CHAPTER 6
INITIAL HEARING AND GUARDIAN AD LITEM/COURT APPOINTED SPECIAL ADVOCATE

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I. INITIAL HEARING PROCEDURES

I. A. Hearing Required

IC 31-34-10-2(a) states that the juvenile court shall hold an initial hearing on the CHINS petition within ten days of the filing of the petition. In **In Re Heaton**, 503 N.E.2d 410, 413 (Ind. Ct. App. 1986), the Court emphasized the need for the hearing to advise parents of potential parental participation and financial responsibility. In **Matter of Lemond**, 413 N.E.2d 228, 248 (Ind. 1980), the Indiana Supreme Court referred to the initial hearing as a jurisdictional hearing. In **Matter of R.R.**, 587 N.E.2d 1341 (Ind. Ct. App. 1992), the Court granted relief from both the CHINS and the termination judgments based on multiple procedural errors, among which was the failure of the trial court to give the parent the required advisement of rights at the initial hearing.

I. B. Purpose of the Hearing

The initial hearing is a non-adversarial hearing for the purpose of advising parties of their rights, appointing counsel to represent indigent parents who request counsel, appointing a guardian ad litem or court appointed special advocate for the child, determining if the child should be referred for assessment by the dual status assessment team as described in IC 31-41-1-5, and determining whether the child's parents, guardian, or custodian wish to admit or deny the allegations in the CHINS petition or request the opportunity to consult with an attorney before entering an admission or denial. See Chapter 5 at IX. for further information on dual status children.

IC 31-34-10-7 provides for two CHINS categories for which the child must admit or deny the allegations of the CHINS petition, instead of requiring the parent, guardian, or custodian to admit or deny the allegations. If the CHINS petition alleges that the child is a CHINS pursuant to IC 31-34-1-6 [child is substantial danger to self or others] or pursuant to IC 31-34-1-3.5 [child is victim of human or sexual trafficking], the court shall determine whether the child admits or denies the allegations of the CHINS petition. A failure to respond constitutes a denial. IC 31-32-4-2(b) provides that the court has the discretion to appoint counsel for the child in a CHINS case. Appointment of counsel for the child before the child enters an admission or a denial to the CHINS allegations would promote the child's due process interests.

Practice Note: Although IC 31-34-10-2(j), discussed in this Chapter at I.D., requires the detention hearing and the initial hearing to be held at the same time, it is important to remember that the detention hearing and the initial hearing are governed by separate statutes with distinct purposes. Evidence should be presented at the detention hearing so the court can make the necessary findings and conclusions as to whether there is probable cause to believe that the child is a CHINS, whether there is a statutory basis for further detention of the child, and whether removal of the child was necessary and in the child's best interests because remaining in the home would be contrary to the health and welfare of the child. The initial hearing is not an evidentiary hearing. It focuses on the procedural rights of parents and children. Practitioners should insure that orders which are generated for the detention hearing and the initial hearing indicate a clear record of the statutory requirements for both hearings.

I. C. Closed or Open Hearing

Pursuant to IC 31-32-6-2 the juvenile court shall determine whether the public should be excluded from the CHINS proceeding. The statute contains no guidelines for making this

determination. It is recommended that the court place a copy of the access or exclusion order into each CHINS file. If the court issues an exclusion order, then the proceedings are closed, and only the parties and other persons admitted by the judge may attend the hearings.

I. D. Scheduling and Meeting Time Limits for the Initial Hearing

IC 31-34-10-2(i) states that a CHINS petition shall be filed before a detention hearing is held. IC 31-34-10-2(a) states that the court shall hold an initial hearing on each CHINS petition within ten days of the filing of the petition. IC 31-34-10-2(j) states that, if a detention hearing is held under IC 31-34-5, the initial hearing shall be held at the same time as the detention hearing. IC 31-34-10-2(d) provides that, if the initial hearing is not scheduled and held within the specified time, the child shall be released to the child's parent, guardian, or custodian.

IC 31-34-10-2(f) states that the court may schedule an additional initial hearing to comply with the procedures and requirements of IC 31-34-10, including situations when the court refers the child for assessment by the dual status assessment team. See this Chapter at I.G. and Chapter 5 at IX. for further information on the dual status assessment team. IC 31-34-10-2(g) states that, except for cases in which the child has been referred for an assessment by a dual status assessment team, an additional initial hearing shall be held not more than thirty days after the date of the first initial hearing, unless the court has granted an extension of time for extraordinary circumstances which are stated in a written order. IC 31-34-10-2(k) states that the court may schedule an additional initial hearing "if necessary to comply with the procedures and requirements of this chapter with respect to any person to whom a summons has been issued under this section." IC 31-34-10-2(l) requires that an additional initial hearing shall be held not more than thirty calendar days after the date of the first initial hearing, unless the court grants an extension of time for extraordinary circumstances and states the extraordinary circumstances in a written court order.

Practice Note: Extraordinary circumstances could include: (1) time needed to appoint counsel for a parent and/or a guardian ad litem for a parent; (2) time needed for the parent's counsel and/or guardian ad litem to confer with the parent before entering an admission or denial to the allegations of the CHINS petition; (3) time needed to complete service by publication (IC 31-32-9-2; Ind. Trial Rule 4.13); (4) time needed to serve summons and petition on an institutionalized or incarcerated parent (Ind. Trial Rule 4.3); (5) delayed discovery of a parent's or guardian's identity and/or address; (6) time needed to comply with the Servicemembers Civil Relief Act or the Indian Child Welfare Act; (7) if the child is alleged to be a CHINS pursuant to IC 31-34-1-6 [petition alleging that child is a substantial danger to self or others] or IC 31-34-1-3.5 [petition alleging child is a victim of human or sexual trafficking offense], time needed for the child's counsel and/or guardian ad litem/court appointed special advocate to investigate the situation and meet with the child to assist the child in entering a denial or admission to the CHINS petition. See this Chapter at I.E. See also Chapter 2 at III.C. for information on the Indian Child Welfare Act and Chapter 2 at IV.C.1. for information on the Servicemembers Civil Relief Act.

When an abandoned infant less than thirty days old is taken into custody by an emergency medical services provider, IC 31-34-2.5-4 states that the attorney for DCS shall request the juvenile court to hold an initial hearing not later than the next business day. An emergency medical services provider may take custody of a child who is, or who appears to be, not more than thirty days old if: (1) the child is voluntarily left in a newborn safety device or with the provider by the child's parent; and (2) the parent does not express an intent to return for the child. IC 31-34-2.5-1. See Chapter 4 at VI.D.3. for more information.

Diligent efforts must be made to locate the child's parents and provide them with notice of the CHINS proceeding, including an explanation of their rights listed at IC 31-34-4-6. Notice and an explanation of rights should be given even if the parent is located after the CHINS adjudication.

In Re C.G., 954 N.E.2d 910 (Ind. 2011), is an appeal of the trial court's order terminating Mother's parental rights. Among other issues, Mother argued that her due process rights were violated because DCS failed to inform her of the CHINS proceeding for her child after Mother initiated contact with DCS. Mother's seven-year-old child was adjudicated a CHINS because: (1) Mother left the child with a male friend (Friend) in Indianapolis while Mother traveled to Utah to visit family; (2) Friend brought the child to the home of a neighbor and former babysitter (Neighbor) for care, and the child stayed with Neighbor for three months; (3) Friend took the child on Spring Break and took the child to another person's house when they returned; (4) Neighbor discovered that the child had been returned to the neighborhood and took the child to Riley Hospital because the child complained that her "privates" hurt; (5) the child was diagnosed with genital herpes, had scarring around the anus and perineum, and the examining physician concluded the child had likely been sexually abused. A CHINS petition was filed, and the case manager learned that Mother had been arrested in Utah but was unable to locate Mother in state or federal prisons in Utah. The child was adjudicated to be a CHINS. Over two months after the CHINS adjudication, the case manager received a letter from Mother informing the case manager that Mother was incarcerated. After receiving the letter, the case manager learned that Mother was incarcerated in Henderson, Kentucky awaiting trial. The case manager did not send Mother an advisement of her rights and a copy of the CHINS petition for four months after his receipt of Mother's first letter. The Court found that the delay in advising Mother of her rights and informing her of the CHINS case upon locating her was "disturbing and inappropriate" and was "a very poor practice model in the field of child protection." Id. at 919-20. The Court could not conclude that the dilatory action resulted in fundamental error or deprived Mother of due process." Id. at 919. The Court also concluded that factual misrepresentations in the case manager's affidavit of diligent inquiry for publication service to Mother did not violate Mother's due process rights. Id. The Court found that a reversal of the termination judgment was not warranted. Id. at 920.

I. E. Parties to the Initial Hearing, Others Who Receive Notice, and ICWA Inquiry

IC 31-34-9-7 provides that the following persons are parties to the CHINS case: the child; the child's parents, guardian, or custodian; DCS; and the child's guardian ad litem or court appointed special advocate. IC 31-34-10(2)(b) and (c) state that a summons and petition shall be issued for the child, the child's parent, guardian, or custodian, the guardian ad litem/court appointed special advocate, and any other person necessary for the proceedings. The juvenile code also contemplates the involvement of additional persons in the CHINS proceeding, either as parties, or as persons directed or allowed to attend. IC 31-34-10-2(b)(3) directs the court to issue a summons to the initial hearing for "any person necessary for the proceedings." Other persons, such as foster parents, relatives, or other significant caretakers for the child, could seek to intervene as parties under Ind. Trial Rule 24. See Chapter 2 at I.G. for discussion on intervening as a party.

It is very important to include alleged or putative fathers as parties to the CHINS proceeding. Mothers and relatives of the child should be questioned, preferably under oath, at the initial hearing regarding the names and whereabouts of alleged or putative fathers and mothers' husbands (who are usually presumed fathers as defined by IC 31-14-7-1) so that proper notice of the CHINS proceeding may be given to all parents. Failure to include all parents will delay the CHINS proceeding or a subsequent termination proceeding arising from the CHINS proceeding. IC 31-9-2-88(b) states that "parent" includes an alleged father. If the child was born to unmarried

parents, but the mother and alleged father signed a paternity affidavit either at the hospital within seventy-two hours of the child's birth or at any later time at the local health department, the father's legal paternity of the child has been established by Indiana law. See IC 16-37-2-2.1(j) and Chapter 12 at VII.

IC 31-34-10-2(h) requires DCS to provide notice of the date, time, place and purpose of the initial hearing and any additional initial hearing to each foster parent or other caretaker with whom a child has been temporarily placed. IC 31-34-10-2(h) also states the court shall provide an opportunity for a person for whom a summons is required and for the foster parent or other caretaker to be heard and to make recommendations to the court at the initial hearing.

Courts and attorneys should also inquire of parents, relatives, and each participant at the initial hearing and any continued initial hearing at which new parties appear for the first time regarding whether there is "reason to know" that the child is an Indian child. 25 U.S.C. § 1903(4) defines "Indian child" as a child who is either: (a) a member of an Indian tribe, or (b) eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe. If the child is an Indian child, the federal Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901 et seq., applies.

On December 12, 2016 the U.S. Bureau of Indian Affairs (BIA) issued detailed federal regulations on ICWA, which apply at detention, initial, placement, factfinding, voluntary and involuntary termination, and adoption hearings. See www.bia.gov for detailed information. 25 CFR § 23.107 lists the following factors which indicate a "reason to know" that a 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, 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 know" the child is an Indian child, ICWA does not apply. 25 CFR § 23.107 states 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. The individual tribes have the final say on whether the child is a member of the tribe or a parent is a member of the tribe and the child is eligible for membership. BIA will assist DCS in locating tribes and making inquiries on whether the child is an Indian child.

Notice of the CHINS proceeding and the tribe's right of intervention must be sent to each tribe of which the child may be a member or eligible for membership by registered or certified mail, return receipt requested. 25 CFR § 23.111 states what must be included in the notice. A copy of the notice must also be sent to the BIA Regional Director, whose name and address may be found on the BIA website. If the child is an Indian child, 25 U.S.C. § 1911(b) provides that the tribe may choose to assume jurisdiction over the child. If the tribe declines jurisdiction, the State court is required to use the ICWA standards and requirements on multiple procedural and substantive issues. 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 in a termination of parental rights case for a Potawatomi Indian child, rather than federal law, was error. The trial court's order terminating the parental rights of the child's Potawatomi Indian mother was reversed and remanded for proceedings to be conducted consistent with the Court's opinion and the ICWA. Id. at 576.

The ICWA requirements are found at 25 U.S.C. § 1912 and the following are most relevant to the initial hearing: (1) no foster care (CHINS) proceedings shall be held until at least ten days after receipt of the notice by the Indian parent, custodian, and tribe; (2) an Indian parent, Indian custodian, and tribe must be granted up to twenty additional days to prepare for the CHINS proceeding after receiving notice; (3) when the court determines indigency, an Indian parent or custodian shall have the right to court appointed counsel in any removal or placement hearing; (4) each party to a foster care proceeding shall have the right to examine all reports or other documents filed with the court; (5) no foster care placement may be ordered unless the court determines, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the Indian parent or Indian custodian is likely to result in serious emotional or physical damage to the child; (6) any party seeking to effect foster care placement for an Indian child must 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 proven unsuccessful. 25 CFR § 23.122 defines qualified expert witnesses and the court or any party may request assistance from the tribe or the BIA in locating qualified expert witnesses. 25 CFR § 23.113 provides that emergency removals should occur only in limited circumstances when there is imminent physical damage or harm to the child. See Chapter 2 at III.C. and IV.C. and Chapter 3 at I.G.5. for further discussion of the Indian Child Welfare Act as it pertains to rights and jurisdiction.

Courts and attorneys should also inquire of parents and relatives regarding whether a parent is a member of the U.S. Armed Forces, in which case the Servicemembers Civil Relief Act, 50 U.S.C. 521 applies. If a parent is a member of the U.S. Armed Forces, a stay of proceedings and court appointed counsel for the parent may be required. See Chapter 2 at IV.C.1. for further discussion of Servicemembers Civil Relief Act.

In **Hite v. Vanderburgh Cty Office Fam. & Chil.**, 845 N.E.2d 175 (Ind. Ct. App. 2006), a termination case, 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. See also **In Re J.S.O.**, 938 N.E.2d 271, 277 (Ind. Ct. App. 2010) (paternity affiant Father, whose whereabouts were known to DCS, was not made party to CHINS case; subsequent involuntary termination of Father's parental rights order was reversed due to violation of his due process rights in CHINS case).

I. F. Failure to Appear for Initial Hearing

If the parent fails to appear for the initial hearing and was properly notified of the hearing, the court may issue a writ of attachment to take the parent into custody. The authority to issue the body attachment is based on IC 34-47-4-2, which is specifically made applicable to the juvenile code through IC 31-32-14-1.

I. G. Appointment of Guardian ad Litem/Court Appointed Special Advocate and Dual Status Assessment Referral

IC 31-34-10-3 requires the appointment of a guardian ad litem or court appointed special advocate for the child in all CHINS cases at the initial hearing. See IC 31-34-10-3(1), (2), and (3). *Practice Note:* Courts and attorneys are cautioned that failure to appoint a guardian ad litem/court appointed special advocate for the child in every CHINS case will likely result in reversible error. Indiana Appellate Courts have previously reversed termination judgments in situations where a guardian ad litem/court appointed special advocate was not appointed in a termination proceeding. Procedural irregularities in CHINS cases have been cited as reasons for Courts' reversal of termination judgments. See **In Re G.P.**, 4 N.E.3d 1158 (Ind. 2014); **In Re J.S.O.**, 938 N.E.2d 271(Ind. Ct. App. 2010); **A.P.v. PCOFC**, 734 N.E.2d 1107 (Ind. Ct. App. 2000), *trans. denied*; **Matter of R.R.**, 587 N.E. 2d 1341 (Ind. Ct. App. 1992).

IC 31-34-2.5-4 states that the attorney for DCS shall, without unnecessary delay, request the juvenile court to appoint a guardian ad litem or court appointed special advocate for a child who is or who appears to be not more than thirty days old and who has been voluntarily left with an emergency medical services provider by a parent who does not express an intent to return for the child. After receiving a written report and recommendation from the guardian ad litem or court appointed special advocate and holding a hearing, the court can find, pursuant to IC 31-34-21-5.6(b)(5), that efforts to locate the child's parents or reunify the child's family are not necessary. IC 31-34-2.5-3. See Chapter 4 at VI.C. and IC 31-34-2.5-3.

IC 31-34-10-2(e) states that the court shall determine if the child should be referred for an assessment by a dual status assessment team as described in IC 31-41-1-5. In making its determination, the court shall consider the length of time since the delinquent act or the incident of abuse or neglect. See Chapter 5 at IX. for further information on dual status children.

I. H. Presence of Child at Hearing and Appointment of Counsel for the Child

The court is required to summons the child for the initial hearing and to furnish the child with a copy of the CHINS petition pursuant to IC 31-34-10-2(b) and (c). IC 31-32-6-8 provides that the child may be excluded from any part of any hearing for good cause shown upon the record. Any party can petition for the child's exclusion from the hearing, and the court can rule on the petition without a hearing. Grounds for requesting that the child be excluded may include: the child's age; trauma to the child; the child's inability to understand or appreciate the proceedings; harm to family integrity; and the child's physical or mental condition, including hospitalization, precludes the child's presence. The child should usually be present if the CHINS petition alleges pursuant to IC 31-34-1-6 that the child has substantially endangered himself or others or the CHINS petition alleges pursuant to IC 31-34-1-3.5 that the child is a victim of human or sexual trafficking. The court may appoint counsel for the child pursuant to IC 31-32-4-2(b) in any CHINS case. Counsel could represent the child if the child is present or has been excluded from the hearing.

I. I. Appointment of Counsel for Parent

Indiana case law requires the appointment of counsel for indigent parents in CHINS cases if parents so request. In **In Re G.P.**, 4 N.E.3d 1158 (Ind. 2014), the 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 that IC 31-34-4-6 enumerates a number of legal rights afforded to the parent of a child alleged to be abused or neglected when that child is subject to detention or DCS has filed a CHINS petition. Id. The Court noted that DCS is required to inform the parent in writing of these rights, and, importantly, 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 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. 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 cases are not correct on that point. Id. at 1163. See Chapter 2 at IV.C. for further discussion.

I. J. Advisements at Initial Hearing and Opportunity To Be Heard

I. J. 1. CHINS Allegations and Dispositional Alternatives

IC 31-34-10-4 provides that the court shall inform the child, if the child is "at an age of understanding," and the parent, guardian, or custodian of the following at the initial hearing:

(1) the nature of the allegations in the petition; and

(2) the dispositional alternatives available to the court if the child is adjudicated a child in need of services.

The dispositional alternatives advisement includes the alternatives listed in IC 31-34-20-1.

I. J. 2. Parental Participation and Financial Responsibility

IC 31-34-10-5 requires the court to advise the child's parent, guardian, or custodian of potential parental participation and financial responsibility at the initial hearing. Specifically, the statute states:

> The juvenile court shall inform the parent or guardian of the estate that if the child is adjudicated a child in need of services:
>
> (1) the parent, guardian, or custodian of the child may be required to participate in a program of care, treatment, or rehabilitation for the child;
>
> (2) the parent or guardian may be held financially responsible for services provided for the parent, guardian, or child; and
>
> (3) the parent, guardian, or custodian may controvert the following:
>
> (A) Allegations made at the child's dispositional or other hearing concerning the parent's, guardian's or custodian's participation.
>
> (B) Allegations concerning the parent's or guardian's financial responsibility for services that would be provided.

I. J. 3. Recommended Advisement of Rights

It is not required by the initial hearing statutes, but it is recommended that the court inquire if DCS provided the parent, guardian, or custodian with the written advisement of rights stated in IC 31-34-4-6 at the time the child was removed from the home or the

filing of the CHINS petition, whichever occurred earlier. The court should also advise the child's parent, guardian or custodian of his or her rights under IC 31-32-2-3, as well as the right to appear with counsel. It is recommended that the court advise parents that they may request court appointed counsel if they are indigent. See Chapter 2 at IV.C. for discussion on right to court appointed counsel in CHINS proceedings.

I. J. 4. Opportunity To Be Heard and Make Recommendations

IC 31-34-10-2(h) requires the court at the initial hearing to provide an opportunity to be heard and to make recommendations to the following persons: (1) a person for whom a summons is required to be issued (child, child's parent, guardian, custodian, guardian ad litem/court appointed special advocate, and any other necessary person); and (2) each foster parent or other caretaker with whom the child has been temporarily placed.

I. K. Admission or Denial of Petition

IC 31-34-10-6 provides that, except when the CHINS petition is filed pursuant to IC 31-34-1-6 [child substantially endangers self or others] or IC 31-34-1-3.5 [child is victim of human or sexual trafficking offense], the juvenile court shall determine whether the parent, guardian, or custodian admits or denies the allegations of the petition. A failure by the parent, guardian, or custodian to respond constitutes a denial. IC 31-34-10-7 provides that the juvenile court shall determine whether the child admits or denies the petition when the CHINS category is self-endangerment under IC 31-34-1-6 or victim of human or sexual trafficking under IC 31-34-1-3.5. A failure by the child to respond constitutes a denial. The child's counsel and/or guardian ad litem/court appointed special advocate should consult with the child before an admission is made.

The language allowing the parent, guardian, or custodian to admit the CHINS petition is very broad. It may allow the parent, guardian, or custodian to admit that the child is a CHINS due to the acts or omissions of another person. For example, the parent could admit that the child was the victim of a sex offense committed by the parent's boyfriend. A parent could admit that the child was a CHINS due to the acts or omissions of the other parent. If the other parent failed to appear and contest the allegations, judgment could be entered on the admission. It is recommended that DCS lay the following foundation for the CHINS admission: (1) an exact statement of what is being admitted, particularly if the admission varies from the allegations in the petition; (2) evidence that the admission is made voluntarily and with no duress or coercion from DCS; and (3) a factual basis for the admission. DCS may also request the court's authorization to amend the allegations in the CHINS petition to clarify inaccuracies or to facilitate agreement.

A parent, guardian, or custodian may wish to enter a general admission that the child is in need of services without admitting to any specific act or omission. This admission has the advantage of being more easily made and avoiding trauma to the family and child by possible testimony concerning abuse or neglect. The disadvantage is the difficulty of providing and proving the need for rehabilitation when the parent, guardian, or custodian declines to take responsibility for the condition of the child. The court will usually limit the dispositional orders to parental treatment and participation relevant to the acts or omissions contained in the admission. If the admission is not specific, the parents may not receive the services necessary to insure the safety and stability of the child.

In **In Re J.K.**, 30 N.E.3d 695 (Ind. 2015), the Indiana Supreme Court reversed the trial court's CHINS adjudication of a seventeen-year-old child. Id. at 696. The Court noted that, at the first hearing, the trial court: (1) complained that the dispute made her hair hurt; (2) told the parents,

who were in the process of divorcing, that their dispute was "ridiculous", "retarded", indicative of "stupidity", "just nuts", and otherwise "not what this court is for"; and (3) stated it would "warn" (rather than merely instruct or advise) the appointed mediator. Id. at 700. The Court these remarks strongly suggested to the parties that they would not receive a "fair trial before an impartial judge". Id. The Court said that the second hearing confirmed that impression because: (1) the court called the parties "knuckleheads for failing to resolve their dispute in mediation; (2) the court adjudicated the child a CHINS without having received any sworn testimony; (3) when Father's counsel objected, the court persuaded Father to change his mind by stating that Father would find himself finding a new job if he wanted to "play that game", and expressed frustration at the time, which was 5:30 p.m.; and (4) only then did Father relent and say, contrary to his counsel's statements moments earlier, that the child was a Child in Need of Services. Id. The Court found that the cumulative effect of the court's comments and demeanor had a direct impact on Father's decision to accept the court's leading suggestion to "waive factfinding", and that such coercion was fundamental error. Id. 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 K.B.**, 793 N.E.2d 1191 (Ind. Ct. App. 2003), Mother sought inpatient treatment for the ten-year-old child due to his severe aggression toward family members, destruction of property, fire-setting, running away and truancy. After the child was deemed medically ready for release, Mother refused to accept care, custody and supervision of the child and declined to pick the child up despite his discharge status. A CHINS petition was filed, and Mother admitted to the allegations of the CHINS petition at the initial hearing. Subsequently, the LaPorte Office of Family and Children (LPOFC) filed a motion to dismiss the CHINS petition, which was denied by the trial court. LPOFC appealed the court's subsequent dispositional order, arguing that the trial court was required by IC 31-34-9-8 to dismiss the petition so the court was without jurisdiction to enter the dispositional order. The Court concluded that the ability of LPOFC to move the trial court for mandatory dismissal of the CHINS petition pursuant to IC 31-34-9-8 ended upon Mother's admission to the allegations of the CHINS petition. Id. at 1198.

IC 31-34-9-1(a) and (b) state that the DCS attorney or the prosecuting attorney may request the juvenile court to authorize the filing of a CHINS petition and shall represent the interests of the state at this proceeding and at all subsequent proceedings on the petition. IC 31-34-9-1(b)(2) provides that the prosecuting attorney and DCS may agree that DCS shall represent the interests of the state at all subsequent proceedings. IC 31-34-9-1(c) requires the prosecuting attorney to meet all CHINS deadlines and procedures if the prosecuting attorney is representing the state at a subsequent proceeding after the CHINS petition has been filed. IC 31-34-9-8(a) states that a person representing the interests of the state may file a motion to dismiss any petition the person has filed. A reasonable interpretation of this statute is that a person who filed the CHINS petition may file a motion to dismiss the CHINS petition. IC 31-34-9-8(b) requires a person representing the interests of the state who files a motion to dismiss a CHINS petition which the person has previously filed to provide a statement of the reasons for requesting that the petition be dismissed. IC 31-34-9-8(c) states that, not later than ten days after the motion to dismiss is filed, the court shall either grant the motion or set a hearing on the motion. IC 31-34-9-8-(d) states that, if the court sets a hearing on the motion to dismiss, a guardian ad litem or court appointed special advocate may be appointed to represent the child.

I. L. Negotiations, Amendments to the Petition and Agreed Entries

Nothing in the juvenile code prohibits the parties from negotiating the specific CHINS allegations, the dispositional alternatives for the child, and/or the parental participation and financial responsibility. Such negotiations may result in an amendment to the CHINS petition.

It is encouraged that amendments be made in writing, or at the very least, thoroughly reviewed on the record prior to the CHINS admission. Judges may vary in their willingness to accept negotiated admissions or agreed entries. Judicial flexibility in considering agreements that have been negotiated by all the parties to the CHINS proceeding with input from service providers and others caring for the child is recommended.

In **In Re K.D.**, 962 N.E.2d 1249 (Ind. 2012), the Indiana Supreme Court reversed and remanded the juvenile court's CHINS adjudication with instructions to provide Stepfather with a factfinding hearing. Id. at 1260. The Court also discussed situations where a CHINS admission by one parent would be incapable of providing a factual basis for the CHINS adjudication. Id. at 1256. The Court observed that, if the parents are divorced or separated, one parent could not admit the child is a CHINS based on allegations of what occurred in the other parent's home, unless that parent had first-hand knowledge of what transpired. Id. The Court explained that allowing a CHINS adjudication based on one parent's admission could lead to vindictive admissions, designed to attack the other parent in situations when parents are divorced or going through contentious separations. Id.

In **In Re E.E.S.**, 874 N.E.2d 376 (Ind. Ct. App. 2007), *trans. denied*, the Court reversed the trial court's termination of Mother's parental rights because Bartholomew County Office of Family and Children (BCOFC) had failed to uphold its end of the agreement with Mother that in exchange for the parents' admitting to the allegations contained in the CHINS petitions, BCOFC would maintain and support the family bond until Mother was released from prison and had an opportunity to engage in services. Id. at 381-82. In reversing the termination order, the Court acknowledged that (1) the circumstances that led to the removal of the children had not been remedied because Mother was still incarcerated, and the maternal grandparents were still unable to provide a proper environment for the children; (2) the record facts demonstrated that termination of Mother's parental rights was in the best interests of the children; and (3) this was a case where the Court normally would affirm the termination. Id. at 381. The Court stated that it disapproved of such agreements because they restricted the OFC from acting pursuant to the termination statutes or in the best interests of the children; however, neither could the Court "allow an OFC to ignore such an agreement when the parent's consideration for the agreement was, in essence, waiver of the right to due process at the CHINS proceeding." Id. at 382. To BCOFC's argument that it had no choice but to file the petition based on the requirement of IC 31-35-2-4.5 that a petition to terminate should be filed when a child has been removed from a parent and under OFC supervision for not less that fifteen months of the most recent 22 months, the Court responded that (1) BCOFC was presumed to have known of the statutory requirements when it entered into the agreement with Mother; (2) despite that statutory requirement, BCOFC entered into the agreement with Mother without putting any constraints on the agreement; (3) BCOFC could have complied with the statutory requirement and honored its agreement with Mother by requesting a continuance of the termination proceedings until Mother was released from prison; and (4) "BCOFC cannot avoid its agreement with [Mother] by feigning lack of control." Id.

In **Matter of C.M.,** 675 N.E.2d 1134 (Ind. Ct. App. 1997), a termination proceeding, Mother claimed that the allegations in the CHINS petition, which she had admitted, were not true. Mother alleged that she had signed the admission in the CHINS proceeding because her attorney told her that this was the only way for the child to receive government services. The Court held that Mother's admission in the CHINS proceeding was voluntary and admissible in the termination proceeding, but collateral estoppel did not prevent Mother from presenting evidence to refute her prior CHINS admission. Id. at 1138.

I. M. Subsequent Action on Admission or Denial

IC 31-34-10-8 states that, if the parent guardian, or custodian admits the CHINS allegations, the court shall enter judgment accordingly and schedule a dispositional hearing. IC 31-34-11-1(a) states that, unless the allegations have been admitted, the court shall complete a factfinding hearing.

I. M. 1. Factfinding Hearing if Denial

IC 31-34-10-9(a) states that the court can proceed immediately to the factfinding hearing after the initial hearing, if the following parties consent: (l) the child, if competent to do so: (2) the child's counsel, guardian ad litem, court appointed special advocate, parent, guardian or custodian; and (3) the person representing the interests of the state. The preferred reading of IC 31-34-10-9(c) is to require the consent of all the persons stated therein.

IC 31-34-11-1(a) provides that the court shall complete a factfinding hearing not more than sixty days after the petition was filed. IC 31-34-11-1(b) states that court may extend the time to complete a factfinding for an additional sixty days if all parties consent to the additional time. IC 31-34-11-1(d) states that, if the factfinding hearing is not held within the statutorily required time, upon a motion with the court, the court shall dismiss the case without prejudice. The court's ability to take the CHINS 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. But see IC 31-34-11-4, which allows DCS, the child, or the child's parent, guardian, or custodian to request that a judgment be entered within thirty days of the request.

IC 31-34-11-2(a) states that, if the court finds that the child is a CHINS, the court shall: (1) enter judgment accordingly; (2) order a predisposition report; (3) schedule a dispositional hearing; and (4) complete a dual status screening tool on the child, as described in IC 31-34-1-3. A dual status child, defined in detail at IC 31-41-1-2, is a child who is or was the subject of both a CHINS and a juvenile delinquency informal adjustment or case. The "dual status screening tool" (IC 31-34-11-2(a)), is a factual review of a child's status conducted by the DCS case manager or probation officer to determine whether the child meets the criteria for being a dual status child. IC 31-34-11-2(b) states that if the court determines a child is a dual status child, the court may refer the child for an assessment by a dual status team as described in IC 31-41-5. See Chapter 5 at IX. for further discussion of dual status children.

In **Matter of D.P.**, 72 N.E.3d 976 (Ind. Ct. App. 2017), the Court reversed the trial court's CHINS adjudication of an eleven-year-old child. Id. at 985. At the scheduled factfinding hearing, Mother admitted the child was a CHINS because pending domestic violence charges had been filed against Father. Father was incarcerated in the county jail on the date of the hearing, and the trial court took judicial notice of Father's criminal cause number, and that it was a felony case. Father did not appear for the factfinding hearing, but was represented by counsel. The Court opined that, under the circumstances, Mother's CHINS admission, which was based on Father's conduct, was not binding upon Father or conclusive evidence that the child was a CHINS. Id. at 982. The Court looked to In Re K.D., 962 N.E.2d 1249, 1256 (Ind. 2012), in which the Indiana Supreme Court opined that, despite the mother's CHINS admission, it was necessary to prove allegations against both the mother and the stepfather to support a CHINS finding. D.P. at 981. Quoting K.D., 962 N.E.2d 1259, the Court noted "[w]e hold that when one parent wishes to admit and another parent wishes to deny the child is in need of services, the trial court

shall conduct a fact-finding hearing as to the entire matter." D.P. at 981-82. The Court explained, "[t]he necessary takeaway after K.D. is that, although one parent's admission *may* be sufficient to support a CHINS adjudication, it is not *automatically* sufficient." (Emphasis in opinion.) D.P. at 981. The Court noted that Mother's admission accused Father of conduct that was endangering the child. Id.

In **In Re S.A.**, 15 N.E.3d 602 (Ind. Ct. App. 2014), the twenty-two-month-old child was alleged to be a CHINS and removed from Mother's custody due to Mother's heroin use, the violent relationship between Mother and her boyfriend, and the scars from cigarette burns on the child's hands. Father spent the first two years of the child's life serving on active duty in the U.S. Navy. When he became aware of the CHINS case, Father requested paternity testing, a public defender was ordered to represent him, and the trial court entered a denial of the CHINS allegations on Father's behalf. Before the CHINS factfinding was held, Mother admitted allegations in the CHINS petition, and the trial court adjudicated the child to be a CHINS and held a dispositional hearing. Later, the court held the factfinding hearing requested by Father and issued written findings in support of its decision to "continue the adjudication that [the Child] is a [CHINS]." Father appealed, and the Court reversed the CHINS adjudication. Id. at 612. The Court opined that, by adjudicating the child as a CHINS prior to Father's factfinding hearing, the trial court deprived Father of a *meaningful* opportunity to be heard (emphasis in opinion). Id. at 609.

On rehearing in In **In Re S.A.**, 27 N.E.3d 287 (Ind. Ct. App. 2015), *trans. denied*, 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). Id. at 292. The Court was fully aware of the requirement at IC 31-34-11-1 that the trial court shall complete the factfinding within sixty days after the CHINS petition was filed, with a sixty-day extension if all parties consent. Id. at 292 n.3. 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. Id. at 292-93. The Court said that, if an adjudication is unavoidable before evidence has been heard from the second parent, then the trial court must give meaningful consideration to the evidence provided by the second parent in determining whether the child remains a CHINS. Id. at 293.

In **In Re T.N.**, 963 N.E.2d 567 (Ind. 2012), the Indiana Supreme Court reversed the CHINS adjudication. Mother admitted the CHINS allegations, but Father objected to the CHINS status being granted on Mother's admission, adding that the parties shared joint legal and physical custody. The Court held that the trial court erred in not conducting a contested factfinding hearing that was requested by Father. Id. at 469. Consequently, the Court held that Father's due process rights were violated. Id.

In **In Re K.D.**, 962 N.E.2d 1249 (Ind. 2012), the Indiana Supreme Court noted that 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 enter judgment accordingly and schedule a dispositional hearing, but 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 distinguished its opinion in In Re N.E., 919 N.E.2d 102 (Ind. 2010). K.D. at 1259-60. The Court stated that, while a CHINS determination establishes the status of a child and a separate analysis as to

each parent is not automatically required, there are fact-sensitive situations where due process guarantees require separate fact finding hearings for each parent. Id. 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. at 1260. The Court also discussed situations where a CHINS admission by one parent would be incapable of providing a factual basis for the CHINS adjudication. Id. at 1256. The Court observed that if the parents are divorced or separated, one parent could not admit the child is a CHINS based on allegations of what occurred in the other parent's home, unless that parent had first-hand knowledge of what transpired. Id. The Court explained that allowing a CHINS adjudication based on one parent's admission could lead to vindictive admissions, designed to attack the other parent in situations when parents are divorced or going through contentious separations. Id.

I. M. 2. Judgment and Dispositional Hearing if Admission

Once an admission is made, IC 31-34-10-8 provides that the court shall enter judgment that the child is in need of services and schedule a dispositional hearing. The court should specify the CHINS category upon which judgment is entered. This assists DCS and the child's parent, guardian, or custodian in determining the need for, and extent of, rehabilitation services.

IC 31-34-10-9(a) and (c) provide that if the respondent admits the CHINS petition the court can proceed immediately to a dispositional hearing upon the consent of specified persons. See this Chapter immediately above at M.1. for persons who may consent to proceed directly to the dispositional hearing. The parties may not want to proceed immediately to a disposition hearing if a predispositional report has not been filed and considered by all the parties. IC 31-34-18-1 through IC 31-34-18-3 require that DCS prepare a predispositional report which contains recommendations for: (1) the care, treatment, rehabilitation, and placement of the child; (2) parental participation; and (3) financial responsibility. See Chapter 8 at I. for discussion on predispositional reports.

In **Matter of Ce.B.**, 74 N.E.3d 247 (Ind. Ct. App. 2017), the Court affirmed the juvenile court's CHINS adjudication for two children, who were five years old and one year old, when the CHINS petitions were filed. Id. at 250. The petitions alleged that: (1) the children lived with Mother and her boyfriend (Custodian), and the children's father was in prison; (2) Mother and Custodian engaged in domestic violence in front of the five-year-old child; (3) Custodian was recently arrested for a domestic violence related incident involving Mother and had pending criminal charges against him; (4) Custodian used cocaine and marijuana; and (5) Mother used marijuana. The Court appointed an attorney for Mother and an attorney for Custodian. The attorneys stipulated to the CHINS petition and affidavit. Both Mother and Custodian were present at the court hearing in person and stated they understood that there would not be a CHINS trial, and the judge would decide the CHINS case based on the CHINS petition and affidavit. The juvenile court adjudicated the children to be CHINS, ordered Mother and Custodian not to use illegal drugs or alcohol and to participate in random drug screens, and scheduled a dispositional hearing. At the dispositional hearing, Mother and Custodian, with their attorneys, sought to withdraw their CHINS stipulations. DCS objected to their requests. The juvenile court denied Mother's and Custodian's requests to withdraw their stipulations. Custodian appealed, claiming the juvenile court erred in finding the children to be CHINS without first holding a factfinding hearing. The Court found the juvenile court *did* hold a factfinding hearing at which Custodian, represented by his attorney, chose to stipulate that the facts contained in the CHINS petitions and reports of

preliminary inquiry were true (emphasis in opinion). Id. The Court noted Custodian's acknowledgement on appeal that stipulations generally may be withdrawn only for cause. Id. Quoting Harlan v. Harlan, 544 N.E.2d 553, 556 (Ind. Ct. App. 1989), *reh'g denied*, *aff'd* 560 N.E.2d 1246 (Ind. 1990), the Court said, "As a general rule, stipulations may not be withdrawn without the consent of both parties, or for cause. Typically, the grounds for setting aside a stipulation include fraud, mistake, undue influence, or grounds of a similar nature. It is not a ground for relief that the stipulation was disadvantageous to the party seeking relief." Ce.B. at 250. The Court found that Custodian did not set forth any grounds for cause either at trial or in his appeal. Id.

II. GAL/COURT APPOINTED SPECIAL ADVOCATE IN CHINS CASES

IC 31-34-10-3 provides that a guardian ad litem or a court appointed special advocate shall represent the best interest of a child in every CHINS proceeding. The guardian ad litem/court appointed special advocate is a legal party to the CHINS case pursuant to IC 31-34-9-7. The term "guardian ad litem/court appointed special advocate" is used throughout this Chapter.

II. A. Appointment of Guardian ad Litem/Court Appointed Special Advocate

Since 2005, Indiana law has required the appointment of a guardian ad litem/court appointed special advocate for every child in a CHINS case. Trial courts also have discretion to appoint a guardian ad litem/court appointed special advocate for the child in other types of legal cases. See this Chapter below at III. for a detailed discussion on the appointment of guardians ad litem/court appointed special advocates in custody and parenting time issues in dissolution cases, guardianship proceedings, delinquency, custody and parenting time issues in paternity cases, mental health commitments, grandparent visitation, termination of the parent-child relationship, adoption, and sibling visitation cases.

In **D.T. v. Indiana Dept. of Child Services**, 981 N.E.2d 1221 (Ind. Ct. App. 2013), DCS filed a CHINS petition when the child was two days old and the child's Father was fifteen years old. A public defender was appointed to represent Father at the initial CHINS hearing. Father's mother was also present at most of the CHINS hearings. When the child was twenty months old, the trial court terminated Father's parental rights after an evidentiary hearing. Father had not requested the appointment of a guardian ad litem to represent his best interests in the CHINS case. In his appeal of the trial court's order terminating his parental rights, Father argued that a guardian ad litem would have insisted that the obligations imposed on him in the CHINS case be tailored to a minor and also that a guardian ad litem would have better understood the importance of the choices made at the CHINS hearings. The Court affirmed the termination order, finding that there was no fundamental error, and that Father's due process rights were not violated when the trial court failed to appoint a guardian ad litem for Father. Id. at 1226. The Court found that IC 31-32-3-11, which allows the juvenile court to appoint a guardian ad litem or court appointed special advocate for the child at any time, could have applied to Father, but the wording clearly indicates that the appointment of a guardian ad litem under this section is discretionary.

In **In Re A.L.H.**, 774 N.E.2d 896 (Ind. Ct. App. 2002), Mother appealed the trial court's judgment terminating her parental rights. She argued, inter alia, that the trial court's failure to appoint a guardian ad litem for the child at the beginning of the CHINS case violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The Court was not persuaded by her argument, noting that at the time of the CHINS proceeding in this case, IC 31-6-4-13.6(c), recodified at IC 31-34-10-3, gave the trial court discretion to determine whether a guardian ad litem or court appointed special advocate was required. Id. at 901. The Court found that Mother had not provided evidence showing how the trial court abused its

discretion by refusing the appointment of a guardian ad litem or court appointed special advocate and that Mother had not shown how the result of the proceedings would have been different if the guardian ad litem or court appointed special advocate had been appointed. The Court opined that, because the guardian ad litem is appointed to protect the interests of the child, Mother could not claim prejudice by the trial court's refusal to appoint a guardian ad litem or court appointed special advocate in the CHINS proceedings. Id. The Court noted that the trial court had appointed not only a court appointed special advocate for the child, but had also appointed counsel for Mother when the termination petition was filed. Practitioners should note that this case was decided prior to the 2005 amendment to IC 31-34-10-3 mandating appointment of a guardian ad litem/court appointed special advocate for every alleged CHINS at the initial hearing. See this Chapter at I.G.

II. B. Statutory Definitions of Guardian ad Litem and Court Appointed Special Advocate

IC 31-9-2-28(a) states:

> "Court appointed special advocate," for purposes of IC 31-15-6 [dissolution of marriage], IC 31-17-6 [custody and visitation], IC 31-19-16 [postadoption visitation], IC 31-19-16.5 [postadoption sibling contact], IC 31-28-5 [foster care sibling visitation], and the juvenile law, means a community volunteer who:
>
> (1) has completed a training program approved by the court;
>
> (2) has been appointed by a court to represent and protect the best interests of a child; and
>
> (3) may research, examine, advocate, facilitate, and monitor a child's situation.

IC 31-9-2-50(a) states:

> "Guardian ad litem," for purposes of IC 31-15-6 [dissolution of marriage], IC 31-19-16 [postadoption visitation], IC 31-19-16.5 [postadoption sibling contact], IC 31-28-5 [foster care sibling visitation], and the juvenile law, means an attorney, a volunteer, or an employee of a county program designated under IC 33-24-6-4 who is appointed by a court to:
>
> (1) represent and protect the best interests of a child; and
>
> (2) provide the child with services requested by the court including:
>
> (A) researching;
>
> (B) examining;
>
> (C) advocating;
>
> (D) facilitating; and
>
> (E) monitoring;
>
> the child's situation.
>
> A guardian ad litem who is not an attorney must complete the same court approved training program that is required for a court appointed special advocate under section 28 of this chapter.

IC 31-9-2-28(b) and IC 21-9-2-50(b) require court appointed special advocates and guardians ad litem in CHINS, termination of the parent-child relationship, and delinquency cases to complete training in the identification and treatment of child abuse and neglect and early childhood, child, and adolescent development as required by 42 U.S.C. 510a(b)(2)(B)(xiii).

Neither the guardian ad litem nor court appointed special advocate definition includes non-attorney professionals who may be appointed as a guardian ad litem for payment, such as a trained social worker, counselor, or psychologist. These persons may not be serving as a

volunteer, lawyer or as an employee of a local guardian ad litem or court appointed special advocate program, and do not seem to fit in either definition. The court would need to determine if the particular ethics of the profession, or applicable rules of privilege or confidentiality for the profession are in conflict with the guardian ad litem/court appointed special advocate role.

II. C. Distinguishing Guardian ad Litem and Court Appointed Special Advocate

By statute there are only minor differences between the definition of a guardian ad litem and the definition of a court appointed special advocate. Neither a guardian ad litem nor court appointed special advocate is required by statute to be an attorney. However, in practice in Indiana, it is common that the court appoints an attorney to serve as a guardian ad litem.

The technical distinctions between the statutory definitions of guardian ad litem and court appointed special advocate are as follows:

- TRAINING. A court appointed special advocate is required to complete a training program. All guardians ad litem who represent children's best interests in CHINS, termination of the parent-child relationship, or delinquency cases also must complete a training program. Attorney guardians ad litem are not required to complete a training program to represent children's best interests in custody, guardianship, adoption or other family law cases.

- VOLUNTEER OR EMPLOYMENT STATUS. A court appointed special advocate is defined as a "community volunteer"; however, a guardian ad litem is defined as an "attorney, volunteer, or employee of a county program." This may indicate that attorneys and employee guardians ad litem may receive remuneration for their services, whereas court appointed special advocates may not. A court appointed special advocate volunteer could receive reimbursement for expenses such as mileage, long distance telephone calls and copying costs.

- PROVIDING SERVICES TO THE CHILD. The guardian ad litem definition states that the guardian ad litem is appointed to "provide the child with services requested by the court." This language does not appear in the court appointed special advocate definition.

See the statutes at II.B., which require special training for guardians ad litem and court appointed special advocates who serve children in CHINS, termination, and delinquency cases. The training requirements apply to attorneys as well as to community volunteers and employees of county programs.

II. D. Role of Guardian ad Litem/Court Appointed Special Advocate

The guardian ad litem/court appointed special advocate is appointed by the juvenile court to represent and protect the best interests of a child. IC 31-32-3-6. The guardian ad litem/court appointed special advocate serves as an "officer of the court." IC 31-32-3-7. The definition statutes clarify that the roles and rights of the guardian ad litem/court appointed special advocate include researching, examining, advocating, facilitating, and monitoring the child's situation. See IC 31-9-2-50 (definition of guardian ad litem); IC 31-9-2-28 (definition of court appointed special advocate).

In **Kern v. Wolf**, 622 N.E.2d 201 (Ind. Ct. App. 1993), the Court affirmed the termination of parental rights judgment against Mother's claim that the court appointed special advocate's zealous representation of the child was improper. Id. at 204. Mother objected that the court appointed special advocate "vigorously pursued the termination action" and "obtained

depositions, summoned and examined witnesses and generally exercised a dominant role in the termination proceedings, with the DPW exercising a subordinate role." Id. Rejecting Mother's claim, the Court stated:

> Pursuant to I.C. 31-6-1-12 [recodified at IC 31-9-2-28] a CASA is empowered to "represent and protect the best interests of a child and to provide that child with services requested by the court." According to The American Heritage Dictionary (Second Edition), "represent" means, inter alia, as "to keep from harm, attack or injury: to guard." Ascribing to these terms their plain and ordinary meaning, we conclude that the CASA acted within statutory parameters when she took measures to pursue the termination of mother's parental rights.

Id. at 204.

IC 31-28-5.8 established Collaborative Care and set out a new role for the participation of guardian ad litem/court appointed special advocate in review hearings and termination of Collaborative Care services. See this Chapter at II.O.

IC 31-28-5-1 through 5 are the statutes on sibling visitation for children who are receiving DCS funded foster care and their siblings, regardless of whether the siblings are receiving foster care. IC 31-28-5-3 allows any of the following to request DCS to permit sibling visitation: (1) a child, (2) a child's foster parent, (3) a child's guardian ad litem/court appointed special advocate, (4) an agency that has the legal responsibility to care for, treat, or supervise a child. If DCS denies a sibling visitation request, the child's guardian ad litem/court appointed special advocate may petition the court with jurisdiction in the county in which the child receiving foster care is located for an order requiring sibling visitation. IC 31-28-5-4(a). IC 31-28-5-5(a) authorizes the juvenile court to appoint a guardian ad litem/court appointed special advocate if a child who is receiving foster care requests sibling visitation. See this Chapter at III.I.2. for additional information.

II. E. Special Considerations When Guardian ad Litem or Court Appointed Special Advocate is an Attorney

The difficulty of an attorney serving as a guardian ad litem or court appointed special advocate for a child is the possible conflict between the attorney's professional and ethical responsibilities in an "attorney-client relationship" as opposed to the "best interests" representation provided by a guardian ad litem or court appointed special advocate. In an attorney-client relationship an attorney is obligated (1) to ascertain and forward the "stated desires" of the client; (2) to keep the client informed and facilitate "client-directed" litigation, and (3) to maintain the client's confidences. See Ind. Professional Conduct Rules 1.2, 1.4, and 1.6. On the other hand, the "best interests" representation provided by a guardian ad litem or court appointed special advocate considers the stated desires of the child dependent upon the developmental age and needs of the child, but the advocate makes an independent determination of the best interests of the child. Also, in representing the "best interests" of a child a guardian ad litem or court appointed special advocate may choose to shield the child from the controversy and involvement in the litigation that could prove traumatic or harmful to the child. Finally, "best interests" representation may require sharing the confidences of the child for the purpose of protecting the child or furthering the best interests of the child.

The Court acknowledged the dilemma when an attorney serves as guardian ad litem in the dissolution custody cases **Deasy-Leas v. Leas**, 693 N.E.2d 90 (Ind. Ct. App. 1998), in which parents' attorneys subpoenaed the files of the attorney guardian ad litem. The opinion states:

> Complicating matters further and even more challenging in terms of discerning the guardian's role and what types of information should remain confidential, is the situation

> when the guardian ad litem is an attorney. The attorney-client privilege is a cornerstone to legal representation. To say that an attorney acting as a guardian completely loses the shroud of confidentiality calls into question the efficacy of appointing guardians ad litem instead of attorneys to represent children.
>
> We are faced with such a situation in the present instance. Guardian McKim is an attorney. Here, the parties requesting the information attack the guardian for acting more as an attorney than as the guardian for the best interests of the children. While admittedly the line is blurred when a guardian is also an attorney, the general duties are similar. Each is sworn to represent the best interests of the client or the charge. It is also noteworthy, that Guardian McKim's request for appointment of an attorney to represent the guardian was denied, leaving her no choice to proceed in both her capacity as guardian and her capacity as an attorney.

Id. at 98.

It is critical for the court to clarify whether the attorney is appointed as an attorney, a guardian ad litem, or both for the child. IC 31-32-3-3 provides that the attorney representing the child may be appointed as the child's guardian ad litem or court appointed special advocate.

Ind. Professional Conduct Rule 1.14 "Client with Diminished Capacity" states:

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.
(d) This Rule is not violated if the lawyer acts in good faith to comply with the Rule.

The expanded commentary to the amended Rule discusses the lawyer's role in taking protective action and emergency legal action.

In **Parmeter v. Cass Cty Dept. of Child Serv.**, 878 N.E.2d 444 (Ind. Ct. App. 2007), a CHINS case, the Court held that trial court did not abuse its discretion when it denied Mother's motion to strike the guardian ad litem's report. Id at 452. Mother alleged that the guardian ad litem, an attorney, had a conflict of interest and contended that the trial court should have struck the guardian ad litem's report, but cited no authority in support of her contention. The Court said that Mother's argument was therefore waived, citing Appellate Rule 46(A)(8)(a). Id. Waiver notwithstanding, the Court concluded that it could not agree with Mother. Id. Mother's conflict of interest was based on a newspaper article printed shortly after the filing of the guardian ad litem's report. The article said that Father's attorney had been named Logansport city attorney and the guardian ad litem had been named deputy city attorney. The guardian ad litem denied any conflict of interest, but withdrew as guardian ad litem because of the appearance of a conflict created by the move of her practice into the offices of Father's attorney.

See also **In Re Paternity of N.L.P.**, 926 N.E.2d 20, 25 (Ind. 2010), in which the Indiana Supreme Court stated that a two-tiered billing system that attempts to parse which particular services are unique to attorney guardians ad litem and which are not is unnecessary and unworkable.

Guardians ad litem and court appointed special advocates should become knowledgeable about child abuse and neglect reporting statutes and comply with Indiana law on reporting child abuse/neglect. See Chapter 4 at I. for complete information

II. F. State Office of Guardian ad Litem/Court Appointed Special Advocate

II. F. 1. History

The Child Abuse Prevention and Treatment Act of 1974 at 42 U.S.C. § 5101 made federal grant money available to states that provided specific child abuse prevention and treatment programs. One of the required programs was the mandatory appointment of a guardian ad litem/court appointed special advocate for every child in a CHINS case. Indiana Programs are variously referred to as guardian ad litem programs or court appointed special advocate programs. In 1989, the Indiana legislature created state matching funds for county guardian ad litem and court appointed special advocate programs and created a state office of Guardian ad Litem/Court Appointed Special Advocate. Amendments to IC 31-34-10-3 which require the appointment of a guardian ad litem or court appointed special advocate for every child alleged to be a child in need of services, put Indiana into compliance with the federal Child Abuse Prevention and Treatment Act.

II. F. 2. State Office of Guardian ad Litem/Court Appointed Special Advocate and State Funding

IC 33-24-6-4(a) established the State Office of Guardian ad Litem/Court Appointed Special Advocate. The State Office, which is part of the Indiana Office of Court Services, provides training services and communication services for local officials and county Guardian ad Litem/Court appointed Special Advocate programs, and has a Code of Ethics for county programs. The executive director of the State Office, an experienced family law attorney, and other State Office staff members are assisted and guided by the Advisory Commission, which includes representative program directors and judges. The State Office of Guardian ad litem/ Court Appointed Special Advocate lists all county guardian ad litem/court appointed special advocate programs which provide representation for children in CHINS cases on the Indiana Supreme court website, and provides other useful information. See www.in.gov/judiciary. The State Office holds an annual county directors and staff institute and an annual volunteer conference and provides training for attorneys and for county program directors and staff.

IC 33-24-6-4 authorizes the distribution of matching funds, as appropriated by the General Assembly, to counties administering guardian ad litem and court appointed special advocate programs for children who are the victims of child abuse or neglect under IC 31-33. The formula for the distribution of matching funds is codified at IC 33-24-6-5 and provides that distribution is based on the number of CHINS cases in a county. Small counties that would have received less than $2,000 under the formula are granted $2,000. IC 33-24-6-4(c) provides that matching funds which are not distributed each year by July 1 do not revert to the general fund, but are available to be redistributed to county programs. IC 33-24-6-4(e) states that "[o]nly guardian ad litem or court appointed special advocate programs certified by the supreme court are eligible for funding under this section." IC 33-24-6-4(a) provides that the county fiscal body shall appropriate adequate funds for the county to be eligible for the state matching funds.

II. F. 3. County Guardian ad Litem/Court Appointed Special Advocate Programs

Most of the county programs use volunteers to represent children, but some programs use trained professionals or a combination of volunteer and professional services. The programs recruit the volunteers and provide training in the legal, social science, and developmental aspects of child abuse and neglect. After appointment to a particular case, the volunteer receives ongoing supervision from the program. Some programs use attorneys to assist in legal issues and/or to represent the volunteer in court cases. The guardian ad litem/court appointed special advocate has broad powers as a party to subpoena witnesses and records, to file motions, and take action necessary to represent the best interest of the child.

County programs conduct volunteer recruitment, screening and training. A Code of Ethics and Guardian ad Litem/Court Appointed Special Advocate Program Standards have been provided to county programs by the State Office of Guardian ad Litem/Court Appointed Special Advocate and its advisory commission. In order to receive certification from the State Office and be eligible for state funding, a statement of commitment to adhere to the Ethics and Program standards, submit relevant statistics on service provision, attend the annual directors' and volunteers' conferences, and provide updated information to the State Office must be signed by the county program director.

II. G. Party Status for Guardian ad Litem/Court Appointed Special Advocate and Rights as a Party

IC 31-34-9-7 provides that guardians ad litem and court appointed special advocates are legal parties to CHINS proceedings. As a party to the CHINS proceeding under IC 31-34-9-7, the guardian ad litem/court appointed special advocate is entitled to notice of all proceedings and to all the protections and privileges accorded to parties under the civil trial rules. This includes the following rights: file pleadings, motions, and appeals; subpoena documents and use other methods of discovery; and testify in court as well as call and examine witnesses and admit documents into evidence.

IC 31-34-10-2(g) requires the court at the initial hearing to provide an opportunity to be heard and to make recommendations to the court to a person for whom a summons is required to be issued. IC 31-34-10-2(b) requires a summons to be issued to the child's guardian ad litem/court appointed special advocate, so the guardian ad litem/court appointed special advocate has the right to an opportunity to be heard and to make recommendations at the initial hearing or an additional initial hearing. IC 31-34-19-1.3(b) requires the court at the dispositional hearing to provide an opportunity to be heard and to make recommendations to the court, to a person for whom a summons is required to be issued under IC 31-34-10-2. The guardian ad litem/court appointed special advocate is included among the persons for whom a summons must be issued, so the court must provide the guardian ad litem/court appointed special advocate an opportunity to be heard and to make recommendations at the dispositional hearing. The above statutes provide additional specific support for the guardian ad litem's/court appointed special advocate's role as a party to the CHINS case at initial and dispositional hearings.

See **In Re Involuntary Term. of Parent-Child Rel.**, 755 N.E.2d 1090 (Ind. Ct. App. 2001), in which the Court opined that both statutory authority (IC 31-35-2-7) and Indiana Appellate Rule 17(A) allow the guardian ad litem to be a party to an appeal of an involuntary termination of the parent-child relationship proceeding. The guardian ad litem/court appointed special advocate is also a party to an expedited appeal of a CHINS proceeding pursuant to Ind. Appellate Rule 14.1. See Chapter 8 at XIII.C.1. for further discussion.

II. H. Court's Discretion to Appoint Counsel for Guardian ad Litem/Court Appointed Special Advocate

IC 31-32-3-4 provides that the guardian ad litem or court appointed special advocate may be represented by counsel, and IC 31-32-3-5 provides that the court "may" appoint counsel for the guardian ad litem or court appointed special advocate if "necessary to protect the child's interests."

II. I. Standing to Initiate Case and to File Motions and Reports

The guardian ad litem/court appointed special advocate does not have standing to initiate a CHINS petition, but can file a petition for the involuntary termination of the parent-child relationship under IC 31-35-2-4 and IC 31-35-3-4. The guardian ad litem/court appointed special advocate has a broad range of authority in the CHINS case as indicated in subsections 1 through 4 immediately below.

II. I. 1. Protective and No Contact Orders

Pursuant to IC 31-32-13-1 the guardian ad litem or any person providing services to the child or parent (which would reasonably include a court appointed special advocate) may seek a protective order at any time during the CHINS process for the following purposes: to control the conduct of any person in relation to the child; to provide a child with an examination or treatment; or prevent a child from leaving the court's jurisdiction on an emergency or non-emergency basis. Under IC 31-34-25-1(2) the guardian ad litem/court appointed special advocate has standing to request an order to restrain any person from direct or indirect contact with the child after the child has been adjudicated a CHINS.

The statute on dispositional protective/no contact orders is codified at IC 31-34-25-1 through 5. The guardian ad litem/court appointed special advocate may sign and file a verified petition for the juvenile court to require a party to refrain from direct or indirect contact with a child or a member of a foster family pursuant to IC 31-34-25-1(2).

II. I. 2. Parental Participation

IC 31-34-16-1 through IC 31-34-16-3 provide that the guardian ad litem/court appointed special advocate may file a verified parental participation petition to require the child's parent, guardian or custodian to do any of the following: obtain assistance in fulfilling their obligations for the child; provide specified care, treatment or supervision for the child; or work with any persons providing care, treatment, or rehabilitation for the child.

II. I. 3. Modification Petition

IC 31-34-23-1 provides that the child, the child's guardian ad litem/court appointed special advocate, the child's parent, guardian or custodian, the DCS attorney, and any person providing services under a court decree to the child or the child's parent, guardian, or custodian have standing to petition the court to modify any dispositional order. The court may also modify a dispositional decree on the court's own motion. IC 31-34-23-1.

II. I. 4. Predispositional, Review, and Permanency Reports

IC 31-34-18-1(b) provides that the guardian ad litem/court appointed special advocate can file a predispositional report. The statute does not set a time requirement on the filing of the report, unlike the dissolution statute, IC 31-17-2-12 (b), which requires that a guardian ad litem/court appointed special advocate report be filed ten days in advance of the custody hearing in order for hearsay evidence in the report to be admissible. See **Keen v. Keen**, 629 N.E.2d 938 (Ind. Ct. App. 1994) (error for court in divorce proceeding to consider guardian ad litem report which was not timely served on the parties). Since the ten day time requirement of the dissolution statutes may be excessive for CHINS proceedings, it is

recommended that the guardian ad litem/court appointed special advocate report be served on the parties and filed with the Court three to five days before the hearing.

IC 31-34-22-1 requires that DCS shall prepare a progress report before CHINS review hearings, but makes no mention of alternative reports by the guardian ad litem/court appointed special advocate or any other party. The broad language of IC 31-34-22-3, which states that "any report" may be admitted if it contains evidence of probative value, suggests that reports prepared by the guardian ad litem/court appointed special advocate should be admissible for the six month periodic review hearing and the twelve month permanency hearing.

IC 31-34-19-2(a) (predispositional report) and IC 31-34-22-3(a) (periodic case review report) state that "any" report may be admitted into evidence to the extent that the report contains evidence of probative value even if the evidence would otherwise be excluded. IC 31-34-23-4 states that IC 3-34-18 and IC 31-34-19 apply to the preparation and use of a modification report. *Practice Note:* A reasonable interpretation of the above statutes is that a guardian ad litem/court appointed special advocate report prepared for a dispositional, periodic case review, or dispositional modification hearing may be admitted into evidence even if the report contains hearsay as long as the report contains evidence of probative value. Evidence of probative value could include information from the child's and parent's therapists and service providers, information from the child's school teachers and counselors, and staff, foster parents, residential and medical treatment providers, and private agency social workers.

IC 31-34-19-2(c) (predispositional report) and IC 31-34-22-3(c) (periodic case review hearing report and permanency hearing report) list the persons who "shall be given a fair opportunity to controvert any part of the report admitted into evidence." In dispositional hearings IC 31-34-19-2(c) states that the child, parent, guardian, custodian, "person representing the interests of the state," and the foster parent or other caretaker shall be given the opportunity to controvert the report. In periodic case review hearings and permanency hearings, IC 31-34-22-3(c) states that the child, parent, guardian, custodian, "person representing the interests of the state," and other persons entitled to receive a report under IC 31-34-22-2 (which includes the guardian ad litem/court appointed special advocate) shall be given the opportunity to controvert the report.

Practice Note: Guardians ad litem/court appointed special advocates should be aware that their reports which are admitted into evidence may be controverted. In some circumstances, the guardian ad litem/court appointed special advocate may elect to consult with the child, in an age appropriate manner, concerning whether the child wishes to controvert information contained in predispositional, periodic case review, and permanency reports prepared by DCS, the guardian ad litem/court appointed special advocate, or other parties.

IC 31-34-21-7(b), the permanency hearing statute, requires the court to consult with the child in person or through an interview or written statement or report submitted by a guardian ad litem/court appointed special advocate, a case manager, or a 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) provides that the court shall: (1) require DCS to provide notice of the permanency hearing to the child; (2) provide the child an opportunity to be heard and to make recommendations to the court in accordance with IC 31-34-21-4(d); (3) require DCS to document or provide testimony regarding the intensive, ongoing, and, as of the date of the hearing, unsuccessful efforts made by the DCS

to return the child home or secure placement with a relative, legal guardian, or adoptive parent; (4) ask the child about his desired permanency outcome; (5) make a judicial determination explaining why another planned permanent living arrangement is the best plan; and (6) require DCS to document that the child's placement is following the reasonable and prudent parent standard and that the child has regular ongoing opportunities to engage in age or developmentally appropriate activities. The above is a summary of the requirements at IC 31-34-21-7(c). See Chapter 9 at II.D.3. for further discussion IC 31-34-21-7(c).

Practice Note: The guardian ad litem/court appointed special advocate report for a permanency hearing should contain information from the age appropriate consultation with the child about the proposed permanency plan, including the child's wishes. If the child is at least sixteen years old and the permanency plan is another planned permanent living arrangement, the guardian ad litem/court appointed special advocate should advocate for DCS to provide services to the child, including transitional services planning, Collaborative Care [IC 31-28-5.8], referrals for Education and Training Vouchers, applications for Medicaid, and the Youth Connections Program. See Chapter 9 at III.G. for further information on these services.

II. J. Access to Reports, Records, and Photographs

II. J. 1. Predispositional and Review Reports

IC 31-34-18-6 provides that the predispositional report prepared by DCS "shall be made available within a reasonable time before the dispositional hearing" to the guardian ad litem or court appointed special advocate. The language of the statute does not indicate whether the report will be provided by the court or DCS, but it is generally considered to be the responsibility of DCS to provide and distribute necessary copies of the report to the parties. IC 31-34-22-2(a) and (b) provide that any report prepared by the state for review of a dispositional decree, the periodic case review hearing or the permanency hearing shall be made available to the guardian ad litem/court appointed special advocate "within a reasonable time after the report's presentation to the court or before the court hearing."

II. J. 2. Juvenile Court Records, Including Confidential Records Filed With the Court

The guardian ad litem/court appointed special advocate has access to juvenile court records under the general provision of IC 31-39-2-3, which provides access to the court records to all parties to the CHINS case without a court order. IC 31-33-15-2 further provides that the guardian ad litem and court appointed special advocate shall be given access under IC 31-39 to "(1) all reports relevant to the case; and (2) any reports of examinations of the child's parents or other person responsible for the child's welfare." The statute gives access to a broad range of confidential reports or documents pursuant to IC 31-39. It is limited to the records covered by IC 31-39, which include juvenile court and law enforcement records. Therefore, IC 31-33-15-2 gives access to reports and documentation filed with the court and law enforcement, but may not authorize access to any documents not filed with the court regarding the child or the child's parent, guardian, or custodian.

II. J. 3. Law Enforcement Records

The guardian ad litem/court appointed special advocate has access to law enforcement records through the general provision of IC 31-39-4-4, granting access to relevant law enforcement records to any party to a juvenile court proceeding and the party's attorney.

II. J. 4. DCS Records

IC 31-33-18-2(7) provides that the "reports and other material" of DCS "shall be made available" to the guardian ad litem/court appointed special advocate. IC 31-33-18-1 lists the breadth of available documents as being any other information obtained, reports written, or photographs taken concerning the reports in the possession of: (A) the division of family resources; (B) the local office [of DCS]; (C) the department [DCS]; or (D) the department of child services ombudsman established by IC 4-13-9-3.

IC 31-33-26-16(a)(4) provides that a person or agency to whom child abuse and neglect reports are available under IC 31-33-18-2 may have access to information contained in the Child Protection Index. Since IC 31-33-18-2(7) grants the guardian ad litem/court appointed special advocate access to DCS records, a guardian ad litem/court appointed special advocate also has access to the child protection index. See Chapter 4 at V. for further discussion of the child protection index.

II. J. 5. Photographs, X-rays, and Medical Reports

IC 31-33-10-1 requires that child abuse and neglect reporters who are health care providers, hospitals, and other medical institutions shall take photographs of areas of trauma on the child who is the subject of a report of abuse, and if medically indicated, complete radiological or other medical examinations of the child. IC 31-25-2-13 gives the guardian ad litem/court appointed special advocate access to photographs, x-rays, or physical examination reports of the child taken by health care providers pursuant to IC 31-33-10-1.

II. J. 6. Mental Health Records of Child and Parents

IC 16-39-2-9 provides that a "court appointed representative" can exercise the child's right to release the child's mental health records on behalf of the child. IC 16-39-4-2(b)(5) specifically states that a "guardian ad litem" or "court appointed special advocate" involved in the planning, provision, and monitoring of mental health services for the child can make a written request for mental health records; however, this statute additionally requires that the child's treating physician must give a written consent for the release of the records.

Obtaining the mental health records of the child's parent, guardian, or custodian may be difficult if the parent, guardian, or custodian does not consent to the release of the records, or the records are not otherwise included in the court's file and available through IC 31-33-15-2. IC 16-39-2-8 provides that a court may order the release of the patient's mental health record without the patient's consent upon a showing of good cause in a juvenile proceeding under IC 31-30 through IC 31-40, following a hearing held under the Indiana Rules of Trial Procedure. This statute does not limit who can request mental health records, so it is reasonable to assume that the guardian ad litem/court appointed special advocate has standing to file a request and to litigate the request at the required hearing.

IC 16-39-4-2(d) states that a parent, guardian, guardian ad litem, or court appointed special guardian who prepares a written request for mental health records shall sign an authorization for the release of mental health records, as may be requested by the provider, to satisfy federal HIPAA requirements. IC 16-39-4-3 states that, if a provider receives a written request under IC 16-39-4-2(b), the provider shall give the following: (1) a summary of the patient's diagnosis; (2) the types of medication that have been prescribed; (3) a summary of the 26information on patient's rights under IC 12-27-6-2 and IC 12-27-6-3; and (4) a summary of the patient's prognosis.

See **Meridian Health Services Corp. v. Bell**, 61 N.E.3d 348 (Ind. Ct. App. 2016), *trans. denied*, for an excellent discussion of HIPAA privacy rules and Indiana statutes on a mental health provider's efforts to restrict Father's access to his daughter's mental health therapy records. The Court concluded that HIPAA and state law clearly required Meridian Health Services Corporation, which was providing mental health therapy to the daughter of divorced parents, to release the daughter's records to Father. Id. at 360. The Court held the trial court did not abuse its discretion in finding Meridian in contempt for failing to comply with the court order to release the records. Id. The Court also concluded the trial court did not abuse its discretion in ordering Meridian to pay Father's attorney fees. Id. The opinion was affirmed on rehearing at **Meridian Health Services Corp. v Bell**, 65 N.E.3d 611(Ind. Ct. App. 2016).

II. K. Confidentiality of Guardian ad Litem/Court Appointed Special Advocate Records

There is no case or statutory law on the confidentiality of the guardian ad litem/court appointed special advocate records in a CHINS or termination of the parent-child relationship case. Indiana Administrative Rule 9(A) states that except as otherwise provided in this Rule, access to court records is governed by the Indiana Access to Public Records Act (IC 5-14-3-1 et seq). Admin. Rule 9(G) provides for the exclusion from public access of entire cases which are declared confidential by statute or other court rule. IC 31-39-1-2 provides for the confidentiality of the records of CHINS and termination of the parent-child relationship cases, so CHINS cases and termination of the parent-child relationship cases are excluded from public access. The State Office of GAL/CASA requires county GAL/CASA Programs to subscribe to the State Office Code of Ethics, which requires that "[n]either a GAL/CASA program or volunteer will disclose confidential information relating to a case to any person who is not a party to the case except in reports to the court and as provided by law or court order." Since the guardian ad litem/court appointed special advocate does not have a privileged relationship with the child, parties to the CHINS case may have access to the records of the guardian ad litem/court appointed special advocate through the civil discovery process. Guardians ad litem/court appointed special advocates should seek direction from the county program attorney or the trial court before sharing confidential medical information, including counseling and drug and alcohol treatment records, for one parent of the child with the other parent of the child.

See Indiana Trial Rule 26(C), which provides that "Upon motion by any party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the county where the deposition is being taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense..." The protective order can completely deny the discovery request, or limit the scope, conditions, and redisclosure of the discovery.

In the dissolution custody case **Deasy-Leas v. Leas**, 693 N.E.2d 90 (Ind. Ct. App. 1998), the parties filed notice of discovery requesting production of the guardian ad litem's files. The guardian ad litem filed motions to quash the discovery and requested protective orders pursuant to Ind. Trial Rules 26(C) and 45(B). Id. at 92. The trial court denied the motion to quash upon its findings that (1) the guardian ad litem was appointed to represent the best interests of the child, not the child himself; (2) the law did not impose an attorney-client privilege upon the guardian ad litem-child relationship, and (3) the law does not impose any confidentiality or privilege upon the guardian ad litem-child relationship. Id. at 92. On appeal, the Court determined that Indiana has not enacted a statutory privilege for communications between the guardian ad litem and the child, and no privilege exists absent a statute. Id. at 94. The Court examined a broad range of juvenile and domestic relations custody statutes relating to confidentiality and determined that the "legislative scheme, while not specifically offering a guardian ad litem privilege, contains the

general confidentiality provisions" and these provisions "cast a shadow on the legislature's willingness to give parties carte blanche access to communications and investigations lest they prey upon familial difficulties at the children's expense." Id. at 98. Further, the Court found that the guardian ad litem has by statute access to a great deal of confidential records and information. The parties can examine and cross-examine the guardian ad litem with regard to those records and the parties can discover those records independent of the guardian ad litem file, but "the appointment of a guardian ad litem should not be a discovery tool" for the parties. Based upon the general legislative scheme to provide some measure of confidentiality in guardian ad litem representation, and the intention to avoid the use of the guardian ad litem as a discovery tool for the parties, the Court determined that a trial court may, "when requested by a party acting with the mission to guard the children's best interest," issue protective orders under T.R. 26(C) to protect certain documents and communications in the guardian ad litem file from discovery. Id. at 99.

II. L. Guardian ad Litem/Court Appointed Special Advocate Testimony and Hearsay

When testifying in the CHINS factfinding hearing, the guardian ad litem/court appointed special advocate may be prohibited from repeating verbatim statements the child has made to the guardian ad litem/court appointed special advocate or to other persons, unless the statements fall into a hearsay exception. See **Roark v. Roark**, 551 N.E.2d 865, 869 (Ind. Ct. App. 1990) (hearsay generally not admissible at factfinding hearing and court erred in admitting out-of-court statements of children solely on opinion of guardian ad litem that testifying would be too traumatic for the children); Ind. Evidence Rule 802 (hearsay not admissible unless allowed by rules or law). See also Chapter 7 at VIII. and IX. for detailed discussion of hearsay, hearsay exceptions, and child hearsay exception. In the termination of parental rights case **Matter of D.V.H.**, 604 N.E.2d 634, 638-639 (Ind. Ct. App. 1992), the Court rejected Mother's argument that the guardian ad litem's testimony about the child's desires was hearsay. The Court indicated that the guardian ad litem should "refrain from repeating verbatim statements" made by the child, but noted that the legislative creation of the guardian ad litem appointment "contemplates some summarization of the child's desires and state of mind." Id. at 639. In detention, dispositional, and case review hearings, as opposed to the factfinding and termination hearings, the guardian ad litem or court appointed special advocate may include reliable hearsay in the reports and reliable hearsay could also be admitted in the testimony of the guardian ad litem/court appointed special advocate. See also **Matter of A.F.**, 69 N.E.3d 932 (Ind. Ct. App. 2017), *trans. denied*, a termination of parental rights case, in which Father argued the trial court abused its discretion by allowing the guardian ad litem to summarize and testify to what the children had told her about their wishes for future placement. The Court opined that under the circumstances the guardian ad litem's testimony on the children's desires did not warrant reversal. Id. at 948. But see **In Re O.G.**, 65 N.E.3d 1080 (Ind. Ct. App. 2016), *trans. denied*, a termination of parental rights case, in which Father argued on appeal that the juvenile court erroneously permitted the guardian ad litem to testify regarding the child's wishes which he had expressed to the guardian ad litem. The Court held that the guardian ad litem's testimony was inadmissible hearsay and the juvenile court erred by permitting it. Id. at 1080. The Court reversed the juvenile court's termination judgment, finding, inter alia, that there was insufficient evidence of a reasonable probability that the conditions that resulted in the removal and continued placement of the child would not be remedied. Id. at 1096.

In dispositional and case review hearings, the guardian ad litem or court appointed special advocate may include reliable hearsay in the reports and reliable hearsay could also be admitted in the testimony of the guardian ad litem/court appointed special advocate.

II. M. Immunity from Liability

IC 31-32-3-10 provides that a guardian ad litem, court appointed special advocate, employee of county guardian ad litem/court appointed special advocate program, or volunteer for the county guardian ad litem/court appointed special advocate program is immune from civil liability if he/she performs necessary duties in good faith and does not act with gross misconduct.

II. N. GAL Appointment in Involuntary Drug and Alcohol Treatment Proceedings

IC 31-32-16-1 through 11 allows parents to petition for and the juvenile court to order involuntary drug and alcohol treatment for children. IC 31-32-16-1 states that this procedure is separate from and does not affect: (1) a proceeding for involuntary treatment under IC 12-26 (mental health commitment); or (2) a juvenile court order under IC 31-37 (delinquency proceeding) that requires drug or alcohol treatment. IC 31-32-16-11 states that the judge may appoint a guardian ad litem for the child at any time in this proceeding. Since the statutory definition of guardian ad litem at IC 31-9-2-50 includes the phrase "for purpose of…the juvenile law", a guardian ad litem appointed under IC 31-32-16-11 has the same duties and immunities listed at IC 31-32-31-1 through 10 as any other guardian ad litem has in juvenile court. See IC 31-32-3-1 through 10.

II. O. Collaborative Care Services

Collaborative Care services for youth, eighteen or nineteen years of age, who received foster care under a court order during the month before they reached the age of eighteen are codified at IC 31-28-5.8-1 through 9. These statutes also added a new role for guardians ad litem and court appointed special advocates. IC 31-28-5.8-7(b) requires that the court conduct periodic reviews of a collaborative care agreement in a formal court hearing. IC 31-28-5.8-7(c) states that DCS shall provide notice of a hearing at least seven days before the hearing to, among others, the older youth and to a guardian ad litem or court appointed special advocate participating with the consent of the older youth. IC 31-28-5.8-8 states that, if DCS terminates a collaborative care agreement before the expiration date without the concurrence of the older youth, the court may, at the request of the older youth or a guardian ad litem or court appointed special advocate participating with the consent of the older youth, hold a hearing on the cause of the termination of the collaborative care agreement and enter an order with findings and conclusions regarding whether DCS properly terminated the agreement. See Chapter 9 at IV.H. for further discussion of Collaborative Care.

II. P. Guardian ad Litem Costs and Fees in CHINS Cases

IC 31-33-15-3 states that "[a]ny costs related to the services of a guardian ad litem shall be paid according to IC 31-40." IC 31-32-3-9 likewise provides that if any fees arise in connection with the guardian ad litem/court appointed special advocate "payment shall be made under IC 31-40." IC 31-40-1-3 provides that the parent or the guardian of the child's estate is financially responsible for any services ordered by the court, and the court shall order payment or reimbursement at a hearing, "unless the court finds that the parent or guardian is unable to pay or that justice would not be served by ordering payment from the parent or guardian." Under the user fee provision of IC 31-40-3-1 the judge can order the parent or guardian to pay a guardian ad litem user fee not to exceed $100 in cases in which a guardian ad litem or court appointed special advocate is appointed. IC 31-40-3-1 is subject to IC 31-40-1-3, which provides that no payment shall be ordered if the parent or guardian is unable to pay or justice would not be served by ordering payment. It may be argued that the user fee provision of IC 31-40-3-1 was intended to limit the liability of the parent or the guardian of the child's estate to only the $100 fee. There is a counter argument that the court's authority under IC 31-40-1-3 to order parental reimbursement is very broad and not limited to the $100 user fee limit.

In general IC 31-40-1-2 requires DCS to pay the cost of any child services provided by or through DCS for the child and the child's parent, guardian, or custodian, but the law provides for many exceptions to this general statute. See Chapter 8 at IX.A. for further discussion.

In **In Re N.S.**, 908 N.E.2d 1176 (Ind. Ct. App. 2009), the Court reversed and remanded two consolidated cases in which the trial court had erroneously ordered that DCS pay the guardian ad litem fees associated with the underlying CHINS proceedings. Id. at 1177. In these two cases, the trial court determined that there was probable cause to believe the children were CHINS, appointed a guardian ad litem, and ordered DCS to pay a $300.00 preliminary guardian ad litem fee. DCS appealed the trial court's orders that it pay the preliminary guardian ad litem fee, and moved that the cases be consolidated for appeal. The consolidation request was granted. The Court concluded that IC 31-40-3-2 clearly states that the fiscal body of the county shall appropriate money for use by the courts in providing guardian ad litem or court appointed special advocate services, and that IC 33-24-6-4 supports the proposition that the burden of financially supporting guardian ad litem and court appointed special advocate programs lies with the county. Id. at 1180-82. The Court held that the trial court erred in ordering DCS to pay the fees associated with the services provided by the guardians ad litem in these cases. Id. at 1182. See also **In Re J.J.**, 912 N.E. 909, 912 (Ind. Ct. App. 2009) (citing reasoning and findings of In Re N.S., 908 N.E.2d 1176, 1182-83 (Ind. Ct. App. 2009), Court reversed and remanded for further proceedings because trial court had erroneously ordered that DCS pay guardian ad litem fees associated with underlying CHINS proceedings); **In Re J.W.,** 911 N.E.2d 667, 668 (Ind. Ct. App. 2009) (Court adopted rationale and findings of In Re N.S., 908 N.E.2d 1176, 1182-83 (Ind. Ct. App. 2009) and held trial court had erred in ordering DCS to pay fees associated with services provided by the guardians ad litem).

II. Q. Discharge of Guardian ad Litem/Court Appointed Special Advocate

IC 31-32-3-8 provides that a "guardian ad litem or court appointed special advocate serves until the juvenile court enters an order for discharge under IC 31-34-21-11." IC 31-34-21-11 provides that when the juvenile court finds that the objectives of the dispositional decree have been met, the court shall discharge the child and the child's parent, guardian or custodian.

III. GUARDIAN AD LITEM/COURT APPOINTED SPECIAL ADVOCATE APPOINTMENT IN TERMINATION AND OTHER LEGAL PROCEEDINGS

The appointment of a guardian ad litem or court appointed special advocate has been statutorily provided for in many types of legal proceedings involving children. In the absence of specific statutory authority, appointment may still be required in any legal proceeding in which the court finds that "an infant or incompetent person is not represented, or is not adequately represented." Ind. Trial Rule 17(C). See also **Matter of Paternity of H.J.F.**, 634 N.E.2d 551, 553-55 (Ind. Ct. App. 1994).

III. A. Custody and Parenting Time Issues in Dissolution Proceedings

The dissolution court may appoint a guardian ad litem/court appointed special advocate at any point in a dissolution proceeding to represent and protect the best interests of the child. IC 31-17-6-1. In **Schenk v. Schenk**, 564 N.E.2d 973 (Ind. Ct. App. 1991), a custody case, the Court noted that the statute does not mandate appointment of guardians ad litem in dissolution cases, and the Court found that it was not an abuse of discretion to fail to appoint a guardian ad litem in that particular case. Id. at 979.

In dissolution proceedings, the guardian ad litem and court appointed special advocate "shall represent and protect the best interests of the child," and are considered "officers of the court for the purpose of representing the child's interests." IC 31-17-6-3; IC 31-17-6-4. The guardian ad litem/court appointed special advocate may subpoena witnesses and present evidence regarding the supervision of the action or any investigation and report that the court requires of the guardian ad litem/court appointed special advocate. IC 31-17-6-6. Although not addressed by statute, the Court noted in the dissolution custody cases **Deasy-Leas v. Leas**, 693 N.E.2d 90, 97 (Ind. Ct. App. 1998), that the guardian ad litem "is a party to the proceedings and is subject to examination and cross-examination." The guardian ad litem/court appointed special advocate may be represented by counsel, or may request court appointment of counsel if necessary to protect the child's best interests. IC 31-17-6-5. The guardian ad litem/court appointed special advocate may be appointed to investigate and report on the custodial arrangements for the child, and may submit a written report containing hearsay which may be received in evidence and may not be excluded on the grounds that the report is hearsay or otherwise incompetent, if all statutory requirements are satisfied. IC 31-17-2-12. IC 31-17-6-9 allows the court to assess a user fee against either or both parents. The court may order that the fee may be paid to the clerk to be maintained as a guardian ad litem/court appointed special advocate appointment fund, or to the county guardian ad litem/court appointed special advocate program, or to the individual or attorney who provided the guardian ad litem service. A guardian ad litem/court appointed special advocate may be ordered by the dissolution court to exercise continuing supervision over a child and "to assure that the custodial or visitation terms of an order entered by the court" are followed. IC 31-17-6-7. The guardian ad litem/court appointed special advocate serves until the court enters an order for removal. IC 31-17-6-3.

In **Montgomery v. Montgomery**, 59 N.E.3d 343 (Ind. Ct. App. 2016), the Court reversed the trial court's order modifying custody of the child from Father to Mother as there was insufficient evidence of a substantial change in circumstances justifying modification or that modification was in the child's best interests. Id. at 355. The facts of the case indicate that the trial court appointed a guardian ad litem for the child, the guardian ad litem testified at the hearing, and her report was entered into evidence. Id. at 346-48. In explaining its opinion, the Court found it important that the guardian ad litem recommended the child continue in the custody of Father. Id. at 353. Mother noted that the guardian ad litem's report was filed over a year before the hearing and the guardian ad litem could not testify with certainty that her recommendation would be the same because she had not interacted with the parties and the child since that time, but the Court said that since Mother was seeking to modify custody, it was Mother's burden to demonstrate that something happened in the year since the report was filed that could or would have changed the guardian ad litem's recommendation. Id. at 353 n.4.

In **Milcherska v. Hoerstman**, 56 N.E.3d 634 (Ind. Ct. App. 2016), the Court affirmed the probate court's denial of Mother's request to relocate with the parties' eleven-year-old child from Mishawaka, Indiana to Texas. Id. at 643. The facts of the case indicate that the probate court appointed a guardian ad litem, who filed a motion for a temporary restraining order requesting that the child remain in Indiana with Father until after the hearing. Id. at 636. The guardian ad litem also testified at the final hearing. Id. On the issues of the child's wishes and best interests, the Court noted the guardian ad litem's testimony that the child was very intelligent and mature, the child received her emotional stability from Father, her home life in Texas had caused anxiety, she had many friends and family in Mishawaka, and it was in her best interest to remain with Father in Indiana. Id. at 640.

In **Steele-Giri v. Steele**, 51 N.E.3d 119 (Ind. 2016), a dissolution custody modification case, the Indiana Supreme Court affirmed the trial court's denial of Mother's motion for custody

modification. Id. at 123. The facts of the case note that the guardian ad litem filed a report, which the trial court reviewed. In its discussion of the custody modification factors, the Court noted evidence in support of its opinion from the guardian ad litem's report on: (1) the child's relationship with Father and her paternal grandparents; (2) the child's relationship with the daughter of Father's live-in girlfriend; and (3) information from the teacher on the child's adjustment to school. Id. at 125-28.

In **L.C. v. T.M.**, 996 N.E.2d 403 (Ind. Ct. App. 2013), the Court reversed the trial court's denial of Mother's petition to modify custody of the two children, ages eleven and thirteen, from shared physical custody with Father and Mother to sole physical custody with Mother. Id. at 412. The Court opined that the evidence presented at the hearing clearly established that a modification of custody would be in the children's best interest, and that Mother established that a substantial change had occurred in at least one of the custody factors. Id. The Court specifically noted evidence from the guardian ad litem's report and testimony, which included: (1) the children's wishes had changed and they had become distressed at the negative, disparate treatment they were receiving when compared to the better treatment that their step-siblings were receiving at Father's home; (2) the children were "adamant" that the custody and parenting time arrangement should change and they felt that the environment at Father's home was "hostile"; (3) the children had good reasons for desiring the change in custody; (4) if Father held firm to his current position, the children would be so angry and disenfranchised that it would irreparably harm their relationship with him. Id. at 410.

In **Swadner v. Swadner**, 897 N.E.2d 966 (Ind. Ct. App. 2008), a dissolution of marriage case, the Court (1) held that the trial court had the authority to appoint a guardian ad litem to represent and protect the best interest of the child; (2) stated that it could not conclude that the guardian ad litem exceeded her authority when, in her preliminary recommendations, she recommended that if the unborn child was a boy, the child's middle name should be Wakefield, a traditional middle name in the Father's family; and (3) did not conclude that Mother was permanently bound by the guardian ad litem's recommendation concerning the middle name, where the parties had agreed to adopt the preliminary recommendations, but each had reserved the right to argue against them at the final hearing. Id. at 972-73. The Court concluded that the trial court had not abused its discretion in determining that joint custody was appropriate and noted that the guardian ad litem had recommended joint legal custody and parenting time in excess of the minimum established by the Parenting Time Guidelines for Father. Id. at 974. The Court affirmed the trial court's determination that Mother's request to relocate with the children was not in the children's best interests, citing the guardian ad litem's evidence and recommendation against granting Mother's request. Id. at 976-77.

In **J.M. v. N.M.**, 844 N.E.2d 590 (Ind. Ct. App. 2006), *trans. denied*, a dissolution of marriage case, Father appealed the trial court's order restricting his parenting time to supervised parenting time by a counseling service. The parties had agreed to the appointment of a guardian ad litem in a provisional order. The parties also agreed to binding arbitration pursuant to the Family Law Arbitration Statute, IC 34-57-4-1 et seq. The guardian ad litem testified, introduced her report as a exhibit, and cross-examined witnesses at the two day binding arbitration hearing. Before the hearing, Father objected to the participation by the guardian ad litem in the proceedings, which objection was overruled. The guardian ad litem's report, which was submitted at the hearing, recommended that Father have therapeutically supervised parenting time and that he undergo a psychological evaluation, including a drug and alcohol assessment. In his appellate claim that the decree regarding parenting time must be reversed, Father argued that the guardian ad litem was erroneously allowed to examine and cross-examine witnesses and that there was a lack of statutory authority for this role. The Court disagreed, citing the guardian ad litem's statutory role

(IC 31-9-2-50), the appointment statute (IC 31-15-6-1), the requirement to represent and protect the best interests of the child (IC 31-15-16-3), the guardian ad litem's role as officer of the court (IC 31-15-6-7), and the ability of the guardian ad litem to subpoena witnesses and present evidence (IC 31-15-6-7) and be represented by counsel (IC 31-15-6-6). Id. at 600-01.The Court also cited Carrasco v. Grubb, 824 N.E.2d 705, 710 (Ind. Ct. App. 2005), *trans. denied*, and Deasy Leas v. Leas, 693 N.E. 2d 90, 93 (Ind. Ct. App 1998), *trans. denied*, which state that the guardian ad litem is a party to the proceedings. J.M. at 601. The Court concluded that the guardian ad litem's participation in the arbitration hearing was within statutory authority and there had been no abuse of discretion. Id. The Court found no merit in Father's argument that the guardian ad litem's presence during the hearing was barred by the separation of witnesses order. Id. The Court also rejected Father's contention that the guardian ad litem's alleged post-arbitration questioning of father's witness rendered the guardian ad litem's participation in the arbitration hearing improper because Father failed to show any prejudice he had suffered. Id. The Court also disagreed with Father's argument that his objections to the admission of the guardian ad litem's report based upon Indiana Rules of Evidence 602, 701, 702 and 702(b) had been erroneously overruled. Id. at 602. The Court found that Father had posed no such objections at the pre-arbitration meeting at which time the admission of the report had been discussed and that Father had the opportunity to question the guardian ad litem extensively about the contents of her report, and to use statements therein in his questioning of other witnesses. Id. The Court also opined that, even if the guardian ad litem's report and testimony were erroneously admitted, sufficient evidence from other sources supported the trial court's parenting time determination. Id.

In **Carrasco v. Grubb**, 824 N.E.2d 705 (Ind. Ct. App. 2005), *trans. denied*, the Court affirmed the trial court's order modifying custody of one of the children to Father where the guardian ad litem who had been appointed for the original dissolution had filed a report and recommended such a change. Id. at 713. One of the issues raised by Mother on appeal was that the guardian ad litem's participation in the post-dissolution proceedings was not authorized by law. The Court concluded that a guardian ad litem's responsibilities are not dependent upon the stage of the proceedings, and, in seeking a change of custody of one of the children, the guardian ad litem properly participated in the proceedings and was acting in the child's best interests. Id. at 710-11. The Court noted that IC 31-15-6-4 provides that a guardian ad litem is required to serve until excused by the trial court. The Court further noted that in Deasy-Leas it had determined that the "guardian is a party to the proceedings and is subject to examination and cross examination" and accordingly the guardian ad litem is permitted "to present evidence regarding the supervision of the action or any investigation and report that the court requires of the guardian ad litem or court appointed special advocate." IC 31-15-6-7. Carrasco at 710. Additionally, the Court held that, when Mother refused to sign the change of custody agreement to which she had previously agreed, the guardian ad litem had the authority to request a hearing in light of IC 31-15-6-8 which provides that a guardian ad litem shall continue to supervise the situation "to assure that the custodial or visitation terms of an order…are carried out…" Id. at 710. The Court rejected Mother's argument that the guardian ad litem was simply attempting to relitigate the trial court's award of custody. Id. The Court noted that IC 31-17-2-21 permits a trial court to modify a child custody order if modification is in the best interest of the child and there has been a substantial change in one or more of the factors listed in IC 31-17-2-8, and that IC 31-17-4-2 authorizes the trial court to modify parenting time if the best interests of the child are served. Id.

In **Cunningham v. Cunningham**, 787 N.E.2d 930 (Ind. Ct. App. 2003), a dissolution custody modification case, the Court held that, despite the opinions of the court appointed family therapist custody evaluator and the guardian ad litem, the trial court's decision to deny Father's petition for modification was supported by the evidence. Id at 936. The Court noted that, although the guardian ad litem spoke with all family members concerned in the custody evaluation, he did not

speak with any of the children's teachers or school counselors, despite the fact that the decline in the older child's school performance was a primary issue in the case. Id. The Court also noted that neither the custody evaluator nor the guardian ad litem addressed the fact that Father's fiancée and her thirteen-year-old son had begun residing with Father. Id.

In **Haley v. Haley**, 771 N.E.2d 743 (Ind. Ct. App. 2002), a dissolution custody modification case, Mother challenged the court appointed special advocate's testimony as being "odd and unsubstantiated." The Court declined to make a determination concerning the court appointed special advocate's credibility, but noted that it was highly important to point out that the trial court found apparent bias in the court appointed special advocate's report and yet still ruled in favor of Father's custody modification petition. Id. at 748 n.1.

In **Deasy-Leas v. Leas**, 693 N.E.2d 90 (Ind. Ct. App. 1998), the guardian ad litem, who was appointed in two dissolution custody proceedings, brought an interlocutory appeal of the trial court's denials of her motions to quash discovery requests and requests for protective orders. The Court noted that Indiana has not enacted a statutory privilege for communications between guardians ad litem and their charges. Id. at 94. The Court opined that a trial court may rely on the protective powers of Ind. Trial Rule 26(c) when a guardian ad litem or any other party requests confidentiality in custody proceedings. Id. at 96. The Court said that the other parties' rights to discovery are then safeguarded by the information. Id. The Court held that, if the guardian ad litem is in possession of records to which the parties are entitled, the parties can use the avenues open to them to discover those items from the primary sources. Id. at 97. The Court said that the appointment of a guardian ad litem: (1) should not be a discovery tool to be used by a party after waiting a sufficient amount of time for disclosures to be made; and (2) should not be a short cut to privileged information. Id. at 98. The Court also observed that the guardian ad litem is a party to the proceedings and is subject to examination and cross-examination. Id. at 97. The Court explained that a trial court may, especially when requested by a party acting with the mission to guard the children's best interest, rely on T. R. 26(c) and the general confidentiality provisions to protect certain documents and communications. Id. at 99.

In **Danner v. Danner**, 573 N.E.2d 934 (Ind. Ct. App. 1991), the Court held that the dissolution court can assess a fee for guardian ad litem services against a parent. The court can award the guardian ad litem compensation for his services. Id. at 938.

III. B. Guardianship Proceedings

If a minor is not represented, or adequately represented, by counsel in a guardianship proceeding, the court shall appoint a guardian ad litem for the child, unless the court determines that it is appropriate to waive the appointment. IC 29-3-2-3. The court shall also appoint a guardian ad litem or court appointed special advocate when a petition seeking the appointment of a guardian for a child alleges the following: the child's custodial parent has died and the noncustodial parent does not have the right to custody because the noncustodial parent had earlier been denied parenting time (or given only supervised parenting time) by the order of the dissolution court. IC 29-3-3-6. See Chapter 14 at IV.E. for further discussion of guardians ad litem/court appointed special advocates in guardianship proceedings. IC 29-3-9-6(e) provides that the court may appoint a guardian ad litem on behalf of a protected person for the purpose of reviewing an accounting of a guardian's administration of an estate. IC 29-3-9-6(e) applies when the protected person does not have a spouse, adult child, or parent or when the same person served as guardian before the protected person's death and is also the personal representative of the person's estate.

In **In Re Guardianship of Atkins**, 868 N.E.2d 878 (Ind. Ct. App. 2007), an adult guardianship case, a guardian ad litem was appointed to represent Atkins, a middle aged businessman who was

incapacitated due to a ruptured aneurysm, acute subarachnoid hemorrhage, and a stroke. Atkins' parents and his same gender life partner separately petitioned to be appointed guardian of Atkins' person, and the trial court heard evidence on who should be appointed Atkins' guardian. The trial court considered the guardian ad litem's testimony in making its decision. Id. at 884. The trial court appointed Atkins' parents as guardians of his person and estate, and Atkins' life partner appealed. One of the issues in the life partner's appeal was whether the trial court should have required the presence of Atkins, who was recovering from his medical conditions, at the contested guardianship hearing. The Court opined that the trial court erroneously declined to require Atkins' presence at the hearing. Id. at 887. The Court explained that the right to be present at the guardianship hearing is akin to a due process right belonging to the allegedly incapacitated person. Id. The Court said it was the duty of Atkins' court-appointed guardian ad litem to represent Atkins' interest and insist that he be present at the hearing, but the guardian ad litem did not do so. Id. The Court found that, consequently, Atkins' right to be present at the hearing had been waived. Id. The Court declined to remand for a new trial. Id. The Court was "compelled" to affirm the trial court's order that Atkins' parents be appointed his co-guardians, but remanded with instructions to grant the life partner visitation and contact with Atkins. Id. at 888.

In **In Re Guardianship of Hickman**, 811 N.E.2d 843 (Ind. Ct. App. 2004), *trans. denied*, an adult guardianship case, the Court affirmed the trial court's order awarding attorney fees from the estate for the guardianship petitioner's attorneys despite another party's argument that because a guardian ad litem had been appointed, the involvement of the guardianship petitioner was no longer necessary. Id. at 853. The Court opined that a trial court is required to appoint a guardian ad litem to represent the interests of an alleged incapacitated person. Id. at 852. The Court further stated that, unlike the guardian ad litem, a guardianship petitioner is not required to act in accordance with the incapacitated person's best interests. Id. Because the guardianship petitioner's interests might have been different from the incapacitated adult's interests, the argument that attorney fees for the guardianship petitioner were unreasonable was without merit. Id.

In another appeal on the same adult guardianship case, **In Re Guardianship of Hickman**, 805 N.E.2d 808 (Ind. Ct. App. 2004), *trans. denied*, the Court discussed whether the trial court had abused its discretion in admitting the guardian ad litem's testimony and report before an advisory jury. The Court noted that the dissolution of marriage statute, IC 31-17-2-12, permitted a guardian ad litem's report to be received in evidence at the hearing and that the report may not be excluded due to hearsay and further that the guardian ad litem may testify and be subject to cross-examination. Id. at 823. The Court also noted that the guardianship statutes contain no provisions regarding the admissibility of the guardian ad litem's recommendations. Id. The Court did not decide the issue, because it found that any error in admitting the guardian ad litem's testimony was harmless. The Court further stated, "[we] do not, however, mean to suggest that statements and other submissions from a guardian ad litem made before a nonadvisory jury are not completely subject to the rules of evidence for their admissibility." Id. at 824.

See also **In Re Guardianship of M.N.S.**, 23 N.E.3d 759 (Ind. Ct. App. 2014) (in termination of guardianship case, trial court appointed guardian ad litem to represent child's interests; guardian ad litem filed reports with the court and testified at hearings); **In Re Paternity of A.S.**, 984 N.E.2d 646 (Ind. Ct. App. 2013) (trial court appointed guardian ad litem in third party custody case, who submitted a report with recommendations and testified), *trans. denied*; **In Re Paternity of T.P.**, 920 N.E.2d 726 (Ind. Ct. App. 2010) (trial court acknowledged guardian ad litem's recommendation that custody be modified in favor of third party custodians, but determined recommendation was made without regard for presumption in favor of natural parent), *trans. denied*; **Allen v. Proksch**, 832 N.E.2d 1080 (Ind. Ct. App. 2005) (guardian ad litem's

recommendation that, despite presumption in favor of natural parent, custody of child should remain with Grandmother with future goal of reunification with Father, was cited by Court as one of factors which Court found provided ample support for trial court's judgment granting Grandmother third-party custody of child); **Hinkley v. Chapman**, 817 N.E.2d 1288 (Ind. Ct. App. 2004) (cites testimony of guardian ad litem, who had reviewed child's psychological evaluation, as well as other information, that because of child's educational deficiency it was in his best interests to be placed with his adult sister and her husband who were seeking guardianship of child); **In Re Guardianship of B.H.**, 770 N.E.2d 283 (Ind. 2002) (recommendations of court appointed special advocate report cited by Court was one of factors noted in trial court's detailed findings of facts which Court found provided ample support for trial court's judgment granting stepfather's guardianship petition); and **Francies v. Francies**, 759 N.E.2d 1106 (Ind. Ct. App. 2001) (trial court and Court of Appeals referred to the guardian ad litem report as supporting evidence for finding that Grandmother who sought custody and child had become strongly emotionally attached), *trans. denied*.

III. C. Delinquency Proceedings

The delinquency initial hearing statutes at IC 31-37-12 do not mandate the appointment of a guardian ad litem or court appointed special advocate nor do they require consideration of the appointment at the initial hearing. IC 31-32-3-1 provides that the juvenile court may appoint a guardian ad litem or a court appointed special advocate at any time, and this statute has been interpreted to allow appointment in any juvenile proceeding, including a delinquency proceeding. IC 31-37-10-7 does not include the guardian ad litem/court appointed special advocate as a party in delinquency proceedings.

In **K.S. v. State**, 849 N.E.2d 538 (Ind. 2006), a delinquency probation violation case, the child appealed his disposition of wardship to the Department of Correction for six months. The probation violation involved physical aggression by the child against his sister, in which Mother intervened. On appeal the child argued that the court erred in failing to appoint a guardian ad litem. The child claimed that Mother had a conflict of interest because she was the parent of the victim. The Court stated that the parent of an alleged juvenile delinquent does not have a conflict of interest by virtue of being a parent of both the juvenile and the victim. Id. at 543, citing Whipple v. State, 523 N.E.2d 1363, 1369-70 (Ind. 1988). The Court opined that the juvenile court is well within its discretion when it decides not to appoint a guardian ad litem for a juvenile delinquent whose mother does not have a conflict of interest. Id. The Court further noted that the child was represented by counsel hired to protect his best interests, and counsel was eligible to be appointed guardian ad litem pursuant to IC 31-32-3-3 in the event the court chose to appoint one. Id. See also **D.D.B. v. State**, 691 N.E.2d 486, 487 (Ind. Ct. App. 1998) (guardian ad litem appointed for child in delinquency proceeding cannot waive child's right to testify unless guardian ad litem and child have meaningful consultation and child knowingly and voluntarily joins in the waiver).

III. D. Custody and Parenting Time Issues in Paternity Proceedings

The paternity article of family law, IC 31-14, makes no reference to the appointment of a guardian ad litem or court appointed special advocate for a child, and does not provide for a custody or visitation investigation by a guardian ad litem or court appointed special advocate. However, since paternity actions are within juvenile court jurisdiction, the juvenile court procedural law authorizes and controls the appointment of a guardian ad litem or court appointed special advocate in paternity proceedings. IC 31-32-3-1 provides that the juvenile court may appoint a guardian ad litem or court appointed special advocate for a child "at any time." In **Matter of Paternity of H.J.F.**, 634 N.E.2d 551 (Ind. Ct. App. 1994), the Court opined that a guardian ad litem appointment is not warranted in all paternity cases, but a "guardian ad litem

must be appointed to protect the child's interests in all cases where a party seeks to overcome the presumption that a child born in wedlock is legitimate." Id. at 555. In **C.J.C. v. C.B.J.**, 669 N.E.2d 197 (Ind. Ct. App. 1996), the trial court appointed a guardian ad litem upon its dismissal of Mother's petition to establish paternity, for the purpose of determining if it would be in the child's best interests to amend the petition and proceed with the paternity action in the child's own name. In **In Re Paternity of V.M.E.**, 668 N.E.2d 715 (Ind. Ct. App. 1996), the Court remanded the case and ordered the trial court to appoint a guardian ad litem to represent the children in the establishment of paternity. The Court stated that "in narrow circumstances, such as when the children are not adequately represented, an appointment is required." Id. at 717. The Court opined that the enmity between the parents with a real possibility of a custody award to Father made it unlikely that the children's rights would be adequately represented by Mother. Id.

In **In Re Paternity of J.G.**, 19 N.E.3d 278 (Ind. Ct. App. 2014), the trial court appointed a guardian ad litem for the child on Father's motion to modify the child's custody from Mother. The court held an evidentiary hearing, at which the guardian ad litem testified. The guardian ad litem prepared a report, but it was never offered or admitted into evidence as an exhibit. The trial court modified custody of the child to Father, and the Court affirmed the trial court's judgment. Id. at 283. The Court found the evidence supported the trial court's conclusions that modification of custody was in the child's best interests and that there had been a substantial change in one or more of the custody factors at IC 31-14-13-6. Id. Among other evidence, the Court noted the guardian ad litem's testimony that: (1) the child was very happy at the school where Father had enrolled her, she achieved good grades, and had no trouble at school; (2) the child was "really close" to Father and Stepmother; (3) Father's home was appropriate and the child had her own bedroom; (4) the child had appropriate clothing and maintained good hygiene in Father's care; and (5) the stability offered by Father was preferable to the instability offered by Mother. Id. In response to Mother's argument that the guardian ad litem's report was inadmissible hearsay, the Court noted that: (1)) at points during the guardian ad litem's testimony, Mother objected based on hearsay, and the trial court sustained those objections; and (2) the report was never admitted into evidence as an exhibit, so the Court did not need to consider whether the report itself was hearsay. Id. at 283 n.4.

In **In Re Paternity of N.L.P.**, 926 N.E.2d 20 (Ind. 2010), the Indiana Supreme Court vacated the Court of Appeals opinion at 888 N.E.2d 403 (Ind. Ct. App. 2008) and reversed the trial court orders which found that the attorney guardian ad litem's fees of $34,800 were unreasonable and reduced the guardian ad litem fees to $20,000. Id. at 23. The Court remanded the case for further proceedings, and held that, because there was no evidence that the parties' agreements with the guardian ad litem for payment of her fees were void as against public policy, and the trial court made no findings as such, the trial court was bound to enforce the terms and conditions of the agreements. Id. at 25. After serving as the guardian ad litem for the parties' child for four years and performing numerous tasks as part of her role as guardian ad litem, attorney Jill Swope submitted a bill for $34,800 based on a contract that each party had signed separately. The Court cited IC 31-32-3-1, stating that the trial court is empowered to appoint a representative for the child in the form of a guardian ad litem. Id. The Court further quoted IC 31-14-18-2(a), which states the trial court may order a party to an action to pay: "(1) a reasonable amount for the cost to the other party of maintaining an action under this article; and (2) a reasonable amount for attorney's fees, including amounts for legal services provided and costs incurred, before the commencement of the proceedings or after entry of judgment." Id. The Court stated that both the trial court and the Court of Appeals focused on the reasonableness of the requested guardian ad litem fees, but this focus was misplaced. Id. The Court noted that the clients neither contested the guardian ad litem's bill nor participated on appeal, and the parties had separately entered into written agreements with the guardian ad litem that set forth hourly rates. Id. The Court noted the

very strong presumption of the enforceability of contracts that represent the freely bargained agreement of the parties. Id. The Court disagreed with the vacated Court of Appeals opinion, which stated that a person acting as a both a guardian ad litem and as an attorney should bill separately for her services and that failing to do so meant that the resulting fees were presumptively unreasonable. Id. at 24-25. The Court said that a two-tiered billing system that attempts to parse which particular services are unique to an attorney and which are not is at least unnecessary and at most unworkable. Id. at 25.

In **In Re Paternity of P.S.S.**, 913 N.E.2d 765 (Ind. Ct. App. 2009), the Court affirmed the juvenile court's dismissal of the child's petition to establish paternity filed against Mother and Putative Father after the dissolution of the marriage of the child's parents. Id. at 796. The Court observed that a guardian ad litem had been appointed for the child during her parents' dissolution case, so that the child's interests were represented during mediation. The Court concluded that the child had a full and fair opportunity to take part in the resolution of the paternity issue during mediation, and that it would be unfair to give her "a second bite at the apple." Id.

The Court affirmed the trial court's orders regarding communication between the parents and parenting time in **In Re Paternity of G.R.G.**, 829 N.E.2d 114 (Ind. Ct. App. 2005), a paternity parenting time and child support modification case. Id. at 121-23. A guardian ad litem was appointed to represent the child. The guardian ad litem issued a report and recommendations and also testified. The father appealed the trial court's order that the parties communicate only in writing absent an emergency, alleging that the order was against the evidence presented at trial and was an abuse of discretion. The Court quoted the guardian ad litem's testimony and held that the evidence was sufficient to support the trial court's findings that the parents were unable to effectively communicate with each other, which supported the court's order that they communicate only in writing. Id. at 121. On appeal Father also argued that the trial court abused its discretion by not awarding him parenting time on midweek evenings. The Court noted that the trial court's order stated, "Visitation is ordered pursuant to the Guardian Ad Litem's report, because it is the alternative to continued conflict of the parents." Id. at 123. The Court opined that the trial court had not erred in entering the parenting time order in accordance with the guardian ad litem report because the order took into account the child's best interests. Id. at 123. See also **In Re Paternity of B.D.D.**, 779 N.E.2d 9 (Ind. Ct. App. 2003); **L.M.A. v. M.L.A.**, 755 N.E.2d 1172 (Ind. Ct. App. 2001); and **In Re Adoption of A.N.S.**, 744 N.E.2d 780 (Ind. Ct. App. 2001), paternity cases in which a guardian ad litem was appointed and testified or filed motions.

In **In Re R.P.D. ex rel. Dick**, 708 N.E.2d 916 (Ind. Ct. App. 1999), a paternity petition was brought in the name of the six-year-old child and Mother, as next friend, alleging that someone other than Mother's current husband was the father of the child. The husband, alleged father, and court-appointed guardian ad litem for the child filed motions to dismiss the paternity proceeding. Following an evidentiary hearing on whether establishment of paternity was in the best interests of the child, the court dismissed the paternity petition. The Court affirmed the trial court's dismissal, reasoning that a hearing was necessary to determine the best interests of the child since Mother (as next friend) and the guardian ad litem disagreed as to whether the paternity proceeding was in the child's best interests. Id. at 918-19. The Court found that the trial court's judgment that the paternity proceeding was not in the child's best interests was not clearly erroneous. Id. at 919.

III. E. Juvenile Mental Health Commitments

The juvenile court has concurrent jurisdiction over mental health commitments of persons under the age of eighteen. IC 31-30-1-5; IC 31-34-19-3. The juvenile court shall appoint a guardian ad

litem or court appointed special advocate for the child before it begins the commitment preceding, and the guardian ad litem/court appointed special advocate shall represent and protect the best interests of the child. IC 12-26-8-1. In addition to advocating for the child in the commitment hearing, the guardian ad litem/court appointed special advocate is required to visit the facility and evaluate the services where the child is placed under the commitment thirty days, sixty days, and every six months after the commitment. IC 12-26-8-4. The guardian ad litem/court appointed special advocate shall have access to all reports relevant to the child. IC 12-26-8-6. The guardian ad litem/court appointed special advocate shall submit a report regarding the thirty day, sixty day, and six month evaluations. IC 12-26-8-5. See Chapter 8 at X. for further discussion on juvenile mental health commitments.

In **In Re R.L.H.**, 831 N.E.2d 250 (Ind. Ct. App. 2005), three consolidated delinquency cases, the Court noted that IC 12-26-8-1 et. seq. requires the appointment of a guardian ad litem or court appointed special advocate in a mental health commitment proceeding and outlines the duties of the guardian ad litem/court appointed special advocate. Id. at 257. The commitments were reversed due to failure to follow statutory procedures. Id. at 258.

III. F. Grandparent Visitation

In **In Re Guardianship of C.R.**, 22 N.E.3d 657 (Ind. Ct. App. 2014), a grandparent visitation case, the Court reversed the trial court's order for a professional visitation evaluation of the children and parties to be conducted by psychologists. Id. at 662. The Court found that Grandparents did not have standing to petition for an evaluation and the trial court did not have the authority to order such an evaluation *sua sponte*. Id. The Court noted that the Indiana Legislature could have added grandparents with visitation rights to the list of those eligible to request an evaluation under IC 31-17-2-12, but it chose not to do so. Id. at 661-62. The Court also observed that IC 31-17-6-1, the statute authorizing trial courts to appoint guardians ad litem and court appointed special advocates in family law cases, does not include the Grandparent Visitation Act at IC 31-17-5. Id. at 662. The Court said in dicta that the appointment of a guardian ad litem or court appointed special advocate was not included in the Grandparent Visitation Act, "presumably because the legislature did not think it appropriate for courts to have such a potentially burdensome appointment power in cases of grandparent visitation." Id.

Practice Note: It is strongly recommended that a lawyer or a volunteer who is appointed by a court to serve as a guardian ad litem/court appointed special advocate in a grandparent visitation case inform the court and parties of the above case and secure the written agreement of all parties to the guardian ad litem/court appointed special advocate appointment before accepting the appointment and devoting time to the case.

III. G. Termination of Parent-Child Relationship Proceedings

The child's guardian ad litem/court appointed special advocate in a CHINS petition has standing to file a petition for the involuntary termination of the parent-child relationship under IC 31-35-2-4(a)(2) and (3), and under IC 31-35-3-4 [petition for termination based on parent's conviction of specified offenses]. In **Kern v. Wolf**, 622 N.E.2d 201 (Ind. Ct. App. 1993), Mother argued on appeal that the termination statute was unconstitutional "because it permits the initiation of a petition for termination of parental rights by a community volunteer rather than a state actor," but the Court found that Mother waived the issue, noting that a "constitutional question will not be considered on appeal unless it was presented in the trial court." Id. at 203.

IC 31-35-2-4.5 mandates that DCS or the child's guardian ad litem/court appointed special advocate shall file a petition for the involuntary termination of the parent-child relationship when

a child has been out of the home and under the supervision of DCS or a county probation department for fifteen of the last twenty-two months, or there has been a judicial finding that reasonable efforts toward reunification are not required. When a guardian ad litem or court appointed special advocate files a termination petition pursuant to IC 31-35-2-4.5(b) [mandatory termination petition because court has found that reasonable efforts are not required or child has been removed from parent and under DCS custody for fifteen of the most recent twenty-two months], IC 31-35-2-4.5(c) requires that DCS shall be joined as a party to the petition. IC 31-35-2-5 and IC 31-35-3-6 state that upon the filing of a termination petition, the DCS attorney shall represent the interests of the state in all subsequent proceedings on the petition.

IC 31-35-2-7(a) requires the juvenile court to appoint a guardian ad litem/court appointed special advocate on any petition for the involuntary termination of the parent-child relationship in which the parent objects to the termination. See **Jolley v. Posey County DPW**, 624 N.E.2d 23 (Ind. Ct. App. 1993) (reversible error to fail to appoint guardian ad litem). In **Matter of S.L.**, 599 N.E.2d 227 (Ind. Ct. App. 1992), the Court noted that the children in a contested, involuntary termination of the parent-child relationship case have a "statutory right to have a guardian ad litem or special advocate represent their best interests." Id. at 229. The Court clarified that failure to appoint a guardian ad litem was not harmless error, because the attorney for the welfare department represented the state, the attorney for Mother represented Mother's interests, and no one represented the child's interests as required by the appointment statute. Id. at 230. The Court said that the interests of the welfare department and the child "are not necessarily identical." Id. at 230 n.3.

IC 31-35-2-7(b) provides that the judge "may reappoint" the guardian ad litem or court appointed special advocate who served the child in the underlying CHINS case to serve as the guardian ad litem or court appointed special advocate in the termination proceeding. If a termination petition is granted and the matter is referred for adoption proceedings, IC 31-35-6-2 states that the child's guardian ad litem/court appointed special advocate shall: (1) give information to DCS regarding the best interests of the child; (2) review the adoption plan as to the best interests of the child; and (3) report to the juvenile court and, if requested, to the probate court regarding the adoption plan and its appropriateness.

IC 31-35-3.5 states that the court shall terminate the parent-child relationship when a parent has been proven by clear and convincing evidence to have committed an "act of rape" (as defined by IC 31-9-2-0.9), which resulted in the child's conception. Notably, IC 31-35-3.5 does not require that the alleged perpetrator parent was criminally convicted of rape or child molesting. There is no requirement that the child who is the subject of the termination petition be an adjudicated CHINS. Unlike other termination of the parent-child relationship cases, which must be filed by DCS, the guardian ad litem/court appointed special advocate, or by a licensed child placing agency (for voluntary termination proceedings pursuant to IC 31-35-1), a termination petition pursuant to IC 31-35-3.5 may be filed only by the parent who is the victim of the "act of rape". In addition to proving that the child was conceived as a result of an "act of rape", the victim parent must also prove that termination of the parent-child relationship is in the child's best interests. IC 31-35-3.5-8 states the court may appoint a guardian ad litem, a court appointed special advocate, or both for the child, as provided in IC 31-17-6-1[statute on appointing guardian ad litem/court appointed special advocate in dissolution proceeding]. See Chapter 11 at III.G. for more information.

In **D.T. v. Indiana Dept. of Child Services**, 981 N.E.2d 1221 (Ind. Ct. App. 2013), the Court concluded that minor Father's due process rights were not violated when the trial court failed to appoint a guardian ad litem for him in the CHINS case. Id. at 1226. The Court noted that Father

was represented by a public defender in the CHINS case and that his mother was also present for most hearings and was involved in the case. Id. at 1225-26.

III. G. 1. Guardian Ad Litem/Court Appointed Special Advocate Evidence

The evidence presented by the guardian ad litem /court appointed special advocate has been noted by the Court in many opinions on termination of the parent-child relationship. Guardian ad litem/court appointed special advocate evidence was not an issue on appeal in most of these cases, but they are offered as examples of issues on which the guardian ad litem/court appointed special advocate could present evidence in a termination proceeding.

In **Matter of G.M.**, 71 N.E.3d 898 (Ind. Ct. App. 2017), the Court affirmed the juvenile court's order terminating Mother's parental rights. Id. at 909. The child was removed from Parents at the age of two days and adjudicated to be a CHINS due to Mother's use of unprescribed prescription drugs and heroin during pregnancy, the child's drug withdrawal at birth, and Father's unavailability due to his criminal conviction for rape. The child also had a heart condition, which necessitated multiple medical appointments. The Court found the juvenile court did not error when it concluded that termination was in the child's best interests and terminated Mother's parental rights because there was sufficient evidence to support the conclusion. Id. Among the evidence which the Court noted in support of the conclusion was the guardian ad litem's testimony that termination was in the child's best interests because Mother had not addressed her substance abuse, had not attended the child's medical appointments or visited him regularly, and had not learned about his medical condition. Id.

In **Matter of A.F.**, 69 N.E.3d 932 (Ind. Ct. App. 2017), *trans. denied*, the Court affirmed the trial court's order which terminated Father's parental rights to his three children. Id. at 949. The guardian ad litem testified that: (1) the oldest child wanted only to be adopted; (2) the middle child wanted to be returned to Mother or to Father, but if this was not possible, she felt loved by her foster parents and wanted to be adopted; and (3) the youngest child would like for Mother and Father to reunite, or to live with Father, her uncle, and her grandfather, but if these two options were not possible, she would be happy to be adopted by her foster parents who loved her. Father argued the trial court abused its discretion by allowing the guardian ad litem to summarize and testify to what the children had said. Father asserted there is nothing about the role of the guardian ad litem which creates an exception to the hearsay rule prohibiting out-of-court statements, and that summarizing out-of-court statements is no less hearsay then repeating the statements verbatim. The Court noted that: (1) Father did not object following the trial court's statement that the guardian ad litem could summarize but not repeat what the children said verbatim; and (2) two of the children indicated they would live with Father. Id. at 948. The Court opined that under the circumstances and in light of other evidence, including Father's multiple incarcerations, the case manager's recommendation that adoption was in the children's best interests, and the therapist's support for the adoption plan, the Court could not say reversal was warranted. Id.

In **In Re O.G.**, 65 N.E.3d 1080 (Ind. Ct. App. 2016), *trans. denied*, the Court reversed the trial court's order which terminated Mother's and Father's parental rights to their child. Id. at 1096. In support of its conclusion that there was not clear and convincing evidence that continuation of the parent-child relationship posed a risk to the child's well-being, the Court noted the guardian ad litem's testimony that Mother and the child had a "strong relationship," Mother was "very in tune to [child's] needs during visits," and Mother was "very comfortable with him and he was very comfortable with her." Id. at 1094. The Court also held that the

guardian ad litem's testimony on the child's wishes was inadmissible hearsay and the juvenile court erred by admitting it. Id. at 1088.

In **In Re Termination of V.A.**, 51 N.E.3d 1221 (Ind. 2016), the Court reversed the trial court's termination of Father's parental rights. Id. at 1153. At trial, the guardian ad litem testified that, based on reports about supervised visits with Father and Mother which were prepared by the supervising agency, Father had demonstrated an inability to keep the child safe from Mother. The Court noted that the guardian ad litem only interacted with the parents at court or in facilitation and had not attended a case conference. Id. at 1149. The Court noted that the guardian ad litem's testimony did not support a finding that Father would be unable to keep the child *physically* safe from Mother if the child were returned to the marital home (emphasis in original). Id. at 1150. Although the guardian ad litem recommended that Father's relationship with the child be terminated, the Court opined that the need for permanency alone is insufficient to support termination of parental rights, and termination should not be granted simply because there is an arguably better home available for the child. Id. at 1152. The Court noted that the child did not have a preadoptive home and the trial court found only that the child should be "*freed* for adoption" (emphasis in original). Id. at 1152.

In **In Re A.G.**, 45 N.E.3d 471 (Ind. Ct. App. 2015), *trans. denied*, the Court affirmed the trial court's order terminating the parental rights of incarcerated Father. Id. at 480. The Court noted that both the child's case manager and the child's court appointed special advocate recommended termination of Father's parental rights. Id. The Court opined that these recommendations, in conjunction with evidence that the conditions leading to removal were not likely to be remedied, were sufficient to prove by clear and convincing evidence that termination of Father's parental rights was in the child's best interests. Id.

In **In Re K.E.**, 39 N.E.3d 641 (Ind. 2015), the Indiana Supreme Court reversed the trial court's order terminating Father's parental rights to his child. Id. at 652. The Court considered the impact of delaying termination on the child's well-being, and found it significant that the paternal aunt, who was the child's relative caretaker, the court appointed special advocate, and the DCS case manager all acknowledged it was unlikely that the child would be harmed by delaying termination. Id. at 650.

In **D.B.M. v. Indiana Dept. of Child Services**, 20 N.E.3d 174 (Ind. Ct. App. 2014), *trans. denied*, the Court affirmed the trial court's order terminating Father's parental rights. Id. at 182. The Court noted the following evidence from the guardian ad litem and DCS case manager: (1) both testified that Father had not complied with the trial court's order to participate in services recommended by the family-functioning assessment; (2) both testified that Father had no relationship with the child; and (3) the guardian ad litem testified that Father had "basically fallen off the face of the earth and we haven't always know where he has been." Id. The Court concluded that the evidence supported the trial court's determination that there was a reasonable probability that the conditions resulting in the child's removal or the reasons for his placement outside Father's home would not be remedied. Id.

In **In Re R.A.**, 19 N.E.3d 313 (Ind. Ct. App. 2014), *trans. denied*, the Court reversed the trial court's order terminating incarcerated Father's parental rights to his son, who was two years old at the time of the termination order. Id. at 321-22. The Court found that three of the trial court's findings concerning Father were erroneous, and concluded that the remaining findings did not support termination of Father's parental rights. Id. at 320. The Court opined that one of the findings, which stated that the court appointed special advocate recommended

termination "based on the parent's lack of participation in services and the length of time the child has been in foster care", was not supported by the evidence. Id. The Court observed that the court appointed special advocate based her recommendation for terminating Father's parental rights solely on his incarceration and unavailability to parent for an undetermined length of time, not on his failure to participate in services. Id.

In **In Re A.S.**, 17 N.E.3d 994 (Ind. Ct. App. 2014), *trans. denied*, the Court determined that the juvenile court's findings of fact with regard to the court appointed special advocate were not supported by the evidence, and that excluding those findings rendered the order of termination inappropriate. Id. at 318, 320. Although the juvenile court found that the court appointed special advocate had recommended termination based on the parents' lack of participation in services, the Court noted that the court appointed special advocate had actually testified that termination was in the child's best interests as to Father because he was not "going to be available for awhile." Id. at 320. The Court concluded that, without the erroneous findings on the court appointed special advocate's testimony, as well as other findings the Court determined were erroneous, the State had failed to meet its burden to show by clear and convincing evidence that Father's parental rights should be terminated, so the Court reversed the termination judgment. Id. at 320.

In **C.A. v. Indiana Dept. of Child Services**, 15 N.E.3d 85 (Ind. Ct. App. 2014), the Court affirmed the trial court's order terminating Mother's and Father's parental rights. Id. at 95-96. When the children were first removed from Parents' care because Father was dealing methamphetamine in their presence, the children were withdrawn, did not make eye contact, appeared traumatized, and hid whenever anyone came to the door of the foster home. The Court noted the court appointed special advocate's testimony about the improvements in the children's personalities and behavior by the time of the termination hearing. Id. at 91. The Court found that the testimony of the court appointed special advocate, case manager, and service providers supported the trial court's judgment terminating Mother's and Father's parental rights. Id. at 94-96.

In **In Re Z.C.**, 13 N.E.3d 464 (Ind. Ct. App. 2014), the Court affirmed the trial court's order terminating Mother's parental rights to her child, who was born with controlled substances in his system. Id. at 470. The Court disagreed with Mother's claim that the trial court erred when it determined that termination of her rights was in the child's best interests. Id. The Court opined that testimony from both DCS and the court appointed special advocate that termination of Mother's rights was in the child's best interests supported the trial court's findings and conclusions. Id.

In **In Re S.S.**, 990 N.E.2d 978 (Ind. Ct. App. 2013), *trans. denied*, the Court affirmed the trial court's order terminating Mother's parental rights despite Mother's argument that her due process rights had been violated when the trial court denied her motion for continuance of the evidentiary hearing on the termination case. Id. at 985-86. Mother had moved to Florida after the entry of the CHINS dispositional decree and had not seen the three children for ten months. The Court balanced Mother's due process rights against the State's interest in protecting the children from harm, and noted the guardian ad litem's testimony that he "would be floored if there was...any bond whatsoever based upon the absence of the parent." Id. at 985.

In **K.T.K. v. Indiana Dept. of Child Services**, 989 N.E.2d 1225 (Ind. 2013), the Indiana Supreme Court affirmed the trial court's order which terminated Mother's parental rights. Id. at 1236. The Court found that the trial court did not err in concluding that termination of

Mother's parental rights was in the children's best interests. Id. The Court noted, inter alia, the guardian ad litem's testimony that termination was in the children's best interests based on her concerns over the length of time that it took Mother to commit to a path of recovery and "the fact that the children just really need a permanent home." Id. at 1235.

In **A.D.S. v. Indiana Dept of Child Services**, 987 N.E.2d 1150 (Ind. Ct. App. 2013), *trans. denied*, the Court affirmed the trial court's order terminating Mother's parental rights to her two children. Id. at 1159. The Court concluded that the totality of the evidence supported the determination that termination was in the children's best interests. Id. The Court noted that the guardian ad litem and the DCS family case manager both supported termination of Mother's parental rights and adoption by the children's current caregivers. Id.

In **In Re A.P.**, 981 N.E.2d 75 (Ind. Ct. App. 2012), the Court affirmed the trial court's order terminating Mother's and Father's parental rights. On the issue of whether the termination of Mother's parental rights was in the child's best interests, the Court noted the guardian ad litem reported that Mother "has no proven record of sobriety or accepting responsibility for her actions. Consequently, and without a drastic change in attitude, actions, and lifestyle…it is in the children's best interests for [Mother's] parental rights to be terminated." Id. at 83. The Court could not say that the trial court erred in giving credence to the guardian ad litem's and family case manager's professional opinions that termination of Father's parental rights was in the children's best interests. Id. at 84-85.

In **In Re M.A.J.**, 972 N.E.2d 394 (Ind. Ct. App. 2012), the Court reversed the trial court's termination judgment. Id. at 404. The Court concluded, in light of the undisputed evidence that Mother had made eight months of solid progress in each area of concern, DCS did not meet its burden of demonstrating that the conditions resulting in removal would not be remedied. Id. at 395-96. The Court noted the testimony of the court appointed special advocate that Mother was "very loving… very good with discipline, and seemed to really care for the girls," but he recommended termination because, since March 2010, he had seen nothing but a spiral down. Id. at 399. The Court also noted the court appointed special advocate's acknowledgment that he had very little contact with Mother since the termination petition had been filed because he concentrates fully on the children and no longer concerns himself with the parents after DCS has moved to terminate parental rights. Id.

In **T.B. v. Indiana Dept. of Child Services**, 971 N.E.2d 104 (Ind. Ct. App. 2012), *trans. denied*, the Court affirmed the trial court's termination order and declined to judicially legislate an exception whereby mentally handicapped parents are immune from involuntary termination proceedings. Id. at 110. The Court noted that both the family case manager and the court appointed special advocate recommended termination of Mother's parental rights as in the children's best interests. Id. at 108.

In **In Re C.M.**, 960 N.E.2d 169 (Ind. Ct. App. 2011), the Court reversed the trial court's judgment terminating Mother's parental rights. Id. at 175.The Court found that Mother's testimony claiming she had accomplished each of the things required to remedy the prior conditions and meet reunification goals was not directly contradicted. Id. The Court noted the trial court's acknowledgment that the children's caseworker, former foster mother, and guardian ad litem recommended termination of parental rights. Id. at 174.

In **H.G. v. Indiana Dept. of Child Services**, 959 N.E.2d 272 (Ind. Ct. App. 2011), *trans. denied*, the Court reversed the trial court's termination judgment, finding that DCS failed to meet its burden of proving that termination was in the children's best interest. Id. at 294. The

Court noted the guardian ad litem's reports filed in the CHINS case and her testimony in the termination case regarding the children's visits with parents, that termination would be "devastating" to one of the children, and that it would harm the three children if they were separated. Id. at 287. The guardian ad litem also testified that the parent-child relationship posed a threat to the children because "they need permanency, stability." Id.

In **In Re C.G.**, 954 N.E.2d 910 (Ind. 2011), the Indiana Supreme Court affirmed the trial court's order terminating Mother's parental rights, finding that none of the errors made by DCS rose to the level of violating Mother's due process rights or warranting reversal. Id. at 925. The Court noted that the guardian ad litem testified that the child needed permanency, granting the termination petition would provide permanency, and the child was very bonded with her foster mother. Id.

In **In Re D.L.**, 952 N.E.2d 209 (Ind. Ct. App. 2011), *trans. denied*, the Court found that Parents' notice of appeal was untimely and their appeal from the trial court's order terminating their parental rights was therefore dismissed. Id. at 214. The Court also reviewed the record and found no clear error in the trial court's decision. Id. The Court noted that the trial court acknowledged the difficulties presented by the oldest child's having run away from his placement, but credited the court appointed special advocate's testimony that the child had success while under DCS supervision, supporting the conclusion that an appropriate adoptive placement could also be successful. Id.

In **In Re A.K.**, 924 N.E.2d 212 (Ind. Ct. App. 2010), the Court affirmed the trial court's termination judgment, finding that it was supported by clear and convincing evidence. Id. at 224. On the issue of the child's relationship with Father, the Court noted the court appointed special advocate's testimony that the child would sit in Father's lap during visitation and state that she loved Father, but that the child also indicated that she was afraid of Father. Id. at 223.

In **In Re H.L.**, 915 N.E.2d 145 (Ind. Ct. App. 2009), the Court affirmed the trial court's order terminating Father's parental rights to his child, who had been diagnosed with cystic fibrosis. Id. at 150. The Court opined that DCS had established the requisite elements to support the termination order. Id. The Court noted the testimony of the guardian ad litem that: (1) she had visited with the child in her foster home and found the child was "doing very well"; (2) adoption of the child by her foster parents was in the child's best interests; (3) the child has a lot of medical needs and the foster mother was very diligent in "administering those procedures" and "making sure that [H.L.'s] lungs are cleared out." Id.

In **In Re J.S.,** 906 N.E.2d 226 (Ind. Ct. App. 2009), the Court affirmed the trial court's order terminating the parent-child relationships of Mother and Father with their son. Id. at 237. In support of the termination judgement, the Court noted the recommendations of the case manager and court appointed special advocate to terminate parental rights and the court appointed special advocate's recommendation in her report in favor of termination, as well as other report excerpts including that "[the child] needs to be in a stable home environment where his physical and emotional needs are met in a loving manner." Id.

In **In Re I.A.,** 903 N.E.2d 146 (Ind. Ct. App. 2009), the Court affirmed the trial court's order terminating Mother's parent-child relationship with her youngest child, even though, at the same time, the trial court had also denied the termination petition with regard to four of her other children. Id. at 156. The Court said that because of the youngest child's special needs and because, for good reasons, he was treated separately by the attorneys and the witnesses throughout the proceedings, the judgment terminating Mother's parental rights to the

youngest child was not clearly erroneous. Id. In concluding that there was sufficient evidence to support the trial court's determination that termination of Mother's parental rights was in the youngest child's best interests, the Court noted the guardian ad litem's testimony that the child was thriving with his foster parents, who had stabilized his medical conditions, and that termination was in the child's best interests. Id.

In **In Re E.D.,** 902 N.E.2d 316 (Ind. Ct. App. 2009), *trans. denied*, the Court affirmed the trial court's order terminating Mother's parent-child relationship with the child, despite Mother's contention on appeal that she was denied due process of law when the trial court denied her request to continue the termination hearing. Id. at 323. Mother's continuance request was premised on the assertion that, because of her serious mental health issues, Mother was unable to assist in her defense, and that this inability should be treated the same as a situation in which a criminal defendant is found to be incompetent to stand trial. The Court noted the trial court's finding that the child's guardian ad litem had observed the child's interaction with his foster parents as loving and that the child was thriving. Id. at 320. The Court also noted that, when the DCS became aware Mother was incarcerated, the child's guardian ad litem sent a letter to Mother at the prison, but she never responded. Id. at 318.

In **Moore v. Jasper County Dept.,** 894 N.E.2d 218 (Ind. Ct. App. 2008), the Court reversed the trial court's termination of Mother's parental rights to her two children. Id. at 229. The Court held that the Jasper County DCS had failed to carry its burden of establishing, by clear and convincing evidence, that there was a reasonable probability the conditions leading to the children's removal from Mother's care would not be remedied and that continuation of the parent-child relationship posed a threat to the children's well-being. Id. The guardian ad litem's strong objection to the termination of Mother's parent rights was one of three reasons the Court gave for its holding. Id. at 228. The Court noted his testimony that this was a "unique case," that he believed Mother was a "changed person," that Mother's marriage had provided her with "an opportunity of stability … that [Mother had] never been afforded previously[,]" and that termination of Mother's parental rights would be "detrimental" to the children's well-being. Id.

In **R.W.,Sr. v. Marion Cty. Dept. Child Serv.,** 892 N.E.2d 239 (Ind. Ct. App. 2008), the Court quoted the testimony of the guardian ad litem and noted its importance in supporting the trial court's determination that termination of Mother and Father's parental rights to their respective children was in the best interests of the children. Id. at 250. The Court noted that the guardian ad litem testified about the positive integration of the children into their foster home, their apparent happiness there, and that the birth parents had what she believed to be plenty of time to complete services, but had not done so. Id.

In **In Re L.B.**, 889 N.E.2d 326 (Ind. Ct. App. 2008), the Court referred to the supporting testimony of the guardian ad litem when it affirmed the trial court's termination of Father's parental rights. Id. at 340-41. When discussing Father's contention that termination was not in the children's best interests, the Court specifically stated its reliance on the guardian ad litem's testimony that she believed it was in the children's best interests to proceed with termination given the time that had elapsed and lack of participation in services by the parents, and that she had visited with all the children in their current placements and agreed with MCDCS's permanency plan for the children to be adopted by their current foster parents. Id. at 340.

In **In Re A.B.**, 887 N.E.2d 158 (Ind. Ct. App. 2008), the Court affirmed the trial court's termination of Mother's parental rights. Id. at 170. The Court quoted and summarized the

guardian ad litem's testimony that (1) there had been tension between Mother and the child not just based on the child's negative behavior and that she felt the child "would continue to struggle greatly if she [were] returned to" Mother's care; (2) the services provided to Mother had not advanced the situation any closer to reunification although Mother loved the child; and (3) termination of Mother's parental rights would be in the child's best interests for "lots of reasons." Id. at 169.

In **In Re S.L.H.S.**, 885 N.E.2d 603 (Ind. Ct. App. 2008), the Court affirmed the trial court's termination of Father's parental rights. Id. at 619. In discussing its conclusion that the trial court's finding that termination was in the child's best interests was supported by clear and convincing evidence, the Court noted the court appointed special advocate's testimony that continuation of the parent-child relationship posed a threat to the child's well-being, that termination of Father's parental rights was in the child's best interest, and that the child needed permanency. Id. at 618.

In **A.J. v. Marion County Office of Family**, 881 N.E.2d 706 (Ind. Ct. App. 2008), *trans. denied*, the Court found that termination of Mother's relationship with the children was in the children's best interests, and related portions of the guardian ad litem's testimony regarding the children's needs for permanency and how such permanency would help remedy their behavioral problems. Id. at 718-19. The Court quoted the guardian ad litem's explanation on why termination should occur, "the parents have not been engaged with the children, haven't been visiting them, haven't moved forward on reunification over this long period of time. My issue is with the length of time that has passed…" Id. at 718. The guardian ad litem also testified that (1) the children's behavior problems, as well as some of the other problems, would be rectified if the children had permanency; (2) the children needed to be somewhere they knew they were going to stay and feel comfortable; (3) she had visited the children in their pre-adoptive foster homes and the children were doing well; and (4) the foster parents were committed to adoption, engaged in the children's lives, and addressing the children's emotional needs. Id.

In **In Re B.J.**, 879 N.E.2d 7 (Ind. Ct. App. 2008), *trans. denied*, the Court affirmed the trial court's termination order. Id. at 23. Mother contended on appeal that the guardian ad litem's testimony that the foster parents were probably in a better position to take care of the children's needs was inappropriate. Id. at 22. The Court agreed with Mother that the right of parents to raise their children should not be terminated solely because there is a better home available for the children, but found that the trial court's determination was properly based on the inadequacy of Mother's custody, rather than on who could provide the "better" home. Id.

In **In Re A.J.**, 877 N.E.2d 805 (Ind. Ct. App. 2007), *trans. denied,* the Court affirmed the termination of Parents' parental rights, noting, among other things, the testimony of the guardian ad litem that termination of parental rights and subsequent adoption was in the best interests of the children, and that DCS had a satisfactory plan for the care and treatment of all three children following termination, namely adoption. Id. at 812.

In **Castro v. State Office of Family and Children**, 842 N.E.2d 367 (Ind. Ct. App. 2006), *trans. denied*, the Court noted the trial court finding that the court appointed special advocate reported that the child was doing well in foster care and her current foster parents were considering adopting her. Id. at 371.

In **In Re Invol. Termn. Of Par. Child Rel. A.H.**, 832 N.E.2d 563 (Ind. Ct. App. 2005), the guardian ad litem issued a report for the termination hearing in which she included following

information: (1) Father believed he could control his anger and adequately parent the children; (2) the guardian ad litem believed that because of his disorders, Father would not be able to adequately and safely parent the children; (3) the guardian ad litem believed that Father could not control his behavior well enough to parent very provocative, special needs children; (4) the children's condition at the time of their various detentions; (5) the children's improvements made while outside the care of either parent. Id. at 566. The Court concluded that the evidence was sufficient to support the trial court's termination of Father's parental rights. Id. at 571.

In **In Re A.I.**, 825 N.E.2d 798 (Ind. Ct. App. 2005), *trans. denied*, Parents appealed the trial court's judgment terminating the parent-child relationship, arguing that there was no particularized evidence to support the finding that termination was in the child's best interest. The Court held the trial court's finding that termination was in the child's best interest was supported by the evidence. Id. at 811. The Court noted the evidence of the child's court appointed special advocate that she thought it was in the child's best interest to terminate Parents' rights. Id.

In **In Re D.L.**, 814 N.E.2d 1022 (Ind. Ct. App 2004), *trans. denied*, the Court affirmed the trial court's termination judgment. Id. at. The Court noted the guardian ad litem's testimony about the two children's relationship with their pre-adoptive parents, stating: (1) the children's interactions with pre-adoptive parents were very appropriate and loving and they "seemed like a natural family"; (2) both children were "doing good"; (3) the older child wanted to be with Mother but "was fine where he was if he couldn't go back home"; (4) permanency was important for the children and being "in limbo" was "not a healthy state for them to be in." Id. at 1025.

In **In Re Termination of Relationship of D.D.**, 804 N.E.2d 258 (Ind. Ct. App. 2004), *trans. denied*, the Court affirmed the trial court's judgment terminating the parent-child relationship despite Mother's claim that the order was clearly erroneous. Id. at 268. The Court noted that the child's guardian ad litem had investigated the case by interviewing the child's former caretaker, the current foster parents, the OFC case manager and other service providers. The guardian ad litem had also visited the child at two different residences and at school and had attended a planning meeting for the child. The guardian ad litem recommended that termination of parental rights and adoption were in the child's best interests. Id. at 263-264.

In **McBride v. County Off. Of Family & Children**, 798 N.E.2d 185 (Ind. Ct. App. 2003), the court appointed special advocate, a pediatrician, testified that: (1) she had spent over two hundred hours on the case; (2) in her opinion termination was in the children's best interests; (3) Mother had been making decisions which endangered her children for over seven years; (4) the children had experienced multiple placements, didn't feel safe with Mother, had numerous removals from Mother's home and needed permanency. Id. at 193

In **In Re W.B.**, 772 N.E.2d 522 (Ind. Ct. App. 2002), the Court affirmed the trial court's judgment terminating the parent-child relationship between Parents and their youngest two children, despite Parents' claim that the evidence was insufficient to support the termination judgment. Id. at 534. Parents' rights to five older children had been previously terminated. At the termination trial for the two youngest children, the court appointed special advocate recommended termination and testified to the following: (1) she was also the court appointed special advocate for the other children; (2) the older children had consistently made allegations of sexual abuse by both parents to her and to therapists and foster parents; (3) she found it difficult to believe that the claims of sexual abuse were not true; (4) Parents had lived

at fourteen different places from the time of the oldest child's birth; (5) Parents had been evicted from six places while the older children had been living with them; (6) Parents and older children had occasionally stayed with relatives and had even slept on the street for a few nights. Id. at 526-528.

In **In Re E.S.**, 762 N.E.2d 1287 (Ind. Ct. App 2002), the court appointed special advocate filed written recommendations with the trial court after the termination petition was filed stating that she was not sure what the decision regarding the child's welfare should be because visitation had not been tried to determine whether reunification was possible. Id. at 1291. The trial court's termination judgment was reversed due to insufficient evidence. Id. at 1292.

In **Carrera v. Allen County OFC**, 758 N.E.2d 592 (Ind. Ct. App. 2001), the court appointed special advocate director testified that Mother was informed that her compliance with program directives was necessary for the child's return, yet she continued to refuse assistance. Id. at 596.

In **In Re Involuntary Term. of Parent-Child Rel.**, 755 N.E.2d 1090 (Ind. Ct. App. 2001), the guardian ad litem and case manager testified that the foster mother had provided a safe and stable environment for the children and that the children had bonded with each other and their foster mother Id. at 1098.

In **In Re D.J.**, 755 N.E.2d 679 (Ind. Ct. App. 2001), the court appointed special advocate testified that he had not seen any actual commitment on Mother's behalf to performing the tasks required for reunification and that she lacked enough tools to be a good parent. Id. at 682.

Practice Note: Practitioners are cautioned that no termination statute provides for the admission into evidence of a guardian ad litem/court appointed special advocate report in termination proceedings if a party objects to the admission of the report. Instead of providing a report, the guardian ad litem/court appointed special advocate should testify and present witnesses, if needed, according to the Indiana Rules of Evidence.

III. G. 2. Guardian ad Litem/Court Appointed Special Advocate Legal Role in Proceedings

In **In Re J.M.,** 908 N.E.2d 191 (Ind. 2009), the Indiana Supreme Court affirmed the trial court's denial of DCS's petition to terminate the parental rights of Mother and Father. The trial court had denied the termination petition, and the guardian ad litem appealed. In its decision, the Court expressed its appreciation to the guardian ad litem for his obvious concern for the welfare of the child, and the quality of his advocacy. Id. at 193 n.2.

In **In Re Involuntary Term. of Parent-Child Rel.**, 755 N.E.2d 1090 (Ind. Ct. App. 2001), Mother appealed the trial court's judgment terminating the parent-child relationship. Among the issues Mother asserted on appeal was that the guardian ad litem should not be a party to the appeal because the guardian ad litem presented no evidence independent from the OFC at the termination trial and did not hold an independent position on appeal. Mother claimed that the guardian ad litem had not conducted an independent assessment of the children, did not conduct a true home study and did not conduct an investigation into the cause of Mother's problems. The Court opined that Mother had waived this issue because she raised it for the first time on appeal and had not objected to the guardian ad litem's appearance on the appeal nor to the guardian ad litem being a party at the termination hearing. Id. at 1099. Despite the waiver, the Court concluded that the guardian ad litem was a proper party to the appeal, citing

both statutory authority (IC 31-35-2-7) and an appellate rule (Ind. Appellate Rule 17(A)). Id. The Court opined that neither OFC nor the guardian ad litem was automatically disqualified because their interests converged. Id.

Although the guardian ad litem's legal participation was not an issue on appeal, it is noteworthy that the guardian ad litem filed a cross-appeal with the OFC in **In Re D.L.**, 814 N.E.2d 1022 (Ind. Ct. App. 2004), *trans. denied*. In another case, **J.M. v. Marion County OFC**, 802 N.E.2d 40 (Ind. Ct. App. 2004), *trans. denied*, the guardian ad litem filed a joint motion for a ninety-day continuance of termination proceedings along with the OFC and Mother. The OFC and the guardian ad litem appealed the court's denial of the termination of the parent-child relationship petition, and also argued that the court erred when it allowed Mother to present additional evidence after the parties had rested in **In Re D.Q.**, 745 N.E.2d 904 (Ind. Ct. App. 2001). The court appointed special advocate filed an appellate brief in **In Re R. J.,** 829 N.E.2d 1032 (Ind. Ct. App. 2005).

III. H. Adoption and Postadoption Contact with Birth Parents

It is recommended that the guardian ad litem or court appointed special advocate who represents a CHINS in a termination of parental rights case continue her/his representation of the child into the adoption proceeding. See IC 31-32-3-8 (guardian ad litem/court appointed special advocate serves until court enters order for discharge); IC 31-34-21-11 (discharge occurs when the objectives of the dispositional decree have been met). When an adoption petition has been filed for a child who is a CHINS, the guardian ad litem/court appointed special advocate in the CHINS case should seek clarification from the court with jurisdiction over the adoption on whether the guardian ad litem/court appointed special advocate is also being appointed to represent the child's best interests in the adoption case. Due to the adoption code's requirements of considering the child's best interests, guardians ad litem and court appointed special advocates may also be appointed in adoption cases which do not involve a child who is a CHINS. See IC 31-19-16-2 (referring to guardians ad litem and court appointed special advocates appointed in adoption proceedings under the authority of IC 31-32-3). One of the six conditions listed in IC 31-19-16-2 for granting post-adoption visitation is the requirement that an appointed guardian ad litem or court appointed special advocate recommend that the post-adoption visitation is appropriate.

In **In Re Adoption of E.L.**,913 N.E.2d 1276, 1280-81 (Ind. Ct. App. 2009), when Stepfather filed a petition to adopt the child, Putative Father filed a paternity petition on his own behalf and on behalf of the child, naming himself and the child as "Co-Petitioners," and the cases were consolidated. Relying on In Re B.W., 908 N.E.2d 586 (Ind. 2009), the Court held that, contrary to the trial court's finding, because Putative Father timely filed a paternity petition, his failure to file a motion contesting adoption did not imply consent to adoption under IC 31-19-9-12(1), but Putative Father's failure to register as a putative father constituted an irrevocably implied consent to the child's adoption. Id at 1280. The Court held that the trial court erred in dismissing the paternity petition with respect to the child. Id. at 1282. The guardian ad litem appointed by the trial court had recommended that Stepfather's adoption be denied and paternity established in Putative Father. In its decision, the Court reminded the parties that the trial court could not approve the proposed adoption unless it first found the adoption was in the child's best interest, and stated:

> The GAL appointed to represent [the child's] interests has objected to such a finding, meaning the adoption is by no means a foregone conclusion, and whether paternity can be established in [Putative Father] is a live controversy between the parties. We emphasize that the GAL has a continuing responsibility, on remand, to advocate [the child's] best interest

> and to continue to object to any proposed adoption that the GAL finds to be not in [the child's] best interests.

E.L. at 1281 n.5.

In **In Re Adoption of B.C.S.**, 793 N.E.2d 1054 (Ind. Ct. App. 2003), the Court affirmed the trial court's order granting the adoption petition filed by the child's presumed father and denying the adoption petition filed by the maternal great-aunt and great-uncle. One of the issues raised by the great-aunt and great-uncle was that the trial court's failure to appoint a guardian ad litem constituted reversible error. The great-aunt and great-uncle argued that IC 29-3-2-3 and Ind. Trial Rule 17(C) required the court to appoint a guardian ad litem. The Court was not persuaded and held that the trial court had discretion to determine whether a minor was adequately represented in the proceedings such that no guardian ad litem was necessary, citing In Re Adoption of L.C. , 650 N.E.2d 726, 732-33 (Ind. Ct. App 1995), *trans. denied*, *cert denied sub nom*. Newman v. Worcester County Dept. of Social Servs., 517 U.S. 1136, 116 S. Ct. 1423, 134 L. Ed. 2d 547 (1996). B.C.S. at 1060. The Court also noted that the trial court accepted a report from a court appointed special advocate appointed by Madison Superior Court in a related paternity proceeding. The Court stated that, under the statutory definitions, IC 31-9-2-50 and IC 31-9-2-28, a court appointed special advocate and a guardian ad litem function in the same capacity at the trial court of representing and protecting the best interests of the child by researching, examining, advocating, facilitating, and monitoring a child's situation. Id. at 1061.

See Chapter 13 at VIII.D. for further discussion of guardian ad litem/court appointed special advocate in adoption.

III. I. Sibling Visitation

III. I. 1. Postadoption Sibling Contact

In **In Re Adoption of T.J.F.,** 798 N.E.2d 867 (Ind. Ct. App. 2003), the child's guardian ad litem and the OFC filed a motion to permit postadoption visitation with a birth sibling which was granted by the trial court. The guardian ad litem's involvement was not an issue on appeal. The Court reversed the trial court's order granting postadoption sibling visitation because the adoption decree did not contain provisions authorizing postadoption sibling visitation as required by IC 31-19-16.5-1 and because the findings did not support the judgment that it was in the adopted child's best interests to visit her biological sibling. Id. at 872-74.

IC 31-19-16.5-1 provides that at the time the adoption decree is entered, the adoption court may order the adoptive parents to provide specific postadoption contact privileges for an adopted child who is at least two years of age with a pre-adoptive sibling. The court must determine that the postadoption contact would serve the best interests of the adopted child and that each adoptive parent consents to the court's order for postadoption contact privileges before entering the order. The court shall consider any relevant evidence in making its determination, including a recommendation by the child's guardian ad litem/court appointed special advocate. IC 31-19-16.5-2. The adoption may not be revoked nor may money damages be awarded if the postadoption sibling contact order is violated. IC 31-19-16.5-3; IC 31-19-16.5-7.

IC 31-19-16.5-4 states that the following persons may file a petition requesting that the adoption court vacate, modify, or compel compliance with a postadoption sibling contact order: (1) a pre-adoptive sibling by next friend or guardian ad litem/court appointed special advocate; (2) the adopted child by next friend or guardian ad litem/court appointed special

advocate; (3) an adoptive parent. This statute, like the paternity statute, does not define "next friend," but Indiana Appellate decisions in paternity cases have indicated that, under most circumstances, the "next friend" would be limited to parents, guardians, guardians ad litem, and prosecutors. See **R.J.S. v. Stockton,** 886 N.E.2d 611 (Ind. Ct. App. 2008) and **J.R.W. ex rel. Jemerson v. Watterson**, 877 N.E.2d 487 (Ind. Ct. App. 2007).

IC 31-19-16.5-5 provides that the court may vacate or modify a postadoption sibling contact order at any time after the adoption if the court determines, after a hearing, that this action is in the adopted child's best interests. IC 31-19-16.5-5 provides that before a hearing to vacate, modify, or compel compliance with the postadoption contact order, the court may appoint a guardian ad litem/court appointed special advocate for the adopted child "if the interests of an adoptive parent differ from the child's interests to the extent that the court determines the appointment is necessary to protect the best interests of the child." IC 31-19-16.5-6 states that the provisions regarding the representation, duties, and appointment of a guardian ad litem/court appointed special advocate at IC 31-32-3 apply to postadoption contact proceedings. Among the provisions of IC 31-32-3 are: (1) the guardian ad litem/court appointed special advocate may be represented by an attorney (IC 31-32-3-4); (2) the court may appoint an attorney to represent the guardian ad litem/court appointed special advocate (IC 31-32-3-5); (3) the guardian ad litem/court appointed special advocate is an officer of the court (IC 31-32-3-7); (4) except for gross misconduct, if the guardian ad litem/court appointed special advocate performs duties in good faith, he or she is immune from civil liability that may occur as a result of the performance (IC 31-32-3-10).

Practice Note: The guardian ad litem/court appointed special advocate appointed on a postadoption sibling visitation case may have previously represented the child's best interests in a CHINS, termination, or adoption proceeding. If there has been a significant amount of time since the prior representation, the guardian ad litem/court appointed special advocate appointed for postadoption sibling contact issues will need to conduct a thorough investigation, focusing on the child's adjustment to the adoptive family and current best interests. The guardian ad litem/court appointed special advocate should consult with the child, if age appropriate, the child's adoptive parents, mental health therapists, and service providers for the pre-adoptive sibling before making a recommendation.

III I. 2. Foster Child Sibling Visitation

IC 31-28-5-1 through 5 are the statutes which allow court ordered sibling visitation for children who are receiving DCS funded foster care and their siblings, including siblings who are not receiving foster care. IC 31-28-5-5(a) states that the juvenile court "may appoint a guardian ad litem or court appointed special advocate if a child receiving foster care requests sibling visitation." IC 31-28-5-5(b) states that the provisions of IC 31-17-6 [guardian ad litem/court appointed special advocate in dissolution and parenting time proceedings] apply to a guardian ad litem/court appointed special advocate appointed under this section. IC 31-28-5-3 states that a child, a child's foster parent, guardian ad litem/court appointed special advocate, or a supervising agency may request DCS to permit the child in foster care to have sibling visitation, and DCS shall permit sibling visitation and establish a visitation schedule if DCS finds that sibling visitation is in the best interests of each child who receives foster care. If DCS denies a request for sibling visitation, IC 31-28-5-4(a) allows the guardian ad litem/court appointed special advocate to petition the juvenile court with jurisdiction in the county in which the child is receiving foster care is located for an order requiring sibling visitation if DCS denies a request for sibling visitation. IC 31-28-5-4(b) states that if the juvenile court determines it is in the best interests of the child receiving foster care to have

sibling visitation, the juvenile court shall order sibling visitation and establish a schedule for sibling visitation. See this Chapter at III.A. for further information about IC 31-17-6.

Practice Note: It is important to note that the guardian ad litem/court appointed special advocate appointed pursuant to IC 31-28-5-5(a) is representing the best interests of the child who is receiving foster care and is not representing the best interests of the foster child's sibling. Since IC 31-34-10-3 requires the appointment of a guardian ad litem/court appointed special advocate for every child who is alleged to be a CHINS, a child who is receiving DCS funded foster care should already have a guardian ad litem/court appointed special advocate appointed before the issue of sibling visitation arises. The guardian ad litem/court appointed special advocate appointed for a foster child who is requesting sibling visitation should conduct a thorough investigation before making a recommendation that sibling visitation is in the foster child's best interests. The investigation should include consulting with the child, the child's DCS family case manager, the child's foster parent, the child's mental health therapist and other service providers, the sibling, the sibling's parent, guardian or custodian, and service providers for the sibling and the sibling's parent, guardian or custodian. The guardian ad litem/court appointed special advocate should also be careful to represent the foster child's best interests, not the foster child's wishes. The guardian ad litem/court appointed special advocate should include the foster child's wishes in the verbal or written report to the court.