CHAPTER 2
RIGHTS OF CHILDREN AND PARENTS, GUARDIANS, CUSTODIANS, RELATIVES, AND FOSTER PARENTS

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I. INDIVIDUALS WITH RIGHTS IN CHINS PROCEEDINGS

I. A. Civil v. Criminal Law

CHINS cases are civil in nature, which affects the rights of the parties in CHINS cases. See IC 31-32-1-3, which states that the Indiana Rules of Trial Procedure apply to CHINS cases. See also **Matter of Jordan**, 616 N.E.2d 388, 392 (Ind. Ct. App. 1993), in which the Court noted that the "concerns in a CHINS situation and a criminal proceeding are vastly different." The constitutional and statutory protections provided to criminal defendants are not generally applicable to parents, guardians, or custodians in CHINS cases. See Chapter 4 at IV.D.1. and D.2 for discussion on criminal and CHINS litigation of child abuse and neglect.

I. B. Child Defined

A "child" for purposes of the juvenile law is defined at IC 31-9-2-13(d) as a person under the age of eighteen or a person eighteen, nineteen, or twenty who was adjudicated a CHINS prior to his or her eighteenth birthday and who has not been discharged from juvenile jurisdiction. See IC 31-30-2-1 (continuing juvenile jurisdiction).

I. C. Overview of Parent, Guardian, and Custodian

The juvenile code focuses on the child and his family unit. IC 31-34-9-7 states that parents, guardians, and custodians have party status in the CHINS case. IC 31-32-2-3(b) provides that a parent, guardian, or custodian is entitled to cross-examine witnesses, obtain witnesses or tangible evidence by compulsory process, and to introduce evidence at CHINS hearings, and participation proceedings. See IC 31-34-20-1(6) and IC 31-34-20-3 [dispositional orders to participate in services]. Only the child's parents and the guardian of the child's estate can be held financially responsible for court ordered services. IC 31-40-1-3.

It is recommended that all known parents, guardians, and custodians be given notice of the CHINS proceeding. See IC 31-34-10-2(b) (a summons shall be issued for the child, the parent, guardian, custodian, guardian ad litem/court appointed special advocate, and any other person necessary for the proceedings). If it is unclear whether a particular person (i.e. parent's live-in boyfriend/girlfriend, a relative who resides in the child's home, a babysitter who has assumed full-time care of the child due to parent's abandonment) qualifies as a custodian, that person should be summoned to the initial hearing as a person necessary for the proceedings. The court can determine whether the person qualifies for custodian status at the initial hearing.

I. D. Parent

IC 31-9-2-88(a) defines the term "parent"

> "Parent" ... means a biological or adoptive parent. Unless otherwise specified, the term includes both parents, regardless of their marital status.

IC 31-9-2-88(b) states that "parent" for purposes of the CHINS and termination of the parent-child relationship statutes includes an alleged father. IC 31-34-9-7 clarifies that the child's parents are parties to the CHINS proceeding and have all the rights of parties under the Indiana Rules of Trial Procedure.

I. D. 1. Alleged Father

It is recommended that alleged fathers be identified and involved in the CHINS proceeding. Paternity should be established or disestablished as quickly as possible. The mother, child, alleged father, prosecutor, and DCS all have standing to initiate a proceeding to legally establish paternity. IC 31-14-4-1 and IC 31-14-4-3. The alleged father and mother also can execute a paternity affidavit to establish paternity pursuant to IC 16-37-2-2.1. See Chapter 12 for discussion on rights of alleged fathers and establishment of paternity by affidavit or court proceedings.

IC 31-14-7-3 provides:

> A man is a child's legal father if the man executed a paternity affidavit in accordance with IC 16-37-2-2.1 and the paternity affidavit has not been rescinded or set aside under IC 16-37-2-2.1.

IC 16-37-2-2.1(j) provides that a properly executed paternity affidavit establishes paternity and gives rise to parenting time in accordance with the parenting time guidelines adopted by the Indiana Supreme Court unless another determination is made by a court in a proceeding under IC 31-14-14. IC 16-37-2-2.1(j) also states that the paternity affidavit "may be filed with a court by the department of child services [DCS]". IC 16-37-2-2.1(l) states that to rescind a properly executed paternity affidavit more than sixty days after its execution, not only must a court have "determined that fraud, duress, or material mistake of fact existed in" its execution, but the court must also, at the request of the man who is a party to the affidavit, have ordered a genetic test, the results of which indicate that the man is excluded as the father of the child. IC16-37-2-2.1(n) states that the court may not set aside the paternity affidavit unless a genetic test ordered pursuant to the statute excludes the person who executed the paternity affidavit as the child's biological father. IC 16-37-2-2.1(p) states that if a man has executed a paternity affidavit, the executed paternity affidavit conclusively establishes the man as the legal father of a child without any further proceedings by a court.

In **In Re M.R.**, 934 N.E.2d 1253 (Ind. Ct. App. 2010), the Court vacated the juvenile court's CHINS parental participation decree regarding Alleged Father. Id. at 1254. The Court opined that Alleged Father's mere status as a party did not confer authority to the juvenile court to order his parental participation prior to a determination that he was, in fact, a parent. Id. at 1255. The Court found it "curious that the juvenile court would enter a parental participation decree against an individual who has not yet been determined to meet the definition of a parent as provided by our juvenile law." Id. Citing IC 31-9-2-88, which defines "parent" for the purposes of the juvenile law as a biological or adoptive parent, the Court observed that the exclusive means to establish a man's paternity are through an action filed pursuant to the paternity statute or the execution of a paternity affidavit. Id. The Court understood why Alleged Father was summoned as a necessary party to the CHINS proceeding, noting IC 31-34-10-2(b), which states that a summons for an initial hearing on a CHINS petition shall be issued for: (1) the child, (2) the child's parent, guardian, custodian, guardian ad litem, or court appointed special advocate, and (3) *any other person necessary for the proceedings* (emphasis in opinion). Id. at 1255 n.3. *Practitioners should note that the M.R. opinion preceded the 2011 amendment of the definition of "parent" at IC 31-9-2-88 to include alleged fathers*.

See also **In Re J.S.O.**, 938 N.E.2d 271 (Ind. Ct. App. 2010), in which paternity affiant Father, whose whereabouts were known to DCS at the time of the child's initial removal from Mother's care, was never made a party to the CHINS case nor provided with notices of

CHINS hearing, copies of CHINS orders, and case plans. Failure to follow the statutorily mandated CHINS procedures resulted in the Court's reversal of the trial court's subsequent order terminating Father's parental rights. Id. at 277.

But see **In Re C.S.**, 863 N.E.2d 413 (Ind. Ct. App. 2007), *trans. denied*, in which the Court reversed the judgment determining the child to be CHINS as to alleged Father. Id. at 420. The Court held that alleged Father's "failure" to establish paternity before the fact-finding hearing was not evidence of neglect on his part which would seriously impair or endanger child, and the only evidence before the juvenile court relating to Father was that he would be an acceptable parent to child. Id. at 419.

In **Re Parent-Child Relationship of S.M.**, 840 N.E.2d 865 (Ind. Ct. App. 2006), the Court opined that Alleged Father had standing to challenge the decision of the juvenile court which terminated his parental rights. Id. at 872. The Court found that none of the involuntary termination statutes at IC 31-35-2 "require that a putative father take any steps to establish his paternity in order to contest a termination action where an adoption is not pending." Id. at 871. The Court was not persuaded by DCS's arguments concerning the rights of alleged fathers in adoption proceedings, emphasizing that DCS could have initiated adoption proceedings and sought to divest Alleged Father of his standing pursuant to IC 31-35-1-4.5, the voluntary termination statute, but instead chose to seek termination of Alleged Father's rights under IC 31-35-2. Id. at 872. The Court affirmed the order terminating Alleged Father's parental rights. Id. Alleged Father had failed to take any steps toward establishing his paternity or demonstrating his fitness as a parent, and he had been aware of the steps he must take to do so for over a year. Id. at 870. The Court could not say that the juvenile court had erred in determining that there was a reasonable probability that the conditions resulting in the child's removal would not be remedied. Id.

I. D. 2. Custodial and Noncustodial Parents

The legal definition of "parent" clearly includes both the custodial and noncustodial parent of a child of divorced parents, a child born out of wedlock for whom paternity has been established in court, and a child for whom a paternity affidavit has been signed.

The noncustodial parent may request placement of the child who was removed from the custodial parent in the CHINS proceeding. The court can place the child with the noncustodial parent at detention (IC 31-34-4-2) [court shall consider placement of child with suitable and willing relative], at the dispositional hearing (IC 31-34-19-7) [court shall consider placing child with relative before considering any other placement], and later as a permanency option (IC 31-34-21-7.5(c)(1)(A) [permanent placement of the child with noncustodial parent].

IC 31-34-4-2(d) [temporary protective custody placement], IC 31-34-20-1.5 [dispositional placement], and IC 31-34-21-7.5(c)(1)(A) [permanent placement of child with noncustodial parent] require a criminal history check (defined at IC 31-9-2-22.5), which includes a check of DCS records for substantiated abuse or neglect prior to placement. Pursuant to these statutes the court can order or DCS can approve placement of the child in the home of a person who has committed specifically listed felonies or delinquent acts or substantiated acts of abuse or neglect if the offenses or acts are not relevant to the person's present ability to care for the child, the convictions or delinquency adjudications did not occur within the past five years, and the placement is in the best interest of the child. See this Chapter at I.G.2., Chapter 5 at III.E.2., and Chapter 8 at V.C. for further discussion of these statutes.

See also **In Re D.B.**, 43 N.E.3d 599, 606-07 (Ind. Ct. App. 2015) (finding that DCS offered no evidence that child's surviving non-custodial Father was an unfit parent, but that DCS merely proved that Father had been an absent parent, Court concluded that there was insufficient evidence to support the trial court's conclusion that the child was a CHINS); **In Re S.A.**, 15 N.E.3d 602, 612 (Ind. Ct. App. 2014) (Court found insufficient evidence to support CHINS adjudication because noncustodial Father, who established paternity after CHINS petition was filed, had secured employment, prepared a bedroom for the child at home Father shared with child's paternal grandparents, had begun to develop relationship with child, and had support group of relatives); and **M.S. v. Indiana Dept. of Child Services**, 999 N.E.2d 1036, 1041 (Ind. Ct. App. 2013) (Court opined evidence in CHINS case supported the child's continued placement with out-of-state formerly noncustodial Father and that the eventual dismissal of CHINS case was not error).

I. D. 3. Delivery of Services to Noncustodial Parent

IC 31-34-21-7.5(c)(1)(A) includes "placement of the child with the child's noncustodial parent" as a permanency option. *Practice Note:* It is recommended that services be offered to both custodial and noncustodial parents simultaneously due to the time limited reunification statute requiring the permanency hearing within twelve months of removal and the rebuttable presumption of CHINS jurisdiction for not longer than twelve months pursuant to IC 31-34-21-7(d).

Termination case law involving services to noncustodial parents during the CHINS proceeding includes: **In Re O.G.**, 65 N.E.3d 1080, 1095-96 (Ind. Ct. App. 2016) (Court reversed termination judgment, noting evidence of DCS's failures to make service referrals for Father or to communicate with him); **In Re R.A.**, 19 N.E.3d 313, 321 (Ind. Ct. App. 2014) (Court reversed termination judgment for alleged Father, who learned of his paternity of child while incarcerated; Father agreed to participate in DCS services after his release from incarceration, but did not have opportunity to do so because termination petition was filed while he was still incarcerated awaiting trial); **In Re J.S.O.**, 938 N.E.2d 271 (Ind. Ct. App. 2010) (termination reversed; paternity affiant Father was not included in CHINS proceeding); **In Re I.A.**, 934 N.E.2d 1127, 1136-36 (Ind. 2010) (termination reversed; case plan for reunification was never developed for Father indicating what was expected of him and no services other than parent aide were offered to him); **Bester v. Lake County Office of Family**, 839 N.E.2d 143, 145, 149 (Ind. 2005) (termination reversed; child born out of wedlock and tested positive for cocaine, but alleged Father established paternity, visited regularly and was 100 percent compliant with court ordered services); **Hite v. Vanderburgh Cty Office Fam. & Chil.**, 845 N.E.2d 175, 184 (Ind. Ct. App. 2006) (termination affirmed; alleged Father incarcerated when child removed due to neglect by Mother; Father was not deprived of notice as to what conduct on his part could lead to termination); **Castro v. Office of Family and Children**, 842 N.E.2d 367, 377 (Ind. Ct. App. 2006) (termination affirmed; child removed from neglectful Mother and never lived with noncustodial Father who was incarcerated serving forty year sentence; OFC was unable to offer services or fully evaluate Father to determine what services were necessary), *trans. denied*; **Rowlett v. Office of Family and Children**, 841 N.E.2d 615, 623 (Ind. Ct. App. 2006) (termination reversed; children removed from neglectful Mother; incarcerated Father had participated in parenting classes and other services while in prison and was entitled to maintain relationship with children), *trans. denied*; **In Re Parent-Child Relationship of S.M.**, 840 N.E.2d 865, 869-70 (Ind. Ct. App. 2006) (termination affirmed; child removed from Mother because he tested positive for cocaine at birth; alleged Father failed to comply with DCS requirements of parenting assessment, drug and alcohol assessment and treatment, and establishment of paternity); **In Re R.J.**, 829 N.E.2d 1032, 1038 (Ind. Ct. App. 2005) (termination reversed;

child removed from Mother's custody, but alleged Father established paternity, obtained steady employment and located housing, completed parenting classes, substance abuse counseling, and psychological evaluations and visited child regularly); **In Re C.C.**, 788 N.E.2d 847, 854 (Ind. Ct. App. 2003) (termination affirmed; child removed from Mother because child tested positive for cocaine at birth; alleged Father failed to comply with parental participation decree requiring notification of change of address, completion of parenting assessment, home based counseling and drug and alcohol assessment, establishment of paternity, consistent visitation, securing and maintaining housing and income), *trans. denied*; **In Re B.D.J.**, 728 N.E.2d 195, 201 (Ind. Ct. App. 2000) (although the state does not have to prove provision of services to Father as an element of the termination case, Court indicated that Father was not liable for Mother's actions and provision of services to Father and his response to those services would be evidence of whether Father could remedy the conditions which prevented DFC from placing the children with him; case clearly indicates that DFC should be offering services to the noncustodial parent to determine his suitability for having permanent care of the children); **In Re A.A.C.**, 682 N.E.2d 542, 544 (Ind. Ct. App. 1997) (proper inquiry is what conditions led to DPW's retention of custody once paternity was established and second whether there is a reasonable probability that those conditions will be remedied); **Tipton v. Marion County DPW**, 629 N.E.2d 1262, 1266 (Ind. Ct. App. 1994) (Court criticized OFC for failure to show what conditions or harmful behaviors on the part of noncustodial Father prevented OFC from placing child with Father when child was removed from Mother); **Matter of C.D.**, 614 N.E.2d 591, 593 (Ind. Ct. App. 1993) (grounds for emergency removal of children from Mother's home would not have been applicable to divorced noncustodial Father, but psychological examinations of Father and children revealed other grounds justifying removal from Father); **Matter of A.M.**, 596 N.E.2d 236, 240 (Ind. Ct. App. 1992) (evidence insufficient to terminate parental rights of biological Father who established paternity once CHINS proceeding was initiated but was never given opportunity to have custody of child).

I. D. 4. Custody of Child at Death of Custodial Parent

IC 29-3-3-6 provides that a noncustodial parent whose visitation with his child was suspended or who was given only supervised visitation by order of the divorce court does not have the right to custody of his child at the death of the custodial parent without legal proceedings. However, if there is no visitation restriction, custody inures to the noncustodial parent at death of the custodial parent.

IC 31-17-2-11 requires the dissolution court to appoint a temporary custodian for a child when visitation is supervised or suspended. The statute states:

> (a) If, in a proceeding for custody or modification of custody under IC 31-15, this chapter, IC 31-17-4, IC 31-17-6, or IC 31-17-7, the court:
>
> (1) requires supervision during the noncustodial parent's parenting time privileges; or
>
> (2) suspends the noncustodial parent's parenting time privileges;
>
> the court shall enter a conditional order naming a temporary custodian for the child.
>
> (b) A temporary custodian named by the court under this section receives temporary custody of a child upon the death of the child's custodial parent.
>
> (c) Upon the death of a custodial parent, a temporary custodian named by a court under this section 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.

IC 31-17-2-25 states:

> (a) This section applies if a custodial parent or guardian of a child dies or becomes unable to care for the child.
> (b) Except as provided in subsection (d), if a person other than a parent files a petition:
> (1) seeking to determine custody of the child; or
> (2) to modify custody of the child;
> that person may request an initial hearing by alleging, as part of the petition, or in a separate petition, the facts and circumstances warranting emergency placement with a person other than the noncustodial parent, pending a final determination of custody.
> (c) If a hearing is requested under subsection (b), the court shall set an initial hearing not later than four (4) business days after the petition is filed to determine whether emergency placement of the child with a person other than the child's noncustodial parent should be granted, pending a final determination of custody.
> (d) A court is not required to set an initial hearing in accordance with this section if:
> (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 pleadings that the petitioner does not have a reasonable likelihood of success on the merits; or
> (3) manifest injustice would result.

Although both of the above statutes are found in dissolution law, the statutes could be applied to paternity custody and parenting time situations under the theory that paternity and dissolution child custody and visitation statutes are *in pari materia* and are appropriately construed together. See **Sills v. Irelan**, 663 N.E.2d 1210, 1214 (Ind. Ct. App. 1996).

I. E. Guardian

IC 31-9-2-49 defines the term "guardian" for purposes of the juvenile law as meaning a "person appointed by a court to have the care and custody of a child or the child's estate, or both." See Chapter 14 for additional information on jurisdiction, procedures, rights and responsibilities in guardianships.

I. E. 1. Rights and Responsibilities of Guardian

This Deskbook refers to a "guardian" as a person appointed guardian of the child under Title 29 by a court with probate jurisdiction. Title 29 provides at IC 29-3-8-1(a) that a guardian of a minor (other than a temporary guardian) has all of the responsibilities and authority of a parent, unless otherwise ordered by the court. A guardianship proceeding must be filed in a court with probate jurisdiction, unless the child is a CHINS whose permanency plan is guardianship. IC 29-3-2-1(c). A "guardian" is defined at IC 29-3-1-6 as:

> ...a person who is a fiduciary and is appointed by a court to be a guardian or a conservator responsible as the court may direct for the person or property of an incapacitated person or a minor. The term includes a temporary guardian, a limited guardian, and a successor guardian but excludes one who is only a guardian ad litem....

IC 29-3-5-3(a) provides that the probate court shall appoint a guardian when it finds that:

> (1) the individual for whom the guardian is sought is an incapacitated person or a minor; and

> (2) the appointment of a guardian is necessary as a means of providing care and supervision of the physical person or property of the incapacitated person or minor.

In **In Re N.H.**, 866 N.E.2d 314 (Ind. Ct. App. 2007), the Court reversed and remanded the juvenile court's judgment which determined that (1) the Stepfather/guardian (Stepfather) of a Child in Need of Services was no longer a party to the CHINS proceeding; and (2) Stepfather was not entitled to discovery in the CHINS proceeding. Id. at 318. Stepfather had been appointed guardian of the child, who was his stepdaughter. Mother was deceased. The child became the subject of a CHINS petition two years after Stepfather had been appointed her guardian. Stepfather made several non-party requests for production of information regarding the child's placement and progress, and requested documents from the child's guardian ad litem. The guardian ad litem filed a Motion for Protection from Discovery, alleging in part that Stepfather had no legal interest in the child in that he was not her legal guardian under the CHINS case, and that he was not her father or her alleged father. The juvenile court granted the protective order, finding that Stepfather was not a party to the case. Because his guardianship of the child had not been terminated, the Court held that the juvenile court had erred in finding that Stepfather was not a party to the CHINS proceeding. Id. The Court observed: (1) Stepfather noted that, according to IC 31-34-9-7 a child's guardian is a party "to all proceedings described in the juvenile law and [has] all rights of parties under the Indiana Rules of Trial Procedure;" (2) all parties agreed that Stepfather had been properly appointed guardian of the child prior to the CHINS proceedings; (3) Stepfather contended that his guardianship of the child continued until it was properly terminated, which had not occurred; (4) Stepfather noted that, if the filing of a CHINS petition automatically terminated a guardianship, a large part of the CHINS statute would be meaningless; (5) OFC and the guardian ad litem agreed that the juvenile court erred in dismissing Stepfather as a party to the CHINS proceedings; and (6) the guardian ad litem noted that the usual procedure was to consolidate the guardianship case with the CHINS case, and then seeking termination of the guardianship would be the functional equivalent of seeking the termination of parental rights. Id. at 317.

I. E. 2. Guardianship as a Permanency Option

The term "legal guardian" is used in IC 31-34-21-7.5(c)(1)(D) as a permanency option for a CHINS. It is defined as:

> ...a caretaker in a judicially created relationship between the child and caretaker that is intended to be permanent and self-sustaining as evidenced by the transfer to the caretaker of the following parental rights with respect to the child:
>
> (i) Care, custody, and control of the child.
>
> (ii) Decision making concerning the child's upbringing.

It is generally assumed that a "legal guardian" refers to a guardianship of the child created in a probate proceeding under Title 29. The notion that a guardianship is permanent as stated in IC 31-34-21-7.5(c)(1)(D) is distinct from Indiana case law which provides that guardianship may be a temporary arrangement and may be judicially challenged by the natural parent if the parent subsequently becomes available, willing, or fit to care for the child. See Chapter 9 at III.F.

Guardianship for an adjudicated CHINS can be established in juvenile court as a permanency plan. IC 31-30-1-1(10) gives the juvenile court exclusive original jurisdiction in:

> (10) Guardianship of the person proceedings for a child:

(A) who has been adjudicated as a child in need of services;
(B) for whom a juvenile court has approved a permanency plan under IC 31-34-21-7 that provides for the appointment of a guardian of the person; and
(C) who is the subject of a pending child in need of services proceeding under IC 31-34.

IC 29-3-2-1(c)(2) provides that a juvenile court has exclusive original jurisdiction over matters related to guardians of the person and guardianships of the person described in IC 31-30-1-1(10).

IC 31-30-2-1(d) states:

(d) Except as provided in subsection (g) [older youth who receives kinship guardianship or other assistance], the juvenile court's jurisdiction over a proceeding described in IC 31-30-1-1(10) for a guardianship of the person continues until the earlier of the date that:
(1) the juvenile court terminates the guardianship of the person; or
(2) the child becomes:
(A) nineteen (19) years of age, if a child who is at least eighteen (18) years of age is a full-time student in a secondary school or the equivalent level of vocational or career and technical education; or
(B) eighteen (18) years of age, if clause (A) does not apply.
If the guardianship of the person continues after the child becomes the age specified in subdivision (2), the juvenile court shall transfer the guardianship of the person proceedings to a court having probate jurisdiction in the county in which the guardian of the person resides. If the juvenile court has both juvenile and probate jurisdiction, the juvenile court may transfer the guardianship of the person proceeding to the probate docket of the court.
(e) The jurisdiction of the juvenile court to enter, modify, or enforce a support order under IC 31-40-1-5 continues during the time that the court retains jurisdiction over a guardianship of the person proceeding described in IC 31-30-1-1(10).
(f) At any time, a juvenile court may, with the consent of a probate court, transfer to the probate court guardianship of the person proceedings and any related support order initiated in the juvenile court.

IC 31-34-21-7.7(a) states that if the juvenile court approves a permanency plan under section 7 of this chapter that provides for the appointment of a guardian 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(b) states that if a guardianship of the person proceeding for the child is pending in a probate court, the probate court shall transfer the proceeding to the juvenile court. IC 31-34-7.7(c) states that in creating a guardianship of a minor, a probate or juvenile court may include in an order the requirements and terms and conditions described in IC 29-3-8-9(a). IC 31-34-21-7.7(d) states that 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(e) states that the probate court may assume or reassume jurisdiction of the guardianship after the CHINS case creating the guardianship is closed.

I. F. Custodian

The term "custodian" is defined at IC 31-9-2-31, which states:

(a) "Custodian", for purposes of the juvenile law, means a person with whom a child resides.

(b) "Custodian", for purposes of IC 31-34-1, includes any person who is:
(1) a license applicant or licensee of:
(A) a foster home or residential child care facility that is required to be licensed or is licensed under IC 31-27;
(B) a child care center that is required to be licensed or is licensed under IC 12-17.2-4; or
(C) a child care home that is required to be licensed or is licensed under IC 12-17.2-5;
(2) a person who is responsible for care, supervision, or welfare of children while providing services as an owner, operator, director, manager, supervisor, employee, or volunteer at:
(A) a home, center, or facility described in subdivision (1);
(B) a child care ministry, as defined in IC 12-7-2-28.8, that is exempt from licensing requirements and is registered or required to be registered under IC 12-17.2-6;
(C) a home, center, or facility of a child care provider, as defined in IC 12-7-2-149.1(4);
(D) a home, center, or facility that is the location of a program that provides child care, as defined in section 16.3 of this chapter, to serve migrant children and that is exempt from licensing under IC 12-17.2-2-8(6), whether or not the program is certified as described in IC 12-17.2-2-9; or
(E) a school, as defined in section 113.5 of this chapter;
(3) a child caregiver, as defined in section 16.4 of this chapter;
(4) a member of the household of the child's noncustodial parent; or
(5) an individual who has or intends to have direct contact, on a regular and continuing basis, with a child for whom the individual provides care and supervision.

I. F. 1. Who Qualifies as a Custodian

The term "custodian" is very broad and may include a stepparent or a live-in boyfriend or girlfriend of the custodial parent, as well as relatives or other adults with whom the child is living. It is recommended that these non-parents living in the child's household, or with whom the child resides, should generally be considered "custodians" and included in the CHINS proceeding. Labeling these persons as "custodians," or otherwise joining them as parties in the CHINS proceeding, authorizes the juvenile court to issue orders regarding their treatment of the child and their participation in counseling or other treatment orders. In some situations, however, the court will not give party status to live-in adults who are dangerous to the well-being of the child, and may instead issue protective orders prohibiting contact with the child, and ordering the custodial parent not to maintain contact with the abusive adult. See **Sills v. Irelan**, 663 N.E.2d 1210 (Ind. Ct. App. 1996) (paternity custody modification case in which trial court ordered Mother to have no contact with boyfriend who was under investigation for injuring child).

There is little case law on what categories of persons qualify as "custodian" under the juvenile code. See **Matter of K.H.**, 688 N.E.2d 1303, 1306 n.5. (Ind. Ct. App. 1997) (Court noted that the man who resided with the subject child's Mother, and who was the father of the subject child's half sibling, could have been considered a "custodian" as to the subject child in the CHINS proceeding); **In Re C.W.**, 723 N.E.2d 956, 959 n.3 (Ind. Ct. App. 2000) (Court noted that Mother's live-in boyfriend was dismissed as an interested party in the CHINS proceeding when he no longer cohabited with Mother).

I. F. 2. Custodianship as Permanency Option

IC 31-34-21-7.5(c)(1)(C) creates a permanency option that may be referred to as "permanent custodian." This statute provides that a possible permanency option for a child is placement of the child with a responsible person including an adult sibling, a grandparent, an aunt, an uncle, the custodial parent of the child's sibling or another relative who is willing and able to act as the child's permanent custodian and carry out the responsibilities required by the permanency plan. See Chapter 9 at III.E. and III.F. for discussion of case law regarding third party custodianship and guardianship and statutory amendments regarding concurrent original jurisdiction with juvenile court for dissolution and paternity courts.

I. G. Rights of Grandparents, Relatives, and Other Non-Parents

A child's grandparent, relative, or other non-parent who has cared for the child may fit into one of the two categories of persons who are given rights under the juvenile code: guardian or custodian. If the grandparent, relative, or other non-parent is not recognized by the court as a guardian or custodian, he/she may petition the court to intervene as a party pursuant to Ind. Trial Rule 24. See **In Re Adoption of I.K.E.W.**, 724 N.E.2d 245, 249 n. 5 (Ind. Ct. App. 2000) (Court reviewed distinction between intervention of an interested person as a party under T.R. 24, and joinder of parties under T.R. 19); **In Re E.I.**, 653 N.E.2d 503, 507-508 (Ind. Ct. App. 1995) (Court said in dicta it would be "illogical" result to preclude "joinder of such parties as guardians, custodians, foster parents, or other relatives of the child").

IC 31-9-2-107(c) states that "relative", for purposes of IC 31-27 [regulation of residential child care placements], IC 31-28-5.8 [collaborative care], IC 31-34-4 [temporary placement of child taken into custody], IC 31-34-19 [dispositional hearing], and IC 31-37 [delinquency proceedings], means any of the following in relation to a child: parent, grandparent, brother, sister, stepparent, stepgrandparent, stepbrother, stepsister, first cousin, uncle, aunt, any other individual with whom a child has an established and significant relationship.

I. G. 1. Rights of Relatives and Other Non-Parents to Notice of Hearings and Right to be Heard

IC 31-34-21-4 requires that DCS send notice of case review and permanency hearings seven days before the hearings to relatives and other persons who are "currently providing care" for the child or who have had "a significant or caretaking relationship to the child." These persons are also entitled to be heard and to make recommendations at these hearings. The right to be heard and to make recommendations includes the right to submit a written statement to the court that, if served upon all parties, may be made part of the court record and the right to present oral testimony and to cross-examine witnesses. IC 31-35-2-6.5 creates similar rights in termination proceedings. See IC 31-34-21-4(d) and IC 31-35-2-6.5(e).

It is important to identify the child's relatives and provide notice to them, which may result in additional placement options for children. IC 31-34-3-4.5 requires DCS to exercise due diligence (within thirty days of a child's removal from parents) to identify all adult relatives, including the child's siblings over the age of eighteen, and any adult relatives suggested by either parent. DCS must notify the relatives of the child's removal, set forth options for care and placement of the child, describe the requirements for relatives to become foster parents, describe services available to the child in foster care, and describe how a relative may enter into an agreement with DCS to receive financial assistance through the adoption assistance or guardianship assistance program. See Chapter 5 at II.C.3. for further discussion. IC 31-34-4-2(a), which authorizes out-of-home placement for a child who is taken into protective custody under a court order, requires consideration of the child's placement with a de facto custodian

in addition to a suitable and willing relative. IC 31-34-4-2(c) requires DCS to complete an evaluation based on a home visit before placing the child with a relative or a de facto custodian. IC 31-34-4-2(d) requires DCS to conduct a criminal history check of each person residing in the out-of-home placement. See this Chapter at I.G.2. for the definition of a criminal history check.

Numerous CHINS statutes require DCS to provide notice of hearings. Statutes also require the court to provide an opportunity to be heard and, in some cases, make recommendations for foster parents and other caretakers with whom a child has been placed. A summary of the statutes follows:

- IC 31-34-5-1 (detention hearing) and IC 31-34-5-1.5 (detention hearing for abandoned infant) require DCS to give notice to a foster parent or other caretaker with whom the child has been placed. The court shall provide the foster parent or caretaker an opportunity to be heard and make recommendations. See Chapter 5 at IV.D.1. for further discussion.
- IC 31-34-10-2(h) (initial hearing) requires DCS to give notice to each foster parent or other caretaker with whom a child has been temporarily placed. The court shall provide a foster parent or other caretaker an opportunity to be heard and make recommendations. See Chapter 6 at I.E. and I.J.4. for further discussion.
- IC 31-34-11-1(c) states that if the factfinding hearing is not held immediately after the initial hearing, DCS shall provide notice of any factfinding hearing to each foster parent or other caretaker with whom the child has been placed. The court shall provide the foster parent or other caretaker an opportunity to be heard at the factfinding hearing. (*Practice Note:* Note that this statute does not require the court to provide an opportunity to make recommendations).
- IC 31-34-19-1.3 requires DCS to notify the foster parent or other caretaker with whom the child has been placed of the dispositional hearing. The court shall provide a foster parent or other caretaker the opportunity to be heard and to make recommendations. See Chapter 8 at II.A.
- IC 31-34-23-4, the dispositional modification statute, requires notice of the hearing to be given in accordance with IC 31-34-19-1.3. IC 31-34-19-1.3 requires DCS to give notice to a foster parent or other caretaker. *Practice Note:* It is a reasonable interpretation that the notice requirement for dispositional modification includes the requirement that the court provide an opportunity for the foster parent or other caretaker to be heard and to make recommendations. See Chapter 8 at XV.G.2.
- IC 31-34-22-3, the statute for the periodic case review and permanency hearing reports, allows any person who is entitled to receive the report (which, according to IC 31-34-22-2(a), includes a foster parent or any other person entitled to receive notice of a case review or permanency hearing) the opportunity to controvert any part of the report admitted into evidence. See Chapter 9 at I.G. See this Chapter at I.I. for further discussion of IC 31-32-1-4.

Seven days before the periodic case review hearing, including a permanency hearing, IC 31-34-21-4 provides that DCS must send notice of the hearing to:

(1) The child's parent, guardian, or custodian.
(2) An attorney who has entered an appearance on behalf of the child's parent, guardian, or custodian.

(3) A prospective adoptive parent named in a petition for adoption of the child filed under IC 31-19-2 if:
(A) each consent to adoption of the child that is required under IC 31-19-9-1 has been executed in the form and manner required by IC 31-19-9 and filed with the local office;
(B) the court having jurisdiction in the adoption case has determined under any applicable provision of IC 31-19-9 that consent to adoption is not required from a parent, guardian, or custodian; or
(C) a petition to terminate the parent-child relationship between the child and any parent who has not executed a written consent to adoption under IC 31- 19-9-2 has been filed under IC 31-35 and is pending.
(4) The child's foster parent or long term foster parent.
(5) Any other person who:
(A) the department has knowledge is currently providing care for the child; and
(B) is not required to be licensed under IC 12-17.2 or IC 31-27 to provide care for the child.
(6) Any other suitable relative or person whom the department knows has had a significant or caretaking relationship to the child.

DCS must also send notice of the review hearing to each party to the case. IC 31-34-21-4(e).

I. G. 2. Relative or Other Non-Parent Placement or Custody of Children

A grandparent, relative, or other non-parent can make DCS, the parties, and the court aware of his/her willingness to care for the child as a temporary protective custody placement option, a dispositional placement option, or a permanency option. DCS is required to consider relative placements for children in the case plan (IC 31-34-15-4), and to consider relative placements before other placements for temporary protective custody (IC 31-34-4-2, IC 31-34-6-2) and dispositional placements (IC 31-34-18-2, IC 31-34-19-7). The dispositional guidelines at IC 31-34-18-4 encourage relative placement by stating that the person preparing the predispositional report shall recommend placement of the child in the least restrictive (most family like) setting, close to the parents' home, which least interferes with family autonomy, is least disruptive of family life, and provides a reasonable opportunity for parent participation in the child's care and treatment.

In **In Re C.W.**, 723 N.E.2d 956 (Ind. Ct. App. 2000), a CHINS case, the child was placed in foster care, and Grandparents filed kinship petitions for placement of the child with them. In reviewing the CHINS procedures, the Court noted that IC 31-34-4-2 states the court should first consider placement of a child with relatives when a child is removed from the home. Id. at 961. The trial court's order denying the petition for kinship placement was affirmed as being in the "best interest" of the child on evidence that Grandparents had not eradicated smoke from their home or vehicle, the child had bronchitis, and the court appointed special advocate recommended continued placement of the child in foster care and not with Grandparents. Id. at 962. In **E.R. v. Office of Family & Children**, 729 N.E.2d 1052 (Ind. Ct. App. 2000), a CHINS case, the children and Parents were Mexican nationals. The Court rejected Parents' claim that the trial court erred in failing to place the children with Spanish-speaking foster parents, or in the alternative, to place them with relatives in Mexico. Id. at 1061. The Court noted that "every effort should be made to design a system that is sensitive to the needs of non-English speaking, culturally diverse people," but found that the Office of Family and Children reasonably attempted to locate Spanish speaking foster parents for the children, and the children were provided with Spanish speaking counselors. Id. at 1060-61.

Parents could not complain that the juvenile court failed to consider placement of the children with their paternal grandparents in Mexico, because Parents failed to cooperate and to enable the court to obtain the information needed to determine the feasibility of placing the children with the paternal grandparents. Id. at 1061.

Relatives and other non-parents who are not licensed as foster parents and who seek placement of children who are the subjects of CHINS proceedings should be aware of the statutory requirements for a criminal history check (defined by IC 31-9-2-22.5) required by IC 31-34-4-2 (temporary protective custody placement), IC 31-34-20-1.5 (dispositional placement) and IC 31-34-21-7.5 (permanency plan placement). The criminal history check includes a fingerprint based criminal history background check of both state and national data bases or a national name based criminal history check and a check of local law enforcement agency records in every jurisdiction where the person lived within the past five years, for persons living in a residence who are at least eighteen years old. It also includes, for persons who live in the residence and are at least fourteen years old, the collection of substantiated reports of child abuse or neglect in a jurisdiction where the person resided within the past five years, and a check of the national sex offender registry. See the following for the statutory requirements for placement of children with non-licensed persons and the statutory citations for each type of hearing:

- Criminal history checks performed for the initial protective custody placement need not be repeated for dispositional or permanency placement. IC 31-34-20-1.5(b) [dispositional placement]. IC 31-34-21-7.5(b) [permanency placement].

- The following felony convictions listed at IC 31-9-2-84.8 by a household resident will *always* prevent the proposed placement of the child in the home: murder, causing suicide, assisting suicide, voluntary manslaughter, reckless homicide, domestic battery, aggravated battery, kidnapping, human and sexual trafficking, a felony sex offense under IC 35-42-4, incest, neglect of a dependent, child selling, an offense relating to material or a performance that is harmful to minors or obscene (IC 35-49-3), or a substantially equivalent felony in another state. See IC 31-34-4-2(e) [protective custody placement], IC 31-34-20-1.5(a) [dispositional placement], IC 31-34-21-7.5(a) [permanency placement].

- The court may order or DCS may approve the proposed placement if a household resident has committed an act resulting in a substantiated report of abuse or neglect or has a juvenile delinquency adjudication for an act listed at IC 31-9-2-84.8 or has a conviction for specific felonies if the person's commission of the felony, delinquent act, or act of abuse or neglect is not relevant to the person's present ability to care for a child and the placement is in the child's best interest. See IC 31-34-4-2(g) [protective custody placement], IC 31-34-20-1.5(d) [dispositional placement], IC 31-34-21-7.5(d) [permanency plan].

- The felony convictions by a household resident that *might not* prevent placement of the child in the home are: battery, criminal confinement, carjacking, arson, a felony involving a weapon under IC 35-47 or IC 35-47.5, a felony relating to controlled substances under IC 35-48-4, a felony under IC 9-30-5 [operating a vehicle while intoxicated], or a substantially equivalent felony for which conviction was entered in another jurisdiction *if the conviction did not occur within the past five years*. See IC 31-34-4-2(g) [protective custody placement],

IC 31-34-20-1.5(d) [dispositional placement], IC 31-34-21-7.5(d) [permanency plan].

- In determining whether to approve the placement of the child in a home where a household resident has committed an act of child abuse or neglect, or has a delinquency adjudication for an act listed at IC 31-9-2-84.8, or a felony conviction that does not specifically prevent placement, the court and DCS shall consider the following: (1) the length of time since the person committed the offense, delinquent act, or abuse or neglect; (2) the severity of the offense, delinquent act, or abuse or neglect; (3) evidence of the person's rehabilitation, including the person's cooperation with a treatment plan, if applicable. IC 31-34-4-2(h) [protective custody hearing], IC 31-34-20-1.5(e) [dispositional placement], and IC 31-34-21-7.5(e) [permanency plan]. In approving a permanency plan under these circumstances, the court shall make a written finding.

In **D.L. v. Huck**, 978 N.E.2d 429 (Ind. Ct. App. 2012), the child, an adjudicated CHINS, was placed with Aunt and Uncle by DCS after a home study and comprehensive background checks were completed. Parents voluntarily terminated their rights so the child could be adopted by Aunt and Uncle, and the juvenile court authorized Aunt and Uncle to petition for adoption of the child. DCS removed the child from the home of Aunt and Uncle one month later based on a twenty-year-old substantiated abuse report against Uncle. Uncle had never been interviewed about the substantiated report. Aunt and Uncle were unaware that there had been a substantiated allegation against Uncle. Grandfather then requested but was denied custody of the child. The Family (Father, Aunt and Uncle, Grandfather, and the child) brought suit against DCS, which filed a motion to dismiss. The trial court granted dismissal of seven of the eight counts, holding that the claims were barred by quasi-judicial immunity because they were based on allegations that DCS acted wrongly in the course of duties within the CHINS proceeding for the child. The trial court also concluded that Aunt, Uncle, and Grandfather lacked standing to bring the claims against DCS because they did not have a custodial relationship with the child prior to the CHINS proceeding. The Court determined that Aunt and Uncle had a liberty interest in their relationship with the child, such that they had standing to bring suit, and that Grandfather did not have standing to bring suit. Id. at 438. The Court opined that it seemed "at odds with reality" to conclude that Aunt and Uncle did not have any liberty interest with the child. Id. at 437. The Court noted that: (1) Aunt and Uncle had a pre-existing biological relationship with the child that is not typical of foster families; and (2) there was no tension between the liberty interests of Aunt and Uncle and those of the natural parents in that the natural parents had terminated their rights with the expectation that Aunt and Uncle would adopt the child. Id. In considering the issue of Grandfather's standing, the Court said that much of the law surrounding grandparents' rights with regard to their grandchildren is related to the grandparent visitation statute, which is in derogation of the common law. Id. at 438. The Court opined that, if at common law grandparents have no right to seek visitation with a grandchild, it follows that they do not have a liberty interest in maintaining a relationship with that child, at least absent a custodial relationship. Id. The Court found that the trial court correctly determined that Grandfather did not have standing to bring suit. Id. On rehearing at **D.L. v. Huck**, 984 N.E.2d 223, 226 (Ind. Ct. App. 2013), the Court declined to revise its opinion with regard to Grandfather's standing.

In **In Re G.R.**, 863 N.E.2d 323 (Ind. Ct. App. 2007), a CHINS case, the child's maternal grandmother and step-grandfather filed a petition for kinship placement of the child more than three months after Mother's parental rights had been involuntarily terminated. The court

denied the petition. The Court opined that the trial court's denial of the petition for placement with kin was proper. Id. at 328. The Court stated:

> The Indiana Code does not define "grandparent" for purposes of the CHINS statutes – Indiana Code Sections 31-34-1-1 through 31-34-25-5 – and it appears that this Court has not yet specifically addressed the issue.
>
> Indiana Code Section 31-34-4-2(a) states: "If a child alleged to be a child in need of services is taken into custody under an order of the court under this chapter, the court shall consider placing the child with a suitable and willing blood or adoptive relative caretaker, including a grandparent, an aunt, an uncle, or an adult sibling, before considering any other out-of-home placement." We conclude that because Mother's parental rights were terminated prior to the filing of the Leonellis' [maternal grandmother and step-grandfather's] petition for placement, Mrs. Leonelli [maternal grandmother] was no longer G.R.'s grandparent and the trial court was therefore not required to consider her for placement under 31-34-4-2(a) or any other CHINS statute. Mr. Leonelli [step-grandfather] was not a grandparent to G.R. under the CHINS statutes because he had never been her blood or adoptive relative.

Id.

Practice Note: Subsequent to the issuance of G.R., IC 31-34-4-2 was amended to include the required initial consideration of the child's placement with a de facto custodian as well as placement with a suitable and willing relative. The statute states in part:

> (a) If a child alleged to be a child in need of services is taken into custody under an order of the court under this chapter and the court orders out-of-home placement, the department [DCS] is responsible for that placement and care and must consider placing the child with a:
> (1) suitable and willing adoptive relative caretaker sibling; or
> (2) de facto custodian;
> before considering any other out-of-home placement.
> (b) The department shall consider placing a child described in subsection (a) with a relative related by blood, marriage, or adoption before considering any other placement of the child.
> (c) Before the department places a child in need of services with a relative or a de facto custodian, the department shall complete an evaluation based on a home visit of the relative's home.

I. G. 3. Standing of Relatives and Former Domestic Partners to Seek Visitation

Stepparents and former domestic partners who have maintained a custodial and parental relationship with a child may have standing to seek visitation with a child. The stepparent or former domestic partner must also prove that visitation is in the child's best interest. See **Richardson v. Richardson**, 34 N.E.3d 696 (Ind. Ct. App. 2015); **Fawcett v. Gooch**, 708 N.E.2d 908 (Ind. Ct. App. 1999); **Francis v. Francis**, 654 N.E.2d 4 (Ind. Ct. App. 1995); **Caban v. Healy**, 634 N.E.2d 540 (Ind. Ct. App. 1994); **In Re Custody of Banning**, 541 N.E. 2d 283 (Ind. Ct. App. 1989); **Collins v. Gilbreath**, 403 N.E.2d 921 (Ind. Ct. App. 1980). Case law generally indicates that only stepparents have standing to seek visitation. See **Worrell v. Elkhart Cty. Office of Family**, 704 N.E.2d 1027, 1029 (Ind. 1998) (foster parents lack standing to seek visitation with former foster children); **Matter of E.M.**, 654 N.E.2d 890 (Ind. Ct. App. 1995) (Mother's former boyfriend lacked standing to pursue visitation with Mother's child); **Tinsley v. Plummer**, 519 N.E.2d 752 (Ind. Ct. App. 1988)

(court denied visitation to child's great aunt and uncle who saw child only five times a year at family gatherings). Even though a person may lack standing to seek visitation in the CHINS case, the juvenile court may not be prohibited from granting such visitation if it finds it is in the best interest of the child in the CHINS proceeding.

In **Brown v. Lunsford**, 63 N.E.3d 1057 (Ind. Ct. App. 2016), the Court reversed the trial court's order granting visitation with Brown's daughter to Lunsford, Brown's former boyfriend, who was not related to Brown's daughter. Id. at 1065. Quoting Collins v. Gilbreath, 403 N.E.2d 921, 923 (Ind. Ct. App. 1980), the Court observed that Indiana courts have been cautious not to "open the door and permit the granting of visitation rights to a myriad of unrelated third persons…who happen to feel affection for a child." Brown at 1062. Quoting Worrell v. Elkhart Cnty. Office of Family and Children, 704 N.E.2d 1027, 1028 (Ind. 1989), the Court said that "[b]efore a court may proceed to the substance of a visitation request, the party seeking visitation must satisfy the threshold requisite of a custodial and parental relationship." Brown at 1062. The Court noted that, pursuant to Collins, the Court has declined to extend standing to third parties who have not acted in a custodial or parental capacity. Brown at 1062. The Court looked to A.C. v. N.J., 1 N.E.3d 685, 697 (Ind. Ct. App. 2013), in which the Court held, for the first time, that a same-sex partner who was not the child's biological parent, had standing to seek visitation with the child. Brown at 1064. The Court concluded that the reasoning in the A.C. opinion was inapplicable to the Brown case and therefore not controlling. Brown at 1065. The Court noted that its opinion in A.C. was an effort to resolve the legal issue of same-sex partner's rights before the U.S. Supreme Court decided in Oberfell v. Hodges, 135 S. Ct. 2584 (2015) that same-sex partners may marry. Brown at 1065. The Court did not believe that the A.C. holding or rationale could be extended to the Brown case in light of the unique factual circumstances and particular legal landscape in which A.C. was decided. Brown at 1065. The Court opined that the trial court's order did not take into consideration the decision that Brown, a fit parent, made to deny Lunsford visitation with Brown's daughter. Id. The Court found no indication that Lunsford presented evidence compelling enough to overcome the presumption that Brown's decision to terminate her daughter's visitation with Lunsford was in her daughter's best interest. Id.

In **Gardenour v. Blondelie**, 60 N.E.3d 1109 (Ind. Ct. App. 2016), *trans*. *denied*, Kristy Gardenour and Denise Blondelie entered into a registered domestic partnership agreement in accordance with California law in 2006. The California Domestic Partner Act provided that registered domestic partners had the same rights, protections, and benefits, and the same responsibilities, obligations, and duties under law as are granted to spouses, and that the rights and obligations with respect to a child of either of them shall be the same as those of spouses. The couple moved to Indiana and agreed to co-parent a child. Kristy was artificially inseminated and gave birth to the child. After their relationship ended, Denise returned to California and Kristy filed a petition for dissolution of marriage. The trial court: (1) found that Kristy and Denise agreed to enter into a California domestic partnership, which was a spousal relationship; (2) found that Denise is the child's legal parent; and (3) awarded joint legal custody of the child to Kristy and Denise, physical custody to Kristy, and parenting time to Denise. Kristy appealed. The Court affirmed the trial court's orders. Id. at 1120-21. The Court held that Kristy and Denise, as spouses, knowingly and voluntarily consented to artificial insemination, with Kristy as the birth parent and that Denise is the child's legal parent. Id. at 1120. The Court concluded that the trial court did not err in awarding Denise joint legal custody nor did it err in ordering her to pay child support. Id. at 1120 n.5. The Court noted that the trial court ordered Denise to receive the following parenting time: video chat communications twice per week; three visits per week

for one hour each when she travels to Indiana; and parenting time as the parties deem fit when Denise travels to Indiana for holidays and the child's birthday. Id. Given the lack of evidence indicating parenting time with Denise would endanger the child, coupled with the limited parenting time awarded to her, the Court concluded the trial court did not err in awarding Denise parenting time. Id. at 1120.

In **A.C. v. N.J.**, 1 N.E.3d 685 (Ind. Ct. App. 2013), the Court affirmed the trial court's denial of former Domestic Partner's (Partner's) request for joint custody of the child conceived during Partner's same-sex relationship with Mother. Id. at 694. The Court reversed the trial court's conclusion that Partner lacked standing to seek visitation with the child and remanded with instructions to the trial court to reconsider Partner's request for visitation under the standard set forth in third-party visitation cases. Id. at 697. Citing Worrell v. Elkhart Cnty. Office of Family & Children, 704 N.E.2d 1027 (Ind. 1998), the Court noted that the Indiana Supreme Court expressed agreement "with the prior holdings limiting standing to step-parents" and held "that the right does not extend to foster parents." A.C. v. N.J. at 695-96. The Court recognized that there are good reasons to limit the class of individuals with standing to seek third-party visitation. Id. at 697. The Court said that, by recognizing a right to third-party visitation, the Court has acknowledged that a child's interest in maintaining relationships with those who have acted in a parental capacity will sometimes trump a natural parent's right to direct the child's upbringing. Id. The Court opined that the situation in this case was "characterized by an even stronger indicia of a custodial and parental relationship" because the parties originally intended for Partner to fulfill the role of the child's second parent and actively encouraged the development of a parental bond between Partner and the child. Id. The Court believed that the Indiana Supreme Court's decision in King v. S.B., 837 N.E.2d 965 (Ind. 2005), "signaled its amenability to expanding the class of petitioners with standing to seek third-party visitation to include individuals similar to Partner." A.C. v. N.J. at 697. The Court said that a former domestic partner is not automatically entitled to visitation in these circumstances; it must still be established that visitation is in the child's best interests. Id.

In **M.S. v. C.S.**, 938 N.E.2d 278 (Ind. Ct. App. 2010), the Court affirmed the trial court's order which vacated the trial court's previous order approving an agreement signed by Mother and her former Domestic Partner (Partner). Id. at 287. The agreement provided that Mother and Partner would share joint legal custody of Mother's child, Mother was the child's primary physical custodian, and Partner would have parenting time with the child by agreement or in accordance with the Indiana Parenting Time Guidelines. Mother and Partner separated eighteen months after the trial court approved their custody and parenting time agreement. The Court found that the following facts amply supported the trial court's finding that continued visitation with Partner was not in the child's best interests: (1) Partner threw things at Mother and pushed her to the ground in the child's presence; (2) Partner threatened Mother's life in the child's presence; and (3) Partner's actions were so threatening that the six-year-old child tried to intervene by holding on to Partner and telling Mother to leave. Id. at 287. Partner first argued that she was entitled to parenting time with the child because she contended that she was the child's legal parent. The Court concluded that Partner had waived any claim that she was entitled to parenting time as the child's legal parent, because Partner failed to raise this argument before the trial court. Id. at 285. Partner's second argument was that the trial court erred in finding that she must be a de facto custodian in order to be granted parenting time. The Court observed that the trial court specifically found that even if Partner were a de facto custodian, that status would *not* entitle her to parenting time (emphasis in original). Id. at 286. Citing K.I. Ex Rel J.I. v. J.H., 903 N.E.2d 452, 461-62 (Ind. 2009), the Court noted that the Indiana Supreme Court has held that the de facto

custodian statute bears only on the question of custody, not visitation. M.S. at 286. The Court said that "parenting time", as defined by IC 31-9-2-88.5, is "the time set aside by a court for a *parent* and child to spend together." (Emphasis in opinion.) Id. The Court observed that, when the General Assembly has defined a word, the Court is bound by that definition; therefore, the Court concluded that only parents may be awarded parenting time. Id. Because Partner had waived any claim that she was the child's legal parent, Partner was not entitled to parenting time with the child. Id.

The Court stated that Indiana case law permits third-party visitation, as opposed to parenting time, to be awarded to an unrelated adult under certain limited circumstances, citing Schaffer v. Schaffer, 884 N.E.2d 423, 425 (Ind. Ct. App. 2008), Francis v. Francis, 654 N.E.2d 4, 7 (Ind. Ct. App. 1995), *trans. denied*, and other cases. M.S. at 286. The Court noted that the Indiana Supreme Court has expressed approval of a line of cases limiting standing to seek third-party visitation to former stepparents. Id. at 286. The Court opined that these cases would appear to preclude a visitation order in favor of Partner, because it was undisputed that Partner was not the child's former stepparent. Id. The Court also noted King v. S.B., 837 N.E.2d 965, 967 (Ind. 2005), in which the Indiana Supreme Court reversed the trial court's grant of a mother's motion to dismiss her same-sex former domestic partner's lawsuit seeking to be recognized as the child's legal parent or to be awarded visitation. M.S. at 287. In King the Court held that the former domestic partner was not necessarily precluded from being awarded "[a]t least some of the relief sought." King at 967. M.S. at 287.

In **Kitchen v. Kitchen**, 953 N.E.2d 646 (Ind. Ct. App. 2011), the Court found that the trial court lacked authority to grant visitation for maternal Aunt and Uncle with the child, because Aunt and Uncle lacked standing to petition for visitation. Id. at 650. The child and Mother had lived with Aunt and Uncle until Mother's death after an extended illness. At the time the trial court entered the visitation order, the child was living with Father. The Court adhered to the limitation of Indiana statutes and case law which confer standing on visitation only to parents, grandparents, and stepparents. Id.

In **Schaffer v. Schaffer**, 884 N.E.2d 423 (Ind. Ct. App. 2008), the Court affirmed the trial court's order reducing Stepfather's visitation with the child from that set forth in the Indiana Parenting Time Guidelines, but not terminating his visitation as requested by Mother. Id. at 429. The Court found that where, as here, the issue is merely modifying visitation – whether increasing, decreasing, or terminating it altogether – the only relevant inquiry is the best interests of the child, and the party requesting the modification or termination bears the burden of proof. Id. at 428. The Court noted that: (1) Mother did not introduce any evidence from a child psychologist, licensed clinical social worker, counselor, or therapist to substantiate her assertion that terminating Stepfather's visitation was in the child's best interests; (2) it was undisputed that Stepfather was not unfit; and (3) Mother did not introduce evidence that Stepfather would endanger the child. Id. at 429.

See also **In Re Paternity of J.A.C.**, 734 N.E.2d 1057, 1060 (Ind. Ct. App. 2000) (trial court's findings were insufficient to grant visitation to maternal Aunt because court did not find that relationship between Aunt and child was custodial and parental and that visitation was in child's best interest).

I. G. 4. Rights of Grandparents in Visitation and Adoption

In addition to the rights discussed above for relatives and non-parents, grandparents may petition for court ordered visitation under the specific requirements and limitations listed in

the Grandparent Visitation Statutes at IC 31-17-5-1 through 10. See Chapter 15 on Grandparent Visitation.

Case law reflects the limited rights of grandparents in contested adoption cases involving grandchildren who are CHINS. In **In Re Adoption of I.K.E.W.**, 724 N.E.2d 245 (Ind. Ct. App. 2000), the child's foster parents and the child's grandparents (Grandparents) filed separate petitions to adopt the child in the same probate court. The probate court granted the foster parents' adoption, and dismissed Grandparents' petition for adoption. On appeal, the Court observed: (1) grandparents are not entitled to intervene as a matter of right in the adoption case; (2) a liberty interest in a grandchild, giving rise to due process rights, may exist only where the grandparent-grandchild relationship is custodial; (3) the court is not required to consolidate competing adoption petitions. Id. at 249, 251. With regard to rights, the Court also noted that a termination of parental rights generally extinguishes the rights of a grandparent, because those rights are derivative of the parents' rights. Id. at 249 n.6. The Court observed that "it is well settled that '[r]elatives have no preferential legal right to adopt' in Indiana." Id. at 251. The Court reversed and remanded the trial court's order granting foster parents' adoption, concluding that the trial court abused its discretion when it denied Grandparents' motion for relief from the adoption judgment. Id. The Court ruled that Grandparents were "interested" persons and the probate court had an "affirmative duty" to give them notice of the asdoption petition filed by foster parents. Id. at 250, 51. See also **In Re Adoption of B.C.H.**, 22 N.E.3d 580, 587 (Ind. 2014) (Court vacated adoption to allow "lawful" custodian Grandparents who had been primary caregivers of the child for the first forty-five months of her life to receive notice of the adoption petition and the right to present testimony at the adoption hearing); and **In Re C.W.**, 723 N.E.2d 956, 960 n. 6 (Ind. Ct. App. 2000) (Court stated that, in order for an adoption court to fulfill its duty to notify appropriate parties, it has an affirmative duty to conduct an initial inquiry to determine whether or not all "interested parties" have been given notice of the petition for adoption and if there are any competing actions pending in other courts).

In **In Re G.R.**, 863 N.E.2d 323 (Ind. Ct. App. 2007), Maternal Grandmother and Step-grandfather (Grandparents) filed a petition for grandparent visitation rights and motion to intervene in the CHINS case on the same day that Mother's parental rights were terminated. Subsequently Grandparents filed a motion for opportunity to review juvenile files, which the trial court denied. At the hearing on the petition for grandparent visitation the trial court found that Grandparents lacked standing to seek visitation and did not permit them to testify or present evidence. The trial court denied the petition for visitation and failed to rule on the motion to intervene, in essence denying it. The Court agreed with the trial court's analysis, finding that Grandmother did not fall into any of the categories of grandparents described in IC 31-9-2-77. Id. at 326. IC 31-9-2-77 defines maternal or paternal grandparent for purposes of IC 31-17-5-1 (the Grandparent Visitation Act) as: (1) the adoptive parent of the child's parent; (2) the parent of the child's adoptive parent; and (3) the parent of the child's parent. The Court opined that, following the termination hearing, Mother was no longer the child's "parent" and Grandmother lost her status as the parent of the child's parent. Id. The Court distinguished In Re Groleau, 585 N.E.2d 726 (Ind. Ct. App. 1992), because, in the Groleau case, Grandmother had already been granted visitation rights when the termination of Father's rights occurred. G.R. at 326. The Court further agreed with the trial court's conclusion that Step-grandfather lacked standing to pursue visitation rights to the child, but disagreed with the court's reasoning where it failed to distinguish the Step-grandfather as a step-grandparent, rather than as a biological or adoptive grandparent. Id. at 327. The Court noted that a Step-grandparent does not fall within the definitions of "maternal or paternal grandparent" as set forth in IC 31-0-2-77 and declined to expand the plain meaning of the

statute to include step-grandparents. Id. The Court also found no abuse of discretion in the trial court's denial of the motion to intervene and the motion to review juvenile files because of lack of standing. Id.

In **In Re Adoption of Z.D.**, 878 N.E.2d 495 (Ind. Ct. App. 2007), the child had been adjudicated a Child in Need of Services in Tippecanoe County and had been placed in foster care in Tippecanoe County. Paternal Grandmother (Grandmother) filed a petition to intervene in the CHINS case and in the subsequent termination of parental rights proceedings. After parental rights were terminated, Grandmother, a Benton County resident, filed a petition to adopt the child in Benton County, and notice of the petition was served on the Tippecanoe County Department of Family and Children (TCDFC). The foster parent filed a petition to adopt the child in Tippecanoe Circuit Court, but Grandmother did not receive notice of the petition. The foster parent's petition for adoption was granted by the Tippecanoe Circuit Court; therefore, Grandmother's petition for adoption in Benton County was dismissed. Grandmother then filed a motion to correct error and a motion to intervene in the foster parent's adoption proceeding in Tippecanoe Circuit Court, which were denied. The Court affirmed the foster parent's adoption, holding, inter alia, that: (1) neither the Tippecanoe Circuit Court nor the TCDFC was required to provide Grandmother with notice of the foster parent's adoption petition; (2) because Father's parental rights had been terminated, any of Grandmother's derivative due process rights with respect to visitation, custody, or adoption were effectively extinguished by the time Paternal Grandmother filed her adoption petition; (3) after the termination of Father's rights, Grandmother had neither standing to petition to adopt in Benton County, nor to intervene in the Tippecanoe Circuit Court adoption. Id. at 498. The Court opined that TCDFC was acting in the child's best interests when it refused to consent to Grandmother's adoption because Father was a convicted child molester, yet Grandmother indicated that she would allow Father to maintain contact with the child. Id. at 498-99.

I. H. Foster Parents

IC 31-9-2-47 defines "foster parent" as "an individual who provides care and supervision to a child in a foster family home (as defined in IC 31-9-2-46.9)." "Long term foster parent", defined at IC 31-34-21-4.6, means a foster parent who has provided care and supervision for a child for at least twelve of the most recent months; or fifteen of the most recent twenty-two months. The statutes regarding licensing of foster homes are found at IC 31-27-4.

IC 31-34-21-4(a)(4) includes the child's foster parent or long term foster parent among the persons to whom DCS must provide notice at least seven days before "the periodic case review, including a case review that is a permanency hearing under section 7." In accordance with IC 31-34-21-4(d), foster parents are to be afforded "an opportunity to be heard and to make any recommendations to the court" in a periodic case review hearing or a permanency hearing.

I. H. 1. Role of Foster Parents

In **Worrell v. Elkhart Cty. Office of Family**, 704 N.E.2d 1027 (Ind. 1998), the Indiana Supreme Court discussed the role of the foster parent:

> Unlike parent and step-parent relationships, foster relationships are designed to be temporary, providing a 'safe, nurturing environment' until the child can either be returned to the natural parents or adopted by new ones. Indiana Foster Family Handbook 46 (1995). Furthermore, the foster relationship is contractual; the parents are reimbursed by the State for their care of the children. See id. at 101-05. Finally, as

> Judge Garrard noted in his dissent, the foster relationship may be one in a series of temporary arrangements.

Worrell at 1029.

In **Stewart v. Randolph County OFC**, 804 N.E.2d 1207 (Ind. Ct. App. 2004), *trans. denied*, a termination case, Mother argued, inter alia, that her due process rights were violated regarding case plans because the children's foster parent was not involved in the development of the case plans as required by IC 31-34-15-5. The Court found that Mother did not demonstrate how she was harmed by the lack of foster parent involvement in the development of the case plans since the evidence showed that the foster parent was "actively involved in fulfilling the terms of the case plans with respect to the children's needs." Id. at 1211 n.2.

I. H. 2. Rights of Foster Parents

Indiana law does not grant foster parents party status in the CHINS and termination proceedings. Foster parents may seek to intervene as a party under Ind. Trial Rule 24. See **In Re E.I.**, 653 N.E.2d 503, 507-508 (Ind. Ct. App. 1995) (Court said in dicta it would be an "illogical" result to preclude "joinder of such parties as guardians, custodians, foster parents, or other relatives of the child.") Foster parents and former foster parents can also petition to request intervention as a party at the periodic case review or permanency hearings pursuant to IC 31-34-21-4.5. The petition may be granted if the court determines intervention is in the best interests of the child. See **Matter of Ale.P.**, 80 N.E.3d 279 (Ind. Ct. App. 2017) (juvenile court granted former Foster Parents' motion to intervene and heard testimony on their motion for return of foster children; Court affirmed juvenile court's denial of Foster Parents' motion, holding: (1) Foster Parents were not denied due process; and (2) returning children to Foster Parents' home was not in children's best interests).

IC 31-34-15-5 [case plan statute] and IC 31-34-22-1(b) [dispositional modification statute] require that DCS consult with foster parents in preparation for the case plan and review hearings. IC 31-34-21-4(a)(4) requires that DCS give seven days notice of review and permanency hearings to foster parents. IC 31-34-21-4(d) affords foster parents the right to be heard and to make recommendations at those hearings, which includes: (1) the right to submit a written statement to the court that, if served upon all parties to the child in need of services proceeding (and other specified persons), may be made a part of the court record; and (2) the right to present oral testimony to the court and to cross-examine any witnesses. IC 31-35-2-6.5(d) creates similar rights for foster parents in termination hearings. IC 31-35-2-6.5(g) clarifies that the notice and opportunity to be heard does not make the foster parents a party to the termination proceeding. IC 31-35-2-6.5(f) requires that the court continue the hearing if DCS has not provided the court with a signed verification from the foster parent that the foster parent has been notified of the hearing at least five business days before the hearing. The court is not required to continue the hearing if the foster parent appears for the hearing.

IC 31-34-22-2(a) includes a foster parent in the list of persons to whom the reports for periodic case review hearings and permanency hearings shall be made available. IC 31-34-22-2(b) and (c) provide that a factual summary of the report may be provided to the foster parent if the court determines on the record that the report contains information that should not be released to the foster parent. IC 31-34-22-3(c) allows any person who is entitled to receive a report under IC 31-34-22-2 (which includes a foster parent) to be given a fair opportunity to controvert any part of a report admitted into evidence.

IC 31-28-1-2 states that the local DCS office of the county in which a foster child resides shall maintain a health summary record for the foster child. IC 31-28-1-3 states the provider

of ongoing care to the child shall complete the record. IC 31-28-1-4 states DCS shall obtain the record from the provider when the child: (1) is placed in foster care; and (2) is returned to the natural parents, adopted, or placed in another permanent plan. IC 31-28-2-2 states that, if medical care is provided to a foster child, the person who has custody of the child shall inform the provider of: (1) the form under IC 31-28-3; and (2) that the provider is required to file a copy of the child's medical treatment records with the DCS local office. IC 31-28-2-4 states DCS shall provide a copy of the child's medical treatment records which are filed pursuant to IC 31-28-2 to the foster parent. IC 31-28-3 establishes the medical passport program for children who receive foster care. Under the medical passport program, DCS shall (1) maintain a record of medical care provided to the child; (2) facilitate a provider in giving appropriate care to a foster child; (3) allow foster parents to authorize routine and emergency medical care to a foster child; and provide forms for a medical provider to submit to the local DCS office. IC 31-28-3-2.

In **In Re Infant Girl W.**, 845 N.E.2d 229 (Ind. Ct. App. 2006), *trans. denied sub nom.* In Re Adoption of M.W., 851 N.E.2d 961 (Ind. 2006) (Dickson, J., dissenting), the child, a ward of Morgan County OFC, was adopted by same sex foster parents in Marion Probate Court despite Morgan County OFC's refusal to consent to the adoption. The adoptive parents' motion to intervene in the CHINS case in Morgan Juvenile Court was granted. The adoptive parents filed a motion to dismiss the CHINS case, arguing that: (1) the child had been adopted; (2) the child was no longer a CHINS; and (3) no new or amended CHINS petition had been filed naming the adoptive parents as parties or alleging that the child was endangered in their care. The Morgan Juvenile Court denied the motion to dismiss, and, after a hearing, ordered that: (1) the child should remain a CHINS under the placement and care of OFC; (2) the child should be placed with a pre-adoptive family; and (3) the child's Birth Mother should provide the court with information of relatives willing to care for the child. The Morgan Juvenile Court did not recognize the authority of Marion Probate Court to act on the case. The Court opined that Morgan Juvenile Court erred in treating the Marion Probate Court's adoption decree as void, erred in refusing to dismiss the CHINS petition, and found that Morgan Juvenile Court's unqualified statutory obligation to discharge its CHINS jurisdiction was not tolled by possible or actual appeals of an adoption decree that remained in force. Id. at 246.

I. H. 2. a. No Standing to Seek Visitation With Prior Foster Child

In **Worrell v. Elkhart Cty. Office of Family**, 704 N.E.2d 1027, 1029 (Ind. 1998), the Indiana Supreme Court ruled that foster parents do not have standing to request visitation with former foster children.

I. H. 2. b. Rights of Foster Parent in Adoption

See the following cases in which court orders granting adoptions by foster parents were affirmed: **In Re Adoption of M.H.**, 15 N.E.3d 612, 628 (Ind. Ct. App. 2014) (Court could not conclude that order granting foster parents' adoption petition and denying relatives' petition for adoption was clearly erroneous); **In Re Adoption of J.M.**, 10 N.E.3d 16, 22 (Ind. Ct. App. 2014) (foster parents proved that birth parents' consent to adoption of child (who was adjudicated a CHINS) by foster parents was unnecessary due to birth parents' unfitness); **In Re Adoption of A.S.**, 912 N.E.2d 840, 850 (Ind. Ct. App. 2009) (adoption of siblings by second foster mother and her adult daughter was in children's best interests; DCS and parents had consented to adoption); **In Re Adoption of L.M.R.**, 884 N.E.2d 931, 938 (Ind. Ct. App. 2008) (foster parent's adoption was in child's best interests; trial court properly determined that DCS failed to act in child's best interest by refusing to consent to foster parent's adoption); **In Re Adoption of H.N.P.G.**,

878 N.E.2d 900, 907 (Ind. Ct. App. 2008) (foster parents proved that Father was an unfit parent and adoption was in child's best interests; DCS recommended that foster parents' adoption be granted), *trans. denied*; **In Re Adoption of J.D.B.**, 867 N.E.2d 252, 257-58 (Ind. Ct. App. 2007) (foster parents proved that Father's consent to adoption was not needed because child was born out of wedlock and conceived as a result of sexual misconduct with a minor; DCS consented to foster parents' adoption), *trans. denied.* See also **In Re Adoption of S.A.**, 918 N.E.2d 736 (Ind. Ct. App. 2009), *trans. denied*, in which DCS had consented to the child's adoption by foster parents, but the trial court denied foster parents' petition and granted the adoption petition of Adoptive Mother, who had previously adopted birth mother's teenaged children. The Court held that Adoptive Mother did not need DCS's consent for her petition for adoption to be granted because DCS failed to consent for reasons that were not in the child's best interests. Id. at 743.

But see the following cases in which trial court orders granting adoption by foster parents were reversed: **In Re Adoption of J.S.S.**, 61 N.E.3d 394, 399 (Ind. Ct. App. 2016) (Court found trial court did not err in determining that Foster Parents failed to meet their burden of proof to obviate necessity of Father's consent to adoption because Father was denied visitation by CHINS court and paid child support regularly); **In Re Adoption of C.B.M.**, 992 N.E.2d 687, 695 (Ind. 2013) (Court vacated adoption because it was based upon termination of Mother's parental rights and termination judgment was reversed after adoption); **In Re Adoption of N.W.R.**, 971 N.E.2d 110, 116 (Ind. Ct. App. 2012) (trial court should have granted DCS's motion to withdraw its consent to foster parents' adoption because DCS failed to perform its statutory duty to investigate placement alternatives); **In Re Adoption of H.L.W., Jr.**, 931 N.E.3d 400, 410 (Ind. Ct. App. 2010) (trial court erred when it determined that DCS's withholding of consent to adoption by foster parents was not in child's best interests).

In **In Re Infant Girl W.**, 845 N.E.2d 229 (Ind. Ct. App. 2006), *trans. denied sub nom.* In Re Adoption of M.W., 851 N.E.2d 961 (Ind. 2006) (Dickson, J., dissenting), a CHINS proceeding and the voluntary termination petition of Birth Mother's parental rights were pending in Morgan Juvenile Court when the foster parents, a same sex couple, filed a joint petition for adoption in the Marion Superior Court, Probate Division (Marion Probate Court). The child's Birth Mother consented to the adoption in writing and the unknown father was deemed to have irrevocably consented to the adoption as a matter of law because of his failure to register as a putative father. Morgan County OFC refused to consent to the foster parents' adoption. The Court noted that, because OFC was the child's guardian, its consent would normally have been required, but the Marion Probate Court concluded, pursuant to IC 31-19-9-8(a)(10), that the reasons for OFC's refusal to consent were not in the child's best interests. Id. at 244. Morgan County OFC's consent was therefore not necessary, and the Court found that Marion Probate Court properly granted the foster parents' joint petition for adoption. Id. at 244-45.

I. I. Manner of Notice

IC 31-32-1-4 addresses the notice of hearings in CHINS proceedings. IC 31-32-1-4(a) states that any written notice of a hearing shall be given to a party (parent, guardian, custodian, guardian ad litem or court appointed special advocate) in the manner provided by Ind. Trial Rule 5. Notice to non-party individuals (foster parent, other caretaker, prospective adoptive parent in specified situations) may be given by either personal delivery or by mail as provided by Ind. Trial Rule 5(B)(2). T.R. 5(B) states that service on a party shall be made upon the party's attorney unless service upon the party himself is ordered by the court. Service upon the party or attorney shall be made via hand delivery; leaving the document at the attorney's office or at a person's dwelling

house with some person of suitable age and discretion residing therein; by facsimile or e-mail if the party or attorney has consented to service via facsimile or e-mail, leaving it at some other suitable place, selected by the attorney upon whom service is being made, pursuant to duly promulgated local rule; or per T.R. 5(B)(2), via United States mail. The document should also contain a certificate of service and be filed with the court. T.R. 5(B)(2) provides that proof of service by mail may be made by written acknowledgement of service, by affidavit of the person who mailed the papers, or by certificate of an attorney.

DCS is responsible for giving notice with one exception. IC 31-32-1-4(d) states that written notice is not required if verbal notice of the date, time, place and purpose of the hearing is given by the court at an earlier hearing at which the individual to be notified is present. IC 31-32-1-4(e) states that written notice is also not required in the following circumstances: (1) the hearing is scheduled to be held within forty-eight hours (excluding Saturdays, Sundays, and legal holidays for state employees); (2) the individual responsible for giving notice provides verbal notice of the date, time, place, and purpose of the hearing directly to the person required to be notified; and (3) the individual responsible for giving notice verifies by affidavit or testimony at the hearing that verbal notice was given.

Practice Note: Practitioners should be certain that court orders which are generated at court hearings accurately list the names of all persons, including alleged fathers, foster parents, and relative caretakers, in attendance at the hearing to clarify who received verbal notice by the court of the next hearing date, time, place, and purpose. If the court order is unclear concerning who attended, it will be necessary for DCS to send written notice to the persons who are not listed in the order as being present.

I. J. Right to Interpreter

In **Tesfamariam v. Wolenhaimanot,** 956 N.E.2d 118 (Ind. Ct. App. 2011), the Court addressed the question of whether a trial court in a civil case must administer an oath to an interpreter and establish an interpreter's qualifications. The trial court provided an interpreter in a child custody dissolution case, using the services of Language Line, a telephone interpretation service approved and funded by the Indiana Supreme Court. The trial court failed to establish that Mother's interpreter was qualified and failed to administer an oath to her interpreter to provide an accurate translation. The Court said that the issue in this case was whether the trial court effectively denied Mother an interpreter by failing to establish that her interpreter was qualified. Id. at 121. The Court quoted Ind. Evidence Rule 604, which states that "[a]n interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation." Tesfamariam at 121. The Court cited Cruz Angeles v. State, 751 N.E.2d 790, 795 (Ind. Ct. App. 2001), *trans. denied*, in which questions were listed for the trial court to qualify an interpreter. Tesfamarium at 122. The Court concluded that establishing an interpreter's qualifications and administering an oath to an interpreter to provide an accurate translation are necessary to protect a party's Due Process rights. Id. at 122. The Court opined that, because the Due Process rights in the child custody case were substantial, it was appropriate to require the same procedural safeguards here as in criminal cases. Id. The Court concluded that the trial court abused its discretion when it failed to administer an oath to Mother's interpreter and failed to establish that the interpreter was qualified, but this error was not a fundamental error. Id. at 123. The Court concluded that Mother had waived her objections by failing to raise them at trial. Id.

In **Arrieta v. State**, 878 N.E.2d 1238 (Ind. 2008), the Indiana Supreme Court held:

> We distinguish defense interpreters, who simultaneously translate English proceedings for non-English-speaking defendants, from proceedings interpreters, who translate non-English testimony for the whole court. We conclude that courts should regularly provide proceedings interpreters at public expense when they are needed, regardless of a defendant's indigency even when the defendant speaks English, as they are part of the basic apparatus of a court's operation. By contrast, we see little reason why the public should finance defense interpreters for defendants who possess financial means.

Id. at 1239. The Court also noted that the Indiana Code does not have a statute addressing interpreter fees in criminal proceedings, but it does address interpreter fees in civil proceedings at IC 34-45-1-4 (court has discretion to set fees and determine person responsible for cost when court appoints interpreter). Id. at 1244 n.9.

In **Gado v. State**, 882 N.E.2d 827 (Ind. Ct. App. 2008), *trans. denied*, the Court held that the trial court had not abused its discretion in concluding that the defendant did not require a Djerma interpreter and proceeding to trial after affording the defendant the services of a certified French interpreter. Id. at 831. The Court noted that (1) the State had presented considerable evidence that the defendant was less than candid regarding his alleged inability to speak and understand English and possibly French, the official language of the defendant's native country, Niger; and (2) the trial court had essentially found that the defendant intentionally was attempting to frustrate his prosecution by faking inability to communicate in any language other that Djerma, a rare language for which it is very difficult to find interpreters. Id.

In **Nur v. State**, 869 N.E.2d 472 (Ind. Ct. App. 2007), *trans. denied*, the Court affirmed the trial court's denial of the defendant's motion for a new trial, finding that the trial court was not put on notice that the defendant had a significant language difficulty, or that any misunderstandings were due to his comprehension of English, as opposed to an underlying mental defect Id. at 481. The Court set forth guidelines as to how trial courts should undertake to decide whether to appoint defense interpreters, interpreters who simultaneously translate English-speaking proceedings for non-English speaking defendants. Id. at 479. The Court opined that a trial court's decision on whether to appoint an interpreter is reviewed for abuse of discretion. Id. at 480.

See also **In Re A.P.**, 882 N.E.2d 799, 803 (Ind. Ct. App. 2008) (initial CHINS hearing was continued to arrange for Spanish interpreter for Father, and when Father did not appear at next scheduled hearing date, trial court again continued hearing without additional action because of possible language barriers to Father's understanding of the proceeding).

II. PROCEDURAL DUE PROCESS RIGHTS OF CHILDREN

II. A. Party Status

IC 31-34-9-7 provides that the child is a legal party to "the proceedings described in the juvenile law and have all rights of parties under the Indiana Rules of Trial Procedure."

II. B. Presence at Hearings

IC 31-32-2-1 implies the right of the child to be present at CHINS hearings by granting the child specific rights to be used in CHINS hearings. IC 31-34-10-2(b) requires that the child be summoned to the initial hearing. But see IC 31-32-6-8, which provides that the child may be excluded from any part of any hearing "for good cause shown upon the record." As a matter of good practice, the court should not conduct a CHINS hearing in the absence of the child unless the court has made a ruling on the record regarding why the child has been excluded.

IC 31-34-21-7(c) requires DCS to give notice of the permanency hearing to a child who is at least sixteen years of age when the proposed permanency plan provides for another planned permanent living arrangement. The court shall provide the child an opportunity to be heard and to make recommendations to the court in accordance with IC 31-34-21-4(d). IC 31-34-21-4(d) includes within the right to be heard and to make recommendations: (1) the right to submit a written statement that, if served on all parties and persons with a right to notice, may be made a part of the court record; and (2) the right to present oral testimony and cross-examine any witnesses at the permanency hearing.

II. C. Counsel

The child does not have the right to court appointed counsel. The court has the discretion to appoint counsel for the child in any juvenile court proceeding. See IC 31-32-4-2(b). The child or the child's guardian ad litem or court appointed special advocate would be appropriate parties to request the appointment of counsel for the child.

Practice Note: Since IC 31-34-10-7 states that the court shall determine whether the child admits or denies the allegations that the child is a CHINS under IC 31-34-1-3.5 [victim of human or sexual trafficking] or IC 31-34-1-6 [child substantially endangers own health or the health of another person], it is recommended that counsel be appointed for the child in these situations.

II. D. Guardian ad Litem/Court Appointed Special Advocate Appointment

IC 31-34-10-3(1) and (2) require the appointment of a guardian ad litem or court appointed special advocate for the child in all CHINS categories at the initial hearing. The court appointed special advocate and the guardian ad litem are included in the list of persons at IC 31-34-10-2(b) who shall be issued a summons for the CHINS proceeding. IC 31-35-2-7(a) requires the appointment of a guardian ad litem or court appointed special advocate for the child if the parent objects to the involuntary termination of the parent-child relationship. IC 31-35-2-7(b) provides that the court may reappoint the guardian ad litem or court appointed special advocate who served the child in the CHINS case to represent and protect the child's best interests in the termination case.

II. E. Case Plan, Notice of Hearings and Rights at Hearings

IC 31-34-15-1 states that a case plan is required for each child in need of services who is under DCS supervision as a result of an out-of-home placement or the issuance of a dispositional decree. The contents of the case plan are set out at IC 31-34-15-4. IC 31-34-15-4 provides that the case plan must include a description and discussion of a permanent plan, or two permanent plans, if concurrent planning, for the child and an estimated date for achieving the goal of the plan or plans. IC 31-9-2-22.5(b) states that "concurrent planning" requires the identification of two permanency plan goals and simultaneous reasonable efforts toward both goals with the knowledge of all participants.

IC 31-34-15-7(a) requires DCS to consult with any child age fourteen or older in developing the child's case plan or transitional services plan. If DCS is unable to consult with the child because the child cannot participate effectively in plan development due to physical, mental, emotional, or intellectual disability, DCS must document the reasons for the child's inability to participate. If the child refuses to participate in plan development, DCS must record the child's refusal and document efforts made to obtain the child's input or participation. IC 31-34-15-7(b) permits the child to select up to two representatives who are at least eighteen years old, members of the case planning team, and not foster parents or caseworkers for the child to represent the child in the development of the case plan or the transitional services plan. IC 31-34-15-7(c) permits the child

to designate one of the child representatives who is a member of the case planning team to serve as the child's adviser and, as necessary, advocate for the child "with respect to the application of the reasonable and prudent parent standard to the child." The "reasonable and prudent parent standard", defined at IC 31-9-2-101.5, means the "standard characterized by careful and sensible parental decisions that maintain the health, safety, and best interests of a child." IC 31-34-15-7(d) provides DCS may reject the child's choice of an individual selected to be a member of the case planning team at any time if DCS has good cause to believe that the individual would not act in the child's best interests.

Notice of the time, place, and purpose of the CHINS detention hearing shall be given to the child. IC 31-34-5-1. The child may petition the court for an additional detention hearing. IC 31-34-5-5. The child shall be notified of motions that seek to regulate the child's conduct, provide for physical examination or treatment of the child under IC 31-32-12, or prevent the child from leaving the court's jurisdiction. See IC 31-32-13-1 and 3. IC 31-32-13-2 states that a hearing shall be set on such motions or the court may consider the matter at any hearing or proceeding authorized under juvenile law. An order can be issued on an emergency basis effective for a seventy-two hour period without prior notice to the child or a hearing. See IC 31-32-13-7 through 9.

The child shall be summoned to the initial hearing and provided a copy of the CHINS petition. IC 31-34-10-2(b) and (c). The case review hearing statute, IC 31-34-21-4(e), requires that DCS send notice of the review and permanency hearings to all parties seven days before the hearing, which would include notice to the child. IC 31-34-23-1 states that the child is entitled to seek modification of dispositional orders. The court may issue a temporary order for an emergency change in the child's residence, but the "persons affected", which would include the child, must then be given notice by DCS, and the court shall hold a hearing if requested. See IC 31-34-23-3(a). DCS shall give notice of other proposed modifications of the dispositional order which will affect the child, and the court shall hold a hearing. IC 31-34-23-3(b).

The child has the opportunity to be heard and to make recommendations at the following hearings: (1) IC 31-34-5-1(b) [detention hearing]; (2) IC 31-34-10-2(h) [initial hearing]; (3) IC 31-34-19-1.3(b) [dispositional hearing]. Since IC 31-34-23-4 [dispositional modification statute] states that IC 31-34-18 and IC 31-34-19 apply to the modification and use of a modification report, a reasonable legal interpretation is that a child also has the opportunity to be heard and to make recommendations at a dispositional modification hearing.

IC 31-34-21-7(b)(4), the permanency hearing statute, requires the court to consult with the child, "in an age appropriate manner as determined by the court" regarding the proposed permanency plan. The statute states that the court shall consult with the child in person, or through an interview with or written statement or report submitted by: (1) the guardian ad litem or court appointed special advocate; (2) a case manager; or (3) the person with whom the child is living and who has primary responsibility for the care and supervision of the child. If the child is at least sixteen years old and the proposed permanency plan provides for another planned, permanent living arrangement, IC 31-34-21-7(c) requires that the child shall receive notice of the permanency hearing. IC 31-34-21-7(c) also states the court shall do the following at each permanency hearing for a child who is at least sixteen years old and whose permanency plan is another planned, permanent living arrangement: (1) provide the child an opportunity to be heard and to make recommendations; (2) require DCS to document or provide testimony about the intensive, ongoing, and unsuccessful efforts made by DCS to return the child home or to secure placement with a fit and willing relative, legal guardian, or adoptive parent, including using search technology, such as social media, to find biological or adoptive family members for the

child; (3) ask the child about the desired permanency outcome and document the child's response; (4) make a determination explaining why another planned permanent living arrangement is the best permanency plan and provide compelling reasons why it continues not to be in the child's best interests to return home, or be placed for adoption, with a legal guardian, or with a fit and willing relative; and (5) require DCS to document or provide testimony on the steps DCS is taking to ensure that (a) the child's placement is following the "reasonable and prudent parent standard" and (b) the child has regular, ongoing opportunities to engage in age or developmentally appropriate activities, including consulting with the child about the opportunities to participate in activities.

The transitional services plan, discussed at IC 31-25-2-21, is prepared for children who are becoming or have become eighteen years old while receiving foster care and for young adults who are age eighteen or nineteen and receiving collaborative care services. IC 31-25-2-21(e) provides that DCS shall include as part of the transitional services plan the enrollment of the young adult in the Medicaid program.

II. F. Advisement of Rights

The initial hearing statute, IC 31-34-10-4, provides that the court shall advise the child of the nature of the CHINS allegations and of the dispositional alternatives "if" the child is of an age of understanding. IC 31-34-19-9 requires the court to advise the child at the dispositional hearing of the modification procedures stated at IC 31-34-23. These advisements are subject to the presence of the child at the CHINS hearing; however, the child can be excluded for good cause pursuant to IC 31-32-6-8. The juvenile code does not require that the court advise the child of the right to subpoena, cross-examine, and introduce evidence in CHINS proceedings if the child is excluded from the CHINS hearings.

II. G. Subpoena, Cross-Examine, and Introduce Evidence

IC 31-32-2-1 states, in pertinent part:

(a) Except when the child may be excluded from a hearing under IC 31-32-6, the child is entitled to:

(1) cross-examine witnesses;
(2) obtain witnesses or tangible evidence by compulsory process; and
(3) introduce evidence on the child's own behalf.

The child's attorney and/or the child's guardian ad litem/court appointed special advocate may assume these rights when the child is excluded from a hearing.

II. H. Access to Reports

IC 31-34-18-6 states that the child and the child's attorney, guardian ad litem, or court appointed special advocate are entitled to a copy of the predispositional report within a reasonable time before the dispositional hearing. IC 31-34-22-2 states that a report prepared by the state for a dispositional or periodic case review hearing shall be made available to the child and to the child's guardian ad litem/court appointed special advocate within a reasonable time after the report's presentation to the court or before the hearing. If the court determines on the record that the dispositional or case review report contains information that should not be released to the child, and denies access of the report to the child, the court may provide the child a factual summary of the report. IC 31-34-18-6(c); IC 31-34-22-2(c). IC 31-34-19-2(c) [predispositional report] and IC 31-34-22-3(c) [periodic case review report] give the child a fair opportunity to controvert any part of a periodic case review report admitted into evidence. The

child's attorney, guardian ad litem, or court appointed special advocate could assist the child with using this opportunity.

II. I. Access to Records

IC 31-39-2-3 [juvenile court records] and IC 31-39-4-4 [law enforcement records] are available to the child except for records relating to hearings from which the child was excluded under IC 31-32-6 and records of the predispositional, review or other reports to which the child was denied access under IC 31-34-18-6 or IC 31-34-22-2. IC 31-33-15-2 provides that the child's guardian ad litem and court appointed special advocate shall have access under IC 31-39 (which includes court and law enforcement records) to all reports relevant to the case and "any reports or examinations of the child's parents or other person responsible for the child's welfare." The guardian ad litem and court appointed special advocate also have access to court records under IC 31-39-2-3(a) and to law enforcement records under IC 31-39-4-4(a) by virtue of their party status in the CHINS proceeding pursuant to IC 31-34-9-7(4). IC 31-33-18-2(7) gives the child's guardian ad litem and court appointed special advocate access to DCS records.

II. J. Waiver of Child's Right to Guardian ad Litem

In **Matter of S.L.,** 599 N.E.2d 227 (Ind. Ct. App. 1992), a termination case, the Court ruled that Mother could not waive the statutory right to the appointment of a guardian ad litem, because the right belonged to the children. The Court noted that a right guaranteed to a child under the juvenile code can only be waived in compliance with IC 31-6-7-3 (recodified at IC 31-32-5 et. seq.). Id. at 229 n.2. Given the inability of the children to assert the right to appointment of a guardian ad litem/court appointed special advocate and the court's failure to appoint a guardian ad litem/court appointed special advocate, Mother had standing to raise the issue on appeal. Id. at 229. The Court stated that Mother's "fundamental right to a parent-child relationship was impacted by the lack of an independent representation of the children's interest." Id. The Court could not find the trial court's failure to appoint a guardian ad litem was harmless error. Id. at 230. The Court reversed and remanded for action consistent with its opinion. Id.

III. SUBSTANTIVE DUE PROCESS RIGHTS OF CHILDREN

III. A. Right to State Intervention, Protection, and Services

The substantive due process right of the child to a certain standard of safety and parental care has not traditionally been well defined in the law, although the fundamental right of the parent to the care and control of the child is often and clearly articulated in the law. See this Chapter at V. on substantive due process rights of parents. There is a difficult balance between the right of the parents to raise the child as they choose, and the interest of the child in a safe, stable, and nurturing environment. In **J.W. v. Hendricks County Office**, 697 N.E.2d 480 (Ind. Ct. App. 1998), the Court stated:

> A parent has a fundamental right to direct the upbringing of his or her child; however, this right is balanced against the parent's corresponding duty to protect the child and to do whatever may be necessary for the child's care, maintenance, and preservation. It is only where the parents are unable to fulfill their duty that the state has the authority, pursuant to its parens patriae power, to intervene. [citations omitted]

Id. at 482-483.

Case law has clarified the State's "compelling interest in protecting the welfare of the child by intervening in the parent-child relationship when parental neglect, abuse or abandonment are at issue." **E.P. v. Marion Cty. Office of Fam. & Child.,** 653 N.E.2d 1026, 1032 (Ind. Ct. App. 1995); **J.T. v. Marion County OFC**, 740 N.E.2d 1261, 1264 (Ind. Ct. App. 2000). The Court has

noted that although parental rights are of a constitutional dimension, the trial court must subordinate the interests of the parents to the child in termination proceedings. **In Re A.G.**, 45 N.E.3d 471, 479 (Ind. Ct. App. 2015); **In Re E.E.**, 736 N.E.2d 791, 794 (Ind. Ct. App. 2000).

See the following CHINS and termination cases which discuss a child's right to safety and the need for state intervention: **K.B. v. Indiana Dept. of Child Services**, 24 N.E.3d 997, 1004 (Ind. Ct. App. 2015) (in CHINS case, Court concluded trial court's decision that children's physical or mental health was seriously endangered due to their exposure to domestic violence was not erroneous; CHINS statute does not require trial court and DCS to wait until child is physically or emotionally harmed to intervene); **In Re Des.B.**, 2 N.E.3d 828, 838 (Ind. Ct. App. 2014) (a trial court is not required to wait until a tragedy occurs to intervene); **In Re A.H.**, 992 N.E.2d 960, 967 (Ind. Ct. App. 2013) (parents' fundamental right to raise their children without undue interference by the state, and the state's interest in protecting welfare of children are both substantial), *trans denied*; **In Re G.W.**, 977 N.E.2d 381, 385 (Ind. Ct. App. 2012) (when parents neglect, abuse, or abandon their children, state has authority under its parens patriae power to intervene), *trans. denied*; **In Re R.P.**, 949 N.E.2d 395, 401 (Ind. Ct. App. 2011) (CHINS statutes do not require that trial court wait until a tragedy occurs to intervene; instead a child is a CHINS when he or she is endangered by parental action or inaction); **Castro v. Office of Family and Children**, 842 N.E.2d 367, 375 (Ind. Ct. App. 2006) (government had a strong interest in removing child from unsuitable home), *trans. denied*; **In Re A.H.**, 751 N.E.2d 690, 699 (Ind. Ct. App. 2001) (the rights of a parent are not greater than the rights of a child whose growth and development have already been threatened by abuse); **M.H.C. v. Hill**, 750 N.E.2d 872, 875 (Ind. Ct. App. 2001) (because the ultimate purpose of the law is to protect the child, the parent-child relationship must give way when it is no longer in the child's best interests to maintain relationship). See also **In Re W.B.**, 772 N.E.2d 522 (Ind. Ct. App. 2002), a termination case where the twin children were removed at birth due to Parents' history of neglect with respect to older siblings, who had previously been adjudicated CHINS. The Court stated that the balancing of past conduct in light of present behavior was even more crucial where the children at issue had never resided with the parents. Id. at 530.

In **In Re K.S.**, 750 N.E.2d 832 (Ind. Ct. App. 2001), the Court affirmed the trial court's termination order which was entered "due to the abjectly filthy conditions" in which Mother repeatedly chose to raise her children. Id. at 839. The Court concluded that Mother "was clearly entitled to a second chance in 1993, but not a fourth chance in 2000." Id. The Court quoted the trial court's findings:

> The children have immediate needs for permanency and stability which their parents continue to be unable to provide for them, and which has been and will continue to be provided in an adoptive placement. It is in their best interests to grow up in a clean, safe, secure, and stable environment, free of piles of junk and garbage, free of stench of excrement, free of maltreated, diseased, flea-infested animals, free of being ushered out of their home, their school and their community, with their names or appearances changed in order to stay one step ahead of the next CPS investigation, free of fathers who could not possibly care less about them or their best interests, free of being bounced back and forth between their mother and foster care placement, free of fear that the next foster care placement may not be a good one or allow sufficient contact with siblings, free of anger, fear and humiliation at being social outcasts, and free of interminable wait for their mother to finally "succeed", and the torturous uncertainty of not knowing what will happen to them tomorrow, next week, next month, next year.

Id. at 838.

III. A. 1. Minimum Standard of Care for Children

The CHINS categories at IC 31-34-1-1 through 11 generally set a minimal level of care for children by establishing basic necessities and protection the parent must provide the child, and behaviors by the parent that are prohibited, i.e. neglect, abuse, sexual abuse, etc. A child has no standing to initiate a CHINS proceeding to ensure his or her protection or care, or to initiate a petition for the termination of the parent child relationship. A guardian ad litem or court appointed special advocate has standing to initiate a termination petition under IC 31-35-2-4(a). The following criminal laws can sanction parents for failure to care for their children: neglect of dependent (IC 35-46-1-4), failure to support (IC 35-46-1-5), violation of compulsory attendance law (IC 20-33-2-28), battery (IC 35-42-2-1), and child sexual abuse (multiple crimes listed in IC 35-42 and 45). Criminal prosecutions for child abuse or neglect do not provide services to the child, although they may result in restraining or no contact orders, or the actual incarceration of the offender. Victim assistance funds are sometimes available through the office of the prosecutor. See IC 5-2-6.8. Neither federal nor state law consistently defines the right of the child to a certain standard of parental care or quality of life. Some Indiana cases discuss the right to at least a minimal level of care and to necessary support. In **Stone v. Daviess Co. Div. Child Serv.**, 656 N.E. 2d 824, 831 the Court stated: "[e]very child is entitled to a minimum level of care regardless of the special needs or limited abilities of its parents. In the final analysis, the rights of the parents under the Fourteenth Amendment and the ADA [Americans with Disabilities Act] must be subordinated to the protected rights of the children." The Court further stated that parental interests are not absolute and must be subordinated to the child's interests in an involuntary termination of the parent-child relationship case. Id. at 828. In **E.P. v. Marion Cty. Office of Fam. & Child.**, 653 N.E.2d 1026, 1032 (Ind. Ct. App. 1995), the Court stated that the parent's constitutionally protected right to raise his or her child is not without limitations and the right must at all times yield to the child's best interest as determined by the courts of this state. In the criminal neglect of dependent case, **Mallory v. State**, 563 N.E.2d 640 (Ind. Ct. App. 1990), the Court addressed the duty of a parent to care for and protect her child:

> A parent is charged with an affirmative duty to care for her child. Smith v. State (1980), Ind. App., 408 N.E.2d 614, 621. ... Mallory [the mother] had a duty not to deprive her dependent daughter of necessary support, and she further had a duty to provide that support when needed.

Mallory at 644.

The following criminal cases discuss situations where parents and custodians failed to provide proper parental care: **Pierson v. State**, 73 N.E.3d 737, 741 (Ind. Ct. App. 2017) (infant died of malnutrition in care of mildly mentally handicapped Father; Father found guilty but mentally ill on charges of reckless homicide and neglect of a dependent), *trans. denied*; **Carter v. State**, 67 N.E.3d 1041, 1048 (Ind. Ct. App. 2016) (Court affirmed Father's conviction for battery resulting in bodily injury on evidence that Father struck fourteen-year-old daughter at least fourteen times with belt, which caused significant bruising and lasting pain; Father's punishment exceeded reasonable parental discipline), *trans. denied*; **Patel v. State**, 60 N.E.3d 1041, 1062 (Ind. Ct. App. 2016) (Court vacated Mother's Class A felony neglect conviction for baby's death and remanded for trial court to enter Class D felony conviction and sentence Mother accordingly; Court found sufficient evidence that Mother was aware baby was born alive and knowingly endangered baby by failing to provide medical care); **Smith v. State**, 34 N.E.3d 252, 257-58 (Ind. Ct. App. 2015) (Mother's use of two belts to beat her thirteen-year-old daughter ten to twenty times and engaging in physical fight with daughter constituted sufficient evidence of battery not protected by parental privilege);

McConniel v. State, 974 N.E.2d 543, 560-61 (Ind. Ct. App. 2012) (Stepmother failed to seek medical attention for five-year-old stepdaughter despite warnings by family, neighbors, and healthcare workers that child's condition was worsening), *trans. denied*; **Dexter v. State**, 945 N.E.2d 220, 224-25 (Ind. Ct. App. 2011) summarily affirmed on this issue at 959 N.E.2d 235 (Ind. 2011), (child experienced "abusive head trauma" in care of Mother's boyfriend; boyfriend had been warned against throwing child into the air); **Lay v. State**, 933 N.E.2d 38, 42-43 (Ind. Ct. App. 2010) (Father, who was nearby, heard Mother abusing child and took no action); **Brown v. State**, 770 N.E.2d 275, 281 (Ind. 2002) (shocking tale of maternal neglect; overwhelming evidence proved Stepmother knew child desperately needed medical care and that child would still be alive had she received it promptly); **Cooper v. State**, 831 N.E.2d 1247, 1251 (Ind. Ct. App. 2005) (battery case in which Mother's behavior was excessive, unreasonable, and outside bounds of parental discipline), *trans. denied*; **Wright v. State**, 829 N.E.2d 928, 929 (Ind. Ct. App. 2005) (Father avoided seeking medical attention for his children because he believed he did not have insurance; it was obvious and apparent to any reasonable lay person that the twins were in dire need of medical care); **Mitchell v. State**, 813 N.E.2d 422, 428 (Ind. Ct. App. 2004) (Father's battery and disorderly conduct convictions affirmed; Father's out-of-control unreasonable behavior imposed on his four-year-old child did not shield Father from criminal liability), *trans. denied*; **Johnson v. State**, 804 N.E.2d 255, 257 (Ind. Ct. App. 2004) (battery case in which evidence was sufficient to find that Mother's treatment of child was excessive and did not constitute reasonable parental discipline); **Lush v. State**, 783 N.E.2d 1191, 1198 (Ind. Ct. App. 2003) (Indiana Supreme Court has adopted the reasonable parent standard in cases involving neglect of a dependent for failure to timely obtain medical care); **Chinda v. State**, 754 N.E.2d 981, 984 (Ind. Ct. App. 2001) (State demonstrated that Mother's actions of placing newborn in trash dumpster subjected baby to dangerous life-threatening situation in accordance with neglect of dependent statute), *trans. denied*.

III. A. 2. Mandatory Reporting of Abuse or Neglect

An individual who has reason to believe a child is abused or neglected shall immediately make a report to DCS or law enforcement. IC 31-33-5-1 and 4. It is a misdemeanor criminal violation to knowingly fail to report child abuse or neglect. See IC 31-33-22-1; **Smith v. State**, 8 N.E.3d 668 (Ind. 2014); **Fisher v. State**, 548 N.E.2d 1177 (Ind. Ct. App. 1990). See Chapter 4 at I. for detailed information on reporting child abuse or neglect.

IC 31-27-4-35 mandates licensees to report child victims or alleged child perpetrators of sex offenses to DCS. A licensee, defined at IC 31-9-2-76.3, "means a person who holds a valid license under IC 31-27." Licenses are issued for group homes for children, foster parents, child caring institutions, and child placing agencies. IC 31-27-4-35 states that licensees are required to immediately contact DCS if a foster child under the age of sixteen engages in or is the victim of sexual contact (as defined by IC 25-1-9-3.5), or has a delinquency charge or adjudication for a sex offense, an adult criminal charge or conviction for a sex offense, or is the victim of a sex crime under IC 35-42-4. IC 31-27-4-35(c) and (d) state that DCS is required to notify licensees before placing a foster child under the age of sixteen who has engaged in sexual contact or has a delinquency charge or adjudication or an adult charge or conviction for a sex offense. Each licensee with whom the child has been previously placed must also be so notified by DCS.

III. A. 3. Mandatory Assessment, Protective Detention, and Service Delivery

The federal Adoption and Safe Families Act of 1997 clarifies that the health and safety of children is the first priority of child protection service. 42 U.S.C. § 671 (15)(A). This policy is echoed in state law at IC 31-34-21-5.5(a), which provides that "[i]n determining the

extent to which reasonable efforts to reunify or preserve a family are appropriate under this chapter, the child's health and safety are of paramount concern."

In **Matter of Jordan**, 616 N.E.2d 388 (Ind. Ct. App. 1993), the Court found that the Indiana detention statutes "provide an appropriate and adequate balance between the need and right on the part of a child to be protected from harm, and the parent's right to have the custody and care of the child remain in him or her." Id. at 393.

IC 31-33-8-1(a) states that DCS "shall initiate an appropriately thorough child protection assessment" of every report of known or suspected child abuse or neglect. The definition of "assessment" at IC 31-9-2-9.6, means an initial and ongoing investigation or evaluation that includes a review and determination of the safety issues that affect a child, an identification of the underlying causes of the safety issues, a determination of whether child abuse, neglect, or maltreatment occurred, and a determination of the family's needs.

See Chapter 4 at III. for more information concerning statutes on DCS's role in initiating assessments of reports.

III. A. 4. Criminal or Juvenile Court Prosecution

Following its assessment of a report of child abuse or neglect, DCS "may" institute a program of Informal Adjustment (IC 31-34-8) if the child is safe in the home, the family is cooperative, and formal judicial action is not needed. If the DCS assessment indicates that judicial action is in the best interest of the child, IC 31-33-14-1 states that DCS "shall" refer the child abuse or neglect case to the prosecutor if criminal prosecution is desired or to the juvenile court. DCS "shall" assist in either court proceeding as is needed. (IC 31-33-14-2). If the case is referred to the juvenile court, then the DCS attorney or the prosecutor "shall" decide whether to request judicial authorization to file a CHINS petition on the basis of the preliminary inquiry. See IC 31-34-7-3. The DCS attorney or the prosecutor "may" file the request for judicial authorization to file a CHINS petition pursuant to IC 31-34-9-1 if the injury, endangerment, or condition of the child fits within one of the CHINS categories set out at IC 31-34. IC 31-34-9-2 states that the juvenile court "shall" authorize the filing of the CHINS petition if it finds probable cause to believe the child is in need of services and if necessary jurisdictional prerequisites are met. The Court also shall determine if a child should be referred for an assessment by a dual status assessment team as described in IC 31-41-1-5. If the child is adjudicated a CHINS, the juvenile court "shall" enter a dispositional order that is consistent with the welfare of the child. IC 31-34-19-6. See Chapter 5 at IX. for discussion of dual status child.

III. A. 5. Requirement to Exert Reasonable Efforts For Preservation, Reunification or Alternate Permanent Placement

IC 31-25-2-11(c) includes among the general duties of DCS that reasonable efforts must be made to provide family services designed to prevent a child's removal from home. IC 31-34-21-5.5 also mandates DCS to make reasonable efforts to preserve and reunify families. IC 31-34-21-5.6 provides for exceptions to the reasonable efforts requirement. See **Matter of S.G. v. Indiana Dept. of Child Services**, 67 N.E.3d 1138 (Ind. Ct. App. 2017); **In Re R.H.**, 55 N.E.3d 304 (Ind. Ct. App. 2016); **C.T. v. Marion Cty. Dept. of Child Services**, 896 N.E.2d 571(Ind. Ct. App. 2008), *trans. denied*; and **G.B. v. Dearborn Cty. Div. of Fam. & Child.**, 754 N.E.2d 1027 (Ind. Ct. App. 2001), *trans. denied*, for discussion of IC 31-34-21-5.6, which allows the court to order that reasonable efforts to reunify or preserve the child's family are not required. See also Chapter 4 at VI. for further information.

III. A. 6. Mandatory Permanency Planning

IC 31-34-15-2 requires that DCS complete a case plan within sixty days of: (1) the removal of the child from the home or (2) the date of the dispositional decree, whichever occurs first. DCS must complete the case plan after negotiating with the child's parent, guardian, or custodian, the child if the child is at least fourteen years old, and the child's chosen representatives. IC 31-34-15-4(1) requires that the plan must include a permanent plan or two permanent plans, if concurrent planning, for the child and an estimated date for achieving the goal of the plan. IC 31-34-21-7(a) requires that the court shall conduct a permanency hearing and approve a permanency plan for the child no later than twelve months from the date the child was removed from the home, or twelve months after the date of the dispositional decree, whichever occurs first. See **A.P. v. PCOFC**, 734 N.E.2d 1107, 1115 (Ind. Ct. App. 2000), *trans. denied*. IC 31-34-21-7.5(c) recognizes reunification of the child and parent as one permanency option, but it also includes these alternative permanency options: placement with the child's noncustodial parent; placement for adoption; permanent custodianship; legal guardianship; placement in "another planned, permanent living arrangement." IC 31-34-21-7.5(c)(2) and (3) require that the permanency plan include a time schedule for implementing the permanency option and provisions for interim arrangements for the child's care and custody until the permanency option can be implemented.

The permanency hearing statute, IC 31-34-21-7(b)(4), requires the court to consult with the child regarding the proposed permanency plan. IC 31-34-21-7(c)(1) and (2) require notice and an opportunity to be heard for a child who is at least sixteen years old and whose permanency plan is to transition from foster care to another planned permanent living arrangement. Additionally, IC 31-34-21-7(c) requires the court to examine permanency efforts in detail. See this Chapter at II.B. for detailed discussion of the statute.

In **McBride v. County Off. Of Family & Children**, 798 N.E.2d 185 (Ind. Ct. App. 2003), the Court found that Mother's allegation of due process violation because the permanency hearing was held fourteen months, instead of twelve months, after the children's removal was without merit. Id. at 197. In **Carrera v. KCOFC**, 761 N.E.2d 431 (Ind. Ct. App. 2001), the Court found that the judge's approval of termination of parental rights as the permanency plan did not indicate that the judge was biased against Mother's parental abilities to the extent that he would necessarily terminate Mother's rights at a subsequent termination hearing. Id. at 436.

See Chapter 9 at II. and III. for further discussion on permanency.

III. B. Abortion, Drug Exposure, and Severe Disabilities

III. B. 1. Abortion

Abortion statutes are found at IC 16-34. Before the abortion, if the pregnant woman, and her husband, if she is married, have stated in writing that they do not wish to keep the child if the child is born alive, the child shall immediately upon birth become a ward of DCS. IC 16-34-2-3(d). A pregnant minor must have the written consent to her abortion from one of her parents, her legal guardian, or a custodian accompanying her. IC 16-34-2-4(a). The term "parent, legal guardian, or custodian" for purposes of consenting to a minor's abortion does not include the department of correction, a community based correctional facility, or a secure juvenile facility. IC 16-18-2-266.4. The state or a state agency, such as DCS, cannot consent to an abortion for an unemancipated pregnant minor. IC 16-34-1-10. An exception to IC 16-34-1-10 allows the state or a state agency to consent to the abortion if it is necessary to avoid the pregnant minor's death or substantial and irreversible impairment of

a major bodily function, as determined by a physician who certifies this determination in writing.

Unless the juvenile court finds it is in the best interests of the minor to obtain an abortion without parental notification, a parent, legal guardian, or custodian of the unemancipated minor is entitled to receive notice of the minor's intent to obtain an abortion before the abortion is performed. IC 16-34-2-4. If the minor does not wish to be required to obtain the consent of her parent, legal guardian, or custodian to the abortion, or if her parent, guardian, or custodian refuses to consent to the abortion, the minor may petition the juvenile court on her own behalf or by next friend in the county where she resides or the county in which the abortion is to be performed for a waiver of the consent requirement for abortion and a waiver of the parental notification requirement. IC 16-34-2-4(b). The juvenile court shall appoint an attorney to represent the minor in the waiver proceeding and on any appeals. IC 16-34-2-4(f). The juvenile court must rule upon the minor's petition within forty-eight hours after the filing of the petition. IC 16-34-2-4(e). The court must consider the concerns expressed by the minor and her physician, and must waive the parental consent requirement if the court finds that the minor is mature enough to make the abortion decision independently or that an abortion would be in the minor's best interests. IC 16-34-2-4(e). The juvenile court must waive the parental notification requirement if it finds that obtaining an abortion without parental notification is in the best interests of the pregnant minor. IC 16-34-2-4(e). Expedited appeals are permitted and provided for under IC 16-34-2-4(g). See Chapter 3 at II.G.16. for additional information.

See **Matter of P.R.**, 497 N.E.2d 1070 (Ind. 1986) (child was a ward of Marion County Welfare Department but Mother's parental rights had not been terminated; natural Mother was proper person to consent to child's abortion); and **S.H. v. D.H.**, 796 N.E.2d 1243, 1247 (Ind. Ct. App. 2003) (trial court erred when it required both parents, who had joint legal custody per dissolution decree, to give their consent to daughter's abortion; statute requires consent of only one parent).

III. B. 2. Protection of Fetus and Live Child Regarding Mother's Substance Use

Indiana law provides that children who are harmed by a mother's use of alcohol or drugs during her pregnancy may fit within the specialized CHINS categories at IC 31-34-1-10 and 11. See Chapter 1 at VIII. for discussion on children affected by mother's use of alcohol or illegal substances during pregnancy.

Indiana has addressed the issue of parental criminal liability for children who are born drug affected. In **Herron v. State**, 729 N.E.2d 1008 (Ind. Ct. App. 2000), *trans. denied*, the Court ruled that the trial court erred in failing to dismiss the criminal neglect of dependent petition alleging Mother's use of cocaine during her pregnancy. Id. at 1011. The Court determined that an unborn child is not a "dependent" for purposes of the criminal neglect of dependent charge at IC 35-46-1-4. Id. at 1010. To criminalize conduct toward a fetus the legislature would have to specifically state that the forbidden conduct applied to a fetus, as it does in the feticide statute at IC 35-42-1-6, and the intentional killing of a viable fetus at IC 35-42-1-1. Id. at 1011. The Court recognized that civil law allows for recovery for injuries sustained by unborn children, but noted that criminal liability is a substantially different issue. Id. at 1011.

See also **In Re S.M.**, 45 N.E.3d 1252 (Ind. Ct. App. 2015), in which the Court reversed the CHINS adjudication of a child whose meconium tested posted for marijuana at birth. Id. at 1257. The Court found the record devoid of evidence that the child needed any care,

treatment, or rehabilitation that he was not receiving; thus, the second prong of the CHINS statute was not met. Id.

III. B. 3. Right to Deny Treatment to Severely Disabled Newborns

IC 31-34-1-9 deals with the right of a disabled newborn to receive medical and nutritional treatment necessary to sustain life. This statute states:

> A child in need of services under section 1, 2, 3, 4, 5, 6, 7, or 8 of this Chapter includes a child with a disability who:
>
> (1) is deprived of nutrition that is necessary to sustain life; or
>
> (2) is deprived of medical or surgical intervention that is necessary to remedy or ameliorate a life threatening medical condition;
>
> *if the nutrition or medical or surgical intervention is generally provided to similarly situated children with or without disabilities*. (Emphasis added.)

IC 31-34-1-9 exempts certain children with disabilities from state protection as a CHINS. If the medical situation of the child is one that would not generally be treated, regardless of whether the child has a disability, then the denial of life sustaining nutrition, hydration, or medical intervention does not fall within the abuse or neglect CHINS categories. See Chapter 1 at II.G. for further information on severely disabled newborns.

III. C. Indian Child Welfare Act

Indian children, parents, and custodians have special rights in CHINS, voluntary and involuntary termination, and adoption proceedings by federal law. The Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901 et seq., was established as a national policy to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for: (1) the removal of Indian children from their families; (2) the placement of Indian children in foster or adoptive homes which reflect the unique values of Indian culture; and (3) by providing for assistance to Indian tribes in the operation of child and family service programs. 25 U.S.C. § 1902. 25 U.S.C. § 1903 provides applicable definitions. An "Indian child" is defined as any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. (25 U.S.C. § 1903(4)). A "parent" is defined as any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established. (25 U.S.C. § 1903(9)). "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership, or (b) in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts. (25 U.S.C. § 1903(5)). "Foster care placement" means any action removing an Indian child from his or her parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated. (25 U.S.C. § 1903(1)).

ICWA regulations, which became effective on December 12, 2016, are found at the Bureau of Indian Affairs (BIA) website, www.bia.org. 25 CFR § 23.107 states that for new proceedings, the trial court should inquire whether there is "reason to know" the child is an Indian child. 25 CFR § 23.107 lists the following factors which indicate a "reason to know" that the child is an Indian child: (1) anyone, including the child, tells the court the child is an Indian child or there is information indicating the child is an Indian child; (2) the domicile or residence of the child or the Indian parent or Indian custodian is on a reservation or in an Alaska Native Village; (3) the child

is or has been a ward of the tribal court; (4) either parent or the child possesses identification indicating tribal membership. If there is no "reason to now" the child is an Indian child, the ICWA does not apply. 25 CFR § 23.107 states that if there is "reason to know" the child is an Indian child, but there is not sufficient evidence to determine that the child is an Indian child, then the court must confirm on the record that DCS or another party used due diligence to identify and verify whether the child is a member of a tribe or a biological parent is a member of a tribe and the child is eligible for membership. BIA will assist in locating tribes and making inquiries on whether a child is an Indian child.

25 U.S.C. § 1912(a) provides that if there is an involuntary foster care proceeding or termination of parental rights proceeding in a State court (for example DCS files a CHINS petition or a termination of the parent-child relationship proceeding regarding an Indian child), the party seeking foster care placement (DCS) must notify the tribe, by registered mail, with return receipt requested, of the pending proceedings and of the Indian tribe's right of intervention. If the identity or location of the tribe cannot be determined, such notice shall be given to the Secretary of the Interior in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the Indian parent or Indian custodian and the tribe or the Secretary of the Interior. The tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding. 25 U.S.C. § 1911(b) provides that in any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe. Transfer shall be subject to declination by the tribal court of such tribe. In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding. (25 U.S.C. § 1911(c)). If the tribe declines jurisdiction, the State court must use the ICWA standards in determining removal from Indian parents, foster care placement, or termination of parental rights. See **Matter of D.S.**, 577 N.E.2d 572, 575 (Ind. 1991), in which the Indiana Supreme Court found that proceeding under state law, rather than the federal ICWA, in an involuntary termination case for a Potawatomi Indian child was error, and reversed the termination judgment.

25 U.S.C. § 1912(e) provides for a clear and convincing standard in foster care proceedings and for specific evidence to be presented. 25 U.S.C. § 1912(d) states that any party seeking to effect foster care placement or termination of parental rights proceedings under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. No foster care placement may be ordered in such proceedings in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. (25 U.S.C. § 1912(e)). 25 U.S.C. § 1912(f) provides that no termination of parental rights may be ordered in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

25 U.S.C. § 1915(b) provides the following criteria for foster care or preadoptive placements for Indian children:

> Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with –
>
> a. a member of the Indian child's extended family;
> b. a foster home licensed, approved, or specified by the Indian child's tribe;
> c. an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
> d. an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

25 U.S.C. § 1915(c) provides that [in the case of a placement under subsection (a) or (b)] if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in 25 U.S.C. § (b). 25 U.S.C. § 1915(c) also states that where appropriate, the preference of the Indian child or parent shall be considered and where a consenting Indian parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences. 25 U.S.C.§ 1915(d) provides that the standards for preference requirements shall be "the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social or cultural ties."

CHINS proceedings, termination of parental rights proceedings, and adoptions of Indian children are covered by the ICWA. See **Adoptive Couple v. Baby Girl**, 133 S. Ct. 2552, 2556, 168 L.Ed.2d 729 (2013) (ICWA sections 1912(d), 1912(f), and 1915(a) did not bar termination of biological Indian Father's parental rights in connection with adoption by non-Indian adoptive couple; non-Indian Birth Mother consented to adoption and no alternative Indian party formally sought to adopt child) and **Mississippi Choctaw Indian Band v. Holyfield**, 490 U.S. 30, 109 S. Ct. 1597, 104 L.Ed.2d 29 (1989) (infant Indian twins were "domiciled" on the reservation within the meaning of ICWA's exclusive tribal jurisdiction provision; the state court was without jurisdiction to enter adoption decree for non-Indian parents). For Indiana cases on ICWA, see **In Re Adoption of D.C.**, 928 N.E. 2d 602 (Ind. Ct. App. 2010) (ICWA did not apply in adoption case because child had not been removed from custody within Indian family), *trans. denied*; **In Re S.L.H.S.**, 885 N.E.2d 603 (Ind. Ct. App. 2008) (despite efforts by Father and DCS to track down child's alleged Indian status, no tribal membership for child was identified; therefore, ICWA did not apply and termination judgment was affirmed); **Matter of D.S.**, 577 N.E.2d 572 (Ind. 1991) (state court termination order reversed and remanded due to failure to follow jurisdictional and evidentiary standards of ICWA), and **Matter of Adoption of T.R.M.**, 525 N.E.2d 298 (Ind. 1988) (state adoption court properly found good cause and that it was in the child's best interests to deny transfer to the Tribe).

The Interethnic Adoption Act of 1996, 42 U.S.C. § 1996(b), states a child's placement into adoption or foster care shall not be delayed or denied on the basis of the child's or the foster or adoptive parent's race, color, or national origin. This law specifically states that it does not affect the application of ICWA. 42 U.S.C. § 1996(b)(3).

See Chapter 3 at II.G.5., Chapter 6 at I.E., Chapter 8 at II.A. and V.A., Chapter 10 at II.F., and Chapter 11 at II.C. for additional information on the Indian Child Welfare Act.

IV. PROCEDURAL DUE PROCESS RIGHTS OF PARENT, GUARDIANS, AND CUSTODIANS

IV. A. Party Status

IC 31-34-9-7 provides that the "child's parents, guardian, or custodian" are parties "to the proceedings described in the juvenile law and have all rights of parties under the Indiana Rules of Trial Procedure." In **In Re J.S.O.**, 938 N.E.2d 271, 277 (Ind. Ct. App. 2010), the Court concluded that the trial court's order terminating paternity affiant Father's parental rights violated his due process rights because of failure to name him as a party to the CHINS case and failure to follow other CHINS statutory mandates as to Father. The Court reversed the trial court's termination order.

IV. B. Presence at Hearing

The law generally presumes that parents have the right to be present for CHINS hearings, given the rights of parents listed at IC 31-32-2-3 to present evidence and cross-examine witnesses. This issue is complicated when parents are incarcerated.

See the following termination cases in which the Court discussed parents' constitutional right to be present at termination hearings: **A. B. v. Indiana Dept. of Child Services**, 61 N.E.3d 1182, 1188 (Ind. Ct. App. 2016) (Court found Father was given the opportunity to be heard at a meaningful time and in a meaningful manner, but his ultimate absence from the hearing was the result of his disruptive actions while using the privilege of telephone testimony and his failure to appear in person despite a clear ability to do so); **In Re J.E.**, 45 N.E.3d 1243, 1249 (Ind. Ct. App. 2015) (Court concluded trial court acted within its discretion in denying incarcerated Father's motion to be transported to termination of parental rights hearing), *trans. denied*; **In Re B.H.**, 44 N.E.3d 745, 749 (Ind. Ct. App. 2015) (Court found no reason to conclude that absent Mother was denied a fair hearing due to trial court's denial of her motions for continuance), *trans. denied*; **In Re K.W.**, 12 N.E.3d 241, 249 (Ind. 2014) (Court vacated trial court's order terminating incarcerated Mother's parental rights; although Mother did not have absolute right to be present at termination hearing, she was denied the right to be heard at meaningful time and in meaningful manner); **S.L. v. Indiana Dept. of Child Services**, 997 N.E.2d 1114,1120 (Ind. Ct. App. 2013) (Court affirmed order terminating incarcerated Father's parental rights, finding he was not denied due process because federal prison authorities would not allow him to attend hearings or participate by telephone; trial court devised process whereby Father was provided with transcript of hearing and consulted with his attorney); **In Re S.S.**, 990 N.E.2d 978 (Ind. Ct. App. 2013) (Court concluded trial court's denial of absent Mother's motion for continuance did not deny her due process of law), *trans denied*; **In Re C.G.**, 954 N.E.2d 910, 921, 923 n.4 (Ind. 2011) (Court observed that there is no absolute right for parent to be present at termination hearing and that decision on whether incarcerated parent is permitted to attend hearing is within sound discretion of trial court; Court noted that videoconferencing equipment can be used in termination proceedings, subject to provision of Indiana Administrative Rule 14); **In Re A.B.**, 922 N.E.2d 740 (Ind. Ct. App. 2010) (Court reversed termination judgment and gave tardy Mother new opportunity to testify); **In Re H.L.**, 915 N.E.2d 145, 148, 150 (Ind. Ct. App. 2009) (Court concluded that incarcerated Father was not deprived of due process when he was not present at termination hearing; he did not avail himself of opportunity to participate by telephone); **In Re E.E.**, 853 N.E.2d 1037, 1044 (Ind. Ct. App. 2006) (trial court's denial of Father's attorney's continuance request in termination case and court's decision to proceed in Father's absence did not deny Father due process of law); **In Re Involuntary Term. Paren. of S.P.H.**, 806 N.E.2d 874, 879 (Ind. Ct. App. 2004) (Court found incarcerated Father's argument that his due process rights were violated because trial court failed to secure his presence at CHINS hearing was

without merit; Father never filed a motion to be transported to CHINS hearings); **In Re C.C.**, 788 N.E.2d 847, 853 (Ind. Ct. App. 2003) (Court concluded that trial court's decision to proceed in alleged Father's absence on last day of termination trial did not deny due process when Father had previously testified and was represented by counsel), *trans. denied*; **Tillotson v. Dept. of Family and Children**, 777 N.E.2d 741, 746 (Ind. Ct. App. 2002) (Parents incarcerated for neglect of dependent did not request a hearing in their motions to transport and failed to specify any type of alternative means available to trial court; under narrow facts of this case, trial court's failure to implement alternative means for Parents to testify did not deprive them of due process of law). The Tillotson opinion "cautioned that, in future cases, trial courts would be well advised to fully consider alternative procedures by which an incarcerated parent could meaningfully participate in the termination hearing when the parent cannot be physically present." Id. at 746. The Court listed the following alternative procedures: (1) using a speaker phone at the hearing; (2) continuing the hearing after the State has presented its case and allowing the parent time to review a transcript or audio tape of the hearing and then respond to allegations raised by the State's witnesses. Id. at 746 n.7.

IV. C. Appointment of Counsel in CHINS Proceeding

In **In Re G.P.**, 4 N.E.3d 1158 (Ind. 2014), the Indiana Supreme Court opined that IC 31-34-4-6 explicitly provides for the statutory right to court appointed counsel for a parent in a CHINS case if the parent requests the appointment of counsel and the trial court finds the parent to be indigent. Id. at 1163. The Court observed IC 31-34-4-6(a)(2) states that the parent *has the right to be represented by a court appointed attorney* at each court proceeding on a petition alleging the child is a CHINS upon the request of the parent if the court finds that the parent does not have sufficient financial means for obtaining representation as described in IC 31-34-10-1(emphasis in opinion). Id. at 1162. The Court opined that, to the extent any case law holds that a trial court has discretion to appoint counsel for an indigent parent in a CHINS proceeding, those case are not correct on that point. Id. at 1163. The Court emphasized that IC 31-34-4-6 does not necessarily compel the trial court to inquire, in each and every case, as to whether the parent wants appointed counsel; the language of this statute provides that the parent must affirmatively request this statutory right. Id. at 1163-64 n.7. The Court opined that IC 31-32-4-3 would give the trial court discretion to appoint counsel for a parent who fails to meet the statutory requirements for being indigent but for whom the court appointed counsel might still be appropriate. Id. at 1164. The Court clarified that appellate review of any denials of these discretionary appointments would still entail the analysis from prior Indiana case law, balancing the due process factors outlined in Matthews v. Eldridge, 424 U.S. 319 (1976) against the general presumption that does not favor court appointed counsel in civil matters. G.P. at 1164. The Court said that, where those factors overcome the presumption, due process would require appointed counsel, and a trial court would abuse its discretion in deciding otherwise. Id.

IV. C. 1. Overview: Servicemembers Civil Relief Act

Increased military and reserve military deployments require juvenile courts, attorneys, and guardians ad litem/court appointed special advocates to be aware of and to follow the requirements of the United States Servicemembers Civil Relief Act, 50 U.S.C. § 521. This federal law, formerly called the Soldiers' and Sailors' Relief Act of 1940, applies to any civil action or proceeding, including any child custody proceeding in which the defendant does not make an appearance. 50 (Appendix) U.S.C. § 521(a). The law was enacted to protect "those who have been obliged to drop their own affairs to take up the burdens of the nation" from exposure to personal liability without an opportunity to defend in person or through counsel. See **Harris v. Harris**, 922 N.E.2d 626, 639 (Ind. Ct. App. 2010); **Collins v. Collins**, 805 N.E.2d 410, 414 (Ind. Ct. App. 2004), *trans. denied*; **In Re Paternity of T.M.Y.**, 725 N.E.2d

997, 1004 (Ind. Ct. App. 2000); **Burbach v. Burbach**, 651 N.E.2d 1158, 1162 (Ind. Ct. App. 1995). 50 U.S.C. § 521(b) states as follows:

> (b) Affidavit requirement
> (1) Plantiff to file affidavit.
> In any action or proceeding covered by this section, the court, before entering judgment for the plaintiff, shall require the plaintiff to file with the court an affidavit--
> (A) stating whether or not the defendant is in military service and showing necessary facts to support the affidavit; or
> (B) if the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service.
> (2) Appointment of attorney to represent defendant in military service. If in an action covered by this section it appears that the defendant is in military service, the court may not enter a judgment until after the court appoints an attorney to represent the defendant. If an attorney appointed under this section to represent a servicemember cannot locate the servicemember, actions by the attorney in the case shall not waive any defense of the servicemember or otherwise bind the servicemember.

50 U.S.C. § 521(d) provides:

> (d) Stay of proceedings.
> In an action covered by this section in which the defendant is in military service, the court shall grant a stay of proceedings for a minimum period of 90 days under this subsection upon application of counsel, or on the court's own motion, if the court determines that--
> (1) there may be a defense to the action and a defense cannot be presented without the presence of the defendant; or
> (2) after due diligence, counsel has been unable to contact the defendant or otherwise determine if a meritorious defense exists.

IV. C. 2. Due Process Considerations for Court Appointed Counsel and Abuse of Discretion

In **In Re G.P.**, 4 N.E.3d 1158 (Ind. 2014), the Indiana Supreme Court vacated the termination judgment, concluding that the trial court's failure to actually provide counsel for Mother in the CHINS case, after granting Mother's request for court appointed counsel, denied Mother due process and compelled the undoing of the termination process. Id. at 1165-68. In **K.S. v. Marion County Dept. Child Services**, 917 N.E.2d 158 (Ind. Ct. App. 2009), the Court vacated the trial court's termination order, finding that the court abused its discretion when it granted the oral motion of Mother's attorney to withdraw her appearance at the commencement of the termination trial in violation of the local Rule. Id. at 165. The Court ordered that on remand: (1) Mother's attorney may seek to withdraw her appearance, provided that her motion to withdraw complies with the local Rule; and (2) if Mother's attorney complies with the local Rule, and Mother again fails to appear in person or fails to take steps necessary to obtain counsel within a reasonable time, the trial court may reinstate the termination order. Id. In **D.A. v. Monroe County Dept. of Child Serv.**, 869 N.E.2d 501 (Ind. Ct. App. 2007), the Court reversed the termination judgment, concluding that Father was denied due process of law and was not given an opportunity to be heard at a meaningful time or in a meaningful manner. Id. at 512. Father was not notified of his attorney's intent to withdraw her appearance or that the motion to withdraw was granted, resulting in lack of

representation for Father at the termination hearing. In **Baker v. County Office of Family & Children**, 810 N.E.2d 1035 (Ind. 2004), a termination case, the Indiana Supreme Court found that there was nothing to suggest that representation of both Parents by a single attorney led to a fundamentally unfair hearing when Parents were not presenting evidence against one another and neither Parent stood to gain significantly by separate representation. Id. at 1042. In **Lawson v. Marion County OFC**, 835 N.E.2d 577 (Ind. Ct. App. 2005), the Court found that Father's due process rights were significantly compromised in a termination case when Father's attorney left the hearing before its completion, leaving Father unable to cross-examine witnesses regarding critical evidence against him. Id. at 581.

IV. C. 3. Statutory Right of Indigent to Appointment of Counsel in Non-CHINS Civil Proceedings

IC 34-10-1-2 provides that the court may, under exceptional circumstances, assign an attorney to prosecute or defend a cause if the court is satisfied that the person who applies for leave to prosecute or defend a cause as an indigent person lacks sufficient means. The court may consider the following factors in deciding to appoint counsel: (1) the likelihood of the applicant prevailing on the merits of the claim or defense; and (2) the applicant's ability to investigate and present claims or defenses without an attorney, given the type and complexity of the facts and legal issues in the case. IC 34-10-1-2(d) requires the court to deny an application if the court determines that: (1) the applicant failed to make a diligent effort to obtain an attorney before filing the application or (2) the applicant is unlikely to prevail on his claim or defense. In **Sholes v. Sholes**, 760 N.E.2d 156 (Ind. 2001), the Indiana Supreme Court held:

> In sum, in ruling on an application for appointed counsel in a civil case, the trial court must determine whether the applicant is indigent, and whether the applicant, even if indigent, has means to prosecute or defend the case. If those criteria are met, and there is no funding source or volunteer counsel, the court must determine whether the mandate of expenditure of public funds is appropriate in that case.

Id. at 157.

The Court opined that the decision to appoint counsel for an indigent litigant in a civil case turns on the court's assessment of the nature of the case, the genuineness of the issues, and any other factors that bear on the wisdom of mandating public funds to pay court appointed counsel. Id. at 159. The trial court must first determine whether the civil litigant is indigent and then must examine the litigant's status in relation to the type of action before the court to determine whether the litigant has sufficient means to prosecute or defend the action. Id. at 161. If the action is one of the kind often handled by persons with means without employing counsel, such as small claims actions, the court may find that an indigent litigant has sufficient means to proceed without counsel. Id. Similarly, contingent fee or fee shifting statutes may also be cases where court appointed counsel is inappropriate. Id. The Indiana Constitution prevents requiring a specific lawyer to accept employment without compensation in a specific case. Id. at 164. The trial court is obligated to consider whether any fiscal or other governmental interests would be severely and adversely affected by a Trial Rule 60.5 order requiring payment of any appointed counsel. Id. at 166.

IV. C. 4. Indian Child Welfare Act Right to Counsel for Indian Parents

Indian parents or Indian custodians have the right to court appointed counsel in any removal, placement, or termination proceedings. Where State law makes no provision for appointment of counsel, the court may appoint counsel for the parents and the Secretary of the Interior shall pay reasonable fees and expense. See 25 U.S.C.A. § 1901 et seq. and this Chapter at III. C.

IV. C. 5. Waiver of Right to Counsel

See **In Re G.P.**, 4 N.E.3d 1158, 1168 (Ind. 2014), in which the Indiana Supreme Court vacated the termination judgment because the CHINS court failed to actually provide counsel for Mother in CHINS review proceedings after Mother had requested court appointed counsel and the court had determined that she was indigent. The Court stated it has never held that a litigant who elects to waive counsel is permanently bound by that decision. Id. at 1164. See also **Keen v. Marion Cty. D. of Public Welfare**, 523 N.E.2d 452, 453-54 (Ind. Ct. App. 1988), for dialogue on waiver of court appointed counsel by Mother in termination case. The Court concluded that the trial court properly determined that Mother waived her right to court appointed counsel. Id. at 456.

IV. C. 6. Determining Indigence

In **Elliott v. Elliott**, 634 N.E.2d 1345 (Ind. Ct. App. 1994), Father requested waiver of appellate filing and certification fees to appeal a modification of a support order, claiming the right of an indigent civil litigant to proceed on appeal in forma pauperis under Campbell v. Criterion Group, 605 N.E.2d 150 (Ind. 1992). The Court clarified that an indigence determination is affected by the type (criminal v. civil) and stance (trial or appellate level) of the case, and the purpose of the indigence determination (appointment of counsel, waiver of appellate fees, etc). Id. at 1350-51. Because the Court looked to the indigence guidelines formulated in criminal and civil case law on court appointment of counsel, the opinion may be relevant to the indigence determination on appointment of counsel in CHINS cases. The indigence guidelines discussed in the Elliott opinion are summarized as follows:

- The federal poverty guidelines may be one factor in determining indigence, but they are not dispositive. It is not possible to set specific monetary guidelines to determine indigence.

- Indigence does not mean the person is "totally without means." A person is indigent if he "legitimately lacks financial resources without imposing substantial hardship on himself or his family."

- The indigence determination must be based on several factors and should examine the total financial picture, balancing assets against liabilities and considering the amount of disposable income or other resources reasonably available after payment of fixed or certain obligations.

Id. at 1350.

IV. C. 7. Ineffective Assistance of Counsel

In **Baker v. County Office of Family & Children**, 810 N.E.2d 1035 (Ind. 2004), the Indiana Supreme Court stated that, where parents whose rights were terminated upon trial claim on appeal that their lawyer underperformed, the focus of the inquiry should be on whether it appears that the parents received a fundamentally fair trial whose facts demonstrate an accurate determination. Id. at 1041. See this Chapter at IV.D.1. for detailed discussion of the Court's reasons for its determination regarding the standard for counsel.

In **Lang v. Starke Cty. Office of Fam. Children**, 861 N.E.2d 366 (Ind. Ct. App. 2007), a termination case, Father argued that his attorney had been ineffective due to: (1) attorney's failure to ensure that Father had the opportunity to review tapes and transcripts of the previous CHINS proceeding; (2) attorney's failure to cite statutory or case law during cross-examination; and (3) attorney's failure to take action to reinstate Father's visitation during the

pendency of the termination hearing. The Court cited Baker v. County Office of Family and Children, 810 N.E.2d 1035, 1041 (Ind. 2004) and concluded that Father's attorney provided him with effective assistance. Lang at 376.

IV. D. Appointment of Counsel in Related Proceedings

IV. D. 1. Termination of the Parent-Child Relationship

A parent is entitled to court appointed counsel in proceedings for the involuntary termination of the parent-child relationship. IC 31-32-2-5, IC 31-32-4-1, and IC 31-32-4-3(a). See Chapter 11 at V.F. for further discussion on appointment of counsel in termination cases, including case law.

Indiana statutes also indicate that a parent has the right to court appointed counsel in proceedings for the voluntary termination of the parent-child relationship proceeding. IC 31-35-1-2 states that voluntary termination proceedings are governed by procedures prescribed by: IC 31-32-1[applicability of Indiana Rules of Trial Procedure and notice requirements]; IC 31-32-4 [right to counsel]; IC 31-32-5 [waiver of right to counsel and service of summons]; IC 31-32-6 [exclusion of public and child from proceedings]; IC 31-32-7 [venue]; IC 31-32-8 [change of judge]; IC 31-32-9 [service of summons]; and IC 31-32-10 [applicability of civil discovery procedures]. IC 31-32-4-3(a) states that the court shall appoint counsel for a parent in proceedings to terminate the parent-child relationship. The statute does not distinguish between involuntary and voluntary proceedings. IC 31-32-4-3(b) provides that the court may appoint counsel to represent any parent in any other proceeding.

In **In K.S. v. Marion County Dept. Child Services**, 917 N.E.2d 158 (Ind. Ct. App. 2009), the Court reversed and remanded the trial court's termination order because Mother's court appointed attorney failed to comply with the local Rule in withdrawing her appearance on behalf of Mother. Id. at 165. Mother had failed to appear for five scheduled hearings on the termination case. The trial court granted the oral motion to withdraw appearance made by Mother's attorney and proceeded to hear evidence and enter a termination order. The Court found that Mother's attorney had failed to expressly inform Mother of the intention to withdraw and of the risk Mother was facing by the attorney's decision. Id.

In **D.A. v. Monroe County Dept. of Child Serv.**, 869 N.E.2d 501 (Ind. Ct. App. 2007), the Court reversed and remanded the trial court's order terminating Father's parental rights to his three children. Id. at 512. The Court held that the trial court abused its discretion by granting the motion of Father's attorney to withdraw her appearance for Father because the attorney failed to comply with Monroe County Circuit Court Civil Rule 2. Id at 509. The Court noted that: (1) Father's attorney did not inform Father of the date of the hearing on the termination petition or of her intention to withdraw her appearance on his behalf; (2) Father did not have time to secure new counsel due to his attorney's failure to inform him of her motion to withdraw her appearance or of the date scheduled for the hearing on her motion; (3) Father was deprived of counsel without notice in violation of his right to counsel in a termination proceeding; (4) the trial court conducted a termination hearing in which Father was unable to present evidence or to cross-examine witnesses because he was neither present nor represented by counsel. Id.

In **Baker v. County Office of Family & Children**, 810 N.E.2d 1035 (Ind. 2004), a termination case, Parents, who were not married, claimed that the trial court did not adequately inquire about their decision to go forward with representation at the termination trial by the same lawyer. The lawyer stated prior to the final hearing that both Parents

consented to his joint representation and that no conflict existed because there was no situation that Parents would be blaming each other for the allegations raised by OFC. Parents stated at the hearing that they agreed to the joint representation. On appeal, Parents contended that their right to counsel had been violated because there had not been an adequate demonstration that they understood the consequences of joint representation. The Indiana Supreme Court concluded that transporting the structure of the criminal law, featuring the opportunity for repeated re-examination of the original court judgment through ineffectiveness of counsel claims and post-conviction process, had the potential for doing serious harm to children whose lives had by definition already been very difficult. Id. at 1039. The Court gave the following reasons for departing from the criminal law standard for parents' counsel in termination proceedings enunciated in J.T. v. Marion County OFC, 740 N.E.2d 1261, 1265 (Ind. Ct. App. 2000): (1) experience in criminal law with the present system of direct appeals, post-conviction proceedings, and habeas petitions demonstrates that with rare exception counsel perform capably and thus ensure accurate decisions; (2) criminal prosecutions and termination proceedings are substantially different in focus, because the resolution of a civil juvenile proceeding focuses on the best interests of the child, not on guilt or innocence; (3) extended litigation in termination cases imposes a substantial burden on vulnerable children whom the system seeks to protect; it is in the child's best interest and overall well being to limit the potential for years of litigation and instability; (4) the odds of an accurate determination in a termination case are enhanced by the fact of judicial involvement that is much more intensive than in the usual criminal case. Baker at 1039-1041.

The Court opined that, where parents whose rights were terminated at trial claim on appeal that their lawyer underperformed, the focus of the inquiry is whether it appears that the parents received a fundamentally fair trial whose facts demonstrate an accurate determination. Id. at 1041. The question is not whether the lawyer might have objected to this or that, but whether the lawyer's overall performance was so defective that the appellate court cannot say with confidence that the conditions leading to removal are unlikely to be remedied and that termination is in the child's best interest. Id. The Court found that there was nothing to suggest that representation by a single lawyer led to a fundamentally unfair hearing in the instant case, noting: (1) joint representation did not result in a conflict of interest because both Parents preserved the same interests of preserving parental rights; (2) the lawyer appropriately questioned and cross-examined witnesses on behalf of both Parents and cross-examined both Parents; (3) Parents were not presenting evidence against one another nor were they blaming one another; (4) the record did not suggest that either Parent stood to gain significantly by separate representation; (5) each Parent was responsible for his or her own participation in services and neither could gain from the other's participation or lack thereof. Id. at 1042.

In **Lawson v. Marion County OFC**, 835 N.E.2d 577 (Ind. Ct. App. 2005), the Court reversed the termination judgment against Father, concluding that his due process rights were significantly compromised because his attorney was excused from the hearing before its completion, leaving Father unable to cross-examine witnesses regarding critical evidence against him. Id. at 581. Father did not appear at the termination hearing, despite having been notified of the date, but his attorney was present at the start of the hearing. OFC presented evidence from two witnesses, after which Father's attorney asked to be excused from the hearing if none of OFC's further evidence related to Father. The trial court excused Father's attorney. Despite the unmistakable implication that OFC had concluded with its evidence against Father, OFC then presented additional evidence against him, including two witnesses and a parenting assessment report. Two of the trial court's findings in support of the termination judgment were based on this witness testimony and assessment. The Court cited

IC 31-32-2-3(b), which provides that a parent in a termination proceeding is entitled to cross-examine witnesses and introduce evidence on his own behalf. Id. at 580. The Court held that, while a swift resolution of the matter is necessary to avoid further uncertainty regarding the child's permanency, the error in the case was "too great to ignore." Id. at 584.

In **Keen v. Marion Cty. D. of Public Welfare**, 523 N.E.2d 452 (Ind. Ct. App. 1988), a termination case, the Court concluded that the trial court properly determined that Mother had waived her right to court appointed counsel. Id. at 455. The trial court had appointed a public defender to represent Mother, but Mother was dissatisfied with his services because of lack of communication between them. On the day of trial, with witnesses present, Mother asked for a continuance so that she could obtain private counsel. The court informed Mother that, if she was unable to obtain private counsel, there was no opportunity to obtain a public defender again. Mother did not obtain private counsel, and requested another public defender be appointed at the next trial date, which was two months later. The court denied her request, because she had previously waived counsel. The record of the trial court's advisement to Mother of her right to counsel and the consequences of her waiver of counsel are included in this opinion. Id. at 453-54.

IV. D. 2. Adoption

In **Matter of Adoption of C.J.**, 71 N.E.3d 436 (Ind. Ct. App. 2017), the Court reversed and remanded the adoption court's decree granting Stepmother's petition to adopt Mother's child. Id. at 444. Pursuant to a paternity court order, Father had custody of the child, and Mother had supervised parenting time. Father married Stepmother, who filed a petition for adoption of the child, alleging inter alia that Mother's consent to the adoption was not required because Mother had not communicated significantly with the child for at least one year when able to do so. After Mother was served with notice of the adoption, she filed her objection to the adoption. The adoption court held a hearing on the issue of whether Mother's consent was required for the adoption. At the beginning of the hearing, Mother informed the court that her attorney had withdrawn three months earlier due to her inability to afford to pay him. Mother requested that the court appoint an attorney to represent her. The court questioned Mother regarding her financial circumstances, and Mother stated she worked between forty and forty-five hours per week earing $10.00 per hour and also worked about twenty-four hours per week for another company earning $7.50 per hour. Mother said her monthly expenses totaled $855.00. The court determined that Mother had sufficient income to pay for an attorney and therefore had made a "voluntary choice" to proceed without an attorney. Stepmother presented her case-in-chief, during which Stepmother and Father testified. Mother did not cross-examine Stepmother or Father. During Mother's case-in-chief, she contradicted the testimony of Stepmother and Father. After Mother briefly testified about her attempts to see the child, the court asked Mother a substantial number of questions. Stepmother's attorney raised an objection that the court was "acting as an advocate" for Mother. The court then appointed an attorney to represent Mother and continued the hearing to another date. At the beginning of the next hearing, the court clarified that the hearing was a continuance of the previous hearing, not a new hearing, and parties were to "pick up where [they] left off." Mother then proceeded with her case-in-chief. Later, the adoption court issued an order finding that Mother's consent to Stepmother's petition for adoption was not required because Mother had failed to communicate significantly with the child for at least a year. The court conducted another hearing on Stepmother's adoption petition as to the issue of the child's best interests, and issued its decree granting Stepmother's petition for adoption of the child.

Mother appealed, claiming that the adoption court committed reversible error by failing to

appoint an attorney to represent her until after Stepmother had rested her case at the hearing on Mother's consent. Mother contended that, if she had been represented by an attorney during Stepmother's case-in-chief, her attorney could have explored inconsistencies in Stepmother's and Father's testimony through cross-examination, which might have impacted the court's decision on the need for Mother's consent. The Court disagreed with the adoption court's finding that Mother had made a "voluntary choice" to proceed without the assistance of an attorney. Id. at 443-44. The Court observed: (1) once Mother learned that she might be able to have court-appointed representation, she made it clear that she preferred the assistance of counsel; (2) despite its finding that Mother could afford an attorney, instead of offering the opportunity for Mother to secure a private attorney or encouraging her to do so, the court proceeded with the hearing on the basis that Mother had waived her right to counsel; (3) according to IC 31-32-2-5, a waiver of the right to counsel must be made "knowingly and voluntarily"; (4) nothing on the record demonstrated that the court did anything to impress upon Mother the serious consequences she faced if she represented herself. Id. at 444. The Court found that Mother established a prim facie case that she was deprived of an essential right in violation of due process. Id. The Court remanded for a new hearing on the issue of Mother's consent, at which Mother should, absent a knowing and voluntary waiver of her rights, be afforded the right to retain counsel or, if the adoption court determines that Mother is indigent, to appoint counsel on her behalf. Id.

In **In Re Adoption of A.G.**, 64 N.E.3d 1246 (Ind. Ct. App. 2016), the Court reversed the trial court's order granting Stepmother's petition to adopt Mother's two children. Id. at 1250. Mother asked the trial court to deny the adoption petition and requested the appointment of a public defender to represent her. The trial court heard evidence on Mother's financial situation, found that Mother lacked the money to hire an attorney, and appointed a public defender to represent Mother. Mother's public defender filed a motion to withdraw his appearance for Mother, stating that Mother had failed to cooperate or communicate with him. In filing his motion for withdrawal, the public defender did not comply with Madison County Local Rule LR48-TR3.1-26, which includes the requirement that an attorney shall give the client 21 days' written notice of the intention to seek permission to withdraw. The trial court granted the public defender's motion to withdraw his appearance for Mother. Mother appeared at the scheduled adoption hearing and stated she received the motion to withdraw the public defender's appearance immediately before she was arrested and jailed for failure to appear at court in another case. Mother asked the court if she could request another public defender, but the trial court did not appoint another public defender for Mother, and she did not have an attorney throughout the adoption hearing. The Court found that the trial court abused its discretion in granting the public defender's motion to withdraw his appearance in violation of the local rule. Id. at 1249. The Court referenced its prior holding in In Re Adoption of G.W.B., 776 N.E.2d 952 (Ind. Ct. App. 2002) that parents whose parental rights are being terminated against their will, including in cases of termination of parental rights by adoption, have the right to court appointed counsel if they cannot afford private representation. Adoption of A.G. at 1249. The Court remanded for further proceedings. Id. at 1250.

In **In Re Adoption of K.W.**, 21 N.E.3d 96 (Ind. Ct. App. 2014), the Court reversed the trial court's order granting Grandparents' petition for adoption and remanded the matter, holding that (1) the trial court's failure to rule on Father's request for court appointed counsel was a violation of his right to due process and his statutory right to counsel in an adoption proceeding; and (2) Father did not waive his right to counsel. Id. at 98-99. Father filed a pro se appearance and requested court appointed counsel because he was indigent and had tried unsuccessfully to obtain counsel on his own. The trial court did not rule on Father's request

for counsel and found that Father's consent to the child's was not needed. The Court held Father's due process rights were violated when the trial court ignored his request for court appointed counsel. Id. at 98. The Court found Father was entitled to counsel in adoption proceedings. Id. The Court declined to find that Father had waived his right to counsel by filing pro se documents, failing to request a hearing on his motion to appoint counsel, or failing to ask for court appointed counsel at the adoption hearing. Id. The Court reasoned that a litigant who has been told he will receive appointed counsel is not required to request said counsel at each and every hearing in order to preserve that right. Id. at 98-99.

In **In Re Adoption of Baby W.**, 796 N.E.2d 364 (Ind. Ct. App. 2003), *trans. denied*, Alleged Father unsuccessfully argued that he was denied due process because the adoptive parents' attorney never informed him of his right to counsel. The Court opined that it was the duty of the adoption court, not the duty of the adoptive parents' attorney, to inform Alleged Father of his right to counsel. Id. at 376. The Court also found that any error in the trial court's failure to inform Alleged Father of his right to counsel was harmless because the record reflected that Father had counsel for both the adoption and paternity proceedings. Id.

In **In Re Adoption of G.W.B.,** 776 N.E.2d 952 (Ind. Ct. App. 2002), the Court reversed and remanded the trial court's order which granted Stepfather's petition to adopt the children and denied the divorced Father's motion to contest the adoption. Id. at 955. Father appeared at the adoption hearing without counsel and requested a postponement of the hearing until he had counsel. The trial court refused to grant the continuance, stating that Father had sufficient time to hire an attorney in the two and a half months between the filing of his motion to contest the adoption and the day of the adoption trial. During the hearing, Father told the court that he had not been able to afford an attorney. The Court found that the trial court had not advised Father of his rights and that Father had not knowingly, intelligently, and voluntarily waived his right to counsel. Id. at 954.

In **In Re Adoption of J.D.C.**, 751 N.E.2d 747 (Ind. Ct. App. 2001), the Court opined that failure to appoint counsel for Alleged Father who had failed to register in the putative father registry was harmless because: (1) Alleged Father's consent to adoption was implied as a matter of law due to his failure to register; and (2) even if the court had appointed counsel, there were no contested issues on which counsel would have been able to offer assistance. Id. at 752.

In **Taylor v. Scott**, 570 N.E.2d 1333 (Ind. Ct. App. 1991), the Court reversed the trial court's order granting the adoption petition because the trial court failed to advise Father that he had the right to be represented by counsel. Id. at 1335. The Court clarified that the rights afforded in the involuntary termination statutes apply in adoption proceedings where the petitioners seek to adopt over the objections of one or both of the natural parents. Id. The Court held that the parent objecting to the adoption has three related rights: the right to be represented by counsel; the right to have counsel provided if the parent cannot afford private representation; *and the right to be informed of the two preceding rights*. (Emphasis in opinion.) Id.

In **Petition of McClure**, 549 N.E.2d 392 (Ind. Ct. App. 1990), the Court reversed the trial court's order granting Stepfather's adoption due to the trial court's failure to appoint counsel for Father who was indigent and incarcerated at the time of the adoption proceedings. Id. at 395.

IV. D. 3. Contempt

Pursuant to **In Re Marriage of Stariha**, 509 N.E.2d 1117 (Ind. Ct. App. 1987), persons charged with contempt for failure to pay child support shall be advised of their right to counsel and provided counsel if they are indigent. See also **Moore v. Moore**, 11 N.E.3d 980, 981 (Ind. Ct. App. 2014) (even though alleged contemnor received suspended sentence, he clearly risked possibility of losing physical liberty, and, if indigent, was entitled to court appointed counsel); **Marks v. Tolliver**, 839 N.E.2d 703, 706 (Ind. Ct. App. 2005) (if an alleged civil contemnor is indigent and in jeopardy of incarceration, he may not be incarcerated without having counsel appointed to represent him prior to the contempt hearing); **Branum v. State**, 822 N.E.2d 1102, 1104 (Ind. Ct. App. 2005) (trial court's failure to advise Father of right to counsel in civil child support contempt case required reversal of contempt finding), *clarified on rehearing* at 829 N.E.2d 622 (Ind. Ct. App. 2005).

IV. D. 4. Appeal

In **Parent-Child Rel. v. Indiana Child Services**, 933 N.E.2d 1264, 1267 (Ind. 2010), the Indiana Supreme Court held Indiana statutes dictate that parents' right to counsel continues through all stages of the termination proceeding, including appeal. See Chapter 11 at VI.K.4. for further discussion.

IV. E. Notices of Assessment, Removal of Child, and Hearings in CHINS and Termination Cases

IC 31-32-1-4 requires DCS to give all notices of hearings in CHINS cases. See this Chapter at I.I. for further information.

IC 31-33-18-4(a) requires DCS to give verbal and written notice to each parent, guardian, or custodian of the child who is the subject of an assessment for abuse or neglect. The notice must advise that the parent, guardian or custodian may obtain reports and information regarding the assessment, and if a court case is initiated, they may obtain access to the juvenile court records, except as prohibited by federal law.

IC 31-34-3-1 through IC 31-34-3-4 make special provisions for notice to the custodial parent, noncustodial parent, guardian, and custodian when a child is taken into custody as result of an abuse or neglect assessment. IC 31-34-5-1 requires that notice of the time, place, and purpose of the detention hearing be given to the child's parent, guardian, or custodian if the person can be located. A parent, guardian, or custodian shall be given notice of a motion for protective order or injunction affecting the conduct of the child or the parent, guardian, or custodian. IC 31-32-13-3. IC 31-32-13-7 provides that an emergency order can be issued without notice or hearing.

IC 31-34-10-2(b) and (c) require that the child's parent, guardian, or custodian be summoned to the CHINS initial hearing and that a copy of the CHINS petition shall accompany the summons. IC 31-34-21-4 requires that notices of review and permanency hearings be sent to the child's parent, guardian, or custodian at least seven days prior to the hearing. IC 31-34-23-3(a) requires DCS to give "notice to the persons affected", which presumably would include the child's parents, guardian, and custodian, when a motion requests an emergency change in the child's residence. The court shall hold a hearing thereon if requested. IC 31-34-23-3(b) states that if any other dispositional modification is requested, DCS shall send notice to the persons affected and the juvenile court shall hold a hearing. IC 31-35-2-6.5 requires DCS to send the parents notice of the hearing ten days before the actual termination hearing. This required provision of notice is in addition to, not a substitute for, the requirement to serve the parent with the termination petition, which is mandated by IC 31-32-9-1. See Chapter 11 at III.E. for information on service of process in involuntary termination of the parent-child relationship proceedings.

IC 31-35-1-5 [the voluntary termination of the parent-child relationship statute] states that parents shall be notified of the hearing in accordance with IC 31-32-9. Parents do not need to be notified of the termination hearing under the circumstances set forth in IC 31-35-1-5(b). IC 31-35-1-5(b) provides that a parent who has made a valid consent to the termination of a parent-child relationship may waive the otherwise required notice if the waiver:

(1) is in writing either:
    (A) in the parent's consent to terminate the parent-child relationship; or
    (B) in a separate document;
(2) is signed by the parent in the presence of a notary public; and
(3) contains an acknowledgment that:
    (A) the waiver is irrevocable; and
    (B) the parent will not receive notice of:
        (i) adoption; or
        (ii) termination of parent-child relationship;
    proceedings.

In **Hite v. Vanderburgh Cty. Office of Fam. & Chil.**, 845 N.E.2d 175 (Ind. Ct. App. 2006), a termination case, the incarcerated Father argued that his due process rights had been violated because OFC failed to provide him with notice of the CHINS proceedings. The Court stated:

> We cannot say that the failure to provide Father with notice during the initial stages of the CHINS action substantially increased the risk of error in the termination proceedings. Father was incarcerated at that time and was not deprived of notice as to what conduct on his part could led to termination of his parental rights.

Id. at 184. The Court noted the record revealed that Father did participate in the CHINS proceeding and appeared in person and by counsel for the review hearing. Id.

In **Castro v. Office of Family and Children**, 842 N.E.2d 367 (Ind. Ct. App. 2006), *trans. denied*, a termination case, the incarcerated Father argued that he was not afforded due process of law because he was not informed of the child's removal from Mother's custody until two months after removal. The Court could not say that OFC's actions in removing the child without prompt notice to Father constituted deprivation of due process because: (1) Father failed to explain how he was deprived of due process or how the result of the CHINS/termination proceeding might have been different had he known earlier about the child's removal; (2) because Father was incarcerated, there was little, if anything, he could have done to change the situation; (3) the government had a strong interest in removing the child from an unsuitable home; and (4) Mother was quickly notified of child's removal. Id. at 375.

See also **In Re Involuntary Term. Paren. of S.P.H.**, 806 N.E.2d 874, 878 (Ind. Ct. App. 2004) (incarcerated Father argued that he failed to receive notice of CHINS proceedings, but Court's review of record clearly disclosed that trial court served Father with CHINS petition and notice of review hearings).

For case law regarding the ten day notice (IC 31-35-2-6.5) in involuntary termination cases, see **In Re H.K.**, 971 N.E.2d 100, 103-104 (Ind. Ct. App. 2012) (Court remanded with instructions because record was not clear on whether DCS had sent notice to Mother); **In Re H.T.**, 911 N.E.2d 577, 580-81 (Ind. Ct. App. 2009) (Mother's right to notice was fatally compromised because DCS failed to provide her with essential information, including date, time, and location of hearing); **In Re A.P.**, 882 N.E.2d 799, 805 (Ind. Ct. App. 2008) (Court declined to reverse termination order because Father had received actual notice of hearing from case manager); **Q.B.**

v. MCDCS, 873 N.E.2d 1063, 1067-68 (Ind. Ct. App. 2007) (Court concluded that adequate notice was given to Father, whose whereabouts were unknown); **D.A. v. Monroe County Dept. of Child Serv.**, 869 N.E.2d 501, 512 (Ind. Ct. App. 2007) (Court reversed and remanded termination order because it was it unclear whether Father had timely notice or any notice of hearing); **In Re T.W.**, 831 N.E.2d 1242, 1247 (Ind. Ct. App. 2005) (even assuming OFC was required to provide proof of notice to Mother of termination hearing at least ten days prior to hearing, any such procedural irregularity did not violate Mother's due process rights when Mother was present, represented by counsel, testified, and showed no prejudice by lack of notice); **In Re C.C.**, 788 N.E.2d 847, 851-52 (Ind. Ct. App. 2003) (in order to comply with IC 31-35-2-6.5, one need only meet requirements of Indiana Trial Rule 5, which governs service of subsequent papers and pleadings in an action and authorizes service by mail at party's last known address), *trans. denied*; **In Re A.C.**, 770 N.E.2d 947, 949-50 (Ind. Ct. App. 2002) (OFC served process on Father whose address was unknown by publication pursuant to Indiana Trial Rule 4.13; OFC served notice of the hearing to Father at his last known address several weeks prior to hearing; thus the statutory notice requirement for termination proceedings was met.) See Chapter 11 at V.C. for further discussion of termination notices.

IV. F. Notice of Rights and Other Advisements in CHINS and Voluntary Termination Cases

IC 31-34-4-6 requires DCS to give written notice of rights to the child's parent, guardian, or custodian when the child is taken into custody or when a CHINS petition is filed, whichever occurs first. The written notice shall state the following rights:

> (1) The right to have a detention hearing held by a court within forty-eight (48) hours after the child's removal from the home and to request return of the child at the hearing.
> (2) The right to:
> (A) be represented by an attorney;
> (B) cross-examine witnesses; and
> (C) present evidence on the parent's, custodian's, or guardian's own behalf;
> at each court proceeding on a petition alleging that the child is a child in need of services. The parent, guardian, or custodian has the right to be represented by a court appointed attorney under clause (A) upon the request of the parent, guardian, or custodian if the court finds that the parent, guardian, or custodian does not have sufficient financial means for obtaining representation as described in IC 34-10-1-1.
> (3) The right not to make statements that incriminate the parent, custodian, or guardian and that an incriminating statement may be used during a court proceeding on a petition alleging that the child is a child in need of services.
> (4) The right to request to have the case reviewed by the child protection team under IC 31-33-3-6.
> (5) The right to be advised that after July 1, 1999, a petition to terminate the parent-child relationship must be filed whenever a child has been removed from the child's parent and has been under the supervision of the department [DCS] for at least fifteen (15) months of the most recent twenty-two (22) months.

If the parent, guardian, or custodian is present at the initial hearing, IC 31-34-10-4 requires that the court advise him/her of the allegations in the CHINS petition and of the dispositional alternatives. IC 31-34-10-5 requires the court to advise the parent or the guardian of the child's estate of potential required parental participation and financial responsibility, and of the right to controvert allegations made regarding those issues. IC 31-34-19-9 requires the court to advise the parent, guardian, or custodian at the dispositional hearing of the modification procedures stated at IC 31-34-23. See **Matter of C.B.**, 616 N.E.2d 763, 769 (Ind. Ct. App. 1993) (custodian must be advised of modification proceedings at initial hearing and prior to modification).

A parent who seeks voluntary termination of his parental rights under IC 31-35-1-1, must be advised of the rights set out at IC 31-35-1-12. Parents in a voluntary or an involuntary proceeding for termination of the parent-child relationship should be advised of the right to court appointed counsel. IC 31-32-2-5; IC 31-32-4-1; IC 31-32-4-3.

In **Neal v. DeKalb Cty. Div. of Fam. & Children**, 796 N.E.2d 280 (Ind. 2003), a voluntary termination case, the Indiana Supreme Court construed IC 31-35-1-6 [court hearing on voluntary termination of parental rights] and IC 31-35-1-12 [advice to parents on voluntary termination of parental rights]. The Court determined that the legislature intended that IC 31-35-1-6 should prevail over IC 31-35-1-12. Id. at 285. The Court reversed the trial court's order which had terminated Mother's parental rights despite Mother's attempt in open court to retract or revoke her consent to voluntary termination given at the DFC office two months previously. Id.

IV. G. Subpoena, Cross-Examine, and Introduce Evidence

IC 31-32-2-3 provides that the parent, guardian, or custodian of the child shall have the following rights in a hearing to determine whether a child is a child in need of services, a hearing to determine whether the parent, guardian or custodian should participate in a program of care and treatment of the child, a hearing to determine whether the parent or the child's estate should be financially responsible for the services provided to the child or the parent, and a hearing on a petition for termination of the parent-child relationship:

(1) to cross-examine witnesses;
(2) to obtain witnesses or tangible evidence by compulsory process; and
(3) to introduce evidence on behalf of the parent, guardian, or custodian.

These rights are also listed in IC 31-34-4-6, with the caveat that they are applicable to "each court proceeding on a petition alleging that the child is a child in need of services."

The right of cross-examination is not absolute. Hearsay, which contravenes the right of cross-examination, is admissible in juvenile proceedings pursuant to the exceptions in the Indiana Rules of Evidence. The juvenile code contains specialized hearsay exceptions that apply when the child is legally determined to be unavailable to testify due to incompetency, because there is a substantial likelihood of emotional or mental harm, or for medical reasons, *and* the child's statements have sufficient indicia of reliability (emphasis added by authors). See IC 31-34-13-3 and IC 31-35-4-2. IC 31-34-19-2 and IC 31-34-22-3 permit the admission into evidence of predispositional, case review, and dispositional modification reports which contain probative evidence and which would otherwise be excluded as hearsay.

In **In Re J.K.**, 30 N.E.3d 695 (Ind. 2015), the Indiana Supreme Court reversed the child's CHINS adjudication. Id. at 696. Mother had admitted the CHINS allegations, but Father denied them and requested custody of the child. The parties had nearly reached an agreement on the child's placement, except for confirming whether the child could be transported by bus to her current high school from Father's home in a neighboring school district. During a heated colloquy, the juvenile court judge said to Father, "If I were you, I'd waive factfinding otherwise you're going to find your butt finding a new job. I'll be happy to give you what you want sir and I will order custody to you and then you will be responsible for ensuring that she gets to school every day. Do you want that? We can play that game. They only do it for kids in foster care and court ordered placements, they don't do it for others." The judge told Father that the time was 5:30 p.m. Father then admitted that the child was a CHINS. The Court found that the cumulative effect of the trial court's comments and demeanor had a direct impact on Father's acceptance of the court's leading suggestion to "waive factfinding", and said that such coercion was

fundamental error. Id. at 700. The Court concluded that the trial court's remarks and conduct in their cumulative effect breached the court's duty of impartiality. Id.

In **In Re L.C.**, 23 N.E.3d 37 (Ind. Ct. App. 2015), *trans. denied*, the Court reversed the trial court's CHINS adjudication of a nine-year-old girl and remanded the case to the trial court for a new hearing. Id. at 38. Father established paternity for the child and had custody of her, but allowed the child to live with Mother, where the child was exposed to domestic violence between Mother and her boyfriend. Mother admitted the allegations in the CHINS petition, but Father denied them. The juvenile court accepted Mother's admission and adjudicated the child to be a CHINS before the factfinding hearing requested by Father took place. The Court concluded that the juvenile court erred by adjudicating the child a CHINS before the completion of the factfinding hearing. Id. at 42. The Court stated that the procedure employed by the juvenile court with respect to Father's factfinding hearing in this case had been expressly rejected by the Indiana Supreme Court. Id. The Court concluded that, because Father had challenged the allegations in the CHINS petition, due process required the completion of a factfinding hearing, including the presentation of evidence and argument by both parents before the child was adjudicated a CHINS. Id.

In **In Re S.A.**, 15 N.E.3d 602 (Ind. Ct. App. 2014), the Court reversed the trial court's CHINS adjudication, finding that the trial court had deprived Father of a meaningful opportunity to be heard by adjudicating the child to be a CHINS before Father's factfinding hearing. Id. at 609. Mother, a heroin user, admitted to some of the CHINS allegations, she and DCS entered into an agreement, and the trial court adjudicated the child to be a CHINS while Father had denied the CHINS allegations and his paternity testing was pending. The Court, quoting In Re K.D., 962 N.E.2d 1249, 1259 (Ind. 2012), stated that, when one parent has admitted the CHINS allegations and the other parent denies them, due process requires that the trial court "conduct a factfinding as to the entire matter." S.A. at 609. The Court observed that, although Father had received a factfinding hearing, the trial court had already determined the child's CHINS status based solely on Mother's admission. Id. The Court explained that, because a court cannot issue separate adjudications for each parent, the trial court's CHINS determination should be based on a consideration of the evidence in its entirety. Id. On rehearing, **In Re S.A.**, 27 N.E.3d 287 (Ind. Ct. App. 2015), the Court clarified that, when the CHINS adjudication *can* involve both parents at the same time, it *should* involve both parents at the same time, so there is one adjudication as to all facts pertaining to the entire matter (emphasis in opinion). S.A., 27 N.E.3d at 292. The Court opined that, if multiple hearings are unavoidable, then the trial court should, if at all possible, refrain from adjudicating the child a CHINS until evidence has been heard from both parents. S.A., 27 N.E.3d 287, 292-93.

In **In Re T.N.**, 963 N.E.2d 467 (Ind. 2012), Mother admitted the CHINS petition allegations, but Father objected to CHINS status being granted on Mother's admission. The trial court told Father that he could offer his objections to any services at a contested dispositional hearing, and then found the child to be a CHINS and proceeded to a contested dispositional hearing. Father appealed the CHINS adjudication. The Indiana Supreme Court held that the trial court erred in not conducting a contested factfinding hearing that was requested by Father and, thus, violated his due process rights. Id. at 469. The Court opined that the failure to provide a factfinding hearing for Father deprived him of due process at the CHINS adjudication stage, and he was thus "sent through one barrier between him and DCS having the statutory authority to file a termination of parental rights petition" without the opportunity to even challenge the evidence. Id. The Court concluded:

> Whenever a trial court is confronted with one parent wishing to admit and one parent wishing to deny the child is in need of services, the trial court shall conduct a fact-finding hearing, assuring due process to all parties. It is ultimately in the child's best interest that the parents are given due process at all stages of the proceeding.

Id. The Court reversed the trial court's CHINS adjudication and remanded the case to the trial court to conduct a factfinding hearing for Father. Id.

In **In Re K.D.**, 962 N.E.2d 1249 (Ind. 2012), the Indiana Supreme Court reversed the trial court's CHINS determination and remanded the case to the trial court to provide Stepfather with a factfinding hearing. Id. at 1260. Mother had admitted the allegations of the CHINS petition, including that she and Stepfather had failed to complete all services under the informal adjustment agreement, that Stepfather was an untreated sexual offender and had not yet completed his sexual offender treatment, and that Mother continued to allow him to live in the home. Stepfather denied that the children were CHINS. The trial court set the matter for a dispositional hearing for Mother and a contested factfinding hearing for Stepfather. Prior to the factfinding hearing scheduled for Stepfather, the Indiana Supreme Court decided In Re N.E., 919 N.E.2d 102 (Ind. 2010). Based on its interpretation of the In Re N.E. opinion, the trial court converted the factfinding hearing scheduled for Stepfather into a contested dispositional hearing. The trial court concluded that a contested factfinding hearing as to Stepfather was not required. The Court held that whenever a trial court is confronted with one parent wishing to make an admission that the child is in need of services and the other parent wishing to deny the same, the trial court shall conduct a factfinding hearing as to the entire matter. Id. The Court noted that an apparent conflict arises between IC 31-34-10-8 and IC 31-34-11-1. Id. at 1255. IC 31-34-10-8 states that if a parent, guardian, or custodian admits [the allegations in the CHINS petition], the juvenile court shall do the following: (1) enter judgment accordingly; (2) schedule a dispositional hearing. Id. IC 31-34-11-1 states that the juvenile court shall hold a factfinding hearing if the allegations of the petition have not been admitted. Id. The Court said that "[w]here two statutes are in apparent conflict, they should be construed, if it can be reasonably done, in a manner so as to bring them into harmony." Id. The Court said that: (1) in this case DCS alleged the children to be CHINS based on actions of both Mother and Stepfather; (2) N.E., 919 N.E.2d at 105 states that a CHINS adjudication "focuses on the condition of the child" and "does not establish culpability on the part of a particular parent"; (3) a CHINS adjudication is dependent on DCS proving by a preponderance of the evidence a number of statutorily defined criteria; (4) there was no evidence in the record at a factfinding hearing in this case that Stepfather was an untreated sex offender or how that made the children CHINS. K.D. at 1256. The Court said that lack of a factfinding hearing for Stepfather distinguished this case from In Re N.E., where Father received a fact-finding hearing at which he presented evidence and cross-examined witnesses. K.D. at 1256. The Court further held that the contested dispositional hearing did not provide Stepfather due process because he was not given an opportunity to contest the CHINS allegations. Id. at 1258.

In **In Re V.C.**, 967 N.E.2d 50 (Ind. Ct. App. 2012), *trans. denied*, incarcerated Father appealed the child's CHINS adjudication, contending, inter alia, that the juvenile court had denied his procedural due process rights by erroneously denying his request that the court issue a subpoena to the child's Maternal Aunt to compel her attendance at the factfinding hearing. The Court opined that the juvenile court did not erroneously deny Father's request to issue a subpoena to Maternal Aunt. Id. at 53-54. Father conceded that he did not provide the juvenile court with Maternal Aunt's address, but argued that the court erred by failing to conduct its own investigation into Maternal Aunt's contact information after Father provided her name and possible avenues for obtaining the information to the court. The Court agreed with the juvenile

court that it is not the court's responsibility to "go out and find" the person named in the subpoena. Id. at 53. The Court opined that, even if the juvenile court had issued the subpoena, the court would likely have been unable to serve the subpoena to Maternal Aunt due to Father's failure to provide her address. Id.

See the following CHINS and termination cases in which Appellate Courts reversed trial court judgments because parents had been denied the right of cross-examination pursuant to IC 31-32-2-3: **In Re J.Q.**, 836 N.E.2d 961, 966 (Ind. Ct. App. 2005) (Mother did not receive notice prior to CHINS factfinding of psychologist's recommendation that child not testify); **Lawson v. Marion County OFC**, 835 N.E.2d 577, 581 (Ind. Ct. App. 2005) (Father in termination trial was unable to cross-examine witnesses against him due to absence of his counsel from part of trial); **Thompson v. Clark County Div. of Family**, 791 N.E.2d 792, 796 (Ind. Ct. App. 2003) (summary termination proceeding denied Mother the opportunity to cross-examine witnesses; Mother was denied opportunity to be heard in meaningful manner), *trans. denied*.

IV. H. Access to Reports/Records of Juvenile Court and Law Enforcement

Unless the court determines on the record that the report contains information that should not be released to the parent, guardian, or custodian, IC 31-34-18-6 [predispositional report] and IC 31-34-22-2 [modification of dispositional report] provide that the child's parent, guardian, or custodian is entitled to a copy of the report. When a person is denied access to a report, his counsel shall be given access to the report and the person may be given a factual summary of the report. IC 31-34-19-2 [dispositional hearing] and IC 31-34-22-3 [case review hearing] give the parent, guardian, or custodian a fair opportunity to controvert any part of the report admitted into evidence.

Any party to a juvenile court case has access to the juvenile court record [IC 31-39-2-3] and access to any law enforcement record [IC 31-39-4-4] related to the CHINS proceeding, except for any dispositional or review reports contained in the record to which the party was denied access. See also **N.W. v. Madison Co. Dept. of Public Welfare**, 493 N.E.2d 1256 (Ind. Ct. App. 1986) (right of Mother to discover police reports related to Father's alleged abuse of child).

IV. I. Access to Child Abuse/Neglect Reports, Identity of Reporters, and DCS Records

IC 31-33-18-4 requires DCS to give verbal and written notice to the parents, guardian, or custodian of a child being assessed for child abuse or neglect that they can obtain reports and court records arising from the investigation. A reasonable copying cost may be charged. See **F.D. v. Indiana Dept. of Child Services**, 1 N.E.3d 131, 140 (Ind. 2013), in which the Indiana Supreme Court reversed the trial court's order of summary judgment in favor of DCS in a lawsuit brought by Parents. Parents alleged negligence by DCS in failing to inform Parents that their nephew had admitted to molesting one of their two-year-twin daughters.

IC 31-33-18-2(8) grants access to DCS records for "each" parent, guardian, custodian, or other person who is responsible for the welfare of a child named in a report or record, with protection for the identity of reporters and other appropriate individuals. This right also allows an attorney who is representing a parent, guardian, or custodian to have access to DCS records. The parent, guardian, or custodian could possibly obtain the identity of "reporters and other appropriate individuals" by moving the court under IC 31-33-18-2(9) for an in camera inspection of DCS records. The movant could argue that disclosure of these identities is necessary for a just resolution of the issues pending before the court. In **Doe v. Indiana Dep't. of Child Services**, ___N.E.3d___ (Ind. 2017), the Indiana Supreme Court affirmed the trial court's summary judgment for DCS in a lawsuit filed by a child abuse/neglect reporter because DCS released his

identity to the children's parents, which resulted in harassment to the reporter and his family. See Chapter 4 at I.E. for additional information.

Case law has addressed discovery of DCS records in the context of prosecution of parents, stepparents, and others for criminal acts against children and offenses related to child pornography. See **Lewis v. State**, 726 N.E.2d 836, 843-44 (Ind. Ct. App. 2000) (trial court within its discretion to conduct in camera review of child victim's diary entries held by the welfare department to determine need for disclosure of entries to defendant in child pornography prosecution, and to deny access to most diary entries), *trans. denied*; **Pilarski v. State**, 635 N.E. 2d 166, 171-72 (Ind. 1994) (trial court properly granted welfare department's motion to quash discovery of welfare reports following in camera review of records which indicated no exculpatory material); **Sturgill v. State**, 497 N.E.2d 1070, 1073 (Ind. Ct. App. 1986) (trial court should have conducted in camera inspection of child's statements in welfare record to determine whether any of the statements would benefit the defendant Stepfather's case).

IC 31-33-22-3 allows parents and others falsely accused of child abuse or neglect to: (1) access reports of child abuse and neglect; (2) seek attorney fees in successful civil suits for false reporting; (3) file a complaint with the prosecutor alleging that the person is a victim of a knowing, intentional false report of child abuse or neglect. In **Kinder v. Doe**, 540 N.E.2d 111 (Ind. Ct. App. 1989), a civil action for malicious reporting of child abuse, the Court indicated the right of a parent to obtain the identity of a person reporting child abuse or neglect in very limited situations.

IC 31-33-26-8(a) and (b) state that, unless a court has determined that the child is a CHINS based on a substantiated DCS assessment or on evidence consistent with the assessment that is presented at the CHINS hearing, DCS must notify the child victim's parent, guardian, or custodian and the identified perpetrator within thirty days of the entry of a substantiated child abuse or neglect assessment into the Child Protection Index. IC 31-33-26-8(c)(1) and (2) state that a parent, guardian, or custodian and any person other than a parent, guardian, or custodian who has been identified as a perpetrator of child abuse or neglect may request an administrative hearing to demonstrate why the substantiated assessment should be amended or expunged. IC 31-33-26-8(c)(3) states the administrative hearing must be requested within thirty days of receiving the DCS notice. The administrative hearing shall be stayed if there is a pending CHINS case or if criminal charges are filed against the perpetrator based on the same facts and circumstances on which DCS classified the report as substantiated. See IC 31-33-26-11, IC 31-33-26-12, and Chapter 4 at V.A. and B. for further discussion.

IV. J. Fifth Amendment Privilege Against Self-Incrimination

IC 31-34-4-6 requires DCS to give a written notice to the parent, guardian or custodian of the child of the "right not to make statements that incriminate the parent, custodian, or guardian and that an incriminating statement may be used during a court proceeding on a petition alleging that the child is a child in need of services." This statute appears to create a right to remain silent in CHINS proceedings, but it is unclear how this statute will affect the admissibility of statements made in CHINS proceedings into subsequent criminal proceedings against the parent.

In **Baltimore City Dept. of S.S. v. Bouknight**, 493 U.S. 549, 110 S. Ct. 900 (1990), the U. S. Supreme Court affirmed a juvenile court order requiring a mother to produce her child, against the mother's objection that production would violate her Fifth Amendment privilege against self-incrimination. The Court found that the state's regulatory scheme of protecting children was non-criminal in nature, and that a person could not invoke the Fifth Amendment to avoid the purposes of the non-criminal regulatory scheme.

In Re A.G., 6 N.E.3d 952 (Ind. Ct. App. 2014), is a CHINS case where Mother had been diagnosed with Factitious Disorder by Proxy and the psychiatrist determined that Mother's two children were not safe in Mother's care. Among the trial court's findings and conclusions in its order adjudicating Mother's two children to be CHINS was that Mother's refusal to testify in the State's case in chief drew a negative inference that Mother was concerned about incriminating herself, which was further evidence of Mother's guilt. Mother's sole contention on appeal was that the trial court erred when it drew a negative inference from her invocation of her Fifth Amendment right not to testify. The Court cited Gash v. Kohm, 476 N.E.2d 910, 913 (Ind. Ct. App. 1985), in which the Court opined that the privilege against self-incrimination does not prohibit the trier of fact in a civil case from drawing adverse inference from a witness's refusal to testify. A.G. at 957. The Court found that Mother did not support her contention that a CHINS proceeding should be distinguished from other civil proceedings with cogent argument or citations to the record; thus Mother's issue was waived. Id. at 958.

In **Everhart v. Scott County Office of Family**, 779 N.E.2d 1225 (Ind. Ct. App. 2002), *trans. denied*, a termination case, Father asserted that his right to due process had been violated because OFC offered him counseling services while criminal charges for child physical abuse were pending against him and then used his Fifth Amendment invocation during counseling sessions to show that he had no interest in his children. Father chose not to discuss any information with the social worker which related to the criminal child abuse incidents due to concerns that the statements would be used against him in a pending criminal proceeding. The Court opined that any violation of due process which Father may have suffered by his invocation of his Fifth Amendment right against self-incrimination was harmless because: (1) lack of communication between Father and counselor played a minor role in decision to file termination petition but did not weigh heavily in the decision; and (2) several other factors were considered in the decision to seek termination, including the requirement that a termination hearing be held due to the length of time the children had been out of the parents' home. Id. at 1232. See also **E.P. v. Marion Cty. Office of Fam. & Child.**, 653 N.E.2d 1026, 1029 (Ind. Ct. App. 1995).

See Chapter 4 at III.F. for discussion on Miranda warnings by caseworkers and Chapter 4 at IV.D.2. for discussion on CHINS and criminal prosecution in child abuse and neglect.

V. SUBSTANTIVE DUE PROCESS RIGHTS OF PARENTS

The right of the parent to the care and custody of the child without state interference has been referred to as a natural right, a liberty interest, a privacy interest, and the right to family integrity. The constitutional basis generally given for the substantive due process rights of parents is the right to liberty. The following excerpts from Indiana cases cite or quote major U.S. Supreme Court cases on the fundamental rights of parents.

V. A. Right to Care and Custody of the Child

In **Wardship of Nahrwold v. Dept. of Public Welfare**, 427 N.E.2d 474, 477 (Ind. Ct. App. 1981), the Court quoted extensively from Quilloin v. Walcott, 434 U.S. 246, 255, 98 S. Ct. 549, 554 (1978) on the right to parent, in which the U.S. Supreme Court stated:

> "We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected. See, e.g., Wisconsin v. Yoder, 406 U.S. 205, 231-233, 92 S. Ct. 1526, 1541-42, 32 L. Ed. 2d 15 (1972); Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972) supra; Meyer v. Nebraska, 262 U.S. 390, 399-401, 43 S. Ct. 625, 626-27, 67 L. Ed. 1042 (1923). 'It is cardinal with us that the custody, care and

> nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' Prince v. Massachusetts, 321 U.S. 158, 166, 64 S. Ct. 438, 442, 88 L. Ed. 645 (1944). And it is now firmly established that 'freedom of personal choice in matters of...family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.' Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639-640, 94 S. Ct. 791,796, 39 L. Ed. 2d 52 (1974)."

In summarizing the U.S. Supreme Court cases on the right to parent, the Indiana Court of Appeals stated in Nahrwold at 477:

> In other words, a parent has a fundamental right to raise her child without undue interference by the state, and the parent-child relationship includes a parent's right to have unrestrained custody of her child. Of course, these rights are balanced against the parental duty to provide for the physical and mental well- being of one's children.

In **In Re F.S.**, 53 N.E.3d 582 (Ind. Ct. App. 2016), the Court explained that: (1) substantive due process ensures that state action is not arbitrary or capricious regardless of the procedures used; (2) an arbitrary and capricious decision is made without consideration of the facts and in total disregard of the circumstances and lacks any basis which might lead a reasonable person to the same conclusion; (3) to state a claim for a violation of substantive due process, a party must show that the law infringes upon a fundamental right or liberty interest deeply rooted in our nation's history or that the law does not bear a substantial relation to permissible state objectives (multiple citations omitted). Id. at 591-92.

In **J.T. v. Marion County OFC**, 740 N.E.2d 1261 (Ind. Ct. App. 2000), the Court noted that the parental interests implicated in a termination case are "substantial." The Court stated:

> Specifically, the action involves a parent's interest in the care, custody, and control of his children, 'perhaps the oldest of the fundamental liberty interests' recognized by the United States Supreme Court. Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 2060, 147 L. Ed 2d 49 (2000), [ruling that Washington State grandparent visitation statute violated parent's constitutionally protected interests].
> Id. at 1264.

The following termination cases discuss the constitutional dimension of parents' rights pursuant to the Fourteenth Amendment. The cases also state that parental rights may be terminated when the parents are unable or unwilling to meet their parental responsibilities. See **Termination of Parent-Child Relationship of R.S.**, 56 N.E.3d 625, 628 (Ind. Ct. App. 2016); **In Re E.M.**, 4 N.E.3d 636, 648 (Ind. 2014); **In Re N.Q.**, 996 N.E.2d 385, 391 (Ind. Ct. App. 2013); **K.T.K. v. Indiana Dept. of Child Services**, 989 N.E.2d 1225, 1230 (Ind. 2013); **Bester v. Lake County Office of Family**, 839 N.E.2d 143, 147 (Ind. 2005); **In Re A.I.**, 825 N.E.2d 798, 804-05 (Ind. Ct. App. 2005), *trans. denied*; **Termination of Parent-Child Rel. of L.V.N.**, 799 N.E.2d 63, 68-69 (Ind. Ct. App. 2003); **In Re J.W.**, 779 N.E.2d 954, 959 (Ind. Ct. App. 2002), *trans. denied*; **A.F. v. MCOFC**, 762 N.E.2d 1244, 1250 (Ind. Ct. App. 2002), *trans. denied*; **Carrera v. Allen County OFC**, 758 N.E.2d 592, 594 (Ind. Ct. App. 2001).

In **In Re M.S.**, 999 N.E.2d 1036 (Ind. Ct. App. 2013), the Court concluded that the trial court's placement of the child with Father in the State of Washington was not error. Id. at 1041. The child had been adjudicated a CHINS due to Mother's drug use and neglect. Father was in military

service in the State of Washington and indicated that he was willing and able to care for the child, so the trial court placed the child with Father at an initial and detention hearing and continued the child's placement with Father at the dispositional hearing. Shortly thereafter, the trial court dismissed the CHINS case on DCS's motion after a social work agency in Washington found that Father's home was adequate, the child was well-adjusted, and the child wanted to remain with Father. The Court believed that the legal presumption in favor of natural parents lent strong support to the trial court's decision to place the child with Father. Id. at 1040.

V. B. Right to Family Integrity

The constitutionally protected interest in family integrity was addressed in **Parker v. Dept. of Public Welfare**, 533 N.E.2d 177, 179 (Ind. Ct. App. 1989). In that case the Court affirmed the CHINS judgment and reiterated the limitations on the fundamental right to family integrity. In **Matter of E.M.**, 581 N.E.2d 948 (Ind. Ct. App. 1991), the Court reversed the CHINS judgment and stated that the trial court's finding of "inappropriate parenting" was not sufficient to support intervention by the state and it "invaded Anita's [Mother's] fundamental right to raise [E.M.] without undue interference by the state." Id. at 954. The Court noted limitations on the state's ability to interfere with the family. Id. at 953.

In **Matter of S.G. v. Indiana Dept. of Child Services**, 67 N.E.3d 1138 (Ind. Ct. App. 2017), the Court affirmed the trial court's determination that DCS did not need to undertake reasonable efforts to reunify Mother with four of her children. Id. at 1147. Mother had given birth to ten children. There had been eleven separate CHINS cases involving Mother's children. Mother's parental rights had been involuntarily terminated to two of her children, and the children were adopted. In the instant CHINS case on four of Mother's children, the trial court heard evidence and entered a No Reasonable Efforts order pursuant to IC 31-34-21-5.6(b)(4). Mother claimed that the No Reasonable Efforts Statute violated her substantive due process rights under the Indiana and U.S. Constitutions because it infringed upon her right to family integrity. Quoting G.B. v. Dearborn Cty. Div. of Fam. & Child. 754 N.E.2d 1027, 1031, (Ind. Ct. App. 2001), *trans. denied*, the Court said that in order to succeed on her claim, Mother "must show that the [Statute] infringes upon a fundamental right or liberties deeply rooted in our nation's history or that the law does not bear a substantial relation to permissible state objectives." S.G. at 1145. The Court explained that because our courts have long recognized that parents' rights to raise their children are within the Fourteenth Amendment, the No Reasonable Efforts Statute "must serve a compelling state interest and be narrowly tailored to serve that interest." G.B. at 1032. S.G. at 1145. The Court noted the Court's conclusion in G.B. that the No Reasonable Efforts Statute served the State's compelling interest of protecting children from parental abuse and neglect, is narrowly tailored to meet the compelling interest it is intended to serve, and "is not more intrusive than necessary to protect the welfare of children" because it "include[s] only those parents who have had at least one chance to reunify with a different child through the aid of governmental resources and have failed to do so." G.B. at 1032. S.G. at 1145.

In **In Re Z.C.**, 13 N.E.3d 464 (Ind. Ct. App. 2014), *trans. denied*, Mother misrepresented the identity of the child's putative father to the Court and DCS during the CHINS case because Father was incarcerated and she thought it would look worse for her if she named an incarcerated man as the child's father. In her appeal of the subsequent order terminating her parental rights, Mother asserted that a number of procedural irregularities as to Father violated her due process rights to family integrity. The Court declined to find a due process violation, as it was Mother who misled the trial court regarding Father's identity for over six months. Id. at 470. The Court said that Mother could not assert error in the termination of her rights based on an alleged denial of due process to Father. Id. Quoting Rumple v. Bloomington Hospital, 422 N.E.2d 1309, 1314

(Ind. Ct. App. 1981), the Court noted that litigants are normally barred "from asserting the rights or legal interests of others in order to obtain relief from injury themselves." Z.C. at 470.

In **In Re S.D.**, 2 N.E.3d 1283 (Ind. 2014), the Indiana Supreme Court reversed the trial court's CHINS adjudication of a two-year-old child with special medical needs whose Mother had not completed the required medical training on caring for the child's tracheostomy. Id. at 1291. The medical training, a 24-hour home care simulation, was the last step required by Riley Hospital before the child could be returned to Mother's home. The two-year-old child's four older siblings had been returned to Mother's care at the time of the CHINS factfinding hearing. Wardship was released, and the case was closed as to the siblings. The Court opined that the evidence could not reasonably support an inference that Mother was likely to need the court's *coercive intervention* to complete the last step of medical training, and, when that coercion is not necessary, the State may not intrude into a family's life (emphasis in opinion). Id. at 1290.

Three Appellate cases have addressed parents' due process rights and the right to family integrity arguments pertaining to IC 31-33-8-7(d) and (e). This statute allows DCS, in the course of conducting an assessment of reported abuse or neglect, to petition the court for an order requiring the custodial parent, guardian, or custodian to make the child available to be interviewed. The court may order the interview after notice to the custodial parent, guardian, or custodian and a hearing if the court finds that the custodial parent, guardian, or custodian has been informed of the hearing and DCS has made reasonable and unsuccessful efforts to obtain the consent of the custodial parent, guardian, or custodian to the interview. The three opinions provide different perspectives on the issue, and are not completely in agreement. In **In Re F.S.**, 53 N.E.3d 582 (Ind. Ct. App. 2016), the Court reversed the trial court's order requiring Mother to allow the Crawford County local DCS to interview her two oldest children as part of a child abuse and neglect assessment. Id. at 585. The Court reviewed IC 31-33-8-7 and IC 31-32-13, "which addresses juvenile court procedures generally and the issuance of orders specifically," and stated that the statutes require DCS to show some evidence suggesting abuse or neglect before the trial court may issue such an order. Id. at 589, 599. In **In Re A.H.**, 992 N.E.2d 960 (Ind. Ct. App. 2013), *trans. denied*, the Court affirmed the trial court's order granting DCS's petitions to interview Mother's children, which were filed pursuant to IC 31-33-8-7(d) and (e). Id. at 968. The Court recognized the fundamental right of a parent to raise her child without undue influence by the state. Id. at 966. The Court could not say that due process requires DCS to conduct an assessment or part of an assessment to obtain information which provides a factual basis supporting the accuracy of a child abuse or neglect report prior to interviewing the child(ren). Id. at 967. In **In Re G.W.**, 977 N.E.2d 381 (Ind. Ct. App. 2012), *trans denied*, the Court affirmed the trial court's order requiring Mother to make her nine-year-old daughter (Daughter) available for an interview requested by DCS at Susie's Place, a Child Advocacy Center. Id. at 387. Daughter was not the subject of a child abuse report, which involved allegations that Mother's twelve-year-old daughter had been touched inappropriately by Stepfather, including allegations of sexual intercourse. The Court found that IC 31-33-8-7(d) specifically contemplates that DCS may interview other children in the home to determine their condition. Id. at 386.

In **In Re Adoption of C.B.M.**, 992 N.E.2d 687 (Ind. 2013), the Indiana Supreme Court concluded that the trial court abused its discretion by refusing to set aside the adoption of two children who were adopted by their foster parents after Natural Mother's parental rights had been involuntarily terminated. Id. at 695. After the adoption was granted, the Court of Appeals reversed the termination judgment in Moore v. Jasper Cnty. Dep't. of Child Servs., 894 N.E.2d 218 (Ind. Ct. App. 2008). In the C.B.M. opinion, the Indiana Supreme Court said that, since the only judicial determination that Natural Mother was unfit to retain her parental rights had been

overturned on appeal, letting the adoption stand would be an overreach of State power into family integrity. Id.

In **In Re K.D.**, 962 N.E.2d 1249 (Ind. 2012), the Indiana Supreme Court reversed the trial court's CHINS determination and remanded the case to the trial court to provide Stepfather with a factfinding hearing. Mother had admitted to the CHINS allegations, but Stepfather had denied that the children were CHINS. The trial court held a contested dispositional hearing for Stepfather but did not hold a factfinding hearing for him. The Court held that, under these facts, the contested dispositional hearing did not provide Stepfather due process because he was not given an opportunity to contest the CHINS allegations. Id. at 1258.

In **In Re T.N.**, 963 N.E.2d 467 (Ind. 2012), the Indiana Supreme Court held that the trial court erred in not conducting a contested factfinding hearing that had been requested by Father and, thus, violated his due process rights. Id. at 469.

In **In Re T.H.**, 856 N.E.2d 1247 (Ind. Ct. App. 2006), the Court reversed the CHINS adjudication, holding that the trial court's findings and conclusions did not support any determination that Father neglected, abused, or abandoned, his children, nor that the children's physical or mental conditions were seriously endangered by Father's acts or inaction. Id. at 1250. The Court discussed the fundamental right to family integrity recognized by the U.S. Constitution. This protected freedom of choice includes "the parent's right to raise [his or] her child without undue interference by the state." Matter of E.M., 581 N.E.2d 948, 952 (Ind. Ct. App. 1991), *trans. denied*. T.H. at 1250. The Court opined that, except for a gun storage issue which had been addressed through a safety plan prepared by the OFC caseworker, the only evidence was that Father was an acceptable parent to his children. Id. at 1251.

In **G.B. v. Dearborn Cty. Div. of Fam. & Child.**, 754 N.E.2d 1027 (Ind. Ct. App. 2001), *trans. denied*, a CHINS case, the trial court ruled, after a hearing, that reasonable efforts to reunify and preserve the family were not required pursuant to IC 31-34-21-5.6. because the court had previously terminated Parents' rights to three other children. Parents appealed, arguing that the statute was unconstitutional because it violated their substantive due process rights by infringing on their fundamental right to family integrity. The Court strictly construed the statute, and found that the statute was not more intrusive than necessary to protect the welfare of children. Id. at 1032. The Court opined that the statute is narrowly tailored to include only those parents who have had at least one chance to reunify with a different child through the use of governmental resources and have failed to do so. Id. Because IC 31-34-21-5.6 serves a compelling state interest and is narrowly tailored to serve that interest, it does not violate parents' substantive due process under the Indiana and U.S. Constitutions. Id.

In **James v. Pike County**, 759 N.E.2d 1140 (Ind. Ct. App. 2001), Mother contended that Indiana's termination statute violated her substantive due process rights under the Fourteenth Amendment. She asserted that the statute violated her fundamental right to maintain a legal relationship with her children, contending that the State was not justified in seeking to terminate her parental rights because the children were in a loving home with a relative. The Court disagreed, citing its decision in Phelps v. Sybinksy, 736 N.E.2d 809 (Ind. Ct. App. 2001), *trans. denied*. The Court concluded that the Indiana termination statute does not violate federal law. James at 1142.

In **Trammell v. State**, 751 N.E.2d 283, 289-90 (Ind. Ct. App. 2001), a criminal neglect case, the Court decided, as a matter of first impression, that the trial court's order to the defendant Mother

that she not become pregnant while on probation excessively impinged on her Fourteenth Amendment privacy right of procreation and served no discernible rehabilitative purpose.

In **In Re A.H.**, 751 N.E.2d 690 (Ind. Ct. App. 2001), in which the child was found to be a CHINS due to sexual abuse by Father, the parents and child appealed the dispositional requirements that they undergo evaluations and that the father remain away from the home. Their arguments that the dispositional orders unnecessarily disrupted family life were unsuccessful. The Court opined that the evidence and findings supported the trial court's orders; therefore, the orders were not clearly erroneous. Id. at 699-700.

The following termination cases discuss the importance of the right to family integrity: **Termination of Parent-Child Relationship of R.S.**, 56 N.E.3d 625, 628 (Ind. 2016) (because parent-child relationship is "one of the most valued relationships in our culture," Indiana statutes set a high bar for severing this constitutionally protected relationship); **In Re V.A.**, 51 N.E.3d 1140, 1144 (Ind. 2016) (certainty of trial court's decision to terminate a parent's parental rights to his or her child is paramount); **In Re N.Q.**, 996 N.E.2d 385, 391 (Ind. Ct. App. 2013) (involuntary termination of parental rights is the most extreme measure that court can impose and is designated as last resort when all other reasonable efforts have failed; this policy recognizes the Fourteenth Amendment, which provides parents with the right to establish home and raise children); **In Re S.S.**, 990 N.E.2d 978, 984 (Ind. Ct. App. 2013) (Courts have repeatedly recognized that parents' interest in the care, custody, and control of their children is one of the most valued relationships in our society); **C.T. v. Marion Cty. Dept. of Child Services**, 896 N.E.2d 571, 588 (Ind. Ct. App. 2008) (Court cautioned MCDCS that a juvenile court's determination that reunification services are no longer required neither abolishes a parent's fundamental right to family integrity nor absolves MCDCS of its responsibility to properly oversee and manage the case), *trans. denied;* **Rowlett v. Office of Family and Children**, 841 N.E.2d 615, 623 (Ind. Ct. App. 2006) (law makes it abundantly clear that termination is an extreme measure to be used only as a last resort when all other reasonable efforts to protect the integrity of the natural relationship between parent and child have failed), *trans. denied*; **Stewart v. Randolph County OFC**, 804 N.E.2d 1207, 1210 (Ind. Ct. App. 2004) (choices about marriage, family life, and the upbringing of children are among the associational rights the U.S. Supreme Court has ranked as of basic importance in our society and are rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect), *trans. denied*; **In Re W.B.**, 774 N.E.2d 522, 528 (Ind. Ct. App. 2002) (Fourteenth Amendment shields private family matters, such as child rearing, from unwarranted state intrusion).

V. C. State Policy and Statutory Rights Encouraging Family Life

The policy of the juvenile code promotes family integrity. IC 31-10-2-1(4) and (6) provide that it is the policy of this state "to strengthen family life by assisting parents to fulfill their parental obligations" and "to remove children from their families only when it is in the child's best interest or in the best interest of public safety." The statutory guidelines direct the court to issue dispositional orders that "least" interfere with and "least" disrupt family life, when consistent with the safety of the community and welfare of the child. IC 31-34-19-6. The protective custody statute authorizes emergency custody of the child without a court order, only when provision of services to the family cannot adequately assure the safety of the child in his/her home. In **In Re J.B.**, 61 N.E.3d 308 (Ind. Ct. App. 2016) (opinion on rehearing), the Court reversed the CHINS court's order which discharged the parties and terminated the CHINS case. Id. at 313-14. The Court opined that in this case the goal of the CHINS statutory scheme was not furthered. Id. at 313. The Court looked to IC 31-10-2-1 and noted that state policy and the purpose of Title 31 is to "strengthen family life by assisting parents to fulfill their parental obligations" and to "provide a continuum of services developed in a cooperative effort by local governments and the state."

Id. at 312. The Court found that DCS used the coercive power of the State to insert itself into a family relationship by obtaining a CHINS finding, had the CHINS court modify sole custody to Father, and closed the CHINS case thirty days later, without entering a dispositional decree and giving Mother a meaningful opportunity to participate in services. Id. at 313.

V. D. Protected Rights in Termination of Parental Rights Cases

These significant U.S. Supreme Court opinions on termination of parental rights which discuss the substantive rights of parents in the context of determining entitlement to procedural protections: **Lassiter v. Dept. of Social Services**, 452 U.S. 18, 101 S. Ct. 2153 (1981) (due process does not mandate appointment of counsel for parents in all termination cases); **Santosky v. Kramer**, 455 U.S. 745, 102 S. Ct. 1388 (1982) (clear and convincing evidence standard of proof required in termination hearings); and **M.L.B. v. S.L.J.**, 519 U.S.102, 117 S. Ct. 555 (1996) (right of indigent parent to obtain transcript for appeal of termination judgment). In addition to these Supreme Court cases, a host of other constitutional cases are quoted in Indiana termination cases regarding the substantive rights of parents. Despite the apparent strength of parental rights, it is significant to note that U.S. Constitutional law and Indiana case law continually clarify that the parent's right to the care and custody of the child is subordinated to the interests of the child. See **E.P. v. Marion Cty. Office of Fam. & Child.**, 653 N.E. 2d 1026, 1032 (Ind. Ct. App. 1995).

In **In Re K.T.K.**, 989 N.E.2d 1225, 1230 (Ind. 2013), a termination of parental rights case, the Indiana Supreme Court said:

> The Fourteenth Amendment to the United States Constitution protects the traditional right of parents to establish a home and raise their children." Id. at 147 (citing Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Neb., 262 U.S. 390, 399 (1923)). The parent-child relationship is "one of the most valued relationships in our culture." In re I.A., 934 N.E.2d at 1132 (quoting Neal v. Dekalb Cnty. Div. of Family & Children, 796 N.E.2d 280, 285 (Ind. 2003). And a parent's interest in the upbringing of their child is "perhaps the oldest of the fundamental liberty interests recognized by th[e] [c]ourt[s]." Troxel v. Granville, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). We also recognize, however, that parental interests are not absolute. In re G.Y., 904 N.E.2d at 1259. "[C]hildren have an interest in terminating parental rights that prevent adoption and inhibit establishing secure, stable, long-term, continuous relationships." In re C.G., 954 N.E.2d 910, 917 (Ind. 2011) (citing Lehman v. Lycoming Cnty. Children's Servs. Agency, 458 U.S. 502, 513, 102 S.Ct. 3231, 73 L.Ed.2d 928 (1982)). Consequently, a parent's interests must be subordinated to the child's interests when considering a State's petition to terminate parental rights. In re G.Y., 904 N.E.2d at 1259. Accordingly, "[p]arental rights may be terminated when the parents are unable to unwilling to meet their parental responsibilities" by failing to provide for the child's immediate and long-term needs. In re I.A., 934 N.E.2d at 1132 (alteration in original) (quoting In re D.D., 804 N.E.2d 258, 265 (Ind. Ct. App. 2004), *trans. denied*).

In **Matter of Adoption of Topel**, 571 N.E.2d 1295, 1298 (Ind. Ct. App. 1991), an adoption case, the Court stated that:

> The right to raise one's child is an essential and basic right more precious than property rights and is within the protection of the Fourteenth Amendment to the United States Constitution.

Id. at 1298.

V. E. Right of Parents to Services under Federal and State Law

The Adoption Assistance and Child Welfare Act of 1980 and the Adoption and Safe Families Act of 1997 require that states which receive federal child welfare reimbursement must exert reasonable efforts to preserve and reunite families, unless an exception applies. This federal legislation was intended to ensure that parents received rehabilitation services and other assistance necessary to avoid removing children from the home or to facilitate reunification

The right to specialized services for disabled parents in CHINS cases was discussed in **Stone v. Daviess Co. Div. Child Serv.**, 656 N.E.2d 824 (Ind. Ct. App. 1995). In that case the Court ruled that the federal Americans with Disabilities Act (ADA) was not applicable to a termination of the parent-child relationship case. Id. at 830. The Court clarified that once the Office of Family and Children elects to provide services during the CHINS proceedings to assist parents in improving parental skills, the provision of those services in the CHINS case must be in compliance with the ADA. Id. In the context of a CHINS proceeding, the ADA requires that the Office of Family and Children reasonably accommodate a parent's disability. Id. The Court found that necessary accommodations were made based upon testimony from caseworkers and others that they were aware of the parents' cognitive limitations and tailored their services to meet the special needs of the parents. Id. at 831.

In **N.C. v. Indiana Dept. of Child Services**, 56 N.E.3d 65 (Ind. Ct. App. 2016), *trans. denied*, the Court declined to abandon its prior holding in **Stone v. Daviess Co. Div. Child Serv.**, 656 N.E.2d 824, 830 (Ind. Ct. App. 1995) on the application of the ADA to termination proceedings. N.C. at 70.

In Re R.H., 55 N.E.3d 304 (Ind. Ct. App. 2016) was Mother's appeal of CHINS court orders which found that DCS need not make reunification efforts, suspended Mother's visitation with her child, and changed the permanency plan from reunification to adoption. Mother claimed that DCS had unlawfully discriminated against her, and argued that she was entitled to reasonable accommodations under the Americans with Disabilities Act (ADA) and the Rehabilitation Act (RA) for her undiagnosed disabilities. The Court opined that, if Mother had a disability and was otherwise eligible to receive services, then DCS must provide her with reasonable accommodations when providing those services. Id. at 310. The Court noted testimony by Mother's therapist reflected that reasonable accommodations were provided while Mother was receiving services, and Mother did not contest this conclusion. Id. Quoting Stone v. Daviess Co. Div. Child Serv., 656 N.E.2d at 830, the Court noted that "[T]he ADA was not intended ipso facto to rewrite state substantive law." R.H. at 310. The Court found the juvenile court's determination was not based on Mother's disability but rather was properly based on IC 31-34-21-5.6(b)(4), which states that reasonable efforts to reunify a parent and child are not required if the "parental rights of a parent with respect to a biological or adoptive sibling of a child who is a child in need of services have been involuntarily terminated by a court order." Id. at 309-11. See also **In Re E.E.**, 736 N.E. 2d 791, 796 (Ind. Ct. App. 2000) (non-compliance with ADA is not a matter for the termination petition).

Although Indiana is committed by policy and statute to providing reunification services to families, proof of service delivery is not required as an element of the termination petition. This

is clearly expressed in **Jackson v. Madison County Dept. of Family**, 690 N.E.2d 792 (Ind. Ct. App. 1998):

> It is certainly true that under the policy pronouncements inherent in the entire scheme of CHINS procedures, a primary purpose and function of the Department is to encourage and support the integrity and stability of an existing family environment and relationship. See IC 31-34-15-4, 31-34-18-4, 31-34-19-6, 31-34-20-1 and 31-34-20-3. However, the provision of services and counseling designed to further that purpose is no longer an absolute requirement to a termination of parental rights. ... A parent may not sit idly by for such an extended period without asserting a need and desire for services and then successfully argue that she was denied services to assist her with her parenting. To the extent that Jackson [mother] is claiming that the Department failed to establish that the conditions which resulted in the CHINS removal would not be remedied, the burden was upon her to show that, prior to the filing of a termination petition, she sought services from the Department and was denied.

Id. at 793.

Jackson is in accord with cases which clarify that proof of service delivery is not a necessary element in the termination case, but the case law also indicates that the offer of services, and how parents respond to those services, is relevant.

In **In Re J.C.**, 994 N.E.2d 278 (Ind. Ct. App. 2013), the Court affirmed termination of Mother's parental rights to her three children, finding that DCS presented sufficient evidence that the conditions which resulted in the children's removal would not be remedied. Id. at 290. Mother argued that DCS did not present sufficient evidence to support the trial court's findings because DCS provided inadequate services to her in the CHINS proceeding. The Court said that it was unable to address the adequacy of the services offered to Mother during the CHINS proceeding because that issue is unavailable during an appeal following termination of parental rights. Id. at 287.

In **Prince v. Department of Child Services**, 861 N.E.2d 1223 (Ind. Ct. App. 2007), the Court affirmed the termination judgment and rejected the suggestion that the responsibility for Mother's failure to achieve and maintain sobriety in a timely fashion belonged to either the trial court or DCS. The Court stated that it would not place a burden on either DCS or the trial court to monitor treatment and to continually modify the requirements for drug and alcohol treatment until the parent achieves sobriety. Id. at 1231. The Court said that, if the parent feels the services ordered by the court are inadequate to facilitate the changes required for reunification, then the onus is on the parent to request additional assistance from the court or DCS. Id. The Court indicated that it is not apparent why a parent could not make such requests well before the termination petition is filed. Id. at 1231 n.4.

In **C.T. v. Marion Cty. Dept. of Child Services**, 896 N.E.2d 571 (Ind. Ct. App. 2008), *trans. denied*, a termination case, Mother and Father had previously had their parental rights terminated to their four older children. On the motion of Marion County DCS (MCDCS) in the CHINS case, the juvenile court determined, after a hearing, that reasonable efforts to reunify the child with the family were not required pursuant to IC 31-34-21-5.6. On appeal of the termination order, Mother complained that once the juvenile court had made this determination, MCDCS had failed to perform basic case management tasks. Although the Court found the evidence sufficient to support termination of Mother's parental rights, the Court stated its agreement with Mother that a parent's constitutionally protected right to raise her own children did not "evaporate" once a court determined that a county department of child services is no longer required to make reasonable

efforts to reunify the family. Id. at 583. The Court specifically cautioned MCDCS that a juvenile court's determination that reunification services are no longer required pursuant to IC 31-34-21-5.6 neither abolishes a parent's fundamental right to family integrity, nor absolves MCDCS of its responsibility to properly oversee and manage the case. Id. at 588.

In **In Re Parent-Child Relationship of S.M.**, 840 N.E.2d 865 (Ind. Ct. App. 2006), a termination case, the Putative Father (Father), who lived in Illinois, argued that he should not be held accountable for his failure to participate in services because DCS was not sufficiently diligent in attempting to arrange services. Father seemed to suggest a duty on the part of DCS to coordinate services for out-of-state putative fathers with out-of-state service providers, but provided no authority to support this suggestion. The Court held that DCS had adequately informed Father with the information he needed to take steps toward becoming a parent to the child, and he declined to make use of the information. Id. at 869-70. The Court could not say that the juvenile court erred in determining that there was a reasonable probability that the conditions resulting in the child's removal would not be remedied, and the termination was affirmed. Id. at 870-72.

In **Stewart v. Randolph County OFC**, 804 N.E.2d 1207 (Ind. Ct. App. 2004), *trans. denied*, a termination case, Mother argued that OFC had not made every reasonable effort to maintain the parent-child relationship because OFC failed to offer her assistance through the Wraparound program. In direct contradiction to the testimony of Mother's therapist who recommended the Wraparound program, the OFC family case manager testified that OFC had been providing essentially the same services as Wraparound to Mother and the children, but Mother still missed appointments and failed to keep the house consistently clean. The Court opined that the evidence supported the trial court's determination that all reasonable efforts had been made to avoid termination of Mother's parental rights. Id. at 1214.

In **In Re E.S.**, 762 N.E.2d 1287 (Ind. Ct. App. 2002), the Court reversed the termination judgment, and agreed with Mother's contention that OFC did not provide sufficient evidence to support a finding that the conditions which resulted in the child's removal or the reasons for placement outside Mother's care would not be remedied. Id. at 1291. The Court noted that OFC did not provide Mother with any services or conduct any type of evaluation of the progress Mother was making in counseling. Id. at 1291. The Court found that, even though the OFC did not mandate that Mother obtain services, she actively sought assistance on her own, including regularly attending counseling and parenting classes. Id.

Several termination of the parent-child relationship cases discuss DCS's offer of services in situations where parents were incarcerated. See **In Re J.E.**, 45 N.E.3d 1243, 1248 (Ind. Ct. App. 2015) (Court was not persuaded by incarcerated Father's claim that outcome of termination case turned on resolution of dispute between Father and case manager about whether Father was aware of services; Court noted law does not require DCS to offer services to parent; termination judgment affirmed); **In Re B.H.**, 44 N.E.3d 745, 752 n.3 (Ind. Ct. App. 2015) (Court opined that, to extent Father agued reversal of termination order was warranted because DCS did not provide him with services during his incarceration, it is well established that DCS is not required to provide services before commencing termination proceedings; termination order affirmed), *trans denied*; **In Re R.A.**, 19 N.E.3d 313, 321 (Ind. Ct. App. 2014) (Court reversed termination judgment; Father learned of his paternity of child while in jail awaiting a criminal trial and agreed to participate in services after release; termination petition was filed while Father remained in jail awaiting trial); **In Re H.L.**, 915 N.E.2d 145, 148 (Ind. Ct. App. 2009) (Father had been incarcerated in county jails in three different counties; DCS was unable to offer services to or fully evaluate Father to determine what services were needed; the inability to provide services in

such circumstances did not amount to denial of due process; termination judgment affirmed); **Hite v. Vanderburgh Cty Office Fam. & Chil.**, 846 N.E.2d 175, 184 (Ind. Ct. App. 2006) (Father's expected release date was over two years after termination trial and he could not participate in OFC's services due to his incarceration; termination judgment affirmed); **Rowlett v. Office of Family and Children**, 841 N.E.2d 615, 622 (Ind. Ct. App. 2006) (because of Father's incarceration, OFC did not, nor was it required to, provide Father with services directed at reunification; Father made good faith effort to better himself through correction services; termination judgment reversed), *trans. denied*; **Castro v. Office of Family and Children**, 842 N.E.2d 367, 375 (Ind. Ct. App. 2006) (Father argued that he had a right to have necessary services provided to him, but Court agreed that OFC had done everything it could to best of its ability given resources it had and Father's incarceration; due process requirements were met and termination judgment affirmed), *trans. denied*.

See Chapter 11 for detailed information on Indiana case law in termination of the parent-child relationship cases.

VI. COMMON RIGHTS CONCERNING CHILD AND PARENT, GUARDIAN, AND CUSTODIAN

VI. A. Protective Orders

Under IC 31-32-13-1 the child's guardian ad litem and the child's parent, guardian, or custodian have standing to seek an order to control the conduct of any person in relation to the child, to obtain examination or treatment for the child, and to prevent the child from leaving the court's jurisdiction. See Chapter 5 at VII. and VIII. for discussion on the broad protective powers of the juvenile court.

VI. B. Modification of Dispositional Order

Under IC 31-34-23-1 the child and the child's parent, guardian, or custodian have standing to file a motion to modify any dispositional order. This could include modification of orders on placement, treatment, visitation, parental participation, financial responsibility and any other dispositional order issued by the court.

IC 31-34-23-3, the modification of disposition statute, requires a hearing on any modification except for an emergency change in the child's residence. IC 31-34-23-4, the modification report statute, requires: (1) notice to the child and parent, among others, of the dispositional modification hearing; (2) an opportunity for the child and parent, among others, to be heard and to make recommendations to the court. See Chapter 8 at XV. for further discussion of dispositional modification hearing.

VI. C. Time Requirements

IC 31-34-5-1(a) requires that a detention hearing be held within forty-eight hours of the child's removal from the home, excluding weekends and State legal holidays. If the detention hearing is not timely held, the child shall be released.

IC 31-34-10-2, the initial hearing statute, provides the following time requirements concerning the initial hearing: (1) the CHINS petition shall be filed before the detention hearing is held (IC 31-34-10-2(i)); (2) the initial hearing shall be held at the same time as the detention hearing (IC 31-34-10-2(j)); (3) the initial hearing shall be held on each petition within ten days after the filing of the petition (IC 31-34-10-2(a)); (4) an additional initial hearing shall be held not more than thirty calendar days after the first initial hearing unless the court grants an extension of time

for extraordinary circumstances which are stated in a written order (IC 31-34-10-2(l)). See Chapter 6 at I.D. for further discussion.

IC 31-34-11-1(a) requires the juvenile court to "complete a factfinding not more than sixty (60) days after a petition alleging that a child is a child in need of services is filed." IC 31-34-11-1(b) states that the juvenile court may extend the time to complete a factfinding for an additional sixty days if all parties in the action consent to the additional time. IC 31-34-11-1(d) provides that, if the factfinding hearing is not held within the time set forth in subsection (a) or (b), upon a motion filed with the court, the court shall dismiss the case without prejudice.

IC 31-34-19-1(a) states that the "juvenile court shall complete a dispositional hearing not more than thirty (30) days after the court finds the child is a child in need of services." IC 31-34-19-1(b) provides that, if the dispositional hearing is not completed within thirty days, upon the filing of a motion with the court, the court shall dismiss the case without prejudice. *Practice Note:* If the court needs additional information which is not available at the time of the dispositional hearing, such as evaluations of the child or parents, the court should consider holding an additional dispositional hearing so the court can supplement its original dispositional decree if needed.

IC 31-34-21-2(b) requires that a case review hearing be held no later than six months from the removal of the child from the home or the date of the dispositional hearing, whichever date occurred first.

IC 31-34-21-7(a) requires that a permanency hearing be held no later than twelve months from the date the child was removed from the home or the date of the dispositional order, whichever date occurs first. When the court has made a finding that reasonable efforts toward reunification are not required, a permanency hearing must be held within thirty days of the finding. See IC 31-34-21-7(a)(1).

Practitioners are encouraged to comply with all of the above time requirements to avoid reversible error. See **A.P. v. PCOFC**, 734 N.E.2d 1107 (Ind. Ct. App. 2000), *trans. denied*, in which multiple procedural errors in the CHINS case warranted reversal of the termination judgment.

IC 31-35-2-6 [termination of parental rights petition] and IC 31-35-3-7 [termination of parental rights petition based on parent's criminal conviction] require that a hearing shall be commenced on a petition for the involuntary termination of the parent-child relationship within ninety days of the filing of the petition. IC 31-35-2-6(a) also requires the termination hearing to be completed within 180 days, but the 180 day completion requirement is not included for petitions filed pursuant to IC 31-35-3. IC 31-35-2-6(b) and IC 31-35-3-7(c) state that if a hearing is not held within the required time frame, upon filing a motion with the court by a party, the court shall dismiss the termination petition without prejudice. The above time limitations are not included in termination petitions filed pursuant to IC 31-35-3.5 [termination of parent-child relationship of person who conceived child through an act of rape]. See Chapter 11 at III.G. for further discussion of IC 31-35-3.5.

Practice Note: It is recommended that termination hearings based on petitions filed pursuant to IC 31-35-3-1 be completed within the 180 day time limit to avoid reversible error. Note that IC 31-35-2-6 requires that the hearing be "completed", but does not address whether this means that the court must enter an order on the petition within 180 days. The court's ability to take the termination petition under advisement is governed by Indiana Trial Rule 53.2, which, with some

exceptions, allows the judge ninety days to take matters under advisement before issuing the order.

VI. D. Limited Right to Confidential Hearings

IC 31-32-6-2 requires the court to determine in each juvenile case whether the public should be excluded. However, it is the policy of most juvenile courts to maintain closed proceedings. The records of the juvenile court, law enforcement, and DCS are generally confidential, but parties can obtain access. See IC 31-33-18-2 [access to DCS records], IC 31-39-2 [access to juvenile court records], and IC 31-39-4 [access to law enforcement records].

VI. E. Expungement of Records

IC 31-39-8-2 provides that any person can petition the court the court to expunge court records, law enforcement records, and service provider records related to that person's involvement in a CHINS case. A relevant list of factors for expungement is found at IC 31-39-8-3. IC 31-39-8-4 states that child abuse or neglect information "shall" be expunged when the information is determined to be "unsubstantiated" after an investigation or a court proceeding, and "may" be expunged if the probative value of the information is so doubtful as to outweigh its validity. See **Dubois County Office of Family and Children v. Adams**, 671 N.E.2d 202 (Ind. Ct. App. 1996) (juvenile court lacked jurisdiction to order expungement of Office of Family and Children records when no court case had been initiated). See Chapter 8 at XII. for further discussion on expungement of court, law enforcement, and service provider records.

IC 31-33-27-5 allows a person identified as a perpetrator of child abuse or neglect in a substantiated DCS assessment report to petition the court for expungement of DCS records. See Chapter 4 at V.B. for further discussion.

VI. F. Jury Trial

IC 31-32-6-7 provides that there is no right to a jury trial in CHINS and termination of parental rights litigation. All matters in juvenile court are tried to the bench, with the exception of criminal charges of neglect of a dependent, contributing to the delinquency of a minor, violation of the compulsory school attendance law, and any other criminal matters within the jurisdiction of the juvenile court.

In **Gray v. Monroe County Dept. of Public Welfare**, 529 N.E.2d 860 (Ind. Ct. App. 1988), the Court, relying on an earlier ruling in Shupe v. Bell, 127 Ind. App., 292, 141 N.E. 2d 351, (1957), held that there is no right to a jury trial in a CHINS case. Gray at 861. This ruling was reiterated in **E.P. v. Marion Cty. Office of Fam. & Child**., 653 N.E.2d 1026 (Ind. Ct. App. 1995), in which the Court rejected three new arguments for a jury trial: (1) the jury trial guarantee in Article 1 section 20 of the Indiana Constitution applies to "actions triable by jury at common law," and is inapplicable to CHINS cases since no separate judicial system for juveniles existed at common law; (2) the Seventh Amendment of the U.S. Constitution does not guarantee the right to a jury trial in state courts and does not preclude states from restricting the right to a jury; and (3) Ind. Trial Rule 38(B) does not grant a right to a jury, but only outlines the procedure for exercising the right. Id. at 1030-34.

VI. G. Appeal

IC 31-32-15-1 provides that appeals may be taken from juvenile court judgments as provided by law. The right to appeal extends to any disposition, modification, parental participation, or financial responsibility order issued subsequent to the CHINS adjudication and to any termination of parental rights judgment. See Chapter 8 at XIII. on appeals.

Ind. Appellate Rule 14.1 sets out the expedited appeal process when the juvenile court enters a CHINS or delinquency order for services, including placement, which are contrary to DCS recommendations. The purpose of the rule is for the Appellate Court to determine, inter alia, whether DCS is required to pay for the services. The following persons, among others, shall be served with notice of an expedited appeal by DCS: (1) guardian ad litem/court appointed special advocate; (2) a child who is fourteen years of age or older; (3) child's counsel; (4) parent's counsel; (5) any other party, which would include a pro se parent, a guardian, or a custodian. Any party who has received notice has five business days from service of notice to file an appearance and request any additional items to be included in the record. A party's failure to file an appearance shall remove the party from the expedited appeal. See Chapter 8 at XIII.C.1. for further discussion of Ind. App. R. 14.1 and relevant case law.

Because IC 31-34-9-7 provides that the child is a party to the CHINS proceeding, the child is also a party on appeal. See **Matter of M.O.**, 72 N.E.3d 527, 531 (Ind. Ct. App. 2017) (Child appealed the trial court's finding that she was a CHINS pursuant to IC 31-34-1-6); **In Re Involuntary Term. of Parent-Child Rel.** 755 N.E.2d 1090, 1099 (Ind. Ct. App. 2001) and Ind. Appellate Rule 17(A) (a party of record in the trial court shall be a party on appeal.) In **In Re A.H.**, 751 N.E.2d 690 (Ind. Ct. App. 2001), the facts of the case indicate that the child, a victim of sexual abuse, appealed the CHINS determination along with her parents.

See **In Re Infant Girl W.**, 845 N.E.2d 229 (Ind. Ct. App. 2006), *trans. denied sub nom*. In Re Adoption of M.W., 851 N.E.2d 961 (Ind. 2006) (Dickson, J. dissenting), and **In Re K.B.**, 793 N.E.2d 1191 (Ind. Ct. App. 2003), for examples of interlocutory appeals of CHINS proceedings.

An appeal may not be usually be taken from a permanency hearing. In **In Re K.F.**, 797 N.E.2d 310, 315 (Ind. Ct. App. 2003), the Court held that the permanency plan order did not dispose of all claims as to all parties and thus was not an appealable final judgment. Id. at 315. The Court opined that the parents had not been prejudiced unless and until termination occurred. Id. In **In Re D.W.**, 52 N.E.3d 839, 841 (Ind. Ct. App. 2016), *trans. denied*, the Court dismissed Mother's appeal of the trial court's order terminating her visitation with her child and denying her motion to modify the permanency plan. The Court held that a change in the permanency plan from reunification to termination of parental rights is not a final, appealable judgment. Id. at 841. In **In Re Tr. S.**, 63 N.E.3d 1065 (Ind. Ct. App. 2016), the Court dismissed Mother's appeal of the trial court's review and permanency hearing order which: (1) continued the suspension of her visitation; (2) ordered that DCS need not provide reunification services with the exception of random drug screens; (3) changed the permanency plan from reunification to termination of Mother's parental rights; and (4) found that, in the children's best interests, DCS should initiate termination proceedings. Id. at 1069. The Court noted that Ind. Appellate Rule 14(B)(1)(c)(iii) outlines the certification procedure for parties pursuing an appeal from an interlocutory order and contemplates the situation where the remedy by appeal is otherwise inadequate. Id. at 1068. The Court declined Mother's reasoning to consider the trial court's permanency and review order a final judgment because Rule 14(B) provides Mother an opportunity to bring her case before the Court. Id.

But see **In Re E.W.**, 26 N.E.3d 1006 (Ind. Ct. App. 2015), in which the trial court had determined that the child's permanency plan was "another planned permanent living arrangement" (APPLA). About five months after the permanency plan was ordered, the trial court heard evidence and ordered that all visits between Mother and the child cease. Mother appealed. The Court initially addressed whether it had jurisdiction over the appeal, noting that Mother had brought her appeal under Indiana Appellate Rule 5(A) as an appeal from a final judgment. Id. at 1008. The Court looked to Appellate Rule 2(H), which explains that a judgment is a final judgment if: (1) it disposes of all claims as to all parties; (2) the trial court expressly determines

there is no just reason for delay and in writing directs entry of judgment under Trial Rule 54(B) or Trial Rule 56(C); (3) the judgment is deemed final under Trial Rule 60(C); (4) the judgment is a ruling on either a mandatory or permissive Motion to Correct Error, which was timely filed; or (5) the judgment is otherwise deemed final by law. Id. The Court opined that, at first glance, it seemed that none of these considerations applied to the trial court's order ceasing visitation, but a different picture emerged when the effect of the order was considered. Id. The Court noted that the practical effect of a change of permanency plan to APPLA was that the child would remain a ward of the State until she reached the age of majority. Id. at 1009. The Court found that, by ordering that all contact between Mother and the child cease, the trial court was effectively ending that relationship until the child became a legal adult, by which time it would be the child's choice to resume contact with Mother. Id. The Court opined that, whether or not the trial court's order was technically a final judgment, it certainly operated as one, so the Court would consider Mother's appellate arguments. Id. See also **In Re R.H.**, 55 N.E.3d 304 (Ind. Ct. App. 2016), in which the Court affirmed the trial court's order finding that DCS need not make reasonable efforts to reunify the child with Mother. Id. at 311. Mother's rights to two of her children had previously been involuntarily terminated in separate proceedings. The Court found that the juvenile court's order was an appealable order despite the absence of a specific dispositional order in the record. Id. at 308-09. The Court looked to the effect of the trial court's orders which were entered prior to Mother's notice of appeal, noting that: (1) the court had determined that the child was a CHINS and placed her in foster care; (2) in addition to finding that DCS need not make reunification efforts, the order suspended Mother's visitation with the child; and (3) the permanency order changed the plan from reunification to adoption. Id. at 308. The Court found that the trial court's orders as a whole served the purpose of a dispositional decree, ended the relationship between Mother and the child, and allowed DCS to move forward with termination proceedings. Id. The Court opined that, whether or not the trial court's orders were technically a final judgment, they operated as one and were therefore appealable. Id. at 309.

VII. CIVIL LIABILITY WHEN CHILD ABUSED OR NEGLECTED

VII.A. Liability of State for Failure to Protect Child

IC 31-25-2-2.5 provides that the director, officers, and employees of DCS are not personally liable, except to the State, for an official act done or omitted in connection with the performance of their duties under IC 31-25. IC 31-25-2-7 states that among the DCS duties are: providing child protection services; providing child services, family services, and family preservation services; and regulating and licensing foster homes, group homes, child caring institutions, and child placing agencies.

In **H.B. v. State**, 713 N.E.2d 300 (Ind. Ct. App. 2000), the children brought suit against the office of family and children alleging its negligence (1) in recommending the children be reunited with their Mother, and (2) in failing to report to law enforcement that the children had been molested by Mother's boyfriend during a visit at Mother's home. The facts of the case show that the children had been removed from Mother and adjudicated CHINS. When the office of family and children was advised that the children had been molested by Mother's boyfriend during a home visit, the court ordered counseling for Mother, the children, and the boyfriend. Over one year later, the office of family and children recommended to the court that the children be returned to Mother who was still living with the boyfriend. The children were subsequently molested by the boyfriend. The Court noted that judges are entitled to absolute judicial immunity for all actions taken in the judges' judicial capacity, except where there is a complete absence of any jurisdiction. Id. at 302. This absolute judicial immunity "extends to persons performing tasks so integral or intertwined with the judicial process that these persons are considered an arm of the judicial officer who is immune." Id. In this case, the caseworkers

of the office of family and children were acting as an arm of the court by implementing the court's orders, monitoring the case, and making recommendations; therefore, the office of family and children was entitled to "absolute immunity from suit." Id. at 303. With regard to the alleged failure of the office to report the sexual abuse to law enforcement the court also found that the office was protected by judicial immunity. Because the original report of the boyfriend's molestation occurred after the CHINS adjudication, the failure to report to law enforcement occurred in the course of the duties of the office of family and children and was protected by judicial immunity. Id. See also **Newman v. Deiter**, 702 N.E.2d 1093, 1098 (Ind. Ct. App. 1998) cert. denied at 120 S. Ct. 329 (1999) (absolute judicial immunity applies whether the nature of the law suit is a state tort action or a federal civil rights 1983 action). But see **Lake County Juvenile Court v. Swanson**, 671 N.E.2d 429, 435 (Ind. Ct. App. 1996) (judicial immunity not extended to employees of juvenile detention center where delinquent child was sexually assaulted by other juveniles).

VII.B. Liability of State Government for Failure to Make Reasonable Efforts

It is important to recognize that there is a financial consequence to DCS for failure to provide reasonable efforts, or judicial documentation of reasonable efforts, including loss of IV-D federal reimbursement funds for the foster care or other out-of-home placement of the child. See the regulations to the Adoption and Safe Families Act at 45 C.F.R. § 1356.21(b) and (d). See also Chapter 4 at VI. for information on reasonable efforts.

VII.C. Liability of Parents and Others Providing Care for Child

Indiana law traditionally provided that parents were immune from civil liability for neglecting their children. See **Cooley v. Hosier**, 659 N.E.2d 1127 (Ind. Ct. App. 1996) (doctrine of parental immunity served as complete defense to alleged negligence of noncustodial parent when child ingested drain cleaner). In **Barnes v. Barnes**, 603 N.E.2d 137 (Ind. 1992), the Indiana Supreme Court found that the doctrine of parental immunity will not preclude an action predicated on a claim of the parent's intentional, malicious, felonious conduct to the child, such as multiple acts of rape and sexual brutality. See also **Fager v. Hundt**, 610 N.E.2d 246 (Ind. 1993) (parental tort immunity did not bar claim alleging intentional felonious conduct, sexual abuse, by parent).

In **C.M.L. Ex Rel. Brabant v. Republic Services**, 800 N.E.2d 200 (Ind. Ct. App. 2003), *trans. denied*, the Court held, as a matter of first impression, that a stepparent may not receive the benefit of the parental immunity doctrine unless the stepparent takes the formal steps of becoming "invested with the rights and charged with the duties of a parent." Id. at 209. The Court also found that the parental immunity doctrine does not apply if a parent is acting in a business capacity when causing injury to the child. Id. at 209.

In **Nance v. Holy Cross Counseling Group**, 804 N.E.2d 768 (Ind. Ct. App. 2004), *trans. denied*, the parents of an adjudicated CHINS filed a complaint against the counseling agency due to the child's death in his foster home. The therapist-patient relationship had been terminated due to the child's improvement at least six months prior to the child's death. There were no indications that the child posed a danger to himself or others, and it was undetermined whether the child had died from suicide or homicide. Citing the particular facts of the case as well as public policy concerns, the Court concluded that the counseling agency did not owe a duty to the child and that the trial court had properly entered summary judgment in favor of the counseling agency. Id. at 773.

In **State Farm Fire and Cas. Co. v. C.F.**, 812 N.E.2d 181 (Ind. Ct. App. 2004), *trans. denied*, the parents of a six-year-old girl, who had been sexually abused by a twelve-year-old boy, filed a claim against the twelve-year-old boy and his parents for damages. The boy admitted the delinquency charges regarding his sexual abuse of the girl in juvenile court. The parents of the

delinquent boy had homeowner's insurance. The homeowner's insurance company filed a motion for summary judgment, arguing that the insurance policy did not provide coverage because the sexual abuse victim's injuries were not the result of an accident. The twelve-year-old boy's admission to the delinquency charges showed that his actions were volitional. The Court reversed the trial court's denial of summary judgment in favor of the insurance company because the homeowner's insurance policy did not provide coverage for non-accidental injuries. Id. at 185. In **Tucker v. Roman Catholic Diocese**, 837 N.E.2d 596 (Ind. Ct. App. 2005), *trans. denied*, the Court found that the plaintiff's numerous claims arising from alleged sexual abuse committed on her as a child by a religion teacher were properly dismissed for failure to state a claim pursuant to Indiana Trial Rule 12(B)(6). The breach of oral contract claim was dismissed due to the statute of frauds, the negligence claim was barred by the statute of limitations and plaintiff's lack of standing to show that injuries to others had caused her damage, the promissory estoppel and negligent infliction of emotional distress claims failed to state claims upon which relief could be granted, and the intentional infliction of emotional distress claim failed to allege the Diocese intended to harm her emotionally. Id. at 601-03.

In **State of Indiana v. John Doe**, 987 N.E.2d 1066 (Ind. 2013), the Indiana Supreme Court held that Indiana statutes restricting the recovery of punitive damages in civil cases, (IC 34-51-3-4, -5, and -6), do not violate either Article 1, Section 2 or Article 3, Section 1 of the Indiana Constitution. Id. at 1073-73. The statutes provide that: (1) a punitive damage award may not exceed three times the amount of compensatory damages or $50,000; (2) the person to whom punitive damages were awarded shall be paid 25% of the award, with the remaining 75% of the award to be paid to the state treasurer for deposit into the violent crime victims compensation fund; (3) if a jury awards punitive damages in excess of the cap, the trial court is required to reduce the award to the statutory maximum. In the Doe case, a jury had awarded the plaintiff $150,000 in punitive damages as part of a lawsuit against a priest for childhood sexual abuse. The priest moved to reduce the punitive damages pursuant to the statutory cap. The trial court denied that motion, holding that IC 34-5-3-4, -5, and -6 violated the separation of powers (Article 3, Section 1) and the right to trial by jury in civil cases (Article 1, Section 20). The Court, citing Stroud v. Lints, 790 N.E.2d 440, 445 (Ind. 2003), agreed with the State that the jury's determination of the allocation of punitive damages was not a "finding of fact" for constitutional purposes. Doe at 1071. The Court found that the statutory cap and allocation provisions are fully consonant with the right to jury trial protected by Article 1, Section 20 of our state constitution. Id. The Court also found that the cap is a public policy judgment by the legislature, and the trial court had absolute discretion to award damages as it saw fit within the statutory parameters. Id. at 1072. The Court likened the statutory cap to the statutory penalty for a crime. Id. The Court said that, just as the legislative branch has "broad power to limit common law causes of action and remedies, including punitive damages," the judicial branch "has sole authority to apply those limitations to particular cases." Id.

See also **Harradon v. Schlamadinger**, 913 N.E.2d 297, 303 (Ind. Ct. App. 2009) (in wrongful death action brought against paternal aunt by parents of a baby who suffocated to death while sleeping with Mother on sofa at paternal aunt's house, Court held that (1) as matter of law, sofa was not dangerous condition on paternal aunt's premises, and, even if it could be found to be such, child's parents knew and assumed risk involved with Mother's decision to sleep with baby on sofa; and (2) as matter of law paternal aunt did not breach duty of reasonable care owed to baby), *trans. denied*; and **LaCava v. LaCava**, 907 N.E.2d 154, 165 (Ind. Ct. App. 2009) (imputation rule, which provides that discovery of cause of action in tort claim by child's parent, even absent actual cognition or memory by child, shall be imputed to child and shall conclusively constitute accrual of action within meaning of the disability statute, is premised upon the natural and legal obligations of parents to protect and care for their children).

VII.D. Department of Child Services Liability

IC 31-25-2-2.5 provides that the DCS director, officers, and employees are not personally liable, except to the state, for official acts done or omitted in connection with performance of duties under Title 31.

In **In F.D. v. Indiana Dept. of Child Services**, 1 N.E.3d 131(Ind. 2013), Parents filed suit against DCS, contending that DCS was negligent in failing to notify Parents, as required by IC 31-33-18-4, that their twelve-year-old nephew (Nephew) had admitted molesting their two-year-old daughter (Daughter). Mother had informed DCS that her four-year-old son (Son) had been molested by Nephew. DCS initiated an investigation and interviewed Son and the two-year-old twin daughters. Son disclosed that he had been inappropriately touched by Nephew, but both daughters denied being inappropriately touched by Nephew. DCS then referred the matter to the Evansville Police Department (EPD), for a delinquency investigation. Nephew admitted to the EPD detective that he had inappropriately touched Son and one of the twin daughters (Daughter). The detective informed DCS of Nephew's admissions, which DCS chronicled in a "Contact Log Report." Neither DCS nor EPD informed Parents of Nephew's admission to inappropriately touching Daughter. Nephew was adjudicated delinquent and placed on probation for nine months. Over one year after her initial report to DCS, Mother learned from a third party of Nephew's admission to molesting Daughter, which DCS later confirmed. The trial court granted summary judgment in favor of DCS, concluding that DCS was immune under both IC 31-33-6-1 (immunity from civil and criminal liability for reporting alleged child abuse) and IC 34-13-3-3 (immunity of a governmental entity or employee, a provision of the Indiana Tort Claims Act), and the Court of Appeals affirmed the trial court.

The Indiana Supreme Court reversed summary judgment with respect to DCS and remanded to the trial court for further proceedings. Id. at 140. On the child abuse reporting statutory immunity issue, the Court said that IC 31-33-6-1 provides immunity from liability that might be imposed *because of* participation in a judicial proceeding resulting from or relating to a report of child abuse, but in this case Parents' contention was that DCS's *inaction* with respect to the *separate report* of abuse to Daughter hindered their ability to obtain proper treatment for Daughter (emphasis in opinion). Id. The Court found that the facts of this case did not fall within the circumstances granting immunity under the plain words of the statute, which is in derogation of common law and must be narrowly construed against immunity. Id. With regard to the Indiana Tort Claims Act (ITCA), the Court, quoting Mangold ex rel. Mangold v. Ind. Dep't of Natural Res., 756 N.E.2d 970, 975 (Ind. 2001), said that, because the ITCA is in derogation of the common law, the Court construes it narrowly against the grant of immunity. F.D. at 135. The Court noted DCS's contention that it was immune under IC 34-13-3-3(6), "A governmental entity or an employee acting within the scope of the employee's employment is not liable if a loss results from the following:...(6) [t]he initiation of a judicial or an administrative proceeding." Id. at 137. The Court, citing multiple cases, said that this provision of the ITCA is most commonly associated with suits for malicious prosecution or abuse of process. Id. DCS contended that its child abuse investigation and referral to EPD, which resulted in the delinquency proceeding against Nephew, brought it under the ITCA's provision for the "initiation of a judicial or administrative proceeding." The Court opined that DCS was not immune under IC 34-13-3-3(6) because Parents' claims against DCS did not relate to the molestation of Son, which resulted in Nephew's delinquency adjudication, and because IC 34-13-3-3(6) provides immunity where a loss *results from* the initiation of a judicial or administrative proceeding (emphasis in opinion). Id. The Court clarified that Parents' claims against DCS regarding notification of the molestation of Daughter could be the same if delinquency proceedings had not been initiated against Nephew. Id. at 138. The Court, finding the statute unambiguous and reading the words of IC 34-13-3-3(6)

in their plain, ordinary, and usual sense, opined that ITCA did not provide DCS with immunity in this case. Id. at 139.

In **D.L. v. Huck**, 978 N.E.2d 429 (Ind. Ct. App. 2012), the Court affirmed in part, reversed in part, and remanded Family's complaint against the Department of Child Services (DCS) for further proceedings. Id. at 438. Father, Paternal Aunt and Uncle, Grandfather, and the child (Family) had brought suit against DCS, asserting multiple claims, including negligence, fraud, intentional infliction of emotional distress, and violation of due process rights. The child, born to married parents, had been removed from Mother's care and determined to be a CHINS. DCS completed a home study and comprehensive background check of the home of Aunt and Uncle, found that the Indiana Sex Offender Registry revealed no prior charges or allegations and that there were no prior DCS charges or complaints against Aunt and Uncle, and placed the child in their home. Mother and Father later voluntarily terminated their parental rights so that Aunt and Uncle could adopt the child. Immediately prior to the voluntary termination hearing, counsel for DCS confirmed with Father that Aunt and Uncle would be able to adopt the child. The juvenile court authorized the immediate filing of an adoption petition by Aunt and Uncle. The following month, DCS appeared at the home of Aunt and Uncle and removed the child from their custody without a court order based on a twenty-year-old child abuse report against Uncle that DCS had recently found. In the report, Uncle's then sixteen-year-old daughter accused him of sexually abusing her when she was eight to ten years old. The allegation was "substantiated" based solely on the daughter's statement, but Aunt and Uncle were never interviewed or made aware of the substantiated allegation. The allegation was never the subject of a CHINS action or any criminal charges. Father sought custody of the child, but was denied based on the voluntary termination of his parental rights. Grandfather also sought and was denied custody of the child. The child was placed with non-relatives. Father appealed the voluntary termination of his parental rights, and the juvenile court's order terminating his rights was reversed in In Re K. L., 922 N.E.2d 102 (Ind. Ct. App. 2010). The child was eventually returned to Father's custody.

Family brought suit against DCS, which filed a motion to dismiss. The trial court granted dismissal of seven of the eight counts, holding that the claims were barred by quasi-judicial immunity because they were based on allegations that DCS acted wrongly in the course of duties within the CHINS proceeding for the child. The trial court also concluded that Aunt, Uncle, and Grandfather lacked standing to bring the claims against DCS because they did not have a custodial relationship with the child prior to the CHINS proceeding. The court allowed one claim to go forward, in which Uncle claimed negligence on the part of DCS regarding the substantiated report. Family appealed the dismissal of their seven other claims. The Court concluded that DCS was not entitled to quasi-judicial immunity for any of the actions underlying Family's complaint because there was no court oversight of DCS's actions and decisions, and DCS was not implementing a court order. Id. at 435. The Court held that IC 31-25-2-2.5 entitled DCS to statutory immunity for all of the dismissed claims with the exception of the claim for fraud, which the Court allowed to move forward. Id. at 436. The Court determined that Aunt and Uncle had a liberty interest in their relationship with the child, such that they had standing to bring suit, but Grandfather did not have standing. Id. at 438.

On rehearing in **D.L. v. Huck**, 984 N.E.2d 223 (Ind. Ct. App. 2013), the Court clarified its reading of IC 31-25-2-2.5 and opined that a suit against DCS as an entity should be allowed to proceed even if vicarious and even if suit against the DCS employee is barred, but only for those claims that fall within the Indiana Tort Claims Act, IC 34-13-3-5(d). Id. at 225-26. The Court also granted Family's petition to proceed with their federal civil rights claims. Id. at 226.

VIII. CRIMINAL LIABILITY BY CASE MANAGER

In **Edelen v. State**, 947 N.E.2d 1024 (Ind. Ct. App. 2011), the Court affirmed the class D felony perjury and official misconduct convictions of Gibson County DCS caseworker Edelen. Id. at 1033. One of Edelen's clients, an adjudicated seventeen-year-old CHINS who had been placed in Life Choices, a counseling residential placement facility, ran away from the facility. Edelen called Judge Meade of the Gibson Circuit Court, informed him of the child's run away, and was told by Judge Meade to place the child at the Southwest Indiana Regional Youth Village of Vincennes (SIRYV), an emergency secure facility. It was Judge Meade's policy, consistent with IC 31-34-5-1, that emergency placement for a child would not last more than forty-eight hours without a hearing on the placement. On October 9, 2008, local law enforcement found the child, transported her to SIRYV, and Edelen was promptly informed of the child's placement. Edelen took no action to schedule a hearing on the child's placement with the Gibson Circuit Court. On November 5, the child contacted her attorney to inform her that she was at SIRYV. The child's attorney informed the court that the child had been held at SIRYV for a month without a hearing and moved for a change in placement. Judge Meade granted the motion later that day. On November 26, 2008, Judge Meade held a closed hearing to determine why the child had been locked up for thirty days. Edelen testified that she had told Judge Meade when he was coming out of chambers that the child had been found and that she had asked the DCS attorney for a court order. Edelen acknowledged that she had made entries in the child's contact log long after the fact and even after she had received a subpoena to testify. Judge Meade concluded the hearing by dismissing the CHINS petition. The child had reached the age of eighteen. The Indiana Office of Inspector General began investigating the circumstances of the child's thirty-day stay at SIRYV, and a special agent conducted twenty interviews. On October 26, 2009, the State filed its information against Edelen, alleging that she had committed three acts of perjury at the November 2008 hearing and an additional act of official misconduct for committing her alleged perjury while testifying in her official capacity. At Edelen's jury trial, the State sought to have the transcript of her testimony at the November 2008 hearing introduced into evidence, along with the DCS's contact log from the child's case record, but Edelen objected that they were inadmissible because they were confidential records. The trial court overruled Edelen's objection but ordered the child's identifying information redacted from the documents. Judge Meade and the DCS attorney testified and contradicted Edelen's testimony. The jury convicted Edelen as charged, and the trial court entered its judgments of conviction and sentences. Edelen appealed.

The Court noted that IC 31-39-1-1(a) limits the confidentiality of juvenile court records and specifically excludes records involving an adult charged with a crime or criminal contempt of court. Id. at 1028. The Court, citing In Re T.B., 895 N.E.2d 321 (Ind. Ct. App. 2008), held that the November 2008 transcript was a record that "involve[es] an adult charged with a crime," and, as such, it was not a confidential record for purposes of Edelen's perjury trial. Id. at 1028-29. The Court also observed that Edelen's testimony during the November 2008 proceeding did not just "involv[e]" or "relate" to her later perjury charge, but *is* the crime for which she was charged (emphasis in original). Id. at 1029. The Court also found that the State presented sufficient evidence to support Edelen's convictions, and her argument that the charging information for the official misconduct charge was defective was waived because it was not timely raised. Id. at 1032-33.

In **Moore v. State**, 845 N.E.2d 225 (Ind. Ct. App. 2006), *trans. denied*, the Court reversed the OFC case manager's conviction for obstruction of justice, finding that the charges had been filed outside the statute of limitations and that, even if the charges had been filed in a timely fashion, the evidence was insufficient for conviction of obstruction of justice. Id. at 229. The case involved twins who tested positive for cocaine at birth and who were made wards of Marion

County OFC and placed in foster care. The twins thrived in foster care and their foster mother wished to adopt them. Moore, the case manager, wanted the twins to be adopted by their foster mother but the Special Needs Adoption Program Specialist told her that the twins must be considered for adoption by the Bars family who claimed to be related to the twins. In reality, the Bars' relationship to the twins was "tenuous at best" and not a blood relationship, but instead it was a relationship by marriage to the birth mother's second cousin. Id. at 227 n.3. The case manager prepared an undated adoptive home study which said that no criminal records were found in Indiana for Mr. and Mrs. Bars. On November 11, 1998, the case manager prepared an Adoption Summary, which stated that Mr. and Mrs. Bars had no previous contact with Marion County OFC. Both statements later proved to be incorrect, in that Mr. Bars had convictions for class D felony theft and misdemeanor battery, and OFC had substantiated abuse in the Bars household. The twins were adopted on March 18, 1999, pursuant to the Bars' adoption petition filed on February 24, 1999.

Three years later, the twins were taken to Riley Hospital, where it was found that they were emaciated, had scars and marks on their bodies, and one of the twins died from dehydration. The surviving twin had no verbal skills, was diagnosed with severe failure to thrive and malnutrition, and demonstrated evidence of physical abuse and neglect. Mr. and Mrs. Bars were ultimately convicted of child neglect. Case manager Moore was charged with two counts of class B felony neglect of a dependent and obstruction of justice, a class D felony. Moore was acquitted by the jury of the neglect of dependent charges.

With regard to the obstruction of justice charge, the Court opined that the State was not required to prove actual impairment of the investigation, and the mere potential influence with a line of inquiry was sufficient to establish materiality. Id. at 227-28. The Court found that Moore completed the acts that were alleged to be obstruction of justice on the date she filed the Adoption Summary, November 11, 1998. The Court opined that it was of no moment that the Adoption Summary was not placed before the court until, at the earliest, February 24, 1999, the date the Bars' adoption petition was filed. Therefore, the prosecution was brought three months after the statute of limitations expired and the trial court erred in denying Moore's motion to dismiss. Id.

The Court also noted that the evidence was insufficient to support Moore's conviction because: (1) Moore was a low-level employee with IFSSA who was required to follow policies; (2) it was IFFSA's policy to ignore misdemeanor convictions and felony theft convictions when considering placement of children in potential homes; (3) based on IFSSA policies, Moore's statement in the Adoptive Home Study was not false because there was no material criminal history to report; (4) there was no evidence that Moore knew of the Bars' previous contact with OFC and falsely reported that there was none; (5) negligent conduct is not a criminal act in Indiana; (6) there was "not a shred of evidence" that Moore actually intended to mislead a public official. Id. at 229. The Court characterized the case as "a tragic failure in the system that ought to have protected A.G. and K.G. [the children] from being placed in an abusive home." Id.