 1238, 1245 (Ind. 2008), (Supreme Court applied In Re Guardianship of B.H., 770 N.E.2d 283, 287 (Ind. 2002) standard of review, specifically reciting its statement that an appellate court should not disturb a trial court determination awarding child custody to a non-parent unless "there is no evidence supporting the findings or the findings fail to support the judgment"); **Christian v. Durm**, 866 N.E.2d 826, 829-30 (Ind. Ct. App. 2007) (Court applied In Re Guardianship of B.H., 770 N.E.2d 283 (Ind. 2002) standard of review), *trans. denied;* **Blasius v. Wilhoff**, 863 N.E.2d 1223, 1231 (Ind. Ct. App. 2007) (Court held that "according the trial court the appropriate deference, as we must, we cannot conclude its findings are clearly erroneous or that its judgment is against the logic and effect of the evidence" inasmuch as (1) evidence supports trial court's findings, and trial court's findings provide support for its judgment to grant custody of child to third party custodians; (2) trial court applied standard of review set out in B.H.; and (3) trial court was clearly convinced that placement with third party custodians represented substantial and significant advantage to child), *trans. denied;* **Allen v. Proksch**, 832 N.E.2d 1080, 1095-97, (Ind. Ct. App. 2005) (stated standard of review essentially as stated in In Re Guardianship of B.H., 770 N.E.2d 283 (Ind. 2002)); **Hinkley v. Chapman**, 817 N.E.2d 1288 (Ind. Ct. App. 2004) (quoted In Re Guardianship of B.H., 770 N.E.2d 283 (Ind. 2002) regarding appellate review standard); **In Re Custody of G.J.**, 796 N.E.2d

756 (Ind. Ct. App. 2003) (regarding allegation that party lacks standing, deference to trial court's decision is not required because allegation is treated as motion to dismiss under Indiana Trial Rule 12(B)(6)), *trans. denied*; **Nunn v. Nunn**, 791 N.E.2d 779 (Ind. Ct. App. 2003) (abuse of discretion is standard of review); and **Francies v. Francies**, 759 N.E.2d 1106, 1115-16 (Ind. Ct. App. 2001) (abuse of discretion is standard of review), *trans. denied*.

## VII. RESPONSIBILITITES AND DUTIES OF MINOR'S GUARDIAN/THIRD-PARTY CUSTODIAN

VII. A. Statutes

VII. A 1. Required Powers and Duties

With the exception of a temporary guardian and unless otherwise ordered by the court, the appointed guardian of a minor has all of the responsibilities and authority of a parent and is responsible for the preservation of the minor's property. IC 29-3-8-1.

If the minor has no living parent or if the parents are incapacitated, the guardian may exercise the powers of the parent described at IC 29-3-3-3(1) through (8) by executing the following documents on the minor's behalf: specific Internal Revenue Code documents; waiver of notice, consent and power of attorney under any statute, including Indiana tax documents; consent to unsupervised estate administration; Federal and state income tax returns; consent to medical care or other professional care, treatment or advice for the minor's health and welfare. The guardian must become sufficiently acquainted with the minor to know the minor's capabilities, disabilities, needs, opportunities and physical and mental health. IC 29-3-8-1(a)(1). The guardian may apply any guardianship income and, if necessary, the principle, to the minor's needs for support and shall report the physical and mental condition of the minor to the court. IC 29-3-8-1(a)(3), (4).

A guardian must comply with applicable statutes at IC 29-3-12-1 through 5 when the guardianship is terminated. IC 29-3-8-1(a)(2). IC 29-3-8-3 mandates that a guardian "observe the standards of care and conduct applicable to trustees" with respect to the guardianship property. The guardian must also do the following: protect, preserve and conserve any guardianship property; encourage the minor's self- reliability and independence; consider recommendations for support, care, education and training made by the minor's parent. IC 29-3-8-3.

A court may include in its order creating a guardianship of a minor the requirement that the minor must reside with the guardian until the guardianship is terminated or modified. IC 29-3-8-9(a).

Either DCS or a proposed guardian must notify the guardianship court if DCS has approved financial assistance to a guardian for the minor "as a component of child services (as defined in IC 31-9-2-17.8(1)(E)). IC 29-3-8-9(f). If the guardian will be provided assistance as a component of child services, the court shall order the guardian to provide financial support to the protected person to the extent the following resources do not fully support the needs of the protected person: (1) The guardianship property of the protected person; (2) Child support or other financial assistance received by the guardian from the protected person's parent or parents; (3) Periodic payments the guardian receives from DCS for support of the protected person as set forth in DCS's rules or the terms of the guardianship assistance agreement. IC 29-3-8-9(f).

If IC 29-3-8-9 applies to a child, then the guardianship petitioner must submit all necessary forms and information in order for DCS to conduct a criminal history check as is defined in IC 31-9-2-22.5 and IC 29-3-1-2.5. IC 29-3-5-1.5. This criminal check is required of the petitioner and any other household members before the court appoints the guardian. IC 29-3-5-1.5.

Guardians also have the right to access "digital assets" as set forth in IC 32-39-2-11. After an opportunity for hearing under IC 29-3, a court may grant a guardian access to the digital assets of the protected person. IC 32-39-2-11(a). A custodian disclose to a guardian the catalogue of electronic communications sent or received by the protected person and any digital assets, other than the content of electronic communications, in which the protected person has a right or interest if the guardian gives the custodian: (1) a written request for disclosure; (2) a certified copy of the court order giving the guardian authority over the digital assets; and (3) if requested by the custodian: (A) a number, username, address, or other unique subscriber identifier or account identifier assigned by the custodian to identify the account of the protected person; or (B) evidence linking the account to the protected person. IC 32-39-2-11(b). A guardian may be able to request that the custodian of the digital assets of the protected person suspend or terminate an account of the protected person. IC 32-39-2-11(c). A request made under this subsection must be accompanied by a certified copy of the court order giving the guardian authority over the protected person's property. IC 32-39-2-11(c).

IC 29-3-8-10 provides that a guardian's ability to access the digital assets of a protected person is governed by the above statute.

VII. A 2. Permissive Powers and Duties

A guardian can exercise all of the powers needed to perform the guardian's duties, including:
(1) The power to receive property payable to the minor or the minor's parent, guardian, or custodian from any source;
(2) The power to take custody of the minor and establish the minor's place of abode;
(3) The power to start proceedings or take other action to compel a person to perform their duty to support the minor or to pay for the minor's education, health, or welfare;
(4) The power to consent to medical or other professional care and treatment for the minor's health and welfare;
(5) The power to consent to the marriage or adoption of the minor;
(6) The power to delegate to the minor certain responsibilities for decisions affecting the minor's business affairs and well-being within reason;
(7) The power to purchase a home for the minor, to protect the minor's existing home, or to protect the minor's interest in any real estate;
(8) The powers with respect to the guardianship property as are granted to a guardian under section 4 of this chapter;
(9) The power to bind all or any part of the guardianship property in a transaction for the benefit of the minor; and
(10) If the minor has no living parent, other than a parent who is an incapacitated person, the powers granted to the parent of a minor under IC 29-3-3-3(1) through IC 29-3-3-3(8).

With the approval of and under any conditions imposed by a court after notice and a hearing, a guardian, other than a temporary guardian, may change the physical presence of the protected person to another place in Indiana or to another state, if the court finds that such a change is in the best interests of the protected person. IC 29-3-9-2. If such a change is made, the guardianship may be limited or terminated by the court. IC 29-3-9-2.

VII. A 3. Delegation of Powers and Duties

IC 29-3-9-1 allows a guardian to delegate certain guardian-like powers.

Except as otherwise provided in subsequent subsections, a parent or a guardian may delegate any powers regarding health care, support, custody, or property of the minor to another person. They may do this for any period during which the care and custody of the minor is entrusted to an institution giving care, custody, education, or training, or generally, for twelve months or less. This does not apply to temporary guardians, meaning that a temporary guardian may not delegate his or her duties, and a delegation of this nature is effective immediately unless otherwise stated in the power of attorney. IC 29-3-9-1(c).

One of the exceptions the above ability to delegate is found at IC 29-3-9-1(d). A parent or guardian cannot delegate under a power of attorney the power to consent to the marriage or adoption of a minor, and cannot delegate the power to petition the court to request the authority to petition for dissolution of marriage, legal separation, or annulment of marriage on behalf of the minor. That ability is governed by IC 29-3-9-12.2.

The other exception to the ability to delegate is found at IC 29-3-9-1(h). A licensed foster family who is providing care to a child placed with them by DCS or other juvenile court order cannot provide overnight or regular and continuous care and supervision to a child for whom an IC 29-3-9-1(c) power of attorney was executed. However, DCS may grant exceptions to this limitation upon request.

A person who has a power of attorney executed according to IC 29-3-9-1(c) has all the authority of the parent or guardian as it pertains to the health care, support, custody, or property of the minor. Any limitations must be expressly written in the document in order to be effective. The parent or guardian is responsible for any act or omission of the person having the power of attorney with respect to the affairs, property, and person of the minor.

This type of delegation of powers does not subject any of the parties to any laws, rules, or regulations concerning the licensing or regulation of foster family homes, child placing agencies, or child caring institutions under IC 31-27. IC 29-3-9-1(f). The parties to this type of delegation are also not subject to any foster care requirements or foster care licensing regulations. IC 29-3-9-1(g). A child who is the subject of this type of delegation of powers is not considered to be placed in foster care. IC 29-3-9-1(g).

IC 29-3-9-1(i) makes special provisions relating to a power of attorney in the context of a parent who is a member in the United States military. It applies to parents who are members in the active or reserve component of the United States armed forces, or parents who are in the commissioned corps of various enumerated administration and departments that have been detailed for duty with the Army or Navy. It also applies to parents who are required to enter or serve in active military service under a call or order from the President of the United States, or required to serve on state active duty. Parents who fit these descriptions may delegate the powers described in IC 29-3-9-1(c) for longer than twelve months if the parent is on active duty service. The term of delegation cannot exceed the term of active duty service plus thirty days. The power of attorney needs to indicate that the parent is required to enter or serve in the active military service of the United States, and must also include the estimated beginning and ending dates of the active duty service.

A delegation of powers under this section can be revoked at any time by a written instrument of revocation. This written document must (1) identify the power of attorney that is being revoked; and (2) be signed by the parent or guardian who executed the power of the attorney in the first place. IC 29-3-9-1(j).

VII. A 4. Compensation

IC 29-3-9-3 states that a guardian is "entitled to reasonable compensation for services as guardian and to reimbursement for reasonable expenditures made in good faith on behalf" of the minor.

In **In Re Guardianship of Hickman**, 811 N.E.2d 843, 852 (Ind. Ct. App. 2004), *trans. denied*, an adult guardianship case, the Court affirmed the trial court's order awarding attorney fees from the estate for guardianship petitioner's attorneys despite another party's argument that, because a guardian ad litem had been appointed, the involvement of the guardianship petitioner was no longer necessary. The Court opined that a trial court is required to appoint a guardian ad litem to represent the interests of an alleged incapacitated person. The Court further stated that, unlike the guardian ad litem, a guardianship petitioner is not required to act in accordance with the incapacitated person's best interests. Because the guardianship petitioner's interests might have been different from the incapacitated adult's interests, the argument that attorney fees for the guardianship petitioner were unreasonable was without merit.

VII. B. Case Law

VII. B. 1. Generally

A guardian must act with fidelity and be able to carry out his duties efficiently. **Matter of Guardianship of Brown**, 436 N.E.2d 877 (Ind. Ct. App. 1982). The court must permit representation of a ward by the ward's guardian in a civil lawsuit pursuant to Ind. Trial Rule 17C. See **Richardson v. Brown**, 173 Ind. App. 50, 362 N.E.2d 197 (1977).

In **In Re Guardianship of Stalker**, 953 N.E.2d 1094, 1106-8 (Ind. Ct. App. 2011), an adult guardianship case, the Court concluded that the guardian breached her fiduciary duty to protect, preserve, and properly manage her ward's property, her fiduciary duty of loyalty to her ward, and violated her ward's due process. The Court remanded to the trial court to determine the ward's harm and award damages.

VII. B. 2. Sterilization

The Court of Appeals addressed sterilization of adult female wards in two cases, **Lulos v. State**, 548 N.E.2d 173 (Ind. Ct. App. 1990) and **In Re Guardianship of V.S.D.**, 660 N.E.2d 1064 (Ind. Ct. App. 1996). In these cases, the Court opined that a guardian who seeks a court order for tubal ligation on an incapacitated woman must file a petition for sterilization in good faith and present clear and convincing evidence that the procedure is in the best interests of the ward's health and welfare. In V.S.D., the Court of Appeals found that the trial court's order authorizing the guardian to consent to tubal ligation was supported by the following clear and convincing evidence: the ward had a lengthy history of mental illness that severely impaired her judgment concerning sexual behavior and use of contraception; both of the ward's parents thought tubal ligation was in the ward's best interests; pregnancy precluded the ward's ability to take medication for her mental illness; the ward's mental illness worsened without medication; when properly medicated, the ward did not desire to become pregnant; the ward had been detained on an emergency basis five times within the most recent fifteen months.

VII. C. Local Rules and Practices Concerning Minor's Property

Practitioners should consult the local probate rules or court officials to determine whether and how the guardian will be required to file an inventory of minor's property, keep a separate guardianship bank account for the minor's Social Security monies, child support or assisted guardianship payments, or file an accounting of the minor's property and expenditures every two years.

## VIII. RESIGNATION, REMOVAL AND APPOINTMENT OF SUCCESSOR GUARDIAN

VIII.A. Resignation

A guardian may resign the guardianship appointment and the court may accept the resignation. IC 29-3-12-4(a). Resignation of the guardian does not terminate the appointment of the guardian until the resignation and a final account have been approved by the court. IC 29-3-12-5(c). The resignation of a guardian after letters of guardianship have been duly issued does not by itself invalidate the guardian's acts or omissions prior to removal. IC 29-3-12-4(c). After accepting the guardian's resignation, the court may appoint a successor guardian to succeed to the title, powers and duties of the former guardian if a successor guardian is required. IC 29-3-12-4(b). See this Chapter at VIII.C. for further discussion of successor guardians.

VIII.B. Removal of Guardian

Removal of a guardian deals with the fitness of the guardian. It differs from termination of a guardianship, which deals with the necessity for continuing the guardianship. See **Matter of Guardianship of R.B.**, 619 N.E. 2d 952 (Ind. Ct. App. 1993).

IC 29-3-6-3(a) states that at any time after the appointment of a guardian, any person may serve upon the guardian's attorney and file with the clerk of the court where the guardianship proceedings are pending, a written request for notice of all hearings and copies of all proceedings in connection with the removal, suspension, or discharge of the guardian or termination of the guardianship, as well as other items not related to successor guardians. However, failure to comply with a request for notice under this section does not affect the validity of the proceeding. Unless the court directs otherwise, the guardian or guardian's attorney shall comply with the request.

Practitioners may use this statute to keep informed of the guardianship status of a CHINS whose permanency plan of guardianship has been secured.

VIII.B. 1. Statutory Reasons For Removal

IC 29-3-12-4 provides that a guardian may be removed, after notice and hearing, on the same grounds and in the same manner as provided for removal of a personal representative under IC 29-1-10-6. IC 29-1-10-6 lists the following reasons for removal: (1) the guardian's incapacity (except for physical illness, infirmity or impairment); (2) the guardian is disqualified, unsuitable or incapable of discharging duties; (3) the guardian's mismanagement of estate; (4) the guardian's failure to perform any duty imposed by law or lawful court order; (5) the guardian has ceased to be domiciled in Indiana.

VIII.B. 2. Initiating a Removal Proceeding

The following may initiate removal of a minor's guardian: the minor; any person interested in the guardianship (which arguably would include the minor's parents and relatives); the court on its own motion. IC 29-3-12-4(a). A verified petition for removal should be filed with the court where the guardian was appointed. IC 29-3-12-4(a). A copy of the removal

petition and notice of the hearing date should be served on the guardian and any other person whom the court directs in the same manner in which notices of a guardianship petition should be served. See IC 29-1-1-12 through IC 29-1-1-14; IC 29-3-6-1(b) and this Chapter at IV.B. concerning the manner of notice for removal proceedings.

VIII.B. 3. Emergency Suspension

IC 29-3-3-4(c) provides that if the court finds that a previously appointed guardian is not effectively performing fiduciary duties and the welfare of the minor requires immediate action, the court may suspend the authority of the previously appointed guardian. The court may appoint a temporary guardian for any period fixed by the court. IC 29-3-3-4(c). The temporary guardian has only the powers ordered by the court. The court shall order only those powers that are necessary to prevent immediate and substantial injury or loss to the minor's person or property. IC 29-3-3-4(c). IC 29-3-3-4(d) provides that the court shall order only those powers that are necessary to prevent immediate and substantial injury or loss to the minor's person or property.

Upon the resignation or removal of the guardian, the guardian shall give a final accounting to the court. IC 29-3-12-4(a).

VIII.B. 4. Case Law Concerning Removal of Guardian

The following cases concern the removal of a guardian for an incapacitated adult, but may be useful on a motion for removal of a minor's guardian:

**Carr v. Carr**, 685 N.E.2d 92, 97 (Ind. Ct. App. 1997), where an incapacitated nursing home patient's uncle petitioned to remove the patient's adult daughter as guardian of the patient's $2,500,000.00 estate. The daughter opposed the nursing home move because the Lafayette nursing home required a downgrade in the patient's code status regarding aggressive life-saving measures from "A" to "C". The court ordered the removal of the daughter as guardian of the estate and the daughter appealed, arguing abuse of discretion. The Court of Appeals affirmed the daughter's removal. The Court found that the daughter had failed to file an accounting within the statutorily prescribed time. The Court also stated that the trial court could have concluded that the daughter's request to be compensated at the rate of $80.00 per hour for the ministerial services she had provided to the estate was unreasonable and detrimental to the estate. The Court opined that the statute governing proceedings for removal of a guardian vests broad discretion in the trial court and the Appellate Court will not interfere unless an abuse of discretion clearly appears.

In **Matter of Guardianship of Brown**, 436 N.E.2d 877, 890 (Ind. Ct. App. 1982), two brothers appealed their removal as co-guardians of the persons and estates of their incapacitated parents. The Court affirmed their removal as guardians, finding that the following evidence supported removal: one guardian commingled guardianship funds with personal funds of the guardian, which made accounting difficult and constituted a breach of trust; one guardian isolated and sequestered the parents from their social contact with friends and family members to a degree tantamount to imprisonment; the other guardian had failed to attend to the prescribed diets and medical attention needed by the incapacitated parent. The Court concluded that the trial court had acted within its discretion.

See also **Schwartz v. Schwartz**, 773 N.E.2d 348, 353 (Ind. Ct. App. 2002) (Court affirmed trial court's removal of guardian of estate of incapacitated adult because guardian of estate had mismanaged estate assets, failed to follow court orders, and failed to follow tax laws).

VIII.C. Appointment of Successor Guardian

VIII.C. 1. Statutory Authority

The court may appoint a qualified successor guardian upon the resignation, removal or death of a previously appointed guardian. IC 29-3-12-4. The successor guardian should sign an oath or provide a bond as directed by the court. New letters of guardianship should be issued to the successor guardian, with any limitations of powers noted on the letters. See IC 29-3-7-1, IC 29-3-7-3.

VIII.C. 2. Case Law

**Carr v. Carr**, 685 N.E.2d 92, 97 (Ind. Ct. App. 1997), where an incapacitated nursing home patient's uncle petitioned to remove the patient's adult daughter as guardian of the patient's $2,500,000.00 estate. The daughter opposed the nursing home move because the Lafayette nursing home required a downgrade in the patient's code status regarding aggressive life-saving measures from "A" to "C". The court ordered the removal of the daughter as guardian of the estate and the daughter appealed, arguing abuse of discretion. The Court of Appeals affirmed the daughter's removal. The Court found that the daughter had failed to file an accounting within the statutorily prescribed time. The Court also stated that the trial court could have concluded that the daughter's request to be compensated at the rate of $80.00 per hour for the ministerial services she had provided to the estate was unreasonable and detrimental to the estate. The Court opined that the statute governing proceedings for removal of a guardian vests broad discretion in the trial court and the Appellate Court will not interfere unless an abuse of discretion clearly appears.

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See also **Schwartz v. Schwartz**, 773 N.E.2d 348, 353 (Ind. Ct. App. 2002) (Court affirmed trial court's removal of guardian of estate of incapacitated adult because guardian of estate had mismanaged estate assets, failed to follow court orders, and failed to follow tax laws).

## IX. TERMINATION OF GUARDIANSHIP/THIRD-PARTY CUSTODIANSHIP

IX. A. Statutory Provisions

IX. A. 1. Terms and Conditions Precedent to Terminating A Guardianship

It is possible for a court to craft an order creating a guardianship that includes terms or conditions a parent must meet before seeking any kind of modification of the guardianship, or before seeking to terminate it. IC 29-3-8-9(a). If a guardianship order sets such terms, except as otherwise provided in IC 29-3-12, the court may modify or terminate the guardianship only if the parent complies with the terms and conditions, and proves, by a preponderance of the evidence, his or her current fitness to assume all parental obligations. IC 29-3-8-9(b).

If a court created such a guardianship order, and a petition to modify or terminate the guardianship is filed before the parent complies with the terms or conditions of that order, and the child was the subject of a CHINS petition or an informal adjustment, the court shall refer the petition to DCS for DCS to determine the placement of the child in accordance with the best interests of the child. IC 29-3-8-9(c).

IX. A. 2. Necessity of Involving DCS in Petitions to Terminate A Guardianship

Upon receiving a petition to terminate or modify a guardianship, courts may need to notify DCS of any hearing son the petition in certain circumstances. If a court appointed a guardian for a child who was the subject of a CHINS petition or an informal adjustment, and subsequently to appointing a guardian for that child, a petition to modify or terminate the guardianship is filed, the court shall notify DCS of any hearings related to the petitions. IC 29-3-8-9(d). At any hearing on a petition to terminate or modify a guardianship of a child who the subject of a CHINS or informal adjustment, a court must: (1) Consider the position of DCS; (2) If requested by DCS, allow DCS to present evidence regarding: (A) whether the guardianship should be modified or terminated; (B) the fitness of the parent to provide for the care and supervision of the minor at the time of the hearing; (C) the appropriate care and placement of the child; and (D) the best interests of the child. IC 29-3-8-9(e).

If IC 29-3-8-9 applies to a child, then the guardianship petitioner must submit all necessary forms and information in order for DCS to conduct a criminal history check as is defined in IC 31-9-2-22.5 and IC 29-3-1-2.5. IC 29-3-5-1.5. This criminal check is required of the petitioner and any other household members before the court appoints the guardian. IC 29-3-5-1.5.

IX. A. 3. Termination of a Guardianship By Operation of Law and Exceptions

Except under certain delineated circumstances, IC 29-3-12-1(a) requires the court to terminate a guardianship on a minor's eighteenth birthday, or upon the minor's death. However, IC 29-3-12-6 and 7 both provide circumstances under which a guardianship could be extended past age eighteen.

If a protected person is a minor who has been adjudicated an incapacitated person, the court may not terminate the guardianship when the minor turns eighteen years old. IC 29-2-12-6(a). If the minor who is a protected person is also a recipient or beneficiary of financial assistance provided by DCS through a guardianship described in IC 31-9-2-17.8(1)(E), the court may not terminate the guardianship when the minor reaches eighteen years of age. IC 29-2-12-6(b).

A protected person who is at least seventeen years old and the guardian of the protected person may jointly petition the court to extend the duration of the guardianship beyond the date on which the protected person turns eighteen years old earlier of the following: (1) A termination date, if any, set forth in the petition; or (2) The date the protected person attains twenty-two (22) years of age. IC 29-2-12-7(b). This petition must be verified. IC 29-2-12-7(c). The court, after notice and hearing, may extend a guardianship under this section if the court finds that extending the guardianship is in the best interests of the protected person. This extension of a guardianship does not place the protected person under a legal disability. IC 29-2-12-7(d).

A court may terminate a guardianship of a minor upon the minor's marriage or adoption. IC 29-3-12-1(a). A court may also terminate any guardianship if: (1) the guardianship property does not exceed the value of $3,500; (2) the guardianship property is reduced to $3,500; (3)

the domicile or physical presence of the protected person is changed to another state and a guardian has been appointed for the protected person and the protected person's property in that state; or (4) the guardianship is no longer necessary for any other reason. IC 29-3-12-1(c).

Juvenile courts may have jurisdiction over some guardianships, and this may affect the age at which those guardianships terminate. Statutes dealing with a minor's age and termination of a guardianship or the juvenile court's jurisdiction over the minor are IC 31-30-1-1(13) (collaborative care); IC 31-30-2-1(d) (juvenile court jurisdiction over guardianship past age of 18); IC 31-30-2-1(g) (juvenile court jurisdiction over an older youth). For more information on these statutes, please see this Chapter at III.B.3.

IX. A. 4. Guardian's Powers and Duties Upon Termination of a Guardianship

The powers of a guardian end when a guardianship terminates, except when termination is because of the death of the protected person. The guardians may still pay claims and expenses of administration that are approved by the court and exercise other powers that are necessary to complete the performance of the guardian's trust. IC 29-3-12-1(d). This includes payment and delivery of the remaining property for which the guardian is responsible to various listed individuals or entities. IC 29-3-12-1(d).

IC 29-3-12-5(b) provides that termination for any reason of the authority and responsibility of the guardian does not affect the liability of the guardian for prior acts or the obligation of the guardian to account for the guardian's conduct of his trust.

IX. B. Initiating a Petition For Termination of Guardianship/Third-Party Custodianship

The person seeking to terminate the guardianship should file a verified petition with the court. IC 29-1-1-9. The guardian and other persons whom the court directs should receive a copy of the petition and the order setting the petition for hearing pursuant to IC 29-1-1-12 through IC 29-1-1-14. See this Chapter at IV.B. regarding notice procedures.

Parents and counsel for parents who seek to terminate a guardianship should be mindful of IC 29-3-8-9(a) and (b). IC 29-3-8-9(a) provides that initially, when establishing a guardianship, a probate or juvenile court may include in its order "any terms and conditions that a parent must meet in order to seek modification or termination of the guardianship." IC 29-3-8-9(b) provides that "[e]xcept as provided in IC 29-3-12, if an order creating a guardianship contains terms and conditions described in subsection (a)(2), the court may modify or terminate the guardianship only if the parent: (1) complies with the terms and conditions; and (2) proves the parent's current fitness to assume all parental obligations by a preponderance of the evidence."

If IC 29-3-8-9 applies to a child, then the guardianship petitioner must submit all necessary forms and information in order for DCS to conduct a criminal history check as is defined in IC 31-9-2-22.5 and IC 29-3-1-2.5. IC 29-3-5-1.5. This criminal check is required of the petitioner and any other household members before the court appoints the guardian. IC 29-3-5-1.5.

In **White v. White**, 796 N.E.2d 377 (Ind. Ct. App. 2003), the Court held that, 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.

IX. C. Burden of Proof

The guardian has the burden of proof on a parent's petition to terminate guardianship, as is set forth in Indiana case law; the guardian must prove that the continuation of the guardianship is necessary. See **K.I. ex rel. J.I. v. J.H.**, 903 N.E.2d 453, 459-61 (Ind. 2009) (holding that 1) although in a very technical sense, a natural parent seeking to modify custody has the burden of establishing the statutory requirements for modification by showing modification is in the child's best interest, and that there has been a substantial change in one or more of the enumerated factors, as a practical matter, this burden 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.").

If the guardian manages to carry this burden, then then custody of the child remains in the third party; otherwise, custody must be modified in favor of the child's natural parent. Id.

Case law holds that, in deciding whether to terminate a guardianship or third-party custodianship, the clear and convincing evidence standard must be used, and detailed and specific findings, rather than a generalized finding, are required. See this Chapter at VI.D. for a discussion of **In Re Guardianship of B.H.**, 770 N.E.2d 283, 287-88 (Ind. 2002) and its impact on guardianship and third-party custody case determinations; see also **K.I. ex rel. J.I. v. J.H.**, 903 N.E.2d 453, 459-61 (Ind. 2009).

IX. D. Case Law

In its March 25, 2009 decision in K.I. ex rel. J.I. v. J.H., 903 N.E.2d 453, 459-61 (Ind. 2009), the Supreme Court spoke directly to the standard to be applied in determining whether to modify custody from the guardian or third party custodian back to a parent, thus terminating the guardianship or third party custodianship. The 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) although in a very technical sense, a natural parent seeking to modify custody has the burden of establishing the statutory requirements for modification by showing modification is in the child's best interest, and that there has been a substantial change in one or more of the enumerated factors, as a practical matter, this burden 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. The Court discussed In Re Paternity of Z.T.H., 839 N.E.2d 246 (Ind. Ct. App. 2005) and explicitly disapproved the Z.T.H. court's conclusion that, where a parent requests to modify a third party's custody, "a burden shifting approach is the most appropriate way to protect parental rights and the best interests of the child." The Court noted that, even though, in accordance with IC 31-14-13-6, a party seeking a change of custody must persuade the trial court that modification is in the best interests of the child and that there is a substantial change in one or more of the factors that the court may consider "under section 2 and, if applicable, section 2.5 of this chapter," (1) these are modest requirements where the party seeking to modify custody is the natural parent of a child who is in the custody of a third party; (2) inasmuch as, in accordance with B.H. at 287, the parent comes to the table with a "strong presumption that a child's interests are best served by placement with the natural parent" the first statutory requirement is met from the outset; and (3) because a substantial change in any one of the statutory factors will suffice, "the interaction and interrelationship of the child with ... the child's parents" – one of the grounds on which the trial court relied in this case – satisfies the second statutory requirement.

Practitioners should note that if they are seeking to terminate a third party custody arrangement, that the provisions of IC 31-14-13-6, IC 31-14-13-2, and IC 31-14-13-2.5 are substantively identical to IC 31-17-2-21(a), IC 31-17-2-8, and IC 31-17-2-8.5, respectively.

In **In Re Adoption of L.T.**, 9 N.E.3d 172, 177-9 (Ind. Ct. App. 2014), the Court reversed the Marion Superior Court, Probate Division's order dismissing or terminating Maternal Grandparents' guardianship of their three-year-old granddaughter for lack of subject matter jurisdiction and granting immediate custody of the child to adjudicated Father, her only living parent. The Court remanded with instructions to conduct a hearing on the best interests of the child. Among other things, the Court opined that case law, while indicating that the factor of a substantial change in circumstances is almost always met at the outset in a custody dispute between a parent seeking to regain custody and a non-parent seeking to retain custody because of the strong parental presumption, does not "summarily dispense" with the necessary inquiry into a child's best interests in a custody dispute between a parent and a non-parent. The Court noted that when a natural parent seeks to regain custody of his or her child from a non-parent, "[t]he natural parent must meet a minimal burden of showing a change in a permissible custodial factor, but then the [non-parent] must prove by clear and convincing evidence that the child's best interests are substantially and significantly served by [continued placement with the non-parent]." (citing In Re Paternity of K.I., 903 N.E.2d at 460-61). Father had signed a consent to guardianship after Mother's death and the order granting guardianship was valid, so a hearing on the termination of the guardianship was necessary. Since no hearing was conducted, the record was devoid of any evidence of changed circumstances and any evidence of the best interests of the child indicating that the guardianship should be terminated.

In **In Re Guardianship of M.N.S.**, 23 N.E.3d 759, 766-7 (Ind. Ct. App. 2014), the Court affirmed the trial court's order granting Father's motion to terminate the guardianship over the child. The Court found that the trial court's order: (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 Court found Guardian's argument that the trial court erred by terminating the guardianship was nothing more than a request to reweigh the evidence and reassess the credibility of the witnesses, which the Court will not do.

In **In Re I.E.**, 997 N.E.2d 358, 363 (Ind. Ct. App. 2013), the Court reiterated the burden of proof in a paternity custody modification case and a termination of guardianship. Father was required to prove that modification of custody was in the child's best interests and that there was a substantial change in one or more of the factors that the court may consider under IC 31-14-13-2(2). The "best interest" requirement was met from the outset because of the strong presumption that a child's best interests are served by placement with a natural parent. The Court concluded that the record clearly demonstrated that Father had carried his burden; at that point, the burden shifted to Guardians to "prove by clear and convincing evidence 'that the child's best interests are substantially and significantly served by placement with another person.'" (quoting K.I. Ex Rel. J.J. v. J.H., 903 N.E.2d 453, 460 (Ind. 2009)).

In **In Re Guardianship of L.R.T**, 979 N.E.2d 688, 691 (Ind. Ct. App. 2012), *trans. denied*, the Court affirmed the trial court's order terminating the guardianship. In a custody dispute between a parent and a third party where the parent seeks to re-obtain custody, the burden of proof is always upon the third party. Although the party seeking a change of custody must persuade the trial court that modification is in the child's best interests and there is a substantial change in one of the

custody factors listed at IC 31-14-13-6, "these are modest requirements where the party seeking to modify custody is the natural parent of a child who is in the custody of a third party." In Re K.I., 903 N.E.2d 453, 460 (Ind. 2009 Guardians could not prevail upon their suggestion that the trial court should have disregarded a parent presumption because Guardians have provided long-term care for the children.

The Court in **In Re M.K.**, 867 N.E.2d 271, 275 (Ind. Ct. App. 2007), reversed and remanded the trial court's denial of Mother's petition to terminate the guardianship of her two children. The Court held that the presumption in favor of Mother obtaining custody of her daughters was not rebutted in that (1) there was absolutely no indication that, at the time of the hearing, Mother was an unfit parent; (2) Mother did not voluntarily abandon her daughters for any considerable length of time; and (3) there was no compelling, real, or permanent interests of the children that would be best served by their remaining in the custody of the guardians. The Court emphasized the presumption in favor of the parent in a third party custody dispute and that the third party bears the burden of overcoming this presumption.

In **In Re Guardianship of J.K.**, 862 N.E.2d 686, 691-93 (Ind. Ct. App. 2007) (Crone, J., dissenting), the Court held that the trial court's termination of the guardianship was not clearly erroneous, where (1) the trial court concluded that the circumstances warranting the guardianship had changed and the guardianship should now be terminated; and (2) the Court could not say that the guardians proved by clear and convincing evidence that the guardianship should continue. On appeal, the guardians challenged the propriety of the trial court placing the burden of proof on them, arguing that they had met their burden of proof when the guardianship was established and the parents should have had the burden of proving they were fit in subsequent requests to terminate the guardianship. The Court cited numerous cases which hold that, even when the parents file to reobtain custody of the child, the burden of proof stays with the guardian or third-party custodian and does not shift to the parent. Consequently, even though the parents filed the petition to terminate the guardianship, the guardians had the burden of proving the requirements set forth by in In Re Guardianship of B.H., 770 N.E.2d 283 (Ind. 2002).

In **In Re Guardianship of A.R.S.**, 816 N.E.2d 1160, 1162-63 (Ind. Ct. App. 2004) (Crone, J., dissenting), the Court reversed and remanded the trial court's denial of Mother's petition to terminate the guardianship of her two children. The Court held that a generalized finding that a placement other than with the natural parent is in a child's best interests will not be adequate to support such determination, and detailed and specific findings are required. Further, the Court could not be certain that the proper standard of review, the clear and convincing evidence standard, was employed.

The Court in **In Re Paternity of V.M.**, 790 N.E.2d 1005, 1008-09 (Ind. Ct. App. 2003) affirmed the trial court's denial of Father's petition to modify the custody of his two children which had been previously placed with Maternal Grandfather. The Court held that the record supported the conclusion that the presumption in favor of Father having custody of the children was rebutted by evidence of Father's past unfitness, voluntary abandonment of the children, long acquiescence in the grandfather's custody, and other factors that would rebut the strong presumption in favor of the Father; and that the best interests of the children were served by continued placement with the maternal grandparents. The Court relied on the standard to be applied in custody disputes between a natural parent and a third party as articulated by the supreme court in In Re Guardianship of B.H., 770 N.E.2d 283, 287 (Ind. 2002), and noted that, here, the trial court concluded that staying with the maternal grandparents was in the children's best interests, and it articulated the following specific reasons for its conclusion.

In **Roydes v. Cappy**, 762 N.E.2d 1268, 1274-76 (Ind. Ct. App. 2002) (Riley, J., dissenting), the Court affirmed the trial court's denial of Parents' petition to termination the guardianship. Although the guardianship was originally granted to obtain health insurance for the child, the Court could look beyond the original grounds for granting the guardianship in making its decision to terminate the guardianship. The trial court had not abused its discretion in denying the parents' petition to terminate, even though the trial court did not specifically find that the mother was unfit. The Court further opined that a parent's very recent history of financial irresponsibility and employment instability, especially if it is consistent with an established pattern of such behavior, could be considered in determining whether a parent is presently fit to regain custody of a child.

In **Harris v. Smith**, 752 N.E.2d 1283, 1288-90 (Ind. Ct. App. 2001), the Court affirmed the trial court's order modifying custody from Paternal Grandparents to Mother. On appeal Grandparents claimed that Mother's agreement to place the child in the custody of Grandparents was tantamount to an admission of unfitness. The Court disagreed with this argument, but acknowledged that the trial court was required to consider the stability of the child in making its decision. There is a constitutionally based preference that a parent, rather than a non-parent have custody when the parent has not been shown to be unfit. The Court also stated that a non-parent seeking custody is required to prove the parent's unfitness at the present time, not at some time in the past. The Court opined that the grandparents had not successfully rebutted the mother's presumptively superior right to custody with a clear and persuasive showing that the mother was presently unfit.

See also **In Re M.K.**, 867 N.E.2d 271, 275 (Ind. Ct. App. 2007) (Court reversed trial court's refusal to terminate guardianship, holding, among other things, that guardians had not met their burden of rebutting parental presumption by clear and convincing evidence); **In Re Guardianship of J.K.**, 862 N.E.2d 686, 692 (Ind. Ct. App. 2007), (Court held that, even in actions filed by parents to terminate guardianship, guardians bear burden of proving by clear and convincing evidence that guardianship should continue); **In Re Guardianship of A.R.S.**, 816 N.E.2d 1160, 1162-63 (Ind. Ct. App. 2004) (Crone, J., dissenting) (standard of proof is clear and convincing evidence); **In Re Paternity of V.M.**, 790 N.E.2d 1005, 1008-09 (Ind. Ct. App. 2003) (standard of proof is clear and convincing evidence); **Roydes v. Cappy**, 762 N.E.2d 1268, 1276 (Ind. Ct. App. 2002) (Riley, J., dissenting) (standard of proof is clear and cogent showing); **Harris v. Smith**, 752 N.E.2d 1283, 1290 (Ind. Ct. App. 2001) (burden of proof lies with the third-party custodian and is clear and persuasive showing); and **In Re Guardianship of L.L.**, 745 N.E.2d 222 (Ind. Ct. App. 2001) (the third party bears the burden of overcoming the parental presumption by clear and cogent evidence), *trans. denied*; **Matter of Guardianship of R.B.**, 619 N.E.2d 952, 954 (Ind. Ct. App. 1993).

For case law dealing with terminating a guardianship and granting the former guardian visitation with the child or children under the Grandparent Visitation Act, see **T.H. v. R.J.**, 23 N.E.3d 776, 784-7 (Ind. Ct. App. 2014) (Court declined to extend the de facto custodian statute to provide visitation rights with a child who has been removed from the custody of a de facto custodian; prior case law had determined that since the de facto custodian statute did not address visitation, it therefore did not provide for visitation between a child and the de facto custodian who lost custody of that child); I**n Re Guardianship of K.T.**, 743 N.E.2d 348 (Ind. Ct. App. 2001) (Court stated that Grandparent Visitation Act was the exclusive vehicle through which the former guardians of the child, the maternal grandparents, should have been granted visitation with the child); **In Re Guardianship of J.E.M.**, 870 N.E.2d 517 (Ind. Ct. App. 2007) (finding that any right to visitation with child which Maternal Grandmother may have is provided by Grandparent Visitation Act (GVA), IC 31-17-5, and, although her visitation was not originally granted in

accordance with GVA, inasmuch as no party objected to original order, it cannot now be challenged on basis that it was not issued in compliance with the GVA).

IX. E. Appellate Review Standard

When a trial court has entered findings and conclusions pursuant to Indiana Trial Rule 52, the reviewing appellate court must first determine whether the evidence supports the findings, and then considers whether the findings support the judgment. See **In Re Guardianship of L.R.T.**, 979 N.E.2d 688, 689 (Ind. Ct. App. 2012), *trans. denied*. The findings and judgment will not be set aside unless they are clearly erroneous. A judgment is clearly erroneous when it is unsupported by the conclusions drawn, and conclusions are clearly erroneous when they are not supported by findings of fact. A judgment is also clearly erroneous when the trial court has applied the wrong legal standard to properly found facts. The reviewing appellate court will neither reweigh the evidence nor assess witness credibility, and will only the evidence that supports the trial court's judgment together with all reasonable inferences.

See also **K.I. Ex Rel. J.I. v. J.H.,** 903 N.E.2d 453, 457 (Ind. 2009) (Court observed that it reviews custody modifications for abuse of discretion with a "preference for granting latitude and deference to our trial judges in family law matters." Kirk v. Kirk, 770 N.E.2d 304, 307 (Ind. 2002); on appeal, Court will not set aside the trial court's findings or judgment unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses); **In Re I.E.**, 997 N.E.2d 358, 361 (Ind. Ct. App. 2013) (Court quoted appellate review standard enunciated in K.I. at 457); **In Re Paternity of A.S.**, 984 N.E.2d 646, 651 (Ind. Ct. App. 2013) *trans. denied* (Court said that, in order to determine that a finding or conclusion is clearly erroneous, Court must come to the firm conviction that a mistake has been made); **Parks v. Grube**, 934 N.E.2d 111, 114 (Ind. Ct. App. 2010) (Court said that "[r]eversal is appropriate only if we find the trial court's decision is against the logic and effect of the facts and circumstances before the Court or the reasonable inferences drawn therefrom", quoting In Re Guardianship of B.H., 770 N.E.2d 283, 288 (Ind. 2002)).

## X. ASSISTED GUARDIANSHIP FOR CHINS

The Indiana Administrative Code provides for financial assistance in certain guardianship cases. The Assisted Guardianship Program, found at 465 IAC 2-8-0.5 through -13, applies only to a guardianship assistance agreement signed before July 1, 2012 that provides for monthly assistance payments and under which payments were made for one or more months before July 2012. The Guardianship Assistance Program and State Guardianship Assistance Program are found at 465 IAC 4-2-1 through -33. This section governs procedures that DCS will use to process requests for guardianship assistance under the federal Title IV-E guardianship assistance program ("GAP") and the statute guardianship assistance program ("SGAP").

Sections regarding eligibility will only discuss GAP and SGAP, found at 465 IAC 4-2-1 through -33, since the Assisted Guardianship Program (465 IAC 2-8-0.5 through -13) only applies to agreements made prior to July 2012. Eligibility going forward must be sought under GAP or SGAP.

X. A. Child Eligibility

465 IAC 4-2-20 addresses the eligibility of a child for financial guardianship assistance.

A child must meet **all** of the following criteria in order to be eligible (emphasis added):

(1) Except as provided in (2), the child is either:

(A) not less than thirteen years old; or

(B) a member of a sibling group where at least one sibling is not less than thirteen years old or is otherwise eligible under (2), if:

(i) both the child and the eligible sibling will be placed with the same guardian in the same home; and

(ii) DCS has properly approved the placements for both children.

(2) DCS has properly approved an application for guardianship assistance under this rule on behalf of a child who does not meet the eligibility criterion under (1), if:

(A) the child has: (i) a medical condition; or (ii) a physical, mental, or emotional disability; and

(B) the child's condition or disability: (i) has been diagnosed or determined to exist by a licensed physician; and (ii) is expected to be permanent or continue until after the child becomes twenty-one years old.

(3) The child has been approved for legal guardianship as a permanency plan by an order under IC 31-34-21-7.5 or IC 31-37-19-1 by a juvenile court having jurisdiction over the child, if the order finds and states compelling reasons for selecting guardianship as the preferred choice among available permanency plan options.

(4) The child must be currently eligible to receive foster care maintenance payments while residing in a licensed foster family home in which at least one foster parent is a relative of the child.

(5) The child must have been adjudicated a CHINS or a delinquent child.

(6) The child must have been removed from the child's home and placed in a foster family home, under supervision of DCS or another public agency that has an agreement with DCS, pursuant to a dispositional decree.

(7) The child must be residing with a guardian who meets the eligibility requirements.

(8) The child must have resided with the guardian in the guardian's home for a continuous period of time not less than six months.

(9) The permanency plan for the child approved by the juvenile must require the appointment of a legal guardian for the child, subject to IC 29-3-8-9.

(10) The child is either:

(A) a United States citizen; or

(B) a qualified alien, as defined in 8 U.S.C. 1641(b), who is not ineligible for a federal public benefit under 8 U.S.C. 1613.

(11) For purposes of a Title IV-E guardianship assistance agreement, the child must meet any additional eligibility requirements for a kinship guardianship assistance payment.

(12) If the child is residing with a successor guardian who meets the eligibility requirements specified in section 31(c) of this rule, the eligibility requirements in subdivisions (4), (7), and (8) do not apply to eligibility of the child for assistance under this rule.

X. B. Guardian's Eligibility

465 IAC 4-2-21 addresses the eligibility requirements for a guardian in order to be eligible for financial guardianship assistance.

A guardian must meet all of the following requirements, unless they are a successor guardian:

(1) The guardian must be a relative of the child who is not the child's parent.

(2) The guardian must reside in a home that is licensed as a foster family, or a comparable law of the state in which the home is located.

(3) For purposes of eligibility as a relative (defined by IC 31-9-2-107(c)(12)), the guardian must be an individual who:

(A) was a de facto custodian for the child (defined by IC 31-9-2-35.5) for a period of time before the child became a ward of DCS; or

(B) has been approved as a relative of the child, for purposes of receiving guardianship assistance as provided in this rule, by:

(i) DCS, in a report submitted to the court for purposes of a permanency hearing, or a periodic review hearing, that is held subsequent to approval of a permanency plan for legal guardianship of the child; and

(ii) the court, in an order entered following the permanency hearing or periodic review hearing at which the report was submitted and considered.

(4) The guardian, upon establishment of a legal guardianship under IC 29-3, or comparable state law, must be legally responsible for providing care, support, maintenance, education, and supervision, including financial support as provided in IC 29-3-8-9(f), as necessary to meet the needs and promote the welfare of the child.

(5) The guardian must meet each of the following, as shown by a home study or evaluation prepared or approved by DCS:

(A) Have the current and projected continuing ability to provide for the child's physical, mental, emotional, educational, and psychological needs, upon termination of supervision of the child by DCS.

(B) Have the continuing ability, willingness, and motivation to access and obtain appropriate services outside the home that: (i) are necessary or appropriate for the health, education, development, and well-being of the child; and (ii) will assist the child in becoming a self-supporting adult.

(C) Have established a nurturing, stable relationship with the child in which the child indicates a desire to continue a family relationship and residence with the guardian.

(D) Have demonstrated the ability to determine and regulate an appropriate level of relationship and ongoing contacts with any parent or other relative of the child, consistent with the safety and best interests of the child, and in conformity with any plan of visitation ordered or approved by the court in: (i) the CHINS or delinquency proceeding; or (ii) any other court proceeding relating to continuing custody of, or visitation with, the child.

(6) Each guardian, and every member of the guardian's household who is at least fourteen years old, must successfully complete a criminal history check, and a check of any and all applicable sex or violent offender registries.

(7) Guardianship assistance is not available if the criminal history check reveals that a guardian or household member:

(A) has ever been convicted of a felony as enumerated in 42 U.S.C. 671(a)(20)(A) involving: (i) child abuse or neglect; (ii) spousal abuse (domestic battery); (iii) a crime against a child (including child pornography); or (iv) a crime involving violence, including rape, sexual assault, or homicide, but not including other physical assault or battery;

(B) has been convicted, within five years before the date the check is conducted, of a felony based on: (i) physical assault or battery against an adult; or (ii) a drug related or alcohol related offense;

(C) has been convicted of a felony that would prohibit the court from granting a petition for guardianship by the guardian or household member, as described in IC 29-3-7-7;

(D) is a sex or violent offender, or a sexually violent predator, for whom the court is prohibited from granting a petition for guardianship pursuant to IC 29-3-7-7;

(E) has ever been convicted of a misdemeanor relating to the health or safety of a child; or

(F) has a record of any of the following, unless DCS approves a waiver request as provided in (8): (i) Any felony conviction; (ii) Four or more misdemeanor convictions; (iii) A juvenile adjudication for an act that would be a felony described in IC 29-3-7- 7; (iv) A substantiated determination of child abuse or neglect under IC 31-33-8-12, or comparable law in any other state.

(8) A guardian may request a waiver of any record based on the results of a criminal history check, applicable to the guardian or any household member, that is described in subdivision

(7)(F). A waiver may be requested, considered, and granted or denied, under the procedure and criteria specified in the applicable DCS policy. If a waiver request is granted, DCS will not deny guardianship assistance eligibility based solely on the existence of a record described in subdivision (7)(F).
(9) The eligible child must consent in writing to establishment of a legal guardianship for the child and placement with the selected guardian, if the child is:
(A) at least sixteen years old; and
(B) competent, as determined by the department, to provide informed consent to the placement and terms of the guardianship assistance agreement.
(10) The eligible child who is at least thirteen years old must be consulted concerning the proposed guardianship and the selected guardian.

Subsection (b) provides that a successor guardian who meets the requirements of 465 IAC 4-2-31 does not need to meet the criteria specified in subsection (a)(1), (a)(2), and (a)(3) of this rule.

X. C. DCS Responsibilities and Duties

DCS has duties and responsibilities in regards to the Indiana guardianship program application; many of these duties and responsibilities can be found at 465 IAC 4-2-22.

The application form must be available on DCS's website and at its local offices. Completed applications must be sent to the family case manager or to DCS if there is no current family case manager. DCS may request additional information under certain circumstances.

DCS must review the application, determine eligibility, and issue a determination within forty-five days. If the application is approved, then DCS is represented by a DCS attorney in negotiating the monetary terms of the agreement. If DCS determines that negotiations have concluded without reaching an agreement, DCS must send a final offer letter. If the guardian accepts the final offer letter, DCS must begin payment. If an administrative hearing changes the amount of the payment, DCS must pay the revised payment amount, retroactively.

DCS may unilaterally, without the consent of the guardian or amendment of the agreement, institute an across the-board reduction of the payment amount specified in a state guardianship assistance agreement, if: (A) DCS determines that the reduction is necessary due to the insufficiency of available funds; and (B) the state guardianship assistance agreement authorizes DCS to make percentage reductions in the periodic payment. 465 IAC 4-2-23. If this occurs, DCS must send to the guardian thirty days advance notice of the reduction amount, the reasons for the reduction, and the estimated time and expiration of the reduction. 465 IAC 4-2-23.

DCS can provide information concerning resources that may be available to the guardian or the child through DCS or other community agencies. This would be done in order to assist the guardian in providing for the child's physical, mental, psychological, educational, and other needs appropriate to the child's development and transition to adult status and independent living. 465 IAC 4-2-25.

DCS is not responsible for monitoring how the guardian is providing care to the child during the time the guardianship assistance agreement is in effect, except as otherwise provided. 465 IAC 4-2-26. DCS has no responsibility for administration of the guardianship. 465 IAC 4-2-27.

If a guardian submits a period report that DCS believes is inaccurate, DCS may initiate an assessment of the child, guardian, and family situation to determine whether a reportable event or other change in circumstances has occurred that may require modification, suspension, or

termination of the guardianship assistance agreement, termination of the legal guardianship, or appointment of a different guardian for the child. 465 IAC 4-2-28.

DCS may also suspend or terminate payments under 465 IAC 4-2-30 and -31. See this Chapter at X.F.

If the assistance agreement was signed before July 1, 2012, the following may apply:

DCS has the following duties and responsibilities in facilitating the appointment of the eligible guardian:

(1) Referral to county office attorney to assist with the establishment of guardianship. 465 IAC 2-8-4.

(2) With the county director's approval, the county office may file the petition for appointment of guardian and pay all or any designated portion of the legal costs and other expenses of the guardianship proceeding, including the services of the attorney for the county office. Practitioners should be certain that all guardianship pleadings clearly reflect that counsel for the county office is not the guardian's attorney. 465 IAC 2-8-4. See this Chapter at III.C.

(3) Give notice of the guardianship as required by IC 29-3-6-1(3). 465 IAC 2-8-4.

(4) Seek the parents' consent to guardianship if the parent is identified and can be contacted with reasonable efforts and provide a written report to the court in the guardianship proceeding of the efforts to solicit parental consent. 465 IAC 2-8-4.

(5) Provide to the guardian at the time the guardianship assistance agreement is approved information concerning social service resources that may be available to the guardian or the child through the county office or other community agencies. 465 IAC 2-8-8.

(6) DCS is not responsible for monitoring the guardian's care and supervision of the child or for providing additional services to the child after the guardianship is completed. 465 IAC 2-8-8.

X. D. Monetary Payments to Guardians

The amount of the payment is to be negotiated between DCS and the guardian, and must take into consideration the needs and circumstances of the child and the guardian. It cannot exceed the foster care maintenance payment rate that would have been paid on the child's behalf in foster care. It must be paid in regular intervals, and must be subject to both increase and decrease, depending on various circumstances. 465 IAC 4-2-23.

If the guardianship agreement was signed before July 1, 2016, then the following may apply:

DCS will determine the amount of monthly payments, which, pursuant to 465 IAC 2-8-5, are not to exceed $512.00 per child. Payments shall begin in the month after the closure of the juvenile court CHINS case or the guardianship appointment, whichever occurs later. But see **In Re C.S.**, 713 N.E. 2d 863 (Ind. Ct. App. 1999), discussed in this Chapter at III. B., which states that the trial court lacked jurisdiction to appoint a guardian while the CHINS case was still open.

DCS has no responsibility for accounting to the court or disposition of the monthly assistance payments made to the guardian. 465 IAC 2-8-11. A periodic review of the guardianship assistance shall be conducted by the county office of family and children and the assistance amount may be redetermined based on the review and TANF guidelines. 465 IAC 2-8-5(e).

X. E. Guardian's Responsibilities and Duties

The Indiana Administrative Code provides that guardians who received assisted guardianship payments have the following duties, in addition to the duties imposed on guardians by statutes or by a court order specific to their appointment.

X. E. 1. Cooperation With Office of Family and Children and Title IV-D Program

The guardian shall apply for assistance on prescribed form and must send it to the family case manager or DCS directly within ten days of a petition to establish legal guardianship. 465 IAC 4-2-22. Guardians and/or their attorneys must negotiate the terms of the agreement and sign the agreement. 465 IAC 4-2-22. If guardians do not agree with DCS's final offer, they may submit a request for administrative review, as provided by 465 IAC 4-2-22.

A guardian may request modification to the periodic payment amount. 465 IAC 4-2-32. Such a request cannot be made more than once every twelve months. If such a request is made DCS may request additional information from the guardian, and will notify the guardian of its decision within sixty days.

Guardians must submit periodic reports, as outlined in 465 IAC 4-2-28. The guardian is responsible for compliance with all duties and responsibilities of a legal guardian as provided in IC 29-3. 465 IAC 4-2-27. This includes filing with the proper court any pleadings, reports, documents, or accounts with respect to the guardianship petition. 465 IAC 4-2-27.

If the assistance agreement was signed before July 1, 2012, the following may apply:

The guardian must sign the assistance agreement. 465 IAC 2-8-5. The guardian must provide to DCS any financial or other information requested for the annual review. 465 IAC 2-8-5. The guardian shall assign any rights to receive child support payments from the parent to the Title IV-D Program. 465 IAC 2-8-9.

X. E. 2. Health Insurance

465 IAC 4-2-24 applies if a child is not eligible for guardianship assistance under a Title IV-E guardianship assistance agreement. In that case, a guardian must apply on behalf of the child for the continuation of any medical insurance for assistance for which the child is eligible. The child's eligibility for Medicaid or the children's health insurance program is determined by Division of Family Resources. If the child is not eligible for Medicaid or CHIP, the guardian must get private health insurance coverage for the child that gives substantially similar benefits. The guardian must maintain the coverage as a condition to continued eligibility for monthly assistance.

If the assistance agreement was signed before July 1, 2012, the following may apply:

The guardian shall apply for medical insurance for the child through the Indiana Medicaid Program, the Children's Health Insurance Program, or any other financial assistance program for medical expenses. 465 IAC 2-8-7(a). If the child is not eligible for a program, the guardian must obtain and maintain private health insurance which provides benefits substantially equivalent to the state programs, and provide evidence of health insurance to the county office of family and children. 465 IAC 2-8-7(b), (c), and (d).

X. E. 3. Notification of Additional Proceedings and Reportable Events

The guardian is responsible for compliance with all duties and responsibilities of a legal guardian as provided in IC 29-3. 465 IAC 4-2-27. This includes filing with the proper court any pleadings, reports, documents, or accounts with respect to the guardianship petition. 465

IAC 4-2-27. The guardian must also give DCS notice of all hearing in the guardianship case. 465 IAC 4-2-27.

Guardians must also notify DCS of a reportable event within ten days. These are events that are a change in the circumstances of the child or family that could affect either continuing eligibility or the amount of the payments. Reportable events include, but are not limited to:

(1) the guardian moves to a new residence;
(2) the child:
(A) moves out of the home of the legal guardian;
(B) is placed outside the guardian's home in another home or residential facility;
(C) is married;
(D) is no longer attending school;
(E) receives notice of a call to active duty in the United States armed services or the national guard, as specified in IC 5-9-4-1(a)(2); or
(F) has new health insurance coverage;
(3) the guardian is no longer legally responsible for care, supervision, or support of the child;
(4) another person or agency is supporting the child in whole or in part;
(5) the child or a guardian dies;
(6) the guardian has become physically or mentally incapacitated to the extent that the guardian is no longer able to provide adequate or appropriate care and supervision of the child; or
(7) if the order creating the guardianship is entered after the child's sixteenth birthday, and periodic payments are being made after the child's eighteenth birthday pursuant to a guardianship assistance agreement, the child is:
(A) not employed for at least eighty hours per month;
(B) not attending school or a vocational or educational certification or degree program;
(C) not participating in a program or activity designed to promote or remove barriers to employment; or
(D) no longer incapable of performing any of the activities in clauses (A) through (C) due to a documented medical condition.

If the assistance agreement was signed before July 1, 2012, the following may apply:
The guardian must give notice to DCS of all hearings in the guardianship proceeding during any time that the guardianship assistance agreement is in effect. 465 IAC 2-8-11(b). This provision allows DCS to be informed if a parent seeks termination of the guardianship or visitation which could put the child at renewed risk. Guardians are also responsible for all proper filings, pleading, reports, and documents in the guardianship case. 465 IAC 2-8-11(a).

X. F. Termination or Suspension of Guardianship Assistance

DCS can suspend payments for various reasons, including: (1) not receiving a periodic report; (2) the status report doesn't comply with proper form or procedure; (3) the child has become a ward of DCS and DCS is paying out of home foster care maintenance payments of the child; (4) the guardian is no longer providing financial support to the child; or (5) the child no longer meets the continuing qualifying requirements found at 465 IAC 4-2-33. There are several exceptions to these situations and other variations. 465 IAC 4-2-30.

DCS must terminate assistance in the following situations (465 IAC 4-2-31(a)):

(1) The child is eighteen years old, except as provided in subsection (d).
(2) A court grants legal custody of the child to a person other than the guardian.
(3) Incarceration of the child in an adult correctional facility pursuant to a sentence and commitment order of a court of competent jurisdiction.
(4) Detention of the child in a juvenile detention center for a period of time of not less than one hundred eighty days, pursuant to an order of a juvenile court.
(5) Entry of a dispositional decree in a CHINS proceeding based on events occurring while the child is residing with the guardian and subsequent to the date of approval of the guardianship assistance agreement, if the dispositional decree provides for removal of the child from the home of the guardian.
(6) Death of the child.
(7) Except as provided in subsection (c), death or incapacity of the guardian.
(8) The child becomes emancipated.
(9) The child commences active duty in the US armed services or the national guard.
(10) Termination of the legal guardianship by order of a court.
(11) Resignation of the guardian and appointment of a successor guardian.

DCS may terminate assistance in the following situations (465 IAC 4-2-31(b):

(1) The child is no longer residing in the home of the guardian.
(2) The guardian has failed to submit to DCS the information required or requested by DCS for the guardianship program status report.
(3) The guardian is not providing financial assistance necessary or adequate for the support and maintenance of the child.
(4) Except as provided in subsection (c), the guardian no longer satisfies one or more of the eligibility criteria.
(5) The guardian has failed to maintain health insurance, or has failed to maintain Medicaid or children's health insurance program eligibility and coverage on behalf of the child.
(6) The child has been determined to be a CHINS by an order entered by a juvenile court in a proceeding after approval of the guardianship assistance agreement.
(7) Except as provided in subsection (c), a successor guardian has been appointed for the child in the guardianship proceeding.
(8) DCS has determined that appropriated funds are no longer available to support continuation of state guardianship assistance periodic payments.

DCS must send notice of the termination of assistance. 465 IAC 4-2-31(e). If the guardian receives a payment after the effective date (found at subsection (f)) of the termination, then the guardian must repay it. 465 IAC 4-2-31(g). For terminations pursuant to subsection (a)(1), DCS will provide notice of termination of a guardianship assistance agreement to the guardian at least ninety days before the effective date of the action. The notice will include information and instructions concerning continuation eligibility and procedures under section 33 of this rule. For terminations pursuant to this section, other than subsection (a)(1), the department will provide notice of termination of a guardianship assistance agreement to the guardian within ten days after receipt of notice of the occurrence. In the event that a successor guardian has been appointed for the child, DCS must make payments to the successor guardian, under circumstances listed at 465 IAC 4-2-31(c).

It is possible for guardianship assistance to continue past the age of eighteen. 465 IAC 4-2-33. Such a request must be approved by DCS, and the child must meet the requirements laid forth in 465 IAC 4-2-33.

If the assistance agreement was signed before July 1, 2012, the following may apply:

DCS shall terminate the guardianship assistance agreement and monthly payments if any of the following occurs (465 IAC 2-8-6(a)):
(1) the child's death or adoption;
(2) termination of the guardianship by the court;
(3) entry of a court order awarding custody to another person;
(4) the child's incarceration in an adult correctional facility;
(5) the child's detention in a juvenile detention center for more than 180 days;
(6) entry of a dispositional decree in a new CHINS proceeding based on events occurring while the child is residing with the guardian if the decree removes the child from the guardian's home.

DCS may terminate the guardianship assistance agreement and monthly payments if any of the following occurs (465 IAC 2-8-6(b)):
(1) the child is no longer living with the guardian;
(2) a successor guardian has been appointed;
(3) the guardian is not supporting the child adequately;
(4) the guardian has not provided information requested for the annual review;
(5) the guardian fails to provide medical insurance or meet eligibility criteria;
(6) the child has been adjudicated a CHINS in a new proceeding;
(7) appropriated funds are no longer available.

Assistance payments usually terminate when the child reaches the age of eighteen years, but may continue and may be made directly to the child until the child is nineteen years of age if the child is a full time high school, vocational school, or technical school student. 465 IAC 2-8-6(c).