CHAPTER 7
FACTFINDING

Table of Contents

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I. OVERVIEW

The factfinding is an adversarial hearing in which the parties litigate the allegations that the child is in need of services. This chapter deals with discovery, pre-trial motions, procedure, and evidentiary issues relevant to the factfinding hearing.

II. DISCOVERY

II. A. Rules of Procedure

IC 31-32-10-3 provides that the law of discovery for civil cases applies to CHINS proceedings.

II. B. Discovery and Access to Information Generally

Ind. Trial Rule 26(B)(1) states that parties may obtain discovery about any matter which is not privileged which is relevant to the subject matter of the pending action. It is not grounds for objection that the information being sought will be inadmissible at the trial, so long as the information one party is seeking appears to be reasonably calculated to lead to the discovery of admissible evidence.

In the spousal maintenance case of **Pierce v. Pierce**, 702 N.E.2d 765, 767 (Ind. Ct. App. 1998), the Court stated that:

> The Indiana rules of discovery are designed to allow a liberal discovery procedure, the purposes of which are to provide parties with information essential to litigation of all relevant issues, to eliminate surprise, and to promote settlement. Discovery is designed to be self-executing with little, if any, supervision of the court.

IC 31-32-11-1 of the juvenile code provides that certain statutory privileges are not grounds for excluding evidence in child abuse and neglect proceedings. See this Chapter at II.C. for more information. Confidentiality statutes, as distinguished from privilege statutes, may also affect the ability to discover or admit certain evidence into the record. See this Chapter at II.D. for more information.

When a person or entity fails to comply with a discovery request, a motion to compel discovery can be granted by a court upon a finding that the information sought is relevant and is not protected by a privilege or immunity. See **Matter of Snyder**, 418 N.E.2d 1171, 1176, (Ind. Ct. App. 1981). See also this Chapter below at II.H. on sanctions in discovery.

II. C. Effect of Privilege on Discovery

Privileged communications are established by statutory law. See **Deasy-Leas v. Leas**, 693 N.E. 2d 90, 99 (Ind. Ct. App. 1998). Evidentiary privileges are generally disfavored and must be strictly construed. See Deasy-Leas at 95; **Goodwin v. State**, 573 N.E.2d 895, 897 (Ind. Ct. App. 1991); **Matter of C.P.**, 563 N.E.2d 1275, 1276-79 (Ind. 1990).

When a particular communication is privileged, the recipient of the communication cannot divulge the information, unless the recipient is directed to do so by the person making the communication, or the privilege is overridden or abrogated by another statute for a specific purpose. See Goodwin at 897. Ind. Evidence Rule 101(c) provides that rules and laws on privilege apply at "all stages of all actions, cases, and proceedings."

II. C. 1. Overview of Statutes Abrogating Specific Privileges

IC 31-32-11-1 provides that the following privileged relationships are not grounds for excluding evidence in child abuse and neglect proceedings:
(1) husband and wife;
(2) health care provider and the health care provider's patient;
(3) licensed social worker, licensed clinical social worker, licensed marriage and family therapist, licensed mental health counselor; licensed addiction counselor, or licensed clinical addiction counselor, and a client of any of these professionals;
(4) school counselor and a student;
(5) school psychologist and a student.

IC 31-34-12-6 additionally provides that neither the physician-patient privilege nor the husband-wife privilege "is grounds for excluding evidence in a proceeding in which the child is alleged to be a child in need of services." See Chapter 4 at I.C.1 through C.9 for more discussion of these privileged relationships.

Privileges that are not statutorily abrogated for purposes of admissibility of evidence in child abuse and neglect proceedings are the attorney-client privilege, the clergy communication privilege, and victim counselor-victim privilege. But see Ind. State Bar Ass'n Legal Ethics Comm., Opinion No. 2 of 2015, 59 Res Gestae 24, 24 (2015); "Viewpoint: Lawyers for Children on Lawyer's Duty to Report Child Abuse and Neglect," *Res Gestae*, Vol. 59, No. May 2016.

II. C. 2. Husband-Wife Privilege

Confidential communications made to a spouse are privileged under IC 34-46-3-1(4). However, pursuant to IC 31-32-11-1(1) and IC 31-34-12-6, this privilege cannot be used to exclude evidence in any judicial proceeding that results from a report of potential child abuse or neglect, that relates to the subject matter of the report, or that relates to failing to report child abuse as is required. It is also not grounds for excluding evidence in a proceeding in which the child is alleged to be a CHINS. It is not a valid objection to discovery.

For other proceedings, the Indiana Supreme Court clarified the spousal privilege at **Glover v. State**, 836 N.E.2d 414, 422 (Ind. 2005) and **State v. Wilson**, 836 N.E.2d 407, 414 (Ind. 2005). The Court concluded in both cases that the marital privilege prevents a court from requiring a spouse to testify as to confidential marital communications, but does not bar the spouse from testifying if the spouse chooses to do so.

In **Lay v. State**, 933 N.E.2d 38, 41 (Ind. Ct. App. 2010), the Court held that the defendant had waived his appeal on the issue of marital privilege because he did not raise any objection during his wife's testimony during the trial. The Court went on to opine that "[w]aiver notwithstanding, the trial court did not abuse its discretion when it allowed [the defendant's wife] to testify against [the defendant]." The Court noted that the Indiana Supreme Court has explained that "'The marital privilege prevents a court from requiring a spouse to testify as to confidential marital communications, but does not bar the spouse from testifying if the spouse chooses to do so.'" (citing Glover v. State, 836 N.E.2d 414, 422 (Ind. 2005)).

In **Dixson v. State**, 865 N.E.2d 704, 712-14 (Ind. Ct. App. 2007), *trans. denied*, the Court held that given the evidence that jail inmates were well informed in a number of ways that their telephone calls were recorded, the trial court could clearly have concluded that the defendant's telephone conversation with his wife was made in the presence of a third party,

the Marion County Sheriff's Department and its agents, and therefore it was not covered by the marital communications privilege at IC 34-46-3-1.

See also **Davidson v. State**, 558 N.E.2d 1077, 1091 (Ind. 1990) (Defendant attempted to bar her husband's testimony under the husband-wife privilege in the trial of the murder of her two children; the trial court refused to apply the spousal privilege, and the Indiana Supreme Court affirmed); **Baggett v. State**, 514 N.E.2d 1244, 1245 (Ind. 1987) (husband-wife privilege not grounds for excluding evidence in criminal prosecution for child molestation).

II. C. 3. Physician-Patient Privilege

Communications made by a patient to a physician in the course of the physician's professional business or advice given, are privileged under IC 34-46-3-1(2).

However, pursuant to IC 31-32-11-1(2) and IC 31-34-12-6(1), this privilege cannot be used to exclude evidence in any judicial proceeding that results from a report of potential child abuse or neglect, that relates to the subject matter of the report, or that relates to failing to report child abuse as is required. It is also not grounds for excluding evidence in a proceeding in which the child is alleged to be a CHINS. It is not a valid objection to discovery.

In the criminal deviate conduct and rape case of **Williams v. State**, 819 N.E.2d 381, 386 (Ind. Ct. App. 2004), *trans. denied*, the defendant's motion for mental health records of the adult victim was denied by the trial court on the basis of the physician-patient privilege. The defendant alleged error because the victim never asserted the privilege. The Court affirmed the trial court's denial of the defendant's motion because the defendant had not followed the necessary statutory requirements of IC 16-39-3-3 et seq. The Court opined that the onus does not rest with the trial court to ensure that a criminal defendant properly complies with statutory procedures to gain access to a victim's confidential mental health records.

In the termination case of **Shaw v. Shelby County DPW**, 612 N.E.2d 557, 558 (Ind. 1993), the Court ruled that the physician-patient privilege did not apply to the testimony of a physician who had examined the mother in connection with this case and another case. The Court found that the physician-patient privilege is not a bar to testimony in termination cases, just as it is not a bar in CHINS cases under IC 31-6-7-13(d) (recodified at IC 31-34-12-6).

In the delinquency case of **Matter of C.P.**, 563 N.E.2d 1275, 1276 (Ind. 1990), the Court affirmed the ruling of the Court of Appeals that the child's communications to the counselor were not covered by the physician-patient privilege, and stated: "We hold that a counselor who aids the psychiatrist is covered by the [physician-patient] privilege. By contrast, a counselor who is in fact the caregiver and acts largely independently is not an adjunct to the psychiatrist and thus is not covered by the privilege."

See also **Fout v. State**, 619 N.E.2d 311, 313 (Ind. Ct. App. 1993) (Mother's conviction for neglect of her child who died twenty-four hours after an at-home delivery was reversed because the evidence was insufficient to show that Doctor had warned Mother of the fetus's condition and had advised her to seek immediate medical assistance if the child exhibited certain conditions at birth; trial court excluded Doctor's testimony regarding her warnings to Mother under the physician-patient privilege, despite IC 31-32-11-1 which provides that the privilege is not a ground for exclusion of evidence in child abuse and neglect proceedings); **Devore v. State**, 658 N.E.2d 657, 658 (Ind. Ct. App. 1995) (Defendant admitted himself to a hospital for treatment to control his child molesting and the hospital reported him to the authorities as a child molester; his hospital medical records were admitted at the sentencing

hearing. On appeal, the Court ruled that IC 31-32-11-1 applies to criminal cases, and it provides that the physician-patient privilege is was not a valid ground for excluding evidence in this type of case).

II. C. 4. School Counselor-Student Privilege

IC 31-32-11-1(4) and (5) provide that neither the privileged relationship between a school counselor-student or a school psychologist-student is grounds for excluding evidence in a child abuse or neglect proceeding.

IC 20-28-12-5(5) allows for school psychologist to disclose information with the consent of the client, or in the case of the client's death or disability, the express consent of the client's legal representative. IC 20-28-12-5(6) provides that a school psychologist may disclose information under circumstances in which privileged communication is lawfully invalidated.

II. C. 5. Psychologist-Patient Privilege

IC 25-33-1-17(5) provides that confidential communications made by a patient to a certified psychologist are privileged, but disclosure is allowed if the psychologist has the expressed consent of the client or subject, or in the case of a client's death or disability, the express consent of the client's legal representative. IC 25-33-1-17(6) provides that that confidential communications made by a patient to a certified psychologist are privileged, but disclosure is allowed in "circumstances under which privileged communication is abrogated under the laws of Indiana."

IC 31-32-11-1 is such an abrogation statute, and it provides that a health care provider-patient privilege is not grounds for excluding evidence in any judicial proceeding resulting from a report of child abuse or neglect. The statutory definition of "health care provider," quoted in Chapter 4 at I.C.1., includes a "mental health professional." A psychologist unquestionably qualifies as a mental health professional, and therefore the psychologist-patient privilege is not a bar to discovery in child abuse and neglect proceedings.

See also **Ross v. Delaware County Dept. of Welfare**, 661 N.E.2d 1269, 1271 (Ind. Ct. App. 1996) (psychologist-patient privilege not a bar to testimony in termination hearing).

II. C. 6. Social Worker, Mental Health Counselor, and Marriage and Family Therapist Privileges

The statutes in IC 25-23.6-1 define the professions of clinical social worker, counselor, licensed addiction counselor, licensed clinical addiction counselor, licensed social worker, mental health counselor, marriage and family therapist, and social worker. Each of these professions is also included in the definition of counselor, found at IC 24-23.6-1-3.8: "counselor" is defined as referring to a social worker, a clinical social worker, a marriage and family therapist, a mental health counselor, an addiction counselor, or a clinical addiction counselor who is licensed under IC 25-23.6.

IC 25-23.6-6-1 provides that matters communicated by a client to a "counselor" in the counselor's official capacity, are privileged information and may not be disclosed by the counselor to any person, except in circumstances under which the privilege is abrogated by Indiana law. Indiana law at IC 31-32-11-1 abrogates the privilege as to all of these professionals: a licensed social worker, licensed clinical social worker, licensed marriage and family therapist; licensed mental health counselor; licensed addiction counselor; or a licensed clinical addiction counselor. IC 31-32-11-1(3). As previously discussed in this

Chapter, II.C.5, IC 31-32-11-1(2) covers health care providers, which in turn covers the term mental health professional.

However, when considering the discoverability and admissibility of mental health communications, it is also necessary to look at the confidentiality statutes for mental health records under IC 16-39 to determine if the records of a mental health provider are protected from discovery. See this Chapter below at II.D.4. on confidentiality of mental health records.

II. C. 7. Case Law on Discovery and Testimony of Social Workers and Therapists Regarding Client Communications

In **In Re Des.B.**, 2 N.E.3d 828, 835 (Ind. Ct. App 2014), the Court affirmed the trial court's CHINS adjudication, and found that Mother had not preserved the issue of whether the trial court abused its discretion when it admitted Counselor's Assessment into evidence. Mother objected to the admission of the Assessment on the grounds that it was based on hearsay and was cumulative of Counselor's testimony. On appeal, Mother argued that the admission of the Assessment violated her privilege to protect confidential communications between herself and Counselor, as provided by IC 25-23.6-6-1. A party "may not argue one ground for an objection to the admission of evidence at trial and then raise new grounds on appeal."

In **Johnson v. State**, 959 N.E.2d 334, 340-41 (Ind. Ct. App. 2011), *trans. denied*, the Court affirmed the trial court, holding that the social worker's testimony about the defendant's statements regarding his anger and fear about harming his daughter were admissible under Ind. Evid. R. 401, 402, 403, and 404. The Court opined that the social worker's testimony demonstrated the defendant's anger issues and how those issues might affect the defendant's daughter was relevant and made the defendant's guilt more probable. Therefore, the testimony was admissible under Ind. Evid. R 401 and 402, Rules which provide that if evidence is relevant, it is admissible. The Court also opined that the social worker's testimony was admissible under Ind. Evid. R. 403, which provides that although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice. Lastly, the Court determined that the social worker's testimony was admissible under Ind. Evid. R. 404(a), which provides that evidence of a person's character or trait of character is not admissible to show "action in conformity therewith on a particular occasion." The Court opined that the defendant's statement was a factual admission, and the social worker's testimony tended to prove that the defendant was the one who had harmed the child.

In **J.B. v. E.B.**, 935 N.E.2d 296, 299-301 (Ind. Ct. App. 2010), the Court concluded that the counselor/client privilege did not apply in a judicial proceeding resulting from a child abuse or neglect report, and held that the trial court erred in excluding Father's evidence of Son's counseling records. The Court noted that the counselor/client privilege protects matters communicated to a counselor in the counselor's official capacity and may not be disclosed; however, IC 31-32-11-1 provides that the counselor/client privilege does not apply in proceedings resulting from reports of child abuse. The Court further noted that Daughter informed Father that Son had touched her inappropriately, Father was seeking to protect Daughter's safety, and the privileged information at issue concerned Son's potential to reoffend. The Court concluded that this case fell within the purview of IC 31-32-11-1 and that the counselor/client privilege did not apply; therefore, the trial court erred in excluding the counselor's records, and the error was not harmless.

In **State v. Pelley**, 828 N.E.2d 915, 918-20 (Ind. 2005), a murder case, the Court held that the social worker/mental health counselor privilege statute concerns only disclosures made after the statute was enacted on July 1, 1990 and has only prospective application from that date.

In **Everhart v. Scott County Office of Family**, 779 N.E.2d 1225, 1231-2 (Ind. Ct. App. 2002), *trans. denied*, the Court determined that the social worker could have disclosed any information revealed by Father which would have indicated his guilt in child physical abuse pursuant to IC 25-23.6-6-1(2), and that Father's only recourse to protect himself was to invoke the Fifth Amendment. The Court went on to find that, contrary to Father's assertion, DCS did not maintain that the petition to terminate the parent-child relationship was sought because Father refused to discuss the abuse incidents. The Court opined that, although Father's lack of communication about abuse during counseling played a minor role in the filing of the termination petition, several other factors were considered, including the requirement that a hearing be held because of the length of time the children had been out of the home. The Court held that any violation of due process which Father may have suffered by the discussion of his invocation of his Fifth Amendment right against self-incrimination was harmless. Father had argued on appeal that he had been deprived of his right to due process by the use of his invocation of his right against self-incrimination during counseling sessions.

See also **Hayes v. State**, 667 N.E.2d 222, 226 (Ind. Ct. App. 1996) (Court ruled that the therapist-client relationship was not grounds for excluding the therapist's testimony; Stepfather filed a motion to suppress his statements, alleging that the therapist's disclosures to the child protection service violated the therapist-client privilege. The Court affirmed the denial of Stepfather's motion to suppress and ruled that any privileges were abrogated by statute); **Stone v. Daviess County Div. Child Serv.**, 656 N.E.2d 824, 831 (Ind. Ct. App. 1995) (Court ruled that the social worker-patient privilege is not a bar to testimony in termination cases).

But see **Sims v. State**, 601 N.E.2d 344, 346 (Ind. 1992) (Court ruled that it was a violation of the defendant's Fifth Amendment privilege against compelled disclosure to allow the defendant's counselor to testify regarding statements the defendant made in court ordered therapy); **Daymude v. State**, 540 N.E.2d 1263 (Ind. Ct. App. 1989) (Court ruled that Father's statements in the counseling sessions incriminating himself in the child molestation were protected by the physician-patient privilege, and the statute that abrogates that privilege for purposes of reporting child abuse and neglect did not apply because a report of child abuse or neglect had already been made to initiate the CHINS proceeding; arguably, the records of such court ordered therapy would be discoverable in a CHINS case based on the provision in IC 31-34-12-6 that the physician-patient privilege is not grounds for excluding evidence in any proceeding in which the child is alleged to be a child in need of services).

II. C. 8. Attorney-Client Privilege and Clergy Communications Privilege

IC 34-46-3-1(1) prohibits attorneys from testifying about confidential communications made to them in the course of their professional business. Ind. Rule of Professional Conduct 1.6(a) provides that a lawyer shall not reveal information relating to representation of a client unless the client consents after consultation. However, Prof. Cond. R. 1.6(b) allows a lawyer to reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing any criminal act, or to prevent reasonably certain death or substantial bodily harm. Arguably this exception would include child physical or sexual abuse or child neglect situations. See Ind. State Bar Ass'n Legal Ethics Comm., Opinion No. 2 of 2015, 59 Res Gestae 24, 24 (2015); "Viewpoint: Lawyers for Children on Lawyer's Duty to Report Child Abuse and Neglect," *Res Gestae*, Vol. 59, No. May 2016.

IC 34-46-3-1(3) provides that clergy shall not be required to testify regarding "confessions or admissions made to a clergyman in the course of discipline enjoined by the clergyman's church" or a "confidential communication made to a clergyman in the clergyman's professional character as a spiritual adviser or counselor."

The juvenile code does not contain a statute abrogating the attorney-client privilege or clergy privilege for reporting or evidentiary purposes in child abuse or neglect proceedings. See Chapter 4 at I.C.8 and C.9 for further discussion of these privileges.

In **Brown v. Katz**, 868 N.E.2d 1159, 1167-69 (Ind. Ct. App. 2007), the Court held that the trial court had not abused its discretion by dismissing the malicious prosecution charge. The Court stated that in light of Plaintiff's indolence, it agreed with the trial court that the appellees had been sufficiently burdened and should not have been required to proceed. Plaintiff had asserted that a vast majority of the documents requested and the answers to a vast majority of the questions asked at his deposition were protected by attorney-client and/or work product privilege. The Court noted that blanket claims of privilege are disfavored, and claims of privilege must be made and sustained on a question-by-question or document-by-document basis. A party asserting privilege bears the burden of establishing the validity of its assertion.

In **Shanabarger v. State**, 798 N.E.2d 210, 215-17 (Ind. Ct. App. 2003), *trans. denied*, Father's conviction for the murder of his infant son was affirmed. The Court was unpersuaded by Father's claim that the trial court had erred in permitting Father's original counsel to testify about Father's conversations with his sister and brother-in-law. Father argued that his sister and brother-in-law were agents of his court appointed attorney, but the attorney had specifically told Father that anything Father told his sister and brother-in-law was not privileged. The Court noted that the person who asserts the privilege has the burden of showing the following by the preponderance of the evidence: (1) the existence of an attorney/client relationship; and (2) that a confidential communication was involved. Additionally, statements made within the presence of hearing of a disinterested third person are not protected by the privilege. Statements to an attorney's agent are protected under IC 34-46-3-1(1) so long as: (1) the communication involves the subject matter about which the attorney was consulted; and (2) the agent was retained by the attorney for the purposes of assisting the attorney in rendering legal advice to or conducting litigation on behalf of the client. The Court was also unpersuaded that Father's statements to the police chaplain were inadmissible and fell within the clergy privilege because the chaplain had expressly told Father that anything said would not be confidential and would be shared with the police.

In **In Re Commitment of J.B.**, 766 N.E.2d 795, 800-1 (Ind. Ct. App. 2002), an involuntary mental health commitment case, the adult patient argued on appeal that the statements he had made to a deacon of the Church of Jehovah's Witnesses regarding wanting to kill his ex-wife triggered the priest-penitent privilege. The Court noted that the clergy privilege must be strictly construed. The Court opined that the patient's unsupported argument could not prevail because the patient: (1) presented no evidence of the deacon's particular role or the role of a deacon generally within the Church and (2) neglected to set forth any evidence explaining the nature or circumstances of his communication with the deacon, other than his conclusion that it fell under the priest-penitent privilege.

II. C. 9. Victim Advocate - Victim Privilege

The statutes found at IC 35-37-6 create a privilege for communications made by a victim to a victim counselor in the course of treating the victim for a psychological or emotional condition that was caused by one of the listed criminal offenses.

"Victim" (IC 35-37-6-3) is defined as any person against whom the following acts are committed: domestic or family violence, dating violence, sexual assault (as defined in IC 5-26.5-1-8), human and sexual trafficking (IC 35-42-3.5), or stalking (IC 35-45-10-5). Victim also includes a person who is a family member of a victim but is not a family member who is accused of committing an act of domestic or family violence, dating violence, sexual assault, human and sexual trafficking, or stalking. "Crime involving domestic or family violence" is defined at IC 35-31.5-2-76

"Victim advocate", defined at IC 35-37-6-3.5, is an individual employed or appointed by or who volunteers for a victim services provider, or the student advocate office of a state educational institution, or an approved postsecondary educational institution, if the individual provides services to a victim. The term also includes an employee, an appointee, or a volunteer of a victim services provider, domestic violence program, sexual assault program, rape crisis center, battered women's shelter, or a transitional housing program for victims of domestic violence. Lastly, the term victim advocate includes a program that has as one of its primary purposes to provide services to an individual against whom the following acts are committed: domestic or family violence, dating violence, sexual assault, human and sexual trafficking, or stalking, as well as a non-perpetrator family member of a victim.

The term "victim advocate" does not include a law enforcement officer, a prosecuting attorney, an employee or agent of a law enforcement officer, a prosecuting attorney, or an employee or agent of a prosecuting attorney's office. IC 35-37-6-3.5(b).

"Victim service provider," defined at IC 35-37-6-5, is a public or nonprofit private agency, not affiliated with a law enforcement agency that has, as one of its primary purposes, to provide services for emotional and psychological conditions of victims.

IC 35-37-6-9 creates a privilege for confidential communications made by a victim to a victim advocate or victim service provider in any judicial, legislative, or administrative proceeding. The privilege includes production of records. IC 35-37-6-9(a)(2) allows the victim advocate or victim service provider to reveal confidential information if the victim specifically consents to the disclosure in a written authorization that contains the date the consent expires. IC 35-37-6-9(e) and (f) allow the custodial parent, custodian, guardian, or guardian ad litem of an unemancipated child under the age of eighteen to consent to disclose information on the victim child's behalf as long as the custodial parent, custodian, guardian, or guardian ad litem has not committed or been alleged to have committed an offense against the victim.

IC 35-37-6-1.5(b)(2) exempts alleged child abuse or neglect that is required to be reported under IC 31-33 from the definition of confidential communication. IC 35-37-6-8 provides that a victim advocate is not relieved of any duty to report suspected child abuse or neglect under IC 31-33.

The victim-victim counselor privilege statute does not state that it applies to CHINS proceedings. An argument could be made that it is applicable to CHINS proceedings in which the perpetrator has also been charged in criminal court with one of the specified

criminal acts or the perpetrator is alleged to have committed one of the specified criminal acts in the CHINS petition.

In **In Re Crisis Connection**, 949 N.E.2d 789, 802 (Ind. 2011), the defendant in a child molesting prosecution contended that he had a constitutional right to inspect the records of a counseling agency which provided services for victims of acts of domestic or family violence, sexual assault, or dating violence. The Indiana Supreme Court found that the defendant did not have a constitutional right to an *in camera* review of the victim advocate agency's records. The Court stated that by providing a complete ban to disclosure in cases like this one, Indiana's victim advocate privilege advances the State's compelling interest in maintaining the confidentiality of information gathered in the course of serving emotional and psychological needs of victims of domestic violence and sexual abuse. See Chapter 4 at I.C.7 for further discussion.

II. C. 10. Prescription Drug Records Privilege

Prescriptions are considered confidential information in Indiana. IC 25-26-13-15 provides that a pharmacist: must hold in strictest confidence all prescriptions, drug orders, records, and patient information; may only divulge such information when it is in the best interest of the patient or when requested by the Board of Pharmacy or its representatives or by a properly charged law enforcement officer; may not divulge information about any prescription drug order, record, or patient information, except in connection with a criminal prosecution or proceeding or proceeding before the board, to which the person to whom the information relates is a party.

In **Walgreen Co. v. Hinchy**, 21 N.E.3d 99 (Ind. Ct. App. 2014), *affirmed on rehearing*, 25 N.E.3d 748 (Ind. Ct. App. 2015), the Court concluded that the pharmacist's conduct in accessing patient's prescription profile and divulging the information she learned from those records to the patient's ex-boyfriend violated a duty of confidentiality owed to the patient.

In **Williams v. State**, 819 N.E.2d 381, 387-8 (Ind. Ct. App. 2004), *trans. denied*, the defendant, charged with criminal deviate conduct and rape, sought court ordered discovery of the adult victim's prescription drug records from her drugstore for the past three years. The trial court denied the discovery motion, but the Court reversed the trial court's order. The Court stated that the victim's right to maintain confidentiality of her prescription drug records must be balanced with the defendant's right to adequately defend the charges. The Court stated that the relevance of the information was limited to the narrow question of whether the victim's use of prescribed medication on the evening in question affected her perception and recall of events. The Court offered no opinion on whether the prescription drug information would be admissible at trial and failed to see how the victim's use of prescribed medication could create a motive to manufacture sexual assault allegations.

II. C. 11. Licensed Addiction Counselor and Licensed Clinical Addiction Counselor

IC 25-23.6-1-4.3 and 4.5, and IC 25-23.6-10.1 are definitions of and state licensing standards for addiction counselors and clinical addiction counselors. Although the statutory scheme does not include a privilege for communications between licensed addiction and clinical addiction counselors and their patients, IC 31-32-11-1 abrogates the privilege between licensed addiction and clinical addiction counselors and patients for reporting and testifying concerning child abuse and neglect. 2017 legislation added IC 25-23.6-1-4.4, which defines a "licensed addiction counselor associate" as an individual who is licensed as an addiction counselor associate under IC 25-23.6-10.5-1.5.

See Chapter 4 at I.C.6. for further information on licensed addiction counselors.

II. D. Confidentiality Statutes

II. D. 1. Juvenile Court Records

IC 31-39-1-2 provides that juvenile court records which are considered confidential are available only in accordance with IC 31-39-2, and the court shall take appropriate actions to protect juvenile court records from unauthorized disclosure. Juvenile court records which are not considered confidential include, but are not limited to: Records involving proceedings that pertain to: (A) paternity issues; (B) custody issues; (C) parenting time issues; or (D) child support issues concerning a child born to parents who are not married to each other. IC 31-39-1-1. Therefore, IC 31-39-1 and IC 31-39-2 do not apply to these records.

Juvenile court records are available without a court order to: the prosecutor or staff, IC 31-39-2-5; the attorney and authorized staff of DCS and the DCS ombudsman, IC 31-39-2-6; and any "party" and party's counsel to the proceeding, with the exception of children excluded from hearings and persons who are denied access to predisposition reports or records, IC 31-39-2-3. DCS, the child, the child's parent, guardian, custodian, and the child's guardian ad litem or court appointed special advocate are all considered parties to the case pursuant to IC 31-34-9-7.

The court may grant service providers access to the court records on the child and the child's family under IC 31-39-2-9.

IC 31-39-2-13.5 provides that juvenile court records are available without a court order to an employee of DCS, a caseworker or a juvenile probation officer conducting a criminal history check (as defined in IC 31-9-2-22.5) to determine the appropriateness of an out-of-home placement for a child at imminent risk of placement, a child in need of services or a delinquent child. See Chapter 5 at III.E.2. and Chapter 8 at V.B. for further discussion of criminal history check. A "child at imminent risk of placement," defined at IC 31-9-2-14.5 and IC 31-26-5-1, is "a child less than eighteen years of age who reasonably may be expected to face in the near future out-of-home placement ... as a result of one of the following: (1) [d]ependency, abuse, or neglect; (2) [e]motional disturbance; (3) [f]amily conflict so extensive that reasonable control of the child is not exercised; (4) [d]elinquency adjudication."

IC 31-39-2-13.8 authorizes the juvenile court to grant a public, nonpublic, or charter school access to all or a portion of a student's juvenile court records upon written request which establishes that the records are necessary for the school to serve the student's educational needs or to protect the health or safety of a student, employee, or volunteer at the school. IC 31-39-2-13.8(c) requires the juvenile court that releases records to a school to notify the child and the child's parent, guardian, or custodian that the records have been released. The juvenile court that releases the records shall order the school to keep the records confidential, but the records may be forwarded to: (1) another school; (2) a person on consent of the student's parent, guardian, or custodian; (3) a court, law enforcement agency, the department of correction, DCS, the office of the secretary of family and social services; or (4) a primary or secondary public or nonpublic school. IC 31-39-2-13.8(d). A school or person that receives juvenile court records shall keep them confidential.

The Office of DCS ombudsman was established at IC 4-13-19. IC 31-25-5-1 and 2 were added and pertain to cooperation with the ombudsman. IC 31-25-5-2 requires DCS and the

juvenile court with jurisdiction over a child to provide the ombudsman with appropriate access to all DCS records concerning the child (excluding adoption records) and immediate access, without prior notice, to any facility in which the child is placed or receiving services funding by DCS. See Chapter 4 at II.H. for further discussion of office of DCS ombudsman.

In **Edelen v. State**, 947 N.E.2d 1024, 1029, 1031 (Ind. Ct. App. 2011), the Court affirmed the DCS case worker's criminal convictions for perjury and official misconduct. At Edelen's criminal jury trial, the State sought to have the transcript of her testimony at a juvenile court CHINS hearing introduced into evidence. Edelen objected to the introduction of the transcript, claiming that the juvenile court records were confidential pursuant to IC 31-39-1. The criminal court allowed the transcript to be admitted into evidence but ordered the child's identifying information redacted from the transcript. On appeal, the Court opined that the criminal court did not abuse its discretion in admitting the transcript into evidence, and found that the transcript was not confidential under IC 31-39-1-1(a)(1) because it involved an adult charged with a crime. The Court stated that Edelen's testimony during the CHINS hearing did not just involve or relate to her later perjury charge but *is* the crime for which she was charged (emphasis in original). See Chapter 2 VIII. for further discussion. See also this Chapter at II.D.3.c. below regarding DCS log entries.

In **In Re Paternity of K.D.**, 929 N.E.2d 863, 868-872, 873-875 (Ind. Ct. App. 2010), the Court held that the trial court's order prohibiting Mother from discussing the legal proceedings in her daughter's paternity case was an invalid prior restraint on Mother's free speech, and that the confidentiality provisions in the Indiana Code do not prevent Mother from talking to others about the case based on her knowledge obtained independently of the paternity proceedings. In reaching the conclusion that the order was a prior restraint and that privacy rights were not affected, the Court noted the following: (1) Mother's stated reason for talking with the media was political speech, which the First Amendment protects; (2) the attorneys, judges, and guardians ad litem who participated in these hearings had no privacy rights; (3) the child's privacy rights had to be weighed against Mother's right to free speech to challenge the government; (4) neither the child nor the Father alleged any harm, though the Court noted that Father was not without recourse if Mother was making false accusations. In concluding that the juvenile court's order was not a valid prior restraint in light of IC 31-39-1-1 and 2, the Court noted the following: (1) the juvenile code only provides for limited situations in which a person associated with the case may request the court to exclude the public from proceedings; (2) in this case, no one asked the court to exclude the public from the case; (3) IC 31-19-1-2 provides that juvenile court records are confidential; (4) the trial court correctly prohibited Mother from discussing with anyone, including the media, the contents of the records in the proceedings; and (5) however, the trial court's order was not narrowly tailored, and instead of prohibiting Mother from discussing the contents of the juvenile court records, the order prevented Mother from discussing any aspects of the case with anyone, which would include Mother's independent knowledge. Lastly, the Court noted that Mother's free speech could be subject to a tort action for defamation, and that while there was no evidence of harm to the child by Mother's speech to the media in this case, that the question of balancing free speech and privacy when harm was done to a child was not before the Court in this case. *Note*: Subsequent to this case, IC 31-39-1-1 was amended to make many of the records and proceedings at issue in this non-confidential.

In **In Re T.B.**, 895 N.E.2d 321, 340-3, 345-6, 348-9, 352-3 (Ind. Ct. App. 2008), the Court affirmed in part and reversed in part the juvenile court's orders granting the release of certain records at the request of news media; the Court held that the juvenile court did not err in releasing redacted copies of its records from the CHINS proceeding that was pending at the

time of the child's death pursuant to IC 31-39-2-10. The Court concluded that (1) IC 31-39-2-10 applies to both closed and pending cases and to both CHINS and juvenile delinquency cases; and (2) IC 31-39-2-15 does not govern whether a juvenile court may release records pursuant to IC 31-39-2-10. The Court stated that the death of any child is a matter "of the keenest public interest ... and especially when the child is ostensibly under the auspices of the state;" and that the news outlets have a "legitimate interest" in informing the public of the facts surrounding the death of the child "while in the care of her mother, just hours before a scheduled court hearing." Furthermore, the Court observed that IC 31-39-1-1 provides that the confidentiality provisions of IC 31-39-1 "[apply to all records of the juvenile court except the following: (1) Records involving an adult charged with a crime or criminal contempt of court...." Mother had been charged with neglecting and murdering the child prior to the first hearing on the request for access of records. The Court held that IC 31-39-1-1(a)(1) applies only to those juvenile court records that relate specifically to both the adult and the charged crime; and noted that to conclude otherwise would be to subvert the confidentiality provisions of IC 31-39-1-2 and to convert IC 31-39-1-1(a)(1) into a fishing license for prosecutors and the public alike. [*Practitioner note:* IC 31-39-1-1 was amended in 2014, adding subsection (a)(3), which provides that paternity issues, parenting time, custody, and child support to the list of items for which confidentiality is excluded].

The T.B. Court also held that the juvenile court did not err in releasing its records from the prior closed CHINS proceeding. In light of the child's death during the pending CHINS proceeding, which was of "legitimate interest" for the purposes of IC 31-39-2-10, Mother's prior involvement in the child welfare system was of equal interest and import. The Court noted that IC 31-39-2-10 is not limited to pending cases, and it contemplates the release of court records regarding an adult respondent in a CHINS case, given that practically all CHINS cases involve an adult respondent. The juvenile court did not err in releasing redacted DCS records pursuant to IC 31-33-18-1.5. The plain language of IC 31-33-18-1.5 provides that a properly redacted DCS record "regarding a child whose death or near fatality may have been the result of abuse, abandonment, or neglect" that is otherwise not confidential under state or federal law "may be disclosed to any person who requests the record." [*Practitioner note:* IC 31-33-18-1.5 has undergone significant amendments in 2009, 2011, and 2013].

The T.B. Court determined that Mother's due process claims for a trial free from prejudicial pretrial publicity were not ripe for adjudication, and her due process rights were protected in other ways, such as a change of venue and voir dire.

However, the T.B. Court determined that the juvenile court erred in releasing a transcript of the August 2007 CHINS review hearing pursuant to IC 31-32-6-2, because it does not say that a juvenile court may release a transcript of a proceeding from which the public was excluded. For purposes of IC 31-32-6-2, a "proceeding" is an actual hearing or trial, not a transcript of the hearing or trial. The Court also held that the juvenile court erred in releasing its records from Mother's juvenile delinquency proceedings pursuant to IC 31-39-2-8. The plain language of the statute indicates that the record must relate to the act or acts that serve as the basis for the delinquency allegation. Mother's alleged neglect and murder of the child were not the basis for the delinquency allegations.

II. D. 2. Law Enforcement Records

Law enforcement records involving allegations that a child is a delinquent or a CHINS are generally confidential; however, the persons listed in IC 31-39-4 have access to the records without a court order or without specific permission from the head of the law enforcement agency. These people or entities generally include:

(1) a law enforcement officer;
(2) the judge of the juvenile court or any authorized staff member;
(3) any party to a juvenile court proceeding and the party's attorney;
(4) the judge of a court having criminal jurisdiction or any authorized staff member if the record is to be used in a presentence investigation in that court;
(5) a prosecuting attorney or staff;
(6) an attorney for DCS, or an authorized staff member of DCS or the DCS ombudsman;
(7) a party to criminal or juvenile delinquency proceedings;
(8) a victim of delinquent act;
(9) other interested persons and researchers.

Please note that many of the people or entities on this list have certain restrictions placed upon them or must meet certain requirements before being entitled to records without a court order or specific permission. The statutes may be found at IC 31-39-4-1 through -11.

In **N.W. v. Madison Co. Dept. of Public Welfare**, 493 N.E.2d 1256, 1260 (Ind. Ct. App. 1986), the Court ruled that a mother opposing a determination that her child was a CHINS had a right to review police reports regarding sexual abuse of the child by the father. The opinion indicated that it is sufficient that the party be given an opportunity to review the records; the discovering party is not entitled to copies of law enforcement records.

II. D. 3. Records of Department of Child Services, Child Fatality Review Team, State Child Fatality Review Committee, Division of Family Resources, and Ombudsman

IC 31-33-18-1 provides that the various records of DCS, local DCS offices, the DCS ombudsman, the division of family resources, and the child fatality teams and committee are confidential.

However, the many subsections of IC 31-33-18-2 specify persons who shall be given access to the records. For a full list of persons or entities who shall be given access to these records, practitioners should consult the statute. A few examples include: (1) legally mandated public or private child protective agency investigating a report of child abuse or neglect or treating a child or family that is the subject of a report or record; (2) individuals or entities who are investigating a report of a child who may be a victim of child abuse or neglect (police officer or other law enforcement agency; prosecuting attorney; coroner); (3) a physician who suspects a child may be a victim of child abuse or neglect; (4) an agency with legal responsibility for a child who is the subject of a report or record or a parent, guardian, custodian, or other person who is responsible for the child's welfare; (5) an individual named in the report or record who is alleged to be abused or neglected; (6) each parent, guardian, custodian, or other person responsible for the welfare of a child named in a report or record or their attorney; (7) a person about whom a report has been made, with certain limitations; (8) an employee of DCS, a caseworker, or a juvenile probation officer conducting a criminal history check for specific delineated reasons; (9) a court for redaction purposes, or upon the court's finding that access to the records may be necessary for determination of an issue before the court, with certain limitations. See Chapter 4 at I.E.

IC 31-33-18-1.5(e) provides a mechanism by which other persons may request certain records of a child death or near fatality resulting from child abuse or neglect. Subject to certain exceptions, a redacted local office, DCS, or DCS ombudsman record regarding a child whose death or near fatality may have been the result of abuse, abandonment, or neglect is not confidential and may be disclosed to any person who requests the record (emphasis added). IC 31-33-18-1.5(e). The person requesting the record may be required to pay the reasonable

expenses of copying the record. IC 31-33-18-1.5(i) makes provisions for what information must be included in the records released to a requesting person. See this Chapter II.D.3.b. for more detailed information on this statute and releasing redacted records.

Case law issued prior to the statute granting access of records to alleged perpetrators held that denial of the records to criminal defendants violated due process of law. See **Sturgill v. State**, 497 N.E.2d 1070 (Ind. Ct. App. 1986); **Pennsylvania v. Ritchie**, 480 U.S. 39, 107 S. Ct. 989 (1987).

Caseworker notes prepared in the regular course of business are not generally protected from discovery under the work product immunity. See **Matter of Snyder**, 418 N.E.2d 1171 (Ind. Ct. App. 1981).

II. D 3. a. What Records Are Confidential?

IC 31-33-18-1 has been repeatedly amended and now states:

(a) Except as provided in section 1.5 of this chapter, the following are confidential:

(1) Reports made under this article (or IC 31-6-11 before its repeal).

(2) 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;

(C) the department; or

(D) the department of child services ombudsman established by IC 4-13-19-3.

(b) Except as provided in section 1.5 of this chapter, all records held by:

(1) the division of family resources;

(2) a local office;

(3) the department;

(4) a local child fatality review team established under IC 16-49-2;

(5) the statewide child fatality review committee established under IC 16-49-4; or

(6) the office of the department of child services ombudsman established by IC 4-13-19-3;

regarding the death of a child determined to be a result of abuse, abandonment, or neglect are confidential and may not be disclosed.

II. D. 3. b. Redacting Confidential Records for Public Access

IC 31-33-18-1.5 requires the juvenile court exercising jurisdiction in the county where a child's death or near fatality that may have been the result of abuse, abandonment or neglect occurred to release redacted DCS, local office, and office of DCS ombudsman records to a person who requests the records.

IC 31-33-18-1.5(b) defines the following circumstances under which a child's death or near fatality is the result of abuse, abandonment, or neglect : (1) DCS, county office, division of family resources, a local child fatality review team, the statewide child fatality review committee, or the office of DCS ombudsman determines that a child's death or near fatality may have been the result of abuse, abandonment, or neglect; or (2) the prosecutor files an indictment or information; or complaint alleging delinquency that, if proven, would cause a reasonable person to believe the child's death or near fatality may have been the result of abuse, abandonment or neglect. IC 31-33-18-1.5(b) further

provides that, upon the request of any person, or upon its own motion, the court exercising juvenile jurisdiction in the county in which the child's death or near fatality occurred shall determine whether the allegations contained in the indictment, information, or complaint would cause a reasonable person to believe the child's death or near fatality may have been the result of abuse, abandonment, or neglect.

IC 31-18-1.5(c) was added to provide that if a juvenile court finds that a child's death or near death was a result of child abuse, abandonment, or neglect, the court must make findings and provide the findings, indictment, information, or complaint described in (b)(2) to DCS.

IC 31-18-1.5(d) provides for definitions of "case", "contact", "identifying information", "life threatening", and "near fatality" for purposes of this statute.

IC 31-33-18-1.5(e) provides that subject to certain exceptions, a redacted local office, DCS, or DCS ombudsman record regarding a child whose death or near fatality may have been the result of abuse, abandonment, or neglect is not confidential and may be disclosed to any person who requests the record (emphasis added). Persons requesting the record must pay the reasonable expenses of copying to the entity having control of the record and to the court pursuant to IC 31-33-18-1.5(h).

IC 31-33-18-1.5(f) provides that when a person requests the record, the entity having control of the record shall immediately transmit a copy of the record, or the original if requested by the court, to the court exercising juvenile jurisdiction in the county where the death or near fatality occurred. The court shall redact the following information within 30 days pursuant to IC 31-33-18-1.5(g): (1) all identifying information described in IC 31-3-18-1.5(d)(3)(B) through (d)(3)(F) of a person, and (2) all identifying information of a child less than eighteen years of age. Identifying information is broadly defined at IC 31-18-1.5(d).

IC 31-33-18-1.5(i) requires the following to be included in the record disclosed by the court: (1) summary of abuse or neglect report and factual description of contents of report; (2) child's gender and age; (3) cause of fatality or near fatality if determined; (4) whether DCS had any contact with the child or the perpetrator before the fatality or near fatality, including the frequency of the contact or communication and the date of the last contact or communication, and if the child's case was closed, why it was closed; (5) the status of the child's case at the time of the fatality or near fatality and the reasons for closure if the case was closed.

IC 31-33-18-1.5(j) provides that the court's determination that certain identifying information or other information is not relevant to establishing the facts and circumstances leading to the death or near fatality of a child is not admissible in a criminal proceeding or civil action.

See Chapter 4 at II.E., F., and H. for additional discussion of local child fatality review team, statewide child fatality review committee, and office of DCS ombudsman.

II. D. 3. c. Persons and Entities Who Have Access to Confidential Records

IC 31-33-18-2 includes the following persons and entities who may have access to records of DCS, the division of family resources, the local office, and the office of DCS ombudsman, and the local and statewide child fatality review teams:

(1) Persons authorized by this article.
(2) A legally mandated public or private child protective agency investigating a report of child abuse or neglect or treating a child or family that is the subject of a report or record.
(3) Certain persons or entities who are investigating a report of a child who may be a victim of child abuse or neglect (police, law enforcement, prosecuting attorney, coroner).
(4) A physician who has before the physician a child whom the physician reasonably suspects may be a victim of child abuse or neglect.
(5) An individual legally authorized to place a child in protective custody with certain requirements and restrictions.
(6) An agency having the legal responsibility or authorization to care for, treat, or supervise a child who is the subject of a report or record or a parent, guardian, custodian, or other person who is responsible for the child's welfare.
(7) An individual named in the report or record who is alleged to be abused or neglected or, if the individual named in the report is a child or is otherwise incompetent, the individual's guardian ad litem or the individual's court appointed special advocate, or both.
(8) Each parent, guardian, custodian, or other person responsible for the welfare of a child named in a report or record and an attorney of the person described under this subdivision, with protection for the identity of reporters and other appropriate individuals.
(9) A court, for redaction of the record, or upon the court's finding that access to the records may be necessary for determination of an issue before the court, with certain limitations.
(10) A grand jury upon the grand jury's determination that access to the records is necessary in the conduct of the grand jury's official business.
(11) An appropriate state or local official responsible for child protection services or legislation carrying out the official's official functions.
(12) The community child protection team appointed, upon request, to enable the team to carry out the team's purpose.
(13) A person about whom a report has been made, with identity protections in place.
(14) An employee of DCS, a caseworker, or a juvenile probation officer conducting a criminal history check to determine the appropriateness of an out-of-home placement
(15) A local child fatality review team.
(16) The statewide child fatality review committee.
(17) DCS.
(18) The division of family resources, in certain circumstances.
(19) A citizen review panel.
(20) DCS ombudsman.
(21) The state superintendent of public instruction with protections for identity.
(22) The state child fatality review coordinator.
(23) A person who operates a child caring institution, group home, or secure private facility if certain requirements are met.
(24) A person who operates a child placing agency if certain requirements are met.
(25) The National Center for Missing and Exploited Children.
(26) A local domestic violence fatality review team, as determined by the department to be relevant to the death or near fatality that the local domestic violence fatality review team is reviewing.
(27) The statewide domestic violence fatality review committee, as determined by the department to be relevant to the death or near fatality that the statewide domestic violence fatality review committee is reviewing.

In **Edelen v. State**, 947 N.E.2d 1024 (Ind. Ct. App 2011), the Court affirmed the introduction into evidence of DCS log entries in the case worker's criminal perjury and official misconduct trial. See this Chapter at II.D.1 and Chapter 2 at VIII for further discussion.

In **In Re T.B.**, 895 N.E.2d 321, 352-3 (Ind. Ct. App. 2008), the Court held, among other things, that the juvenile court did not err in releasing, pursuant to IC 31-33-18-1.5, redacted records of Indiana DCS and Marion County DCS regarding a child who was the subject of a CHINS proceeding at the time of her death which was allegedly caused by multiple blunt force injuries. The Court concluded that in her argument on appeal, Mother disregarded the plain language of IC 31-33-18-1.5, which provides that a properly redacted DCS record "regarding a child whose death or near fatality may have been the result of abuse, abandonment, or neglect" that is otherwise not confidential under state or federal law "may be disclosed to any person who requests the record." See this Chapter at II.D.1. for a more in-depth discussion of this case.

In **In Re K.B.**, 894 N.E.2d 1013, 1015-17 (Ind. Ct. App. 2008), the Court reversed the trial court's order granting the media access to the CHINS records of Mother's two children, holding that because there was not a specific ongoing threat to the safety or welfare of the community, the trial court abused its discretion in disclosing the children's CHINS records. The Court's decision was based on the limited case record, and (1) the record was not well-developed; (2) the trial court issued its order without notice and without a hearing; (3) there was no indication that any person actually requested access to the children's records; (4) DCS had concerns about releasing the records; (5) the heart of Mother's complaint appeared to be the release of the "caseworker's report of preliminary inquiry & investigation," which was very detailed; and (6) the local newspaper article filed with the motion to correct error appeared to quote the caseworker's investigatory report at length. The Court concluded that the report was confidential and should not have been made available to the public. The Court (1) looked to IC 31-33-18-1(a) "which specifically controls the investigation of child abuse and neglect," and concluded that the investigatory report and any other information obtained during the investigation was confidential; (2) then looked to IC 31-33-18-2 which governs the release of an investigatory report and does not include media representatives in its list of persons to whom an investigatory report may be made available; and (3) found that, given the specific language of IC 31-33-18-2, "it is clear that the legislature intended to limit the persons who had access to these confidential reports." The K.B. Court then analyzed IC 31-39-2-10, which the trial court had relied on in releasing the records, and stated:

> We agree it is unclear under what circumstances the legislature intended any interested person to be able to access juvenile court records. We invite the legislature to clarify this ambiguity so as to ensure the confidentiality of legal records involving children. Nevertheless, we need not determine this issue today because even assuming that [IC] 31-39-2-10 applies to CHINS proceedings, we conclude that the trial court abused its discretion in disclosing [the two living children's] CHINS records. Id. at 1016-17.

Noting that the trial court indicated in its order that it was granting access to the records to educate the public, address the community's interest in the welfare of the children, and to give the public new insight into the workings of the trial court and DCS, the K.B. Court stated that these goals are laudable, but they need not be achieved at the expense of the children's privacy interests. The Court opined that the children here are entitled to the same privacy and confidentiality that are offered to other children involved in less

notorious CHINS proceedings, and public awareness about either child abuse, our court system, or DCS, does not warrant the disclosure of the children's CHINS records because awareness can be achieved by a variety of less intrusive measures.

II. D. 4. Mental Health Confidentiality Statutes

Mental health professionals may be affected both by privilege and confidentiality statutes. The relevant privilege statutes are generally abrogated by IC 31-32-11-1 for evidentiary purposes in child abuse and neglect proceedings; however, an abrogation of those privileges may not automatically override the confidentiality provisions for mental health records in IC 16-39. See this Chapter at II.C.1 through C.11 for what types of mental health providers are covered by IC 31-32-11-1.

IC 16-18-2-226 defines mental health records as meaning "recorded or unrecorded information concerning the diagnosis, treatment, or prognosis of a patient receiving mental health services or developmental disability training." The mental health confidentiality laws apply to those private and public institutions and persons that fit within the definition of "provider" at IC 16-18-2-295, which includes: individuals who are licensed, registered, or certified as health care professionals, including (among others) doctors, nurses, emergency medical technicians, psychotherapists, and psychologists; private and public hospitals and health facilities; a sexual assault nurse; state mental health institutions; and community mental health programs.

IC 16-39-2-3 states that a patient's mental health record is confidential. IC 16-39-2-7 provides that mental health records are not discoverable or admissible in any legal proceeding without patient consent, unless there is a special exception for the release. An exception to this is found at IC 16-39-2-8, which makes provisions for court ordered release of mental health records in a juvenile court proceeding.

IC 16-39-2-6(10)(E) provides that mental health records can be disclosed without a patient's consent to the extent necessary to satisfy reporting requirements of the child abuse and neglect reporting statute (IC 31-33-5-4). IC 16-39-2-6(10) provides other exceptions in which a patient's mental health records can be disclosed without consent in order to comply with reporting requirements; these exceptions can be found in subsections (10)(A) through (G).

Cumbersome discovery procedures can be avoided by obtaining the consent of the person whose record is sought. Some agencies utilize standardized "release of information" forms. When there is no required form, the consent should be in writing, signed by the person whose record is sought, dated, state the name of the person requested to release the records, and state the name of the person or provider to whom the record is to be released. The release should state the scope of the consent in terms of subject matter requested to be released, i.e. diagnosis, treatment, medication, specialized programming. IC 16-39-2-5(c)(8) requires that the consenting person be advised that his/her consent is subject to revocation at any time, except to the extent that action has been taken in reliance on the consent. The consent shall contain the date, event, or condition on which the consent will expire if not previously revoked. Unless otherwise specified, the release is valid for 180 days from the date the request is made. IC 16-39-2-5(d).

For cases dealing with a parent being required to release their mental health records, see:

L.G. v. S.L., 76 N.E.3d 157 (Ind. Ct. App. 2017) *trans. pending*, where the Court held that Father's delay in producing mental health records pursuant to a discovery order did not warrant dismissal, especially since the delay was at least in part attributable to

Adoptive Parents. IC 16-39-2-3 provides that a patient's mental health records are confidential and can only be disclosed with the consent of the patient unless otherwise provided by IC 16-39-2 and -3. Since Father objected to the release of his mental health records, Adoptive Parents were required to follow all proper procedures. Since no proper procedures were followed to obtain the mental health records, Father's delay in complying with the discovery order was entirely attributable to Adoptive Parents, and not to Father.

Pitts v. Johnson Cty. Dept. of Public Welfare, 491 N.E.2d 1013 (Ind. Ct. App. 1986), where the Court dealt with the propriety of a contempt sanction for a parent who refused to consent to disclosure of her mental health records in a termination case.

Reynolds v. State, 575 N.E.2d 28, 30 (Ind. Ct. App. 1991), where the defendant was not prejudiced in criminal trial because same judge had ordered defendant to consent to release of information regarding his progress in mental health counseling in the related CHINS case.

II. D. 4. a. Mental Health Records of Parent, Guardian, or Custodian

Although mental health records are generally confidential, there are exceptions under chapters 2 and 3 of article 39 of the mental health statutes that are relevant to obtaining the mental health records of non-consenting parents in CHINS and termination cases. See Chapter 4 at III.G.3. and Chapter 11 at VI.D.

IC 16-39-3-8 provides that in an emergency situation, DCS can file a verified petition in the juvenile court for a hearing to obtain the mental health records of the child's parent, guardian, or custodian for preparation of the preliminary inquiry. There are notice and time requirements for the hearing, and the statute states that the court shall order the release of the records if it finds the following by a preponderance of the evidence:

(1) Other reasonable methods of obtaining the information sought are not available or would not be effective.

(2) The need for disclosure in the best interests of the child outweighs the potential harm to the patient caused by a necessary disclosure. In weighing the potential harm to the patient, the juvenile court shall consider the impact of disclosure on the provider-patient relationship and the patient's rehabilitative process.

Also, IC 16-39-3-3 provides that a person may seek access to a patient's mental health record without the patient's written consent in an investigation or prosecution resulting from a report of child abuse or neglect, by filing a petition in a circuit or superior court requesting a release of the patient's mental health records. A hearing is required and the notice requirements are stated at IC 16-39-3-4 and the standards for granting access are stated at IC 16-39-3-7. IC 16-39-3-9 provides for limitations and protections for a mental health record disclosed under these statutes, and IC 16-39-3-10 provides that the court shall maintain as confidential the record or transcript of a hearing involving confidential mental health records.

Another exception for obtaining mental health records can be found at IC 16-39-2. 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 the showing of good cause following a hearing under IC 16-39-3 or in a proceeding under IC 31-30 through IC 31-40 following a hearing held under the Indiana Rules of Trial Procedure." IC 31-34 and -35 specifically apply to CHINS and termination of the parent-child relationship cases. However, this statute contains little guidance on required procedures other than the applicability of the Indiana Rules of Trial Procedure and a hearing requirement.

Further, IC 16-39-3-11 specifically states that the procedures and standards under IC 16-39-3 (which are discussed in the paragraphs above) are not applicable to a hearing for mental health records in CHINS and termination cases, and that such records must be dealt with according to the Indiana Rules of Trial Procedure and IC 16-39-2-8.

In the absence of clear direction, it is recommended that a petition be filed specifying the desired mental health records and the need for disclosure. Notice of the hearing should be given to the following: the patient whose record is sought; the lawyer, guardian, or guardian ad litem or court appointed special advocate appointed for the child or adult patient whose record is sought; the mental health provider that maintains the record or the attorney general if the provider is a state institution; and any other party to the CHINS proceeding. The court may look to IC 16-39-3-8 for obtaining mental health records in preparation for the preliminary inquiry (which is quoted in the paragraphs above) as guidance, though not controlling, on the "good cause" issue.

The following arguments could potentially persuade the court that there is "good cause" to order the release of records: relevancy of mental health records to caretaker's emotional and mental condition as it relates to caretaker's ability to care for the child; need to determine the best interests of the child; unavailability of mental health information through other sources; need to know mental health of parent to prepare statutorily required case plans and predispositional and review reports.

It could be argued that the release of the records in juvenile proceedings will not be harmful to the patient because CHINS cases are confidential civil proceedings to strengthen family life and protect children (IC 31-10-2-1(4) and (6)), and any minimal harm caused by the release of the records is off-set by the advantages of being able to better help the family through a full understanding of existing mental health conditions. The party seeking the record can also remind the court of mechanisms available under Ind. Trial Rule 26(C) to limit the scope of the release, to limit the persons to whom the record is released, and to seal judicial records containing mental health testimony. Finally, the party seeking the record can request that the court conduct an in camera review of the mental health records to determine relevancy and appropriate limits on the record. See **Canfield v. Sandock**, 563 N.E.2d 526 (Ind. 1990) (personal injury case dealing with propriety of in camera review of medical records and protective orders to limit scope of discovery). But see **Buford v. Flori Roberts, Inc.**, 663 N.E.2d 1159, 1161 (Ind. Ct. App. 1996) (petitioner's entitlement to good cause hearing on discovery of mental health records in tort litigation obviates need or right for in camera review of her mental health records).

Arguments against release of mental health records are as follows: irrelevancy of the mental health record to the proceedings; availability of mental health information through other sources; harm to future treatment relationship between patient and mental health provider.

Although **Matter of J.O.**, 556 N.E.2d 948, 949-50 (Ind. Ct. App. 1990), was decided under the former mental health confidentiality laws, it may still be relevant for its interpretation of what constitutes mental health services. The issue on appeal in J.O. was whether the testimony and records of welfare caseworkers and persons variously referred to in the opinion as social workers, mental health providers, and a clinic program

director, were excludable under the mental health confidentiality laws because they reflected on Mother's mental health services. The Court framed the issue as follows:

> If their testimony would have divulged information respecting the mental health services received by [Mother] then IC 16-14-1.6-8 [mental health confidentiality law then in effect] would mandate its exclusion. On the other hand, if the evidence could merely have revealed the services offered as part of the case plan developed by the welfare department, then the statute would not operate to exclude the evidence.

In **L.G. v. S.L.**, 76 N.E.3d 157 (Ind. Ct. App. 2017) *trans. pending*, the Court held that Father's delay in producing mental health records pursuant to a discovery order did not warrant dismissal of Father's motion to contest his child's adoption, especially since the delay was at least in part attributable to Adoptive Parents. IC 16-39-2-3 provides that a patient's mental health records are confidential and can only be disclosed with the consent of the patient unless otherwise provided by IC 16-39-2 and -3. Since Father objected to the release of his mental health records, Adoptive Parents were required to follow all proper procedures. Since no proper procedures were followed to obtain the mental health records, Father's delay in complying with the discovery order was entirely attributable to Adoptive Parents, and not to Father.

In **In Re Des.B.**, 2 N.E.3d 828, 835 (Ind. Ct. App 2014), the Court affirmed the trial court's CHINS adjudication, and found that Mother had not preserved the issue of whether the trial court abused its discretion when it admitted Counselor's Assessment into evidence. Mother objected to the admission of the Assessment on the grounds that it was based on hearsay and was cumulative of Counselor's testimony. On appeal, Mother argued that the admission of the Assessment violated her privilege to protect confidential communications between herself and Counselor, as provided by IC 25-23.6-6-1. A party "may not argue one ground for an objection to the admission of evidence at trial and then raise new grounds on appeal."

In **In Re Invol. Termn. of Par. Child Rel. A.H.**, 832 N.E.2d 563, 567-9 (Ind. Ct. App. 2005), Father objected to the introduction of a psychiatric report prepared for the purpose of obtaining social security disability benefits and to the testimony of a licensed social worker from a mental health center. The trial court admitted the report and social worker's testimony into evidence and granted the termination petition. Father argued that this was error because he had not signed a release for the admission of the report; therefore, his right of privacy pursuant to the 1996 Health Insurance Portability and Accountability Act (HIPAA) had been violated. The Court noted that HIPAA restricts access to medical records without the individual's direct consent, but that exceptions do exist, which include the reporting of child abuse. 42 CFR 160.203 (c); 42 C.F.R. 164.512 (2)(c). The Court went on to note that IC 16-39-3-3, IC 16-39-3-4 and IC 16-39-3-8 provide for mental health records to be obtained by petition, hearing and court order. The Court concluded that the parents' rights to nondisclosure of records had to give way to the court's duty to safeguard the physical, mental, and emotional well-being of the child. Even though the trial court may not have followed the precise procedures regarding the admissibility of the medical records, the interests of the children outweighed the confidentiality to which Father might have been entitled; the trial court's noncompliance with the federal regulations governing the disclosure of Father's records was harmless.

II. D. 4. b. Mental Health Records of the Child

The laws on mental health records provide a variety of statutory authority and procedures to access the records of a child patient. IC 16-39-2-9 provides that the child's parent or

guardian or other "court appointed representative" can consent to the release of a child's mental health records on the child's behalf. DCS may qualify as the child's guardian or as a "court appointed representative" and the child's guardian ad litem or court appointed special advocate may qualify as a "court appointed representative." IC 16-39-2-5 states that upon written request and reasonable notice, a patient's mental health record shall be made available for inspection or copying to the patient's "legal representative" or an "individual or organization designated by the patient."

IC 16-39-4-2 and 3 provide that the child's parent, guardian, 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 a summary of the child's diagnosis, the information required to be given to the child, the types of medication prescribed for the child, and a summary of the child's prognosis. However, IC 16-39-4-2 additionally requires that the child's treating physician give a written consent for the release of the information.

IC 16-39-4-2(c) provides that "Upon the written request of the parent, guardian, or court appointed special guardian who is involved in the planning, provision, and monitoring of the mental health of a child enrolled in a school, the provider shall provide the child's school principal or school leader with information described in section 3 of this chapter without charge."

IC 16-39-4-2(d) provides that "A parent, guardian, GAL, or court appointed special guardian who prepares a written request under this section shall sign an authorization for the release of mental health records, as may be requested by the provider in satisfaction of any requirements under the federal [HIPAA] and state law. A provider that discloses information and records to a school principal or school leader as requested under this chapter is immune from civil, criminal, and administrative liability for the disclosure to the school principal or school leader. The authorization required by the provider may confirm the provider's immunity."

Please note that 42 U.S.C. 290dd-2 is the consolidation of 42 U.S.C. 290dd-3 and 42 U.S.C. 290ee-3.

In **In Re N.G.**, 51 N.E.3d 1167, 1173 (Ind. 2016), the Indiana Supreme Court affirmed the trial court's order terminating Mother's parental rights, and concluded in part that Mother's claim that her due process rights were violated by DCS's failure to produce a videotape of her children's counseling sessions was waived for failure to object.

In **Matter of C.P.**, 543 N.E.2d 410 (Ind. Ct. App. 1989), affirmed on this issue at footnote 1 in Indiana Supreme Court opinion 563 N.E.2d 1275, 1276 (Ind. 1990), Mother of an alleged delinquent child consented to the release of the child's mental health records and the records were introduced at the delinquency factfinding hearing over the child's objection. The Court of Appeals found that the mental health confidentiality statute in effect at the time, IC 16-14-1.6-8(g) (significant section recodified at IC 16-39-2-9), allowed the parent or guardian to consent to the release of the child's mental health records.

II. D. 5. Hospital Records

The disclosure of hospital records is covered in IC 16-39-1 and IC 34-43-1. Hospital medical records are defined at IC 34-6-2-60 as, for purposes of IC 34-43-1, the hospital's clinical record maintained on each hospital patient.

Hospitals must keep their medical records in such a manner that permits the information to be made easily available in written or printed format to only authorized persons. IC 34-43-1-3. If a patient must give written consent for the release of their records, the elements of the written consent are found at IC 16-39-1-4.

"Authorized persons" means the patient, or a person authorized by the patient to request the records, if the authorization was made in writing not more than sixty days before the date of the request for the records. IC 34-6-2-15. It also includes physicians or other professionals within the hospital, a person entitled to request health records under IC 16-39-1-3, a coroner investigating a death under certain circumstances, and any other person designated by order of a court of competent jurisdiction. IC 16-39-1-3 allows the following people to authorize the release of hospital records:

(1) a competent patient if the patient is emancipated and less than eighteen years old, or at least eighteen years old;
(2) the parent, guardian, or custodian of the patient, if the patient is incompetent;
(3) if the patient is deceased, a coroner or a personal representative of the patient's estate; if the deceased patient does not have a personal representative, a parent, guardian, or custodian of the child patient can make such a request.

IC 34-43-1-5 provides that hospital records may be obtained in three ways: (1) a subpoena and a written request under Ind. Trial Rule 34; (2) a subpoena and the patient's written authorization; (3) a court order. The records must be certified pursuant to IC 34-43-1-7 and handled according to IC 34-43-1-8.

When the requested hospital record includes confidential drug or alcohol treatment records, mental illness records, or communicable disease records, the hospital employee receiving the subpoena must execute a verified affidavit that identifies the part of the record that is confidential and must inform the requesting party either that the drug and alcohol records can only be obtained by compliance with federal procedure, or that the mental illness or communicable disease records will be provided only under a court order after an in camera review of the confidential record. IC 34-43-1-10 through 12.

A provider may withhold requested information under certain delineated circumstances. IC 16-39-1-5.

In **Watters v. Dinn**, 633 N.E.2d 280, 287 (Ind. Ct. App. 1994), the Court ruled that the hospital was not liable for release of a patient's mental health record that was protected under the physician-patient privilege, based upon its determination that the physician-patient privilege applies to the physician and the hospital does not have to assert the privilege.

II. D. 6. Drug and Alcohol Records

In the absence of patient consent, a court order is necessary to obtain protected drug and alcohol records. IC 16-39-1-9 provides that protected drug and alcohol abuse records described in 42 U.S.C. 290dd-2 may not be disclosed unless authorized, in accordance with 42 U.S.C. 290dd-2.

Not all drug and alcohol records fall within the protection of 42 U.S.C. 290dd-2. To fall within the protection, the records must contain information as to the patient's identity, prognosis, treatment, and diagnosis in a program receiving federal funding or having some other connection to the federal government. See **Ley v. Blose**, 698 N.E.2d 381, 383 (Ind. Ct. App. 1998) (holding that protection of 42 U.S.C. 290dd-2 was not warranted where patient failed to produce evidence that the health care providers involved had any connection with the federal government); **Hurt v. State**, 694 N.E.2d 1212, 1215-16 (Ind. Ct. App. 1998) (holding that a patient's statements made in the course of mental health treatment unrelated to his alcoholism were not considered confidential under 42 U.S.C. 290dd-2). Moreover, the prohibitions on disclosure of information protected by the statute do not apply to reporting of child abuse and neglect under state law. See 42 U.S.C. 290dd-2(e).

Release of protected drug and alcohol records may be disclosed in accordance with the prior written consent of the patient with respect to whom such record is maintained, but only to such extent, under such circumstances, and for such purposes as may be allowed under regulations prescribed. See 42 U.S.C. 290dd-2(b)(1); IC 16-39-1-1(b)(2); 42 C.F.R. 2.64.

A patient's records may be obtained without patient consent upon a showing of good cause in a hearing. Specifically, 42 U.S.C. 290dd-2(b)(2)(c) allows release:

> (C) if authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefor, including the need to avert a substantial risk of death or serious bodily harm. In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure.

42 C.F.R. 2.64 specifies the procedures and other criteria for a court's issuance of an order authorizing disclosure (including notice, hearing, criteria for orders, and contents of orders).

In determining what constitutes "good cause" for the release of records, state and federal cases have granted access to protected drug and alcohol records when necessary to the safety or best interests of a child. See **Doe v. Daviess County**, 669 N.E.2d 192, 196 (Ind. Ct. App. 1996) (Court found that trial court had conducted a hearing regarding the confidentiality of the records, had "respected and employed adequate safeguards to protect Mother's confidentiality," and any "technical noncompliance with the federal regulations governing the disclosure" was harmless; affirmed trial court's finding of good cause stating that "Mother's protected interests must give way to the best interests of the child.").

In **In Re C.B.**, 865 N.E.2d 1068, 1072-3 (Ind. Ct. App. 2007), the Court affirmed the juvenile court's judgment determining the child to be a CHINS, and the Court concluded that since a child's best interests outweigh a parent's right to confidentiality, the juvenile court properly admitted the results of Mother's urine drug screen test along with the dispositional report.

In **In Re Involuntary Term. of the Parent-Child Rel. of A.H.**, 832 N.E.2d 563 (Ind. Ct. App. 2005), the Court concluded that even though the trial court did not follow the procedures regarding the admissibility of the medical records, the interests of the children outweighed the parent's confidentiality concerns. The Court opined that this rule safeguards the children's physical, mental and emotional well-being.

In **Carter v. KCOFC**, 761 N.E.2d 431, 437-9 (Ind. Ct. App. 2001), Mother appealed the termination judgment, alleging that the trial court erred by admitting her mental health, drug, and alcohol records into evidence despite her objection. Mother contended that the admission of the records violated 42 U.S.C.A. 290dd-2 and 42 C.F.R. 2.64. 42 U.S.C.A. 290dd-2 provides that substance abuse education and treatment records shall be confidential. The contents of the records may be disclosed, regardless of patient consent, if authorized by an appropriate order of a court after showing good cause. Good cause requires a balancing test weighing the public interest against the need for disclosure against the possible injury to the patient or the program. The Court noted the procedures for ordering disclosure of privileged medical records were codified at 42 C.F.R. 2.64.

The Court held that Mother had waived the federal privilege at the CHINS proceeding. Waiver notwithstanding, the Court concluded that the trial court had not followed the procedural requirements of 42 C.F.R. 2.64 with respect to the medical records. The Court opined that the trial court's need to serve the interests of the child with regard to the child's relationship to its parents clearly outweighed any confidentiality to which Mother may have been entitled, particularly where the whole process was part of the effort to bring her to a place where she could retain her relationship to her child. The Court found that any technical noncompliance with the federal regulations was harmless.

Mother also argued that the trial court erred by permitting the health care provider to use privileged drug and alcohol records to refresh her memory while testifying about Mother's past drug and alcohol problems. The Court held that, to the extent that the health care provider may have testified from medical documents which Mother claimed were privileged, Mother waived the privilege during the CHINS proceeding or the needs of the court to meet the interests of the child clearly outweighed any confidentiality to which Mother might be entitled.

II. D. 7. Guardian ad Litem Records

In **Deasy-Leas v. Leas**, 693 N.E.2d 90, 97-99 (Ind. Ct. App. 1998), the Court ruled that the guardian ad litem representing a child in a divorce proceeding could seek a protective order under Ind. Trial Rule 26 (C) to limit disclosure of confidential information. The Court noted that there is no statutory guardian ad litem-child privilege; however, the juvenile and family law statutes generally reflect an intention to provide "some form of confidentiality in proceedings" regarding children. The Court stated that:

> What seems clear is that the appointment of the guardian [ad litem] should not be a discovery tool to be used by a party after waiting a sufficient amount of time for disclosures to be made. Appointment of a guardian ad litem should not afford a short cut to privileged information. Id. at 98.

II. E. Motion for Examination of Child, Parent, Guardian, or Custodian

Ind. Trial Rule 26(A) and the juvenile code contain procedures to obtain discovery by physical and mental examination. It may be necessary to obtain a mental or physical examination of the child or the child's parent, guardian or custodian in preparation for the factfinding hearing.

II. E. 1. IC 31-32-12-1(3) Examination Motion

Pursuant to IC 31-32-12-1(3), an order can be sought for the physical or mental examination of the child "to provide information for the disposition hearing," after the court has given judicial authorization for the filing of the CHINS petition. IC 31-32-12-2 provides that the examination can be completed on an outpatient basis or the child may be confined for up to

fourteen days (not including weekends and legal holidays) for completion of the mental or physical examination.

The stated purpose of an examination under IC 31-32-12-1(3) is to obtain information for the dispositional hearing. However, nothing prevents the parties from seeking and obtaining this examination prior to the factfinding hearing and introducing the examination results at the factfinding hearing, if relevant. A party objecting to an examination of the child prior to the factfinding hearing, could argue that an exam for the purpose of providing information for the dispositional hearing should not take place unless, and until, the court determines the child is in need of services.

Arguably a party may seek an order for the examination of the child's parent, guardian, or custodian prior to the factfinding under IC 31-32-13-1, if it can be shown that the mental or physical health of the parent, guardian, or custodian is at issue. See Chapter 8 at I.A. through I.F. on preparation for the dispositional hearing. See Chapter 5 at VII. for discussion on protective orders to obtain examinations and treatment.

II. E. 2. Ind. Trial Rule 35 Examination Motion

Ind. Trial Rule 35 can be used to obtain a mental or physical examination of the child or the child's parent, guardian, or custodian. T.R. 35(A) states that:

> When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

See Chapter 8 I.B.6 for other discussion on T.R. 35.

II. F. Work Product Immunity or Trial Preparation Materials

Work product immunity is a qualified privilege for materials prepared in anticipation of litigation. See **Hickman v. Taylor**, 329 U.S. 495 (1947). Ind. Trial Rule 26(B) refers to "trial preparation materials" rather than work product immunity. T.R. 26(B) provides that trial preparation materials are discoverable only upon a showing of substantial need in preparation of the movant's case and an inability to obtain substantially equivalent materials by other means without undue hardship. "Although a party may obtain discovery of ordinary work product materials by making a special showing, a party seeking discovery is never entitled to the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of the party concerning the litigation." **National Eng. Co. v. C & P Eng. Co.**, 676 N.E.2d 372, 376 (Ind. Ct. App. 1997) (citations omitted).

Both DCS and defense counsel's work product are protected in CHINS and termination proceedings. Civil case law discusses this rule. In **Kristoff v. Glasson**, 778 N.E.2d 465, 470-71 (Ind. Ct. App. 2002), a personal injury case, the respondent argued that the trial court had erred when it denied respondent's request to compel the plaintiff to produce the audio portion of a videotape of the accident scene. The videotape was prepared at the request of plaintiff's attorney and recorded instructions from the attorney to the professional videographer regarding placement of the car. The Court opined that the record supported the trial court's denial of respondent's motion to compel discovery because the audio recording was a tangible item prepared in

anticipation of trial by plaintiff's attorney and was attorney work product. The Court quoted Pioneer Lumber, Inc. v. Bartels, 673 N.E.2d 12, 16 (Ind. Ct. App. 1996), regarding attorney work product:

> In order to constitute work product, the material sought to be discovered must: (1) consist of documents or tangible things; (2) have been prepared in anticipation of litigation or for trial; and (3) have been prepared by or for another party or by or for that other party's representative. However, T.R. 26(B)(3) allows a party to obtain work product, but only upon a "showing that the party seeking discovery: (1) has a substantial need for the materials in the preparation of his case; and (2) is unable without undue hardship to obtain the substantial equivalent of the materials by other means."

In **Matter of Snyder**, 418 N.E.2d 1171 (Ind. Ct. App. 1981), the Court ruled that caseworker notes from a welfare wardship case were prepared in the regular course of business and not in anticipation of future termination of parental rights litigation; therefore, they were not protected by work product immunity in the termination case. Snyder does not foreclose the possibility that some welfare records may qualify under work product immunity; but to qualify, the evidence must clearly show that the records were made in anticipation of litigation and not in the regular course of business.

In **Gault v. State**, 878 N.E.2d 1260, 1266-67 (Ind. 2008), the Court discussed the tension between the work product doctrine and Evidence Rule 612 which requires that, absent circumstances addressed by Evid. R. 612(c), a document used by a witness to refresh his or her recollection on the stand must be accessible to the parties "whose interests could be harmed by the testimony that was based on the refreshed memory." Evid. R. 612(c) allows for *in camera* review of documents, part of whose relevance is disputed, for parties who wish to challenge whether some or all of a piece of evidence must be turned over to another party. The Court noted that it had previously held that police reports are the work product of the prosecuting attorney (having been prepared for the prosecuting attorney by the police officer as the prosecuting attorney's agent). The Court held that, if a witness has used a document to refresh his or her recollection during testimony, the document may not be kept from a party with an adverse interest without careful consideration by the trial court under Evid. R. 612(c). However, the Court cautioned that "adverse" parties must not be permitted to abuse Evid. R. 612 as an opportunity to gain access to privileged materials by insisting those materials be shown to refresh the recollection of witnesses, and then in turn be shown to that otherwise not privy adverse party.

In **Brown v. Katz**, 868 N.E.2d 1159, 1167-9 (Ind. Ct. App. 2007), the Court held that the trial court had not abused its discretion by dismissing the malicious prosecution charge after having warned Plaintiff that the evidence sought was discoverable and that he "now has notice" that dismissal with prejudice was a possible sanction for future noncompliance. The Court stated that in light of Plaintiff's indolence, it agreed with the trial court that the appellees had been sufficiently burdened and should not have been required to proceed. Plaintiff had asserted that a vast majority of the documents requested and the answers to a vast majority of the questions asked at his deposition were protected by either attorney-client and/or work product privilege.

See also **Indiana Newspapers v. Indiana University**, 787 N.E.2d 893, 915 (Ind. Ct. App. 2003), *trans. denied*, in which the Court opined that there was a genuine issue of material fact whether state university trustees' investigation materials concerning basketball coach were protected as attorney work product.

II. G. Protective Orders in Discovery

Any party, and any person from whom discovery is sought, can file a motion under Ind. Trial Rule 26(C) to prohibit or limit the discovery scope sought. A Motion for Protective Order can seek to limit the scope of the discovery to relevant records and can request that the parties not be allowed to copy the records, among other things.

In **In Re N.G.**, 51 N.E.3d 1167, 1173 (Ind. 2016), the Indiana Supreme Court affirmed the trial court's order terminating Mother's parental rights, and concluded in part that Mother's claim that her due process rights were violated by DCS's failure to produce a videotape of her children's counseling sessions was waived for failure to object.

In **M.S. ex rel. Newman v. K.R**., 871 N.E.2d 303, 311-14 (Ind. Ct. App. 2007), *trans. denied*, the Court held that the trial court's issuance of a protective order in favor of a third party and award of attorney fees in the amount of $15,000 to the third party were not an abuse of discretion. The Court noted that (1) the evidence sought through discovery from the third party was not the issue in the underlying grandparent visitation case; (2) when a protective order is either entered or denied during discovery, a presumption arises that the trial court will also order reimbursement of the prevailing party's reasonable expenses pursuant to Trial Rule 37; and (3) the fervor with which the discovery was sought immediately from the third party was the main factor driving the amount of the third party's legal expenses.

In **Munsell v. Hambright**, 776 N.E.2d 1272, 1277-8 (Ind. Ct. App. 2002), *trans. denied*, a mental health patient who had attended therapy sessions for voyeurism sued several counselors, alleging medical malpractice, fraud, and intentional infliction of emotional distress. During discovery, the attorney for one of the counselors issued subpoenas to obtain the patient's mental health records. The patient's attorney informed the counselor's attorney that by statute the records could not be subpoenaed, but that a hearing must be conducted prior to discovery. The counselor's attorney refused to withdraw the subpoenas, so the patient's attorney moved to quash the subpoenas and sought a protective order pursuant to Ind. Trial R. 26(C), to prevent the counselor from discovering the name and address of the victim of the patient's voyeuristic activity. The patient's attorney also requested attorney fees incurred as a result of the motion to quash, which the trial court denied. The Court reversed the denial of the request for attorney fees because the provisions of Ind. Trial R. 37(A)(4) state that, if a motion for a protective order is granted, the court shall, after the opportunity for a hearing, require the party or attorney whose conduct or advice necessitated the motion or both of them to pay the moving party reasonable expenses, including attorney fees, although there are exceptions. The Court also opined that the record disclosed no circumstances making an award of attorney fees unjust. See this Chapter at II.D.4. and 6. for further discussion regarding discovery of mental health and alcohol and drug records.

In **Deasy-Leas v. Leas**, 693 N.E.2d 90, 99 (Ind. Ct. App. 1998), the Court ruled that T.R. 26(C) applies to discovery requests for the records of a guardian ad litem, and the guardian ad litem can seek protective orders as necessary to the best interests of the child.

In **Canfield v. Sandock**, 563 N.E.2d 526, 530-31 (Ind. 1990), the Court affirmed a trial court's ruling limiting discovery of materials covered by the physician-patient privilege, even though the plaintiff had put his medical condition in issue by the filing of the suit. The opinion clarifies that the discovery rules were not intended to "authorize the disclosure of unrelated and potentially embarrassing or ruinous information." The opinion discusses protective orders under Ind. Trial Rule 26(C) and the possibility of in camera review.

See also **Davidson v. Perron**, 756 N.E.2d 1007, 1045-15 (Ind. Ct. App. 2001), a civil rights, defamation, and libel suit brought by a discharged police officer, in which the Court affirmed the trial court's temporal and subject matter protective order with respect to the police officer's motion for production of documents. The Court found that the trial court's discovery limitations did not constitute an abuse of discretion because (1) the police officer's claim of retributive action must stand or fall on its own merits; and (2) the police officer had not demonstrated how occurrences which took place outside the temporal limitation were relevant to his dismissal.

II. H. Sanctions for Violation of Discovery Order

Discovery sanctions may be imposed in CHINS and termination proceedings. The Court of Appeals has affirmed discovery sanctions in both civil and criminal proceedings. Sanctions have varied from court ordered payment of attorney fees to exclusion of evidence and witness testimony.

Severe discovery sanctions, such as default judgment, may not be acceptable in certain cases, such as termination of the parent-child relationship cases. In **Pitts v. Johnson Cty. Dept. of Public Welfare**, 491 N.E.2d 1013, 1015, 1017 (Ind. Ct. App. 1986), the Court acknowledged that while default judgment is a permissible sanction for discovery violations, the Court found error in the trial court's entry of default judgment as a sanction for Mother's failure to comply with a discovery order. Default is not favored in Indiana as a sanction, and particularly not in termination of parental rights cases. The Court held that the trial court erred in not imposing a lesser sanction than default.

However, other Indiana case law indicates that severe discovery sanctions might be more acceptable in the context of a CHINS case, than in the context of a termination case. Although the discovery sanction was not specifically at issue in the CHINS case of **E.P. v. Marion Cty. Office of Fam. & Child.**, 653 N.E.2d 1026, 1032 (Ind. Ct. App. 1995), the Court discussed the sanction with regard to the risk of an erroneous result in a CHINS proceeding when a parent is not represented by counsel. The Court noted that the sanction might have been challenged if Mother had been represented by counsel, but even assuming the risk of an erroneous CHINS adjudication was great given the absence of counsel, the risk did not outweigh the presumption against court-appointed counsel. The Court did not comment on the propriety of the sanction, other than to note that the impact of such a sanction on the case result and on the parent-child relationship is less severe in a CHINS factfinding than a termination proceeding. But see **In Re G.P.**, 4 N.E.3d 1158, 1168 (Ind. 2014) (Court opined that denial of court appointed counsel for Mother in CHINS case compelled "the undoing" of the subsequent termination process and the termination judgment was vacated).

A hearing is necessary before awarding penalties, such as fees, for discovery noncompliance. See **Huber v. Montgomery County Sherriff**, 940 N.E.2d 1182, 1187 (Ind. Ct. App. 2010) (Court held that the trial court erred when it did not hold a hearing before awarding the Sheriff fees and expenses relating to noncompliance with a discovery order, and the Court reversed and remanded the matter for further hearing to determine whether Huber's conduct was substantially justified or whether an award of expenses would be otherwise unjust). But see **Poulard v. Lauth**, 793 N.E.2d 1120 (Ind. Ct. App. 2003) (entry of order compelling discovery and hearing regarding discovery compliance were not prerequisites to valid imposition of discovery sanction to pay party's attorney fees, where waiver had occurred).

For cases where a discovery penalty was reversed or questioned upon appeal, see

L.G. v. S.L., 76 N.E.3d 157 (Ind. Ct. App. 2017) *trans. pending*, the Court held Father's failure to appear at his first scheduled deposition was unjust and did not warrant dismissal of

his motion to contest the adoption of his child, and that Father's delay in producing mental health records pursuant to a discovery order also did not warrant dismissal, especially since the delay was at least in part attributable to Adoptive Parents. Dismissal of Father's motion to contest the adoption based on his failure to appear for his first scheduled deposition, despite his offer to be deposed later that same day, was unwarranted and unjust, especially given the fundamental rights at stake. Adoptive Parents refused rescheduling requests, and the Court deemed their refusal unreasonable. IC 16-39-2-3 provides that a patient's mental health records are confidential and can only be disclosed with the consent of the patient unless otherwise provided by IC 16-39-2 and -3. Since Father objected to the release of his mental health records, Adoptive Parents were required to follow all proper procedures. Since no proper procedures were followed to obtain the mental health records, Father's delay in complying with the discovery order was entirely attributable to Adoptive Parents, and not to Father.

Jackson v. Indiana Family & Social Services, 884 N.E.2d 284, 291 (Ind. Ct. App. 2008) (holding that although the trial court has discretion to impose a variety of sanctions for a party's failure to timely comply with a Trial Rule 12(E) order for a more definite statement, dismissal is a harsh penalty that should be used only as a last resort; and unless the moving party is prejudiced by the pleader's noncompliance, dismissal should not be granted);
Fairland Recreational v. Indianapolis Downs, 818 N.E.2d 100, 103-04 (Ind. Ct. App. 2004) (Court affirmed trial court's denial of attorney fees and costs because imprecise drafting of request for admission justified failure to admit);
Munsell v. Hambright, 776 N.E.2d 1272, 1278 (Ind. Ct. App. 2002) (Court reversed trial court's order denying award of attorney fees to patient who had incurred attorney fees in bringing a motion to quash subpoenas for mental health records), *trans. denied*.

See the following cases in which failure to comply with discovery rules resulted in various penalties:

Whitaker v. Becker, 960 N.E.2d 111, 112-116-7 (Ind. 2012) (affirming trial court's finding that Whitaker and his lawyer acted in bad faith, and that the only realistic and effective remedy was dismissal of Whitaker's case);
Peters v. Perry, 877 N.E.2d 498, 500 (Ind. Ct. App. 2007) (Court held that the trial court did not abuse its discretion by entering default judgment against Plaintiff because he failed to comply with the trial court's discovery order);
Brown v. Katz, 868 N.E.2d 1159, 1167-9 (Ind. Ct. App. 2007) (holding that the trial court had not abused its discretion by dismissing the malicious prosecution charge after having warned Plaintiff that the evidence sought was discoverable and that he "now has notice" that dismissal with prejudice was a possible sanction for future noncompliance);
Smith v. Smith, 854 N.E.2d 1, 5 (Ind. Ct. App. 2006) (dissolution court's order entered without a hearing, which barred husband from introducing evidence or documents concerning information requested in discovery with which husband had not complied was not error);
Hill v. Fitzpatrick, 827 N.E.2d 138, 142 (Ind. Ct. App. 2005) (affirming trial court's sanction ordering the attorney who had sent notice of deposition to pay the attorney for the second co-defendant for the attorney's working time lost traveling to the cancelled deposition; attorney who had given notice of the deposition has obligation to notify all parties of scheduling changes; the obligation to pay the court ordered sanction and the cost of the appeal belonged to the attorney who had given notice of deposition and failed to cancel it, not to his client);
Everage v. Northern Indiana Public Service, 825 N.E.2d 941, 946-48 (Ind. Ct. App. 2005) (exclusion of supervisor's testimony was appropriate sanction for failure to supplement discovery responses);

Poulard v. Lauth, 793 N.E.2d 1120 (Ind. Ct. App. 2003) (entry of order compelling discovery and hearing regarding discovery compliance were not prerequisites to valid imposition of discovery sanction to pay party's attorney fees);
Bradley v. State, 770 N.E.2d 382, 387 (Ind. Ct. App. 2002) (excluding testimony of impeachment witness in voluntary manslaughter case was appropriate sanction for delay in notifying opposing counsel of defendant's intention to call impeachment witness), *trans. denied*;
Davidson v. Perron, 756 N.E.2d 1007, 1013-14 (Ind. Ct. App. 2001) (granting defendants' motion to strike affidavit of plaintiff's witness was not an abuse of discretion when plaintiff had not provided affidavit to defendants until after discovery cut-off date);
Pierce v. Pierce, 702 N.E.2d 765, 767-768 (Ind. Ct. App. 1998) (Court affirmed the trial court's termination of spousal maintenance as a sanction for the former wife's failure to comply with discovery orders).

III. PRE-TRIAL MOTIONS

III. A. Continuances

Indiana Trial Rule 53.5 applies to CHINS proceedings regarding obtaining a continuance. Ind. Trial R. 53.5 provides that upon a motion, a trial may be postponed or continued at the court's discretion. This shall be allowed upon a showing of good cause established by affidavit or other evidence. The rule makes other provision for awarding costs incurred from the delay, and motions for a continuance based on absence of evidence.

Local trial rules may require additional procedures to obtain a continuance, including a statement to the court regarding whether the other party agrees or objects to the continuance, and may establish time frames in which requests for continuances may be made.

In order to obtain a reversal on appeal for the trial court's denial of a motion for continuance, a party must demonstrate good cause for the continuance, abuse of discretion in the denial of the continuance, and prejudice. See **Hallberg v. Hendricks Cty. Office**, 662 N.E.2d 639, 646 (Ind. Ct. App. 1996) (The granting or denial of a continuance is within the discretion of the trial court, and denial of a motion is an abuse of discretion "only if the movant demonstrates good cause for granting the motion").

Unexpected and untimely withdrawal of counsel does not necessarily entitle a party to a continuance, but denial of a continuance based on withdrawal of counsel may be error when the moving party is free from fault and his rights are likely to be prejudiced by the denial. See **Hess v. Hess**, 679 N.E.2d 153, 154-5 (Ind. Ct. App. 1997) (error to deny husband's motion for continuance; good cause had been demonstrated).

A party's failure to object to a continuance requested by another party could result in waiver of statutory time guidelines. See **A.D. v. Clark**, 737 N.E.2d 1214, 1216-17 (Ind. Ct. App. 2000) (GAL and DCS did not object to multiple continuances; GAL then sought to avoid trial court's stay of termination case; Court found that any error in following the statutory time requirement in this case was invited by the failure of GAL or DCS to object to the continuances, and therefore was waived).

Other cases where continuances were ultimately denied:

In **In Re J.E.**, 45 N.E.3d 1243, 1247 (Ind. Ct. App. 2015), *trans. denied*, a termination of parental rights case, the Court concluded that the trial court acted within its discretion in denying Father's request for a continuance until after his release from incarceration. The

decision to grant or deny a motion for continuance: (1) is within the sound discretion of the trial court; (2) an abuse of discretion occurs where the trial court reaches a conclusion that is clearly against the logic and effect of the facts or the reasonable and probable deductions that may be drawn therefrom; and (3) no abuse of discretion will be found where the moving party has not shown that he was prejudiced by the denial of his continuance motion.

In **In Re B.H.**, 44 N.E.3d 745, 749 (Ind. Ct. App. 2015), *trans. denied*, a termination of parental rights case, the Court found no reason to conclude that Mother was denied a fair hearing, and declined to reverse the juvenile court's termination order because Mother's motions to continue the termination hearings were denied. The Court determined Mother had proper advance notice and her failure to not make plans for work and other matters until the last moment were not good cause for a last minute continuance.

In **In Re S.S.**, 990 N.E.2d 978 (Ind. Ct. App. 2013), the Court opined that although Mother's interest in the care and custody of her children was significant, the State's interest in protecting the children was also very significant in light of Mother's inability to protect herself from domestic abuse and to attend to the children's medical and mental health needs. The Court concluded that, when the state's interests is balanced against the low risk of error because Mother was represented by counsel, voluntarily left Indiana, and was aware of the termination hearing, Mother was not denied due process when the juvenile court denied her motion to continue.

In **In Re V.C.**, 967 N.E.2d 50, 54-5 (Ind. Ct. App. 2012), the Court affirmed the CHINS adjudication and found that the juvenile court acted within its discretion in denying incarcerated Father's request for a continuance of the factfinding hearing. Ind. Trial Rule 53.5 provides that a hearing may be continued at the discretion of the court upon a showing of good cause by affidavit or other evidence; the granting or denial of a continuance is clearly within the trial court's discretion and denial of the motion for continuance is an abuse of discretion only if the movant demonstrates good cause for granting the motion. The Court concluded that Father failed to demonstrate good cause for granting his motion for continuance.

In **In Re A.P.**, 882 N.E.2d 799, 805-6 (Ind. Ct. App. 2008), the Court held that, although it would have been equally appropriate and perhaps more desirable for the trial court to have granted the continuance request of Father's attorney, the trial court had not abused its discretion in denying the request. It was reasonable for the trial court to conclude that, even if Father's attorney had been granted more time to communicate with her client, she would still ultimately have faced the same problem of defending the parental rights of a client who lived in a different country from his child and had no plans to return because, among other things, he allegedly engaged in criminal activity while he was in the United States.

In **A.J. v. Marion County Office of Family**, 881 N.E.2d 706, 719 (Ind. Ct. App. 2008), *trans. denied*, the Court held that, while it could not say that the trial court's termination of Mother's parental rights to her children was clearly erroneous, perhaps the more prudent course would have been to continue the case for an additional seven weeks in order to establish whether Mother completed the IOP program and remained drug free.

In **In Re B.J.**, 879 N.E.2d 7, 16-17 (Ind. Ct. App. 2008), *trans. denied*, the Court held that Father was not denied his constitutional right to due process when the trial court denied his counsel's motion to continue and proceeded with the termination hearing in Father's absence. The Court noted that there is no constitutional right to be present at the termination hearing, and Father was zealously represented by counsel. Father failed to allege any specific prejudice other than his unsubstantiated assertion that had he been allowed to meaningfully participate, it is likely that termination would not have been ordered.

In **Q.B. v. MCDCS**, 873 N.E.2d 1063, 1067-68 (Ind. Ct. App. 2007), the Court concluded that Father's due process rights were not violated when trial court denied motion for continuance made by Father's attorney and proceeded with termination hearing in Father's

absence where Court found that (1) adequate notice of the termination hearing was given to Father under circumstances that Father's whereabouts were unknown and sending notice to his last known address would have been futile; (2) GAL had objected to continuance request as not being in children's best interests; (3) at time of hearing, children had been in foster care for more than two years; (4) unsuccessful attempts had been made to reunite family; and (5) Father's rights were not fatally compromised because he was represented by counsel who cross-examined witnesses and had opportunity to review and object to any evidence tendered by DCS or GAL.

In **In Re E.E.**, 853 N.E.2d 1037, 1044 (Ind. Ct. App. 2006), *trans. denied*, the Court concluded that the denial of the request for continuance and decision to proceed in Father's absence did not deny him due process of law. The Court opined that the risk of error caused by the trial court's denial of the continuance was minimal because: (1) Father did not complete court-ordered services, which made it impossible for the caseworker to tell if Father had stopped using drugs; (2) Father's attorney continued to represent him and cross-examined witnesses in his absence; and (3) Father did not have a constitutional right to be present at the hearing.

In **J.M v. Marion County OFC**, 802 N.E.2d 40, 42-4 (Ind. Ct. App. 2004), *trans. denied*, the Court opined that a trial court's continuance decisions will be reversed only upon a showing of an abuse of discretion and prejudice resulting from such abuse, and the reviewing court is concerned with the reasonableness of the action in light of the record. Mother had been granted nearly two years to complete the court ordered services and programs, and Mother had failed to show that she was prejudiced by the trial court's refusal to grant the motion for continuance, despite the joint request for a continuance from Mother and the GAL.

In **In Re C.C.**, 788 N.E.2d 847, 849, 853 (Ind. Ct. App. 2003), *trans. denied*, the Court concluded that putative Father's due process rights had not been violated because he had testified previously, he was represented by counsel on the final date of the hearing, and he did not have a constitutional right to be present at the termination hearing. The Court noted that the termination hearing had been continued several times upon putative Father's request and observed that: "While continuances may be necessary to ensure the protection of a parent's due process rights, courts must also be cognizant of the strain these delays place upon a child."

In **Thompson v. Clark County Div. of Family**, 791 N.E.2d 792, 796 (Ind. Ct. App. 2003), *trans. denied*, it is noteworthy that Mother had been granted six continuances of the termination of the parent-child relationship hearing. Mother's seventh request for a continuance was denied; however, the presentation of evidence in a summary proceeding resulted in a reversal of the trial court's termination judgment with a remand for a proper final termination hearing.

Cases where a continuance should have been granted include:

In **In Re K.W.**, 12 N.E.3d 241, 249 (Ind. 2014), the Court vacated the portion of the trial court's order terminating Mother's parental rights to her child. The Court concluded that, under the facts and circumstances of this case, the trial court abused its discretion in denying Mother's motion to continue the termination hearing and proceeding instead without her participation. The Court found that: (1) the delay that would have resulted from the continuance could have been as short as two weeks because Mother expected to be released from jail within that time period; (2) this delay would have been a minimal inconvenience to all others involved (although the Court recognized that the record did not indicate that the courtroom, staff, parties, and witnesses would have been available on such notice); (3) the proceeding had not been overly drawn out or delayed; (4) this was not a case where there was an overwhelming sense of urgency since the child was two years old, not at risk of physical or emotional abuse, and was healthy and doing well; (5) Mother had a substantially

significant interest in being present at the proceedings. Id. at 244-248. The Court observed that, by the time Mother's motion to continue was made, the trial court was presented with only one choice, continue the trial (i.e., allow Mother to be present or use an alternate method) or proceed without Mother's voice being heard at all.
In **Rowlett v. Vanderburgh County OFC**, 841 N.E.2d 615, 619-20 (Ind. Ct. App. 2006), *trans. denied*, the Court reversed and remanded the trial court's judgment terminating parental rights because the court had abused its discretion in denying incarcerated Father's motion for continuance of the termination dispositional hearing. The Court concluded that Father had shown good cause for the continuance and had demonstrated prejudice by the denial of the continuance; Father was going to be released from prison six weeks after the termination hearing, and wanted an opportunity to participate in reunification services, and he had been participating in services while incarcerated.

III. B. Motions to Dismiss

A person representing the interests of the state may file a motion to dismiss any CHINS petition that the person has filed under IC 31-34-9. IC 31-34-9-8(a). The person filing the motion to dismiss must provide to the court a statement "that sets forth the reasons the person is requesting the petition be dismissed." IC 31-34-9-8(b). The court, ten days after the motion to dismiss is filed, must either: (1) summarily grant the motion to dismiss; or (2) set a date for a hearing on the motion to dismiss. IC 31-34-9-8(c). The court may appoint a guardian ad litem, a court appointed special advocate or both to represent and protect the child's best interests if the court sets the matter for hearing. IC 31-34-9-8(d). Since a guardian ad litem/court appointed special advocate appointment is required for children alleged to be CHINS pursuant to IC 31-34-10-3, IC 31-34-9-8(d) would be needed only in rare situations after the CHINS petition had been filed and prior to the initial hearing.

IC 31-34-9-8 in its most recent form should be applied with consideration for the decision in **In Re K.B.**, 793 N.E.2d 1191 (Ind. Ct. App. 2003), where the Court concluded that the ability of the OFC to move the trial court for mandatory dismissal of the CHINS petition ended upon the mother's admission to the allegations of the CHINS petition. Any motions to dismiss filed subsequent to the mother's admission were to be judged on the merits, as opposed to being automatically granted under IC 31-34-9-8. The Court further opined that the OFC had failed to properly raise the issues on appeal and the issues had been waived due to: (1) failure to file a formal request with the juvenile court for a permissive interlocutory appeal pursuant to Ind. Appellate R. 14(B); and (2) failure to present cogent argument with regard to the juvenile court's denial of a second motion to dismiss. The Court was also unpersuaded by the OFC's argument that its motion to dismiss the CHINS petition was based on its determination that it could not establish the statutory prerequisites that the child was a Child in Need of Services.

III. C. Motion for Admissibility Hearing on Child Hearsay Exception

The hearsay statement or videotape of a child under the age of fourteen (or under the age of eighteen if certain impairment criteria are met) may be admissible in the factfinding hearing under IC 31-34-13. IC 31-34-13-4 requires that the attorney for DCS give the parties at least seven days notice of its intention to introduce the statement or videotape, and the contents of the statement or videotape. DCS should file a motion for the admissibility of the statement and request a hearing to determine the admissibility of the statement or videotape.

In **In Re J.Q.**, 836 N.E.2d 961, 965-6 (Ind. Ct. App. 2005), the failure to provide the statutorily required notice of intention to introduce the child's hearsay statement and failure to hold a separate hearing to determine the admissibility of the statement resulted in a reversal of the CHINS adjudication due to insufficient evidence. IC 31-34-13-3 states that a statement by a child

that would otherwise be inadmissible is admissible in a CHINS proceeding only "after notice to the parties of a hearing." (emphasis added). The Court concluded that a logical and fair reading of IC 31-34-13-3 requires some separation of the child hearsay determination and the CHINS determination to give effect to the statute's notice and hearing requirements. The record showed that Mother was not given adequate notice or opportunity to be heard regarding the admission of the child's statements.

In **Townsley v. Marion County Dept. of Child Services**, 848 N.E.2d 684 (Ind. Ct. App. 2006), the Court held that the trial court was required to conduct a separate hearing to consider the admissibility of the child's out-of-court statements, and failure to conduct a separate hearing to consider the admissibility of the child's out-of-court statements, coupled with the trial court's broad determination of the reliability of the statements, required reversal.

See this Chapter below at IX. for more detailed discussion on the child hearsay exception.

III. D. Motion for Closed Circuit Television or Videotape Testimony of Child

IC 31-34-14 deals with child testimony by closed circuit television in CHINS proceedings, which may be possible for children under the age of fourteen, or under the age of eighteen if certain impairment criteria are met. Upon the motion of the DCS attorney, the court may order that the testimony of the child will be taken in a room other than the courtroom, and then be transmitted to the courtroom by closed circuit television. IC 31-34-14-2. The questioning of the child by the parties would be transmitted to the child by closed circuit television. IC 31-34-14-2. The DCS attorney may also make a motion requesting and the court may order that the testimony of a child be videotaped for use at proceedings to determine whether a child or a whole or half-blood sibling of the child is a CHINS. IC 31-34-14-3.

DCS must give the parties at least seven days written notice of their intention to have the child testify outside the courtroom. IC 31-34-14-4.

See this Chapter below at VII. for further discussion on closed circuit television and court ordered videotape testimony.

III. E. Motion to Suppress Evidence

In **In Re J.V.**, 875 N.E.2d 395, 400-01 (Ind. Ct. App. 2007), *trans. denied*, the Court declined to apply the exclusionary rule to CHINS proceedings, inasmuch as the costs of applying the exclusionary rule to CHINS proceedings outweigh the benefits it would have to deter illegal searches and seizures. On appeal from a case involving pictures deleted off a digital camera and police officers testifying as to the pictures they saw, the Court opined that application of the exclusionary rule to CHINS proceedings would serve to undermine several important State interests including: (1) strengthening family life by assisting parents to fulfill their parental obligations; (2) removing children from families only when it is in the child's best interest or in the best interest of public safety; (3) providing a judicial procedure that ensures fair hearings, recognizes and enforces the legal rights of children and their parents, and recognizes and enforces the accountability of children and parents; (4) promoting public safety and individual accountability by the imposition of appropriate sanctions; (5) encouraging effective reporting of suspected or known incidents of child abuse or neglect; (6) providing effective child services to quickly investigate reports of child abuse or neglect; (7) providing protection for an abused or a neglected child from further abuse or neglect; and (8) providing rehabilitation services for an abused or neglected child and the child's parent, guardian, or custodian.

In **Allied Property and Cas. Ins. Co. v. Good**, 919 N.E.2d 144, 146 (Ind. 2009), the Court concluded, as an issue of first impression, that Indiana trial courts possess the power to sanction parties and attorneys for violating orders in limine and causing mistrials. The Court said that this power is designed to protect the integrity of the judicial system and to secure compliance with the trial court's rules and orders. The trial court must find that the party engaged in egregious misconduct that caused a mistrial before imposing sanctions.

IV. PROCEDURE FOR FACTFINDING HEARING

IV. A. Time Limitation

Unless the allegations of the petition have been admitted, the juvenile court shall complete a factfinding hearing not more than 60 days after a CHINS petition has been filed in accordance with IC 31-34-9. IC 31-34-11-1(a). The juvenile court may extend the time to complete a factfinding hearing for an additional 60 days if all parties in the action consent to the additional time. IC 31-34-11-1(b). There are sanctions for instances in which the time requirements are not met; if the factfinding hearing is not completed within the allowed time period, the court shall dismiss the case without prejudice if a motion is filed requesting the court to do so. IC 31-34-11-1(d).

In **In Re R.P.**, 949 N.E.2d 395, 399-400, 404 (Ind. Ct. App. 2011), the Court concluded the trial court had jurisdiction to decide the case even though the trial court failed to conduct a factfinding hearing within the 60 day time limit. Mother waived her appellate argument that the trial court lacked jurisdiction to decide CHINS proceeding based on the trial court's failure to conduct a factfinding hearing within 60 days after the petition was filed because she failed to raise the defense in the trial court. The Court opined that its decision in Parmeter v. Cass Cty. Dept. of Child Servs., 878 N.E.2d 444 (Ind. Ct. App. 2007), was directly on point for this issue. The Court said that the intent of the Parmeter opinion was to indicate that there are important legislative concerns underlying IC 31-34-11-1 that should not be overlooked due to excusable procedural delays. The Court agreed with Mother that the legitimacy of a reason for a delay is an important factor in determining whether a trial court appropriately conducted a factfinding hearing outside of the 60-day time limit, but declined to find the trial court's actions inappropriate when Mother has not produced any evidence showing there was an illegitimate reason for the delay.

Practice Note: The outcome of Parmeter v. Cass Cty Dept. of Child Serv., 878 N.E.2d 444, 447-48, 452 (Ind. Ct. App. 2007) and its usefulness as precedent, has been called into question, since IC 31-34-11-1(d) was added after this case was decided, and provided for specific sanctions.

In **Parmeter v. Cass Cty Dept. of Child Serv.**, 878 N.E.2d 444, 447-48, 452 (Ind. Ct. App. 2007) the Court held that trial court did not err when it held the fact-finding and dispositional hearings beyond the statutory deadlines, because "shall" as used in IC 31-34-11-1 and IC 31-34-19-1 is directory and not mandatory. Mother alleged that the trial court was without jurisdiction over the CHINS cases because it did not hold the fact-finding or dispositional hearings within the time limits set forth in IC 31-34-11-1 and IC 31-34-19-1. The Court noted that the term "shall" is directory when the statute fails to specify adverse consequences, the provision does not go to the essence of the statutory purpose, and a mandatory construction would thwart the legislative purpose. Thus, the Court concluded that "shall" as used in IC 31-34-11-1 and IC 31-34-19-1 is directory and not mandatory. *Note* that the statute now includes a sanction and may change the outcome.

See also **Wardship of Nahrwold v. Dept. of Public Welfare**, 427 N.E. 2d 474, 480 (Ind. Ct. App. 1981) (delays between the detention hearing, the authorization of the petition, and the

dispositional factfinding hearing "should be kept to a minimum" and a habeas corpus proceeding is an available remedy to avoid delay).

IV. B. Rights of the Child and the Child's Parent, Guardian, Custodian, and Others

The rights of the child, set out at IC 31-32-2-1, and the rights of the child's parent, guardian, or custodian, set out at IC 31-32-2-3, are applicable to the factfinding hearing. These rights include the right to: (1) cross- examine witnesses; (2) obtain witnesses or tangible evidence by compulsory process; and (3) introduce evidence. A child is entitled to these rights except when a child may be excluded from a hearing under IC 31-32-6. IC 31-32-2-1. See Chapter 2 generally for discussion on procedural rights of the child and the child's parent, guardian, or custodian, and Chapter 2 at IV.C. regarding right to counsel.

In **In Re T.N.**, 963 N.E.2d 467 (Ind. 2012) and in **In Re K.D.**, 962 N.E.2d 1249 (Ind. 2012), the Indiana Supreme Court reversed the trial courts' CHINS adjudications because a contested factfinding hearing was not conducted. In In Re T.N., 963 N.E.2d 467, Father requested a factfinding hearing, but the trial court conducted a contested dispositional hearing instead. The Court opined that the trial court erred in not conducting a contested factfinding hearing and this violated Father's due process rights. Id. at 469. In In Re K.D., 962 N.E.2d 1249, Stepfather requested a factfinding hearing, but the trial court conducted a contested dispositional hearing instead. The Court held that whenever a trial court is confronted with one parent wishing to admit that the child is a CHINS 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. See also **In Re L.C.**, 23 N.E.3d 37, 40-2 (Ind. Ct. App. 2015) (Because Father challenged the allegations in the CHINS petition, due process required the completion of a factfinding hearing, including the presentation of evidence and argument by both parents, if present in person or by counsel, before the child was adjudicated a CHINS) *trans. denied*; **In Re S.A.**, 15 N.E.3d 602, 609-612 (Ind. Ct. App. 2014) (the trial court deprived Father of a meaningful opportunity to be heard by adjudicating the child as a CHINS prior to Father's factfinding hearing; when a court cannot issue separate adjudications for each parent, the CHINS determination should be based on a consideration of the evidence in its entirety).

See this Chapter, the rest of the section of IV.B., Chapter 2 at II.G. and IV.G., Chapter 6 at I.M.1., and Chapter 8 at II.C. for further discussion.

IV. B. 1. Counsel

A CHINS court's discretion to appoint counsel can become a mandatory duty to appoint counsel.

In **In Re D.P.**, 27 N.E.3d 1162, 1168 (Ind. Ct. App. 2015), the Court reversed the trial court's order terminating Mother's parental rights; the Court could not conclude that Mother's due process rights received adequate protection in the termination case; therefore, the Court found that reversal of the trial court's order was warranted.

In **In Re G.P.**, 4 N.E.3d 1158 (Ind. 2014), the Court reversed the trial court's termination of the parent-child relationship between the child and Mother, and held that the CHINS court denied Mother her constitutional right to due process as guaranteed by the Fourteenth Amendment in the United States Constitution by telling Mother that it would appoint a lawyer to represent her, and then failing to do so. Mother asked for an attorney, and the CHINS court conducted an indigency examination and found that Mother was entitled to counsel. However, the CHINS court did not immediately appoint counsel to Mother and instead continued with the hearing. When the proceedings were converted to termination

proceedings, Mother sent a letter to the trial court asking to have counsel appointed, which the trial court did. The trial court eventually issued its order terminating Mother's parental rights.

The G.P. Court opined that Mother had a right to counsel in the CHINS case in this circumstance. The Court noted that DCS's argument that appointing counsel in a CHINS case is a matter of discretion and not a statutory right was consistent with past appellate decisions, but that this argument failed to address a relevant statute. IC 31-32-4-3 provides that a court may appoint counsel for a parent in "any other proceeding", and IC 31-32-4-1 provides that "any other person designated by law" may have counsel appointed to him or her if the trial court chooses to do so. Both of these statutes are contained in the chapter titled "Right to Counsel." In resolving this issue, the Court looked to a third statute, IC 31-34-4-6 [Duty to inform parent, custodian, or guardian of legal rights]. This statute is contained in the chapter titled Temporary Placement of Child Taken Into Custody, and it provides that DCS must inform a parent of a child who is alleged to be a CHINS that "[t]he parent…has the right to be represented by a court appointed attorney under clause (A) 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 34-10-1." The Court read these statutes collectively and determined that since IC 31-32-4-1 says that any other person designated by law may have counsel appointed, and IC 31-34-4-6 designates indigent parents in CHINS cases who affirmatively request attorneys as being eligible for having counsel appointed to them, that indigent parents who affirmatively request attorneys in CHINS cases should have counsel appointed to them. The Court noted that this holding did not require the trial court to inquire in every single case if a parent wanted counsel, since it was still the affirmative duty of the parent to request counsel. However, in the present case, the trial court did inquire if Mother wanted counsel, Mother did request counsel, and the trial court found that Mother was indigent; thus, the trial court no longer had discretion to appoint counsel, and instead, was required to appoint counsel. The Court also held that that Mother had not permanently waived her right to counsel at all subsequent hearings or invited the due process violation by failing to repeatedly bring her lack of appointed counsel to the trial court's attention. Lastly, the Court determined that Mother had been denied due process, and this denial could only be addressed by reversing the termination of her parental rights, since the error of failing to appoint counsel for Mother in the CHINS case flowed into the termination proceedings. The Court noted that it was only reversing the termination of Mother's parental rights, and not overturning the adoption; the Court opined that Mother must take steps to do that herself.

The United States Servicemembers Civil Relief Act, 50 U.S.C. 521, was amended effective January 28, 2008, to include any child custody proceeding in which the defendant does not make an appearance. The law was enacted to protect service members from exposure to personal liability without an opportunity to defend in person or through counsel. This statute includes (1) required affidavit by plaintiff regarding whether the defendant is in military service; (2) court appointed attorney to represent a defendant in military service; (3) required stay of proceedings for a minimum period of 90 days for defendant in military service.

Practice Note: Courts, DCS attorneys and caseworkers, guardians ad litem/court appointed special advocates and counsel for parents should determine whether the Servicemembers Civil Relief Act applies to a parent or guardian in a CHINS case and follow the required procedures. See Chapter 2 at IV.C.1. for additional information.

IV. B. 2. Notice to Parents, Foster Parents, and Other Caretakers

IC 31-34-11-1(c) provides that if the factfinding hearing is not held immediately after the detention hearing, foster parents or other temporary caretakers with whom the child is placed shall be notified of the factfinding hearing by DCS. The manner and time period for notice is governed by IC 31-32-1-4. The court shall provide a person who is required to be notified an opportunity to be heard at the factfinding hearing.

DCS shall give notice to non-parties, such as foster parents and other caretakers, by personal delivery or by mail as provided in Rule 5(B)(2) of the Indiana Rules of Trial Procedure. IC 31-32-1-4(a)(2). Written notice may be given by either a copy of a court order or docket entry or a letter addressed to the person required to be notified. The notice must state the date, time, and purpose of the hearing, and, if mailed, must be deposited in the U.S. mail not less than five calendar days (excluding Saturdays, Sundays, and national legal holidays recognized by the federal government). IC 31-32-1-4(b) and (c). Written notice is not required if verbal notice of the date, time, place and purpose of the hearing is given by the court at an earlier hearing at which the individual to be notified is present. IC 31-32-1-4(d).

In **In Re D.P.**, 27 N.E.3d 1162, 1166-8 (Ind. Ct. App. 2015), the Court reversed the trial court's order terminating Mother's parental rights; Mother claimed that she was deprived of due process because the notice concerning the nature of hearing was inadequate. The Court looked to IC 31-35-2-6.5, which requires notice to the parents and their legal counsel at least ten days before a termination hearing. Compliance with this statute is mandatory and is a procedural precedent, but is a defense that must be asserted, and, when placed in issue, DCS must bear the burden of proving compliance with the statute. The Court agreed with Mother's claim that DCS's notice of the upcoming hearing was inadequate, and thus placed at issue compliance with the notice statute.

In **In Re J.Q.**, 836 N.E.2d 961 (Ind. Ct. App. 2005), the Court opined that the OFC's failure to provide advance notice to Mother of the psychologist's recommendation that the child not testify prevented Mother from presenting her own evidence that the child was competent to testify. The Court cited IC 31-32-2-3 which states that a parent is entitled to: (1) cross-examine witnesses; (2) obtain witnesses or tangible evidence by compulsory process; and (3) introduce evidence. The CHINS adjudication was reversed.

See also **D.A. v. Monroe County Dept. of Child Services**, 869 N.E.2d 501 (Ind. Ct. App. 2007) (Father did not have time to secure new counsel and was deprived of counsel without notice, in violation of his statutory right to counsel, and termination hearing was conducted in which Father was unable to present evidence and cross-examine witnesses because he was neither present nor represented by counsel); **In Re A.W.**, 756 N.E.2d 1037 (Ind. Ct. App. 2001) (court failed to provide Father and Stepmother with effective notice of daughter's abuse allegations against Father, Father and Stepmother were denied statutory due process required as to daughter's abuse allegations which led to the parental participation order, they were not informed of daughter taking a polygraph test prior to the test being administered, and they were not allowed to cross-examine witnesses who filed reports substantiating daughter's allegations of abuse).

IV. B. 3. Interpreter

The Indiana Supreme Court adopted the Interpreter Code of Conduct and Procedure and Disciplinary Process for Certified Court Interpreters effective September 24, 2008.

In any situation where an interpreter is used, ensure the interpreter is administered an oath to provide an accurate translation and qualified as an expert. See **Tesfamariam v. Woldenhaimanot**, 956 N.E.2d 118, 1233-3 (Ind. Ct. App. 2011). Case law provides the appropriate questions to ask:

1) Do you have any particular training or credentials as an interpreter?
(2) What is your native language?
(3) How did you learn English?
(4) How did you learn [the foreign language]?
(5) What was the highest grade you completed in school?
(6) Have you spent any time in a foreign country?
(7) Did you formally study either language in school? To what extent?
(8) How many times have you interpreted in court?
(9) Have you interpreted for this type of hearing or trial before?
(10) Are you a potential witness in this case?
(11) Do you know or work for any of the parties?
(12) Do you have any other potential conflicts of interest?
(13) Have you had an opportunity to speak with the non-English speaking person informally? Were there any particular communication problems?
(14) Are you familiar with the dialect or idiomatic particularities of the witness?

A trial court's decision regarding appointing an interpreter is reviewed for an abuse of discretion, which occurs if a decision is against the logic of the facts and circumstances before the court. **Nur v. State**, 869 N.E.2d 472, 479, 480-1 (Ind. Ct. App. 2007), *trans. denied*. This standard applies if the issue of appointing an interpreter is raised at the trial court level; if it is not raised and there is no request for an interpreter and the record shows that the defendant has no significant language difficulty, a trial court does not abuse its discretion by failing to appoint an interpreter. **Nur v. State**, 869 N.E.2d at 480-1.

The following case law on interpreters is provided to facilitate understanding of interpreter issues which may arise in CHINS and termination cases.

In **S.E. v. Indiana Dept. of Child Services**, 15 N.E.3d 37, 40, 44 (Ind. Ct. App. 2014), *trans. denied*, the Court affirmed the trial court's judgment terminating Mother's parental rights to her daughter. The Court found that the trial court did not violate Mother's due-process rights by requiring Mother, who was deaf, to testify by signing to an interpreter. Even though the issue was waived, the Court could not agree that Mother was denied due process when the trial court required her to testify through an interpreter. Interpreters serve not only defendants, but the trial courts as well. The Court observed that a proceedings interpreter may be required during "the taking of testimony" to ensure "that the finder of fact hears all probative testimony, some of which might otherwise be unavailable or misconstrued." The Court noted that in this case, the trial court initially agreed to allow Mother to testify orally, but stopped her when the judge could not understand her testimony and determined that an interpreter was necessary.

In **Tesfamariam v. Woldenhaimanot**, 956 N.E.2d 118, 1233-3 (Ind. Ct. App. 2011), a child custody and parenting time case, both Mother and Father were from Africa, and their native tongue is Tigrinya. The trial court used the services of Language Line, a telephone interpretation service that is funded by the Indiana Supreme Court. The Court held that the trial court abused its discretion because it failed to qualify the interpreter as an expert, and because it failed to administer an oath to the interpreter to provide an accurate translation. Both of these actions are necessary to protect a party's due process rights. Previous case law

presented the appropriate questions to ask: "(1) Do you have any particular training or credentials as an interpreter? (2) What is your native language? (3) How did you learn English? (4) How did you learn [the foreign language]? (5) What was the highest grade you completed in school? (6) Have you spent any time in a foreign country? (7) Did you formally study either language in school? To what extent? (8) How many times have you interpreted in court? (9) Have you interpreted for this type of hearing or trial before? (10) Are you a potential witness in this case? (11) Do you know or work for any of the parties? (12) Do you have any other potential conflicts of interest? (13) Have you had an opportunity to speak with the non-English speaking person informally? Were there any particular communication problems? (14) Are you familiar with the dialect or idiomatic particularities of the witness?" Although the Court determined that the trial court had abused its discretion in not qualifying the interpreter as an expert, and in not administering an oath to the interpreter to provide an accurate translation, the Court determined there was no fundamental error, and that Mother had waived her arguments.

In **Arrieta v. State**, 878 N.E.2d 1238, 1239-40 (Ind. 2008), the Indiana Supreme Court held:

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

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

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

In **Nur v. State**, 869 N.E.2d 472, 479, 480-1 (Ind. Ct. App. 2007), *trans. denied*, the Court affirmed the trial court's denial of the defendant's motion for a new trial, finding that the trial court was not put on notice that the defendant had a significant language difficulty, or that any misunderstandings were due to his comprehension of English, as opposed to an underlying mental defect. In its analysis of the case, the Court set forth guidelines as to how trial courts should undertake to decide whether to appoint defense interpreters, interpreters who simultaneously translate English-speaking proceedings for non-English speaking defendants. If a trial court has notice that a defendant has a significant language difficulty, the trial court must make a determination of whether an interpreter is needed. A defendant manifesting significant language difficulty or requesting an interpreter puts a trial court on such notice. The court's decision should be based on factors such as the defendant's understanding of spoken and written English, the complexity of the proceedings, issues, and

testimony, and whether, considering those factors, the defendant will be able to participate effectively in his defense.

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

IV. B. 4. Other Participation and Accommodation Matters

In **N.C. v. Indiana Dept. of Child Services**, 56 N.E.3d 65, 69-71 (Ind. Ct. App. 2016), the Court affirmed the trial court's order terminating Father's parental rights. Although Father argued that DCS's failure to accommodate his disability was a defense in the termination proceeding, the Court found the issue was waived. Father argued that DCS was required to provide him accommodations under the Americans with Disabilities Act (ADA) because he is deaf and has cognitive and mental health problems. The Court found that the trial record was devoid of issues raised by Father on the failure of DCS to accommodate his disability. The Court opined that Father misapplied the fundamental error doctrine, and stated that Father's argument was more akin to a due process violation.

In **A.B. v. Indiana Dept. of Child Services**, 61 N.E.3d 1182, 1187-8 (Ind. Ct. App. 2016), the Court affirmed the trial court's order terminating Father's parental rights to his child. Father lived locally and was not incarcerated at the time of the hearing. He obtained permission from the court to appear at the hearing via telephone. Father was represented by counsel, yet repeatedly and despite warnings, interrupted the trial court, the attorneys, and the witnesses during his telephonic appearance. He eventually escalated to name calling and threats, at which point the trial court disconnected the telephone Father was using to appear at the hearing. The judge then permitted Father to appear at the hearing in person, but Father refused to appear in person. The Court said that "a trial court judge also has the responsibility of managing the proceedings so proper order exists in the courtroom." The Court found that Father was given the opportunity to be heard at a meaningful time and in a meaningful manner, but his ultimate absence from the hearing was the result of his own disruptive actions and his decision not to appear in person despite a clear ability to do so. The Court concluded that the trial court did nothing to deny Father due process.

In **In Re R.H.**, 55 N.E.3d 304, 310-11 (Ind. Ct. App. 2016), the Court concluded that Mother was not denied services or reasonable accommodations to participate in services because of her disability, and the juvenile court did not violate her rights by entering an order finding that DCS was not required to make reasonable reunification efforts. The Court opined that, if Mother had a disability and was otherwise eligible to receive services, then DCS must provide her with reasonable accommodations when providing those services. Testimony by Mother's therapist reflected that reasonable accommodations were provided while Mother was receiving services. The juvenile court's determination that DCS did not have to continue providing Mother with reunification services was not based on Mother's disability but rather was properly based on the text of IC 31-34-21-5.6(b)(4), which states that reasonable efforts to reunify a parent and child are not required if the "parental rights of a parent with respect to a biological or adoptive sibling of a child who is a child in need of services have been involuntarily terminated by a court order."

In **In Re J.K.**, 30 N.E.3d 695, 698-700 (Ind. 2015), the Supreme Court reversed the CHINS adjudication, concluding that the cumulative effect of the trial court's comments and

demeanor had a direct impact on Father accepting the court's leading suggestion to "waive factfinding", and that such coercion was fundamental error. The Court also concluded that the trial court's remarks and conduct in their cumulative effect breached the court's duty of impartiality. The Court observed that the Court tolerates a "crusty" demeanor towards litigants as long as it is applied evenhandedly, that judges at all times "must maintain an impartial manner and refrain from acting as an advocate for either party", and that a "trial before an impartial judge is an essential element of due process". The Court noted several pieces of evidence which blatantly affected Father's participation, and cumulatively, caused him to admit that the child was a CHINS, despite his clear intention otherwise. These included the judge's: (1) complaints that the dispute was "ridiculous," "retarded," indicative of "stupidity," "just nuts,"; (2) threats to warn the mediator and threats to Father that he would have to find a new job if he wanted to "play that game"; and (3) calling the parties "knuckleheads".

In **In Re L.C.**, 23 N.E.3d 37, 40-2 (Ind. Ct. App. 2015), trans. denied, the Court reversed the trial court's CHINS adjudication, and concluded that the juvenile court erred by adjudicating the child a Child in Need of Services before the completion of the fact-finding hearing. Father claimed that the juvenile court violated his due process rights by depriving him of "a meaningful CHINS hearing." Quoting In Re G.P., 4 N. E. 3d 1158, 1165-66 (Ind. 2014), the Court noted that the resulting balance of: (1) the private interests affected by the proceeding; (2) the risk of error created by the State's chosen procedure; and (3) the countervailing government interest supporting use of the challenged procedure, must provide "the opportunity to be heard at a meaningful time and in a meaningful manner." The Court opined that the procedure employed by the juvenile court with respect to Father's factfinding hearing has been expressly rejected by the Indiana Supreme Court. When "one parent wishes to admit and one parent wishes to deny the child is in need of services, due process requires the juvenile court to conduct a factfinding hearing." Because Father challenged the allegations in the CHINS petition, due process required the completion of a factfinding hearing, including the presentation of evidence and argument by both parents, if present in person or by counsel, before the child was adjudicated a CHINS.

In **In Re S.A.**, 15 N.E.3d 602, 609-612 (Ind. Ct. App. 2014), the Court reversed the CHINS adjudication and found that the trial court deprived Father of a meaningful opportunity to be heard by adjudicating the child as a CHINS prior to Father's factfinding hearing. The Court held that, because a court cannot issue separate adjudications for each parent, the CHINS determination should be based on a consideration of the evidence in its entirety. Three months after the trial court adjudicated the child to be a CHINS based on Mother's admission, the court held a factfinding hearing and found the child to be a CHINS "as to [F]ather" based on the allegation in the initial petition. Mother's admitted drug use could be a sufficient basis for the CHINS adjudication, notwithstanding Father's initial contribution to the child's neglect, but DCS must prove each of the elements in the CHINS statute, and "each parent has the right to challenge those elements." While Father might not be able to dispute the factual allegations admitted by Mother, "he has the right to contest the allegation that his [c]hild needs the coercive intervention of the court", and, in these situations, due process requires that the trial court "conduct a fact-finding hearing as to the entire matter."

In **In Re Des.B.**, 2 N.E.3d 828, 835 (Ind. Ct. App 2014), the Court affirmed the trial court's CHINS adjudication, concluded that any error in the trial court's admission of the California analyst's telephone testimony was harmless, and affirmed the admission of the evidence into the record. Mother argued that the trial court abused its discretion when it permitted the analyst to testify by telephone without following the procedure outlined in Indiana

Administrative Rule 14, and that this evidence prejudiced her because the analyst provided evidence of the only positive drug screen admitted. The Court observed that the analyst's testimony that Mother failed her drug screen was merely cumulative of the evidence. Insofar as the analyst additionally testified about the procedures he used to secure and analyze the drug test, Mother had not argued that the additional information affected her substantial rights.

IV. C. Transportation of Incarcerated Parent to Hearing

Case law provides that it is highly preferable to attempt to secure the presence of an incarcerated parent for CHINS hearings; however, this is within the discretion of the trial court, and the parent should make such a request by a motion. See **A.P. v. PCOFC**, 734 N.E.2d 1107, 1117 (Ind. Ct. App. 2000) (One of many errors Court noted was trial court's failure to have Father transported from jail so he could participate in CHINS review hearing and hearing on motion to prohibit contact with his son); **J.T. v. Marion County OFC**, 740 N.E.2d 1261 (Ind. Ct. App. 2000) (the decision whether to permit an incarcerated person to attend such a hearing rests within the sound discretion of the trial court; Father never filed a motion to be transported to the CHINS hearings; therefore, his argument was without merit).

Transportation as a matter of right is more complicated when the parent is incarcerated in a federal or state prison outside of Indiana. Jurisdiction issues may make it impossible or impractical to have an Indiana court order the release or transportation of a parent from an out of state institution in order to attend a hearing. One option can be for appointed counsel to represent the out of state parent and to communicate through counsel and provide phone contact for the imprisoned parent during the hearing. See **J.T. v. Marion County OFC**, 740 N.E.2d 1261 (Ind. Ct. App. 2000) (the trial court's failure to secure the presence at the termination hearing of Father, who was incarcerated in another state and who had been appointed counsel in the termination proceeding, did not deny Father due process of law. However, on Father's separate ineffective assistance of counsel claim, the Court clarified that a parent has a right to be heard at a meaningful time and in a meaningful manner in the termination proceeding, and counsel should seek a procedure whereby the parent can participate in the hearing. The Court cited recent rulings from other states regarding procedures to provide an incarcerated parent with meaningful and timely participation).

In **In Re J.E.**, 45 N.E.3d 1243, 1247-9 (Ind. Ct. App. 2015), *trans. denied*, the Court affirmed the trial court's order terminating incarcerated Father's parental rights. The Court concluded that the trial court acted within its discretion in denying Father's motion to be transported to the termination hearing. The decision on whether to permit an incarcerated parent to be transported to court in a termination proceeding is a matter within the trial court's sound discretion. The Court looked to In Re C.G., 954 N.E.2d 910 (Ind. 2011), in which the Indiana Supreme Court adopted eleven factors that trial courts should balance in determining whether to transport an incarcerated parent. The Court noted the trial court: (1) clearly stated it had considered the C.G. factors in denying Father's transportation motions; and (2) specifically emphasized the factors it found compelling, namely, the cost and inconvenience factor and the availability of testimony by another reasonable means. For more discussion of C.G. and the eleven factors, see Chapter 2 at IV.B and Chapter 11 at V.L.

In **In Re Involuntary Term. Paren. of S.P.H.**, 806 N.E.2d 874, 879 (Ind. Ct. App 2004), incarcerated Father appealed the trial court's judgment which terminated the parent-child relationship. Father, who was serving an eight year sentence for drug and neglect of a dependent charges, was not present at the CHINS or termination proceedings. He asserted, inter alia, that his due process rights had been violated at the termination proceedings because he was never

transported to the CHINS hearings. The Court found that Father's allegation were waived on appeal but addressed the issue of transportation to the CHINS hearings on its merits. The Court noted, citing J.T. v. Marion County OFC, 740 N.E.2d 1261 (Ind. Ct. App. 2000), that the decision whether to permit an incarcerated person to attend such a hearing rests within the sound discretion of the trial court. The Court found that Father had never filed a motion to be transported to the CHINS hearings; therefore, his argument was without merit.

In **Tillotson v. Dept. of Family and Children**, 777 N.E.2d 741, 746 (Ind. Ct. App. 2002), counsel was appointed to represent the incarcerated parents and they were provided the opportunity to cross-examine witnesses and present evidence through their counsel. Two motions for the parents to be transported to the hearing were denied by the trial court. The parents failed to specify any type of alternative means available to the trial court until the second day of the termination trial, at which point the parents' counsel moved for the parents to testify and hear the proceedings via a speaker telephone to the prisons. The speaker telephone motion was denied. The termination judgment was entered and the parents appealed. The trial court judgment was affirmed. The Court observed that the parents, as unavailable witnesses, could have deposed themselves and entered their depositions into evidence at the hearing pursuant to Ind. Evid. R. 804(b)(1) but had not exercised this option. The Court found it noteworthy that the parents chose not to present any evidence or statements on their own behalf despite the fact that they were well aware of the majority of the allegations that would have been brought against them. The Court concluded, under the narrow facts of this case, that the trial court's failure to implement alternative means for the parents to testify did not deny them due process of law. The Court cautioned that, in future cases, trial courts should fully consider alternative methods whereby an incarcerated parent could meaningfully participate in a termination hearing when the parent could not be physically present. The Court stated that alternative procedures may include using a speaker phone at the hearing or continuing the hearing after the State has presented its case and allowing the parent time to review a transcript or audio tape of the hearing and then respond to the State's allegations.

Older case law on this topic includes:

Matter of A.C.B., 598 N.E.2d 570, 572 (Ind. Ct. App. 1992), where the Court rejected a putative Father's claim that he did not receive rights normally afforded adjudicated fathers in CHINS proceedings. The Court found that Father was notified of the CHINS proceeding, was transported from prison to court for each hearing, and was given an opportunity to be heard and to admit the child was a CHINS.

Foster v. Adoption of Federspiel, 560 N.E. 2d 691 (Ind. Ct. App. 1990), where Father alleged error in the refusal of the trial court to transport him from Westville Correctional Center to the adoption hearing, but because Father presented no argument on that issue, the error was waived. Reading the limited case law on this subject, it appears that the better practice is to arrange for the transportation of a parent from an in-state prison to any CHINS or termination hearings, particularly if the parent has made a written request.

IV. D. Rules of Procedure

IC 31-32-1-3 provides that the Indiana Rules of Trial Procedure apply to CHINS proceedings, except where the juvenile code makes specific exception.

IV. E. Procedural Accommodations for Child Witnesses

IV. E. 1. Harassing and Confusing Questions of Witnesses

Indiana Evidence Rule 611(a) provides that a court should exercise sufficient control over the manner of questioning witnesses and presenting evidence so that, among other things, the witness is protected from harassment or undue embarrassment.

Although **McQuay v. State**, 566 N.E.2d 542 (Ind. 1991), involved an adult victim in a rape trial, it may be equally applicable to child witnesses. In McQuay, the Court ruled it was not error for the judge to limit the defendant's cross-examination of the rape victim. Quoting Delaware v. Van Arsdall, (1986), 475 U.S. 673, 679, 106 S. Ct. 1431, 1435, 89 L. Ed. 2d 674, 683 the Court stated:

> ...trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.
> McQuay at 543.

IV. E. 2. Leading Questions for Children and Parents

Ind. Evid. R. 611(c) bars the use of leading questions on direct examination, "except as may be necessary to develop the witness's testimony." The quoted language may authorize the use of leading questions to develop the testimony of a child witness.

Leading questions have been permitted in examining child witnesses in criminal prosecutions. See **Riehle v. State**, 823 N.E.2d 287, 294 (Ind. Ct. App. 2005), *trans. denied* (Court affirmed the defendant's child molesting conviction; given the child victim's young age and reluctance to testify about the specifics of the case, the trial court did not abuse its discretion in allowing the State to use leading questions to elicit information from the child about the details of her sexual encounters with defendant); **Kien v. State**, 782 N.E.2d 398, 408 (Ind. Ct. App. 2003), *trans. denied* (Court affirmed the defendant's conviction for child molesting; jury had been made aware via testimony of physician, that young children are subject to suggestibility through responding to leading questions. The Court noted that defense counsel drew out the child's inconsistencies during cross-examination and the child admitted that she had lied when answering questions on cross-examination); **Williams v. State**, 733 N.E.2d 919, 922 (Ind. 2000) (leading questions may be used during direct examination to develop the testimony of certain witnesses, including children). See also **Jackson v. State**, 535 N.E.2d 1173 (Ind. 1989); **Altmeyer v. State**, 519 N.E.2d 138, 140 (Ind. 1988); **Ricketts v. State**, 498 N.E.2d 1222 (Ind. 1986).

Leading questions may also be used by counsel in a CHINS case in direct examination of a parent, or by a parent who calls the DCS case manager in the parent's case in chief. Evid. R. 611(c) states that whenever "a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions."

IV. E. 3. Pictures or Drawings in the Courtroom

In **Duffitt v. State**, 525 N.E.2d 607, 608 (Ind. 1988), the Supreme Court expressed strong disapproval of the trial court's use of drawings and posters placed in the courtroom to lessen the anxiety of the young witnesses. The Court affirmed the child molestation conviction, but stated that the decorations in the courtroom for the benefit of the child were not appropriate as they "unduly emphasize the testimony of one witness over another and may convey to

some jurors that the testimony of young children is more important or more credible than that of others."

Duffitt appears primarily relevant to jury litigation; however, the Court's strong language about the sanctum of the courtroom suggests that it may apply to all court settings. The Court stated that the "uncertain capacity of young children to treat seriously the duty to speak truthfully should not be undermined by converting the imposing dignity and solemnity of the courtroom into a casual play area."

See also **Utley v. State**, 589 N.E.2d 232, 239 (Ind. 1992) (Indiana Supreme Court reiterated that the practice of decorating the courtroom walls when done so in deference to certain witnesses is inappropriate as it may convey that the testimony of those witnesses is more credible or more important).

IV. E. 4. Judge's Comments or Questions to Child Witness

Practice Note: Criminal cases on judicial behavior are primarily concerned with improprieties before the jury, which is not an issue in CHINS cases. However, these cases may be relevant to all judicial proceedings to clarify that incidental and reassuring comments to a child witness do not constitute judicial impartiality.

In **Archer v. State**, 996 N.E.2d 341, 346-350 (Ind. Ct. App. 2013), the Court affirmed the trial court's decision and held, *inter alia*, that the trial court's statement that it was "very satisfied" that the child witness was competent to testify did not amount to fundamental error. After the child witness answered questions by the trial court to ascertain her competency, the trial court stated that it was "very satisfied that this witness understands the oath and that she is competent, understands the difference between the truth and a lie and understands the consequences of telling a lie." In holding that the trial court did not err in stating that it was satisfied that the child witness was competent to testify, the Court opined that the trial court's statement addressed competency, not credibility, and the trial court's statement almost directly recited the factors set forth in Indiana case law for determining a child witness's competency. Further, the defendant did not object to the trial court's statements.

See also **Hackney v. State**, 649 N.E.2d 690, 693 (Ind. Ct. App. 1995); **Duffit v. State**, 519 N.E.2d 216, 221 (Ind. Ct. App. 1988); **Brackens v. State**, 480 N.E.2d 536 (Ind. 1985); **Vedron v. State**, 163 Ind. App. 28, 321 N.E.2d 847 (1975).

But see this chapter at XI.A for details about Archer v. State, 996 N.E.2d 341 (Ind. Ct. App. 2013) being abrogated in terms of what types of vouching by other witnesses may be permissible, as well as other case law.

IV. E. 5. Use of Doll by Child Witness

In **Hall v. State**, 634 N.E.2d 837, 843 (Ind. Ct. App. 1994), the Court determined there was no error in social worker's testimony on child's use of anatomically correct dolls.

In **State v. Petry**, 524 N.E.2d 1293, 1298 (Ind. Ct. App. 1988), the Indiana Court of Appeals looked to a Washington case, State v. Hunt, 741 P. 2d 566 (Wash. 1987), for guidance in determining what constitutes corroborative evidence of child molestation. The Washington Court found that the child's play with anatomically correct dolls was additional corroborative evidence of the child molestation and that the doll play was a combination of nonassertive verbal and nonverbal conduct, and therefore, was not hearsay.

In **Cleaveland v. State**, 490 N.E.2d 1140 at 1141 (Ind. Ct. App. 1986), the Court of Appeals stated that the use of a doll in testifying is a form of demonstrative evidence and is admissible when it is "sufficiently explanatory or illustrative or relevant testimony in explaining what occurred."

In **Newton v. State**, 456 N.E.2d 736 (Ind. Ct. App. 1983), there is a discussion on the use of dolls in criminal prosecution for child molestation.

IV. E. 6. Avoiding Face-to-Face Confrontation Between Child and Accused

In addition to the statutes that allow the child to testify by videotape or closed circuit television discussed below in section VII. of this Chapter, judges have attempted other means to block or limit the child's view of the accused.

For case law on these attempts, see:

S.M. v. Elkhart Cty. Off. of Fam. & Chil., 706 N.E.2d 596, 600 (Ind. Ct. App. 1999), where the trial court erred in a termination case in allowing the children to testify in the courtroom while the mother was in the hallway and was not able to see or hear the testimony of the children. Although the trial court failed to follow the specific statutory procedures necessary to allow the children to testify outside the presence of the parent, the Court ruled that the error was not fundamental because the children's testimony reiterated evidence from other witnesses.

Shaffer v. State, 674 N.E.2d 1, 5 (Ind. Ct. App. 1997), where the defendant argued that the trial court erred by allowing the victim to testify in a smaller courtroom, as it put more emphasis on their testimony. The Court declined to find that this was error. While Indiana law does not approve of trial procedures that tend to emphasize the testimony of one particular witness, Indiana trial courts also recognize the potential trauma facing a child in court, and have allowed children to testify under special conditions despite the possibility that it would emphasize their testimony.

Stanger v. State, 545 N.E.2d 1105, 1112 (Ind. Ct. App. 1989), where the trial court angled the witness chair of the child witness away from the accused. The Court of Appeals affirmed the conviction and noted that the "Confrontation Clause does not compel a witness to fix his eyes upon the defendant." The Court found that positioning the witness away from the defendant was a reasonable limitation on the defendant's interest in physical confrontation.

IV. E. **7**. Expulsion of Defendant from CHINS Hearing Due to Intimidating Eye Contact

In the criminal child molestation case of **Stanger v. State**, 545 N.E.2d 1105, 1113, 1118 (Ind. Ct. App. 1989), the Court of Appeals noted in the text of the case that the defendant had been earlier removed from a CHINS hearing due to his intimidation of the child witnesses. While the removal of the defendant was not the subject of appeal, the Court's comment is worthy of note:

> As Justice Blackmun observed in his dissenting opinion in Coy v. Iowa, 108 S. Ct. at 2809, the fear and trauma associated with a child's testimony in front of the defendant may so overwhelm the child as to prevent the possibility of effective testimony. In the present case, the record shows Stanger had already been expelled from a CHINS proceeding for violating a no-contact order by attempting to intimidate the children with eye contact. Stanger at 1113 n.4.

IV. E. 8. Adult May Sit Next to Testifying Child Witness

In the criminal child molestation case of **Hall v. State**, 634 N.E.2d 837, 841-42 (Ind. Ct. App. 1994), the trial court allowed an adult to sit beside the nine-year-old mildly retarded victim

while she testified against her stepfather. The Court affirmed the procedure, noting the following: no statute prohibits this arrangement; the arrangement was within the trial court's discretion; and the defendant did not overcome his burden of showing that the courtroom arrangement was inherently prejudicial.

See also **Shaffer v. State**, 674 N.E.2d 1, 5 (Ind. Ct. App. 1997) (Court approved of victim testifying in a smaller courtroom; Indiana trial courts recognize the potential trauma facing a child in court, and have allowed children to testify under special conditions despite the possibility that it would emphasize their testimony); **Stanger v. State**, 545 N.E. 2d 1105 (Ind. Ct. App. 1989) (Court approved of trial court's decision to allow child witnesses to testify with a support person sitting behind them).

IV. F. Standard and Burden of Proof

IC 31-34-12-3 provides that any finding by a juvenile court (other than a finding of delinquency, criminal conviction, or termination of parental rights) must be based on a preponderance of the evidence. See also **Roark v. Roark**, 551 N.E.2d 865, 869, 870 (Ind. Ct. App. 1990) (standard of proof in CHINS factfinding hearing is preponderance of evidence).

In **In Re Des.B.**, 2 N.E.3d 826, 835-6 (Ind. Ct. App. 2014), the Court noted that DCS has the burden of proving by a preponderance of the evidence that the child is a CHINS. See also **Davis v. Marion County Dept. of Child Servs.**, 869 N.E.2d 1267, 1270 (Ind. Ct. App. 2007).

In **In Re N.E.**, 919 N.E.2d 102, 103, 106 (Ind. 2010), the Indiana Supreme Court said that the question in a CHINS adjudication is not parental fault, but whether the child needs services. The Court opined that, because a CHINS determination regards the status of the child, the juvenile court is not required to determine whether a child is a CHINS as to each parent, only whether the statutory elements have been established. The Court said that a separate analysis as to each parent is not required in the CHINS determination stage. But see **In Re T.N.** 963 N.E.2d 467, 468 (Ind. 2012) and **In Re K.D**. 962 N.E.2d 1249, 1251 (Ind. 2012), discussed in Chapter 6 at I.L and I.M.1., in which the Court held that a parent who requests a contested factfinding hearing has a due process right to that hearing.

IV. G. Rebuttable Presumption of CHINS

The burden of proof in a CHINS case can be affected by the rebuttable presumption provided at IC 31-34-12-4. The statute provides that there is a rebuttable presumption that a child is a CHINS because of an act or omission on the part of the parent, guardian, or custodian, if DCS introduces appropriate evidence that:

(1) the child has been injured;
(2) at the time the child was injured, the parent, guardian, or custodian:
    (A) had the care, custody, or control of the child; or
    (B) had legal responsibility for the care, custody, or control of the child;
(3) the injury would not ordinarily be sustained except for the act or omission of a parent, guardian, or custodian; and
(4) there is a reasonable probability that the injury was not accidental.

IC 31-34-12-4.5 allows DCS to protect children who are endangered due to the presence of a sexual abuse perpetrator when abuse has been substantiated by CHINS or criminal proceedings. IC 31-34-12-4.5(a) provides that there is a rebuttable presumption that a child is a CHINS if DCS establishes that that the child lives in the same household as an adult who:

(1) committed an offense described in IC 31-34-1-3 or IC 31-34-1-3.5 against a child and the offense resulted in a conviction or a judgment under IC 31-34-11-2; or

(2) has been charged with an offense described in IC 31-34-1-3 or IC 31-34-1-3.5 against a child and is awaiting trial.

IC 31-34-12-4.5(b) provides that the following may not be used as grounds to rebut the presumption under subsection (a):

(1) the child who is the victim of the offense described in IC 31-34-1-3 is not genetically related to the adult who committed the act, but the child presumed to be the CHINS under this section is genetically related to the adult who committed the act.

(2) The child who is the victim of the offense described in IC 31-34-1-3 differs in age from the child presumed to be the child in need of services under this section.

IC 31-34-12-4.5(c) provides that this statute does not affect the ability to take a child into custody or emergency custody under IC 31-34-2 if the act of taking the child into custody or emergency custody is not based upon a presumption established under this section. However, if the presumption established under this section is the sole basis for taking a child into custody or emergency custody under IC 31-34-2, the court first must find cause to take the child into custody or emergency custody following a hearing in which the parent, guardian, or custodian of the child is accorded the rights described in IC 31-34-4-6(a)(2) through IC 31-34-4-6(a)(5).

IC 31-34-1-2(b) states that "[e]vidence that the illegal manufacture of a drug or controlled substance is occurring on property where a child resides creates a rebuttable presumption that the child's physical or mental health is seriously endangered."

The effect of the rebuttable presumption on the burden of proof is addressed in Ind. Evidence Rule 301. The Rule states:

In a civil case, unless a constitution, statute, judicial decision, or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally. A presumption has continuing effect even though contrary evidence is received.

Applying Evid. R. 301 to the CHINS rebuttable presumption in IC 31-34-12-4, once DCS presents the evidence necessary to raise the rebuttable presumption, the burden of going forward shifts to the respondent parent. However, the burden of proof always remains with DCS.

In **Indiana Dept. of Child Services v. J.D.**, 77 N.E.3d 801 (Ind. Ct. App. 2017), DCS argued the trial court committed legal error by: (1) failing to give effect to the presumption set forth in IC 31-34-12-4; and (2) rejecting the physicians' testimony that the child's injuries were non-accidental. The Court opined that the trial court's statement in finding the child was not a CHINS made it clear that the trial court's decision was driven by a misunderstanding and misapplication of the law. The Court explained that the manner in which the child was injured, and specifically whether the injuries were non-accidental, was a question of fact, not of law as the trial court stated. The trial court's mischaracterization of this issue was of concern because it effectively required the court to disregard the physicians' testimony that the child's injuries were non-accidental. The Court emphatically rejected the trial court's approach that the idea that trained medical professionals could not determine whether an injury was inflicted non-accidentally was "frankly absurd." The Court observed that: (1) identifying the cause of a patient's injuries is a matter squarely within the purview of medical science; (2) in many cases, doctors or other medical professionals with the appropriate training and experience will be the only individuals with the expertise required to understand and explain the biomechanical forces necessary to produce certain types of injuries; (3) such testimony is of particular importance in cases, such as

this case, where a very young infant has numerous serious injuries for which parents have provided no plausible explanation; (4) the trial court's view overlooked the fact that doctors routinely testify concerning whether injuries are accidental and Indiana Appellate Courts regularly rely on such testimony.

The J.D. Court found DCS presented competent and probative evidence which was sufficient to trigger the application of IC 31-34-12-4, the Presumption Statute, and shift the burden of producing evidence to rebut the presumption to the child's parents. In cases where a child has injuries that suggest neglect or abuse, the Presumption Statute shifts the burden to the party who is most likely to have knowledge of the cause of the injuries—the parent, guardian, or custodian—to produce evidence rebutting the presumption that the child is a CHINS. The trial court's statements suggested it imposed an inappropriately high evidentiary burden on DCS to trigger the Presumption Statute. DCS "need only produce some relevant and admissible evidence tending to establish the elements of the Presumption Statute in order to shift the burden of production to the parents or custodians." DCS did so in this case: (1) there was no question that the child was seriously injured and evidence established that from birth until his removal, the child was continuously in his parents' care; and (2) three physicians concluded based on their training and experience that the child's injuries were non-accidental and indicative of child abuse.

In **In Re C.K.**, 70 N.E.3d 359, 374-5 (Ind. Ct. App. 2016) *trans. denied*, the Court affirmed the juvenile court's determination that the child, who was four months old at the time the CHINS petition was filed, was a CHINS pursuant to IC 31-34-1-1 (neglect) and IC 31-34-1-2 (abuse by parental act or omission). The Court concluded the juvenile court correctly applied IC 31-34-12-4, the rebuttable presumption of CHINS statute. IC 31-34-12-4 provides that a rebuttable presumption is raised that a child is a CHINS because of an act or omission of the child's parent, guardian, or custodian if the state introduces competent evidence of probative value that: (1) the child has been injured; (2) at the time the child was injured, the parent, guardian, or custodian: (A) had the care, custody, and control of the child; or (B) had legal responsibility for the care, custody, or control of the child; (3) the injury would not ordinarily be sustained except for the act or omission of a parent, guardian, or custodian; and (4) there is a reasonable probability that the injury was not accidental. The Court noted the juvenile court had before it sufficient evidence to establish that the child suffered injuries, that while he was in Mother's care he was showing symptoms of a head injury upon his arrival at daycare, that his injuries were of a type not ordinarily sustained except for an act or omission of a parent, and his injuries were not accidental.

See also **In Re C.B.**, 865 N.E.2d 1068 (Ind. Ct. App. 2007) (Court affirmed the juvenile court's judgment determining the child to be a CHINS, and made reference to IC 31-34-12-4, but did not explicitly decide the case upon the basis of that statute); **In Re C.W.**, 723 N.E.2d 956, 959 (Ind. Ct. App. 2000) (a "rebuttable presumption is raised that the child is a CHINS if the state introduced evidence that the child has been injured" citing IC 31-34-12-4; child's injuries were consistent with being shaken; Mother denied she was cause of injuries).

See Chapter 1 at III.D. for additional discussion on rebuttable presumption of CHINS.

IV. H. Rebuttable Presumption of No CHINS Due to Religious Beliefs

IC 31-34-1-14 states that "[i]f a parent, guardian, or custodian fails to provide specific medical treatment for a child because of the legitimate and genuine practice of the religious beliefs of the parent, guardian, or custodian, a rebuttable presumption arises that the child is not a child in need of services because of such failure." See Chapter 1 at II.F.1. for further discussion on this rebuttable presumption.

The Court discussed the rebuttable presumption that a child is not a child in need of services due to parents' practice of religious beliefs in **Schmidt v. Mutual Hosp. Services, Inc.**, 832 N.E.2d 977, 982-3 (Ind. Ct. App. 2005), a civil debt collection case. The Court held that the parents' religious objections to medical treatment of their newborn child by the hospital and their attempts thereby to disclaim any obligation to pay for the child's treatment did not negate their parental obligation to provide necessary medical care for the child or their corresponding duty to pay for the hospital's services. The father explained to sheriff deputies who took the mother to the hospital, where she gave birth, that the parents trusted God rather than medicine for healing. The child was treated at the St. Francis Hospital's Neonatal Intensive Care Unit for seventy-five days after birth. The Court noted that the initial medical treatment provided to the newborn child was emergency in nature and because she was born in the hospital with potentially life-threatening ailments, the hospital had a continuing duty to treat her.

The Schmidt Court said that, after the initial emergency had passed, it would have been appropriate for the hospital to seek the State's intervention in determining a further course of action for the child's care. The Court noted that the hospital continued to treat the child over the parents' objections, stopped asking the parents for consent, and simply provided treatment on its own initiative. The Court said that only the State has the authority to usurp the parents' rights in determining the child's best interest, and the Court did not condone this action by the hospital. The Court noted that a parent's decision to refuse lifesaving medical treatment for a minor child must yield to the State's interest in protecting the health and welfare of the child. The Court also noted that the State's authority to intervene is based on the CHINS neglect statute, IC 31-34-1-1, and that the rebuttable presumption that the child is not a CHINS due to the legitimate and genuine practice of the parents' religious belief did not apply "to situations in which the life or health of the child is in serious danger." Id. at 983 n.7.

IV. I. Judgment, Continuance of Judgment, Re-Opening Case, and Discharge

If the juvenile court finds that the allegations of the CHINS petition have been proven, it shall enter judgment, order a predispositional report, schedule a dispositional hearing, and complete a dual status screening tool on the child, as described in IC 31-41-1-3. IC 31-34-11-2(a). If the child is determined to be a dual status child, the court may refer the child for an assessment by a dual status assessment team as described in IC 31-41-1-5. IC 31-34-11-2(b).

Except as otherwise provided, at the close of all the evidence and before judgment is entered, the court may continue the case for up to twelve months. IC 31-34-11-4(a). If the child, the child's parent, guardian, or custodian, or DCS requests that judgment be entered, the judgment shall be entered not later than thirty days after the request. IC 31-34-11-4(b). If the child is in a juvenile detention facility, the child shall be released not later than forty-eight hours, excluding Saturdays, Sundays, and legal holidays, pending the entry of judgment. A child released from a juvenile detention facility pending the entry of judgment can be detained in a shelter care facility. IC 31-34-11-4(c).

If the juvenile court finds that the child is not a CHINS it shall discharge the child. IC 31-34-11-3.

A juvenile court must complete a dispositional hearing within thirty days after the date the court finds that the child is a CHINS. IC 31-34-19-1(a). The court must conduct this hearing to consider (1) Alternatives for the care, treatment, rehabilitation, or placement of the child. (2) The necessity, nature, and extent of the participation by a parent, a guardian, or a custodian in the program of care, treatment, or rehabilitation for the child. (3) The financial responsibility of the parent or guardian of the estate for services provided for the parent or guardian or the child. (4) The recommendations and report of a dual status assessment team if the child is a dual status

child. IC 31-34-19-1(a). If the dispositional hearing is not completed in this timeframe, the court must dismiss the case without prejudice upon the filing of a motion. IC 31-34-19-1(b).

In **In Re K.D.**, 962 N.E.2d 1249, 1258-60 (Ind. 2012), the Court reversed the trial court's CHINS determination and remanded the case to the trial court to provide Stepfather with a fact-finding hearing. 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 fact-finding hearing as to the entire matter. IC 3134-10-8 states that if a parent, guardian, or custodian admits [the allegations in the CHINS petition], the juvenile court shall do the following: (1) enter judgment accordingly; (2) schedule a dispositional hearing. IC 31-34-11-1 states that the juvenile court shall hold a fact-finding hearing if the allegations of the petition have not been admitted. The Court held that, under these facts, the contested dispositional hearing did not provide Stepfather due process because he was not given an opportunity to contest the CHINS allegations. The Court pointed out that parents have fewer protections in a dispositional hearing than they have in a fact-finding hearing; therefore, it would be advantageous for DCS to proceed to a contested dispositional hearing and by-pass the fact-finding hearing because the juvenile court can admit the DCS dispositional report even if it includes hearsay.

In **In Re A.I.**, 825 N.E.2d 798, 814 (Ind. Ct. App. 2005), *trans. denied*, the Court affirmed the trial court's judgment terminating the parental rights of both parents. Mother appealed, arguing, among other issues, that she had been denied due process when the trial court entered a CHINS finding before the parents had an opportunity to present evidence or contest the petition. The trial court entered a second CHINS finding after the parents presented evidence, but Mother suggested that the CHINS result had been predetermined due to the error in the court's docket entry. The Court found that the error in the court's docket entry was harmless because the trial court had recognized the error and conducted an evidentiary hearing during which the parties had been heard.

In **In Re D.Q.**, 745 N.E.2d 904, 908 (Ind. Ct. App. 2001), the Marion County OFC and Child Advocates, the guardian ad litem, appealed from the trial court's denial of the petition to terminate the parent-child relationship. One of the issues raised was whether the trial court abused its discretion when it reopened the case despite the OFC's objection, and allowed Mother to present additional evidence over four months after the parties had rested. Mother's posthearing evidence included her new lease agreement as well as photographs of her new apartment and its furnishings. The OFC and guardian ad litem cross-examined Mother and offered the testimony of the OFC case manager and the guardian ad litem who reaffirmed their recommendations concerning termination of the parent-child relationship. The Court opined that evidence must be offered during the course of a trial and it is within the trial court's discretion to permit a party to present additional evidence once the party has rested, both parties have rested, or after the close of all the evidence. The Court held that OFC and the guardian ad litem had not demonstrated how the trial court's decision to reopen the evidence had resulted in any prejudice; thus, there was no clear abuse of discretion.

IV. J. Authority of Juvenile Referees and Magistrates

IC 31-31-3-3 through 6 outline the authority to appoint a juvenile referees or magistrates, the requirement that a referee must be admitted to practice law in Indiana, and the duty of a part-time referee to submit findings and recommendations in writing to the juvenile court.

Powers of a magistrate are found at IC 33-23-5-5 and IC 33-23-5-9(b). Among the magistrate's powers listed at IC 33-23-5-5 are: the authority to administer an oath, order issuance of a

subpoena, compel witness attendance, punish contempt, conduct a preliminary, an initial, an omnibus, or other pretrial hearing, conduct an evidentiary hearing or trial, enter a final order in a protective order proceeding to prevent domestic or family violence, approve agreed settlements concerning civil matters, approve decrees of dissolution, settlement agreements, and any other agreements of the parties in domestic relations actions or paternity actions.

IC 33-23-5-9(b) authorizes a magistrate who presides at a criminal trial to enter a final order on a criminal case, conduct a sentencing hearing, and impose sentence. With the exception of the powers authorized by IC 33-23-5-5 and IC 33-23-5-9(b), a magistrate shall report findings in an evidentiary hearing, a trial, or a jury's verdict to the court, which shall enter the final order. IC 33-23-5-9(a). A magistrate who is sitting as a judge pro tem or a special judge may enter a final appealable order. IC 33-23-5-8.

A magistrate must be admitted to the practice of law in Indiana, but cannot practice law while holding the office of magistrate. IC 33-23-5-2 and -3.

In **J.J. v. State**, 925 N.E.3d 796, 800 (Ind. Ct. App. 2015), a delinquency case, the juvenile referee made no findings of fact, but instead, filled in a blank template with boilerplate language. Since IC 31-31-3-6 requires that a juvenile court referee must submit findings and recommendations in writing to the juvenile court, which shall enter such order as it considers proper, this was insufficient to comply with the statute.

In **R.W.,Sr. v. Marion County Dept. Child Serv.,** 892 N.E.2d 239, 244 (Ind. Ct. App. 2008), in affirming the trial court's termination of Mother and Father's parental rights to their respective children the Court held that, although it may be preferable to have the signatures of both the Judge and the Magistrate on the final order terminating parental rights, it is not statutorily required**.** The Court found that the clear and unambiguous language of IC 33-23-5-9 simply requires a magistrate to report his or her findings, following an evidentiary hearing, to the court; it does not prescribe a specific method for doing so such as in a signed final order as Mother contended was necessary.

See also **S.W.E. v. State**, 563 N.E.2d 1318, 1323 (Ind. Ct. App. 1990) (holding that juvenile judge's signing of a waiver order drafted by a prosecutor and adopted by a juvenile referee did not usurp the juvenile judge's exclusive authority to find facts); **Thomas v. State**, 562 N.E.2d 43 (Ind. Ct. App. 1990) (Court ruled that the stamp of the judge's signature on the waiver of jurisdiction order was sufficient; it is presumed that a judge's signature was made by himself, or by another with the judge's authority, unless the record affirmatively shows evidence to the contrary); **R.S. v. State**, 435 N.E.2d 1019 (Ind. Ct. App. 1982) (juvenile referee must submit in writing more than conclusory findings and trial court cannot adopt an order based on conclusory referee findings).

V. EXPERT TESTIMONY

V. A. Foundation for Expert Testimony

Ind. Evid. R. 702 pertains to expert witnesses' testimony, and their ability to testify in the form of opinions. A witness qualifies as an expert who can offer an opinion: (1) by knowledge, skill, experience, training, or education; and (2) if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue. Ind. Evid. R. 702(a). Only one of the characteristics listed in Ind. Evid. R. 702(a) is necessary to qualify an individual as an expert. A witness may qualify as an expert on the basis of practical experience alone. **Kubsch v. State**, 784 N.E.2d 905, 921 (Ind. 2003).

Expert scientific testimony is admissible only if the court is satisfied that the expert testimony rests upon reliable scientific principles. Ind. Evid. R. 702(b).

The trial court has broad discretion in determining the admissibility of evidence, and the determination of whether a witness is qualified to testify as an expert is reviewed on appeal under an "abuse of discretion" standard. **Johnston v. State**, 69 N.E.3d 507 (Ind. Ct. App. 2017); **Hanson v. State**, 704 N.E.2d 152, 155 (Ind. Ct. App. 1999).

Police officers, family case managers, private agency service providers, and foster parents may qualify as experts based on experience and training. Evidence can be elicited regarding the specific topics which the witnesses learned in training classes or with which the witnesses have practical experience. See this Chapter at V.I. and the paragraph directly below for the conflict and recent case law potentially resolving the conflict between Evid. R. 702 and the statutory bar to expert testimony by social worker and V.J. for skilled witness testimony. If a witness cannot be qualified as an expert, the witness could possibly be qualified as a skilled witness.

Social workers may qualify as experts when testifying. In **B.H. v. Indiana Dept. of Child Services**, 989 N.E.2d 355, 360-2 (Ind. Ct. App. 2013), the Court held that that the trial court did not abuse its discretion in qualifying the social worker as an expert witness under Ind. Evid. R. 702; although IC 25-23.6-4-6 prohibits a social worker from offering expert testimony, the statute cannot prevent a trial court from qualifying a social worker as an expert witness. The Court opined that when there is a conflict between a statute and rules of evidence, the rules of evidence prevail. Evid. R. 702 governs the admission of expert testimony, and provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." The Court observed that: (1) the social worker has an undergraduate degree in psychology and a master's degree in social work; (2) she is a board-certified diplomate, which means that she is at the highest level of her profession and can make certain diagnoses without medical supervision; (3) she owns and operates Brighter Tomorrows, where she provides therapy and conducts parenting assessments; (4) she has conducted parenting assessments for more than twenty-five years and learned to administer them under the supervision of a psychologist; (5) she testified about the creation, function, acceptance of and widespread use of the Child Abuse Potential Inventory (CAPI) in the psychiatric community. The Court concluded that this amount of education, experience, and familiarity with parenting assessments, particularly CAPI, constituted sufficient knowledge and experience to qualify the social worker as an expert, and that her testimony would clearly assist the trier of fact in understanding the detailed, numeric CAPI results and how those results reflected on Mother's parenting abilities.

Even when a witness is qualified as an expert, that does not immediately ensure admissibility of expert scientific testimony. An additional foundation is required regarding the reliability of the scientific evidence. See this Chapter at V.E. on expert scientific testimony.

In **Shady v. Shady**, 858 N.E.2d 128, 138-9 (Ind. Ct. App. 2006), the Court found that the trial court did not abuse its discretion in qualifying Mother's witness as an expert on international child abduction. Despite Father's objection that the witness was not an expert because she had attended only two years of post-secondary school, during which she studied nursing, the Court found that the witness clearly qualified as an expert because of her knowledge, training, and practical experience. The witness was the proprietor of a consulting firm specializing in the recovery of abducted children and the assessment of the risk of future abduction, had worked on

over four hundred cases, and had testified before the U.S. Congress, testified as an expert in twelve different states, was a board member with the Missing Children's Investigation Center and a French agency, and had authored, contributed to, and presented papers on international child abduction. The Court noted, in response to Father's assertion that the witness did not qualify as an expert under Evid. R. 702(b) regarding scientific testimony, that the witness was not a "scientist" nor was the subject matter of her testimony "scientific."

In **Burnett v. State**, 815 N.E.2d 201, 204-6 (Ind. Ct. App. 2004), the Court affirmed the trial court's qualification of a veteran police office as an expert on fingerprint identification based on his experience and training. The officer had served for a city police department for twenty years, including spending six years as a crime scene manager, holding certification as a senior crime analyst and an Indiana medical death investigator, and having completed a two year training program on fingerprints. The officer was not certified as a latent fingerprint examiner because he had not read certain books nor had he been in the field for the requisite period of time to sit for the examination. Evidence of the officer's lack of knowledge about fingerprint methodology went to the weight the fact-finder could assign to the officer's expert testimony, not to the admissibility of his testimony under Rule 702(a).

See also **Turner v. State**, 720 N.E.2d 440, 444 (Ind. Ct. App. 1999) (forensic nurse was qualified to give an expert opinion by her years of experience and specialized medical training, and the Court rejected the defendant's argument that only a doctor practicing forensic pediatrics could give an opinion on the possibility that sexual abuse had occurred); **Vega v. State**, 656 N.E.2d 497 (Ind. Ct. App. 1995) (although professor had special knowledge and education greater than the average person, evidence did not show how his testimony about memory would assist the jury to understand the evidence or to determine a fact in issue as is required by Ind. Evid. R. 702(a); trial court did not err in disallowing the testimony).

V. B. Opinion Testimony by Experts

If an expert testifies as to their opinion, and that opinion embraces an ultimate issue, that testimony is not objectionable on that grounds alone. Ind. Evid. R. 704(a). However, no witnesses can testify to things such as the truth or falsity of allegations, whether another witness has testified truthfully, or legal conclusions. Ind. Evid. R. 704(b).

The law does not require that an expert's opinion be certain, and opinions stated in terms of probabilities may be admissible. See **Noblesville Casting Div. of TRW v. Prince**, 438 N.E.2d 722 (Ind. 1982).

In **Alvarez-Madrigal v. State**, 71 N.E.3d 887, 892-3 (Ind. Ct. App. 2017), the Court held that the examining pediatrician's opinion testimony regarding statistics, child abuse, and children reporting child abuse was not prohibited vouching testimony.

In **Baumholser v. State**, 62 N.E.3d 411 (Ind. Ct. App. 2016), *trans. denied*, the Court determined that the opinion testimony of the forensic interviewer that children often delay disclosure of molestation was not improper vouching for alleged victim and thus was permissible.

In **Sampson v. State**, 38 N.E.3d 985, 990-92 (Ind. 2015), the Court determined that opinion testimony about signs of coaching alleged victim is permissible only if defendant opened the door to such opinion testimony from an expert.

In **Norris v. State**, 53 N.E.3d 512 (Ind. Ct. App. 2016), the Court determined admitting the opinion testimony of the expert forensic interviewer which vouched for the child's reliability was harmless, due to the amount of other evidence from other witnesses.

In **Wood v. D.W. ex rel. Wood**, 47 N.E.3d 12 (Ind. Ct. App. 2015) *trans. granted, opinion vacated, opinion reinstated at* 53 N.E.3d 1182, the Court determined that the trial court erred in admitting evidence of the police detective's opinion that the children's allegations of sexual abuse were true. This opinion testimony affected the aunt's substantial rights and was not harmless, and the children's statements and the detective's opinion were the only pieces of evidence supporting the allegation that the aunt had committed a sexual offense against the children.

In **Otte v. State**, 967 N.E.2d 540, 547-8 (Ind. Ct. App. 2012), the Court determined that the domestic violence expert was sufficiently qualified to offer an opinion on the tendency of domestic violence victims to recant. The defendant argued that the expert's testimony was not based upon demonstrably reliable scientific principles. The Court noted that the expert's status as an expert witness was due to her specialized knowledge about victims of domestic violence, and she was properly qualified as such. The Court opined that prior case law indicated that expert testimony explaining the behavior of victims of domestic violence which is not based upon personal knowledge does not cross the line into impermissible vouching, and therefore, there was no Ind. Evid. R. 704(b) violation. The Court observed that the reactions and behaviors of domestic violence victims are not commonly understood by laypersons; therefore, the use of expert testimony in this area explains behaviors, such as recanting, that the jury or finder of fact may not have within its experience, and permits it to assess credibility based upon a more complete understanding of all potential factors at issue.

In **Lyons v. State**, 976 N.E.2d 137, 142-3 (Ind. Ct. App. 2012), the Court affirmed the trial court's decision, finding that the requirements of Ind. Evid. R. 702 were satisfied and there was no error in allowing a child psychologist to testify about various characteristics and behaviors that are commonly found in child sexual abuse victims. The Court held that even though the child's psychologist's testimony was about matters commonly observed in sexual abuse victims in the psychological literature and in her own practice and was not based on "scientific principles," the evidence was admissible under Ind. Evid. R. 702(a), which provides that an individual may be qualified as an expert through knowledge, skill, experience, training, or education. The Court noted that the "specialized knowledge" in Ind. Evid. R. 702(a) does not necessarily mean scientific knowledge, and it does not need to be proven to be reliable by means of "scientific principles". The Court further opined that: (1) the child psychologist met the requirements to be deemed an expert witness; (2) the child psychologist was not testifying that because these behaviors were present in the victim, the victim had been abused; (3) the State offered the child psychologist's testimony because the victim's credibility had been called into question, and Ind. Evid. R. 702 provides that proper expert testimony is acceptable to address the issue of credibility once it is called into question; (4) generally accepted reliable scientific research indicates that child victims of sexual abuse may exhibit behavior that seems inconsistent with claims of abuse, and evidence of commons patterns of behavior in abuse victims would assist the trier of fact to understand the evidence, and this is permissible under Ind. Evid. R. 702(a).

In **Dexter v. State**, 945 N.E.2d 220, 222-3 (Ind. Ct. App. 2011), the Court held that the trial court did not abuse its discretion by allowing an expert to testify to her opinion concerning the abusive nature of the child's injury. The State presented an expert physician who testified that the child experienced "abusive head trauma"; the defendant appealed and claimed this was improper expert testimony about the defendant's guilt. In concluding that the defendant had not demonstrated that the trial court abused its discretion in allowing the testimony, the Court referenced Ind. Evid. R.

702(a), which provides that the trial court has the discretion to allow a witness, who is "'qualified as an expert by knowledge, skill, experience, training, or education,' to testify in the form of an opinion 'if scientific, technical or specialized knowledge will assist the trier-of-fact to understand the evidence or determine a fact in issue.'" The Court further noted that Ind. Evid. R. 704(a) provides that opinion testimony "'is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact.'" However, "'[w]itnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case...'"

In **In Re A.H.**, 751 N.E.2d 690, 697-8 (Ind. Ct. App. 2001), the parents and child appealed the trial court's determination that the child was a CHINS due to sexual abuse by the father. A pharmacist and a psychiatrist testified that the medications the child was taking could have side effects, including confusion, sleepiness, amnesia, intoxication and sedation. The Court was unpersuaded by the argument, noting that the parents and child did not point to testimony by these experts that the child was actually experiencing these side effects when she gave her report of sexual abuse to the state police detective and OFC family case manager. The Court further noted that hospital personnel had checked the child numerous times over a number of days, and their reports indicated that the child was oriented to person, time and place on the day she was interviewed by the detective and family case manager. The Court found that the trial court did not err in placing greater weight on the actual evidence of the child's mental status than it placed on expert evidence about what the child's mental status could have been.

In **Fleener v. State**, 656 N.E.2d 1140, 1141-2 (Ind. 1995), the Court held that the trial court should not have admitted psychotherapist's testimony regarding child sexual abuse syndrome, but the error was harmless. The expert witness testified about common behavior characteristics which were shared by sexually abused children, and identified those characteristics in the victim. This was offered as affirmative proof of the State's case, rather than rebuttal evidence when the victim's credibility was attacked. Expert testimony is permitted only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable, pursuant to Ind. Evid. R. 702(b). In this case, there was no foundational showing of reliability, so it was error to allow the testimony. However, the error was harmless, due to the amount of other evidence.

See the following criminal child battery and neglect cases in which physicians' testimony concerning the severity and cause of children's injuries supported Court's findings that there was sufficient evidence to sustain convictions: **Wright v. State**, 829 N.E.2d 928 (Ind. 2005) (medical experts testified that children's injuries were product of intentional acts rather than accidents); **Lush v. State**, 783 N.E.2d 1191 (Ind. Ct. App. 2003) (medical testimony regarding need for quick treatment for patient who lost consciousness supported conclusion that deprivation of medical care caused serious injury). But see **Beauchamp v. State**, 788 N.E.2d 881 (Ind. Ct. App. 2003), in which inadmissible expert rebuttal witness testimony on the causation of child's injures resulted in reversal of boyfriend's battery conviction due to State's failure to supplement expert's deposition to defense counsel with new information.

See also **Julian v. State**, 811 N.E.2d 392, 400 (Ind. Ct. App. 2004) (witness only testified that the fire was intentionally set, not that the defendant intended to set the fire, and therefore, the testimony did not violate evidentiary rules by testifying as to the intent, guilt, or innocent of the defendant); **Turner v. State**, 720 N.E.2d 440, 444-5 (Ind. Ct. App. 1999) (nurse testified that the "striation and stippling" in the child's genital area were "red flags" indicating a "possibility of something occurring in that area," and subsequently testified that the striation is indication of some type of abuse that "could be" from finger manipulation; Court found no evidence that the nurse impermissibly gave an opinion on the ultimate issue of guilt or the credibility of the child witness); **Matter of D.T.**, 547 N.E.2d 278 (Ind. Ct. App. 1989) (affirmed admissibility of social

worker and psychologist that mother had a "narcissistic personality and exhibited 'magical thinking'"; Court opined that "psychology and sociology often do not present quantitative standards by which to judge mental health and parental ability. Often their characterizations appear imprecise and susceptible to interpretation to the reader of the evidence.")

See also this Chapter at V.F. for discussion on expert opinion on child's credibility and child abuse.

V. C. Expert Not Required to Have First Hand Knowledge of Facts or Victim

Experts can base their opinions on facts or data, even if the expert witness has not personally observed these facts or data. This means that experts can testify to their opinions which may be based on inadmissible evidence, provided that it is of the type reasonably relied upon by experts in the field. Ind. Evid. R. 703. When the opinion of an expert is based on underlying facts or data, Ind. Evidence Rule 705 provides that the expert may be required to disclose the underlying facts or data on cross-examination.

An expert may base an opinion on facts personally known, learned from other sources, or from a combination of those sources. When relying on reports or information from others, the expert must show that he has sufficient expertise to evaluate the reliability of the information, and that the information is of a type normally relied upon by experts in the field. See **Ackerman v. State**, 51 N.E.3d 171 (Ind. 2016); **Allgire v. State**, 575 N.E.2d 600, 609 (Ind. 1991).

Hypothetical questions may be used in expert testimony. See also **Cansler v. Mills**, 765 N.E.2d 698 (Ind. Ct. App. 2002); **Henson v. State**, 535 N.E.2d 1189 (Ind. 1989) (defendant's expert could testify about whether the victim's behavior was consistent with rape trauma syndrome, despite the fact that the expert had not interviewed the victim); **In Re Paternity of K.G.**, 536 N.E.2d 1033 (Ind. Ct. App. 1989) (paternity blood testing case that discusses the use of expert opinion based on a hypothetical question and expert opinion based in part upon reports not in evidence and upon reports inadmissible under the hearsay rule).

In **Barrix v. Jackson**, 973 N.E.2d 22 (Ind. Ct. App. 2012), *trans. denied*, the Court determined that when an expert witness's own independent opinion is arrived at by relying on other sources, and that opinion is introduced into evidence, and the expert is subject to cross-examination, the information which informed the opinion may be admissible for use by the trial court in judging the weight that should be given to the opinion. This is true even if the information which informed the opinion is hearsay.

In **Ruiz v. State**, 926 N.E.2d 532, 535-7 (Ind. Ct. App. 2010), the Court concluded that while the trial court had erred in excluding the doctor's testimony that was offered by the defendant, the defendant was not prejudiced by the error because the doctor's testimony was speculative in nature. The trial court excluded the doctor's testimony based on the factors of unfair prejudice, confusion of the issues, or potential to mislead the jury. The Court opined that these factors are valid considerations in excluding evidence, however, they are not justified when the trial is a bench trial instead of a jury trial, since it is presumed that a trial judge knows the intricacies of evidentiary rules and can make informed ruling in light of the judge's experience and expertise. Consequently, the reasons cited by the trial court did not justify excluding the doctor's testimony. However, the defendant also had to show that he was prejudiced by the trial court's erroneous ruling. The Court opined that the doctor's testimony would not have been helpful because the doctor's opinion would have been speculative at best, and consequently unhelpful to the trier of fact.

In **Pendergrass v. State**, 913 N.E.2d 703, 708-9 (Ind. 2009) (Rucker, J. and Boehm J., dissenting), the Court found that a paternity index table created by an expert DNA analyst based on print-outs provided by the police laboratory was admissible, despite the Defendant's contention that it was inadmissible hearsay. The index was created and used by the expert witness to calculate the probability that the Defendant was the father of his daughter's aborted fetus. In so finding, the Court stated: "One general rule about opinions by qualified experts is that they may rely on information supplied by other persons who have supplied material which the expert regards as material, even if the supplier is not present to testify in court."

In **In Re A.J.**, 877 N.E.2d 805, 813-15 (Ind. Ct. App. 2007), *trans. denied*, the Court held that the trial court did not err in allowing a psychologist expert witness to testify as to his recommendations for treatment which were based, in part, on the results of polygraphs given to Mother and Father. Polygraph examination results are generally inadmissible absent a valid stipulation between the parties; however, the expert witness here did not testify as to the results of the polygraph examinations. The expert did testify as to his recommendations for treatment, which were based, in part, on his review of the polygraph results. Ind. Evid. R. 703 allows experts to testify to opinions based on inadmissible evidence, provided it is the type of evidence reasonably relied upon by experts in the field. The admissibility of the expert's polygraph testimony hinged on whether the use of polygraph examinations in the field of sexual abuse treatment is reasonably relied upon by experts in the field. The Court noted the expert's testimony as to the reliance on polygraph testing by experts in the field and concluded that the challenged testimony was admissible. Further, the Court held that Mother and Father had failed to provide any evidence showing that the trial court made an inappropriate or prejudicial inference based on the expert's testimony.

V. D. Hearsay in Expert Testimony

Experts can base their opinions on facts or data, even if the expert witness has not personally observed these facts or data. This means that experts can testify to their opinions which may be based on inadmissible evidence, provided that it is of the type reasonably relied upon by experts in the field. Ind. Evid. R. 703. When the opinion of an expert is based on underlying facts or data, Ind. Evidence Rule 705 provides that the expert may be required to disclose the underlying facts or data on cross-examination.

In **Barrix v. Jackson**, 973 N.E.2d 22 (Ind. Ct. App. 2012), *trans. denied*, the Court determined that when an expert witness's own independent opinion is arrived at by relying on other sources, and that opinion is introduced into evidence, and the expert is subject to cross-examination, the information which informed the opinion may be admissible for use by the trial court in judging the weight that should be given to the opinion. This is true even if the information which informed the opinion is hearsay.

See also **Ackerman v. State**, 51 N.E.3d 171 (Ind. 2016); **Fleener v. State**, 648 N.E.2d 652 (Ind. Ct. App. 1995), affirmed on this issue at 656 N.E. 2d 1140 (Ind. 1995) (physician who examined the child was allowed to testify what acts of sexual abuse had been reported to her prior to the examination; testimony not hearsay because physician was obtaining the child's medical history in a routine manner and the testimony was offered "to support the validity of her professional conclusions, not to prove the truth of the allegations"); **Matter of Relationship of M.B.**, 638 N.E.2d 804, 809, 810 (Ind. Ct. App. 1994) (psychologist's opinion that children would be traumatized by testifying in court could be based, in part, on counselor's notes about children); **Miller v. State**, 575 N.E.2d 272, 275 (Ind. 1991) (trial court erred in allowing the state's medical witness to testify that another doctor had told him that the defendant's girlfriend was diagnosed with a sexually transmitted disease; Court noted that an expert may in certain situations rely on

hearsay evidence in formulating an expert opinion, but the underlying hearsay was inadmissible in this case).

V. E. Expert Scientific Testimony

Ind. Evid. R. 702 pertains to expert witnesses' testimony, and their ability to testify in the form of opinions. A witness qualifies as an expert who can offer an opinion: (1) by knowledge, skill, experience, training, or education; and (2) if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue. Ind. Evid. R. 702(a). Only one of the characteristics listed in Ind. Evid. R. 702(a) is necessary to qualify an individual as an expert, meaning a witness may qualify as an expert on the basis of practical experience alone.

Expert scientific testimony is admissible only if the court is satisfied that the expert testimony rests upon reliable scientific principles, even when the witness is qualified as an expert. Ind. Evid. R. 702(b).

Ind. Evid. R. 702 assigns a "gatekeeping function" to the trial court of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. **Beal v. Blinn**, 9 N.E.3d 694 (Ind. Ct. App. 2014); **Hottinger v. Trugreen Corp.**, 665 N.E.2d 593, 596 (Ind. Ct. App. 1996), *trans. denied*. When faced with a proffer of expert scientific testimony, the court must make a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology can be applied to the facts in issue. Scientific knowledge admissible under Ind. Evid. R. 702 connotes more than subjective belief or unsupported speculation. Pertinent considerations include whether the scientific theory or technique can be empirically tested and whether it has been subjected to peer review and publication. **Lytle v. Ford Motor Co.**, 814 N.E.2d 301, 309 (Ind. Ct. App. 2004), *trans. denied*. In **Burnett v. State**, 815 N.E.2d 201, 208-9 (Ind. Ct. App. 2004), a kidnapping and robbery case, the Court concluded that the trial court did not abuse its discretion when it admitted the testimony of a police department fingerprint examiner regarding the reliability of a methodology of fingerprint analysis. The Court found that the examiner's testimony touched on at least one of the Daubert v. Merrell Dow Pharm. Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) factors, namely whether the theory has been generally accepted within the relevant field of study. The examiner's testimony showed that the fingerprint analysis method he had used was generally accepted by an international organization in the field and by fingerprint experts in Indiana and neighboring states.

Scientific evidence will be excluded if there is insufficient evidence to establish reliability. The proponent of expert testimony bears the burden of establishing the foundation and reliability of the scientific principles and tests upon which the expert's testimony is based. **Alcantar v. State**, 70 N.E.3d 353 (Ind. Ct. App. 2016) (when trial court is satisfied that the expert's testimony is based on reliable scientific principles, then the accuracy, consistency, and credibility of the expert's opinions may be left to cross-examination, presentation of contrary evidence, argument of counsel, and resolution by the trier of fact);**Hannan v. Pest Control Services, Inc.**, 734 N.E.2d 674, 679 (Ind. Ct. App. 2000), *trans. denied*. See **Lytle v. Ford Motor Co.**, 814 N.E.2d 301 (Ind. Ct. App. 2004) (testimony of two proposed experts properly excluded in products liability case due to failure to prove scientific reliability), *trans. denied*; **West v. State**, 805 N.E.2d 909 (Ind. Ct. App. 2004) (in criminal prosecution for illegal possession of anhydrous ammonia, State failed to present sufficient evidence to establish reliability of chemical test used by law enforcement officers to identify contents of fire extinguisher as anhydrous ammonia), *trans. denied*.

Expert testimony which is a matter of the observations of persons with specialized knowledge differs from the scientific principles governed by Ind. Evid. R. 702(b). **Malinski v. State**, 794 N.E.2d 1071, 1083, 1085 (Ind. 2003). In Malinski, a murder case, the Court held that the trial court did not abuse its discretion in admitting the testimony of a four year veteran forensic pathologist who had specialized knowledge of anatomy and physiology and expertise in examining and evaluating wounds. The testimony elicited was not scientific testimony governed by Ind. Evid. R. 702 (b) but instead was expert testimony based on specialized knowledge beyond that of lay observers.

See **Alcantar v. State**, 70 N.E.3d 353 (Ind. Ct. App. 2016) (when trial court is satisfied that the expert's testimony is based on reliable scientific principles, then the accuracy, consistency, and credibility of the expert's opinions may be left to cross-examination, presentation of contrary evidence, argument of counsel, and resolution by the trier of fact); See also **Daubert v. Merrell Dow Pharm., Inc.**, 509 U.S. 579 (1993); **Wallace v. Meadow Acres Manufactured Hous.**, 730 N.E.2d 809, 818 (Ind. Ct. App. 2000); **Ford Motor Co. v. Ammerman**, 705 N.E.2d 539 (Ind. Ct. App. 1999) (Court affirmed the admissibility of the scientific evidence and noted helpful but not exclusive factors to consider: (1) whether the theory or technique at issue can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; (5) and whether the technique is generally accepted within the relevant scientific community).

V. E. 1. Sexual Abuse Syndrome and Profile

The Indiana Supreme Court has addressed the ability to use child sexual abuse syndrome evidence in criminal case, and determined that it did not satisfy the reliability test to provide directly, through either implication or explicit testimony of the expert's conclusion, the fact the abuse actually occurred. **Steward v. State**, 652 N.E.2d 490, 498-99 (Ind. 1995). In Steward, the Court granted transfer on the defendant's argument that testimony on child sexual abuse syndrome, profile, or pattern evidence is scientifically unreliable to prove the occurrence of abuse. The Court stated that expert scientific testimony is admissible under Evid. R 702(b) "only if reliability is demonstrated to the trial court." Reliability can be established either by judicial notice or "by the proponent of the scientific testimony providing sufficient foundation to convince the trial court that the relevant scientific principles are reliable." The Court relied on Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993) in discussing reliability and coming to the conclusion that the child sexual abuse syndrome evidence did not satisfy the reliability test to prove directly, through either implication or explicit testimony of the expert's conclusion, the fact that abuse actually occurred.

However, evidence of child sexual abuse syndrome, or Child Sexual Abuse Accommodation Syndrome ("CSAAS"), can still be used in other manners. See **Steward** 652 N.E.2d at 499. Evidence of this syndrome can be used to rehabilitate the testimony of a child victim; once a child's credibility is called into question, testimony regarding such signs and symptoms is permissible and proper to help the trier of fact understand that certain reactions of the victim, such as recanting an allegation or delaying the reporting of abuse, is not atypical of a young sexual abuse victim. Such evidence is permissible under Ind. Evid. R. 702(a), which allows for specialized knowledge to assist the trier of fact to understand the evidence. Consequently, if a party presents evidence of unexpected behavior of a child as evidence that the abuse did not happen, or if a child recants a prior abuse allegation, the trial court can permit expert testimony based on reliable scientific principles regarding the prevalence of this behavior.

It may also be possible to use evidence of such syndromes without naming it as a syndrome. See **Baumholser v. State**, 62 N.E.3d 411, 416 (Ind. Ct. App. 2016), where the Court determined that the expert's testimony did not touch on the truth or falsity of the child's allegations, but rather, was only testimony about the how the victims of child molestation behave in general. Therefore, this was not improper evidence or improper vouching. The defendant had relied on Steward, which disallowed vouching testimony regarding Child Sexual Abuse Accommodation Syndrome evidence, but the Court deemed this reliance as misplaced. The Court noted that testimony regarding CSAAS was specifically addressed in Steward, but evidence about this syndrome was not mentioned in this case. The Court distinguished admissibility of evidence of CSAAS from the admissibility of "behavioral evidence without use of the term CSAAS," and held such evidence was admissible (citing State v. Velasquez, 944 N.E.2d 34 (Ind. Ct. App. 2011). Since the testimony of the expert in this case did not mention any syndrome, the testimony did not run afoul of Ind. Evid. R. 704(b) as applied in Steward.

If evidence of child sexual abuse accommodation syndrome is used, and there is evidence of a child victim's prior sexual history that could be used to impeach the child, it should be disclosed. See **Turney v. State**, 759 N.E.2d 671, 677-9 (Ind. Ct. App. 2001), where the defendant's conviction was reversed and remanded. The State, while offering testimony of an expert clinical psychologist regarding child sexual abuse accommodation syndrome, failed to disclose the child victim's prior sexual history. The defendant was entitled to impeach the child sexual accommodation syndrome evidence through cross-examination which could have established another source for the child victim's emotional upset. The introduction of the child sexual abuse accommodation syndrome evidence made the duty to disclose evidence favorable to the defendant mandatory.

For other cases that address the ability to use evidence of child sexual abuse syndrome, or Child Sexual Abuse Accommodation Syndrome as rebuttal or rehabilitation evidence, see

Alvarez-Madrigal v. State, 71 N.E.3d 887, 892-3 (Ind. Ct. App. 2017), where the Court held that the examining pediatrician's testimony that "some statistics will quote that less than two to three children out of a thousand are making up claims" was not prohibited vouching testimony. The defendant argued that the expert's testimony that "some statistics will quote that less than two to three children out of a thousand are making up claims" was vouching testimony prohibited by Steward and Ind. Evid. R. 704(b). The Court disagreed with this argument; the expert's testimony cited a research statistic, addressing how child molestation victims behave in general, and her statement was explaining that a lack of physical injuries is not indicative that a child is fabricating the abuse, and it was based on her education and experience. It was not a statement about the child's credibility or about the truth of the allegations.

Carter v. State, 31 N.E.3d 17, 29 (Ind. Ct. App. 2015), the expert and forensic examiner testified to matters including how children deal with sexual abuse, the disclosure process, and how and why children recant or retract their disclosures of abuse. The Court opined that the expert never mentioned the child victim in her testimony, never made any statement regarding the truth of the child's allegations, and purported to not have any opinion about the case at hand. The expert's testimony was permissible, and was broad, generalized, and included reference to results of research studies.

Baumholser v. State, 62 N.E.3d 411, 416 (Ind. Ct. App. 2016), where the Court determined that the expert's testimony did not touch on the truth or falsity of the child's allegations, but rather, was only testimony about the how the victims of child molestation behave in general. Therefore, this was not improper evidence or improper vouching. The Court distinguished admissibility of evidence of CSAAS from the admissibility of

"behavioral evidence without use of the term CSAAS," and held such evidence was admissible. Since the testimony of the expert in this case did not mention any syndrome, the testimony did not run afoul of Ind. Evid. R. 704(b) as applied in Steward.

In **Lyons v. State**, 976 N.E.2d 137, 142-3 (Ind. Ct. App. 2012), the Court held that even though the child's psychologist's testimony was about matters commonly observed in sexual abuse victims in the psychological literature and in her own practice and was not based on "scientific principles," the evidence was admissible under Ind. Evid. R. 702(a), which provides that an individual may be qualified as an expert through knowledge, skill, experience, training, or education. The Court noted that the "specialized knowledge" in Ind. Evid. R. 702(a) does not necessarily mean scientific knowledge, and it does not need to be proven to be reliable by means of "scientific principles". The Court disagreed with the defendant's assertion that the expert's testimony was barred by Steward, as here, the child's credibility had been called into question by the defendant. This evidence was offered under the exception noted in Steward, as a chance to rebut the defendant's claims of inconsistency in a child's testimony or actions and to rehabilitation the child's testimony.

For cases that address evidence that an alleged perpetrator fits a certain profile, see:

Lasater v. Lasater, 809 N.E.2d 380, n.8 (Ind. Ct. App. 2004), where the Court stated that Ind. Evid. R. 703 requires a showing that the expert is basing his opinion on evidence "reasonably relied upon by experts in the field." Mother had argued that Indiana case law consistently held that evidence of a profile of a child abuser does not meet that standard and is not admissible. The Court determined that this was inaccurate reliance on Steward, as it pertained to the admissibility of evidence of child abuse syndrome and profile evidence on the part of the victims, not evidence relating to profiles of the abusers. Secondly, Mother based her argument on Ind. Evid. R. 703, which is not addressed at all by Steward, so Mother's argument that the Steward case stands for the proposition that evidence of a profile of a child abuser does not meet the Rule 703 standard was misleading.

Buzzard v. State, 669 N.E.2d 996 (Ind. Ct. App. 1996), a psychologist who had neither examined the child victims nor the defendant gave expert testimony regarding the profiles exhibited by molested children and pedophiles (child molesters). On appeal, the Court did not address the propriety of the child victim profile, but ruled that admission of the pedophilia testimony was error. Expert testimony must meet the criteria of Ind. Evidence Rules 702 and 703 and must not be unduly prejudicial or misleading under Ind. Evidence Rule 403. The Court found that the expert pedophilia testimony had little relevance to whether the defendant committed the acts for which he was charged as required by Evid. R. 702(a), and the testimony should have been excluded as prejudicial under Evid. R. 403. The Court did not clarify whether the pedophilia testimony would pass the scientific reliability test of Evid. R. 702(b).

For case law on the inability to use syndrome testimony to prove that abuse happened, see:

Fleener v. State, 656 N.E.2d 1140, 1141 (Ind. 1995), where the Indiana Supreme Court ruled it was error to admit expert testimony on the characteristics of sexual abuse victims to prove that the abuse occurred. The expert's testimony named common behavior characteristics shared by sexually abused children and then identified which of those characteristics were evident in the child victim. The testimony was offered as affirmative proof of abuse. The issue was not whether the witness possessed sufficient expertise to testify as an expert, but whether there had been an adequate foundational showing of reliability for the proffered testimony as is required by Ind. Evid. R. 702(b). Because

there was "no foundational showing of reliability," it was error to admit the testimony for the purposes of proving abuse.

See this Chapter at XI.A for discussion on vouching; see this Chapter at V.E.4 for Post Traumatic Stress Disorder and Rape Trauma Syndrome; see this Chapter at V.E.5 for discussion of battered woman syndrome.

V. E. 2. Expert Testimony on "Suggestiveness Theory"

In **Palmer v. State**, 640 N.E.2d 415, 420 (Ind. Ct. App. 1994), a clinical psychologist testified over the State's objection "regarding his studies on the truthfulness of allegations of child sexual abuse," explaining that "children are vulnerable to memory distortion of alleged molestation and to adopting suggestions from authority figures such as interviewers, counselors or child welfare authorities." The issue on appeal was whether the trial court erred in allowing the State to offer witnesses that it had not listed in pre-trial discovery to rebut the "suggestiveness theory." The Court found no error in the admission of the rebuttal testimony, and the reliability of the "suggestiveness theory" was not challenged on appeal.

Practice Note: Palmer was superseded by statute on other grounds.

V. E. 3. Expert Testimony on Minnesota Multiphasic Personality Inventory (MMPI)

In **Watson v. State**, 784 N.E.2d 515, 520 (Ind. Ct. App. 2003), the conviction of the mother's fiancé for battery resulting in serious bodily injury to a three-year-old child was affirmed. The defendant argued that the trial court erred in allowing the testimony of a psychologist who had examined the defendant pursuant to court orders at the request of Child Protective Services. The psychologist administered an MMPI to the defendant and interpreted it as showing that the defendant was more likely to submit to authority and that the defendant's score on the "over-control hostility scale" was close to the clinical level. The defendant had been administered a second MMPI by a different psychologist whose expert testimony was offered in the criminal trial to support the claim that the defendant's statement to the police about the abuse was the result of coercion. The defendant argued that his communications with the Child Protective Services psychologist were privileged and the Court agreed. The Court found, however, that the defendant waived the privilege by voluntarily putting in issue his mental condition as an affirmative defense. The Court opined that the trial court did not abuse its discretion in admitting the testimony of the CPS psychologist into evidence.

In **Tipton v. Marion County DPW**, 629 N.E.2d 1262, 1269-70, n.5 (Ind. Ct. App. 1994), the welfare department presented expert testimony relating the results of the MMPI to the ability of the fathers to parent, and the issue of whether the fathers presented a danger to the well-being of their children. The Court concluded that the MMPI did not show that one of fathers was a threat to the child; however, the MMPI results of the other father and other evidence did show "a reasonable probability that the emotional problems evidenced by the MMPI which prevent him from being a capable parent will not be remedied." The Court questioned the validity of MMPI evidence, calling its use "disturbing" because of the reason it was offered, namely, as the "the best way to determine how valid a particular interpretation [of the test] might be would be to go and look at the person's past behavior and then, ... to look and see how well it matches up with future actions on the individual's part." The reliability of the MMPI both as a personality assessment and a predictor of future conduct was never established, but the Court felt that assessing its credibility was a matter for the trial court.

See also the following criminal cases on admissibility of MMPI results: **Ulrich v. State**, 550 N.E.2d 114 (Ind. Ct. App. 1990) (inadequate foundation for admission of expert testimony

that defendant's MMPI results were inconsistent with charged sexual activity); **Byrd v. State**, 593 N.E.2d 1183, 1184-1185 (Ind.1992) (trial court did not err in excluding expert testimony that results of defendant's MMPI showed his character was inconsistent with committing murder).

V. E. 4. Post-Traumatic Stress Syndrome and Rape Trauma Syndrome

In **Henson v. State**, 535 N.E.2d 1189 (Ind. 1989), the Indiana Supreme Court affirmed the use of expert testimony on post-traumatic stress syndrome to prove and defend against a rape conviction.

In **Goodwin v. State**, 573 N.E.2d 895, 898 (Ind. Ct. App. 1991), the Court allowed expert testimony to explain that the actions of the thirteen-year-old rape victim were consistent with post-traumatic stress syndrome or rape trauma syndrome, as bearing upon the issue of whether the rape occurred.

In **State v. Petry**, 524 N.E. 2d 1293, 1296 (Ind. Ct. App. 1988), the trial court ruled, and the Court of Appeals affirmed, that the expert testimony on the child's psychological condition did not suffice, in this particular case, as corroborative evidence for purposes of admission of the child's out-of-court statement. The statement of facts makes brief reference to the expert's testimony on post-traumatic stress syndrome, but the validity of the syndrome was not at issue on appeal.

In **Simmons v. State**, 504 N.E.2d 575 (Ind. 1987), the Court approved of the State's use of rape trauma syndrome to show that the victim's actions were consistent with the syndrome.

V. E. 5. Battered Women's Syndrome

IC 35-41-3-11, which is titled "Mental disease or defect; use of justifiable reasonable force" was formerly commonly referred to as the "effects of battery" statute. **Marley v. State**, 747 N.E.2d 1123, 1127, 1130 (Ind. 2001). IC 35-41-3-11(b) provides that the statute applies under the following circumstances when the defendant raises the issue that the defendant was at the time of the alleged crime suffering from the effects of battery as a result of the past course of conduct of the individual who is the victim of the alleged crime:

(1) The defendant raises the issue that the defendant was not responsible as a result of mental disease or defect under IC 35-41-3-6, rendering the defendant unable to appreciate the wrongfulness of the conduct at the time of the crime.

(2) The defendant claims to have used justifiable reasonable force under IC 35-41-3-2. The defendant bears the burden of showing evidence of the reasonableness of the defendant's belief in the imminence of the use of unlawful force or, when deadly force is employed, the imminence of serious bodily injury to the defendant or a third person or the commission of a forcible felony.

Effects of battery is defined at IC 35-31.5-2-109 as follows: "a psychological condition of an individual who has suffered repeated physical or sexual abuse inflicted by another individual who is the:

(1) victim of an alleged crime for which the abused individual is charged in a pending prosecution; and

(2) abused individual's:

(A) spouse or former spouse;

(B) parent;

(C) guardian or former guardian;

(D) custodian or former custodian; or

(E) cohabitant or former cohabitant."

In **Green v. State**, 65 N.E.3d 620, 632-3 (Ind. Ct. App. 2016), the Court held that the trial court did not err when it excluded the testimony of the proposed expert; the defendant could not admit evidence of battered woman syndrome after she withdrew her defense which used the effects of battery statute. The Court noted that while "BWS evidence may be admissible for other purposes in other contexts, its use to explain the impact of past violence by the victim upon the defendant's behavior at the time of the crime is only admissible as it bears upon the defenses of insanity or self-defense."

In **Schermerhorn v. State**, 61 N.E.3d 375, 379-80 (Ind. Ct. App. 2016), the Court held that IC 35-41-3-11 does not provide for the effects of battery to be extended to witnessing battery on third person. The defendant asserted that she was not criminally liable pursuant to the effects of battery statute, as well as IC 35-41-3-2(c), which provides that a person is justified in using reasonable force against any other person to protect the person or a third person from what the person reasonably believes to be the imminent use of unlawful force. The Court noted that the plain language of IC 35-41-3-11 requires the defendant to show that he or she was "suffering from the effects of battery as a result of the past course of conduct" of the victim. However, "past course of conduct" is limited to "repeated physical or sexual abuse" of the defendant by the victim. IC 35-31.5-2-109. The statutes do not address acts by the victim against third parties in the defendant's presence.

In **Marley v. State**, 747 N.E.2d 1123, 1127, 1130 (Ind. 2001), the defendant sought to introduce evidence from a clinical psychologist who had diagnosed the defendant with dysthymia, post-traumatic stress disorder, polysubstance abuse, and mixed personality disorder stemming from early childhood molestation by the murder victim. The Court held, as an issue of first impression, that the purpose of the "effects of battery" statute was to require that battered women's syndrome evidence be limited to self-defense and insanity.

In **Iqbal v. State**, 805 N.E.2d 401, 409-10 (Ind. Ct. App. 2004), the Court affirmed the defendant husband's conviction and found that the trial court did not abuse its discretion in allowing expert testimony concerning battered woman's syndrome. The expert testimony was offered to education the jury on the complexity of behavior of domestic violence victims and to explain the victim wife's reason for allowing the defendant husband to enter her home despite a previous assault and a protective order.

See also **Barrett v. State**, 675 N.E.2d 1112, 1115 (Ind. Ct. App. 1996) (expert testimony on Battered Women's Syndrome was admissible; containing discussion of the syndrome); **Carnahan v. State**, 681 N.E.2d 1164 (Ind. Ct. App. 1997) (expert testimony of BWS admissible to explain why wife recanted allegations of abuse at husband's battery trial).

V. E. 6. Expert Testimony on Child Abuse Potential Inventory

In **B.H. v. Indiana Dept. of Child Services**, 989 N.E.2d 355, 360-2 (Ind. Ct. App. 2013), the Court affirmed the trial court's judgment terminating Mother's parental rights to her two children. A social worker assessed Mother's parenting skills through the Child Abuse Potential Inventory (CAPI) and testified that the children would be at risk from abuse by Mother. The Court concluded that the social worker's testimony was sufficient to establish the reliability of the CAPI. Mother argued that the trial court erred in allowing the social worker's expert testimony because there was no showing that CAPI is a test based on reliable scientific methodology or technique. The Court said that under Evid. R. 702, no specific test is required to establish the reliability of a scientific process. The Court observed that trial

courts may consider: (1) whether the technique has been or can be empirically tested; (2) whether the technique has been subjected to peer review and publication; (3) the known or potential rate of error, as well as the existence and maintenance of standards controlling the technique's operation; and (4) general acceptance within the relevant scientific community. The Court said that, although all of the above factors and others may be relevant, none is not by itself dispositive, and not all need to be present for a trial court to find that the preferred evidence rests upon reliable principles.

In **Lasater v. Lasater**, 809 N.E.2d 380, 390-92 (Ind. Ct. App. 2004) a dissolution custody and visitation case, the Court affirmed the trial court's decision to grant custody to Father and to limit Mother's visitation with the child. The Court was unpersuaded by Mother's argument that the admission of expert testimony of a psychologist, who had evaluated Father, violated Mother's due process rights. The psychologist had administered several psychological tests to Father, including the Child Abuse Potential Inventory. The psychologist testified that the Child Abuse Potential Inventory did not confirm or disconfirm whether abuse had occurred, but it helped the psychologist to compare a person's scores with those of adjudicated abusers. The psychologist's testimony was that Father's test scores did not lie within the abusive range. The Court opined that, while the psychologist's testimony was in the vein of profile testimony, it was specific to Father's score as it related to scores of known abusers and was not the type of impermissible profile testimony discussed in Buzzard v. State, 669 N.E.2d 996 (Ind. Ct. App. 1996).

See also **In In Re C.K.**, 70 N.E.3d 359 (Ind. Ct. App. 2016) (Court affirmed the juvenile court's determination that the child, who was four months old at the time the CHINS petition was filed, was a CHINS pursuant to IC 31-34-1-1 and IC 31-34-1-2; opinion mentions that Mother was administered both the MMPI and the CAPI); **In Re R.S.**, 56 N.E.3d 625 (Ind. 2016) (Indiana Supreme Court reversed the trial court's order terminating Father's parental rights to his ten-year-old child; opinion references CAPI assessment); **Blasius v. Wilhoff**, 863 N.E.2d 1223 (Ind. Ct. App. 2007) (Court affirmed the trial court's award of custody of the child to third party custodians rather than Father; the CAPI assessment is mentioned in the trial court's findings).

V. F. Expert Opinion on Child's Credibility and Child Abuse

Recent Indiana case law makes it very difficult to use expert opinions that reflect even indirectly on a child's credibility, and has expanded the umbrella of what constitutes impermissible vouching. See this Chapter at XI. for case law and discussion. This affects experts as well as skilled witnesses and lay witnesses. Cases in this section should be read carefully by practitioners in light of more recent case law.

V. F. 1. Child's Actions and Conditions Not Inconsistent With Child Abuse

In **Hook v. State**, 705 N.E.2d 219, 222 (Ind. Ct. App. 1999), the Court ruled that it was not error to allow the police detective to testify that based upon his professional experience, it was not uncommon for children involved in child molestation cases to give inconsistent statements over time. The Court found that the testimony was "not a direct comment upon the credibility" of the child, but was rather an "indirect comment" on the child's credibility, as allowed by Indiana law. *Practice Note*: Practitioners should be cautious in using this case, in light of **Hoglund v. State**, 962 N.E.2d 1230, 1236 (Ind. 2012).

In **Steward v. State**, 652 N.E.2d 490, 499 (Ind. 1995), the Court determined that expert testimony may be admitted that child's behavior fits within the general class of reported child abuse victims, in response to defense testimony that child's behavior is inconsistent with

child abuse. The Court opined that Child Sexual Abuse Accommodation Syndrome did not satisfy the reliability test to prove directly, through either implication or explicit testimony of the expert's conclusion, the fact that abuse actually occurred. However, evidence of this syndrome can be used to rehabilitate the testimony of a child victim; once a child's credibility is called into question, testimony regarding such signs and symptoms is permissible and proper to help the trier of fact understand that certain reactions of the victim, such as recanting an allegation or delaying the reporting of abuse, is not atypical of a young sexual abuse victim. For more detail on this case, see this Chapter at V.E.1.

To the extent that these cases touch on whether or not testimony is vouching, see this Chapter at XI.A. for case law. While accrediting testimony (expert or lay witness testifies that the child is not prone to exaggerate or fantasize about sexual matters) and vouching testimony (witness states that the allegation or testimony of the child is truthful) used to be treated differently, Indiana case law now prohibits both, and the Indiana Supreme Court has found them to be virtually indistinguishable. Furthermore, recent case law has called into question the ability to use evidence of what coaching is, and whether or not a child is exhibiting signs of coaching.

V. F. 2. Expert Testimony on Child's Manner of Testifying

In **Lyons v. State**, 976 N.E.2d 137 (Ind. Ct. App 2012), the Court held that the expert's testimony on behavior that was typical of children who had been sexually abused was admissible. The Court noted that the expert was called to testify only when the defendant had repeatedly attacked the child's credibility on those exact behaviors, and the expert did not testify that there was any recognized child abuse syndrome or that the child fit the profile.

In **State v. Velasquez**, 944 N.E.2d 34, 46 (Ind. Ct. App. 2011), the Court determined that the testimony of the expert regarding PTSD should have been permitted, as it did not constitute impermissible vouching testimony. The expert's testimony explained PTSD and stated that the victim's behavior were consistent with that diagnosis. This would show that the victim experienced a traumatic event, not what the event was, and whether the expert believed her allegations to be credible.

In **Stout v. State**, 612 N.E.2d 1076, 1080 (Ind. Ct. App. 1993), the Court held that the expert testimony did not constitute vouching and noted that the expert never asserted a belief that the victim was telling the truth. The Court found that the expert testimony showed the "victim's purported memory loss to be a credible explanation for the revelation of details not previously disclosed" and noted that expert testimony "that an individual's subsequent behavior is consistent or inconsistent with that observed from other victims" is a type of evidence which is admissible.

V. F. 3. Expert Testimony on Delay in Reporting and Recanting Allegations of Child Abuse or Neglect

Carter v. State, 31 N.E.3d 17, 29-30 (Ind. Ct. App. 2015), *rehearing denied*, where the defendant argued that the forensic interviewer impermissibly vouched for the child's credibility when she testified about the dynamics of child abuse, the disclosure process, when and why a child may recant his disclosure of the abuse, and the problems of different genders in disclosing abuse. The Court opined that this did not run afoul of Ind. Evid. R. 704(b), since she never mentioned the child, the case at hand, or the truth or falsity of the child's allegations. The testimony was broad, generalized, and included reference to results of research studies. The Court found that the testimony provided information to the jury

beyond that commonly understood by laypersons, and, under the circumstances, her expert testimony did not constitute impermissible vouching testimony.

Alvarez-Madrigal v. State, 71 N.E.3d 887, 892-3 (Ind. Ct. App. 2017), where the Court held that the examining pediatrician's testimony that "some statistics will quote that less than two to three children out of a thousand are making up claims" was not prohibited vouching testimony. The defendant argued that the expert's testimony that "some statistics will quote that less than two to three children out of a thousand are making up claims" was vouching testimony prohibited by Steward and Ind. Evid. R. 704(b). The Court disagreed with this argument; the expert's testimony cited a research statistic, addressing how child molestation victims behave in general, and her statement was explaining that a lack of physical injuries is not indicative that a child is fabricating the abuse, and it was based on her education and experience. It was not a statement about the child's credibility or about the truth of the allegations.

Steward v. State, 652 N.E.2d 490, 499 (Ind. 1995), where the Court noted the probable admissibility of expert testimony that it is not atypical of a young sexual abuse victim to recant an allegation or delay reporting abuse.

Stewart v. State, 521 N.E.2d 675, (Ind. 1988), where the Indiana Supreme Court affirmed the admission of the testimony of a social worker who was qualified by the court as an expert in counseling sex offense victims. The expert testified that it was not unusual for victims to fail to report sexual crimes "because of the fact that victims are often embarrassed of the sexual nature of the abuse and secondly people don't have the confidence that the system will do anything about it." Id. at 677. The Supreme Court noted that the expert had considerable experience in the area of sexual abuse and that the issue of reporting delay is a relevant matter on which jurors are not as well qualified to form an opinion.

V. F. 4. Expert Testimony That Child Not Prone to Exaggerate or Fantasize

Expert testimony that a child is not prone to exaggerating or fantasizing about sexual matters is no longer permissible, as this has been deemed the functional equivalent of saying that the child is telling the truth.

In **Hoglund v. State**, 962 N.E.2d 1230 (Ind. 2012), the Court examined the admissibility of vouching testimony in the context of child sex abuse allegations. The Court concluded that testimony concerning whether an alleged child abuse victim "is not prone to exaggerate or fantasize about sexual matters" (quoting Lawrence v. State, 464 N.E.2d 923, 295 (Ind. 1984)) is an indirect but functional equivalent of saying the child is "telling the truth". The Court expressly overruled this aspect of the Lawrence opinion as being inconsistent with the mandate of Ind. Evid. R. 704(b), which specifically prohibits witnesses from testifying as to whether another witness "testified truthfully." The Court also considered the question of whether an exception to the prohibition of Rule 704(b) for child victims of alleged sexual abuse should be carved out. The Court noted that there was an underlying rationale to support some accrediting of a child witness' testimony by allowing such evidence as lends credence to a victim's testimony describing acts which would otherwise seem improbable. The Court observed that, allegations of child molesting in this twenty-first century are all too common, and that the need for accrediting testimony is not as acute as it may have been over two decades ago. The Court therefore declined to carve out an exception to Evid. R. 704(b) for sex abuse cases. The Court clarified that the Hoglund ruling does not undercut the decision in Carter v. State, 754 N.E.2d 877 (Ind. 2001) discussed below.

In **Carter v. State**, 754 N.E.2d 877, 881-2 (Ind. 2001), cert. denied, 537 U.S. 831 (2002), a criminal child molestation case, a psychologist specializing in autism who had previously worked with the autistic child victim testified that autistic children generally have a difficult time deceiving others, lack imagination, and are poor liars. The psychologist further testified that she would never say that absolutely every child with autism has no imagination and is incapable of making up something that didn't happen. The Court concluded that, based on the entire context of the psychologist's testimony, she came close to, but did not cross the line into impermissible vouching and the trial court had not erred in permitting the psychologist's testimony.

Other, older cases which may remain useful in light of Hoglund, since Hoglund does not directly touch on the issues in the case, include:

Krumm v. State, 793 N.E.2d 1170, 1175-76, 1197 (Ind. Ct. App. 2003), where the child victim's treating psychologist testified that the child was "firmly based in reality", "able to carry on a coherent conversation," "had a very balanced ability" to store and retrieve memories, and had no difficulty distinguishing fantasy from reality. The defendant failed to object to the admission of this testimony and did not demonstrate fundamental error.

Settle v. State, 526 N.E.2d 974, 976 (Ind. 1988), where the Court affirmed the admission of an expert's opinion that the eight-year-old victim's "perception of reality was accurate." The Court also affirmed the testimony of the child's teacher that the "child was aware of what was going on in the classroom and often answered questions correctly." Neither witness commented upon the truthfulness of the child's testimony.

V. F. 5. Expert Cannot Testify Child is Truthful or Allegations of Abuse are True

Ind. Evidence Rule 704(b) provides that no witness may testify about the truth or falsity of allegations or testify whether another witness has testified truthfully. For other discussion on credibility of child witnesses, see this Chapter at XI.

In **Wilkes v. State**, 7 N.E.3d 402, 405 (Ind. Ct. App. 2014), the Court held that while the detective's statements amounted to impermissible vouching testimony, the error in admitting the testimony was harmless. The Court opined that the other evidence in the record was so substantial that the admission of the impermissible vouching evidence was harmless. The detective testified as follows: (1) the child's reports were consistent; (2) he stated to the defendant that he did not see a reason why the child would lie about the incident; (3) the defendant did not know why the child would make up such accusations; (4) he had discussed with the defendant whether the child's mother would have been motivated to coach the child; and (5) since there was no ongoing custody battle, he didn't believe that a custody battle or the possibility of Mother coaching the child was the reason that the child made the accusations. Taken together, this constituted impermissible indirect vouching that was deemed inadmissible in Hoglund v. State, 962 N.E.2d 1230 (Ind. 2012).

In **Hoglund v. State**, 962 N.E.2d 1230, 1236 (Ind. 2012), the Court overruled that portion of Lawrence v. State, 464 N.E.2d 923, 295 which permitted a witness to testify that a child abuse victim is not prone to exaggerate or fantasize about sexual matters, and cannot testify that a child is truthful. The Court clarified that the Hoglund ruling does not undercut the decision in Carter v. State, 754 N.E.2d 877 (Ind. 2001) discussed in this section.

In **Gutierrez v. State**, 961 N.E.2d 1030, 1034-35 (Ind. Ct. App. 2012), the Court reversed and remanded the matter for a new trial, concluding that the trial court had improperly admitted testimony that vouched for the truthfulness of the child-victim from two State

witnesses. Ind. Evid. R. 704(b) provides that a witness cannot testify as to whether the witness believes that another witness has testified truthfully. Indiana case law provides that testimony to bolster a child's testimony in a child molesting case is prohibited, because it is the duty of jurors to determine what weight they should place on a witness's testimony. Asking a witness whether she formed an opinion as to the child-victim's truthfulness, and having a witness state that she "absolutely" believed the child-victim's testimony is impermissible. The admission of this testimony was a fundamental error, substantially affecting the defendant's rights.

In **Carter v. State**, 31 N.E.3d 17, 29-30 (Ind. Ct. App. 2015), *rehearing denied*, the defendant argued that the forensic interviewer impermissibly vouched for the child's credibility when she testified about the dynamics of child abuse, the disclosure process, when and why a child may recant his disclosure of the abuse, and the problems of different genders in disclosing abuse. The Court opined that this did not run afoul of Ind. Evid. R. 704(b), since she never mentioned the child, the case at hand, or the truth or falsity of the child's allegations. The testimony was broad, generalized, and included reference to results of research studies. The Court found that the testimony provided information to the jury beyond that commonly understood by laypersons, and, under the circumstances, her expert testimony did not constitute impermissible vouching testimony.

Bean v. State, 15 N.E.3d 12, 18-21 (Ind. Ct. App. 2014), where the Court concluded that multiple witnesses and others had impermissibly vouched for the child. The mother impermissibly vouched for the child when she testified that she believed that the defendant had done something to child after talking to her child. The DCS investigator impermissibly vouched for the child by testifying that he substantiated the case by drawing a conclusion that the allegations did happen. The Court also determined that the prosecutor engaged in inappropriate vouching by referencing the DCS investigator's testimony and saying that "we know what happened" because of the DCS investigator's impermissible vouching testimony.

In **Carter v. State**, 754 N.E.2d 877, 881-2 (Ind. 2001), *cert. denied*, 537 U.S. 831 (2002), a criminal child molestation case, a psychologist specializing in autism who had previously worked with the autistic child victim testified that autistic children generally have a difficult time deceiving others, lack imagination, and are poor liars. The psychologist further testified that she would never say that absolutely every child with autism has no imagination and is incapable of making up something that didn't happen. The Court concluded that, based on the entire context of the psychologist's testimony, she came close to, but did not cross the line into impermissible vouching and the trial court had not erred in permitting the psychologist's testimony.

See also **Jones v. State**, 581 N.E.2d 1256, 1257-1258 (Ind. Ct. App. 1991) (caseworker testified that child's videotaped statements were consistent with the child's in-court testimony, that the child demonstrated behavioral characteristics consistent with a history of sexual abuse, and that she believed the child; this last part was an assertion that the child was telling the truth, and thus was impermissible opinion testimony); **Okuly v. State**, 574 N.E. 2d 315 (Ind. Ct. App. 1991) (error for AFDC caseworker to testify that eleven-year-old child victim was telling the truth, but error not fundamental); **Saylor v. State**, 559 N.E.2d 332, 334 n. 2 (Ind. Ct. App. 1990) (error for therapist to testify that she perceived the child's allegations were truthful); **Stewart v. State**, 555 N.E.2d 121, 125 (Ind. 1990) (reversible error to allow psychologist to testify that statements of learning disabled minor victim "could be considered trustworthy").

V. F. 6. Expert Testimony on Credibility of Children Generally

In using expert on the credibility of children at large, as well as how the general child population reacts to certain events and trauma based on research, practitioners should be careful that this testimony is general, researched based, and does not opine on the case at hand. This is in light of **Hoglund v. State**, 962 N.E.2d 1230, 1236 (Ind. 2012), **Steward v. State**, 652 N.E.2d 490, 499 (Ind. 1995), and **Sampson v. State**, 38 N.E.3d 985 (Ind. 2015).

In **Carter v. State**, 31 N.E.3d 17, 29-30 (Ind. Ct. App. 2015), *rehearing denied*, the defendant argued that the forensic interviewer impermissibly vouched for the child's credibility when she testified about the dynamics of child abuse, the disclosure process, when and why a child may recant his disclosure of the abuse, and the problems of different genders in disclosing abuse. The Court opined that this did not run afoul of Ind. Evid. R. 704(b), since she never mentioned the child, the case at hand, or the truth or falsity of the child's allegations. The testimony was broad, generalized, and included reference to results of research studies. The Court found that the testimony provided information to the jury beyond that commonly understood by laypersons, and, under the circumstances, her expert testimony did not constitute impermissible vouching testimony.

In **Krumm v. State**, 793 N.E.2d 1170, 1180-81, 1185 (Ind. Ct. App. 2003), a criminal child molestation case, the Court opined that admission of testimony of the child victim's psychologist regarding research into false memories of children was not fundamental error. The psychologist testified that research in the field of traumatic memory suggested that traumatic memory was less suggestive to manipulation than memories of typical events. In response to the State's hypothetical question as to whether it was possible for a child to formulate a false memory based on seeing a pornographic video several times, the psychologist testified it was highly unlikely. The defendant argued that the psychologist's opinion was not supported by the research she relied upon, but the Court held that defendant's argument went to the weight, not the admissibility, of the psychologist's testimony. The Court also held that a hypothetical question posed to the defendant's expert psychologist as to whether the child victim could "come up with some kind of sexual history" based on having viewed a pornographic video was based on facts not established by evidence and the striking of the expert's answer by the trial court was not an abuse of discretion. The defendant's expert psychologist had testified without objection that a child could view a pornographic video and later recall those views as a personal experience if the child felt pressured to come up with a sexual history.

See also **Carter v. State**, 754 N.E.2d 877, 881-2 (Ind. 2001), *cert. denied*, 537 U.S. 831 (2002) (psychologist specializing in autism who had previously worked with the autistic child victim testified that autistic children generally have a difficult time deceiving others, lack imagination, and are poor liars; based on the entire context of the psychologist's testimony, she came close to, but did not cross the line into impermissible vouching and the trial court had not erred in permitting the psychologist's testimony); **Pedrick v. State**, 593 N.E.2d 1213 (Ind. Ct. App. 1992) (trial court excluded expert testimony on how children's memories, perceptions, and interpretations of events are affected by passage of time, questioning by adults, and conversations with peers; Court found that such testimony was not material or relevant, and was properly excluded by the trial court); **Allgire v. State**, 575 N.E.2d 600, 608 (Ind. 1991) (Court affirmed exclusion of expert testimony because it was of a general nature and related to the reliability of all statements by children, not just sex abuse victims).

V. G. Expert Testimony on Physical Evidence in Sexual Abuse

Indiana case law generally affirms admission of expert testimony on the child's injuries. The following criminal child molestation cases in which expert medical testimony contributed to the Court's finding that sufficient evidence supported conviction:

Brakie v. State, 999 N.E.2d 989, 998 (Ind. Ct. App. 2013), where the sexual assault nurse examined the child and observed that while she had no bruising to her external genitalia, the child had a very large tear that was still actively bleeding and extended almost to her rectum, and that the child's injuries were not consistent with a straddle fall but were consistent with a tool being pushed into the child's vagina.

Newbill v. State, 884 N.E.2d 383, 392, 398 (Ind. Ct. App. 2008), *trans. denied*, where the Court affirmed Defendant's conviction for rape of an adult, where testimony of the trained and certified sexual assault nurse examiner (SANE), who examined the victim, was offered as expert testimony without objection. The SANE's testimony included her expert opinion that the specific areas of the victim's vagina that she examined and observed were red and irritated – an indication of forced sex. Additionally, the Court found that there was no abuse of discretion in the trial court's permitting the SANE to testify as an expert. In this regard, the Court noted (1) she had been a registered nurse for thirty-six years, and associated with emergency department medicine since 1979; (2) she had worked as a SANE ever since she had been certified as such in 1998; (3) she testified using exhibits to demonstrate the findings as to the victim; and (4) her specialized knowledge was helpful for the jury to understand the import of the exhibits which reflected physical findings related to alleged forced sexual activity as well as the meaning of those findings.

D.G.B. v. State, 833 N.E.2d 519, 528 (Ind. Ct. App. 2005), a delinquency case in which the Court affirmed the finding that the juvenile was delinquent for committing child molesting, the doctor who performed the six-year-old child victim's surgery testified that her injury was consistent with penetration of child's vagina with a knife and fork and did not appear to be result of a "straddle" injury; child's statement to mother regarding cause of injury was supported by doctor's testimony.

Gasper v. State, 833 N.E.2d 1036, 1044 (Ind. Ct. App. 2005), *trans. denied*, where, even though doctor testified that eighteen-month-old girl's hymen was still intact, doctor could not conclude that no penetration had occurred. Based on severity of child's internal injuries, her sex organ had been penetrated multiple times with a finger.

Marshall v. State, 832 N.E.2d 615, 622-23 (Ind. Ct. App. 2005) *trans. denied*, where the thirteen-year-old child's treating physician indicated that lacerations near child's anus were consistent with child's recitation of anal penetration.

Kien v. State, 782 N.E.2d 398, 403-04, 410 (Ind. Ct. App. 2003), *trans. denied*, where the physician testified that the child's hymen had been disrupted, there was increased vascularity to the area beneath the hymen which indicated trauma, there was a possible scar in the area, all these conditions were abnormal, were not the types of injuries caused by a fall on a bicycle seat, and all medical findings were consistent with penetration.

Simmons v. State, 746 N.E.2d 81, 87 (Ind. Ct. App. 2001), *trans. denied*, where the following testimony from a pediatrician supported the child molestation conviction:
(1) child's vagina was dilated and her hymen was gone; (2) child had been penetrated in some manner; (3) it would not be unusual for emergency room physician who was looking for major trauma such as bleeding and bruising to overlook manifestations of vaginal penetration which were not obvious.

For purposes of admitting a statement a child makes as part of the Ind. Evid R. 803 hearsay exceptions, it is very important that a child who is about to undergo a medical exam related to abuse understand the nature and purpose of the exam, as well as how important it is report information truthfully. The statement must also be made to medical personnel. See **Mastin v.**

State, 966 N.E.2d 197 (Ind. Ct. App. 2012) (holding that a child's statements to her grandmother about alleged sexual abuse, made after a medical examination had concluded and when no medical professionals were present, was not a statement made to medical personnel and thus, not admissible under the medical diagnosis exception to the hearsay rule).

V. H. Expert Testimony on Harm to Child by Parental Drug Usage

In **White v. State**, 547 N.E.2d 831, 836 (Ind. 1989), the Court of Appeals affirmed the neglect of dependent conviction against the parent of a ten-year-old child for knowingly exposing the child to an environment of illegal drug use. An expert testified that a "child's exposure to an environment of illegal drug use constitutes an actual and appreciable danger by causing the drug-using parent to neglect that child's physical well-being."

However, in **Perrine v. Office of Child Services**, 866 N.E.2d 269, 276-7 (Ind. Ct. App. 2007), the Court reversed the juvenile court's judgment determining the child to be a CHINS as to Mother. The Court held that a single admitted use of methamphetamine, outside the presence of the child, without more, is insufficient to support a CHINS determination. The Court distinguished White v. State, 547 N.E.2d 831, 836 (Ind. 1989), by noting that here, the CHINS petition was based, in relevant part, on Mother's admission to a single recent use of methamphetamine and to a home not free of drug use.

Then, in **In Re J.L.**, 919 N.E.2d 561, 564 (Ind. Ct. App. 2009), the Court affirmed the trial court's determination that the child was a Child in Need of Services. The Court found that Mother knowingly exposed the child to an environment of illegal drug use, which resulted in endangering the child's physical or mental condition because the thirteen-month old child was left without any responsible adult care and supervision. The Court distinguished Perrine, because here, Mother conceded to a lengthy history of drug abuse, including smoking marijuana two to three times per week.

See also **Parker v. Dept. of Public Welfare**, 533 N.E.2d 177, 178 (Ind. Ct. App. 1989) (statement of facts includes psychiatric testimony on dangers of Mother's use of speed and Valium while parenting).

V. I. Conflict Between Statutory Bar to Expert Testimony by Social Worker and Evidence Rule 702

Although IC 25-23.6-4-6 bars licensed social workers from giving expert testimony and IC 25-23.6-10.1-5 bars licensed addiction counselors or licensed clinical addiction counselors from giving expert testimony, case law suggests otherwise.

In **B.H. v. Indiana Dept. of Child Services**, 989 N.E.2d 355, 360-2 (Ind. Ct. App. 2013), the Court affirmed the trial court's judgment terminating Mother's parental rights to her two children, and held that that the trial court did not abuse its discretion in qualifying the social worker as an expert witness under Ind. Evid. R. 702. The Court noted that IC 25-23.6-4-6 prohibits a social worker from offering expert testimony, but opined that the statute cannot prevent a trial court from qualifying a social worker as an expert witness. The Court determined that when there is a conflict between a statute and a rule of evidence, the rule of evidence prevails over any statute. The Court looked to Evid. R. 702, which governs the admission of expert testimony, and provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." The Court observed that: (1) the social worker has an undergraduate degree in psychology and a master's degree in social work; (2) she is a board-certified diplomate, which means that she is at the highest level of her profession and can make certain diagnoses without

medical supervision; (3) she owns and operates Brighter Tomorrows, where she provides therapy and conducts parenting assessments; (4) she has conducted parenting assessments for more than twenty-five years and learned to administer them under the supervision of a psychologist; (5) she testified about the creation, function, acceptance of and widespread use of the Child Abuse Potential Inventory (CAPI) in the psychiatric community. The Court concluded that this amount of education, experience, and familiarity with parenting assessments, particularly CAPI, constituted sufficient knowledge and experience to qualify the social worker as an expert, and that her testimony would clearly assist the trier of fact in understanding the detailed, numeric CAPI results and how those results reflected on Mother's parenting abilities.

Social workers and addiction counselors may also be qualified to give opinions and inferences as skilled witnesses based on personal knowledge and experience. See this Chapter at V.J. for further discussion of skilled witnesses.

V. J. Skilled Witness Testimony

Ind. Evid. R. 701 on opinion testimony by lay witnesses states:

> If the witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is (a) rationally based on the witness's perception and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

This encompasses both lay witnesses and skilled witness. For a recent case on what is needed for a lay witness, see **Whitlock v. Steel Dynamics, Inc.**, 35 N.E.3d 265, 269 (Ind. Ct. App. 2015) (holding that in order for a lay witness's opinion to be admissible, the witness must set forth enough facts to allow the trial court to find that the opinion is rationally based on the witness's personal perceptions; if a lay witness does not identify the objective basis for the opinion, it does not meet the requirements for admission, as there is no way to assess whether it is rationally based on the witness's perceptions and the opinion does not help the factfinder but only tells it in conclusory fashion what it should find).

For a recent case giving a thorough discussion of the difference between a lay witness and a skilled witness, see **Satterfield v. State**, 33 N.E.3d 344, 351-354 (Ind. 2015), holding that the detective's testimony was not admissible as a skilled witness, but was admissible as lay opinion testimony, as it was a helpful summary of observations any ordinary juror could have made while listening to defendant's responses. Both lay and skilled witnesses testify from their observations alone. Skilled witnesses possess knowledge beyond that of the average juror, and this additional knowledge allows a skilled witness to perceive more information from the same set of facts and circumstances than an unskilled witness would be able to. The opinion testimony of either a lay or skilled witness is helpful, as it gives substance to facts which may be hard to articulate; skilled witness testimony is helpful in particular because it involves conclusions that escape the average observer for purposes of rule providing that any witness not testifying as an expert may testify in the form of an opinion if it is rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony or determination of a fact in issue.

Under Evid. R. 701, persons who have acquired expertise in matters of specialized knowledge by personal experience will often be able to draw rational conclusions and give helpful opinions to the trier of fact. Such witnesses possessing specialized knowledge are often called skilled witnesses or skilled lay observers. **Farrell v. Littell**, 790 N.E.2d 612, 617 (Ind. Ct. App. 2003). A "skilled witness" is a person with "a degree of knowledge short of that sufficient to be declared an expert under Rule 702, but somewhat beyond that possessed by the ordinary jurors." **Mariscal v. State**, 687 N.E.2d 378, 380 (Ind. Ct. App. 1997).

Skilled witnesses not only can testify about their observations, they can also testify to opinions or inferences that are based solely on facts within their own personal knowledge. To render an admissible opinion, not only must the skilled witness have specialized knowledge beyond the ken of a lay juror, but he must also give testimony that is rationally based on his perception and testimony that is helpful to the fact finder. "The requirement that the opinion be 'rationally based' on perception means simply that the opinion must be one that a reasonable person normally could form from the perceived facts. The requirement that the opinion be 'helpful' means, in part, that the testimony gives substance to facts which are difficult to articulate." **Ostrowski v. Everest Healthcare**, 956 N.E.2d 1144, 1149-50 (Ind. Ct. App. 2011) (skilled witness could testify; Ind. Evid. R. 701 provides for the manner in which a lay witness may testify, but also encompasses what is referred to as "skilled witness" testimony, which is the "testimony of an observer, skilled in an art or possessing knowledge beyond the ken of the average juror may be nothing more than a report of what the witness observed, and therefore, admissible as lay testimony. This type of evidence…is a matter of the observations of persons with specialized knowledge... A skilled witness is a person with a degree of knowledge short of that sufficient to be declared an expert under Ind. Evid. R. 702, but somewhat beyond that possessed by the ordinary jurors. Skilled witnesses not only can testify about their observations, they can also testify to opinions or inferences that are based solely on facts within their own personal knowledge").

Skilled witnesses cannot testify about their opinions when the information that informs their opinion was given to them by others; their opinions must be inferences based solely on facts within their own personal knowledge. See **Averitt Express, Inc. v. Ind. Dept. of Transportation**, 18 N.E.3d 608 (Ind. Ct. App. 2014) (summary judgment affidavit based in part on information received from others was not admissible as a skilled witness opinion; a skilled witness cannot base an opinion on information received from others or on a hypothetical question).

In CHINS and termination of the parent-child relationship cases, counsel may seek to qualify family case managers, law enforcement personnel, private agency social workers, foster parents, and guardians ad litem/court appointed special advocates as skilled lay witnesses. The skilled witness designation allows such witnesses to testify to their opinions and inferences based on personal experience. In **Matter of A.F.**, 69 N.E.3d 932, 949 (Ind. Ct. App. 2017), the Court affirmed the trial court's order which terminated Father's parental rights to his children, concluding in part the trial court did not abuse its discretion when it admitted the GAL's testimony that the children had suffered trauma from being removed from Parents, returned to Parents, and removed again. Ind. Evid. R. 701 provides that a lay witness may testify as to opinions or inferences which are rationally based on some combination of the witness's own personal observation, knowledge, and past experience. The GAL testified that she had served as a GAL for more than sixteen years, she was assigned as GAL for the children, she had received training on trauma, she observed the children and spoke to them individually, and that the cycle of removal from the parents kept the children "emotionally up and down" because they did not know what would happen next. The Court concluded that the GAL's opinion was rationally based on her personal observation, knowledge, and past experience; thus, the trial court did not abuse its discretion in admitting her testimony that the children suffered trauma.

The criminal child molestation case of **Haycraft v. State**, 760 N.E.2d 203, 211 (Ind. Ct. App. 2001), illustrates a good example of using testimony of an Indiana State Police detective with eight years of experience to describe "grooming" techniques of child molesters. The detective testified that, in his experience, child molesters groom their victims to prepare them for sex by gradually introducing them to sexually explicit materials and sexual contact before actually engaging in sex with them. The foundation laid by the State to establish the detective's

qualifications to testify about grooming techniques of child molesters included: (1) attendance at training on methodology of sexual abuse and profile of offenders; (2) consultation of sexual abuse training manuals; (3) his investigation of other sexual abuse cases; (4) his superior knowledge of the procedures that child molesters employ; (5) his training beyond the average person regarding behavior of child molesters. The Court opined that, given this background, the detective was sufficiently qualified to testify as a skilled witness. The Court further held that the trial court did not abuse its discretion in admitting the detective's testimony because his opinions and inferences were based on his personal experience as an investigator; thus, his testimony was rationally based on his perception. The detective also provided details about how other offenders chose their victims and initiated sexual contact with them; thus, his testimony gave substance to facts that were otherwise difficult to articulate.

Other cases in which skilled witness testimony was admissible include: **Buelna v. State**, 20 N.E.3d 137 (Ind. 2014) (discussing the permissible use of skilled witness testimony in dealing with manufacturing methamphetamines); **A.J.R. v. State**, 3 N.E.3d 1000, 1004 (Ind. Ct. App. 2014) (Opinion testimony by deputy did not deprive juvenile of due process; a skilled witness is a person who possess specialized knowledge short of that necessary to be declared an expert, but beyond that of a regular juror, and can testify to his or her opinions based on facts within his or her personal knowledge. The deputy was properly qualified as a skilled witness); **Romo v. State**, 929 N.E.2d 805 (Ind. Ct. App. 2010) (holding that the detective's testimony that he was familiar with the language of narcotics trafficking was rationally based on his perception, and that the trial court did not abuse its discretion in allowing his testimony; the Court opined that the detective's testimony was based on his personal experience as a narcotics investigator, was helpful to the jury's understanding of narcotics slang terms used by the defendant, and was helpful to the determination of whether the defendant engaged in drug dealing activities), *trans. granted* Romo v. State, 941 N.E.2d 504 (Ind. 2011) (summarily affirmed on this issue); **Linton v. Davis**, 887 N.E.2d 960, 976-77 (Ind. Ct. App. 2008) (in medical malpractice action, labor and delivery nurse should have been allowed to testify as skilled lay witness to her observations concerning baby's heart rate monitor strips and her inferences; she was witness, possessing specialized nursing knowledge, short of that sufficient to be declared expert under Evid. R. 702, but beyond that possessed by ordinary jurors), *trans. denied*; **Vasquez v. State**, 741 N.E.2d 1214, 1217 (Ind. 2001) (police officers who had learned to recognize the glue-sniffing intoxicant toluene by its smell could testify that substance used by defendant contained toluene); **O'Neal v. State**, 716 N.E.2d 82, 89 (Ind. Ct. App. 1999) (police officer who had made hundreds of cocaine arrests and was familiar with cocaine trade could testify that quantity of drugs and cash found on defendant was inconsistent with personal use), *trans. denied*. But see **Kubsch v. State**, 784 N.E.2d 905, 922-23 (Ind. 2003) (detective did not qualify as skilled witness in murder trial because nothing he saw or heard at scene of crime supported opinion that when murder victim's face is covered it is often to disassociate victim from suspect and happens more often in cases where victim and suspect know one another); **Farrell v. Little**, 790 N.E.2d 612, 617-18 (Ind. Ct. App. 2003) (Indiana State Police detective and OFC investigator may have degree of knowledge beyond that of an ordinary lay juror given their respective occupations, but their opinions regarding whether father had sexually abused physically handicapped daughter would not have been helpful to determination of a fact in issue).

See also **Ashworth v. State**, 901 N.E.2d 567, 571-73 (Ind. Ct. App. 2009) (discusses whether "perception" within the meaning of Evid. R. 701 excludes police officer opinion testimony that is based in part on a colleague's investigation), *trans. denied.*

But see **Tolliver v. State**, 922 N.E.2d 1272, 1279 (Ind. Ct. App. 2010), *trans. denied*, where the trial court erred in finding police officer to be a skilled witness in assessing truthfulness from

body language; however, despite trial court's finding, police officer did not testify as to victim's truthfulness, but only observed in his testimony that the victim was uncooperative, based on the victim's rolling away from him, becoming angry with him, and not wishing to speak with him. The Court deemed this a commonsense conclusion and did not require a skilled witness, and was admissible as a simple lay opinion rationally based on perception and helpful to a clear understanding of the facts of the case.

VI. COMPETENCY TO TESTIFY

VI. A. Competency of Child Witnesses

IC 34-45-2-1 through 13 pertain to Indiana law on the competency of witnesses. IC 34-45-2-1 provides simply that all people are competent witnesses in a civil proceeding, except as otherwise provided. Ind. Evid. R. 601 provides that every person is competent to be a witness, "except as otherwise provided in these rules or by statute."

VI. B. Burden of Proving Competency/Incompetency

Criminal case law indicates that a defendant's failure to object to a child's testimony acts as a waiver of any question of the competency of a child as a witness. **Haycraft v. State**, 760 N.E.2d 203, 208-09 (Ind. Ct. App. 2001), *trans. denied*, quoting Kochersperger v. State, 725 N.E.2d 918, 922 (Ind. Ct. App. 2000); **Carter v. State**, 754 N.E.2d 877 (Ind. 2001) (Although Defendant did argue at a pretrial hearing that the child witness was not competent to testify, his counsel did not object again at the hearing; a defendant must reassert his objection contemporaneously at trial with the introduction of evidence in order to preserve the error for appeal). In **Aldridge v. State**, 779 N.E.2d 607, 609-10 (Ind. Ct. App. 2002), the defendant failed to show that either the five or the six-year-old victims were incompetent to testify. Both children adequately displayed that they knew that the truth was and stated repeatedly that they were going to tell the truth. The Court noted that Ind. Evid. R. 601 now assumes competency unless otherwise demonstrated by an opponent of the testimony.

Failure to inquire into competency notwithstanding, the trial court retains the discretion to determine if a child witness is competent, based on the judge's observation of the child's demeanor and responses to questions posed by counsel and the court. **Archer v. State**, 996 N.E.2d 341, 345-7 (Ind. Ct. App. 2013) (the determination of witness competency lies within the sound discretion of the trial court; when determining if a child is competent to testify, the trial court considers whether the child understands the difference between telling a lie and telling the truth, knows she is under a compulsion to tell the truth, and knows what a true statement actually is. Trial court's questions and statements almost exactly mirrored this test, and was a statement of competency, not credibility); **Richard v. State**, 820 N.E.2d 749, 754-5 (Ind. Ct. App. 2005) (Ind. Evid. R. 601 does not prohibit special inquiry into a child's competency prior to testifying when the issue is raised by a defendant; thus, when a child witness is called to testify, the trial court has the discretion to determine if a child witness is competent based on the court's observation of the child's demeanor and responses to questions posed by counsel and the court); **Haycraft**, 760 N.E.2d 203, 209; **Harrington v. State**, 755 N.E.2d 1176, 1181 (Ind. Ct. App. 2001); **Casselman v. State**, 582 N.E.2d 432, 435 (Ind. Ct. App. 1991) (Court stated that despite the repeal of the statute that created an "incompetency presumption," a "child must still demonstrate to the court he has the knowledge required" before competency is established).

In the criminal child molestation case of **Burrell v. State**, 701 N.E.2d 582, 585 (Ind. Ct. App. 1998), the defendant alleged the trial court erred in allowing the five-year-old victim to testify. The language of the opinion indicates that the burden was on the defendant, not the court, to raise the issue of the child's competence. The Court stated that Ind. Evidence Rule 601, read in

conjunction with the repeal of the statute that children under the age of ten were presumed incompetent, "abandoned the previous arbitrary lines drawn regarding age, in favor of a rule which assumes competency until otherwise demonstrated by the opponent of the testimony." See also **Thornton v. State**, 653 N.E.2d 493, 497 (Ind. Ct. App. 1995) (defendant has burden of establishing child witness not competent to testify); but see **Newsome v. State**, 686 N.E.2d 868, 870, 872 (Ind. Ct. App. 1997) (Court held that Evid. R. 601 does not create a presumption of competency for all child witnesses, and the court has an obligation to conduct an inquiry into the child's competency prior to allowing the child to testify).

VI. C. Standard for Determining Competency

The standard for affirming a competency ruling on appeal was stated in the criminal child molestation case of **Hall v. State**, 634 N.E.2d 837, 842 (Ind. Ct. App. 1994):

> If the record contains evidence from which the trial court could have reasonably inferred the child (1) understood the difference between telling the truth and telling a lie, (2) knew she was under compulsion to tell the truth, and (3) knew what a true statement actually was, the trial court's ruling must be affirmed.

See also **Richard v. State**, 820 N.E.2d749, 755 (Ind. Ct. App. 2005), *trans. denied* (affirming the Hall test for competency). Child competency is a question of law decided by the trial court based upon "the judge's observation of the child's demeanor and responses to questions posed to her by counsel and the court." A competency ruling will be reversed only for an abuse of discretion, as a determination of a witness's competency is within the trial court's sound discretion. **Burrell v. State**, 701 N.E.2d 582, 584 (Ind. Ct. App. 1998).

In **Archer v. State**, 996 N.E.2d 341, 346-7 (Ind. Ct. App. 2013), the Court held that the trial court, in determining that the child witness was competent to testify, did not impermissibly vouch for the child witness by stating its opinion that she was competent to testify. The Court noted that the trial court's statement regarding its determination that the child was competent to testify directly mirrored the factors for determining whether a child is competent to testify, and as such, was a statement of the child's competency to testify, not a comment on the child's credibility.

In **Kien v. State**, 866 N.E.2d 377, 385 (Ind. Ct. App. 2007), *trans. denied*, the Court held that because there was no evidence that the victim was incompetent, trial counsel could not be deemed ineffective for failing to challenge her competency. The Court found (1) the victim's testimony at trial showed that she understood the difference between a truth and a lie, knew she was under compulsion to tell the truth, and knew what a true statement was; (2) the fact that the victim's testimony could be interpreted as inconsistent and the fact that she admitted to not testifying truthfully went to her credibility, not her competency; and (3) as such, the jury was free to disregard her testimony if it felt she was not a credible witness.

In **Aldridge v. State**, 779 N.E.2d 607, 609-10 (Ind. Ct. App. 2002), *trans. denied*, the five-year-old victim's six-year-old brother was found by the trial court to be a competent witness to the molestation of his sister. The Court affirmed the trial court's decision to allow the six-year-old brother to testify, noting that both child witnesses repeatedly demonstrated that they knew what the truth was, and stated repeatedly that they were going to tell the truth.

VI. D. Requesting an Examination for Competency

In the criminal child molestation case of **Lane v. State**, 539 N.E.2d 488 (Ind. Ct. App. 1989), the defendant alleged that the trial court erred in denying his request for a psychiatric examination of the child victim. He argued that the examination was necessary because of the victim's age, because she was the sole witness, and because she was shown to have fabricated sexual incidents

in the past. The Court found that, although the child's testimony was contradicted, the record did not reflect that she had fabricated sexual incidents in the past. Further, the Court found that the trial judge had an opportunity to observe the child at length. The Court concluded that the trial court did not abuse its discretion in denying the examination request.

See also **Hoover v. State**, 582 N.E.2d 403 (Ind. Ct. App. 1991), opinion adopted by 589 N.E. 2d 243 (Ind. 1992) (affirmed denial of defendant's request for professional examination of child witness); **Lowe v. State**, 534 N.E.2d 1099 (Ind. 1989) (affirmed denial of defendant's request for examination of thirteen-year-old victim); **Goolsby v. State**, 517 N.E.2d 54 (Ind. 1987) (since child witness had no history of mental illness and no other grounds for incompetency were presented, there was no error in refusing defendant's request for examination of the child).

VI. E. Competency Rulings

In **Ackermann v. State**, 51 N.E.3d 171, 191-2 (Ind. 2016), the Court discussed child witness competency in the context of a "cold" case, where the sole witness was a three-year-old. The Court noted that under both the old standard and the new evidentiary standard at Ind. Evid. R. 601, the child was or was likely to be determined incompetent to testify. A child is only competent to testify if it can be established that he or she: "(1) understands the difference between telling a lie and telling the truth, (2) knows he or she is under a compulsion to tell the truth, and (3) knows what a true statement actually is." The Court opined that it would be highly unlikely that a three-year-old would be able to understand being under oath and being required to tell only the truth.

In **Saylor v. State**, 55 N.E.3d 354, 360-1 (Ind. Ct. App. 2016), the Court held that the trial court properly administered an oath and determined that the child witnesses knew the difference between a truth and a lie. No particular form of oath was required, and in fact, the form of the oath can be flexible in order to be meaningful to both children and mentally impaired witnesses. Ind. Evid. R. 603 requires that before testifying, "a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience." Furthermore, the Indiana Constitution, Art. 1, §8 provides that the "mode of administering an oath or affirmation, shall be such as may be most consistent with, and binding upon, the conscience of the person, to whom such oath or affirmation may be administered", and IC 34-45-1-2 provides that before testifying "every witness shall be sworn to testify the truth, the whole truth, and nothing but the truth. The mode of administering an oath must be the most consistent with and binding upon the conscience of the person to whom the oath may be administered." The Court further stated that there is no prescribed form to determine whether a child is competent to testify, though there are guiding factors; a trial court "has discretion to determine whether a child witness is competent based on the court's observation of the child's demeanor and the child's responses to questions posed by counsel and the court."

In **D.G. v. State**, 947 N.E.2d 445, 449-50 (Ind. Ct. App. 2011), the Court reversed the true finding on the juvenile defendant's charge of what would be class B felony child molesting if committed by an adult. The Court held, *inter alia*, that a failure to inquire into the legally blind six-year-old child witness's competency to testify was error, and that the failure to assess the child witness's competency was not harmless error. The State's proposed remedy of an after the fact hearing to assess the competency of the child witness was not an adequate remedy when nearly a year had passed from the time of the child witness's original testimony, and her ability to tell the difference between a truth and a lie at the present date was irrelevant as to whether she could the difference between a truth and a lie a year ago. The Court noted that a "'child's competency to testify at trial is established by demonstrating that he or she (1) understands the difference between telling a lie and the truth, (2) knows he or she is under a compulsion to tell the

truth, and (3) knows what a true statement actually is.'" Neither the trial court nor counsel conducted any inquiry as to whether the child witness understood any of these three things.

In **Carpenter v. State**, 786 N.E.2d 696, 704 (Ind. 2003) the father's criminal child molestation conviction was remanded because hearsay evidence of the three-year-old child victim's statements to the mother, maternal grandfather, police detective and child welfare caseworker was insufficiently reliable to be admissible. The Court noted that during the child's competency determination, the child was asked three times in different ways whether she understood the difference between the truth and a lie and responded that she did not. The Court stated there is a degree of logical inconsistency in deeming reliable the statements of a person who cannot distinguish truth from falsehood.

In **Carter v. State**, 754 N.E.2d 877, 883-4 (Ind. 2001), *cert. denied*, 537 U.S. 831 (2002), the defendant argued that his eight-year-old autistic daughter was not a competent witness because the record did not show that she knew what an oath meant and that she was compelled to tell the truth. The defendant had lodged no objection and that the alleged defect did not amount to the substantial blatant violation of due process, the test for ordering reversal. The Court noted the following statements by the child at the pre-trial hearing: (1) child asserted that she "tell[s] the most truth ever;" (2) child correctly identified that it would be a lie to say that the prosecutor's white suit was black; (3) child said it was important to tell the truth and that lies "would get the wrong person into jail."

In **Aldridge v. State**, 779 N.E.2d 607, 610 (Ind. Ct. App. 2003), *trans. denied*, where the defendant unsuccessfully argued that a six-year-old witness and five-year-old victim were incompetent to testify, the Court noted the testimony of the victim's mother and the OFC case manager that the victim was capable of understanding the difference between telling the truth and telling a lie. The Court found that mother's and case manager's testimony combined with the victim's consistent testimony throughout cross-examination and the trial court's ability to observe the victim as she testified, caused the Court to determine that the defendant had not met his burden of showing that the victim was incompetent to testify.

In **Haycraft v. State**, 760 N.E.2d 203, 209-10 (Ind. Ct. App. 2001), the Court ruled that the following dialogue revealed that the eight-year-old witness understood the difference between the truth and a lie, knew he was compelled to tell the truth, and knew what a true statement actually was. The child stated: (1) if he broke something he must tell his mother that he did because it would be the truth; (2) if he doesn't tell the truth, he gets in more trouble; (3) it would be a lie to say the prosecutor was wearing a red dress when she was actually wearing a green dress. The child nodded his head affirmatively when asked whether he knew the difference between truth and a lie and he knew how important it was to tell the truth. The Court agreed that it was insufficient for the child to indicate that he would be punished for telling a lie, but said that information was valuable in determining whether a child understood the difference between the truth and a lie.

In **Harrington v. State**, 755 N.E.2d 1176, 1181 (Ind. Ct. App. 2001), the Court found no abuse of discretion in the trial court's determination that the five-year-old victim was competent. The Court noted the following from the record: (1) child responded affirmatively to prosecutor's reminders that child had promised to tell the truth, and that meant he had to tell the truth; (2) prosecutor questioned child about his general understanding of truth and lying and the consequences of lying; (3) child explained how his mother punished him at home if he lied; (4) child gave examples of true statements and lies. Although the defendant argued that the

child's testimony was ambiguous, the Court opined that this argument went to the child's credibility, not his competency.

See also **Burrell v. State**, 701 N.E.2d 582, 585 (Ind. Ct. App. 1998) (Court affirmed the competency ruling on evidence that the child was able to articulate an unpleasant consequence for telling a lie and a pleasant consequence for telling the truth); **Newsome v. State**, 686 N.E.2d 868, 874 (Ind. Ct. App. 1997) (it was an abuse of discretion to qualify the seven-year-old victim as a witness, since she was not asked to give any type of example or other testimony indicating that she actually understood the difference between the truth and a lie; Court ruled that the error was harmless because the child's testimony at trial indicated that she understood that a true statement is one that comports with fact and reality); **Brewer v. State**, 562 N.E.2d 22, 23-24 (Ind. 1990) (Court affirmed the trial court's ruling that witnesses ages eight, ten, and fourteen were competent, as "each child demonstrated he or she knew the difference between telling the truth and telling a lie, and each promised to tell the truth").

VII. COURT ORDERED CHILD TESTIMONY BY CLOSED CIRCUIT TV OR VIDEOTAPE

IC 31-34-14 applies to an action to determine whether a child is a CHINS under: (1) IC 31-34-1-1 through IC 31-34-1-6; (2) IC 31-34-1-10(a); or (3) IC 31-34-1-11. IC 31-34-14-1.

The testimony of children within certain age ranges and possessing certain qualifications may be taken in a room other than the courtroom and be transmitted to the courtroom by closed circuit television, and the questioning of the child by the parties be transmitted to the child by closed circuit television. IC 31-34-14-2. This may be accomplished only via the motion of the DCS attorney, and a court must grant the motion. IC 31-34-14-2. A DCS attorney may also request that the court order the testimony of a child be videotaped for use at proceedings to determine whether a child or a child's sibling (or half sibling) is a CHINS. IC 31-34-14-3.

These statutes, and the corresponding procedures, are referred to in this section of the Deskbook as the "closed circuit television/videotape" statutes or procedures. These procedures are appropriate for children who are competent to testify, but could be emotionally harmed by having to see or hear their parents while they testify, or by otherwise having to testify in the courtroom. However, the statutes require that the parents are able to hear and observe the child's testimony by either the television or videotape process, although the child cannot see the parents while testifying.

These statutes differ from the videotape/statement statutes discussed below in section IX., which is titled "Child Hearsay Exception". The closed-circuit television/videotape statutes allow the state to obtain a court order to make a videotape of the child's testimony or for the child to testify by closed circuit television. The child hearsay exception, on the other hand, deals with the admissibility of a child's out-of-court statement (which may be written, oral, or videotaped) that was not made pursuant to a court order.

VII.A. Age, Case Type, and Harm Requirements

There are three eligibility criteria or requirements to obtain an order for a child to testify by closed circuit television or videotape.

First, IC 31-34-14-4 provides that the closed-circuit television/videotape procedure is applicable to witnesses who:

(1) are under the age of fourteen, and to witnesses ages fourteen, fifteen, sixteen or seventeen who have an impairment of general intellectual functioning or adaptive behavior that is likely to continue indefinitely, constitutes a substantial impairment of the child's ability to function

normally in society; and reflects the child's need for a combination of special, interdisciplinary, or generic care, treatment, or other services that are lifelong or needed for an extended duration and are individually planned and coordinated; and
(2) are found by the court to be children who should be permitted to testify outside the courtroom because a psychiatrist, physician, or psychologist has certified that the child's testifying in the courtroom creates a substantial likelihood of emotional or mental harm to the child, OR a physician has certified that the child cannot be present in the courtroom for medical reasons, OR evidence has been introduced concerning the effect of the child's testifying in the courtroom and the court finds that it is more likely than not that the child's testifying in the courtroom creates a substantial likelihood of emotional or mental harm to the child.

Second, IC 31-34-14-4 provides that the DCS attorney has informed the parties and their attorneys by written notice of the intention to have the child testify outside the courtroom. This notice must have taken place at least seven days before the hearing, in order to give the parties a fair opportunity to respond to DCS's motion to allow the child to testify outside the courtroom.

Third, the proceeding must be one of the applicable proceedings; these procedures for testifying out of the courtroom are applicable to all the CHINS categories, except the categories of parental failure to participate in school disciplinary proceedings (IC 31-34-1-7) and missing children (IC 31-34-1-8).

IC 31-35-5-1 provides that the closed-circuit television/videotape procedures are also applicable to child witnesses in involuntary termination of parental rights cases. The termination statutes at IC 31-35-5-1 through 7 contain requirements and procedures extremely similar to the CHINS law detailed in this section.

VII.B. Procedure to Obtain Closed Circuit Television or Videotaping Testimony

The attorney for DCS must make a motion requesting that the testimony of the child be taken by closed circuit television or videotape. IC 31-34-14-2 (closed circuit television); IC 31-34-14-3 (videotape for use at proceedings to determine whether a child or a whole or half-blood sibling of the child is a CHINS). The DCS attorney must inform the parties and their attorneys in writing at least seven days before the proceedings of the intention to have the child testify outside the courtroom. IC 31-34-14-4(2) and (3).

The statutes do not specifically state that a hearing is required, but IC 31-34-14-4 references specific findings that a court must make before permitting a child to testify out of court under IC 31-34-14-2 or -3. Furthermore, IC 31-34-14-4(3) states that the DCS attorney must give the parties seven days written notice, in order to give the parties a fair opportunity to respond to DCS's motion to allow the child to testify outside the courtroom. A best practice suggestion, therefore, would be that holding a hearing would ensure a fair opportunity for the parents to respond to the motion for out-of-court testimony, especially given the short time required between the notice from DCS and the testimony. However, this could also be a practice reserved for when motions under IC 31-34-14-2 or -3 are contested.

A court may grant the motion made under IC 31-34-14-2 or -3 if the child eligibility requirements are met and if one of the following provisions at IC 31-34-14-4(1)(C) is met:
(1) a psychiatrist, physician, or psychologist has certified that the child's testifying in the courtroom creates a substantial likelihood of emotional or mental harm to the child;
(2) a physician has certified that the child cannot be present in the courtroom for medical reasons;

(3) evidence has been introduced concerning the effect of the child's testifying in the courtroom and the court finds that it is more likely than not that the child's testifying in the courtroom creates a substantial likelihood of emotional or mental harm to the child.

If the motion for closed circuit television or videotaping is granted, the court should issue an order specifying the time and arrangements for the procedure, including who will be present with the child during the testimony and who is authorized to ask questions.

Practice Note: Prosecuting attorneys are now permitted to request the juvenile court to authorize the filing of a CHINS petition. IC 31-34-9-1. The prosecuting attorney must then represent the interests of the state at this proceeding and all subsequent proceedings, unless the prosecuting attorney and DCS agree that DCS shall represent the state's interests. IC 31-34-9-1(b)(2).

VII.C. Procedure for Child's Testimony: Who May be Present With Child and Question Child?

The statutes state who may be present during the child's testimony by closed circuit television (IC 31-34-14-5), or by videotape (IC 31-34-14-6). Who may ask questions is addressed by IC 31-34-14-7. The procedures vary depending upon whether the order is for closed circuit television or videotape, and these differences are highlighted below.

VII.C. 1. Closed Circuit Television

If the court makes an order for closed circuit television, only the following persons may be present while the child testifies: persons necessary to operate the television equipment; persons whose presence the court finds will contribute to the child's well-being; a court bailiff or court representative. IC 31-34-14-5.

Only the following persons can question the child: (1) the DCS attorney; (2) attorneys for the parties; and (3) the judge. IC 31-34-14-7.

VII.C. 2. Videotape

IC 31-34-14-6 now provides that only the following persons may be present in the same room as the child during the child's videotaped testimony: the judge; the DCS attorney; the attorney for each party; persons necessary to operate the electronic equipment; the court reporter; persons whose presence the court finds will contribute to the child's well-being; and the parties, who can observe and hear the testimony of the child without the child being able to observe or hear the parties.

Only the following persons can question the child: (1) the DCS attorney; (2) attorneys for the parties; and (3) the judge. IC 31-34-14-7. However, IC 31-34-14-6 also provides that if a child is testifying by videotape, and if a party is not represented by an attorney, the party may question the child. This may be interpreted to mean that if a parent is not represented by counsel that parent may be in the room during the videotaping to question the child. This would be contrary to IC 31-34-14-7. The safest course to avoid this conflict would be to have the court appoint counsel for the parent to avoid any potential problems.

VII.D. Termination Case Law

Although the authors are not aware of any published CHINS case addressing the closed-circuit television/videotape procedure, issues regarding the necessary procedure were raised in the termination case of **S.M. v. Elkhart Cty. Off. of Fam. & Chil.**, 706 N.E.2d 596, 597-600 (Ind. Ct. App. 1999). Mother was excluded from the courtroom while the children testified, but made no objection at trial. Mother appealed the termination order, arguing that her due process rights were violated. The Court ruled that the closed-circuit television/videotape statutes are the

"exclusive means for presenting children's testimony outside their parents' presence in a termination hearing." The Court went on to state that "[a]t the very least, the statute requires that the trial court employ a procedure that allows the parent to hear and observe the child's testimony," and this was not done in this case. The closed-circuit television/videotape statutes applicable to CHINS and termination cases, unlike their criminal counterpart at IC 35-37-4-8, do not require that the child and parent be able to observe each other during the child's testimony, but the CHINS and termination statutes do require that the parent be able to see and observe the child's testimony. However, the error was harmless, due to Mother's failure to object, and the error was not fundamental, due to the repetitive nature of the evidence in the children's testimony.

VII.E. Indiana Criminal Statute and Case Law

While initially, the criminal and CHINS laws on this topic were very similar, they diverged with ruling in criminal case and newer legislation. See **Brady v. State**, 575 N.E.2d 981 (Ind. 1991) (Indiana Supreme Court ruled that the criminal closed circuit television/videotape law violated the due process right of the defendant to "face-to- face confrontation" with the child victim; in response to Brady, the legislature passed significant amendments to the criminal statute). The criminal statute, referred to as the Protected Person Statute or PPS, provides that the closed-circuit television transmission must go both ways, allowing the child to see the defendant and the trier of fact while testifying and allowing the defendant to see and hear the child testify, among other significant differences.

The Protected Person Statute, IC 35-37-4-6, allows for admission of otherwise inadmissible hearsay evidence relating to specified crimes whose victims are deemed "protected persons." **Tyler v. State**, 903 N.E.2d 463, 4655 (Ind. 2009).

There are three definitions of a protected person. The first is IC 35-37-4-6(c)(1), which defines a protected person as a child who is less than fourteen years old. The second definition of a protected person is IC 35-37-4-6(c)(2), which pertains to individuals over eighteen years old, who have certain types of mental disabilities that manifested before the age of eighteen, are likely to continue, are a substantial impairment of normal functioning, and create a need for special care, treatment, or lifelong services. The last definition of a protected person is IC 35-37-4-6(c)(3), which defines a protected person as a person over eighteen years old who has a mental disability that prevents the person from managing his or her own property or self care.

IC 35-37-4-6(a) provides that the Protected Person Statute applies to the following offenses where the victim is a protected person under subsection (c)(1) or (c)(2): (1) Sex crimes (IC 35-42-4); (2) Battery upon a child (IC 35-42-2); (3) Kidnapping and confinement (IC 35-42-3); (4) Incest (IC 35-46-1-3); (5) Neglect of a dependent (IC 35-46-1-4); (6) Human and sexual trafficking crimes (IC 35-42-3.5); (7) An attempt under IC 35-41-5-1 for an offense listed in subdivisions (1) through (6). IC 35-37-4-6(b) provides the circumstances where the Protected Person Statute applies to a criminal action involving the following offenses where the adult victim is a subsection (c)(3) protected person.

A statement or videotape that (1) is made by a person who at the time of trial is a protected person; (2) concerns an act that is a material element of an offense listed in subsection (a) or (b) that was allegedly committed against the person; and (3) is not otherwise admissible in evidence is admissible in evidence in a criminal action for an offense listed in IC 35-37-4-6(a) or (b) if the requirements of IC 35-37-4-6(e) are met. IC 35-37-4-6(d).

IC 35-37-4-6(e) provides that a statement or videotape described in IC 35-37-4-6(d) is admissible in evidence in a criminal action listed in IC 35-37-4-6(a) or (b) if, after notice to the defendant of a hearing and of the defendant's right to be present, all of the following conditions are met:

(1) The court finds, in a hearing: (A) conducted outside the presence of the jury; and (B) attended by the protected person or by using closed circuit television testimony as described in IC 35-37-4-8(f) and (g); that the time, content, and circumstances of the statement or videotape provide sufficient indications of reliability.

(2) The protected person: (A) testifies at the trial; or (B) is found by the court to be unavailable as a witness for one (1) of the following reasons: (i) From the testimony of a psychiatrist, physician, or psychologist, and other evidence, if any, the court finds that the protected person's testifying in the physical presence of the defendant will cause the protected person to suffer serious emotional distress such that the protected person cannot reasonably communicate. (ii) The protected person cannot participate in the trial for medical reasons. (iii) The court has determined that the protected person is incapable of understanding the nature and obligation of an oath.

If a protected person is unavailable to testify at the trial for a reason listed in IC 35-37-4-6(e)(2)(B), a statement or videotape may be admitted in evidence under this section only if the protected person was available for cross-examination either at the hearing described in subsection (e)(1), or when the statement or videotape was made. IC 35-37-4-6(f).

In order for a statement or videotape to be admissible under this statute, the prosecutor must inform the defendant and the defendant's attorney at least ten days before trial that the prosecutor intends to introduce the statement or videotape, and the content of the statement or videotape. IC 35-37-4-6(g).

If a statement or videotape is admitted in evidence, the court must instruct the jury that it is for the jury to determine the weight given the statement or videotape and that the jury must consider the following: (1) mental and physical age of the person making the statement or videotape; (2) nature of the statement or videotape; (3) circumstances under which the statement or videotape was made; (4) other relevant factors. IC 35-37-4-6(h).

A defendant can introduce a transcript or a videotape of the IC 35-37-4-6(e)(1) hearing into evidence at trial if a IC 35-37-4-6(d) statement or videotape is admitted into evidence under this statute. IC 35-37-4-6(i).

The procedure for using the protected person statute (PPS) is found at IC 35-37-4-8. It details to which criminal actions the PPS applies; the manner in which the closed circuit television must work (so that both the protected person and the accused can see each other, and both can see the trier of fact); videotaping the protected person; what the court must find in order to issue an order allowing such testimony; who may be in the room with the protected person while he or she is testifying; and who may question the protected person.

The Supreme Court in **Tyler v. State**, 903 N.E.2d 463, 467 (Ind. 2009), exercised its supervisory powers to elaborate on the permissible use of statements under IC 31-37-4-6, the Protected Person Statute (PPS). The Court held "if the statements are consistent and both are otherwise admissible, testimony of a protected person may be presented in open court or by prerecorded statement through the PPS, but not both, except as authorized under the Rules of Evidence. If the person is able to testify live without serious emotional distress such that the protected person cannot reasonably communicate, that is clearly preferable." However, noting that rules implemented by use of supervisory powers are not applicable to proceedings conducted prior to

publication, the Court found that the trial court in this case did not commit reversible error by admitting the taped statements, in that, although admission of the videotaped statements by three of the children was cumulative and therefore of minimal probative value, the prejudicial effect of their admission was not significant in the face of the consistent live testimony of all five children.

The Tyler Court observed that (1) it had not, prior to this case, addressed a case under the current Rules of Evidence where, as here, the protected person testified at trial as well as by videotape or other statement; (2) there are some circumstances under which a prior statement of a live witness is admissible under the Rules of Evidence, such as under Rule 801(d)(1)(A) or (B) because it contains inconsistent statements or rebuts a claim of fabrication; (3) neither party in this case claims that the testimony is admissible under these provisions; (4) admitting consistent statements through both prerecorded media and also by live testimony presents problems aside from confrontation clause or hearsay issues; and (5) the problems presented are that admitting both a child's live testimony and consistent videotaped statements is cumulative evidence and can be unfairly prejudicial, if a child or other protected person is sufficiently mature and reliable to testify in open court without serious emotional distress resort to the PPS is unnecessary, and if the person testifies live admitting the additional earlier statement does not serve the statutory purpose of protecting the child from the burden of testifying.

In **Dilts v. State**, 49 N.E.3d 617, 630 (Ind. Ct. App. 2015), the defendant appealed his child molesting conviction, arguing that the trial court abused its discretion in admitting the redacted version of the child's videotaped interview with the forensic interviewer, because the child had already testified at trial. He asserted this was improper vouching, but also, that it was a violation of the PPS statute. The Court noted that he failed to make a timely objection, despite prior discussion of the likelihood of an objection. Because there was no timely objection, the defendant waived the issue for appeal.

In **Harris v. State**, 964 N.E.2d 920, 925-6 (Ind. Ct. App. 2012) *trans. denied*, the Court affirmed the defendant's child molesting and child solicitation convictions. The Court found that the evidence presented by the State was more than sufficient to support the trial court's determinations required by IC 35-37-4-8(B)(i) or (B)(iii). The defendant argued that the trial court erred when it permitted the ten-year-old victim to testify at trial via two-way closed circuit television pursuant to the protected person statute. The defendant hinged his argument on the State having failed to make the required evidentiary showing that the protected person's testifying in the physical presence of the defendant would cause the protected person to suffer serious emotional harm and that the protected person could not reasonably communicate in the physical presence of the defendant to the trier of fact; or that the protect person's testifying in the physical presence of the defendant creates a substantial likelihood of emotional or mental harm to the protected person [IC 35-37-4-8(B)(i) or (B)(iii)]. The Court noted a surfeit of evidence from a psychiatrist, a behavioral clinician, and the child's grandmother as to the harm testifying would cause the child.

In **Cox v. State**, 937 N.E.2d 874, 878-9 (Ind. Ct. App. 2010), the Court reversed the defendant's convictions, holding that the trial court erred in permitting introduction of the child victim's videotaped statement into evidence, and that the error was not harmless. The trial court permitted the videotaped interview to be admitted into evidence, even though the child victim was present and available to testify, and even testified briefly and was cross examined. The Court determined that the Protected Person Statute (PPS) represents a departure from ordinary trial procedure, and because of this, the PPS should only be used when it is necessary to avoid further injury to the protected person. "[I]f a child or other protected person is sufficiently mature and reliable to testify in open court without serious emotional distress, resort to the PPS is not necessary." Since

there was no evidence that the child victim would meet the PPS standard for unavailability based on the potential for serious emotional distress, and because the child victim did in fact testify at the trial in addition to the introduction of his videotaped testimony, the resort to PPS was unnecessary, and the underlying purpose of the PPS to spare a child from unnecessary emotional trauma was not served by the introduction of the videotaped statement. The Court further noted that "admitting both a child's live testimony and consistent videotaped statements is cumulative evidence, and can be unfairly prejudicial."

VII.F. U.S. Constitutional Criminal Case Law

The U.S. Supreme Court has overruled the use of a screen in the courtroom to prevent child witnesses from seeing the defendants while the child witnesses testified. See **Coy v. Iowa**, 487 U.S. 1012, 108 S. Ct. 2798 (1988). However, the U.S. Supreme Court has also affirmed the constitutionality of a criminal statute allowing a child to testify by one-way closed circuit television in a criminal child sex abuse case, against the defendant's Sixth Amendment right to face-to-face confrontation. See **Maryland v. Craig**, 497 U.S. 836, 110 S. Ct. 3157 (1990). This particular criminal statute and the Indiana CHINS closed circuit television/videotape statute are similar in that they both require a case specific determination that the child cannot testify in the court room. The Maryland v. Craig Court at 855 opined that if "the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant."

VIII. HEARSAY

VIII.A. Hearsay Defined and the General Exclusion Rule

Ind. Evidence Rule 801(c) defines hearsay as a statement that is not made by the declarant while testifying at the trial or hearing, and is offered in evidence to prove the truth of the matter asserted.

Hearsay is not admissible unless these rules or other law provides otherwise. Ind. Evid. R. 802. This evidentiary rule is consistent with CHINS case law that hearsay is not admissible in the CHINS factfinding hearing, unless it fits under the CHINS child hearsay exception statute or some other recognized hearsay exception. See **Roark v. Roark**, 551 N.E.2d 865 (Ind. Ct. App. 1990)

VIII.B. Out-of-Court Statements Not Excluded as Hearsay

Out-of-court statements are not always considered hearsay, and therefore not excluded from evidence. For example, when an out-of-court statement is offered for an evidentiary purpose other than an assertion of truth, it may not be excluded as hearsay, as it lacks one of the essential elements of hearsay. Ind. Evid. R. 801(c). Prior consistent and inconsistent statements of witnesses, and identification testimony, are also not considered hearsay when they satisfy certain evidentiary requirements. Ind. Evid. R. 801(d)(1). These statements may be admitted as substantive evidence.

VIII.B. 1. Statements Not Offered for Truth of Matter Asserted

Out-of-court statements offered to impeach a witness are not offered to prove that the statements are true, but to challenge the credibility of a witness, and as such, they are not hearsay. Ind. Evid. R. 801(c).

Case law includes other examples of out-of-court statements that are admissible when not offered to prove the truth of the matter. For examples, see:

Philips v. State 25 N.E.3d 1284 (Ind. Ct. App. 2015), where photographs of warning labels on a crib containing instructions to never to use crib if any part of it was broken and to never use any additional padding inside crib, as serious injury or death could result were not hearsay, because these were not assertions of facts, but rather, were along the lines of a directive or imperative. The photographs were not admitted to prove the facts asserted in them, but rather, were offered to establish what information was presented and available to defendant when using the portable crib and her resultant state of mind, irrespective of the truth of the information.

Corbally v. State, 5 N.E.3d 463 (Ind. Ct. App 2014), where a police officer's testimony about what the victim said about the attack was not admissible as non-hearsay "course-of-investigation" evidence. Although the testimony was part of the course of the investigation, the testimony went far beyond the grounds for admission and instead almost completely repeated graphic details of the crime to which the victim already testified. If the purpose of introducing an out-of-court statement is to prove the fact asserted, and the statement does not qualify as a non-hearsay statement and does not fall under a hearsay exception, the statement is inadmissible hearsay.

In Re A.C., 770 N.E.2d 947, 952 (Ind. Ct. App. 2002), where Father appealed the termination order, arguing in part that there was insufficient evidence that the Marion County OFC had notified him of the termination hearing date. The family case manager testified: (1) that she was familiar with the case file; (2) that the notification letter introduced into evidence was the same as the letter in the case file; and (3) that the author of the letter was a paralegal at Marion County OFC. Father contended on appeal that the letter was inadmissible hearsay. The Court held that the letter was not hearsay because it was not offered for the truth of the matter asserted, namely there would be a court hearing on the given date. Instead, the letter was offered for the non-hearsay purpose of establishing that the OFC had sent a notification letter to Father.

Clark v. State, 728 N.E.2d 880, 885 (Ind. Ct. App. 2000), where the police officer was allowed to testify about allegations made in the Child Protection Report form 310, because the testimony was not admitted to prove that the allegations of molestation against Father were true, but to show the course of the police investigation.

Patton v. State, 725 N.E.2d 462, 464 (Ind. Ct. App. 2000), where out-of-court statements offered primarily to explain why a particular course of action was taken during a criminal investigation were not offered for the truth of matter asserted and were not hearsay.

Fleener v. State, 648 N.E.2d 652 (Ind. Ct. App. 1995), *affirmed a*t 656 N.E. 2d 1140 (Ind. 1995), where Mother testified that the child's revelation to her of the sexual abuse precipitated her divorce from the defendant; this testimony was not hearsay and was admissible. It was not offered to prove that the child's revelation was true, but to rebut the defendant's testimony that he did not know why he was "thrown" out of the house and the suggestion raised by the defense that Mother had encouraged the victim's complaint of sexual abuse and had fabricated the story.

Hall v. State, 634 N.E.2d 837, 843 (Ind. Ct. App. 1994), where the Court ruled that the police officer's testimony that Mother told him the child reported the defendant's molestation to her was properly admitted as relevant to Mother's credibility and was not offered as proof that the defendant molested the child.

But see **Craig v. State**, 630 N.E.2d 207, 211 (Ind. 1994) (officer's testimony regarding what child told Mother about molestation was wrongly admitted for non-hearsay purpose of explaining conduct of police in investigation, given that the child's out-of-court statement had no relevance apart from proving facts asserted in the statement); **McIntyre v. State**, 717 N.E.

2d 114, 122-123 (Ind. 1999) (trial court erred in admitting statements of defendant's mother to police officer to explain officer's actions in investigation, because probative value of understanding progression of the investigation was outweighed by prejudicial effect of out-of-court statements).

VIII.B. 2. Prior Consistent and Inconsistent Statements of Child Witness and Identification Testimony
Despite the definition of hearsay, a statement does not qualify as hearsay if the declarant testifies and is subject to cross-examination about a prior statement, and the statement is:

(1) inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition; or
(2) is consistent with the declarant's testimony, and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
(3) is an identification of a person shortly after perceiving the person. Ind. Evid. R. 801(d)(1).

Ind. Evid. R 801(d) is applicable to the out-of-court statements of children who testify in the factfinding hearing and are available for cross-examination, but does not apply to the statements of children who cannot testify due to incompetency or trauma. A child's out-of-court statement that is consistent with the child's in-court testimony is admissible as substantive evidence if offered to rebut an express or implied charge against the child of recent fabrication or improper influence or motive. A child's out-of-court statement that is inconsistent with the child's court testimony is admissible if the out-of-court statement was taken under oath.

The following cases pertain to a child witness's statement under Ind. Evid. R. 801(d)(1): **Flake v. State**, 767 N.E.2d 1004, 1010 (Ind. Ct. App. 2002) (defendant's convictions for sexual misconduct with a minor and rape were affirmed despite defendant's contention that the trial court had abused its discretion in allowing the State to rehabilitate the fifteen-year-old victim's testimony; Court opined that Ind. Evid. R. 801(d)(1) need not have been applied and the trial court had not abused its discretion in permitting rehabilitation of the victim when the defendant's theory from the beginning was that the victim informed the defendant of her age after engaging in sexual relations); **Bannowsky v. State**, 658 N.E.2d 919, 921-22 (Ind. Ct. App. 1995) (prior consistent statement of child witness to caseworker not admissible under Evid. R. 801 (d) to rebut allegations of recent fabrication because defendant's theory of defense was that child had fabricated abuse from very beginning, but statement could be used to impeach or rehabilitate); **Ridenour v. State**, 639 N.E.2d 288, 295 (Ind. Ct. App. 1994) (children testified at trial and acknowledged making out-of-court statements to the welfare social worker; State offered the tape-recorded statements of the children as prior statements consistent with their trial testimony. Court affirmed the admission of the prior consistent statements); **Kielblock v. State**, 627 N.E.2d 816, 821 (Ind. Ct. App. 1994) (not error in criminal child molestation trial to admit audio recording of child's out-of-court statement to caseworker, which was consistent with child's in-court testimony and was offered to rebut defendant's expressed or implied charge of recent fabrication or improper influence or motive).

The following cases concerned adult witnesses' prior statements under Evid. R. 801(d)(1): **Blair v. State**, 877 N.E.2d 1225, 1233-34 (Ind. Ct. App. 2007), *trans. denied* (no error in the trial court's exclusion of testimony of a friend of the victim that the victim had previously accused the friend's stepfather of molesting the victim while she slept in the friend's bedroom; Court opined that Indiana common law permits evidence of a prior false accusation

of rape, but evidence of prior false accusations may be admitted only if (1) the complaining witness admits that she had made a prior false accusation of rape; or (2) the accusation is demonstrably false, where the victim has admitted the falsity of the charges or they have been disproved); **Ringham v. State**, 768 N.E.2d 893, 899 (Ind. 2002) (Court of Appeals' finding at 753 N.E.2d 29, 36 that trial court did not err when it admitted rape victim's prior consistent statement to police detective summarily affirmed); **Clark v. State**, 808 N.E.2d 1183, 1188-90 (Ind. 2004) (trial court's admission of transcript of sworn prior inconsistent statement of witness to murder did not violate defendant's rights).

The following cases affirmed the admissibility of prior identification statements as not hearsay pursuant to Ind. Evid. R. 801(d)(1)(c): **Johnson v. State**, 881 N.E.2d 10 (Ind. Ct. App. 2008) *trans. denied*; **Dickens v. State**, 754 N.E.2d 1, 6 (Ind. 2001); **Kendall v. State**, 790 N.E.2d 122, 128 (Ind. Ct. App. 2003), *trans. denied*.

VIII.B. 3. Out-of-Court Statement of Party

A statement is not hearsay if, with certain qualifications, it is the statement of an opposing party in a case. Ind. Evid. R. 801(d)(2). The statement must be offered against an opposing party, and:

(1) must have been made by the opposing party in an individual or representative capacity; or
(2) is a statement that the opposing party indicated it adopted or believed was true; or
(3) was made by a person whom the party authorized to make a statement on the subject; or
(4) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
(5) was made by the party's coconspirator during and in furtherance of the conspiracy.

Therefore, under Ind. Evid. R. 801(d)(2), a witness may testify what a party told the witness outside of the courtroom. The statement does not have to be against the interest of the party who made it, but must be offered against the party at trial. The parent, guardian, or custodian, the guardian ad litem/court appointed special advocate, and DCS are all parties to CHINS and termination of the parent-child relationship cases.

In **In Re Paternity of B.B.**, 1N.E.3d 151, 157-9 (Ind. Ct. App. 2013), the Court found that the evidence presented was sufficient to support a finding that the text messages were text messages between the parties, and that a sufficient foundation was laid for their admission. Mother and Father both testified that they were text messages that they had sent and received to and from each other. Father asserted that some of the texts were missing, but he did not offer any evidence of the deleted texts. Mother testified as to the manner of the transfer between the text messages on her phone and the document that was presented to the trial court.

In **VanEtten v. Fegaras**, 803 N.E.2d 689, 692 (Ind. Ct. App. 2004), *trans. denied*, a civil negligence and assault case, the plaintiff's different accounts of the cause of his injuries to emergency medical technicians and police were admissions by a party opponent and excepted from the hearsay rule pursuant to Ind. Evid. R. 801(d)(2).

In **Allen v. State**, 787 N.E.2d 473, 478-9 (Ind. Ct. App. 2003), *trans. denied*, a criminal drug dealing case, the Court construed Evid. R. 801(d)(2)(D), "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." The Court opined that the rule applied to the government in

criminal cases and concluded that the trial court erred by excluding a statement made by a police officer of a matter within the scope of the officer's employment because that statement was not hearsay. The Court also cited City of Indianapolis v. Taylor, 707 N.E.2d 1047, 1057 (Ind. Ct. App. 1999), *trans. denied*, for the ruling that the statement of a police officer would not be hearsay when it was used in a wrongful death case against two police officers and the City of Indianapolis because it was a statement by a party-opponent pursuant to Evid. R. 801(d)(2).

VIII.C. Hearsay Exceptions Generally

Hearsay is not admissible in the CHINS factfinding hearing unless it falls within a recognized hearsay exception. See Ind. Evid. R. 802 and 803; see also **Roark v. Roark**, 551 N.E.2d 865, 869 (Ind. Ct. App. 1990); **Page v. Greene County Dept. Of Welfare**, 564 N.E.2d 956, 959 (Ind. Ct. App. 1991).

Exceptions to the hearsay exclusion rule appear in the following: Ind. Evid. R. 803 (exceptions to the rule against hearsay, regardless of whether the declarant is available as a witness, numbered one through twenty-three); and Ind. Evid. R. 804 (exceptions to the rule against hearsay when the declarant is unavailable as a witness, numbered one through five, with specific criteria for being deemed unavailable).

The child hearsay exceptions to the hearsay exclusion rule are found at IC 31-34-13 [CHINS] and at IC 31-35-4 [termination of the parent-child relationship] are not included in the Rules of Evidence.

In **In Re A.H.**, 751 N.E.2d 690, 698 (Ind. Ct. App. 2001), the Court affirmed the trial court's determination that the child was a CHINS despite an argument by the parents and child that there was insufficient evidence to support the determination. The Court noted that four people, including the state police detective and OFC family case manager, testified that the child told them that the father had come into her bedroom and touched her inappropriately on a number of occasions. The Court opined that this evidence was sufficient for the court to have found by a preponderance of the evidence that the father abused the child by committing sexual misconduct with a minor. The case does not indicate whether hearsay objections to the testimony of the four witnesses were made at the CHINS factfinding.

VIII.D. Hearsay Exceptions Under Ind. Evidence Rule 803

The hearsay exceptions under Ind. Evid. Rule 803 are particularly significant because the person who made the out-of-court statement does not have to testify or be subject to cross-examination. Under Ind. Evid. R. 803, a child's out-of-court statement can be admitted whether or not the child is competent to testify, or whether the child is unavailable to testify for some other reason. The hearsay exceptions of Ind. Evid. R. 803 are based on the "inherent reliability" of specified situations, in which it is assumed that a person is motivated to tell the truth and has no time or reason to lie.

VIII.D. 1. Present Sense Impression, Ind. Evidence Rule 803(1)

Ind. Evid. R. 803(1) states that the following is not excluded by the hearsay rule:

> Present Sense Impression. A statement describing or explaining an event, condition or transaction, made while or immediately after the declarant perceived it.

See **Minor v. State**, 35 N.E.3d 1065 (Ind. Ct. App. 2015) (for a statement to fall under the present sense impression exception to the hearsay rule, three requirements must be met: (1) it

must describe or explain an event or condition; (2) during or immediately after its occurrence; and (3) it must be based upon the declarant's perception of the event or condition).

A translator's statements have been deemed to be admissible as presented sense impressions. In **Palacious v. State**, 926 N.E.2d 1026, 1031-33 (Ind. Ct. App. 2010), the Court held, *inter alia*, that a domestic battery victim's excited utterances, contemporaneously translated by the victim's daughter, were admissible as present sense impressions. The Court opined that the victim's statements were excited utterances. See this Chapter at VIII.D.2. The Court opined that the police officer's testimony about the victim's daughter's translations of the victim's statements was also admissible. The Court noted: (1) statements which are present sense impressions are an exception to the hearsay rule; (2) all of the victim's daughter's translations were contemporaneous translations of what the victim said; (3) this left little to no opportunity for the victim's daughter to fabricate anything; and (4) the victim's daughter testified that she accurately and truthfully translated everything her mother said.

In **Jones v. State**, 800 N.E.2d 624, 628-9 (Ind. Ct. App. 2003), a child battery case, the Court opined that the three-year-old child victim's statement to his mother that the defendant had hit him in the mouth did not qualify as a present sense impression hearsay exception because: (1) alleged battery had occurred sometime within the previous three hours when mother left the victim in defendant's care; and (2) it was clear that child was not describing event as it occurred and was being experienced by the child. The child's statement to his mother was admissible under the excited utterance exception to hearsay rule. See this Chapter at VIII.D.2. immediately below for further discussion of excited utterance exceptions.

VIII.D. 2. Excited Utterance, Ind. Evidence Rule 803(2)

Ind. Evid. R. 803(2) states that the following is not excluded by the hearsay rule:

> Excited Utterance. A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

The three elements necessary to qualify a statement as an excited utterance are: (1) a startling event has occurred; (2) a statement was made by a declarant while under the stress of excitement caused by the event; and (3) the statement relates to the event. **Lieberenz v. State**, 717 N.E.2d 1242, 1245 (Ind. Ct. App. 1999). This is not a mechanical test, and the main question is whether the statement is inherently reliable because the declarant was incapable of thoughtful reflection. **McQuay v. State**, 10 N.E.3d 593 (Ind. Ct. App. 2014).

The amount of time that has passed between the event and the statement is relevant, but not dispositive. See **Noojin v. State**, 730 N.E.2d 672, 676 (Ind. 2000). A statement does not lack spontaneity simply because it was an answer to a question; however, the time lapsed can be extremely important in determining if the victim is still under the stress of the event. See **Wood v. D.W. ex rel. Wood**, 47 N.E.3d 12, 16-17 (Ind. Ct. App. 2015) *opinion ultimately reinstated at* 53 N.E.3d 1182 (Ind. 2015) (absent any indication of how much time had elapsed between alleged molestation and child's hearsay statement, trial court abused its discretion in admitting child's statement during proceeding on petition for protective order in favor of Mother on behalf of child; mere fact that child had exhibited stress when he made the statement was not sufficient to invoke excited utterance exception to hearsay). If a statement is given in response to a question, the "statement must be unrehearsed and made while still under the stress of excitement from the startling event." **Yamobi v. State**, 672 N.E.2d 1344, 1346 (Ind. Ct. App. 1996)

The out-of-court statements of young children have frequently been admitted under the excited utterance rule, even when the children were incompetent to testify or otherwise unavailable. The Court of Appeals has affirmed trial courts' admission of out-of-court statements of unavailable children under the excited utterance rule. In **Boatner v. State**, 934 N.E.2d 184, 186-7 (Ind. Ct. App. 2010), the Court held that the child's statements to a police officer were made while the child was still under the stress of the startling event, and were admissible as excited utterances. In coming to this conclusion, the Court noted the following: (1) the child almost ran into the police officer crying, disorientated, and without shoes; (2) the child made the statements that the defendant had pushed her down and hit her before the police officer could even ask any questions. The defendant claimed that the statements were not excited utterances because the emergency had passed; the Court addressed this by indicating that the proper consideration was whether the child was still under the stress of the events, and cited the reasoning in Jones v. State, 800 N.E.2d 624, 628 (Ind. Ct. App. 2003) as the proper consideration.

In **D.G.B. v. State**, 833 N.E.2d 519, 526-7 (Ind. Ct. App. 2005), a juvenile delinquency case, the six-year-old girl victim's statement to her mother was admissible as an excited utterance because: (1) a startling event occurred when the girl suffered a particularly heinous molestation involving mutilation of her genitalia with a knife and fork and subsequent threats; (2) the girl did not stop bleeding and required hospitalization and surgery which would be frightening and stressful for a six-year-old; (3) after surgery the girl was confronted with the alarming appearance of a knife and fork on her hospital breakfast tray, the very instruments used to inflict injury upon her; (4) the girl was visibly upset when she saw the knife and fork and remained upset as she related the molestation to her mother; (5) based on the girl's young age and the fact that she had to undergo surgery, it was unlikely that she was capable of thoughtful reflection in order to fabricate her story. The Court concluded that the stress of the excitement caused by such a traumatic molestation continued until the time the girl awoke from surgery and gave her account of molestation to her mother. Even though many hours had passed since her molestation, the child was still under the stress of the excitement caused by the "particularly hideous" event and was unlikely to make deliberate falsifications; therefore, her statement made to her mother at the hospital was inherently reliable.

See also **Purvis v. State**, 829 N.E.2d 572, 581 (Ind. Ct. App. 2005), *trans. denied* (ten-year-old child victim's statement to his mother's live-in boyfriend met all the criteria to be classified as an excited utterance; statement was made: (1) almost immediately after the defendant left the home; (2) while the child was crying and plainly upset by the stress of the event; (3) without opportunity for coaching); **Burdine v. State**, 751 N.E.2d 260, 264-65 (Ind. Ct. App. 2001), *trans. denied* (three-year-old victim's statements were admissible; Court noted the following evidence: (1) child's severe injuries; (2) length of time between the events, the child's first statement to a mental health caseworker, and the child's second statement to an OFC investigator, an OFC case manager, and a police detective was not too long for excitement of startling event to have dissipated; (3) the child's second statement was not elicited; (4) the second statement was not rehearsed nor the result of reflection and deliberation); **Jones v. State**, 800 N.E.2d 624, 628 (Ind. Ct. App. 2003) (three-year-old victim's statements to police officer that battery defendant had hit him in the mouth with her fist was admissible because officer responded immediately to mother's 911 call after mother discovered blood on victim's mouth; victim was upset and looked like he had been crying; victim had injury to lower lip; altercation with defendant was startling event that caused victim distress); **Davenport v. State**, 749 N.E.2d 1144, 1148 (Ind. Ct. App. 2001) (tape of five-year-old child's 911 call was admissible in murder case because call was made shortly after child discovered his dead mother's body; child called 911 to report his finding; police

officers who arrived at the house shortly after call described child as confused, in shock, upset and fidgety); **White v. Illinois**, 502 U.S. 346 (1992) (U.S. Supreme Court ruled that a child's "spontaneous declaration" was admissible as a hearsay exception in the criminal sexual assault trial; child's statements to the baby sitter immediately following the assault, the child's statements to her mother thirty minutes after the assault, and the child's statements to a police officer forty-five minutes after the assault were admissible); **Carter v. State**, 683 N.E.2d 631, 632 (Ind. Ct. App. 1997) (neighbor was allowed to testify that the three-year-old child said "daddy took the gun and went bang" even though the child was not competent to testify at trial); **Williams v. State**, 546 N.E.2d 1198, 1999 (Ind. 1989) (Court ruled that despite the passage of time from the shooting until the ambulance arrived and the child made the statement, the child was in an excited state and therefore the child's statement was an excited utterance; a child's competence to testify at trial is not relevant to the admissibility of the child's excited utterance).

However, there are cases in which the child's statement did not fit under the excited utterance exception. See **Shoup v. State**, 570 N.E.2d 1298, 1303 n. 3 (Ind. Ct. App. 1991) (may have been error to admit three-year-old's statement to police that "Daddy did it" under excited utterance exception, because of lapse of time during child's confinement).

Statements which need to be translated by a translator may need to fit two hearsay exceptions: present sense impressions and excited utterances. See VIII.D.1. In **Palacious v. State**, 926 N.E.2d 1026, 1031-33 (Ind. Ct. App. 2010), the Court held that the statements made by the victim to a police officer were admissible through the excited utterance exception to the hearsay rule, even though the victim's statements to the police officer had to be translated by the victim's daughter. The Court opined that the victim's statements were excited utterances, noting that: (1) the police officer was immediately dispatched to the house; (2) although the victim was not crying, she was still in pain; and (3) the victim did not seem to be acting normally. The Court lastly opined that the police officer's testimony about the victim's daughter's translations of the victim's statements was also admissible.

Adult criminal cases may also give some guidance on what does or does not constitute an excited utterance. See the following cases involving excited utterances:

Brittain v. State, 68 N.E.3d 611 (Ind. Ct. App. 2017), where the Court determined that the witness's handwritten notes were excited utterances; she was under the stress of the event and incapable of thoughtful reflection.

Teague v. State, 978 N.E.2d 1183, 1187-88 (Ind. Ct. App. 2012), where the Court held that the neighbor's statements relaying the victim's statements to the 911 operator were admissible under the excited utterance exception to the hearsay rule. The Court noted that one victim appeared at the neighbor's house distraught, injured, and screaming, and the neighbor could hear the other victim screaming from next door. The neighbor immediately called 911 and answered the operator's questions, without the opportunity to reflect upon the events unfolding. An excited utterance can be made in response to a question, so long as the statement is unrehearsed and is made under the stress of excitement from an event. The Court concluded that all of these facts bore sufficient indicia of reliability.

Young v. State, 980 N.E.2d 412, 421-22 (Ind. Ct. App. 2012), where the Court held, *inter alia*, that the victim's statements to the police officer were not admissible as excited utterances, because the victim was not under the extreme and containing stress of the battery by the time the police officer arrived to take her statement. While a lapse of time is not dispositive, usually a statement is less likely to be deemed an excited utterance the further in time the statement was made from the startling event. The victim's statements

were not excited utterances because the officer arrived an hour after the battery, the victim had stopped crying, and she was anxious to leave.
Newbill v. State, 884 N.E.2d 383, 397 (Ind. Ct. App. 2008) (Court affirmed adult rape conviction in which recording of victim's 911 call was admitted pursuant to excited utterance hearsay exception, inasmuch as trial court did not abuse its discretion by determining that victim was still under stress and excitement of startling event even though 911 call occurred number of hours after rape), *trans. denied.*

But see **Marcum v. State**, 772 N.E.2d 998, 1001-02 (Ind. Ct. App. 2002) (battery conviction reversed due to erroneous admission of written statement given by adult victim to police two and one half days after the event; statement not made under stress of excitement; alleged victim's testimony indicated she was capable of thoughtful reflection and fabrication at time statement was given); **Wilson v. State**, 536 N.E.2d 1037, 1043 (Ind. Ct. App. 1989) (Court rejected state's argument that statement made by rape victim to nurse in hospital over an hour after rape was per se excited utterance).

VIII.D. 3. Then Existing Mental, Emotional, or Physical Condition, Ind. Evidence Rule 803(3)
Ind. Evid. R. 803(3) states that the following is not excluded by the hearsay rule:

> Then-Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then-existing state of mind (such as motive, design, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of the declarant's will.

In **Matter of A.F.**, 69 N.E.3d 932, 943 (Ind. Ct. App. 2017), the Court could not say that the trial court's admission of hearsay testimony from the children's behavioral clinician, the children's senior therapeutic support specialist, and the children's therapist warranted reversal of the termination judgment. Any error in the admission of the behavioral clinician's testimony regarding reports that daughter was lying and stealing, or the admission of the therapist's and therapeutic support specialist's testimony regarding reports that daughter had conduct disorder and exhibited sexualized behaviors, was not reversible error. Father argued that testimony was hearsay and did not qualify under medical diagnosis or treatment exception, but the testimony was cumulative of other evidence admitted without objection, including testimony of foster mother that daughter would steal and lie, that daughter had symptoms of conduct disorder, and that daughter had sexualized behavior.

In **Palacious v. State**, 926 N.E.2d 1026, 1031-33 (Ind. Ct. App. 2010), the Court held that the domestic battery victim's statement that she "still hurt a little bit" to her daughter and the police officer was a then existing physical condition, and thus the statement was admissible during the trial.

In **Simmons v. State**, 746 N.E.2d 81, 88-9 (Ind. Ct. App. 2001), *trans. denied*, a child molestation case, the stepmother testified to the three-year-old child victim's statement regarding molestation. The child's statement was admitted pursuant to Ind. Evid. R. 803(3). The defendant argued that the child was permitted to refer to physical pain she was experiencing in the vaginal area, but should not have been allowed to state that the defendant caused her pain. The Court agreed, holding that to the extent the statement referred to the defendant as the cause of her pain it was inadmissible. The Court further noted that the purpose of this hearsay exception is to allow comments concerning a declarant's then existing pain or symptoms which would ordinarily be difficult or impossible to prove. Any statements describing the locality of pain or symptoms of an illness are admissible.

See also **Fleener v. State**, 648 N.E.2d 652, 655 (Ind. Ct. App. 1995), *affirmed at* 656 N.E.2d 1140 (Ind. 1995) (grandmother testified that the child complained while being bathed that "her bottom was sore"; hearsay statement was admissible under Ind. Evid. R. 803(3) as a statement of a then existing sensation or physical condition made at the time the declarant child was perceiving the condition); **Arndt v. State**, 642 N.E.2d 224 (Ind. Ct. App. 1994) (three-year-old child's statements regarding pain were admissible under the criminal child hearsay exception, but the Court also noted that the child's statements were also "arguably admissible" under the excited utterance hearsay exception at Ind. Evid. R. 803(2) and the then existing physical condition hearsay exception at Ind. Evid. R. 803(3)).

VIII.D. 4. Statements Made for Purposes of Medical Diagnosis or Treatment, Ind. Evidence Rule 803(4)

Ind. Evid. R. 803(4) states that the following is not excluded by the hearsay rule:

> Statement Made for Medical Diagnosis or Treatment. A statement that:
> (A) is made by a person seeking medical diagnosis or treatment;
> (B) is made for — and is reasonably pertinent to — medical diagnosis or treatment; and
> (C) describes medical history; past or present symptoms, pain or sensations; their inception; or their general cause.

Part of the analysis which must occur in determining if Ind. Evid. R 803(4) will apply to the out-of-court statement of a child is as follows: (1) is the declarant motivated to provide truthful information in order to promote diagnosis and treatment; and (2) is the content of the statement such that an expert in the field would reasonably rely on it in rendering diagnosis or treatment. See **Cooper v. State**, 714 N.E.2d 689, 691 (Ind. Ct. App. 1999).

Other suggested foundational questions include: (1) Did you explain the purpose of the examination to the girls? (2) How so? (3) Did you ask if they understood the purpose of the examination? (4) Did you ask if they had been seen by a nurse before? (5) Did you explain how important it was that they tell you the truth? (6) How did they respond? Lastly, the Court opined that the following foundational questions could be asked of children receiving medical exams: (1) Have you been to a doctor's office before? (2) Have you been seen by a nurse before? (3) Do you know what nurses do? (4) What do they do? (5) Do you know the difference between the truth and a lie? (6) Do you tell nurses and doctors the truth? (7) Do you know why you tell the nurses and doctors the truth? (8) Did you know why you were seeing this particular nurse? See **VanPatten v. State**, 986 N.E.2d 255, 260-1, 265-6 (Ind. 2013).

In **Matter of A.F.**, 69 N.E.3d 932, 947-8 (Ind. Ct. App. 2017), the Court affirmed the trial court's order which terminated Father's parental rights, and concluded it could not say the trial court abused its discretion in admitting the oldest child's statements to her mental health therapist into evidence pursuant to Ind. Evidence Rule 803(4) (Statement Made for Medical Diagnosis or Treatment). Father contended that the oldest child did not understand the importance of being truthful with the therapist for treatment purposes. The Court observed that "[t]he declarant must subjectively believe that he was making the statement for the purpose of receiving medical diagnosis or treatment." This evidence does not necessarily require testimony from the child-declarant; it may be received in the form of foundational testimony by the medical professional detailing the interaction with the declarant, how he or she explained his role to the declarant, and an affirmation that the declarant understood that role. The Court noted the following evidence in support of its determination that the oldest child's statements to the therapist were admissible: (1) testimony that the therapist told the child that therapy was a safe place where the child would receive help with her feelings and

where they would work together to solve problems; (2) testimony that the therapist told the child about the importance of being truthful in therapy; (3) the oldest daughter was ten years old when she went over Father's letter with the therapist.

In **Walters v. State**, 68 N.E.3d 1097, 1100 (Ind. Ct. App. 2017) *trans. denied*, the Court held that the trial court did not abuse its discretion in admitting nurse's reiteration of minor victim's description of defendant's sexual assault pursuant to the medical treatment exception to the hearsay rule. The victim was eleven years old, there was no evidence that the nurse would steer the conversation to support the assault allegations, the nurse was able to recall how she explained her role to the victim, and the victim was able to identify her as a nurse or doctor.

In **Steele v. State**, 42 N.E.3d 138, 143 (Ind. Ct. App. 2015), the Court determined that hearsay statements made to a nurse by a domestic battery victim which identified the defendant as the perpetrator of domestic violence, were relevant for purposes of medical treatment, and thus, admissible under exception to hearsay rule for statements made for the purpose of medical diagnosis or treatment. The fact that the victim and the defendant had a long-standing relationship were relevant to the hospital's treatment and ensuring their patient's safety. In cases involving child abuse, sexual assault, or domestic violence, trial courts can exercise their discretion in admitting medical diagnosis statements which contain the identity of the perpetrator.

In **VanPatten v. State**, 986 N.E.2d 255, 260-1, 265-6 (Ind. 2013), the Court held that because there was insufficient evidence that the victimized children were motivated to provide truthful information to the nurse, the nurse's testimony should not have been admitted as substantive evidence against the defendant. Ind. Evid. R. 803(4), which generally permits statements made for the purpose of medical diagnosis or treatment to be admitted into evidence, is an exception to the hearsay rule which is based on the belief that people are unlikely to lie to their doctors because doing so could impede their chance to become well again. The following questions about reliability of the statement must be asked: (1) whether the declarant was motivated to give truthful information that an expert in the field would rely upon in making a diagnosis or giving treatment, and (2) the declarant must believe that he or she was making the statement in order to get a medical diagnosis or treatment. While most adults recognize a doctor or a nurse immediately as being a person who will give them a diagnosis or treatment, such an inference is less obvious when a young child is brought to a medical provider by a parent, because "young children may not understand the nature of the examination, the function of the examiner, and may not necessarily make the necessary link between truthful responses and accurate medical treatment." Consequently, when dealing with statements made by children sought to be admitted under 803(4), "there must be evidence that the declarant understood the professional's role in order to trigger the motivation to provide truthful information." The Court determined that this does not require that the child testify, and the foundation for the statements may be received from the "medical professional detailing the interaction between him or her and the declarant, how he or she explained his role to the declarant, and an affirmation that the declarant understood that role."

In reaching its decision, the VanPatten Court noted the following: (1) even though the nurse testified to her entire procedure, and that she goes through this procedure with every child, she had no specific memory of what she said to these children before examining them; (2) there was no testimony to establish either girl knew what telling the truth meant, the importance of telling the truth in a medical examination, the role of the nurse, or any

testimony about past experiences with doctors and nurses; (3) since the child victims were young, it was not an obvious inference that the children knew there were there for a medical examination just because it was obvious they were at a hospital, in an exam room, with a nurse in scrubs; and (4) the children were examined by the nurse only after being extensively interviewed by DCS, and the nurse had observed the DCS interview.

In **Mastin v. State**, 966 N.E.2d 197, 201 (Ind. Ct. App. 2012), the Court held that the child-victim's statement to her grandmother about sexual abuse by Father, made after a medical examination had concluded and when no medical professionals were present, could not be admissible under the medical diagnosis exception to the hearsay rule. However, there was significant independent evidence of the defendant's guilt. The Court noted that the statement must be made to advance a medical diagnosis or treatment, though it does not need to be made to a doctor. The Court opined that, in this case, the child-victim made the statement to her grandmother, after the medical examination was complete, and there were no medical personnel present when the statement was made.

In **Palilonis v. State**, 970 N.E.2d 713, 727 (Ind. Ct. App. 2012), the Court held that the deceased rape victim's statements made to a nurse during her examination describing her sexual assault were admissible under Ind. Evid. R.803(4). The Court opined that the description of the event was within the scope of Ind. Evid. R.803(4), as the statements described the "general character of the cause or external source" of her symptoms. The victim's statements were made to the nurse so that the nurse knew how to proceed in treating the victim, regardless of whether the victim was or was not in pain; therefore, they were statements made for the purpose of medical diagnosis or treatment.

In **In Re Paternity of H.R.M.**, 864 N.E.2d 442, 446-47 (Ind. Ct. App. 2007) the Court held that the five-year-old child's statements to a clinical social worker about her sexual abuse were not admissible under the hearsay exception at Ind. Evid. R. 803(4) because there was a lack of evidence that the child understood the social worker's role in order to trigger the motivation to provide truthful information. The Court also noted that, although it did not have to reach the issue in this case, identity is not normally relevant to a medical diagnosis or treatment, and therefore rarely admissible under this hearsay exception; but, in the context of physical or sexual child abuse, knowledge of the perpetrator is important to the treatment of psychological injuries that may relate to the identity of the perpetrator and to the removal of the child from the abuser's custody or control.

In **In Re W.B.**, 772 N.E.2d 522, 532-4 (Ind. Ct. App. 2002), a termination case, the Court opined that the trial court erred in admitting statements made by older siblings to their therapists and to others regarding sexual and physical abuse by the parents. There was no evidence presented that the declarants were motivated to provide truthful information in order to promote diagnosis and treatment. The therapist's testimony clearly portrayed the young children as "mentally and emotionally incompetent" and no doubt "totally unaware" of the therapist's professional purpose.

See also **McClain v. State**, 675 N.E.2d 329, 331 (Ind. 1996) (Court noted that a child's statement to a psychologist/therapist could qualify under the medical diagnosis or treatment exception, but did not qualify in this criminal child molestation trial because there was no evidence that the child understood that he was speaking to a trained professional for the purpose of obtaining a diagnosis of, or providing treatment for, emotional or psychological injuries); **Fleener v. State**, 648 N.E.2d 652, 658 (Ind. Ct. App. 1995), *affirmed at* 656 N.E. 2d 1140 (Ind. 1995) (testimony of the psychologist that the child "could not get it [the

molestation] off her mind," was properly admitted under the hearsay exception for medical diagnosis or treatment; Ind. Evid. R. 803(4) is not limited to statements given to physicians, but may include persons other than physicians "where the out-of-court declarant subjectively believes that he is making the statement in contemplation of receiving medical diagnosis or treatment"); **White v. Illinois**, 502 U.S. 346 (1992) (U.S. Supreme Court ruled that the statements of a four-year-old victim to an emergency room nurse and a doctor were admissible in a sexual assault case under the Illinois criminal hearsay exception for statements made in the course of securing medical treatment, despite the child's inability to testify at trial).

For adult victim cases addressing this hearsay exception, see **Newbill v. State**, 884 N.E.2d 383, 396-97 (Ind. Ct. App. 2008), *trans. denied* (testimony of the trained and certified sexual assault nurse examiner (SANE) about what the victim told her may have been inadmissible hearsay that did not fit the diagnosis/treatment exception inasmuch as, according to the witness's own testimony, she was not treating the victim or obtaining a medical diagnosis, but was collecting evidence); **Dowell v. State**, 865 N.E.2d 1059, 1065-66 (Ind. Ct. App. 2007), *summarily aff'd* in relevant part by 873 N.E.2d 59 (Ind. 2007) (hearsay testimony of an emergency room nurse as to an adult rape victim telling her that she intended to prosecute was improperly admitted in that it was not relevant to the victim's treatment; waiver aside, Court found that the rest of the nurse's testimony including the identification of the attacker was admissible because it was made for treatment rather than fault).

VIII.D. 5. Recorded Recollection, Ind. Evid. R. 803(5)

Ind. Evid. R. 803(5) states that the following is not excluded by the hearsay rule:

> Recorded Recollection. A record that:
> (A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;
> (B) was made or adopted by the witness when the matter was fresh in the witness's memory; and
> (C) accurately reflects the witness's knowledge.
> If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

This hearsay exception could apply to adult or child witnesses who do not recall significant events that are documented in written or videotaped records. It could apply to a child who has been videotaped or a caseworker, service provider or court appointed special advocate who cannot recall significant information documented in his/her records. The exception does not require a total absence of memory, but it does require that the person acknowledges making the out-of-court statement or record, even if the person states at trial that the statement is untrue. See **A.R.M. v. State**, 968 N.E.2d 820 (Ind. Ct. App. 2012) (recorded recollection exception applied when witness has an insufficient memory of the event recorded; but witness must be able to vouch for accuracy of prior statement); **Williams v. State**, 698 N.E. 2d 848, 850 n. 3 (Ind. Ct. App. 1998) (child's videotaped statement incriminating his father in burglary admitted when child alternated between not recalling statements to police and denying statements on the witness stand); **Impson v. State**, 721 N.E.2d 1275, 1282-83 (Ind. Ct. App. 2000) (woman's affidavit that defendant battered her admitted into evidence when woman's recall of events on witness stand varied significantly from affidavit; witness's avoidance of a question may be labeled "insufficient memory").

See this Chapter at II.D.6. for discussion of therapist using mental health records to refresh recollection for testimony in **Carter v. KCOFC**, 761 N.E.2d 431, 439 (Ind. Ct. App. 2001).

VIII.D. 6. Business Records (Ind. Evid. R. 803(6)) and Public Records (Ind. Evid. R. 803(8))

Ind. Evid. R. 803(6) allows the proponent of the record to prove the necessary foundation by affidavit and allows business records to include opinions and diagnoses. Ind. Evid. R. 803(6) states that the following is not excluded by the hearsay rule:

> Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:
>
> (A) the record was made at or near the time by, or from information transmitted by, someone with knowledge;
>
> (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
>
> (C) making the record was a regular practice of that activity;
>
> (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(9) or (10) or with a statute permitting certification; and
>
> (E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

Ind. Evid. R. 803(8)(A) provides for what public records are admissible, while Ind. Evid. R. 803(8)(B) provides for exclusion of public records:

> Public Records. (A) A record or statement of a public office if:
>
> (i) it sets out: (a) the office's regularly conducted and regularly recorded activities; (b) a matter observed while under a legal duty to [observe and] report; or (c) factual findings from a legally authorized investigation; and
>
> (ii) neither the source of information nor other circumstances indicate a lack of trustworthiness.
>
> (B) Notwithstanding subparagraph (A), the following are not excepted from the hearsay rule:
>
> (i) investigative reports by police and other law enforcement personnel, except when offered by an accused in a criminal case;
>
> (ii) investigative reports prepared by or for a public office, when offered by it in a case in which it is a party;
>
> (iii) factual findings offered by the government in a criminal case; and
>
> (iv) factual findings resulting from a special investigation of a particular complaint, case, or incident, except when offered by an accused in a criminal case.

Ind. Evid. R. 805 provides that hearsay included in a business record or public record (or other hearsay exception) is not hearsay "if each part of the combined statements conforms with an exception to the rule." This has been interpreted to mean that hearsay included within a hearsay exception will not be admissible unless the underlying hearsay also fits within a hearsay exception.

In **In Re O.G.**, 65 N.E.3d 1080, 1087 (Ind. Ct. App. 2016), the Court found that the DCS exhibits of Father's Department of Correction (DOC) records and Putnamville Correctional Facility records did not qualify for admission as business records pursuant to Indiana Rules of Evidence 803(6) or 902(11), and the Court held the juvenile court erred by admitting the exhibits into evidence. Although DCS argued that Father waived his objection because it was based on hearsay and relevance and did not specifically identify the business records exception to the hearsay rule, the Court found the general hearsay objection was sufficient to preserve Father's argument for appeal. The Court reviewed both evidence rules and noted that for both exhibits, DCS did not offer the testimony of a custodian or other qualified

witness; therefore, to be admissible, the records must have been accompanied by a certification which complied with Rule 902. The Court noted several other missing elements.

In **D.B.M. v. Indiana Department of Child Services**, 20 N.E.3d 174, 179-180 (Ind. Ct. App. 2014), *trans. denied*, the Court affirmed the trial court's order terminating Father's parental rights. The Court opined that any error in admitting the DCS supervisor's testimony was harmless. The Court noted that the supervisor based her testimony on documents prepared by the case manager and others, and the testimony was admitted to prove the truth of the mater asserted; therefore, the testimony constituted hearsay. The Court said that, to the extent the supervisor's testimony was based on records in DCS's possession, it would likely be admissible pursuant to the hearsay exceptions for business or public records, Ind. Evidence Rules 803(6) and 803(8). Ind. Evid. R. 803(6) "unequivocally requires the proponent of business records to establish, by testimony of the custodian or other qualified witness, that the records are regularly made."

In **Perry v. State**, 956 N.E.2d 41, 51 (Ind. Ct. App. 2011) (reversed and remanded on other matters), the Court held that the victim's medical record was admissible as a business record. Ind. Evid. R. 803(6) provides for the admission of various types of business records, which includes opinions and diagnosis, as long as they meet the foundation requirements. The Court noted that medical records are routinely deemed admissible under Rule 803(6), and that medical records were not excluded as police records, even where medical personnel may act in cooperation with law enforcement authorities. Since the nurse created the record at the same time she examined the victim and the record was created in the regular course of hospital activity, the victim's medical record and the statements, information, and observations in it were admissible.

In **In Re Relationship of E.T.**, 808 N.E.2d 639, 640, 643-5 (Ind. 2004), the Court affirmed in part and vacated in part the Court of Appeals opinion, In Re E.T., 787 N.E.2d 483 (Ind. Ct. App. 2003), and affirmed the trial court's judgment terminating the parent-child relationship. Supervised visitation notes were admitted into evidence. The Court held that reports that were compiled by Stop Child Abuse and Neglect (SCAN), a nonprofit organization, which described home visits and supervised visitation, did not qualify as business records; therefore, they were not admissible as an exception to the hearsay rule. The Court held that the SCAN reports did not qualify as business records because: (1) not all the information contained in the records was the result of first-hand observations; (2) the reports contained conclusory lay opinions; and (3) nothing in the record supported the view that the reports were prepared for the systematic conduct of SCAN as a non-profit corporation. An exhaustive list of Indiana cases which held that evidence was admissible under the business records exception to the hearsay rule is included in the decision at page 645 n.4.

In **Embrey v. State**, 989 N.E.2d 1260, 1266-7 (Ind. Ct. App. 2013), the Court held that the trial court did not abuse its discretion in admitting the National Precursor Log Exchange ("NPLEx") report, which tracks the sale of drugs used to create methamphetamine, under the business records exception to the hearsay rule. Indiana law requires retailers selling non-prescription ephedrine and pseudoephedrine to electronically submit records of all sales of products containing these drugs to the NPLEx as part of the retailer's regularly conducted business activity. The NPLEx records maintained by the custodian of records are generated at the time the purchaser's information is scanned into the system. The custodian of the NPLEx database submitted a "Business Records Affidavit" together with a printout of the NPLEx record of the purchases and attempted purchases of ephedrine and pseudoephedrine made by the defendant; the affidavit laid the proper foundation for business records. Because the

individuals submitting the information had both firsthand knowledge of the purchases or attempted purchases as well as a duty to accurately report the purchases or attempted purchases, the custodian of the records was not required to have firsthand knowledge of the purchases or attempted purchases.

See also **Fry v. State**, 885 N.E.2d 742, 749 (Ind. Ct. App. 2008) (trial court did not abuse its discretion when it deemed cell phone records properly authenticated and admitted records as evidence where contents of records, considered in conjunction with State's third-party discovery requests and certification from cell phone companies that attached records were true and accurate, created a reasonable probability that records were what they purported to be), *trans. denied*; **Speybroeck v. State**, 875 N.E.2d 813, 821-22 (Ind. Ct. App. 2007) (defendant's convictions for fraud and identity deception were reversed where trial court erroneously admitted as business records bank documents that were not created by an employee of the bank who had personal knowledge of the matters set forth in the documents, and the creators of the documents were not acting in the course of the bank's regularly conducted business activity when they created the documents); **In Re Paternity of H.R.M.**, 864 N.E.2d 442, 448-50 (Ind. Ct. App. 2007) (trial court abused its discretion in admitting business records where their supporting affidavit indicating that the records were kept in the normal course of business, and that it was the regular practice of the business to make such records, did not indicate that affiant certified her statements under oath).

VIII.D. 6. a. Records of the Department of Child Services

In **D.B.M. v. Indiana Department of Child Services**, 20 N.E.3d 174, 179-180 (Ind. Ct. App. 2014), *trans. denied*, the Court affirmed the trial court's order terminating Father's parental rights. The Court opined that any error in admitting the DCS supervisor's testimony was harmless. The Court noted that the supervisor based her testimony on documents prepared by the case manager and others, and the testimony was admitted to prove the truth of the mater asserted; therefore, the testimony constituted hearsay. The Court said that, to the extent the supervisor's testimony was based on records in DCS's possession, it would likely be admissible pursuant to the hearsay exceptions for business or public records, Ind. Evidence Rules 803(6) and 803(8). Ind. Evid. R. 803(6) "unequivocally requires the proponent of business records to establish, by testimony of the custodian or other qualified witness, that the records are regularly made."

In **B.H. v. Indiana Dept. of Child Services**, 989 N.E.2d 355, 363 (Ind. Ct. App. 2013), the Court affirmed the trial court's judgment terminating Mother's parental rights to her two children, and held, *inter alia*, that the trial court erred in admitting the progress reports through the MCDCS caseworker's testimony, but the error was harmless. MCDCS argued that the progress reports were not admitted for the truth of the matter, but rather "to show why [MC]DCS had filed for termination of Mother's parental rights,"; however, the Court opined that the probative value of these reports to show why termination was sought was substantially outweighed by the danger of unfair prejudice given their contents. Ind. Evid. Rule 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice..."

In **In Re Adoption of M.A.S.**, 815 N.E.2d 216, 223 (Ind. Ct. App. 2004), the Court affirmed the trial court's order granting the stepfather's petition to adopt the child without the birth father's consent. The birth father argued that the trial court had abused its discretion by considering a home study submitted to the court by the DeKalb County OFC pursuant to IC 31-19-8-5 and IC 31-19-11-1(a)(3). The Court found that IC 31-19-

8-5 specifically provides that the report "shall be filed with the adoption proceedings." Such reports are "not admissible over objection in a contested case, i.e., a case in which a party whose consent is required refuses to do so", quoting Krieg v. Glassburn, 419 N.E.2d 1015, 1021 n.5 (Ind. Ct. App. 1981). The M.A.S. Court found that because the birth father's consent was not required, the trial court could consider the home study report in determining whether it was in the child's best interests to be adopted by the stepfather.

In **In Re Adoption of B.C.S.**, 793 N.E.2d 1054, 1061-2 (Ind. Ct. App. 2003), the Court affirmed the trial court's order granting the presumed father's petition for adoption and denying the maternal great-aunt and great-uncle's adoption petition. On appeal the great-aunt and great-uncle argued that the trial court had abused its discretion when it relied on hearsay documents, including the Cass County Division of Family and Children report, which were admitted into evidence without objection. The Court was unpersuaded, noting that it is "well settled law that a party may not sit idly by at trial allowing an error to occur without objection and then raise such an error on appeal."

See also **D.W.S. v. L.D.S.**, 654 N.E.2d 1170, 1172-73 (Ind. Ct. App. 1995) (admission of welfare investigation records where person preparing reports had no first-hand knowledge of the alleged abuse was harmless error. The portions of the reports based on the statements of persons interviewed by the caseworkers did not fit within the business records exception because the persons interviewed had no business duty to observe or report the facts of alleged abuse; however, records could be admissible to establish that an event was reported, and caseworker's direct observations were admissible. Hearsay within hearsay must be accounted for); **Page v. Greene County Dept. of Welfare**, 564 N.E.2d 956, 959 (Ind. Ct. App.1991) (error to admit the preliminary inquiry and other welfare reports containing statements of the subject children who did not testify at the termination hearing; reports did not qualify under the business record exception because the caseworkers who prepared the reports did not have personal knowledge of the "facts reported by the children"); **Okuly v. State**, 574 N.E.2d 315, 317 (Ind. Ct. App. 1991) (not abuse of discretion to exclude a document from a welfare file under business record exception, because the welfare supervisor testified that the document was not prepared by her or at her direction, was not in the form generally used in the welfare case file, and she was uncertain why the document had been prepared); **Hinkle v. Garrett-Keyser-Butler Sch. D.**, 567 N.E.2d 1173, 1178-1179 (Ind. Ct. App. 1991) (in suit to reinstate teacher fired for alleged sexual abuse of students, Court ruled welfare reports not admissible under business records or official records exception to hearsay rule).

VIII.D. 6. b. Hospital and Medical Records

In **Ackerman v. State**, 51 N.E.3d 171 (Ind. 2016) *cert. denied*, the Court determined that the deceased pathologist's autopsy report of an infant which concluded the infant had been murdered came within the business records exception. The chief deputy coroner, as custodian of records for county coroner's office, was familiar with the record keeping practices and supervision of records, report and photographs were made and kept in course of regularly conducted business activity near date of event recorded, report was not prepared in anticipation of litigation, and report was kept by employees of office who had personal knowledge of facts and events recorded.

In **Archer v. State**, 996 N.E.2d 341, 350 (Ind. Ct. App. 2013), the Court held that the counseling records that the defendant sought to admit were inadmissible evidence, even if the State opened the door to the evidence. The records contained hearsay statements from

the child victim and the records themselves were hearsay, and the defendant did not have the social worker who created the records present to testify. The Court opined that it did not matter if the State had opened the door to the information contained in the counseling records; the defendant had not shown that the records were not hearsay, nor had he shown that the records fit into any hearsay exception.

In **Perry v. State**, 956 N.E.2d 41, 49-50 (Ind. Ct. App. 2011) (reversed and remanded on other matters), the Court held that the victim's statements detailing her physical attack and identifying her attacker were admissible pursuant to the medical diagnosis exception to the hearsay rule. Evid. R. 803(4) provides for the admissibility of statements "made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." The Court opined that while statements that assign fault or that establishes a perpetrator's identity are usually inadmissible under Rule 803(4). In certain cases, such as sexual assault, the identity of a perpetrator may directly affect diagnosis and treatment; consequently, courts may exercise their discretion in admitting medical diagnosis statements which relay the identity of the perpetrator.

In **Richardson v. State**, 856 N.E.2d 1222, 1226 (Ind. Ct. App. 2006), *trans. denied*, the mother argued that the trial court abused its discretion and violated her Sixth Amendment right to confrontation by admitting the child's medical records into evidence. The mother claimed that the child's medical records constituted testimonial evidence pursuant to Crawford v. Washington, 541 U.S. 36 (2004) and failed to otherwise fall within a recognized hearsay exception. The Court stated that Crawford drew a line between testimonial and non-testimonial hearsay without providing a definition of testimonial evidence, providing the States latitude for developing their hearsay laws in relation to non-testimonial hearsay. The Court opined that the mother's argument was unpersuasive, noting that the Supreme Court's rule as stated in Crawford, 541 U.S.36, 56 is that business records by their very nature are not testimonial. The trial court did not abuse its discretion by admitting the child's medical records pursuant to Evid. R. 803(a).

In **Weis v. State**, 825 N.E.2d 896, 900 (Ind. Ct. App. 2005), the Court did not find error in the trial court's admission of a medical record which contained margin notes regarding child molestation by a pediatric center nurse who did not testify. Had defendant made a timely objection, the trial court could have admitted the medical record as a business record. The doctor read the margin notes to the jury, testifying that the medical record had been made by the nurse as part of a typical intake evaluation at his office. The Court further stated that the child's statements made for purposes of medical diagnosis could not be offered as an exception to the hearsay rule under Ind. Evid. R. 803(4) because the nurse who interviewed the child did not testify at trial.

In **Schaefer v. State**, 750 N.E.2d 787, 793-4 (Ind. Ct. App. 2001), the father established ineffective assistance of trial counsel because his counsel failed to properly object to the admissibility of medical records by nurses and doctors in Alabama who examined the child victim concerning what the child had told them about her physical condition and its cause. The medical records included affidavits from the record keepers. They also contained the opinion regarding the child's condition and its likely cause of sexual abuse by an Alabama doctor who did not testify. The Court discussed the necessity of qualifying an expert for medical opinions, and here, no such foundation was laid. See also **Schloot v. Guinevere Real Estate Corp.**, 697 N.E.2d 1273, 1277 (Ind. Ct. App.

1998) (medical opinions and diagnoses that qualify under the business records exception must additionally meet the requirement for expert opinions in Ind. Evidence Rule 702).

VIII.D. 6. c. Law Enforcement Records

Police records may qualify under the business record exception to the hearsay rule. The police report must be made in the regular course of business and the author of the report must have personal knowledge of the information recorded therein. See **State v. Edgman**, 447 N.E.2d 1091 (Ind. Ct. App. 1983). Information in the police record that is not within the personal knowledge of the maker of the record is hearsay and excludable. See **Wells v. State**, 254 Ind. 608, 261 N.E.2d 865 (1970).

In **In Re O.G.**, 65 N.E.3d 1080, 1087 (Ind. Ct. App. 2016), the Court found that the DCS exhibits of Father's Department of Correction (DOC) records and Putnamville Correctional Facility records did not qualify for admission as business records pursuant to Indiana Rules of Evidence 803(6) or 902(11), and the Court held the juvenile court erred by admitting the exhibits into evidence. Although DCS argued that Father waived his objection because it was based on hearsay and relevance and did not specifically identify the business records exception to the hearsay rule, the Court found the general hearsay objection was sufficient to preserve Father's argument for appeal. The Court reviewed both evidence rules and noted that for both exhibits, DCS did not offer the testimony of a custodian or other qualified witness; therefore, to be admissible, the records must have been accompanied by a certification which complied with Rule 902. The Court noted several other missing elements.

In **Allen v. State**, 994 N.E.2d 316, 320-21 (Ind. Ct. App. 2013), the Court held that the trial court properly admitted the State's exhibit, which was a booking report from the defendant's arrest, under the public records exception to the hearsay rule. While the public records exception to the hearsay rule expressly excludes investigative police reports when offered against the accused in criminal trials, the exclusion does not bar admission of police records pertaining to routine, objective, ministerial, or other non-evaluative matters, made in a non-adversarial setting. Since the booking report contained biographical information, and was only recorded in a ministerial, non-adversarial process, the exhibit was admissible as a public record, and was not an investigative police report. See also **Fowler v. State**, 929 N.E.2d 875, 879 (Ind. Ct. App. 2010).

In **In Re S.L.H.S.**, 885 N.E.2d 603, 614-15 (Ind. Ct. App. 2008) the Court affirmed termination of the Father's parental rights. On appeal, Father contended, among other things, that the trial court erred by admitting into evidence two State exhibits which were statements of his niece and former stepdaughter which were made to the police years earlier and in which they stated that Father had molested them. The Court concluded that there was sufficient nexus between the underlying termination proceedings and the evidence in the statements, and that the evidence of Father's past sexual misconduct was relevant in determining the probability of future parenting problems.

In **Tate v. State**, 835 N.E.2d 499, 509-10 (Ind. Ct. App. 2005), *trans. denied*, the Court found that the defendant's arrest report was admissible under Ind. Evid. R. 803(6). The arrest report included biographical information and the type of charge to be brought. It contained no subjective assumptions, statements, interpretations, or conclusions. A proper foundation had been laid for the report's admission by a keeper of arrest records for the police department who testified that the arrest report was (1) made near the time of the arrest event; (2) prepared by an officer with personal knowledge; and (3) kept in

the regular and routine business at the police department. But see **Rhone v. State**, 825 N.E.2d 1277, 1284 (Ind. Ct. App. 2005) (probable cause affidavit was inadmissible because it related to contested issue, contained factual findings selected by law enforcement officer, and was created for advocacy purposes), *trans. denied*. See also **Serrano v. State**, 808 N.E.2d 724, 727 (Ind. Ct. App. 2004) (arrest record inadmissible as business record because custodian of record did not testify that police officer who filed the arrest report had personal knowledge of the information contained therein and officer who filed arrest report did not testify), *trans. denied*.

In **In Re Paternity of P.E.M.**, 818 N.E.2d 32, 38 (Ind. Ct. App. 2004), a grandparent visitation and contempt case, the Court affirmed the trial court's order denying the admissibility of multiple police reports despite Father's claim that the police reports may be admitted as an exception to the hearsay rule when the information contained therein is based on the personal knowledge of the police officer who is under a duty to report the fact. The Court noted that Ind. Evid. R. 803 specifically excludes investigative reports by police and other law enforcement personnel, unless the reports are offered by an accused in a criminal case.

In **Hardiman v. State**, 726 N.E.2d 1201, 1204 (Ind. 2000), the Court dealt with the admissibility of police records under the hearsay exception for public records at Ind. Evid. R. 803(8). Hearsay statements made to police by bystanders, victims, or witnesses, and included in the police record, are not admissible, unless they fall within their own hearsay exception. The public records hearsay exception does not include investigative reports prepared by or for a government, a public office, or an agency when offered by it in a case in which it is a party.

VIII.D. 6. d. School Records

In **Houston v. State**, 957 N.E.2d 654, 658-660 (Ind. Ct. App. 2011), the Court held (1) that the trial court did not abuse its discretion when it admitted the referral and attendance records of a defendant's child into evidence under the business record hearsay exception, and (2) that the failure to object to the records on hearsay grounds was not ineffective assistance of counsel. The sponsoring witness for the school records was the school attendance officer; the Court opined that the State laid the proper foundation for the records to be admitted as business records. Although the referral records were prepared by the Marion County Prosecutor's office in anticipation of litigation, they were completed by the attendance officer in the regular course of business, and consequently, the referral records were also admissible as business records.

In **Lasater v. Lasater**, 809 N.E.2d 380, 396 (Ind. Ct. App. 2004), the Court affirmed the trial court's admission of the child's school counseling report pursuant to Ind. Evid. R. 803(6) over Mother's appellate objection that an adequate foundation had not been established. At trial, the school counselor had testified that she was familiar with the record and that it was normally kept in the ordinary course of business. Because the report was admitted under the business record exception to the hearsay rule, the teacher was not required to testify for the document to be admissible.

In **J.L. v. State**, 789 N.E.2d 961, 964-5 (Ind. Ct. App. 2003), the Court affirmed the delinquency adjudication, finding computerized school attendance records, offered into evidence by the appointed school attendance officer, were admissible. The Court opined that when data is stored on a computer, the term "custodian" takes on a new meaning and

noted that Evid. R. 803(6) permits the foundational requirements to be established by a "custodian or another qualified witness."

See also **L.H. v. State**, 682 N.E.2d 795 (Ind. Ct. App. 1997) (Court ruled it was proper to admit school records under the business records exception in a delinquency case); **Simmons v. State**, 371 Ind. App. 33, 371 N.E.2d 1316 (1978) (Court affirmed the admission of school attendance records under the business records exception to the hearsay rule).

VIII.D. 6. e. Court Records

Ind. Evid. R. 201 deals with judicial notice. A court may judicially notice the existence of the records of a court of this state. Ind. Evid. R. 201(a)(2)(C). A court may judicially notice a law, which includes records of a court of this state. Ind. Evid. R. 201(b)(5); **Christie v. State**, 939 N.E.2d 961 (Ind. Ct. App. 2011). The court may take judicial notice on its own, or must take judicial notice if a party requests it and the court is supplied with the necessary information. Ind. Evid. R. 201(c). Judicial notice can occur at any stage of the proceeding. Ind. Evid. R. 201(d); **Christie v. State**, 939 N.E.2d 961 (Ind. Ct. App. 2011). If a party makes a timely request, the party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard. Ind. Evid. R. 201(e).

In **In Re D.K.**, 968 N.E.2d 792, 796-7 (Ind. Ct. App. 2012), the Court held that if a trial court takes judicial notice of records of another court proceeding in deciding a case, there must be an effort made to include the other records in the record of the proceeding currently in front of the trial court. The Court also determined that if a party to an appeal wishes to use these "other" records in making an argument before the appellate court, it must include those parts in an appendix submitted to the appellate court, as determined by Indiana Appellate Rule 50. DCS asked the trial court to take judicial notice of the underlying CHINS file, per Indiana Evidence Rule 201(b), and the trial court agreed to do so. However, the Court noted that none of the facts ostensibly relied on by the trial court or referred to by DCS in its appellate brief were supported by any evidence introduced at the termination of parental rights hearing; the underlying CHINS record that the trial court took judicial notice of was not made part of the record upon appeal.

In **Graham v. State**, 941 N.E.2d 1091, 1097 (Ind. Ct. App. 2011), *aff'd on reh'g*, 947 N.E.2d 962 (Ind. Ct. App. 2011), the post-conviction relief court indicated it was going to take judicial notice of the underlying criminal trial, and it did in fact rely on that record; however, the original trial record was not made a part of the post-conviction relief record on appeal. "[R]egardless of the rules regarding judicial notice, any material relied upon by a trial court in deciding a case should be made a part of the record for appeal purposes." On rehearing, the Court further explained that "if a PCR court purports to take judicial notice of other court records and relies on those records in ruling on a PCR petition, but those records are not made part of the PCR record, it places a substantial burden upon this court on appeal to either track down those records and have them transmitted to this court, or to attempt to decide the case without benefit of those records."

In **In Re Paternity of P.R.**, 940 N.E.2d 346, 349-50 (Ind. Ct. App. 2010), the Court held that the trial court properly took judicial notice of the protective order file under Ind. Evid. R. 201(b)(5), which allows for courts to take judicial notice of records of a court of

this state. Ind. Evid. R. 201 further provides that a trial court can take judicial notice at any stage of the proceeding; therefore, it did not matter that the trial court took judicial notice of the protective order file after the custody modification hearing had concluded. The Court conceded that Mother had not been given an opportunity to be heard before the trial court took judicial notice, but the Court noted that Rule 201(e) provides for an opportunity for Mother to make a request to be heard on the trial court's taking judicial notice of the protective order file. The Court also noted Mother did not avail herself of this opportunity, and Mother's appeal did not qualify as a timely request under this rule. The Court opined that, while the procedure it followed was acceptable, a better practice for the trial court to follow would have been to give the parties notice and provide for an opportunity to be heard before issuing its order.

In **Tate v. State**, 835 N.E.2d 499, 509 (Ind. Ct. App. 2005), *trans. denied,* a criminal case, the Court found that a certified information, certified commitment record, certified abstract of judgment and certified plea agreement were appropriately admitted by the trial court under Ind. Evid. R. 803(8). But see **Sigo v. Prudential Property and Cas. Ins.**, 946 N.E.2d 1248, 1254 (Ind. Ct. App. 2011), *trans. denied* (the Court opined that had the drafters of the statute or Rule intended for acquittal evidence to be admissible, they would have expressly said so); **In Re N.Q.**, 996 N.E.2d 385, 395 (Ind. Ct. App. 2013) (the trial court's second termination judgment was reversed and remanded, and the Court concluded that there was insufficient evidence to support it. DCS almost entirely relied upon the record from the first termination hearing and introduced that transcript as evidence; the Court did not hold that a record of the first termination proceeding was inadmissible, but said that the extent to which this record was relied upon by DCS and the trial court was "problematic at best").

VIII.E. Hearsay Exception Not Included in Rules of Evidence

Ind. Evid. R. 101(b) provides that if the Indiana Rules of Evidence "do not cover a specific evidence issue, common or statutory law shall apply."

VIII.E. 1. Complaint of Sexual Crime

It can be argued that a report of a sexual crime is not hearsay if it is offered for a relevant, non-hearsay purpose. In the criminal child molestation case of **Myers v. State**, 617 N.E.2d 553, 556-7 (Ind. Ct. App. 1993), the Court of Appeals found that the defendant's counsel was not ineffective for failure to object to the testimony of the child's therapist and an investigating police officer regarding the complaint of a sexual crime the child made to each of them. The Court stated that "[e]vidence of a complaint made by the alleged victim of a sexual crime is not considered hearsay as long as a detailed narrative of the incident is not given." The Court ruled that the evidence was not offered to prove the truth of the facts stated, but to show the victim made a report, why the investigation was begun, and how it progressed.

However, this practice is called into question by **Craig v. State**, 630 N.E.2d 207, 210-211 (Ind. 1994) (mother's out-of-court statement to police that her child told her she was molested by the perpetrator was not admissible for the non-hearsay purpose of showing that a report of abuse was made or to explain the conduct of the police in interviewing the child).

See also **Williams v. State**, 546 N.E.2d 1198, 1200 (Ind. 1989) (dicta that prompt complaint by victim of sex crime is competent evidence regardless of victim's age or lack of competency); **Ketcham v. State**, 240 Ind. 107, 162 N.E.2d 247, 248-249 (1959) (victim's prompt report of sex crime admissible).

VIII.E. 2. Child Hearsay Exception: Admissibility of Statement or Videotape of Child
The child hearsay exception is applicable to CHINS (IC 31-34-13) and termination (IC 31-35-4) cases. This exception is discussed in detail immediately below at IX. of this Chapter.

VIII.F. U.S. Constitutional Law and Indiana Law on Testimonial Hearsay in Criminal Cases
The U.S. Supreme Court held in **Crawford v. Washington**, 541 U.S. 36, 68-9 (2004), an armed assault criminal case, that in criminal trials the Sixth Amendment to the U.S. Constitution prohibits the introduction of testimonial statements where the defendant had no opportunity to cross-examine the person who made the statements. The Crawford Court did not develop a full definition of "testimonial statements," but identified three formal testimonial situations: (1) testimony at a preliminary hearing; (2) testimony before a grand jury; and (3) testimony at a former trial; and two substantial equivalents: (4) statements made in a "police interrogation;" and (5) statements made by a defendant incident to entering a guilty plea. One guidepost for determining whether hearsay is testimonial is whether an objective witness would reasonably believe that the statement would be available for use at a later trial.

When the evidence is nontestimonial hearsay, the States have flexibility in developing hearsay law and that approach may exempt such statements from Confrontation Clause Sixth Amendment scrutiny altogether. Crawford, 541 U.S. 36, 68 cited in Hendricks v. State, 809 N.E.2d 865, 871 (Ind. Ct. App. 2004), *trans. denied*.

The U.S. Supreme Court decided **Davis v. Washington** and **Hammon v. Indiana** on June 19, 2006 at 547 U.S. 813. Davis involved the admissibility of a domestic battery victim's statements to the 911 operator whom the victim had called for help from law enforcement. The U.S. Supreme Court held that the victim's statements identifying Davis as her assailant were not testimonial because the circumstances indicated that the primary purpose was to enable police assistance to meet an ongoing emergency. In Hammon, an affidavit signed by the alleged victim of domestic battery immediately after a domestic disturbance at the home was admitted into evidence as a present sense impression when the victim did not appear to testify in a criminal domestic battery trial. The victim's statements to the police officer were admitted into evidence as excited utterances through the police officer's testimony. The Supreme Court concluded that the affidavit and the victim's statements were testimonial and were a narrative of past events delivered at some remove in time from the danger she described. The Court opined that the victim's statements were not a cry for help nor the provision of information to enable officers immediately to end a threatening situation.

Practice Note: Practitioners should note that Crawford v. Washington concerns rights of criminal defendants and does not apply to CHINS cases, which are civil in nature. See IC 31-32-1-3 (civil trial rules of procedure apply in CHINS cases); IC 31-32-10-3 (law of discovery for civil cases applies in CHINS cases); IC 31-34-12-3 (preponderance of the evidence standard applies to CHINS cases). See also Chapter 4 at IV.D.1. for additional information on differences between CHINS and criminal litigation. The Crawford v. Washington decision and Indiana criminal case law decided pursuant to Crawford substantially affect criminal prosecutions which may arise from CHINS investigations. It may be possible to secure a CHINS adjudication, but criminal prosecution may be unsuccessful due to the Crawford and Hammon decisions. See **Howard v. State**, 853 N.E.2d 461, 470 (Ind. 2006) (because there was no showing that the child victim was unavailable for trial within the meaning of the protected person statute, the trial court erred in allowing the child victim's deposition into evidence).

Appellate courts discussed Crawford in the following criminal child molestation cases: **Surber v. State**, 884 N.E.2d 856, 862-65 (Ind. Ct. App. 2008) (Court held that as the child was found competent to testify, did testify at trial, and was available for cross-examination, "the rule announced in Crawford is simply not applicable"), *trans. denied*; **Agilera v. State**, 862 N.E.2d 298, 306 (Ind. Ct. App. 2007) (child's statements to her mother and grandmother were not testimonial and did not implicate the Sixth Amendment Confrontation Clause; victim's statements to police detective and to forensic investigator were testimonial, but victim testified, and was available for cross-examination), *trans. denied;* **Anderson v. State**, 833 N.E.2d 119, 123-26 (Ind. Ct. App. 2005) (three-year-old child's statement to great-grandmother who was babysitting the child was nontestimonial and admissible at retrial; child's statements to state police detective and OFC caseworker were testimonial and inadmissible at retrial, assuming child would still be incompetent to testify at re-trial); **Purvis v. State**, 829 N.E.2d 572, 579-82 (Ind. Ct. App. 2005) (ten-year-old developmentally delayed child victim's statements to mother and father figure were nontestimonial and admissible as excited utterances; child's statements to police officer were testimonial and erroneously admitted but reversal not required) *trans. denied*.

In **King v. State**, 985 N.E.2d 755 (Ind. Ct. App. 2013), the Court held that the defendant's confrontation rights were not violated, because the victim's statements to the police officer, which were admitted into evidence, were non-testimonial in nature. The Court noted: (1) the police offer arrived at the scene three minutes after the call; (2) the victim had swelling and redness around her eye and red marks around her throat; (3) the victim was upset and crying; and (4) the victim identified the attacker and indicated that he had her eleven-month-old child, and that she was afraid for the child's safety.

In **Young v. State**, 980 N.E.2d 412, 419-20 (Ind. Ct. App. 2012), the Court held, *inter alia*, that the trial court did not abuse its discretion in admitting the firefighters' testimony, which included hearsay from the victim, and that on this issue, the defendant's confrontation rights had not been violated. The Court examined two factors: (1) the statements and actions of the victim and of the interrogators, and (2) formality and circumstances in which the questioning took place. The Court held that the primary purpose of the firefighters' questioning of the victim was to enable public, government assistance to the victim in an ongoing emergency rather than to prove past events potentially relevant to future criminal prosecution. In coming to this conclusion, the Court noted: (1) the firefighter's inquiries were proper given the victim's injuries, her appearance at the fire station, her statements that she had been beaten, and her statements that the defendant had taken the child and she did not know where they were located; and (2) the level of formality of the interrogation was extremely low.

In **Sandefur v. State**, 945 N.E.2d 785, 788, 790 (Ind. Ct. App. 2011), the Court, after concluding that the victim's mouthed statement to the police officer that the defendant had hit her was admissible hearsay as an excited utterance, further determined that the officer testifying to the victim's statement was not a violation of the confrontation clause. The Court determined the victim's statement was non-testimonial because it was made in an attempt to gain police assistance during an ongoing emergency. The Court noted that emergency was ongoing because the defendant told the officer that someone else had attacked the victim, so the victim was forced to furtively tell the police officer that the defendant, and not a third person, had attacked her.

In **Perry v. State**, 956 N.E.2d 41, 45, 51, 56-7 (Ind. Ct. App. 2011) (reversed and remanded on other matters), the Court held that the victim's statements to the forensic nurse were nontestimonial, and consequently, did not implicate the defendant's confrontation rights. In determining that the victim's statements were nontestimonial in nature because the primary purpose of the victim's statements to the forensic nurse was to receive proper medical and

psychological care, the Court noted: (1) the victim had suffered an unprotected sexual assault, resulting in injuries; (2) the victim was taken to the hospital to receive medical treatment, testing, and psychological care; (3) the victim told the police what happened before meeting with the forensic nurse; (4) the forensic nurse described her questioning as being primarily to determine a treatment plan; and (5) there were no police officers present during this examination. There was an investigative element to the examination, since pictures were taken and samples were collected, and the victim signed a consent to forward the information to law enforcement; however, the Court could not say that the primary purpose of the exam was to prove past facts for a subsequent trial. The medical record itself was also admissible and did not violate the defendant's confrontation rights because the forensic nurse was the declarant of the record, and she appeared at trial and was cross examined; Crawford provides that when a declarant appears for cross-examination at trial, the Confrontation Clause places no limitations on the use of her prior testimonial statements.

In **Boatner v. State**, 934 N.E.2d 184, 187-88 (Ind. Ct. App. 2010), the Court held that even if the defendant had preserved his confrontation rights, the admission of the victim's statement to the police did not violate the defendant's confrontation rights. The defendant had waived the confrontation issue because the defendant had not objected to the admission of deputy's testimony on confrontation grounds. The Court determined that even if the defendant had preserved the issue for appeal, he would not have prevailed because Crawford applies only to testimonial hearsay. The victim's statement to the deputy was non-testimonial in nature because: (1) there was no indication that deputy's purpose in speaking with the victim was to prove past events relevant to later prosecution; and (2) the victim approached the deputy and stated to the deputy that he had been hit and pushed down, before the deputy could ask any questions.

In **Pendergrass v. State**, 913 N.E.2d 703, 704, 707-8 (Ind. 2009) (Rucker, J. and Boehm J., dissenting), the defendant was convicted of two counts of child molesting based in part on DNA evidence showing he was very likely the father of his thirteen-year-old daughter's aborted fetus. The State's witnesses to this effect were a laboratory supervisor at the Indiana State Police Laboratory in Lowell, Indiana, who had direct knowledge of the processing of the samples and an expert DNA analyst who used the laboratory's print-outs to render an opinion. The defendant contended his rights under the Confrontation Clause were violated because the State did not present the technician who ran the samples through the laboratory's equipment. The Indiana Supreme Court, however, concluded that the proof submitted was consistent with the Sixth Amendment as recently detailed in Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009). The Indiana Supreme Court discussed the decision in Melendez-Diaz v. Massachusetts, noting "the certificates were 'quite plainly affidavits,' the U.S. Supreme Court held that the affidavits clearly fell within 'testimonial' evidence because they 'are functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination,' the analysts swearing their accuracy were 'witnesses' for Sixth Amendment purposes, and the defendant was entitled to 'be confronted' with the analysts at trial." The Pendergrass Court, following Melendez-Diaz v. Massachusetts, treated the Certificate of Analysis in Pendergrass as testimonial. The laboratory supervisor who took the witness stand did have a direct part in the process by personally checking the test results of the forensic DNA analyst at the Lowell laboratory. As such, she could testify as to the accuracy of the tests as well as standard operating procedure of the laboratory and whether the forensic DNA analyst at the Lowell laboratory diverged from these procedures. Pendergrass had the opportunity to confront at trial two witnesses who were directly involved in the substantive analysis, unlike Melendez-Diaz, who confronted none at all.

See **Proctor v. State**, 874 N.E.2d 1000, 1002-03 (Ind. Ct. App. 2007) (Court found no Crawford violation as the witness was present at trial and responded willingly to questions, even though at

the trial the witness was unable to recall the events in question because of medication she was taking); **Boyd v. State**, 866 N.E.2d 855, 858 (Ind. Ct. App. 2007) (Defendant's wrongdoing [murdering his wife] forfeited his right to confront his murdered wife at trial as provided by the Sixth Amendment and the Indiana Rules of Evidence), *trans. denied.*

Indiana courts applied the Davis factors with regard to 911 calls in the following criminal cases. **State v. Martin**, 885 N.E.2d 18 (Ind. Ct. App. 2008); **Collins v. State**, 873 N.E.2d 149 (Ind. Ct. App. 2007), *trans. denied*; **Gayden v. State**, 863 N.E.2d 1193, 1198-99 (Ind. Ct. App. 2007), *trans. denied*.

VIII.G. Guardian ad Litem Hearsay Issues

In **Matter of A.F.**, 69 N.E.3d 932, 984 (Ind. Ct. App. 2017), the Court affirmed the trial court's order which terminated Father's parental rights, and concluded the trial court's admission of the GAL's testimony on statements the children made to her about their desires for future placement did not warrant reversal. Father argued the trial court abused its discretion by allowing the GAL to summarize and testify to what the children had said. Father asserted that there is nothing about the role of the GAL which creates an exception to the hearsay rule prohibiting testimony about out-of-court statements, and that summarizing out-of-court statements is no less hearsay than repeating the statements verbatim. The Court noted that: (1) Father did not object following the trial court's statement that the GAL could summarize but not repeat what the children said verbatim; and (2) two of the children indicated that they would live with Father. 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.

In **In Re O.G.**, 65 N.E.3d 1080, 1088 (Ind. Ct. App. 2016), the Court reversed and remanded the juvenile court's order terminating the parent-child relationship between Parents and their child. The Court opined that the juvenile court erred by permitting inadmissible hearsay testimony from the guardian ad litem on the child's wishes. The Court said DCS did not direct the Court's attention to any authority in rule, statute, or case law that creates an exception to the hearsay rule for guardians ad litem, and the Court could find none.

IX. CHILD HEARSAY EXCEPTION

IX. A. Overview of Child Hearsay Exception

The child hearsay exception at IC 31-34-13-1 through 4 provides that the out-of-court statement of a child may be admitted into evidence even though the child does not testify at trial, and no other hearsay exception applies to the child's statement. The ability to use this exception is limited to use in actions started to determine if a child is a CHINS IC 31-34-1-1 through IC 31-34-1-6, IC 31-34-1-10(a), IC 31-34-1-11, and an administrative hearing conducted under IC 31-33-26-9 [amendment or expungement of DCS reports] or IC 31-27-4-23 [administrative hearings concerning imposition of sanctions for foster homes].

The Indiana Rules of Evidence on hearsay make no reference to the child hearsay exception; however, the provision in Ind. Evidence Rule 101(a) that "common or statutory law shall apply" to evidence issues not covered by these rules, is interpreted to mean that the child hearsay exceptions are binding law.

The exception applies to an out of court statement or videotape made by a child under the age of fourteen (or a child between fourteen and eighteen who has a disability or impairment that meets

the described criteria). IC 31-34-13-2. The statement or video tape must concern an act that is a material element in determining whether a child is a CHINS, and must not be otherwise admissible in evidence under statute or court rule. IC 31-34-13-2.

The statements or videotape of the child must also meet requirements for admissibility. IC 31-34-13-3. The court must find, after notice to the parties of a hearing and of their right to be present, that the time, content, and circumstances of the statement or videotape and any other evidence provide sufficient indications of reliability. IC 31-34-13-3(1). The child must then either: (A) testify at the proceeding to determine whether the child or a sibling is a CHINS; or (B) have been available for face-to-face cross-examination when the statement or videotape was made; or (C) is found by the court to be unavailable as a witness under specific criteria. IC 31-34-13-3(2).

A child can be found to be unavailable as a witness by the court for the following reasons: (1) a psychiatrist, physician, or psychologist has certified that the child's participation in the proceeding creates a substantial likelihood of emotional or mental harm to the child; (2) a physician has certified that the child cannot participate in the proceeding for medical reasons; or (3) the court has determined that the child is incapable of understanding the nature and obligation of an oath. IC 31-34-13-3(2)(C).

A statement or videotape of this nature cannot be admitted as evidence unless the DCS attorney informs the parties, at least seven days in advance of the proceedings, of the intent to place the statement or videotape into evidence, and the content of the statement or videotape. IC 31-34-13-4.

The child's statement may be admitted through the testimony of a witness who heard the statement, or through a sponsoring witness who offers the child's written or videotaped statement as an exception to the general rule excluding hearsay. The child hearsay exception applies to the CHINS factfinding and to the contested hearing on a petition for involuntary termination of the parent-child relationship.

In **Townsley v. Marion County Dept. of Child**, 848 N.E.2d 684, 689 (Ind. Ct. App. 2006), the Court reversed the CHINS adjudication and remanded the case with instructions to re-evaluate the CHINS petition consistent with the requirements of IC 31-34-13-3. The Court concluded that the trial court erred in failing to consider, in a separate hearing, the admissibility of the child's out-of-court statements, which was a violation of IC 31-34-13-3. The Court also cited In Re J.Q., 836 N.E.2d 961 (Ind. Ct. App. 2005) discussed immediately below. See this Chapter at IX.D.2. and IX.D.4. for further discussion in Townsley regarding the child hearsay statute.

In **In Re J.Q.**, 836 N.E.2d 961, 967 (Ind. Ct. App. 2005), the Court reversed the CHINS determination and remanded the case with instructions that the trial court more specifically follow the requirements of IC 31-34-13-3, the child hearsay statute, and IC 31-34-19-10, the dispositional statute. See this Chapter at IX.D.1., IX.D.2., and IX.D.4. for further discussion of the child hearsay statute in this case.

In **Roark v. Roark**, 551 N.E.2d 865, 868-869 (Ind. Ct. App. 1990), the Court noted that the child hearsay exception statutes were created to strike a balance between the need to provide fair judicial proceedings and the need to protect the welfare of the child. If it is necessary to exclude a child from the factfinding hearing due to potential harm to the child in testifying, the child's statements will not be admissible unless the statements fit within the child hearsay exception or some other recognized exception.

IX. B. Comparing CHINS and Criminal Child Hearsay Exception

While initially, the criminal and CHINS laws on this topic were very similar, they diverged with ruling in criminal case and newer legislation. See IC 35-37-4-6; **Brady v. State**, 575 N.E.2d 981 (Ind. 1991) (Indiana Supreme Court ruled that the criminal closed circuit television/videotape law violated the due process right of the defendant to "face-to-face confrontation" with the child victim; in response to Brady, the legislature passed significant amendments to the criminal statute). Generally, the criminal statute requires the child be subject to face-to-face confrontation with the accused, and the standards of proof are different. Not only are the CHINS and criminal statutes substantially different in content, the CHINS procedure is subject to the procedural rules and rights applicable to civil trials, whereas the criminal child hearsay exception must comply with the procedural rules and rights applicable to criminal trials. See IC 31-32-1-3; **Matter of Relationship of M.B.**, 638 N.E.2d 804, 811 (Ind. Ct. App. 1994) (Court noted differences between criminal and CHINS child hearsay exceptions).

IX. C. Applicability of the Child Hearsay Exception

IX. C. 1. Age and Categories of Child Witnesses

The exception applies to an out of court statement or videotape made by a child under the age of fourteen, or a child between fourteen and eighteen and who has a disability or impairment that meets the described criteria. IC 31-34-13-2.

If the child is between age fourteen and age eighteen, then the child must have a disability attributable to an impairment of general intellectual functioning or adaptive behavior. IC 31-34-13-2. This disability must be likely to continue indefinitely, constitute a substantial disability to the child's ability to function normally in society, and reflect the child's need for a combination of special, interdisciplinary, or generic care, treatment, or other services that are of lifelong or extended duration and are individually planned and coordinated. IC 31-34-13-2.

The child whose statement or videotape is to be admitted into evidence must be the subject of a CHINS petition, or must be a whole or half-blood sibling of the child who is the subject of a CHINS petition. IC 31-34-13-3.

IX. C. 2. Types of Cases

The ability to use this exception is limited to use in actions started to determine if a child is a CHINS per IC 31-34-1-1 through IC 31-34-1-6, IC 31-34-1-10, IC 31-34-1-11, and an administrative hearing conducted under IC 31-33-26-9 [amendment or expungement of DCS reports] or IC 31-27-4-23 [administrative hearings concerning imposition of sanctions for foster homes].

IX. C. 3. Statement May be Oral, Written, or Videotaped

IC 31-34-13 provides that the child hearsay exception applies to an out-of-court "statement or videotape" made by a child, but the section is silent as to the definition of statement. Ind. Evid. R. 801(a) provides that statement "means a person's oral assertion, written assertion, or nonverbal conduct if the person intended it as an assertion." An argument could be made that a child's drawing could be offered as a "statement" for purposes of the child hearsay exception, if the drawing satisfies the definition of "statement" in Ind. Evid. R. 801(a) and the other requirements of the child hearsay exception are satisfied.

Neither the child hearsay exception nor the definition of "statement" in the Indiana Rules of Evidence requires that the statements of the child be reduced to writing or preserved in a certain manner. This position is consistent with the U.S. Supreme Court opinion in **Idaho v. Wright**, 497 U.S. 805, 818 (1990), in which the Court rejected the argument that out-of-court statements of child victims must be recorded in order to be reliable under Idaho's "catch all" hearsay exception.

IX. D. Procedures to Obtain Admission Under Child Hearsay Exception

IX. D. 1. Motion and Notice

A statement or videotape of this nature cannot be admitted as evidence unless the DCS attorney informs the parties, at least seven days in advance of the proceedings, of the intent to place the statement or videotape into evidence, and the content of the statement or videotape. IC 31-34-13-4.

There is no specific requirement for the filing of a motion with the court to admit a child's statement or videotape under the child hearsay exception. However, IC 31-34-13-3 specifically states that the court must make certain findings "after notice to the parties of a hearing and of their right to be present", which indicates that a hearing must be held. Filing a motion to have evidence admitted under the child hearsay exception is an assumed practice.

In **Townsley v. Marion County Dept. of Child**, 848 N.E.2d 684, 688-89 (Ind. Ct. App. 2006), the Court reversed and remanded the CHINS adjudication because the admissibility and CHINS determinations were made in the same proceeding despite the father's objection to the introduction of child hearsay evidence. DCS had petitioned the trial court for a hearing to introduce the child's out-of-court statements over three months prior to the factfinding hearing but no separate hearing was held. The Court concluded that the trial court erred in failing to consider the admissibility of the child's out-of-court statements in a separate hearing, in violation of IC 31-34-13-3 and contrary to In Re J.Q., 836 N.E.2d 961, discussed immediately below.

In **In Re J.Q.**, 836 N.E.2d 961, 965-67 (Ind. Ct. App. 2005), the Court reversed and remanded the case, finding that the mother had not been given adequate notice or an adequate opportunity to be heard regarding the admission of the child's statements pursuant to IC 31-34-13-3. The Court opined that due to the potentially devastating nature of a CHINS determination, "IC 31-34-13-3 requires some separation of the child hearsay determination and the CHINS determination in order to give effect to the statute's notice and hearing requirements." The mother had appealed the CHINS determination, arguing that the trial court failed to follow the requirements of IC 31-34-13-3 when it admitted child hearsay statements during the CHINS factfinding without holding a prior hearing on the matter.

IX. D. 2. Preliminary Hearing to Determine Admissibility

A statement or videotape of this nature cannot be admitted as evidence unless the DCS attorney informs the parties, at least seven days in advance of the proceedings, of their intent to place the statement or videotape into evidence, and the content of the statement or videotape. IC 31-34-13-4. The hearing should be held prior to the CHINS factfinding hearing or termination hearing. The issues and required findings for the hearing are discussed below in this section.

In **Townsley v. Marion County Dept. of Child**, 848 N.E.2d 684, 688-89 (Ind. Ct. App. 2006), the Court reversed and remanded the CHINS adjudication because the admissibility

and CHINS determinations were made in the same proceeding despite the father's objection to the introduction of child hearsay evidence. DCS had petitioned the trial court for a hearing to introduce the child's out-of-court statements over three months prior to the factfinding hearing but no separate hearing was held. The Court concluded that the trial court erred in failing to consider the admissibility of the child's out-of-court statements in a separate hearing, in violation of IC 31-34-13-3 and contrary to In Re J.Q., 836 N.E.2d 961, discussed immediately below.

In **In Re J.Q.**, 836 N.E.2d 961, 965-67 (Ind. Ct. App. 2005), the Court held that it was error for the trial court to merge its decisions of whether the child's statements were admissible hearsay, and whether he was a CHINS, into one factfinding hearing. The Court concluded that the child's hearsay statements were improperly admitted and could therefore not be considered in addressing the question of whether there was sufficient evidence to support the CHINS finding. The CHINS determination was reversed and remanded.

IX. D. 3. Presence of Child at Preliminary Hearing

The court must find, after notice to the parties of a hearing and of their right to be present, that the time, content, and circumstances of the statement or videotape and any other evidence provide sufficient indications of reliability. IC 31-34-13-3(1). The child must then either: (A) testify at the proceeding to determine whether the child or a sibling is a CHINS; or (B) have been available for face-to-face cross-examination when the statement or videotape was made; or (C) be found by the court to be unavailable as a witness under specific criteria. IC 31-34-13-3(2).

This statute does not specifically state that a child must be present at this hearing where the court makes such a determination. There are mechanisms by which the child hearsay is admissible both with and without the child's presence at the proceeding to determine whether the child or a sibling is a CHINS. Prior versions of this statute specially stated that a child must be present at the hearing to determine admissibility, but that provision was deleted.

See **Matter of Relationship of M.B.**, 638 N.E.2d 804, 809 (Ind. Ct. App. 1994) (decided before the amendment deleting the presence requirement; children were not present in the courtroom for the hearing to determine admissibility of their out-of-court statements but were available; Court found that the procedure followed by the judge "met the spirit of the statute by protecting the children from further trauma associated with testifying or being in the courtroom during testimony").

IX. D. 4. Required Finding of Reliability

The court must find, after notice to the parties of a hearing and of their right to be present, that the time, content, and circumstances of the statement or videotape and any other evidence provide sufficient indications of reliability. IC 31-34-13-3(1).

In **Townsley v. Marion County Dept. of Child**, 848 N.E.2d 684, 689-90 (Ind. Ct. App. 2006), the Court questioned whether the child's statements were adequately reliable under IC 31-34-13-3 to justify their admissibility. Because the sole basis for the CHINS petition with respect to the father was the child's claim of sexual molestation, the findings of reliability were similarly imperative as in J.Q., 836 N.E.2d 961, 965. There were inconsistencies in the child's alleged statements and the child's claims to his therapist were seemingly contrived answers to her leading questions. The trial court's failure to hold a separate hearing to determine the admissibility of child hearsay statements and its broad

determination of the statements' reliability in spite of this undermined the Court's confidence in the CHINS determination, resulting in reversal.

In **In Re J.Q.**, 836 N.E.2d 961, 965 (Ind. Ct. App. 2005), the CHINS determination was reversed and remanded because the notice and separate hearing requirements of the child hearsay statute, IC 31-34-13-3, were not followed. The Court could not find any evidence that the trial court made a finding that the time content, and circumstances of the child's statements provided any indication of reliability. The Court opined that such a finding was required by IC 31-34-13-3(1) and was imperative in a case where, if admitted, the child's out-of-court statements would weigh heavily in the court's CHINS determination. The Court found it "imperative" that the trial court follow the guidelines of IC 31-34-13-3 and make findings that the out-of-court statements of the child indicated sufficient reliability.

IX. D. 5. Reliability Determinations in Criminal Child Hearsay Cases

Although the criminal and civil child hearsay exception statutes have significant differences, the criminal case law may provide some guidance on indicia of reliability. In **Pierce v. State**, 677 N.E.2d 39, 44 (Ind. 1997), the Court addressed a trial court's role in determining the reliability of a protected person's hearsay statements under IC 35-37-4-6 and discussed the importance of that reliability determination.

For cases where there was sufficient indication of reliability, see:

Norris v. State, 53 N.E.2d 512 (Ind. Ct. App. 2016), where the Court determined that the out-of-court statements of the child abuse victim to the therapist were sufficiently reliable and were admissible under the protected-person statute in prosecution for battery. This was so even though four months had passed between date the child was removed from home he shared with defendant and date of the child victim's counseling session when he made the statements to the therapist about abuse. The child's statements were consistent with statements he had made to family case manager soon after his injuries were discovered, and he never wavered in his responses.

Ennik v. State, 40 N.E.3d 868 (Ind. Ct. App 2015) *trans. denied*, where the Court opined that doubt can be cast on the reliability of the statement or videotape sought to be admitted under the Protected Persons Statute as it pertains to children under age fourteen, if the statement or videotape is preceded by lengthy or stressful interviews or examinations.

A.R.M. v. State, 968 N.E.2d 820, 825-6 (Ind. Ct. App. 2012), where the Court held the juvenile court did not abuse its discretion when it determined that the victim's videotaped statement was reliable, and when it determined that the victim had testified at the fact-finding hearing, as was required by the Protected Person Statute; consequently, the State satisfied the requirements of the Protected Person Statute for the videotape to be admitted as evidence at the fact-finding hearing.

J.A. v. State, 904 N.E.2d 250, 255-57 (Ind. Ct. App. 2009) *trans. denied*, where the trial court did not err in concluding that victim's out-of-court statements bore sufficient indications of reliability. The Court noted that (1) victim's use of different terminology in his initial statements and in his testimony could had been caused by victim's normally increased vocabulary over intervening period; (2) victim's language was always age appropriate; and (3) the fact that a young child did not fully recount every detail of his abuse to both his mother and the CPS investigator was not indication that he was lying.

Surber v. State, 884 N.E.2d 856, 862-63 (Ind. Ct. App. 2008) *trans. denied,* where the trial court did not abuse its discretion by concluding that time, content, and circumstances of hearsay statements and videotape provided sufficient indication of reliability where (1) it was unclear exactly when molestations occurred, but all of child's statements were

made relatively close in time to each other; (2) some statements were spontaneous; (3) child used age-appropriate terminology; (4) child was able to distinguish between truth and falsehood; (5) child was five years old at time she made statements; and (6) record did not reveal suggestive questioning or indication of coaching.

Johnson v. State, 881 N.E.2d 10 (Ind. Ct. App. 2008) *trans. denied*, where the eleven-year-old abuse victim's statement identifying Defendant as perpetrator made to the witness was properly admitted; immediately after being kicked, choked and punched in the face, victim ran out of residence, ran for about six minutes, spoke briefly to a friend, went into the church where the witness was working, and told the witness that Defendant had caused the injuries.

Agilera v. State, 862 N.E.2d 298, 305-07 (Ind. Ct. App. 2007) *trans. denied*, where seven-year-old victim's statements were sufficiently reliable to admit them at trial. They were made close in time to the molestation, there was not opportunity for coaching, there was nothing suggestive in the nature of the questioning, there was no indication of a motive for the victim to fabricate, the victim used age-appropriate language, the victim was not subjected to stressful interviews or examinations preceding her statement to her mother, and the victim's statements were corroborated.

Taylor v. State, 841 N.E.2d 631, 636 (Ind. Ct. App. 2006) *trans. denied*, where the five-year-old child victim's statements were reliable because they were made in response to mother's direct question to child about child's acting out behavior; statements were spontaneous, child used age-appropriate language, and neither child nor mother had discernible motivation to lie.

Purvis v. State, 829 N.E.2d 572, 583 (Ind. Ct. App. 2005) *trans. denied*, where the ten-year-old child victim was found unavailable as witness because he could not understand nature and obligation of an oath due to his disability; child's statements were reliable because there was no opportunity for coaching, child had no motivation to lie, mother was uniquely equipped by experience to know whether child was telling the truth, and statements were spontaneous and in age-appropriate language.

Trujillo v. State, 806 N.E.2d 317, 327 (Ind. Ct. App. 2004), where the four-year-old child victim's statements were reliable because they were (1) made spontaneously using age appropriate language; (2) made the first time the child had seen her mother that day; (3) made in response to mother's non-leading, non-suggestive inquiry about how child's day had gone and whether child had eaten; (4) child had no motivation to lie.

M.T. v. State, 787 N.E.2d 2d 509, 512-13 (Ind. Ct. App. 2003), where the Court opined that there were sufficient indications of reliability in the four-year-old child victim's statements to her mother and in the child's videotaped interview with a forensic child interviewer. The Court noted the circumstances surrounding the statement, the spontaneity of the statement, the lack of motivation to lie, the lack of questioning, and other items of evidence.

For cases where there was insufficient indication of reliability, see:

Carpenter v. State, 786 N.E.2d 696, 704 (Ind. 2003), where the Court held that the testimony recounting the child's statements to her mother and grandfather and her videotape interview conducted by the police detectives and child welfare caseworker failed to establish sufficient indications of reliability. The combination of the following circumstances resulted in the Court's ruling regarding lack of sufficient indications of reliability: (1) there was no indication that the child's statements were made close in time to the alleged molestations; (2) the statements themselves were not made sufficiently close in time to each other to prevent implantation or cleansing; and (3) the child was unable to distinguish between truth and falsehood.

Nunley v. State, 916 N.E.2d 712 (Ind. Ct. App. 2009), where the Court concluded that a taped interview conducted a year after the molestation lacked sufficient indicia of reliability and therefore, the videotape and the witness testimony that repeated the contents of the interview should not have been admitted. More than a year passed between the alleged incident of molestation and the interview, there was sufficient opportunity for coaching, the child made new allegations in the interview that she had not said before and did not say again, even at trial, and the child's statements were not spontaneous nor had any appearance of reliability.

For older cases, see **Lewis v. State**, 754 N.E.2d 603, 606 (Ind. Ct. App. 2001), *trans. denied*; **Rickey v. State**, 661 N.E.2d 18 (Ind. Ct. App.1996); **Arndt v. State**, 642 N.E.2d 224 (Ind. 1994); **Casselman v. State**, 582 N.E.2d 432 (Ind. Ct. App. 1991); **Poffenberger v. State**, 580 N.E.2d 995 (Ind. Ct. App. 1991); **Idaho v. Wright**, 497 U.S. 805 (1990).

IX. D. 6. Required Findings Regarding Availability or Unavailability of Child

The statements or videotape of the child must meet requirements for admissibility. IC 31-34-13-3. The court must find, after notice to the parties of a hearing and of their right to be present, that the time, content, and circumstances of the statement or videotape and any other evidence provide sufficient indications of reliability. IC 31-34-13-3(1). The child must then either: (A) testify at the proceeding to determine whether the child or a sibling is a CHINS; or (B) have been available for face-to-face cross-examination when the statement or videotape was made; or (C) be found by the court to be unavailable as a witness under specific criteria. IC 31-34-13-3(2).

A child can be found to be unavailable as a witness by the court for the following reasons: (1) a psychiatrist, physician, or psychologist has certified that the child's participation in the proceeding creates a substantial likelihood of emotional or mental harm to the child; (2) a physician has certified that the child cannot participate in the proceeding for medical reasons; or (3) the court has determined that the child is incapable of understanding the nature and obligation of an oath. IC 31-34-13-3(2)(C).

IX. D. 6. a. Child is Unavailable to Testify

The criteria for a child to be found unavailable to testify under the child hearsay exception is found at IC 31-34-13-3(2)(C)(i) through (iii).

First, a child can be found unavailable to testify because a psychiatrist, physician, or psychologist has certified that the child's participation in the proceeding creates a substantial likelihood of emotional or mental harm to the child. IC 31-34-13-3(2)(C)(i). For case law on this topic, see **In Re J.Q.**, 836 N.E.2d 961, 964, 967 (Ind. Ct. App. 2005) (remanded with instructions that the trial court specifically follow the requirements of IC 31-34-13-3 [child hearsay statute] and IC 31-34-19-10 [dispositional statute]; trial court admitted a written statement by a psychologist that the nine-year-old child would likely suffer emotional harm if he testified at the CHINS hearing, and Court noted that the trial court likely admitted the statement under IC 31-34-13-3(2)(C)(i)); **Matter of Relationship of M.B.**, 638 N.E.2d 804, 809-10 (Ind. Ct. App. 1994) (the children were available, but not present, at the admissibility hearing and an affidavit was admitted by the psychologist on the harm to the children in testifying and being cross-examined; Court rejected parents' argument that affidavit did not suffice as certification; the opinion of the expert that forcing the children to testify and be cross-examined would cause them to withdraw further, would set back their treatment process, and would recreate a threatening and anxiety provoking experience for the children, was sufficient to meet the

state's burden of showing a substantial likelihood of harm to the children by clear and convincing evidence); **Altmeyer v. State**, 496 N.E.2d 1328, 1331 (Ind. Ct. App. 1986) (Court ruled the psychiatrist's testimony that the child's participation in the trial would be "a severe traumatic experience" was sufficient to meet the unavailability requirement).

Second, a child can be found unavailable as a witness if a physician has certified that the child cannot participate in the proceeding for medical reasons. IC 31-34-13-3(2)(C)(ii).

Third, a child can be found unavailable as a witness if the court has determined that the child is incapable of understanding the nature and obligation of an oath. IC 31-34-13-3(2)(C)(iii). See this Chapter at VI. for a discussion on competency. A judicial determination that a child is not competent to testify does not render all of the child's statements unreliable or inadmissible, although the child's competency may be a factor in determining the reliability of the child's out-of-court statements. If the state alleges unavailability on the ground that the child is not competent to testify under IC 31-34-13-3(2)(C)(iii), the court should determine the competency of the child to testify at a preliminary hearing.

IX. D. 6. b. Child Available for Face-to-Face Cross-Examination When Statement Made

The statements or videotape of the child can be admissible if all other criteria are met and the child was available for face-to-face cross-examination when the statement or videotape was made. IC 31-34-13-3(2)(B). On its face, this provision does not require that the child either testify at the factfinding hearing or be determined at a preliminary hearing to be unavailable to testify.

It is important to distinguish this provision from the videotape/closed circuit television law at IC 31-34-14-3. IC 31-34-13-3(2)(B) deals with videotapes and statements that are not made pursuant to court order, whereas IC 31-34-14-3 is a procedure for requesting a court order to make a videotape of the child's testimony. See this Chapter above at VII. for discussion on videotape/closed circuit television law at IC 31-34-14-1 through 7.

IX. D. 6. c. Child Testifies at Trial

The statements or videotape of the child can be admissible if all other criteria are met and the child then testifies at the proceeding to determine whether the child is a CHINS, or at the proceeding to determine if a whole or half-blood sibling of the child is a CHINS. IC 31-34-13-3(2)(A).

When a child is able to testify in the CHINS or termination proceedings, but the child's out-of-court statements do not comply with the restrictions of Ind. Evid. R. 801(d)(1) (prior consistent or inconsistent statements of witness) or Ind. Evid. R. 803 (hearsay exceptions), counsel may attempt to admit the child's out-of-court statements as substantive evidence through the child hearsay exception. IC 31-34-13-3(2)(A) appears to makes the child hearsay exception applicable to the out-of-court statements of a child who testifies in a CHINS or termination factfinding hearing, as long as the age of the child fits within the requirements of IC 31-34-13-2(1), the notice and hearing provisions are complied with, the reliability criteria of IC 31-34-13-3(1) are satisfied, and the statement is not otherwise admissible as required by IC 31-34-13-2(3).

In **Hallberg v. Hendricks Cty. Office**, 662 N.E.2d 639, 647 (Ind. Ct. App. 1996), the Court included the child's statement to the caseworker in its listing of evidence that it found sufficient to support the CHINS judgment. However, the Court noted Father's

argument that the statement should have been excluded because he did not receive advance notice that the statement would be used at trial as is required by the CHINS child hearsay exception statutes. The Court stated in the footnote that the child hearsay statutes "are applicable to those instances where a victim's statement is going to be used and the victim is not going to testify." The Court further noted, if the child victim is going to testify, as occurred in this case, the office of family and children is not required to give notice of its intent to introduce the child's statement. This dicta is contrary to the language of IC 31-34-13-3(2)(A) which specifically makes the child hearsay statutes, and the related notice provisions, applicable to situations in which the child testifies in the CHINS or termination hearing.

IX. D. 7. Burden of Proof on Admissibility

In termination cases, the burden of proof for admissibility of an out-of-court statement under the child hearsay exception is clear and convincing evidence. See **Matter of Relationship of M.B.**, 638 N.E. 2d 804, 811 (Ind. Ct. App. 1994).

In CHINS cases, the burden of proof for admissibility is the lower standard of preponderance of the evidence. See IC 31-34-12-3 (findings in CHINS cases are based on preponderance of evidence standard).

X. PRIOR AND SUBSEQUENT ACTS AND OMISSIONS AND CHARACTER EVIDENCE

The juvenile code, evidentiary rules, and case law provide that evidence of specific actions and omissions of parents can be admitted into evidence at the CHINS factfinding, even if the acts or omissions relate to children other than the subject of the CHINS proceeding, or relate to incidents occurring before or after the specific allegations in the CHINS petition. The evidence is admissible to show intent, knowledge, absence of mistake or accident, and for other similar purposes. It is also admissible to show the character of a parent or caretaker for neglect or abuse.

X. A. Juvenile Code Statute on Prior and Subsequent Acts of Child's Caretaker

IC 31-34-12-5 states: "Evidence that a prior or subsequent act or omission by a parent, guardian, or custodian injured or neglected a child is admissible in proceedings alleging that a child is a child in need of services to show the following:

(1) Intent, guilty knowledge, the absence of mistake or accident, identification, the existence of a common scheme or plan, or other similar purposes.

(2) A likelihood that the act or omission of the parent, guardian, or custodian is responsible for the child's current injury or condition."

This does not require that the acts or omissions have been charged or proven in a criminal or other judicial proceeding and the statute is not explicitly limited to acts or omissions involving the child who is the subject of the current CHINS litigation. See **Matter of J.L.V.**, 667 N.E.2d 186 (Ind. Ct. App. 1996) (evidence of Mother's prior CHINS cases regarding her other children was admissible character evidence). It may include acts or omissions of the parent, guardian, or custodian as to any child. The section does include those acts or omissions that result in injury or neglect of a child; this may reasonably include both physical or emotional injury to the child. Admissions made in a CHINS proceeding may be admissible later in a termination of parental rights proceeding. See **Matter of C.M.**, 675 N.E.2d 1134 (Ind. Ct. App. 1997).

In **Matter of M.B.**, 666 N.E.2d 73 (Ind. Ct. App. 1996) *trans. denied*, the Court determined that a trial court, in a petition to terminate parental rights, should judge the parent's fitness at the time of the termination hearing, taking into consideration evidence of changed conditions. However, a

parent's habitual patterns of conduct must also be considered to determine whether there is a substantial probability of future abuse or neglect.

See **Roark v. Roark**, 551 N.E.2d 865, 871-2 (Ind. Ct. App. 1990) (Father argued that the evidence that his girlfriend's child was injured while in his care was not sufficient to prove that his own children were injured within the meaning of the injury requirement of the CHINS abuse category; Court relied on IC 31-6-7-13(c) (recodified at IC 31-34-12-5) to find that Father's prior acts or omissions against any child were admissible to prove the injury element. The Court concluded that evidence of injury to the girlfriend's child, together with evidence of Father's prior abusive punishment of his own children, was sufficient to affirm CHINS judgment).

X. B. Evidentiary Rule on Prior Acts of Child's Caretaker – Ind. Evidence Rule 404(b)

Ind. Evid. R. 404(b) provides that "(1)… Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character. (2)… This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."

If this evidence rule is being used in the context of a criminal case, upon request by a criminal defendant, "the prosecutor must: (A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and (B) do so before trial—or during trial if the court, for good cause, excuses lack of pretrial notice." Ind. Evid. R. 404(b)(2).

In **Johnson v. State**, 959 N.E.2d 334 (Ind. Ct. App. 2011) *trans. denied*, the Court held that the social worker's testimony about the defendant's concerns that he might hurt his significant other or his baby was admissible under rule of evidence governing character evidence. The Court opined that the social worker's testimony was not offered as evidence of the defendant's characters, but instead as evidence that tended to show he was the person that harmed the child victim.

In **Escobedo v. State**, 987 N.E.2d 103, 116-7 (Ind. Ct. App. 2013), the Court held that because the defendant "opened the door with his testimony" about how he had "been done wrong before" by DCS's removal of his daughter from his home, Ind. Evid. R. 404(b) did not bar the admission of evidence of the child's 2007 injuries that led to her removal from her home by DCS. Before the defendant's trial, the trial court had ruled that evidence of the injuries the child sustained in 2007 would not be admissible under 404(b); however, the defendant, at trial, testified on direct examination about how DCS had wronged him and about the 2007 injuries. The State then presented rebuttal evidence. The Court noted that evidence that that is otherwise inadmissible under 404(b) may become admissible when the defendant "opens the door" to questions on that specific, previously inadmissible evidence. The Court opined that the defendant's testimony that he was "done wrong" left the jury with the false impression that the child was wrongfully removed from his home by DCS; this testimony opened the door and allowed the State to present evidence to correct this false impression.

In **Ceaser v. State**, 964 N.E.2d 911, 912, 917 (Ind. Ct. App. 2012) *trans. denied*, the Court concluded that Mother's prior conviction for battering the same child in a manner similar to the underlying incident was admissible under the intent and lack of accident or mistake exceptions to Ind. Evid. R. 404(b). In order to convict Mother of battery where the defense of parental privilege was asserted, the State was required to prove either: (1) the force Mother used was unreasonable, or (2) Mother's belief that such force was necessary to control the child and prevent misconduct was unreasonable. Where a parent asserting parental privilege has a prior conviction for battering

the child in a manner similar to the circumstance at issue, that evidence goes directly to the reasonableness of the force used and the reasonableness of that parent's belief regarding the force used. A jury could infer, based on Mother's prior conviction for battering the child, that Mother knew what level of physical force exerted against the child was unreasonable.

In **Southern v. State**, 878 N.E.2d 315, 322-23 (Ind. Ct. App. 2007), *trans. denied*, the Court held that the trial court did not err by admitting evidence of subsequent instances of sexual intercourse between Defendant and the child victim; the subsequent instances fell within the plan exception to Evid. Rule 404(b). The facts were sufficient to demonstrate that Defendant had a preconceived plan that was a driving force in the progression of the successive events.

In **Piercefield v. State**, 877 N.E.2d 1213, 1216 (Ind. Ct. App. 2007), *trans. denied*, the Court held that admission of evidence regarding massages Defendant either requested or demanded his stepchildren give him did not violate Evid. R. 404(b). The Court found (1) this evidence showed Defendant's grooming of the children to familiarize them with touching and create more physical relationship with them; (2) this evidence was probative and admissible to show Defendant's preparation and plan; and (3) any prejudice did not outweigh this probative value.

See also **Matter of J.L.V., Jr.**, 667 N.E.2d 186 (Ind. Ct. App. 1996) (trial court allowed OFC to admit evidence in CHINS factfinding regarding Mother's involvement with OFC with her other four children who were not the subject of the current CHINS case; Court concluded that evidence of Mother's prior involvement with the office of family and children was admissible under both the statute and Evid. R. 404(b), as well as Ind. Evidence Rule 405(b) (specific instances of conduct are admissible when character is an essential element of the charge)).

X. C. Character Evidence

Evidence of a person's character or a character trait is not admissible to prove that on a specific occasion, the person acted in conformity with the character or trait. Ind. Evid. R. 404(a)(1). There are some exceptions for a defendant or a victim in a criminal case. Ind. Evid. R. 404(a)(2). Evidence of a witness's character may be admitted under Ind. Evid. Rules 607, 608, and 609. Ind. Evid. R. 404(a)(3).

Despite this, when "a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct." Ind. Evid. R. 405(b). When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. Ind. Evid. R. 405(a). On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct. Ind. Evid. R. 405(a).

In **Miles v. State**, 51 N.E.3d 305 (Ind. Ct. App. 2016) *trans. denied*, the Court determined that the trial court did not err by admitting into evidence text messages between the defendant and the victim to show that the defendant acted in accordance with his character. The text messages showed that the two had a strained relationship, the victim had threatened to keep the defendant's daughter from him, and the defendant had threatened violence against the victim. One text message included an apology for choking the victim.

In **Jacobs v. State**, 2 N.E.3d 116, 120 (Ind. Ct. App. 2014), the Court held that any error made by the trial court in limiting the defendant's ability to question the victim's character for untruthfulness was harmless error. Ind. Evid. Rule 404(a)(2) provides that evidence of a pertinent character trait of the victim is admissible, and Ind. Evid. Rule 405 provides that a party can

present evidence about character traits through testimony about reputation, or on cross, specific instances of conduct. The improper admission of evidence is harmless error when the reviewing court is satisfied that the conviction is supported by other independent evidence.

In **Johnson v. State**, 959 N.E.2d 334 (Ind. Ct. App. 2011) *trans. denied*, the Court held that the social worker's testimony about the defendant's concerns that he might hurt his significant other or his baby was admissible under rule of evidence governing character evidence. The Court opined that the social worker's testimony was not offered as evidence of the defendant's character, but instead as evidence that tended to show he was the person that harmed the child victim.

In **Clark v. State,** 915 N.E.2d 126, 129-131 (Ind. 2009), the Court held that the trial court did not err in admitting the defendant's posting on his MySpace page into evidence. The Court first determined that Rule 404(b) did not apply to this particular piece of evidence, a post made by the defendant, which used descriptive terms for himself such as outlaw, criminal, and others. The MySpace posting contained only the defendant's own statements about himself, not about his deeds or prior criminal acts; consequently, Rule 404(b) did not apply. It was also probative evidence of issues at the defendant's trial, and the Court noted the following: (1) the defendant made his own character an issue; (2) the defendant testified repeatedly about his state of mind, trying to suggest that the murder was reckless rather intentional or criminal; and (3) once the defendant took the stand to testify along these lines, it was proper to allow the State to confront the defendant with his own statements that rebutted his defense.

In **Leisure v. Wheeler**, 828 N.E.2d 409 (Ind. Ct. App. 2005), a custody modification case, the Court held that the criminal history of Mother's new husband was admissible character evidence. The new husband's character was a material issue in the case, and the prior arrests and subsequent convictions were not being used to show action in conformity therewith.

In **Bell v. State**, 820 N.E.2d 1279, 1282-83 (Ind. Ct. App. 2005), *trans. denied*, the defendant sought to introduce evidence of the child victim's alleged assertiveness by asking family members about specific instances of the child's behavior when she was emotionally upset, claiming that this evidence would show the molestation had not occurred because she would have asserted herself or told someone. The Court affirmed the trial court's exclusion of the defendant's evidence because: (1) it was not reputation or opinion testimony and (2) character was not an essential element of a charge, claim or defense.

See also **Matter of D.G.**, 702 N.E.2d 777 (Ind. Ct. App. 1998) (Ind. Evidence Rule 405(b) does apply to termination cases and that rule allows for the admission of "specific instances of that person's conduct" when the character of a person is an essential element of the case. The Court determined that the character of a parent is "an integral factor in assessing a parent's fitness and in determining the child's best interest"); **Matter of J.L.V., Jr.**, 667 N.E.2d 186, 190-91 (Ind. Ct. App. 1996) (Court ruled that character was at issue in a CHINS factfinding hearing, and therefore the parent's prior acts of conduct with different children were admissible for that issue pursuant to Evid. R. 405(b)).

XI. CREDIBILITY OF CHILD WITNESS

XI. A. Accrediting and Vouching Testimony

While accrediting testimony (expert or lay witness testifies that the child is not prone to exaggerate or fantasize about sexual matters) and vouching testimony (witness states that the allegation or testimony of the child is truthful) used to be treated differently, Indiana case law

now prohibits both, and the Indiana Supreme Court has found them to be virtually indistinguishable. Cases in the line of **Lawrence v. State**, 464 N.E. 2d. 923, 925 (Ind. 1984) have been overruled.

Vouching testimony is not admissible as it invades the province of the trier of fact. Vouching occurs when the witness vouches for the veracity of the child. A witness may not directly state that a child is telling the truth about the events at issue, and newer criminal case law indicates that testimony along the lines of whether a child abuse victim is or is not prone to exaggerate or fantasize about sexual matters is not permitted. Indiana case law on accrediting and vouching is consistent with Ind. Evid. R. 704(b), which provides that a witness may not testify to opinions concerning "the truth or falsity of allegations" or "whether a witness has testified truthfully". For other discussion on credibility of child witnesses, see this Chapter at V.F.1. through 6.

It is important for practitioners to note that accrediting testimony and vouching testimony do not affect the ability of a trial court to determine a child's competency. See **Archer v. State**, 996 N.E.2d 341, 346-350 (Ind. Ct. App. 2013) (Court held that trial court's statement that it was "very satisfied" that the child witness was competent to testify was not vouching for the child's credibility; Court opined that the trial court's statement addressed competency, not credibility, and the trial court's statement almost directly recited the factors set forth in Indiana case law for determining a child witness's competency).

This shift in the permissibility of accrediting testimony was elucidated in **Hoglund v. State**, 962 N.E.2d 1230, 1236-1237 n.9 (Ind. 2012).

> In **Hoglund**, the Court examined the admissibility of vouching testimony in the context of child sex abuse allegations. The Court concluded that testimony concerning whether an alleged child abuse victim "is not prone to exaggerate or fantasize about sexual matters" (quoting Lawrence v. State, 464 N.E.2d 923, 295 (Ind. 1984)) is an indirect but functional equivalent of saying the child is "telling the truth". The Court expressly overruled this aspect of the Lawrence opinion as being inconsistent with the mandate of Ind. Evid. R. 704(b), which specifically prohibits witnesses from testifying as to whether another witness "testified truthfully." The Court also considered the question of whether an exception to the prohibition of Rule 704(b) for child victims of alleged sexual abuse should be carved out. The Court noted that there was an underlying rationale to support some accrediting of a child witness's testimony by allowing such evidence as lends credence to a victim's testimony describing acts which would otherwise seem improbable. The Court observed that, allegations of child molesting in this twenty-first century are all too common, and that the need for accrediting testimony is not as acute as it may have been over two decades ago. The Court therefore declined to carve out an exception to Evid. R. 704(b) for sex abuse cases. The Court clarified that the Hoglund ruling does not undercut the decision in Carter v. State, 754 N.E.2d 877 (Ind. 2001) discussed below in this section.
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> In **Carter v. State**, 31 N.E.3d 17, 29-30 (Ind. Ct. App. 2015), *rehearing denied*, the defendant argued that the forensic interviewer impermissibly vouched for the child's credibility when she testified about the dynamics of child abuse, the disclosure process, when and why a child may recant his disclosure of the abuse, and the problems of different genders in disclosing abuse. The Court opined that the forensic interviewer's testimony did not run afoul of Ind. Evid. R. 704(b), since she never mentioned the child, the case at hand, or the truth or falsity of the child's allegations. The testimony was broad, generalized, and included reference to results of research studies. The Court found that the testimony provided information to the jury beyond that commonly understood by laypersons, and, under the circumstances, her expert testimony did not constitute impermissible vouching testimony.

In Bean v. State, 15 N.E.3d 12, 18-21 (Ind. Ct. App. 2014), the Court concluded that multiple witnesses and others had impermissibly vouched for the child. The mother impermissibly vouched for the child when she testified that she believed that defendant had done something to the child after talking to her child. The DCS investigator impermissibly vouched for the child by testifying that he substantiated the case by drawing a conclusion that the allegations did happen. The Court also determined that the prosecutor engaged in inappropriate vouching by referencing the DCS investigator's testimony and saying that "we know what happened" because of the DCS investigator's impermissible vouching testimony.
In **Archer v. State**, 996 N.E.2d 341, 346-350 (Ind. Ct. App. 2013), the Court affirmed the trial court's decision and held, *inter alia*, that the trial court did not abuse its discretion in admitting the testimony of three witnesses that the defendant argued vouched for the child's credibility as a witness. Regarding the grandfather's testimony that the child's behavior improved, the Court could not see how this was at all vouching testimony. Regarding the detective's testimony that there were parts of the interview he wished to follow up on, the court determined there was no vouching or a determination of any kind of truth, falsity, innocence, or guilt in the testimony. Lastly, the forensic interviewer's testimony about coaching indicators was deemed by the Court as admissible, but as a *Practice Note*: practitioners must be aware that the portions of this opinion as it pertains to the permissibility of using evidence about coaching or lack thereof have been overruled by **Sampson v. State**, 38 N.E.3d 985 (Ind. 2015).
In **Gutierrez v. State**, 961 N.E.2d 1030, 1034-35 (Ind. Ct. App. 2012), the Court reversed and remanded the matter for a new trial, concluding that the trial court had improperly admitted testimony that vouched for the truthfulness of the child-victim from two State witnesses. Ind. Evid. R. 704(b) provides that a witness cannot testify as to whether the witness believes that another witness has testified truthfully. Indiana case law provides that testimony to bolster a child's testimony in a child molesting case is prohibited, because it is the duty of jurors to determine what weight they should place on a witness's testimony. Asking a witness whether she formed an opinion as to the child-victim's truthfulness, and having a witness state that she "absolutely" believed the child-victim's testimony is impermissible. The admission of this testimony was a fundamental error, substantially affecting the defendant's rights.
In **Kindred v. State**, 973 N.E.2d 1245, 1258 (Ind. Ct. App. 2012), the Court read Hoglund v. State, 962 N.E.2d 1247, 1258 (Ind. 2012) as suggesting that testimony about coaching amounts to the same improper testimony on the child's truthfulness as testimony about whether a child is prone to exaggerate or fantasize about sexual matters. The Court found that the Greene County CPS caseworker, who opined at defendant's criminal child molestation trial as to whether the child victim was coached, offered an ultimate opinion, which invaded the province of the jury. General testimony about the signs of coaching, as well as the presence or absence of those signs in the child victim at issue, preserves the ultimate credibility determination for the jury and therefore does not constitute vouching. *Practice Note*: The portions of this opinion as it pertains to the permissibility of using evidence about coaching or lack thereof have been addressed by **Sampson v. State**, 38 N.E.3d 985 (Ind. 2015).
In **Lyons v. State**, 976 N.E.2d 137 (Ind. Ct. App 2012), the Court held that the expert's testimony on behavior that was typical of children who had been sexually abused was admissible. The Court noted that the expert was called to testify only when the defendant had repeatedly attacked the child's credibility on those exact behaviors, and the expert did not testify that there was any recognized child abuse syndrome or that the child fit the profile.
In **State v. Velasquez**, 944 N.E.2d 34, 46 (Ind. Ct. App. 2011), the Court determined that the testimony of the expert regarding PTSD should have been permitted, as it did not constitute impermissible vouching testimony. The expert's testimony explained PTSD and stated that

the victim's behavior was consistent with that diagnosis. This would show that the victim experienced a traumatic event, not what the event was, and whether the expert believed her allegations to be credible.

This can also affect the way the DCS caseworkers testify about their work and reports; caseworkers and counsel should be careful when eliciting testimony about what substantiated or unsubstantiated means. Cases on this topic include:

In **Bean v. State**, 15 N.E.3d 12, 18-21 (Ind. Ct. App. 2014), the Court concluded that multiple witnesses and others had impermissibly vouched for the child. The DCS investigator impermissibly vouched for the child by testifying that he substantiated the case by drawing a conclusion that the allegations did happen. The Court also determined that the prosecutor engaged in inappropriate vouching by referencing the DCS investigator's testimony and saying that "we know what happened" because of the DCS investigator's impermissible vouching testimony.

In **Heinzman v. State**, 970 N.E.2d 214 (Ind. Ct. App. 2012, the Court held that it was not impermissible vouching for the DCS caseworker to testify that she had substantiated a child molesting report, especially when the DCS caseworker had also testified that substantiation meant that the allegations had a foundation upon which to proceed with further investigation, and that this specific substantiated report meant that there was a factual foundation for further investigation. The caseworker's testimony in no way indicated that substantiation meant that the allegations were absolutely true, just that DCS had a reason to believe that there may be a factual foundation. The Court differentiated this from previous case law, such as Bradford v. State, 960 N.E.2d 871 (Ind. Ct. App. 2012), where the DCS caseworker had testified that substantiated sexual abuse meant that the DCS office felt there was enough evidence to conclude that sexual abuse actually occurred.

In **Bradford v. State**, 960 N.E.2d 871, 876-77 (Ind. Ct. App. 2012), the Court held that although the DCS caseworker's testimony did not constitute improper vouching for the truthfulness of the child-victim's testimony, the caseworker's testimony did constitute an opinion regarding the truth of the allegations, which violated Ind. Evid. R. 704(b). The caseworker testified that following her investigation, she substantiated sexual abuse by the defendant on the child-victim. The caseworker did not specifically reference the child-victim's testimony at all, and therefore, did not improperly vouch for the child-victim's truthful testimony. However, the caseworker did testify that she "substantiated sexual abuse, meaning [her] office feels that there was enough evidence to conclude that sexual abuse occurred." The Court opined that this constituted an opinion regarding the truth of the allegations, which is prohibited by Ind. Evid. R. 704(b).

More recent case law has called into question the ability to use evidence of what coaching is, and whether or not a child is exhibiting signs of coaching. For cases specifically addressing the use of evidence regarding coaching or the lack thereof, see

Sampson v. State, 38 N.E.3d 985, 990-92 (Ind. 2015), where the Court determined that testimony about signs of coaching alleged victim is permissible only if defendant opened the door, abrogating Kindred v. State, 973 N.E.2d 1245, and Archer v. State, 996 N.E.2d 341. The defendant argued that testimony that the alleged victim showed no evidence of coaching constituted improper vouching for the alleged victim's credibility. The Sampson Court noted that the Hoglund Court held "that general testimony about the signs of coaching, as well as the presence or absence of those signs in the child victim at issue, preserves the ultimate credibility determination for the jury and therefore does not constitute vouching." The Sampson Court noted that this was attempting to distinguish between asking whether or not a child had been coached, and whether or not there were indicators of coaching in a child. The Court noted other Indiana case law on the use of Child Sexual

Abuse Accommodation Syndrome in coming to the conclusion that this was a distinction not permitted in Indiana law. The Court concluded that the subtle distinction between an expert's testimony that a child has or has not been coached versus an expert's testimony that the child did or did not exhibit any "signs or indicators" of coaching was insufficient to not constitute impermissible vouching. However, "*once a child's credibility is called into question proper expert testimony may be appropriate*." (emphasis added). In the present case, since the testimony about indicators of coaching and the lack thereof was not in response to an attack on the child's credibility, the testimony was improper.
Hamilton v. State, 43 N.E.3d 628, 633-34 (Ind. Ct. App. 2015), *affirmed and clarified on rehearing*, 49 N.E.3d 554 (Ind. Ct. App. 2015), the defendant did not object to questions about general indicators, but did object to the question about whether the indicators of coaching were observed in the children. The Court determined that the questioning about the general indicators and the question about whether the indicators of coaching were observed in the children were improper under Sampson, and that the defendant had not opened the door to this questioning. The Court also determined that the detective had not improperly vouched for the child by calling her statements powerful in an attempt to elicit a response from the defendant in an interview. This did not carry the same force as saying the same thing in trial testimony. On rehearing, the Court affirmed its opinion and further discussed the impermissibility of coaching evidence.
In **Kindred v. State**, 973 N.E.2d 1245, 1258 (Ind. Ct. App. 2012), the Court read Hoglund v. State, 962 N.E.2d 1247, 1258 (Ind. 2012) as suggesting that testimony about coaching amounts to the same improper testimony on the child's truthfulness as testimony about whether a child is prone to exaggerate or fantasize about sexual matters. The Court found that the Greene County CPS caseworker, who opined at defendant's criminal child molestation trial as to whether the child victim was coached, offered an ultimate opinion, which invaded the province of the jury. *Practice Note*: The portions of this opinion as it pertains to the permissibility of using evidence about coaching indicators or lack thereof have been addressed by **Sampson v. State**, 38 N.E.3d 985 (Ind. 2015).

For other and older case on vouching, accrediting, and coaching which may still be useful despite the change in case law, see the following cases. *Practice Note*: practitioners should read and use these cases in light of the cases above in this section. Some of these cases may no longer be useful. **Robey v. State**, 7 N.E.3d 371 (Ind. Ct. App. 2014) (witness's comments regarding child's demeanor was not fundamental error; allegedly improper vouching testimony elicited by defense counsel was invited error; and witness's improper vouching testimony was cumulative of properly admitted evidence, and thus was harmless); **Carter v. State**, 754 N.E.2d 877, 882-83 (Ind. 2001), *cert. denied*, 537 U.S. 831 (2002) (psychologist testified that children with autism generally have trouble deliberately deceiving others but did not testify that child was telling the truth; Court concluded this was close to but did not cross the line into impermissible Rule 704(b) vouching); **Rose v. State**, 846 N.E.2d 363, 368 (Ind. Ct. App. 2006) (Court found that the doctor's statements that he was very convinced about the child's allegations and the believability of her story were neither inadvertent nor incidental, but were the centerpiece of his testimony; doctor's impermissible vouching testimony improperly bolstered the child's credibility and impinged on the province of the jury); **Weis v. State**, 825 N.E.2d 896, 901 (Ind. Ct. App. 2005) (Court found that the trial court had not erred in admitting the sheriff's and case manager's testimony; sheriff did not specifically state that she believed the child victim, and case manager explained the OFC protocol on restricting visitation between an alleged abuser and victim); **Saunders v. State**, 807 N.E.2d 122, 125 (Ind. Ct. App. 2004) (Court noted that the police officers' testimony merely confirmed that the victim's first statement to police was different from her second statement; Court opined that the police officers' testimony was cumulative and did not warrant reversal).

XI. B. Sexual History of Child

One method of attacking the credibility of a child witness is to attempt to admit evidence regarding the sexual history of the child. Evidence of this nature is addressed by Ind. Evid. R. 412. Ind. Evid. R. 412 is not the same as the Indiana Rape Shield Statute, IC 35-37-4-4. The Rape Shield Statute (IC 35-37-4-4) only applies in criminal cases. Ind. Evid. R. 412, which is sometimes referred to as the Rape Shield Rule, applies to both civil and criminal cases.

The prohibited evidence which is not admissible in a civil involving alleged sexual misconduct includes: (1) evidence offered to prove that a victim or witness engaged in other sexual behavior; or (2) evidence offered to prove a victim's or witness's sexual predisposition. Ind. Evid. R. 412(a).

Exceptions to this rule prohibiting the use of this type of evidence against a victim or witness in civil cases are found at Ind. Evid. R. 412(b)(2). In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy. Ind. Evid. R. 412(b)(2).

If a party wants to offer such evidence, the party must file a motion, serve notice on the victim, and an in camera hearing must be had on the matter. Ind. Evid. R. 412(c). The record of the hearing is confidential and excluded from public access in accordance with Administrative Rule 9. Ind. Evid. R. 412(c). "Victim" includes an alleged victim for the purposes of this rule. Ind. Evid. R. 412(d).

Practitioners should note that **In Re D.H.**, 859 N.E.2d 737, 741 (Ind. Ct. App. 2007), which is a CHINS case, only addresses the Rape Shield Statute, which applies only to criminal cases. The D.H. Court reversed a CHINS finding because the Court found that the Rape Shield Statute does not apply in CHINS proceedings.

XII. OTHER EVIDENTIARY ISSUES

XII.A. Exclusionary Rule

In **In Re J.V.**, 875 N.E.2d 395, 400-01 (Ind. Ct. App. 2007), *trans. denied*, the Court declined to apply the exclusionary rule to CHINS proceedings, opining that the costs of applying the exclusionary rule to CHINS proceedings outweigh the benefits it would have to deter illegal searches and seizures. Police officers arrived at Parents' home in response to a 911 call at 2:00 a.m. on February 19, 2006. They were admitted and found a digital camera that contained pictures of Mother naked in separate photographs with each of two of the children. The officers left the camera where they found it, and when other officers returned at least a day later with a search warrant, they found the digital camera empty of pictures and missing the memory card. The memory card was not found. At the CHINS hearing, despite Parents' objections, police officers testified regarding their observations of the pictures on the digital camera. Parents appealed the trial court's finding that the children were CHINS. On appeal, the Court noted that (1) the fact that evidence was seized in violation of the Fourth Amendment does not mean that the evidence will be suppressed for every purpose in every proceeding; (2) the exclusionary rule is a judicially created prophylactic device, and it only applies to areas where its remedial objectives are thought most effectively served; and (3) it has been recognized that the rule is most effective when its deterrent benefits outweigh its substantial social costs. The Court reviewed Ind. Dep't of Revenue v. Adams, 762 N.E.2d 728 (Ind. 2002), in which the Indiana Supreme Court declined to

apply the exclusionary rule in Controlled Substance Excise Tax (CSET) proceedings to evidence seized following an unconstitutional search by criminal authorities, because the costs of applying the exclusionary rule to CSET proceedings were found to outweigh the limited benefits. The Court opined that application of the exclusionary rule to CHINS proceedings would serve to undermine several important State interests including: (1) strengthening family life by assisting parents to fulfill their parental obligations; (2) removing children from families only when it is in the child's best interest or in the interest of public safety; (3) providing a judicial procedure that ensures fair hearings, recognizes and enforces the legal rights of children and their parents, and recognizes and enforces the accountability of children and parents; (4) promoting public safety and individual accountability by imposition of appropriate sanctions; (5) encouraging effective reporting of suspected or known incidents of child abuse or neglect; (6) providing effective child services to quickly investigate reports of child abuse or neglect; (7) providing protection for an abused or a neglected child from further abuse or neglect; and (8) providing rehabilitation services for an abused or neglected child and the child's parent, guardian, or custodian.

XII.B. "Best Evidence Rule," Ind. Evidence Rules 1001 to 1008

In **In Re J.V.**, 875 N.E.2d 395, 401-02 (Ind. Ct. App. 2007), *trans. denied*, the Court held that allowing testimony regarding photographs, rather than admitting the photographs themselves, was not an abuse of discretion in that it was consistent with the "best evidence rule" exception. This exception, found at Ind. Evid. R. 1004(1), allows for the admission of evidence of the contents of a photograph where the original is lost or destroyed unless the proponent lost or destroyed the original in bad faith. Evid. R. 1002 requires that "To prove the content of a writing, recording, or photograph, the original writing, recording or photograph is required, except as otherwise provided in these rules or by statute." According to the Court, in order to invoke the exception to the "best evidence rule," the proponent of the evidence must demonstrate that the original was lost or destroyed by showing that a diligent but unsuccessful search has been made in the place or places where the original was most likely to be found. The Court concluded that the record showed the officers made a diligent search for the photos and memory card, and were unable to find them in the place where they were most likely to be found, Parents' residence.

XII.C. Child's Drug Test Results

In **In Re S.W.**, 920 N.E.2d 783, 788-790 (Ind. Ct. App. 2010), the Court affirmed the CHINS adjudication of a seventeen-year-old girl who had been found by a deputy sheriff walking with a friend in a rural area about twelve miles from her home. The Court concluded that the trial court did not abuse its discretion when it admitted evidence of the seventeen-year-old child's drug use at the CHINS factfinding hearing. Parents refused to pick up the child from the police station, the child did not want to return home, and the child told the DCS family case manager that drug use and domestic violence had occurred in her home. The child tested positive for marijuana when removed from home, and the court admitted the drug test result into evidence at the CHINS factfinding hearing. On appeal, the child claimed that the evidence she had used drugs was obtained through an illegal search, arguing: (1) the drug test was administered when she was illegally detained; and (2) the drug rest results were not admissible because she was not given the opportunity to consult with an attorney or her parents prior to taking the drug test, citing IC 31-37-8-4 and In Re Gault, 387 U.S.1 (1967). The Court disagreed that the child was illegally detained, noting that at the time of the drug test, DCS had probable cause to believe that the child was a CHINS due to a lack of supervision by her parents, and DCS had received a judicial order for temporary custody of the child. The Court also disagreed with the child's denial of consultation argument, nothing that both IC 31-37-8-4 and In Re Gault specifically deal with delinquency proceedings as opposed to CHINS proceedings. The Court said that the child "cites no authority which would support a claim that DCS cannot have a child in its custody for that child's protection submit to a drug test."

XII.D. Authenticating or Identifying Evidence

In **In Re Paternity of B.B.**, 1N.E.3d 151, 157-9 (Ind. Ct. App. 2013), the Court found that the evidence presented was sufficient to support a finding that the text messages were actually text messages between the parties, and that a sufficient foundation was laid for their admission. Mother and Father both testified that they were text messages that they had sent and received to and from each other. Father asserted that some of the texts were missing, but he did not offer any evidence of the deleted texts. Mother testified as to the manner of the transfer between the text messages on her phone and the document that was presented to the trial court. In reaching this conclusion, the Court noted Ind. Evid. R. 901 as providing examples of foundations that must be laid in authenticating certain types of documents.

XII.D.1. Authenticating or Identifying Evidence From Social Media

In **Clark v. State**, 915 N.E.2d 126, 129-131 (Ind. 2009), the Court affirmed the defendant's murder conviction, and held that the State's entry from the defendant's MySpace page was admissible electronic evidence. The defendant had been left alone with his girlfriend's two-year-old child. When the girlfriend returned home, the child was bloody, blue, nonresponsive, and severely injured. The defendant attempted several times to prevent the girlfriend from calling 911. Eventually, she successfully placed a call. The paramedics determined that the child was dead when they arrived. At trial, the prosecution, over defense objection, had the defendant read out loud his own description of himself on his MySpace page:

> "Society labels me as an outlaw and criminal and sees more and more everyday how many of the people, while growing up, and those who judge me, are dishonest and dishonorable. Note, in one aspect I'm glad to say I have helped you people in my past who have done something and achieved on the other hand, I'm sad to see so many people who have nowhere. To those people I say, if I can do it and get away. B…sh… And with all my obstacles, why the f… can't you."

The defendant argued that this was inadmissible character evidence, citing Ind. Evid. R. 404(b), which provides in part that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan knowledge, identity, or absence of mistake or accident." The Court also noted that otherwise inadmissible evidence may be admitted where the defendant opens the door to questioning on that evidence. (internal citations omitted). The Court concluded that the trial court properly admitted the evidence of the defendant's MySpace page, since that posting only contained the defendant's own statements about himself and in reference to himself.

The Court also determined the MySpace entry was also probative evidence of an issue at trial. The defendant testified that, at most, he was reckless because he was drunk, and repeatedly suggested during his testimony that his state of mind and requisite intent could only have been best called reckless or irresponsible, and not criminal. The Court opined that "[o]nce [the defendant] took the stand to testify along these lines, it was proper to permit the prosecution to confront [the defendant] with his own seemingly prideful declarations that rebutted his defense."