CHAPTER 8
DISPOSITIONAL AND PARENT ORDERS
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CHAPTER 8
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I. PREDISPOSITIONAL REPORTS AND CASE PLANS

I. A. Mandatory and Discretionary Reports

IC 31-34-18-1(a) states that the court "shall" order DCS or a caseworker to prepare a predispositional report after the court has entered a finding that the child is a CHINS. Pursuant to IC 31-34-10-9(a), the court may proceed directly from a CHINS admission to a dispositional hearing if all parties agree. It can be argued that the court should proceed directly to the dispositional hearing only if the predispositional report has been filed and copies have been provided to the parties. The child, the child's parent, guardian, or custodian, and the guardian ad litem/court appointed special advocate may also file predispositional reports pursuant to IC 31-34-18-1(b).

I. B. Contents of DCS Predispositional Report

I. B. 1. Guidelines for Preparing Predispositional Report

IC 31-34-18-4 provides that, if consistent with the safety and best interest of the child and the community, the person preparing the predispositional report shall recommend care, treatment, and rehabilitation that: (1) is in the least restrictive setting and close to the parent's home; (2) least interferes with family autonomy and least disrupts family life; (3) least restrains the freedom of the child and family; and (4) provides a reasonable opportunity for parent participation.

IC 31-34-18-6.1(b) requires the results of a criminal history check (defined at IC 31-9-2-22.5) to be included in the predispositional report if out-of-home placement of the child with an unlicensed blood or adoptive relative caretaker is being considered. The criminal history check shall be conducted for each person who is currently residing in the location designated as the out-of-home placement. The criminal history check is not required if out-of-home placement to an entity or facility that is not a residence or is licensed by the state is the only placement being considered or if placement is undetermined at the time the predispositional report is prepared. IC 31-34-18-6.1(c)(1), (2). The definition of "criminal history check" at IC 31-9-2-22.5 includes a fingerprint based criminal history background check of both state and national data bases or a national name based criminal history check for persons who are at least eighteen years old. It also includes, for persons who live in the residence and are at least fourteen years old: (1) the collection of substantiated reports of child abuse or neglect in a jurisdiction where the person resided within the past five years; (2) a check of the national sex offender registry; and (3) a check of law enforcement agency records in every jurisdiction where the person has resided in the past five years unless DCS or the court grants an exception to this check.

I. B. 2. Needs and Recommendations for the Child

IC 31-34-18-1(a) provides that the predispositional report must contain a statement of the child's needs, and recommendations for the child's care, treatment, rehabilitation, and placement.

I. B. 3. Out-of-Home Placement With Relatives

If DCS or the caseworker believes that an out-of-home placement would be appropriate for the child, IC 31-34-18-2(b) states that DCS or the caseworker "shall consider" whether the child should be placed with the child's suitable and willing blood or adoptive relative

caretaker, including a grandparent, an aunt, an uncle, or an adult sibling, before considering other out-of-home placements. IC 31-34-20-1.5 allows the court to order relative placements despite a felony conviction and/or substantiated abuse or neglect by the relative in certain situations. See this Chapter at V.C. for further discussion.

I. B. 4. Parental Participation

IC 31-34-18-2(a) provides that the person preparing the predispositional report "shall consider" the necessity, nature and extent of the participation by a parent, guardian, or custodian in a program of care, treatment or rehabilitation of the child. See this Chapter at VIII. for full discussion of parental participation orders.

I. B. 5. Parental Financial Responsibility

IC 31-34-18-3 provides that DCS or the caseworker "shall" prepare a financial report on the parent or the estate of the child to assist the juvenile court in determining the person's financial responsibility for services provided for the child. See this Chapter at IX. for full discussion of financial responsibility.

I. B. 6. Mental Health Examination of Child or Parents

IC 31-34-18-5(1) and IC 31-32-12-1(3) authorize the court to order an examination of the child to assist DCS in making recommendations regarding the needs of the child. IC 31-34-18-5(2) states the court can "make provision" for an examination of the child's parent, guardian, or custodian "if the person gives consent." See Chapter 7 at II.E. for motions for examination of child or parents.

I. B. 7. Conference with Experts

IC 31-34-18-1.1 through 1.3 provide that the person preparing the predispositional report has the discretion, or may be directed by the court, to confer with child experts about the child's needs or placement, and to facilitate conferences with representatives from the child's school, probation department, DCS, a mental health center in the child's county, a developmental disability services provider located in the child's county of residence, and other persons as the court may direct. The experts consulted can help the report writer consider resources and programs which are appropriate for the child, and recommend needed care, treatment and placement for the child. IC 31-34-18-1.2 states that a school representative must be included in the conference if the child is known to be eligible for special education services or placement.

I. B. 8. Mandatory Statement of Dispositional Options Considered and Dual Status Team Report

IC 31-34-18-6.1(a)(1) and (2) direct DCS or the caseworker to include a description of all dispositional options considered in preparing the predispositional report and an evaluation of each option. IC 31-34-18-6.1(a)(3) requires that if the caseworker has consulted any experts pursuant to IC 31-34-18-1.1, the report should include the name, occupation, position and any relationship to the child of each person consulted. IC 31-34-18-6.1(a)(4) states that the report of the dual status assessment team shall be included in the predispositional report if the child is a dual status child under IC 31-41. See Chapter 5 at IX. for discussion of dual status children.

I. C. Report May Contain Hearsay

In **In Re C.B.**, 865 N.E.2d 1068, 1072-73 (Ind. Ct. App. 2003), the Court affirmed the admission of a predispositional report which included hearsay of probative value. Mother's positive drug test results at the birth of her second child were attached to the report. IC 31-34-19-2(a) states that

any predispositional report may be admitted into evidence to the extent that the report contains evidence of probative value even if the report would otherwise be excluded.

I. D. Distribution and Access to Predispositional Report

IC 31-34-18-6 provides that the "predispositional report shall be made available within a reasonable time before the dispositional hearing," and the court "shall provide" copies to the parties. Presumably this language means that the report prepared by DCS, as well as any reports prepared by other parties, shall be filed with the court and served on the parties. Despite the language in the statute that the court "shall provide" copies of the report to the parties, it is the practice for the parties to serve copies of their reports upon the other parties. IC 31-34-18-6 provides that if the juvenile court determines "on the record" that the predispositional report contains information that should not be released to the child or the child's parents, the court "shall" provide a copy of the report to parents' counsel and the child's guardian ad litem or court appointed special advocate, and "may" provide a factual summary of the report to the child and parents. If portions of the predispositional report are based on significant confidential drug, medical, or mental health records, or such confidential records are attached to the predispositional report, the preparer of the report should consider whether IC 31-34-18-6 or another mechanism should be used to avoid distribution of that confidential information directly to the parties. It is also important to safeguard the confidential medical, mental health, and substance abuse treatment information of each parent, guardian, or custodian.

IC 31-34-19-8 requires the court to send a copy of the dispositional report described in IC 31-34-19-10 [statute on dispositional decree which includes incorporating finding or conclusion from predispositional report] to each person who receives placement of the child.

I. E. Presence of Person Who Prepares Predispositional Report at Dispositional Hearing

IC 31-34-19-1.1 provides that the person who prepared the predispositional report "must be present, if possible" at the dispositional hearing. IC 31-34-19.1.1 provides that the person shall provide testimony when requested to explain how the persons participating in the conferences described at IC 31-34-18-1.1 through 1.3 examined the available options and recommended the options that most closely coincide with the dispositional guidelines in IC 31-34-18-4.

I. F. Case Plan

The dispositional statutes do not require the filing of the case plan prepared by DCS at the dispositional hearing. However, the case plan is frequently prepared prior to the dispositional hearing and is used as a supplement to the report.

I. F. 1. Case Plan Requirements, Time Line, and Updates

In accordance with federal law, a case plan shall be prepared for each child who is under the supervision of DCS as a result of an out-of-home placement or a dispositional decree. IC 31-34-15-1. The case plan shall be completed not later than sixty days after the child's first placement outside of the home, or the date of the dispositional decree, whichever occurs first. IC 31-34-15-2.

In **C.A. v. Indiana Dept. of Child Services**, 15 N.E.3d 85 (Ind. Ct. App. 2014), the Court affirmed the trial court's order terminating Mother's parental rights. Id. at 95. Mother claimed that her due process rights had been violated because she was neither given nor signed a case plan. The Court noted the family case manager testified that, during team meetings, she discussed Mother's motivation toward doing what was needed to be reunified with her children, and the team made recommendations regarding what Mother had to do. Id. at 93. The Court found the record indicated that it was not Mother's lack of knowledge or

direction as to what she needed to do for reunification, but her rather lack of participation. Id. The Court found Mother's situation unlike that in A.P. v. PCOFC, 734 N.E.2d 1107 (Ind. Ct. App. 2000), *trans. denied*, discussed in this Chapter at I.F.3., because the A.P. case involved multiple procedural irregularities in the CHINS case. C.A. at 93. While the Court cautioned DCS to be more cognizant of the statutory framework which it should follow, the Court could not conclude that the failure to provide a case plan to Mother resulted in a procedural irregularity so egregious that she was denied due process of law. Id.

In **In Re B.J.**, 879 N.E.2d 7 (Ind. Ct. App. 2008), *trans. denied*, an appeal of the order terminating his parental rights, Father asserted that he was denied his constitutional right to due process when DCS failed to provide him with a case plan during the CHINS proceedings. The Court found that Father had waived any due process challenge to the adequacy of the CHINS proceedings because he had failed to object during the CHINS proceedings and did not raise his constitutional claim at the termination hearing. Id. at 17 n.3.

In **Castro v. Office of Family and Children**, 842 N.E.2d 367 (Ind. Ct. App. 2006), *trans. denied*, the Court affirmed the trial court's order terminating the parent-child relationship and found that Father was not denied due process of law during the CHINS/termination proceeding. Id. at 370. Father argued that the case plan had not been filed within sixty days after the child's first placement as required by IC 31-34-15-2 and that he had not received a copy of the initial case plan within ten days as required by IC 31-34-15-3. Father had been incarcerated for more than ten years and for the child's entire lifetime and was serving a forty year sentence for criminal deviate conduct and burglary. The Court was not persuaded by Father's arguments, noting that, although the OFC failed to comply with the technical time restrictions, the case plans were completed and Father eventually received copies of all of them. Id. at 376. The Court could not say that the OFC's failure to adhere to the time requirements deprived Father of due process. Id. The Court found that Father was informed of the conduct that could lead to termination of parental rights and of the steps needed to facilitate reunification. Id.

In **McBride v. County Off. Of Family & Children**, 798 N.E.2d 185 (Ind. Ct. App. 2003), the Court affirmed the trial court's judgment terminating the parent-child relationship. Id. at 203. Among the due process errors raised by Mother on appeal were that OFC failed to meet the statutory sixty-day requirement for completion of a case plan. Mother also complained about the contents of the case plan. The Court was not persuaded, noting that Mother admitted at the termination hearing that OFC had provided her with case plans and that she was aware of what was required of her before reunification could take place. Id. at 196. The Court also noted that OFC presented a draft case plan to Mother within the sixty-day period but she did not sign the case plan until four months later. Id. The Court held that any alleged deficiencies regarding the case plan did not deprive Mother of due process. Id.

In **In Re A.H.**, 751 N.E.2d 690 (Ind. Ct. App. 2001), the Court affirmed the trial court's CHINS determination despite the parents' and child's challenges. Id. at 702. Among the issues raised was whether the parents' due process rights were violated because the OFC failed to: (1) provide the family with a case plan within sixty days of the child's first placement; and (2) failed to negotiate with the family when developing the plan. The parents relied on the termination of the parent-child relationship case A.P. v. PCOFC, 734 N.E.2d 1107 (Ind. Ct. App. 2000), *trans. denied*, in which the Court reversed the termination judgment due to more than five procedural irregularities in the CHINS proceeding, including the fact that the parents may not have ever received a copy of the case plan. The Court distinguished the A.H. case from A.P. v. PCOFC, 743 N.E.2d 1107, *trans. denied,* because

parental rights were not being terminated in the A.H. case. A.H. at 701. The Court noted that it had previously distinguished CHINS and termination proceedings because, unlike a termination proceeding where an erroneous result would obviously be disastrous, an erroneous CHINS adjudication has a far less disastrous impact on the parent-child relationship. Id. The Court did not find that the alleged procedural irregularities had resulted in the violation of the parents' due process rights. Id. The Court did not believe that the CHINS finding or resulting dispositional order would have been different if the OFC had negotiated with the parents or provided a more timely case plan. Id. at 702.

Indiana statutes on case plans make no reference to modification of case plans or regular distribution to parents of updated case plans. However, in **A.P. v. PCOFC**, 734 N.E.2d 1107, 1113 (Ind. Ct. App.2000), *trans. denied*, the Court noted that it is reasonable to assume that subsequently altered and modified case plans will be provided to parents as the CHINS case proceeds. See this Chapter at I.F.3. for full discussion of the case plan issue in the A.P. case. Documentation should be maintained reflecting conferences with parents to negotiate and review modifications of case plans.

I. F. 2. Contents of the Case Plan

A case plan is a description and discussion of the child's placement needs, the efforts of DCS to provide family services, and the permanent placement plan for the child. IC 31-34-15-4 states that the case plan must include:

(1) A permanent plan, or two (2) permanent plans if concurrent planning, for the child and an estimated date for achieving the goal of the plan or plans.
(2) The appropriate placement for the child based on the child's special needs and best interests.
(3) The least restrictive family-like setting that is close to the home of the child's parent, custodian, or guardian, if out-of-home placement is recommended. If an out-of-home placement is appropriate, DCS shall consider whether a child in need of services should be placed with the child's suitable and willing blood or adoptive relative caretaker, including a grandparent, an aunt, an uncle, or an adult sibling, before considering other out-of-home placements for the child.
(4) Family services recommended for the child, parent, guardian, or custodian.
(5) Efforts already made to provide family services to the child, parent, guardian, or custodian.
(6) Efforts that will be made to provide family services that are ordered by the court.
(7) A plan for ensuring the educational stability of the child while in foster care that includes assurances that the:
(A) placement of the child in foster care considers the appropriateness of the current educational setting of the child and the proximity to the school where the child is presently enrolled; and
(B) DCS has coordinated with local educational agencies to ensure:
(i) the child remains in the school where the child is enrolled at the time of removal; or
(ii) immediate, appropriate enrollment of the child in a different school, including arrangements for the transfer of the child's school records to the new school, if remaining in the same school is not in the best interests of the child.
(8) Any age appropriate activities that the child is interested in pursuing.

(9) If the case plan is for a child in foster care who is at least fourteen years of age, the following:

(A) A document that describes the rights of the child with respect to:

(i) education, health, visitation, and court participation;

(ii) the right to be provided with the child's medical documents and other medical information; and

(iii) the right to stay safe and avoid exploitation.

(B) A signed acknowledgment by the child that the:

(i) child has been provided with a copy of the document described in clause (A); and

(ii) rights contained in the document have been explained to the individual in an age appropriate manner.

IC 31-9-22.1(a) defines "concurrent planning", for purposes of IC 31-34 and IC 31-35 as the establishment of a case plan with concurrent permanency plan goals. The goals are: reunification with the child's parent, guardian, or custodian, or placement with the child's noncustodial parent; adoption; third party custodianship by a relative; guardianship; and another planned, permanent living arrangement (if the child is at least sixteen years old). IC 31-9-2-22.1(b) provides that "concurrent planning" for purposes of IC 31-34 requires the identification of two permanency goals and simultaneous reasonable efforts toward both goals with knowledge of all participants.

In **Castro v. Office of Family and Children**, 842 N.E.2d 367 (Ind. Ct. App. 2006), *trans. denied*, a termination case, the Court found that inconsistencies between the first and second case plans and errors in the second case plan did not deny incarcerated Father due process. Id. at 376. Both the first and second case plans included the same terms regarding Father, namely that he submit to a psychological evaluation upon his release. Because the conditions required in the case plans were clear, the Court could not say that any confusion arising from the inconsistencies in those plans deprived Father of due process. Id.

I. F. 3. Involvement and Rights of Parents and Older Children in Case Plan

IC 31-34-15-2 states that DCS shall complete the case plan after negotiating with the child's parent, guardian, or custodian, the child (if the child is at least fourteen years old), and any child representatives selected by the child pursuant to IC 31-34-15-7. If the child is at least fourteen years old, IC 31-34-15-7(a) states that DCS shall consult with the child in the development of the case plan. If the child is unable to participate effectively in the development of the case plan due to a physical, mental, emotional, or intellectual disability, DCS may excuse the child from the consultation requirement by documenting the reasons for the child's inability to participate in developing the case plan. If the child refuses to participate in the development of the plan for reasons other than a disability, DCS shall record the refusal and documents efforts made to obtain the child's input or participation in the plan. IC 31-34-15-7(b) allows the child to select not more than two representatives to represent the child in the development of the case plan. The representatives: (1) must be at least eighteen years old; (2) must be a member of the case planning team; and (3) may not be the child's foster parent or caseworker. IC 31-34-15-7(d) states that DCS may reject a person selected by the child to be a member of the case planning team if DCs has good cause to believe that the person would not act in the child's best interests. *Practice Note*: the child's guardian ad litem/court appointed special advocate could serve as the child's representative for the development of the case plan if selected by the child.

In **In Re E.E.S.**, 874 N.E.2d 376 (Ind. Ct. App. 2007), *trans. denied*, many terms of the case plan to which Mother had consented were not applicable until Mother was released from prison. The Court reversed the trial court's termination of Mother's parental rights because Bartholomew County Office of Family and Children (BCOFC) failed to uphold its end of the agreement with Mother that, in exchange for the parents' admitting to the allegations contained in the CHINS petitions, BCOFC would maintain and support the family bond until Mother was released from prison and had an opportunity to engage in services. Id. at 381-82. In doing so, the Court acknowledged that (1) the circumstances that led to the removal of the children had not been remedied because Mother was still incarcerated, and the maternal grandparents were still unable to provide a proper environment for the children; (2) the record demonstrated that termination of Mother's parental rights was in the best interests of the children; and (3) this was a case where the Court normally would affirm the termination judgment. Id. at 381. The Court stated that it disapproved of such agreements because they restricted the OFC from acting pursuant to the termination statutes or in the best interests of the children; however, the Court could not "allow an OFC to ignore such an agreement when the parent's consideration for the agreement was, in essence, waiver of the right to due process at the CHINS proceeding." Id. at 382.

In **Castro v. Office of Family and Children**, 842 N.E.2d 367 (Ind. Ct. App. 2006), *trans. denied*, incarcerated Father argued unsuccessfully on appeal of the termination of the parent-child relationship judgment that he had been denied due process of law because he was not able to participate in negotiating a case plan pursuant to IC 31-34-15-2. The Court disagreed, noting that, even though Father was unable to participate in person in the formulation of case plans, he was able to communicate by letter with the OFC case manager. Id. at 376. The Court further held that Father did not allege that he was not allowed to participate in case plan negotiations; rather, he was unable to do so because of his incarceration. Id.

In **In Re Involuntary Term. Paren. of S.P.H.**, 806 N.E.2d 874 (Ind. Ct. App. 2004), Father, who had been incarcerated throughout the entire CHINS and termination proceedings for drug and neglect of a dependent charges, argued on appeal of the trial court's termination of the parent-child relationship judgment that his due process rights had been violated regarding the case plans. He referenced the absence of his signature on the case plans and alleged that the Clay County Division of Family and Children (CCDFC) failed to negotiate with him prior to filing the case plans. Citing that IC 31-34-15-2 provides that "[t]he county office of family and children, after negotiating with the child's parent, guardian, or custodian, shall complete a child's case plan…", the Court noted the record disclosed that CCDFC negotiated the case plan with Mother, who was the non-incarcerated parent, before submitting the plan to the trial court for approval. Id. at 879. The Court further noted that the case plan's purpose is to serve notice of parental conduct that could lead to termination of the parent-child relationship. Id. The Court found that (1) Father was provided with copies of both case plans and thus was put on notice; (2) the statute lacks the requirement that the case plan be signed by the parent; and (3) the absence of Father's signature did not amount to a procedural irregularity. Id.

In **Stewart v. Randolph County OFC**, 804 N.E.2d 1207 (Ind. Ct. App. 2004), *trans. denied*, Mother appealed the trial court's decision terminating her parental rights. Mother argued that her due process rights were violated regarding the case plans in the following ways: (1) the Randolph County OCF did not negotiate the case plans with her pursuant to IC 31-34-15-2; (2) she was not provided with copies of the case plans in a timely manner as required by IC 31-34-15-2; (3) the children's foster parent was not involved in the development of the case plans as required by IC 31-34-15-5. The Court was not persuaded by Mother's arguments. The Court used case law on statutory interpretation to determine the

apparent legislative intent and quoted Black's Law Dictionary (7th Ed. 1999), which defines "negotiate" as "[t]o communicate with another party for the purpose of reaching an understanding… [or][t]o bring about by discussion or bargaining." Id. at 1211. The Court quoted the OFC family case manager's testimony about how she developed the case plans with Mother. The case manager explained that she had case conferences with Mother and the service providers and discussed what services and activities Mother needed to be working on for reunification. The case manager then reviewed the case plans with Mother and asked her if she had any problems with the responsibilities before asking her to sign them. The Court, noting that Mother was represented by counsel at every stage of the proceedings and never objected to the case plan requirements, concluded that the OFC complied with IC 31-34-15-2 when it completed the case plans. Id. The Court found that Mother cited no evidence regarding the timeliness of the plans and did not demonstrate how she was harmed by the lack of foster parent involvement in the development of the case plans, since the evidence showed that the foster parent was "actively involved in fulfilling the terms of the case plans with respect to the children's needs." Id. at 1211 n.2. The Court opined that Mother had not demonstrated that she was denied her right to due process regarding the case plans. Id. at 1211.

In **In Re T.F.**, 743 N.E.2d 766 (Ind. Ct. App. 2001), Parents alleged that OFC's failure to provide them with a case plan was a procedural irregularity in the CHINS proceeding that nullified the CHINS determination, thereby rendering the subsequent termination order void. The Court rejected Parents' argument and affirmed the trial court's order terminating the parent-child relationship. Id. at 770, 776. The Court found that: (1) no case plan was included in the record on appeal to enable the Court to determine if there was a difference in what was required by the case plan as opposed to the court orders; (2) the court record was replete with evidence that Parents were provided with notice of what conduct could lead to termination of their parental rights; and (3) the case reflected only an "allegation of one procedural error" involving the case plan, and not the multiple procedural irregularities in the CHINS and termination proceedings that occurred in A.P. v. PCOFC, 743 N.E.2d 1107 (Ind. Ct. App. 200), *trans. denied*. T.F. at 772-73.

In **A.P. v. PCOFC**, 734 N.E.2d 1107 (Ind. Ct. App. 2000), *trans. denied*, Parents raised the failure of the office of family and children to provide them with case plans during the CHINS case as one of their grounds for reversing the termination judgment. The Court noted that Indiana law required the office of family and children to "negotiate" a case plan with the parents and to send a copy of the case plan to the parents within ten days after its completion. Id. at 1113. Although the Court acknowledged that Indiana law does not discuss modifications to case plans, it indicated that it is only reasonable to assume that subsequently altered and modified case plans should be provided to the parents. Id. In examining the actions of the office of family and children as reflected in the record, the Court questioned whether the office of family and children had "negotiated" the case plans with the parents, because the section of the case plan designated for parental signature was left blank on all the case plans. Id. The Court noted the difficulty of negotiating with parents who are incarcerated, but implied that negotiation with the non-incarcerated parent might suffice. Id. at 1113 n.5. Regardless of the negotiation issue, the Court stated that the failure of the office of family and children to provide copies of the case plans to Parents could have "substantially increased the risk of error with respect to the termination of parental rights" in that Parents were "deprived of some degree of notice as to what conduct on their part could lead to the termination of those rights." Id. at 1114. Although the Court noted that the original dispositional orders and subsequent review orders "may have provided some written notice" of required parental conduct, it was necessary for Parents to receive copies of the

case plans because the plans might contain requirements not stated in the court orders. Id. The Court concluded that it was error to fail to provide copies of the case plan to Parents, and reversed the termination judgment on its determination that this error, combined with other procedural errors in the CHINS case, denied Parents due process of law. Id. at 1119.

I. F. 4. Role of Foster Parents in Case Plan

IC 31-34-15-5 states that each foster parent "shall" cooperate in the development of the case plan for the child, and DCS "shall" discuss with at least one foster parent of a child the foster parent's role regarding the following: (1) rehabilitation of the child and the child's parents, guardians, and custodians; (2) visitation arrangements; and (3) services required to meet the special needs of the child. See Chapter 2 at I.H. on rights of foster parents generally. See **Stewart v. Randolph County OFC**, 804 N.E.2d 1207, 1211 n.2 (Ind. Ct. App. 2004), *trans. denied*, for brief discussion of foster parent involvement in case plans.

I. F. 5. Federal Law

IC 31-34-15-1 provides that the case plan shall be prepared "in accordance with federal law." The relevant federal law appears at 42 U.S.C. § 675(1)(A) through (E) and states that the case plan is a written document which includes at least the following:

> (A) A description of the type of home or institution in which a child is to be placed, including a discussion of the safety and appropriateness of the placement and how the agency which is responsible for the child plans to carry out the voluntary placement agreement entered into or judicial determination made with respect to the child in accordance with section 672(a)(1) [1] of this title.
> (B) A plan for assuring that the child receives safe and proper care and that services are provided to the parents, child, and foster parents in order to improve the conditions in the parents' home, facilitate return of the child to his own safe home or the permanent placement of the child, and address the needs of the child while in foster care, including a discussion of the appropriateness of the services that have been provided to the child under the plan.
> (C) The health and education records of the child, including the most recent information available regarding—
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> (i) the names and addresses of the child's health and educational providers;
> (ii) the child's grade level performance;
> (iii) the child's school record;
> (iv) a record of the child's immunizations;
> (v) the child's known medical problems;
> (vi) the child's medications; and
> (vii) any other relevant health and education information concerning the child determined to be appropriate by the State agency.
>
> (D) Where appropriate, for a child age 16 or over, a written description of the programs and services which will help such child prepare for the transition from foster care to independent living.
> (E) In the case of a child with respect to whom the permanency plan is adoption or placement in another permanent home, documentation of the steps the agency is taking to find an adoptive family or other permanent living arrangement for the child, to place the child with an adoptive family, a fit and willing relative, a legal guardian, or in another planned permanent living arrangement, and to finalize the adoption or legal guardianship. At a minimum, such documentation shall include child specific recruitment efforts such as the use of State, regional, and national adoption exchanges including electronic exchange systems to facilitate orderly and timely in-State and interstate placements.

(F) In the case of a child with respect to whom the permanency plan is placement with a relative and receipt of kinship guardianship assistance payments under section 673(d) of this title, a description of—

(i) the steps that the agency has taken to determine that it is not appropriate for the child to be returned home or adopted;

(ii) the reasons for any separation of siblings during placement;

(iii) the reasons why a permanent placement with a fit and willing relative through a kinship guardianship assistance arrangement is in the child's best interests;

(iv) the ways in which the child meets the eligibility requirements for a kinship guardianship assistance payment;

(v) the efforts the agency has made to discuss adoption by the child's relative foster parent as a more permanent alternative to legal guardianship and, in the case of a relative foster parent who has chosen not to pursue adoption, documentation of the reasons therefor; and

(vi) the efforts made by the State agency to discuss with the child's parent or parents the kinship guardianship assistance arrangement, or the reasons why the efforts were not made.

(G) A plan for ensuring the educational stability of the child while in foster care, including—

(i) assurances that each placement of the child in foster care takes into account the appropriateness of the current educational setting and the proximity to the school in which the child is enrolled at the time of placement; and

(ii)

(I) an assurance that the State agency has coordinated with appropriate local educational agencies (as defined under section 7801 of title 20) to ensure that the child remains in the school in which the child is enrolled at the time of each placement; or

(II) if remaining in such school is not in the best interests of the child, assurances by the State agency and the local educational agencies to provide immediate and appropriate enrollment in a new school, with all of the educational records of the child provided to the school.

Federal regulation 45 CFR § 1356.21(g)(4) and (5) provides that the case plan shall include "a description of the services offered and provided to prevent removal of the child from the home and to reunify the family" and document "the steps to finalize a placement when the case plan goal is or becomes adoption or placement in another permanent home."

II. DISPOSITIONAL HEARING

II. A. Hearing and Notice Requirements, Including Notices for Indian Children

The juvenile court "shall" hold a dispositional hearing. IC 31-34-19-1. The hearing may be held immediately after an admission of CHINS if the parties consent as stated in IC 31-34-10-9(a) through (c), or it may be scheduled for a later date. When the case is resolved by a factfinding hearing and a judgment of CHINS is entered, the court shall set a date for the dispositional hearing. IC 31-34-19-1.3(a) requires DCS to provide notice of the date, time, place, and purpose of the dispositional hearing to each: (1) party or person for whom a summons is required to be issued under the initial hearing statute (child, parent, guardian, custodian, guardian ad litem/court appointed special advocate, any other necessary person); and (2) foster parent or other caretaker with whom the child is placed. Notice shall be provided at the time the dispositional hearing is scheduled. IC 31-34-19.1.3(b) states the court shall provide the persons

who are required to be notified an opportunity to be heard and to make recommendations to the court at the dispositional hearing.

If a party appears at court for the first time at the dispositional hearing, the Court should inquire whether the party has "reason to know" that the child is an Indian child. 25 U.S.C. § 1903(4) defines "Indian child" as a child who is either: (a) a member of an Indian tribe, or (b) eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe. If the child is an Indian child, the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901 et seq., applies to the child's case. If the party provides information which indicates that there is "reason to know" the child is an Indian child, as outlined in the factors at 25 CFR § 23.107, inquiries must be made by DCS or another party to determine whether the child is an Indian child. The court may be required to hold an additional dispositional hearing because extra time will be needed to make the inquiries and provide notice to the tribe or tribes. The U.S. Bureau of Indian Affairs will assist DCS in locating tribes and making inquiries on whether the child is a member or the child is eligible for membership. If the child is determined to be an Indian child, the Indian tribe must be given notice of the CHINS case, and the tribe has the opportunity to request the transfer of jurisdiction over the child to the tribe. If the tribe declines jurisdiction, the Indiana court must comply with the ICWA, which requires specific findings, and states that the child may be removed from the Indian parent only when clear and convincing evidence from testimony by qualified expert witnesses is shown. 25 U.S.C. § 1915 establishes placement preferences for Indian children. See this Chapter at V.A for more information for information on placement options. See Chapter 3 at II.G.5., Chapter 6 at I.E., and www.bia.gov for further information on ICWA jurisdiction and notification requirements.

II. B. Time Limitations

IC 31-34-19-1(a) requires the court to complete a dispositional hearing not more than thirty days after the date the court finds that a child is a child in need of services. IC 31-34-19(b) states that, if the dispositional hearing is not completed within thirty days, upon the filing of a motion with the court, the court shall dismiss the case without prejudice. IC 31-34-19-6.1(c) allows the court to continue the dispositional hearing for not more than seven days so DCS can consider alternate dispositional recommendations. See this Chapter at III.C.

II. C. Rights of the Child and the Parent, Guardian, or Custodian

The child and the child's parent, guardian or custodian are entitled to be present at the dispositional hearing. However, the child may be excluded by the court for good cause shown upon the record. IC 31-32-6-8.

The court may appoint counsel for the child. IC 31-32-4-2(b). The child has the right to subpoena evidence and witnesses, cross-examine witnesses, and present evidence, unless the child is excluded from the proceeding. IC 31-32-2-1. See Chapter 2 at II. for information on the procedural due process rights of children. A guardian ad litem/court appointed special advocate shall be appointed for every child in a CHINS proceeding at the initial hearing. IC 31-34-10-3. See Chapter 6 at I.G. for further discussion.

In **In Re G.P.**, 4 N.E.3d 1158 (Ind. 2014), the Indiana Supreme Court opined that IC 31-34-4-6 explicitly provides for a statutory right to court appointed counsel for a parent in a CHINS case if the parent requests the appointment of counsel and the trial court finds the parent to be indigent. Id. at 1163. The Court held that Mother was denied due process of law by the juvenile court's failure to actually appoint counsel at a CHINS review hearing when she had requested court appointed counsel and the court had found her to be indigent. Id. at 1166. Although the trial court found that Mother was entitled to appointed counsel, court appointed counsel never appeared to

represent Mother at the review hearing, a subsequent review hearing, or the permanency hearing. The Court said that, although Mother had waived her right to counsel at the CHINS initial hearing, she was not permanently bound by that decision. Id. at 1164. The Court vacated the subsequent termination of Mother's parental rights due to the denial of Mother's due process rights in the CHINS case. Id. at 1169. *Practice Note*: Practitioners should be aware of the G.P. opinion in considering the appointment of counsel for indigent parents in dispositional hearings. See Chapter 2 at IV.C.

In **In Re K.D.**, 962 N.E.2d 1249 (Ind. 2012), the Court reversed the CHINS adjudication and remanded the case for the trial court to provide Stepfather with a factfinding hearing. Id. at 1260. Stepfather, who denied the CHINS allegations, had been given a contested dispositional hearing instead of the factfinding hearing requested by Stepfather and DCS. The Court said that: (1) a contested dispositional hearing does not cure the lack of a factfinding hearing when the facts warrant such a hearing; (2) parents have fewer protections in a dispositional hearing than they have in a factfinding hearing; (3) at a dispositional hearing, the juvenile court can admit the DCS dispositional report even if it includes hearsay; (4) the contested dispositional hearing held in the instant case did not afford Stepfather the same due process as he would have received in a contested factfinding hearing. Id. at 1259. See Chapter 2 at V.B. for further discussion.

II. D. Required Advisements to Parties

IC 31-34-19-9 states that the child and the child's parent, guardian, or custodian shall be advised of the dispositional modification procedures at the dispositional hearing. This advisement alerts them to the court's ongoing jurisdiction and responsibility to modify court orders necessary for the care of the child, reunification of the parent and child, and to otherwise obtain permanency for the child. The advisements required at the initial hearing greatly impact the dispositional stage of the CHINS case. At the initial hearing, the child (if at an age of understanding) and the child's parent, guardian, or custodian shall also be advised of the dispositional alternatives available to the court. IC 31-34-10-4. IC 31-34-10-5(1) states that the parent, guardian, or custodian shall be advised that the court can order participation in the care, treatment, and rehabilitation of the child. IC 31-34-10-5(2) states that the parent or the guardian of the child's estate must be advised that the court can hold the parent or guardian to be financially responsible for services provided to the child, parent, or guardian. IC 31-34-10-5(3) states that the parent, guardian, or custodian must be advised that they may controvert allegations concerning their participation and financial responsibility.

In **Matter of Y.D.R.,** 567 N.E.2d 872 (Ind. Ct. App. 1991), a termination case, Mother argued that she was prejudiced by the juvenile court's failure to advise her at the dispositional hearing of the procedures for modification of a dispositional decree. The Court noted that the dispositional statute does provide that the child and parents shall be advised of the modification procedures; however, the Court ruled that Mother failed to show she was prejudiced by the court's omission. Id. at 875.

Failure to advise a custodian of modification procedures was an issue in **Matter of C.B.,** 616 N.E.2d 763 (Ind. Ct. App. 1993), a CHINS case. The Court ruled that the juvenile court had continued jurisdiction over an adjudicated CHINS who had been placed with her uncle in Tennessee. Id. at 769. The Court also ruled that the juvenile court's order which modified the dispositional decree by requiring the child to be returned to Indiana was invalid because: (1) the record did not reflect that Uncle had been given notice of the modification procedures; and (2) Uncle had not been given specific notice of the dispositional modification hearings at which the juvenile court determined it was necessary to return the child to Indiana. Id. at 769-70.

II. E. Admission of Predispositional Reports into Evidence

Predispositional reports should be offered into evidence at the dispositional hearing. IC 31-34-19-2. Filing the report with the court in advance of the hearing may not place the report into evidence. IC 31-34-19-2(c) requires that the child; parent, guardian, or custodian; person representing the interests of the state; and foster parent or other caretaker entitled to notice of the dispositional hearing shall "be given a fair opportunity to controvert any part of the report admitted into evidence." See this Chapter at II.A. for notice requirements for dispositional hearings.

II. F. Hearsay

IC 31-34-19-2(a) states that any predispositional report may be admitted into evidence to the extent that the report contains evidence of probative value even if the report would otherwise be excluded. In **In Re C.B.**, 865 N.E.2d 1068, 1072 (Ind. Ct. App. 2007), *trans. denied*, a CHINS case, the Court held that the (1) the juvenile court was permitted to admit the dispositional report despite its inclusion of any hearsay, as long as the report contained evidence of probative value; and (2) inasmuch as the child's best interests outweigh a parent's right to confidentiality, the juvenile court properly admitted the results of Mother's positive drug screen test at the birth of her second child and information about the second child's positive drug test for controlled substances along with the predispositional report.

II. G. Standard of Proof

The standard of proof for the dispositional hearing is the preponderance of the evidence. IC 31-34-12-3.

II. H. Dispositional Guidelines, Policy, and Requirements

IC 31-34-19-6 states that, if consistent with the safety of the community and the best interest of the child, the juvenile court shall enter a dispositional decree that: (1) (A) is in the least restrictive (most family like) and most appropriate setting available; and (B) close to the parents' home, consistent with the best interest and special needs of the child; (2) least interferes with family autonomy; (3) is least disruptive of family life; (4) imposes the least restraint on the freedom of the child and the child's parent, guardian, or custodian; and (5) provides a reasonable opportunity for participation by the child's parent, guardian, or custodian.

The purpose and policy statute of the juvenile code, IC 31-10-2-1, also provides significant guidance in determining dispositional issues. It states, in pertinent part, that it is the policy of this state to "(2) recognize the responsibility of the state to enhance the viability of family and children in our society; ... (4) strengthen family life by assisting parents to fulfill their parental obligations; ... (6) remove children from families only when it is in the child's best interest or in the best interest of public safety; ... (12) provide a continuum of services developed in cooperative effort by local governments and the state."

IC 31-34-19-7(a) and (b) contain the dispositional requirement that when out-of-home placement is recommended, the court "shall" consider whether the child should be placed with the child's suitable and willing blood or adoptive relative caretaker before considering other out-of-home placements.

The definition of "relative" for purposes of IC 31-34-19 [dispositional hearing] at IC 31-9-2-107(c) includes the child's parent, grandparent, brother, sister, stepparent, stepgrandparent, stepbrother, stepsister, first cousin, uncle, aunt, and any other individual with whom the child has an established and significant relationship. IC 31-34-19-7(c) states that a home evaluation and background checks described at IC 31-34-4-2 are required before the child is placed with a

relative or a de facto custodian. When relatives are not licensed foster parents, a criminal history check as defined by IC 31-9-2-22.5 is required prior to placement. IC 31-34-20-1.5(a) states that, except as provided in IC 31-34-20-1.5(d), the court may not enter a dispositional decree placing a child in another home if a person who is currently residing in the home has committed substantiated abuse or neglect or has a felony conviction or a juvenile adjudication for a nonwaivable criminal offense as defined at C 31-9-2-84.8. Substantiated abuse or neglect and some felony convictions or delinquency adjudications, particularly those for which the person was convicted more than five years ago, may not prevent the relative placement if the person's offense, delinquent act, or act of child abuse or neglect is not relevant to the person's present ability to care for the child and the placement is in the child's best interest. The court shall consider the length of time since the person committed the offense, delinquent act, or act of abuse or neglect; the severity of the offense, delinquent act, or abuse or neglect; and evidence of the person's rehabilitation, including cooperation with a treatment plan in making the placement decision. IC 31-34-20-1.5(e). See this Chapter at V.C. for the list of nonwaivable offenses.

Although the dispositional guidelines contain a mixture of the interests of the child and the parents, case law indicates that the "best interests" of the child is a substantial consideration in resolving issues at the dispositional stage of a CHINS case. See **In Re C.W.**, 723 N.E.2d 956, 962 (Ind. Ct. App. 2000) (Court affirmed dispositional order on its finding that placement with the foster parents, rather than grandparents, was in best interest of the child). In **Matter of Joseph**, 416 N.E.2d 857 (Ind. Ct. App. 1981), the Court affirmed the juvenile court ruling that visitation with Father was not in the best interests of the child. The Court stated:

> In short, the decisions of this state reveal the "best interests" standard has not been employed to make vague moral judgments about alternative lifestyles and parental fitness. Instead, the process of effecting that which is "in the best interests of the child" has in fact been an effort by our courts to preserve, and in some instances create, an environment conducive to the mental and physical development of the child - an environment which, to the extent possible, meets the "need of every child for unbroken continuity of affectionate and stimulating relationships with an adult." As such, the "best interests" test without question forwards a compelling state interest which justifies the resultant interference with the rights of the biological parents.
> Id. at 861.

In **In Re A.H.**, 751 N.E.2d 690 (Ind. Ct. App. 2001), a CHINS case, the child was found to be a CHINS due to sexual abuse by Father. The trial court's dispositional degree required the child to live with Mother while Father maintained residence elsewhere. The dispositional decree also required the child and parents to be evaluated at the Indianapolis Institute for Marital and Family Relations, Inc. to develop a comprehensive plan of care, treatment and rehabilitation. On appeal, one of the parents' and child's arguments was that the dispositional decree failed to meet the requirements of IC 31-34-19-6 because it unnecessarily disrupted family life and freedom, unnecessarily interfered with family autonomy, imposed unnecessary restrictions on the child and parents, and restrained Father's freedom. With regard to the trial court's determination that Father live elsewhere, the Court opined that the judgment was not clearly erroneous and could not find fault in the decision to remove Father from the home, given the court's finding that he had sexually abused the child. Id. at 700. The Court cited In Re Joseph, 416 N.E.2d 857, 860 (Ind. Ct. App. 1981), which states that there is a compelling state interest in protecting the welfare of the child when child abuse has been established and the rights of the parent are not greater than the rights of a child whose growth and development have already been threatened by abuse. A.H. at 700. With regard to the court ordered evaluation at the Indianapolis Institute, the family noted that they were voluntarily receiving counseling at St. Vincent Stress Center and the staff

psychologist, who had evaluated the child, testified that the child was receiving all the services she needed from the St. Vincent therapist. The Court found that the Indianapolis Institute evaluation order was not clearly erroneous because: (1) it did not preclude the family from continuing their therapy at St. Vincent; (2) the St. Vincent psychologist and therapist admitted they were unaware that Father had molested the child on a number of occasions and that the child was a ward of the OFC; and (3) the evidence supported the trial court's finding that an independent evaluation was necessary because the family's denial of the molestation left doubt as to whether counseling had treated the incidents as inappropriate sexual acts and whether counseling had addressed the child's safety needs. Id.

II. I. Issues Before the Court

The issues before the court at the dispositional hearing are contained within a variety of statutes, as follows:

II. I. 1. Needs and Dispositional Alternatives for Child

The court shall consider the alternatives for the care, treatment, rehabilitation, or placement of the child at the dispositional hearing. IC 31-34-19-1(1). These include the determination of which supervision, outpatient treatment, placement, emancipation, and services options within the dispositional alternatives statute, IC 31-34-20-1, are appropriate for the child.

II. I. 2. Parental Participation

The court shall consider the necessity, nature, and extent of participation by a parent, guardian, or custodian in the child's program of care, treatment, or rehabilitation. IC 31-34-19-1(2). Parental participation may be initiated through the filing of a parental participation petition as outlined in IC 31-34-16. See this Chapter at VIII. for discussion on parental participation.

II. I. 3. Financial Responsibility

The court shall consider the financial responsibility of the parent or the guardian of the child's estate for services provided to the child, parent, or guardian. IC 31-34-19-1(3) and IC 31-40-1-3. If the child is removed from the home and placed with a relative, foster parent, or in a residential placement, the court shall order existing child support obligations assigned to DCS, or otherwise determine a child support order consistent with the child support guidelines. IC 31-40-1-5(b) and (c). See this Chapter at IX. for discussion on financial responsibility.

II. I. 4. Reasonable Efforts Requirement: Efforts of Department of Child Services

IC 31-34-19-10(3) and (4) require that a written finding be made in the dispositional order on whether DCS has made reasonable efforts toward preservation or reunification of the family, in accordance with federal law. This finding could be satisfied by the court adopting and incorporating by reference a statement of services offered and provided to the family made in the case plan or predispositional report filed with the court. See Chapter 4 at VI. for discussion on reasonable efforts requirements. IC 31-34-19-10(b) allows the court to incorporate a finding or conclusion from a predispositional report as a written finding or conclusion in the court's dispositional decree. This would include findings regarding reasonable efforts.

In **G.B. v. Dearborn Cty. Div. of Fam. & Child.**, 754 N.E.2d 1027 (Ind. Ct. App. 2001), *trans. denied*, a CHINS case, Parents appealed the trial court's dispositional order which made the child a ward of OFC with placement and visitation at OFC's discretion and found that reasonable efforts to reunify the child with the child's parent or preserve the child's

family were not required. Parents argued that the statute which allows the court to dispense with reasonable efforts, IC 31-34-21-5.6, was unconstitutional. Because the court had terminated Parents' relationship to their other children two years before the child's birth, the OFC asked the trial court at the November dispositional hearing to find that reasonable efforts were not required. The trial court continued the dispositional hearing to December and made the requested finding at the December dispositional hearing. The Court opined that IC 31-34-21-5.6, which allows the court to dispense with the reasonable efforts requirement in certain situations, did not violate Parents' substantive due process rights under the Indiana and United States Constitutions because the statute serves a compelling state interest and is narrowly tailored to serve that interest. Id. at 1032. The Court noted that, even if the trial court finds that reasonable reunification efforts are not required, the court and OFC are still required to follow the statutory procedures in both CHINS and termination cases. Id.

II. I. 5. Dual Status Assessment Team Report

The court shall consider the recommendations and report of a dual status assessment team if the child is a dual status child. IC 31-34-19-1(4). A dual status child has usually been involved in both delinquency and CHINS proceedings. See IC 31-41-1-2. The requirements for the dual status assessment team report are outlined at IC 31-41-2-6. See Chapter 5 at IX. for further discussion.

II. I. 6. Visitation and Parenting Time

The dispositional statutes do not mention visitation as an issue for the dispositional hearing, but visitation is essential to the juvenile code policy of preserving and reunifying families. The review hearing statute, IC 31-34-21-5(b)(5) and (b)(13), provides that the parent's visitation, and opportunity to visit, is an important consideration at the review hearing; therefore, visitation should be addressed and clarified during the dispositional hearing. It is desirable that conditions, times, and places for visitation with the child be clarified by the court and DCS, with reasonable procedures for modifying the visitation schedule as needed by the parents, DCS, or foster parents and relative caretakers. See this Chapter at VI. for statutes and case law regarding visitation and parenting time in both CHINS and family law cases.

II. J. Judicial Findings, Including Legal Settlement for School Attendance

IC 31-34-19-10 states that the juvenile court shall accompany its dispositional decree with written findings and conclusions. The statute lists six areas that must be addressed in the findings and conclusions:

(1) The needs of the child for care, treatment, or rehabilitation.
(2) The need for participation by the parent, guardian, or custodian in the plan of care for the child.
(3) Efforts made, if the child is a child in need of services, to:
    (A) prevent the child's removal from; or
    (B) to reunite the child with;
the child's parent, guardian, or custodian in accordance with federal law.
(4) Family services that were offered and provided to:
    (A) a child in need of services; or
    (B) the child's parent, guardian, or custodian;
in accordance with federal law.
(5) The court's reasons for the disposition.
(6) Whether the child is a dual status child under IC 31-41.

The juvenile court is required under IC 31-34-20-5(b)(1) to include findings of fact regarding the child's "legal settlement" in its dispositional order or other decree making or changing the child's placement. A student's "legal settlement" in a school corporation, as defined by IC 20-18-2-11, means the student's status with respect to the school corporation that has the responsibility to: (1) permit the student to attend the corporation's local public schools without the payment of tuition or (2) pay the transfer tuition for the student if the student attends school in a local public school of another school corporation. The "legal settlement" findings shall be made whenever DCS or the court places the child, changes the child's placement, or reviews the implementation of a decree from a case review hearing. IC 31-34-20-5(a). IC 20-26-11-9 requires DCS to notify the school corporation where the child has legal settlement and the school corporation where the child will attend school of the placement or change of placement of the child no later than ten days after the child is placed or placement is changed. IC 31-34-20-5(e) states that DCS or a juvenile court may place a child in a public school regardless if the public school has a waiting list for admissions, if DCS or the juvenile court determines that the school's program meets the child's educational needs and the school agrees to the placement. A placement under IC 31-34-20-5(e) does not affect the legal settlement of the child.

IC 31-34-20-1(c) states that, if the juvenile court orders removal of the child from home or awards wardship to DCS at the dispositional hearing, and it is the first juvenile court order that authorizes the child's removal from the parent, guardian, or custodian, the juvenile court must include the written findings and conclusions required by IC 31-34-5-3(b) and (c) in the dispositional order. The findings are needed so that federal funding under Title IV-E can be accessed to offset the cost of the child's placement. IC 31-34-5-3(b) requires the court to include all findings and conclusions required under: (1) applicable provisions of Title IV-E of the federal Social Security Act (42 U.S.C. 670 et seq.); or (2) any applicable federal regulation, including 45 C.F.R. 1356.21. IC 31-34-5-3(c) states that inclusion in the juvenile court order of language approved and recommended by the judicial conference of Indiana relating to the child's removal from home constitutes compliance with IC 31-34-5-3(b).

In **In Re R.P.**, 949 N.E.2d 395 (Ind. Ct. App. 2011), Mother contended that the court had denied her due process by failing to issue adequate findings and conclusions in its dispositional order. In the dispositional order, the trial court stated that: (1) the children would continue to receive visitation with Mother, therapy, and schooling; (2) participation by Mother in the plan of care for the children was necessary for reunification; (3) remaining in the home of Mother would be contrary to the welfare of the children because the children need protection; and (4) that reasonable efforts to prevent or eliminate removal of the children were not required due to the emergency nature of the situation, as follows: immediate removal of the children was necessary in order to protect the children. The order also stated that Mother made accusations about [Father] which the children denied. The Court concluded that the findings did not violate Mother's right to procedural due process. Id. at 404. The Court opined that the dispositional order was sparse, but it was apparent that the trial court did consider the elements required by IC 31-34-19-10. Id. at 403. The Court opined that the finding that "Mother made accusations against [Father] [that] the children denied" was sufficient to justify the emergency nature of the situation. Id. The Court also said that the risk to Mother's parental rights toward the children, who had been placed with Father, was lower than if the children had been placed outside the home, which increases the possibility of subsequent termination of parental rights. Id.

In **In Re N.E.**, 919 N.E.2d 102 (Ind. 2010), the CHINS petition was filed because Mother was unable to protect her four children from domestic violence. Before her removal by DCS, the youngest child had been spending a great deal of time in the home of Father and Paternal Grandmother. Conflicting evidence was presented as to where the child spent most of her time,

with Mother testifying that the child had lived with her most of the time, and Father and Grandmother testifying that the child had lived with them for most of her life. The guardian ad litem stated that the child was appropriately cared for while in Grandmother's and Father's home. The trial court adjudicated the child to be a CHINS, continued her in foster care, and held a dispositional hearing, ordering the child and her siblings to be wards of the State. The trial court made no specific findings as to Father or its reasons for not placing the child with Father. Father appealed. Because the trial court's dispositional decree did not address its reasons for not placing the child with Father, the Court opined that the decree might well have interfered with Father's rights and violated the "least restrictive (most family like)" placement mandate of IC 31- 34-19-6(1)(A); thus, remand was warranted. Id. at 108. The Court noted that the dispositional order found that it was contrary to the health and welfare of the children to be returned home, but the trial court's reasons for its disposition did not seem to take into account the time the child spent in Father's (and Grandmother's) care or anything else regarding the suitability of placing the child with Father. Id. The Court found these omissions of consequence because: (1) when the juvenile court makes decisions during a CHINS hearing as to whether the child will become a ward of the State or orders services, this has the potential to interfere with the rights of parents in the upbringing of their children; (2) procedural irregularities, like an absence of clear findings of fact, in a CHINS proceeding may be of such importance that they deprive a parent of procedural due process with respect to a potential subsequent termination of parental rights; (3) IC 31-34-19-6 requires the juvenile court to enter a dispositional decree that is "the least restrictive (most family like)" and IC 31-34-19-7 requires the court to consider placing a child with a blood relative before considering other out-of-home placements. Id. The Court affirmed the youngest child's CHINS adjudication but vacated the dispositional decree for the youngest child and remanded for proceedings consistent with the opinion. Id.

In **In Re J.Q.**, 836 N.E.2d 961 (Ind. Ct. App. 2005), the Court found that the trial court's CHINS adjudication was not proper and reversed and remanded the case in light of the trial court's failure to adequately state reasons for its disposition by following the requirements of IC 31-34-19-10. Id at 967. The Court also found that the trial court had made procedural errors in admitting the child's hearsay statements pursuant to IC 31-34-13-3. Id. at 966. The Court stated that its review of the findings of fact was made difficult by the trial court's vague language in its disposition hearing report, where the trial court merely stated:

> The Court finds that reasonable efforts have been offered and available to prevent or eliminate the need for removal from the home…the Court also finds that the services offered and available have either not been effective or been completed that would allow the return home of the child without Court intervention. The Court finds it is contrary to the health and welfare of the child to be returned home and that reasonable efforts have been made to finalize a permanency plan for the child.

Id. at 966. The Court opined that IC 31-34-19-10(5) requires that the trial court give reasons for its disposition in a CHINS proceeding. Id. at 966-67. The Court concluded that, in order to balance the rights of parents in the upbringing of their children against the State's legitimate interest in protecting children from harm, the trial court needs to carefully follow the language and logic laid out by the legislature in CHINS statutes. Id. at 967. The Court remanded with instructions that the trial court follow IC 31-34-13-3 and IC 31-34-19-10. Id.

In **In Re A.I.**, 825 N.E.2d 798 (Ind. Ct. App. 2005), *trans. denied*, the Court affirmed the trial court's judgment terminating the parent-child relationship. Id. at 801. Parents argued on appeal, among other issues, that the trial court denied Mother due process because it failed to issue findings pursuant to IC 31-34-19-10. The record showed that the trial court held a dispositional

hearing, and that prior to the hearing the OFC prepared a predispositional report with assistance and input from Mother. Parents appeared with counsel at the hearing, agreed to the Parental Participation Petition, and had the opportunity to be heard. The trial court issued the following dispositional order:

> Court finds that the child has a special need for care, that there is a need for treatment and rehabilitation; there is a need for participation by the parents which appears to be forthcoming; efforts made to reunite the family have been unsuccessful to date; family services offered and provided have been reasonable; child remains a child in need of services; child is made a ward of Vanderburgh Office of Family and Children with placement [not] with the mother; this placement is in the least restrictive, most appropriate, and in the child's best interest.

Id. at 814. The Court concluded that there was no constitutional deficiency with respect to compliance with IC 31-34-19-10 because the order, while sparse, substantially complied with the statutory requirements and it was clear that the trial court considered all the factors set forth in the statute. Id.

In **Stewart v. Randolph County OFC**, 804 N.E.2d 1207 (Ind. Ct. App. 2004), *trans. denied*, the Court affirmed the trial court's judgment terminating Mother's parental rights to her four children. Id. at 1217. In her appeal, Mother contended that the trial court's findings and conclusions in the dispositional decrees did not comply with IC 31-34-19-10. Mother maintained that the dispositional decrees failed to mention the children's needs, the needs for her participation in the children's care plans, the efforts that had been made to prevent the children's removal and the court's reasons for its ruling. The Court concluded that the trial court's findings satisfied the requirements of IC 31-34-19-10. Id. at 1217. The Court quoted the trial court's dispositional order, which included six findings, some of which had sub-parts, the Parental Participation order, and the CHINS petition allegations and held that the findings clearly outlined the needs of the children and Mother and respective services provided, including specific service providers to meet the needs of each child. Id. at 1214-17.

In **McBride v. County Off. Of Family & Children**, 798 N.E.2d 185 (Ind. Ct. App. 2003), the Court affirmed the trial court's decision terminating the parent-child relationship. Id. at 203. Mother claimed on appeal that alleged procedural irregularities in the CHINS case had violated her due process rights. Mother specifically argued that the trial court's findings in the dispositional decree did not meet the requirements of IC 31-34-19-10. Mother had not objected to any of the alleged deficiencies in the CHINS process during the CHINS proceedings, nor had she argued the alleged due process violation during the termination proceedings. The Court held that Mother had waived her constitutional challenge. Id. at 195. The Court further noted that, in its dispositional order and findings, the trial court incorporated the OFC's seventeen page predispositional report. The Court found that the dispositional order as a whole met the statutory requirements for orders set forth at IC 31-34-19-10 (requiring written findings and conclusions accompanying dispositional decree concerning, in part, (1) needs of child for care, treatment rehabilitation, or placement; (2) need for participation by parent; (3) efforts made toward reunification; (4) services offered; and (5) reason for disposition). Id. at 196.

In **A.P. v. PCOCF**, 734 N.E.2d 1106 (Ind. Ct. App. 2000), *trans. denied*, the Court found that the juvenile court's failure to issue findings in the dispositional order was a significant procedural irregularity. Id. at 1115-16. The Court noted the juvenile code requires that written findings and conclusions accompany the dispositional decree. Id. at 1116. The Court clarified that this

requirement was even more critical when the dispositional order involves a change in the child's placement. Id.

II. K. Scheduling Review Hearings and Progress Reports

The case review process is outlined in IC 31-34-21 and IC 31-34-22 and discussed at length in Chapter 9 at I. The case of each child under DCS supervision must be reviewed at least once every six months from the date the child was removed from the home, or the date of the dispositional order, whichever occurs first. To insure compliance with the six month time requirement, the court should set a date for the review hearing at the close of the dispositional hearing. This procedure will also insure notice to the parties of the hearing date. IC 31-34-21-4 requires DCS to send a separate written notice seven days before the review hearing to: (1) the child's parent, guardian, or custodian; (2) an attorney who has entered an appearance on behalf of the child's parent, guardian, or custodian; (3) a prospective adoptive parent named in a petition for adoption of the child filed under IC 31-19-2 under specified circumstances; (4) the child's foster parent or long term foster parent; (5) any other unlicensed caretaker; (6) any other suitable relative or person whom DCS knows has had a significant or caretaking relationship to the child; (7) each party to the CHINS case. See IC 31-34-21-4(a)(1) through (6); IC 31-34-21-4(e).

IC 31-34-21-1(b) requires the court to order DCS to file a report every three months after the dispositional decree is entered on the progress made in implementing the decree. An additional court hearing is not required by the statutory amendment, but IC 31-34-21-1(c) states that the juvenile court shall proceed under IC 31-34-23, the dispositional modification statute, if the court seeks to consider modification of the dispositional decree after reviewing the report. A party may request a hearing after receipt of the three month report.

III. OVERVIEW OF DISPOSITIONAL ALTERNATIVES

III. A. Statutory Listing of Dispositional Options

IC 31-34-20-1 lists the dispositional alternatives available in CHINS cases. Subject to IC 31-34-20-1.5, the court may order one or more of the following:

(1) Order supervision of the child by the department [DCS];
(2) Order the child to receive outpatient treatment;
  (A) at a social service agency or a psychological, a psychiatric, a medical, or an educational facility; or
  (B) from an individual practitioner.
(3) Remove the child from the child's home and authorize the department [DCS] to place the child in another home or shelter care facility. Placement under this subdivision includes authorization to control and discipline the child.
(4) Award wardship of the child to the department [DCS] for supervision, care, and placement.
(5) Partially or completely emancipate the child under section 6 of this chapter.
(6) Order the child's parent, guardian, or custodian to complete services recommended by the department [DCS] and approved by the court under IC 31-34-16, IC 31-34-18, and IC 31-34-19.
(7) Order a person who is a party to refrain from direct or indirect contact with the child.
(8) Order a perpetrator of child abuse or neglect to refrain from returning to the child's residence.

IC 31-34-20-1.5 requires DCS or the caseworker to conduct a criminal history check (as defined in IC 31-9-2-22.5) of a person residing in an unlicensed home where the child would be placed under a dispositional decree. The juvenile court may not enter a dispositional decree placing a child in the home or award wardship to DCS that will place the child with a person who has committed substantiated abuse or neglect or has a conviction or juvenile delinquency adjudication for a nonwaivable offense listed at IC 31-9-2-84.8. The dispositional options statute, IC 31-34-20-1, is modified by the requirements of IC 31-34-20-1.5. See this Chapter at V.C. for further discussion of the criminal history check.

In **In M.S. v. Indiana Dept. of Child Services**, 999 N.E.2d 1036 (Ind. Ct. App. 2013), the child had been removed from Mother, adjudicated a CHINS, and was placed with Father in the State of Washington. Mother argued that the placement of the child violated IC 31-34-20-1(b) and was not supported by the evidence. The Court noted that the child was not placed in an out-of-state facility, but with Father. The Court indicated that placement with a parent is a unique situation and no facility, inside or outside of Indiana, is equal to it. Id. at 1041. The Court believed that the evidence supported the child's continued out-of-state placement with Father, which the trial court found to be in the child's best interests, and that the placement decision was not error. Id.

The court also has the authority to issue orders for parental participation (see this Chapter at VIII.), financial responsibility (see this Chapter at IX.), and protective/no contact orders (see this Chapter at VII.) as a part of the dispositional decree. The court may also detail the conditions of visitation.

III. B. Limits on Dispositional Orders

IC 31-34-20-1(b)(2) states that the juvenile court may not place a child in a home or facility that is located outside Indiana unless: (1) the placement is recommended or approved by the DCS director or DCS director's designee; or (2) the juvenile court makes written findings based on clear and convincing evidence that: (A) the out-of-state placement is appropriate because there is not an equivalent facility with adequate services located in Indiana; (B) institutional care in the other jurisdiction is in the best interest of the child and will not produce undue hardship; or (C) the location of the home or facility is within a distance not greater than fifty miles from the child's county of residence. See also IC 31-40-1-2(e), which states that DCS is "not responsible for payment of any costs or expenses for housing or services provided to or for the benefit of a child placed by juvenile court in a home or facility located outside Indiana, if the placement is not recommended or approved" by the DCS director or director's designee. See this Chapter at IX.A. for discussion of IC 31-40-1-2.

III. C. Consideration and Acceptance of DCS's Recommendations

IC 31-34-19-6.1 establishes a multi-step procedure to address the general requirement that the court accept DCS's dispositional and dispositional modification recommendations and the statutory procedures to be followed when the court disagrees with DCS.

- IC 31-34-19-6.1(a) requires the juvenile court, before entering its dispositional decree or a modification to a dispositional decree, to consider the following: (1) recommendations made by DCS in its predispositional report; and (2) recommendations made by the child's parent, guardian, or custodian, guardian ad litem/court appointed special advocate, foster parent or other caretaker, or other party to the CHINS case. The court may also submit the court's own recommendations if the court determines that the child's best interests require consideration of other dispositional options.

- IC 31-34-19-6.1(b) states that if the juvenile court accepts the recommendations in the DCS predispositional report, the juvenile court shall enter its dispositional decree with its findings and conclusions under IC 31-34-19-10.
- IC 31-34-19-6.1(c) states that if the juvenile court does not accept the recommendations in the DCS predispositional report and wants DCS to consider the recommendations of the court, a party, or the foster parent or relative caretaker, the dispositional hearing or dispositional modification hearing shall be continued for not more than seven business days after service of notice of the court's determination. DCS shall consider the recommendations requested by the court and submit a supplemental predispositional report stating DCS's final recommendations and reasons for accepting or rejecting the recommendations that were not included in the original DCS report. If the court accepts the supplemental DCS recommendations, the court may adopt the recommendations as its findings and enter its dispositional decree.
- IC 31-34-19-6.1(d) states "[t]he juvenile court shall accept each final recommendation of the department contained in the supplemental predispositional report ... unless the juvenile court finds that a recommendation is: (1) unreasonable, based on the facts and circumstances of the case; or (2) contrary to the welfare and best interests of the child.
- IC 31-34-19-6.1(e) states that if the juvenile court does not accept one or more of DCS's final recommendations contained in the supplemental predispositional report, the juvenile court shall: (1) enter its dispositional decree with written findings and conclusions; and (2) specifically state why the juvenile court is not accepting DCS's final recommendations.
- The court should also make findings regarding whether a placement is an emergency required to protect the health and welfare of the child. IC 31-34-19-6.1(g).
- DCS may appeal the juvenile court's decree which is contrary to DCS's final recommendations. IC 31-34-19.6-1(f).
- IC 31-34-19-6.1(g) states:

> If the department prevails on appeal, the department shall pay the following costs and expenses incurred by or on behalf of the child before the date of the final decision:
>
> (1) Any programs or services implemented during the appeal initiated under subsection (f), other than the cost of an out-of-home placement ordered by the juvenile court.
>
> (2) Any out-of-home placement ordered by the juvenile court and implemented after entry of the dispositional decree or modification order, if the court has made written findings that the placement is an emergency required to protect the health and welfare of the child.
>
> If the court has not made written findings that the placement is an emergency, DCS shall file a notice with the Indiana judicial center.

The expedited appeal process for DCS to appeal court orders contrary to DCS's recommendations is delineated at Ind. Appellate Rule 14.1. See this Chapter at XIII.C.1. for further discussion of Ind. Appellate Rule 14.1 and relevant case law.

IV. WARDSHIP, SUPERVISION, OUTPATIENT TREATMENT, FAMILY SERVICES, AND EMANCIPATION

IV. A. Wardship

IC 31-34-20-1(a)(4) states that the court may award wardship of the child to DCS for supervision, care, and placement. The definition of wardship at IC 31-9-2-134.5 states:

> (a) "Wardship", for purposes of the juvenile law, means the responsibility for temporary care and custody of a child by transferring the rights and obligations from the child's parent, guardian, or custodian to the person granted wardship. Except to the extent a right or an obligation is specifically addressed in the court order establishing wardship, the rights and obligations of the person granted wardship include making decisions concerning the:
> (1) physical custody of the child;
> (2) care and supervision of the child;
> (3) child's visitation with parents, relatives, or other individuals; and
> (4) medical care and treatment of the child.
> (b) "Wardship" does not apply to requirements for consenting to an adoption under IC 31-19-9.

Courts may specifically tailor wardship orders to provide guidance regarding rights, obligations, and decision making duties.

IV. A. 1. Limits on Court's Authority to Create Wardships

IC 31-34-20-1.5(a) states that, except as provided in IC 31-34-20-1.5(d), the court may not enter a dispositional decree ordering placement of the child in another home or awarding wardship to DCS that will place a child in another home if a person currently residing in the home has committed an act resulting in a substantiated report of child abuse or neglect or has a conviction or juvenile delinquency adjudication for an act listed as a nonwaivable offense which is defined at IC 31-9-2-84.8. See this Chapter at V.C. for the felonies listed at IC 31-9-2-84.8 and the court's option to enter a dispositional decree under IC 31-34-20-1.5(d) approving the child's placement in the home or to award wardship to be awarded to DCS for placement of the child in the home.

IV. A. 2. Limits on Wardship

The statutory definition of "wardship" provides at IC 31-9-2-134.5(b) that "wardship" does not apply to requirements for consenting to an adoption under IC 31-19-9. See Chapter 13 at IV.E. for information on a guardian's or custodian's ability to withhold consent to an adoption, including case law on DCS's refusal to consent to a child's adoption.

IV. A. 3. Medical Care for Ward

The definition of "wardship" at IC 31-9-2-134.5(a) states that "[e]xcept to the extent a right or an obligation is specifically addressed in the court order establishing wardship, the rights and obligations of the person granted wardship include making decisions concerning the:…(4) medical care and treatment of the child." This statute seems to conflict with IC 31-28-3-2, which requires DCS to establish a medical passport program for children who receive foster care under which DCS shall "…(3) [a]llow foster parents to authorize routine and emergency medical care to a foster child." See also **Matter of P.R.**, 497 N.E.2d 1070 (Ind. 1986), in which the Court opined that wardship of the Marion County Department of Public Welfare had not terminated Mother's parental rights to her daughter; therefore, Mother was the proper person to give parental consent to the ward's abortion. The Court opined that the

Welfare Department's consent to abortion was "wholly unnecessary under the facts of this case."

IV. B. Supervision

IC 31-34-20-1(a)(1) provides that the juvenile court may order supervision of the child by DCS. The juvenile code does not define supervision. In the context of a CHINS case, supervision is perceived as monitoring the care and treatment of the child and family. A supervision order can be issued whether the child is in his own home or is placed elsewhere. Supervision may involve the following: visits to see the child; interviews with foster parents, relative caretakers or other adults who regularly interact with the child; visits to the home of the child's parent, guardian or custodian; observation of parent-child interaction; school checks regarding the educational and social development of the child; and interviews with service providers to be sure that court ordered treatment services are being utilized. In addition to direct supervision, regular home checks by a DCS service provider may be appropriate when the child has special medical needs or the parent has limited parenting skills with regard to a child's daily feeding, hygiene, and medical care. Caseworkers from DCS may provide supervisory services directly, or DCS may contract with an independent agency to provide some aspects of the supervision.

IV. C. Outpatient Treatment for Child

IC 31-34-20-1(a)(2) authorizes the court to order outpatient treatment for the child at a social service agency, or a psychological, psychiatric, medical, or educational facility, or from an individual practitioner. This subdivision only authorizes outpatient services.

IV. D. Court Ordered Services

IC 31-34-20-1(a)(6) authorizes the court to "order the child's parent, guardian, or custodian to complete services recommended by the department and approved by the court under IC 31-34-16 [petition for parental participation], IC 31-34-18 [predispositional report], and IC 31-34-19 [dispositional hearing]." IC 31-34-20-3 provides that if the juvenile court determines a parent, guardian, or custodian should participate in a program of care, treatment, or rehabilitation for the child, the court may order the parent, guardian, or custodian to: (1) obtain assistance in fulfilling obligations as a parent, guardian, or custodian;(2) provide specified care, treatment or supervision for the child; (3) work with a person providing care, treatment, or rehabilitation for the child; (4) participate in a program of the department of correction; and (5) participate in a mental health or addiction treatment program.

IV. E. Emancipation

IC 31-34-20-1(a)(5) provides that the court may partially or completely emancipate the child as a dispositional alternative. IC 31-34-20-6 states that the juvenile court may emancipate the child if the court finds that the child:

(1) wishes to be free from parental control and protection and no longer needs that control and protection;
(2) has sufficient money for the child's own support;
(3) understands the consequences of being free from parental control and protection; and
(4) has an acceptable plan for independent living.

The emancipation may be partial or complete, and the court shall specify what rights and responsibilities of the parent have been suspended, and what specific rights or authority are granted to the child. An emancipated child is still subject to the compulsory education law and the jurisdiction of the juvenile court. The juvenile court does not have statutory authority to emancipate a child without a CHINS or delinquency adjudication. The request for emancipation can be raised at the dispositional hearing or any subsequent review or modification hearing.

IV. F. No Contact and No Return to Child's Residence Orders

IC 31-34-20-1(a)(7) provides that the court may order a person who is a party to refrain from direct or indirect contact with the child. See IC 31-34-25 [no contact orders]. See this Chapter at VII. for detailed discussion of no contact orders. IC 31-34-20-1(a)(8) provides that the court may order a perpetrator of child abuse or neglect to refrain from returning to the child's residence. See Chapter 5 at II.B. for detailed discussion of child protective orders for removal of alleged perpetrators, IC 31-34-2.3.

V. PLACEMENT OPTIONS

V. A. Statutory Authority and Placement Considerations, Including Placement of Indian Children

IC 31-34-20-1(a)(3) states that the court may remove the child from the child's home and authorize DCS to place the child in another home, shelter care facility, child caring institution, group home, or secure private facility. Placement under this subdivision includes authorization to control and discipline the child. The purpose and policy statute endorses removal of the child from the home "only when it is in the child's best interest." IC 31-10-2-1(6). Placement outside of the home should be in the least restrictive placement possible, close to the parents' home and in the most family-like setting consistent with the needs of the child. See IC 31-34-19-6(1), (3); IC 31-34-15-4(3). IC 31-34-20-1.5 requires a criminal history check (defined at IC 31-9-2-22.5) of a person who is residing in a home where the child will be placed under a dispositional decree. Criminal history checks are not required for licensed placements or if placement is undetermined at the time the predispositional report is prepared. IC 31-34-20-1.5(c). See this Chapter at I.B.1. for further discussion, including definition of criminal history check. See this Chapter at V.C. for a more detailed discussion of IC 31-34-20-1.5.

IC 31-30-1-2.5 states that a juvenile court may not appoint a person to serve as the guardian or custodian of a child or permit a person to continue to serve as a guardian or custodian of a child if the person is a sexually violent predator (as defined by IC 35-38-1-7.5) or has been convicted of specific sex crimes, including an attempt or a conspiracy to commit the crime, or a crime under the laws of another jurisdiction, including a military court, that is substantially equivalent to any of the listed sex crimes.

If the child who needs placement is an Indian child and the tribe declines jurisdiction, the Indiana court must comply with the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901 et seq. ICWA establishes criteria and placement preferences for the child. 25 U.S.C. § 1915(b) states that any child accepted for foster care placement shall be placed in the least restrictive setting which most approximates a family, where the child's special needs, if any, can be met, and that is within reasonable proximity to the child's home. 25 U.S.C. § 1915(b) also states that, in the absence of good cause to the contrary, preference shall be given to placement with: (i) a member of the child's extended family; (ii) a foster home licensed, approved, or specified by the child's tribe; (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (iv) an institution for children approved by the tribe or operated by an Indian organization which has a program suitable to meet the child's needs. 25 U.S.C. § 1915(c) states that, if the tribe has established a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the special needs of the child, and the preference of the Indian parent shall be considered when appropriate. See this Chapter at II.A. See also www.bia.gov for the ICWA regulations.

V. B. Placing Child With Noncustodial Parent

The juvenile court has jurisdiction to change the custody order of the dissolution court or the paternity court and place a child in need of services with the noncustodial parent. See IC 31-30-1-1(2) (exclusive jurisdiction of juvenile court over child in need of services of divorced parents); IC 31-30-1-1(3) (exclusive jurisdiction of the juvenile court concerning paternity). The court's authority to change custody of the child from one parent to another is also reflected in the permanency option stated at IC 31-34-21-7.5(c)(1)(A), which provides that the juvenile court can place the child with the child's noncustodial parent. IC 31-34-20-1.5(a) provides that the juvenile court may not enter a dispositional decree approving or ordering placement of a child in a home or awarding wardship to DCS that will place the child in a home if a person residing in the home has committed substantiated child abuse or neglect or has a juvenile adjudication or adult conviction for a nonwaivable offense listed at IC 31-9-2-84.8. IC 31-34-20-1.5 appears to require a noncustodial parent and all persons residing in the noncustodial parent's household to pass a criminal history check (defined at IC 31-9-2-22.5) conducted by DCS or the caseworker who prepared the predispositional report prior to placement. IC 31-34-20-1.5(b). The criminal history check includes checks for substantiated child abuse and neglect in a jurisdiction where the person resided within the previous five years. See IC 31-9-2-22.5. Some specific felony convictions and juvenile adjudications always preclude placement. These are defined as "nonwaivable offenses", and are listed at IC 31-9-2-84.8. The juvenile court may approve the child's placement despite some specific felony convictions, delinquency adjudications, or substantiated child abuse or neglect. IC 31-34-20-1.5(d) and (e). See this Chapter at V.C. for additional discussion of IC 31-34-20-1.5.

IC 31-30-1-12 (a) and (b) addresses conflicting dissolution and CHINS custody orders. The dissolution court which issued the original custody ruling has concurrent jurisdiction with the juvenile court to hear a petition to modify custody, parenting time, or child support of a child who is the subject of a CHINS or delinquency case. The dissolution court's custody modification order will take effect only if it is adopted and approved by the juvenile court or when the juvenile court closes its jurisdiction over the CHINS or delinquency case. IC 31-30-1-13 contains a similar provision for avoiding conflicting custody orders in CHINS and paternity cases. Pursuant to these jurisdictional statutes, a parent can seek a dissolution or paternity custody order that is consistent with the CHINS order while the CHINS case is still open. This will insure that the parent approved for custody in the juvenile proceeding will not lose custody due to a contrary dissolution or paternity custody ruling when the CHINS case is closed.

IC 31-30-1-12(c) [dissolution] and IC31-30-1-13(c) [paternity] provide that juvenile orders in CHINS cases which modify custody, parenting time, or child support orders survive the termination of the CHINS or delinquency proceeding until the dissolution or paternity court assumes or reassumes primary jurisdiction.

Practice Note: Attorneys and judges should note that there appear to be drafting errors in IC 31-30-1-12 and IC 31-30-1-13. IC 31-30-1-12(b) refers only to a situation when a dissolution court which has concurrent jurisdiction with a juvenile court modifies child custody and does not include the modification of parenting time or child support by the dissolution court. IC 31-30-1-13(b) refers only to a situation when the paternity court which has concurrent jurisdiction with a juvenile court modifies child custody and does not include the establishment or modification of paternity, child support, or parenting time by the paternity court.

In **Matter of N.C.**, 72 N.E.3d 519 (Ind. Ct. App. 2017), the Court concluded DCS failed to prove by a preponderance of the evidence that the coercive intervention of the juvenile court was necessary to protect the well-being of the six-year-old child (child). Id. at 526. The child is one of

four half-siblings who have the same mother. Each child has a different father. DCS began an assessment on a report that Mother was using methamphetamine while caring for the children. Based on information the case manager learned during her interviews with the children at school about domestic violence and drug use in Mother's home and Mother's admission of recent methamphetamine use, DCS arranged for the child and his half-siblings to begin staying with their maternal aunt. When the DCS assessment began, Mother and Father already had a prior case with a DR designation in Circuit Court concerning the child's custody, parenting time, and support. The day after DCS began the assessment, Father petitioned the Circuit Court to modify custody to Father, alleging that the child's living situation with Mother was harmful and that DCS had indicated action would be taken. Six days later, DCS filed a CHINS petition in the juvenile court for the child and his half-siblings. Before the CHINS factfinding hearing was held, the Circuit Court held a custody hearing, at which Mother, Father, and DCS appeared. Mother did not object to Father being awarded temporary custody of the child, but objected to a final custody hearing determination before the CHINS factfinding hearing. The Circuit Court found the evidence supported granting Father temporary custody of the child, and noted the child was the subject of a CHINS proceeding and both the juvenile court and DCS approved of the child's placement with Father. The Circuit Court did not make a permanent change in the child's custody and said that Father or Mother could request a hearing if the CHINS petition was dismissed or the parties were discharged at a later date.

Although the child had been placed with Father for about two months at the time of the CHINS factfinding hearing, and the DCS case manager found that everything looked appropriate in Father's home, the juvenile court found the child to be a CHINS, noting that Father's custody order was temporary. The juvenile court said that if Father had a visitation order which limited Mother's contact and protected the child, the court would dismiss the CHINS case. After the juvenile court's dispositional hearing, Mother requested a hearing in Circuit Court to modify Father's temporary custody of the child back to her. Father filed a petition requesting permanent custody of the child in Circuit Court. The Circuit Court scheduled a custody modification hearing, which was set to be held about two months after the Court of Appeals issued this opinion. The Court found the evidence in the CHINS factfinding case supported the conclusion that the coercive intervention of the juvenile court was necessary early in the CHINS proceedings because Father did not obtain a temporary custody order in the Circuit Court case until two months after the CHINS petition was filed. Id. at 525. The Court noted that, by the time the factfinding hearing took place, Father had obtained the Circuit Court custody order, and DCS had no concerns about Father or the child's placement with him. Id. The Court observed that the domestic violence and substance abuse had occurred in *Mother's* home, the child was no longer in that home, and whatever neglect he experienced due to Mother's issues at the outset of the case were rectified by being placed in Father's home by the time of the factfinding hearing (emphasis in opinion). Id. The Court opined that "[n]either the trial court's findings nor the evidence in the record supported the juvenile court's conclusion that its intervention was required *at the time of the factfinding hearing* in order to protect the child's health and safety." (Emphasis in opinion.) Id. The Court concluded that DCS failed to prove each element required by the statute to show that the child was a CHINS, so the juvenile court erred in adjudicating the child to be a CHINS. Id. The Court reversed and remanded to the juvenile court to vacate the child's CHINS adjudication. Id. at 527.

In **In Re J.B.**, 55 N.E.3d 903 (Ind. Ct. App. 2016), two children, ages eleven years old and eight years old, were found to be CHINS by Circuit Court because Mother was using methamphetamine and had a car accident with the children in the car when she blacked out. Father had established his paternity of the children in Superior Court, and Parents shared joint legal and physical custody of the children according to Superior Court's paternity order. Before the dispositional hearing, DCS filed a motion to change custody in Circuit Court, requesting that

Father be given full custody of the children and that the CHINS case be closed. Circuit Court held a hearing, following which it entered an order giving Father sole legal and physical custody of the children and giving Mother supervised parenting time. Circuit Court then discharged the children and parents and terminated the CHINS case one month after the CHINS adjudication. The Court held that, while Circuit Court could enter a CHINS dispositional decree that removed the children from Mother and authorized DCS to place them with Father, as soon as Circuit Court discharged the parties to the CHINS case, Circuit Court lost jurisdiction, and Superior Court's joint custody order in the paternity case controlled. Id. at 906. The Court concluded that, because it appeared that Circuit Court would not have discharged the parties and terminated the CHINS case unless it thought that Father was awarded full custody, the Court reversed and remanded the case for further proceedings. Id. On rehearing, **In Re J.B.**, 61 N.E.3d 308 (Ind. Ct. App. 2016), the Court reached the same result as its original opinion, but for different reasons by looking beyond the language of IC 31-30-1-13 to the policy and purpose of the CHINS statutory scheme. The Court found problems with the meaning of IC 31-31-1-13(d), which states that "[a]n order establishing or modifying paternity of a child by a juvenile court survives the termination of the [CHINS] proceeding", and asked the legislature to take a deeper look at IC 31-30-1-12 and -13. Id. at 312. The Court said that, when the trial court closed the CHINS case without ever entering a dispositional decree, it did not give Mother a meaningful opportunity to participate in the services DCS had recommended. Id. at 313. The Court opined that the goal of the CHINS statutory scheme, which is not to remove children from their parents without giving the parents a reasonable opportunity to participate, was not furthered in this case. Id.

In **In M.S. v. Indiana Dept. of Child Services**, 999 N.E.2d 1036 (Ind. Ct. App. 2013), the Court affirmed the trial court's dismissal of the CHINS case after the child had been placed in the State of Washington with Father. Id. at 1041. The Court opined that the presumption in favor of natural parents, recognized in In Re Guardianship of B.H., 770 N.E.2d 283, 285 (Ind. 2002), lent strong support to the trial court's decision to place the child with Father. Id. at 1040. The Court noted that Father had not seen the child in four years, the trial court had no independent knowledge of the condition of Father's home at the time of the placement, and that an inspection of the home was not conducted until *after* the child began living with Father in Washington (emphasis in opinion). Id. at 1041. The Court believed that more in-depth questioning of Father and a home inspection prior to placement would have certainly been prudent, and preferred a more cautious approach when placing a child out-of-state. Id.

V. C. Preferential Placement with Relatives or Other Specified Persons

IC 31-34-19-7 states that, if the court enters a dispositional decree that includes an out-of-home placement, the court shall consider whether the child should be placed with a suitable and willing relative related by blood, marriage, or adoption, before considering any other out-of-home placement. The statutory definition of "relative" at IC 31-9-2-107(c), for purposes of IC 31-34-19 [dispositional hearing] includes the child's parent, grandparent, brother, sister, stepparent, stepgrandparent, stepbrother, stepsister, first cousin, uncle, aunt, and "any other individual with whom the child has an established and significant relationship." IC 31-34-19-7(c) states that before a child is placed with a relative or defacto custodian, a home evaluation and background checks described in IC 31-34-4-2 are required.

IC 31-34-20-1.5(a) states that the juvenile court may not enter a dispositional decree placing a child in another home or awarding wardship to DCS that will place the child in the unlicensed residence if a person residing in the home has committed substantiated abuse or neglect, or has a delinquency adjudication or adult conviction for a nonwaivable offense as defined by IC 31-9-2-84.8. The nonwaivable offenses are: (1) murder (IC 35-42-1-1); (2) causing suicide (IC 35-42-1-2); (3) assisting suicide (IC 35-42-1-2.5); (4) voluntary manslaughter (IC 35-42-1-3); (5) reckless

homicide (IC 35-42-1-5); (6) battery (IC 35-42-2-1) (within the past five years); (7) domestic battery (IC 35-42-2-1.3); (8) aggravated battery (IC 35-42-2-1.5); (9) kidnapping (IC 35-42-3-2); (10) criminal confinement (IC 35-42-3-3) within the past five years; (11) human and sexual trafficking (IC 35-42-3.5); (12) a felony sex offense under IC 35-42-4; (13) carjacking (IC 35-42-5-2 (repealed) within the past five years; (14) arson (IC 35-43-1-1) within the past five years; (15) incest (IC 35-46-1-3); (16) neglect of a dependent (IC 35-46-1-4(a)(1) and IC 35-46-1-4(a)(2)); (17) child selling (IC 35-46-1-4(d)); (18) a felony involving a weapon under IC 31-47 or IC 35-47.5 within the past five years; (19) a felony relating to controlled substances under IC 35-48-4 within the past five years; (20) an offense relating to material or a performance that is harmful to minors or obscene under IC 35-49-3; (21) a felony under IC 9-30-5 within the past five years; and (22) a felony that is substantially equivalent to a felony listed in subdivisions (1) through (21) for which the conviction was entered in another state. IC 31-34-20-1.5(b) states that DCS or the caseworker who prepared the predispositional report shall conduct a criminal history check of a person who is currently residing in the home. IC 31-34-20-1.5(b) also states the criminal history check is not required if criminal history information obtained under IC 31-34-4-2 [statute on preferential placement with relatives or specified others] or IC 31-34-18-6.1 [predispositional report] establishes the person's history of acts resulting in substantiated abuse or neglect, convictions, or juvenile adjudications.

IC 31-34-20-1.5(d) allows the juvenile court to enter a dispositional decree that approves placement of a child in another home or awards wardship to DCS that will place the child in another home if the person residing in the home has committed an act that resulted in abuse or neglect or has a criminal conviction for specific felonies *if the conviction did not occur within the past five years*. The felonies which do not preclude placement, are listed at IC 31-34-20-1.5(d)(1)(B) as follows: (1) battery (IC 35-42-2-1); (2) criminal confinement (IC 35-42-3-3) as a felony; (3) carjacking (IC 35-42-5-2) (repealed) as a felony; (4) arson (IC 35-43-1-1) as a felony; (5) a felony involving a weapon under IC 35-47 or IC 35-47.5; (6) a felony relating to a controlled substances under IC 35-48-4; (7) a felony under IC 9-30-5 [operating a vehicle while intoxicated]; or (8) a substantially equivalent felony in another jurisdiction. The court may also authorize a dispositional placement if a household resident had a juvenile adjudication for a nonwaivable offense that, if committed by an adult would be a felony. To enter the dispositional decree for placement in the home, IC 31-34-20-1.5(d)(2) also states that that the person's commission of the offense, delinquent act, or act of abuse or neglect must not be relevant to the person's present ability to care for the child, and that the dispositional decree placing the child or awarding wardship is in the child's best interest. IC 31-34-20-1.5(e) states the court shall consider the following: (1) the length of time since the person committed the offense, delinquent act, or act that resulted in substantiated abuse or neglect; (2) the severity of the offense, delinquent act, or abuse or neglect; (3) evidence of the person's rehabilitation, including cooperation with a treatment plan, if applicable.

In **In Re G.R.**, 863 N.E.2d 323 (Ind. Ct. App. 2007), the Court affirmed the trial court's denial of the petition for kinship placement filed by the maternal grandmother and step-grandfather. Id. at 328. The petition was filed four months after Mother's parental rights were involuntarily terminated. The Court concluded that, because Mother's parental rights were terminated prior to the filing of the petition, the maternal grandmother was no longer the child's grandparent, and the court was not required to consider her for placement under IC 31-34-4-2(a) or any other CHINS statute. Id.

In **In Re Involuntary Term. Paren. of S.P.H.**, 806 N.E.2d 874 (Ind. Ct. App. 2004), the Court affirmed the trial court's judgment terminating Father's parental rights despite his argument that termination was not necessary because he had provided a satisfactory arrangement with the

paternal aunt to provide care for the children. Id. at 883. The Court noted the testimony of the case manager that the presence of Mother, who was using drugs and who was present in the area, combined with the paternal aunt's inability to protect the children when Mother knew the children's location, ruled out this relative placement. Id. at 881-82. The Court opined that placement with the paternal aunt would expose the children again to the environment they needed to escape and there was no guarantee that the aunt would be able to provide a safe, stable home. Id. at 882.

In **E.R. v. Office of Family & Children**, 729 N.E.2d 1052 (Ind. Ct. App. 2000), the Court ruled that the juvenile court did not err in failing to place the Hispanic children who were adjudicated CHINS with the paternal grandparents in Mexico. Id. at 1061. The Court found that the juvenile court did consider and make efforts with regard to the relative placement, but Parents did not provide the court with the information upon which it could base a decision as to the feasibility of placing the children with the paternal grandparents in Mexico. Id. The Court said that Parents invited error in the juvenile court's inability to obtain the necessary information about the paternal grandparents. Id. An error invited by the complaining party is not a reversible error. Id

In **In Re C.W.**, 723 N.E.2d 956 (Ind. Ct. App. 2000), Grandparents of the child who had been adjudicated to be a CHINS filed a Petition for Kinship Placement at the dispositional hearing asking that the child be placed with them. The office of family and children and court appointed special advocate filed predispositional reports recommending against placement with Grandparents. The court appointed special advocate's report indicated Grandparents' lack of motivation and patience needed for proper care of the child, their habit of smoking cigarettes, and the possibility of their previous knowledge of Mother's abuse of the child about which they failed to take action to protect the child. The trial court denied Grandparents placement on the grounds that the placement was not in the best interests of the child. The child suffered from bronchitis and Grandparents had not completely eradicated the cigarette smoke residue from their home and vehicle. Grandparents' second Petition for Kinship Placement was denied because the child had been adopted by the foster parents in the meantime. The Court opined that Grandparents no longer had standing to seek placement because they no longer held status as the child's grandparents. Id. at 963. The Court affirmed the trial court's orders on both petitions. Id.

V. D. Foster Care

"Foster family home", defined at IC 31-9-2-46.9, means a place where an individual resides and provides care and supervision on a twenty-four hour basis to a child who is receiving care and supervision under a juvenile court order for purposes of placement. Foster parents must comply with the "reasonable and prudent parent standard", defined at IC 31-9-2-101.5, which is discussed in this Chapter at V.E.4.

Foster care licensure statues are found at IC 31-27-4-1et seq. IC 31-9-2-46.7 states that "foster care" for purposes of IC 31-25 [child services: administration], IC 31-26 [child services: programs], IC 31-27 [child services: regulation of residential child care establishments], IC 31-28-1 [health summary records of children receiving foster care], IC 31-28-2 [medical records of children receiving foster care], IC 31-28-3 [medical passport program for children receiving foster care], IC 31-34-21-7.6 [provision of documents to CHINS child], and IC 31-37-22-10 [provision of documents to delinquent child] means living in (1) a place licensed under IC 31-27 or a comparable law of another state; or (2) the home of an adult relative who is not licensed as a foster home.

Foster home licenses expire four years after the date of issuance according to IC 31-27-4-16. IC 31-27-4-5(e) requires DCS or, at the discretion of DCS, the foster care applicant, to conduct a

criminal history check [defined at IC 31-9-2-22.5] of all household members, employees, and volunteers who have direct contact with children. IC 31-27-4-5(g) states that if DCS conducts a criminal history check on the applicant's behalf, DCS shall notify the applicant of the results without identifying a specific offense. IC 31-27-4-5(h) states that a criminal history check is required only at the time of an application for a new license or the renewal of an existing license. IC 31-27-4-5(i) states that employees and volunteers must have criminal history checks before having direct contact with a child placed in the home, and new household members must have criminal history checks before residing in the home.

IC 31-27-4-35 requires notification by licensees, which includes foster parents, of current or prior under age sixteen sexual contact or delinquency or criminal charges involving foster children as alleged perpetrators or victims of sex offenses under IC 35-42-4. Licensees are required to notify DCS immediately of any of the above pursuant to IC 31-27-4-35(a). Sexual contact is defined at IC 25-1-9-3.5 as (1) sexual intercourse, (2) other sexual contact, or (3) foundling or touching intended to arose or satisfy desire of either individual. IC 31-27-4-35(b) states that the information provided to DCS must include: (1) the name of the child; (2) the date of the occurrence of the act if it can be determined; (3) a description of the act; (4) the name of any responding law enforcement agency; (5) any other information the licensee determines is relevant. IC 31-27-4-25(c) and (d) require DCS to notify a prospective licensee before the foster child is placed with the licensee and licensees with whom the foster child was previously placed if the foster child has: (1) engaged in sexual contact if the foster child is less than sixteen years of age; (2) has been charged with or adjudicated as having committed an act that would be a crime under IC 35-42-4 if committed by an adult; or (3) has been charged with or convicted of an offense under IC 35-42-4. IC 31-27-4-35(c) requires DCS to provide the information whether received from a licensee or another reliable source.

See Chapter 2 at I.H. for further discussion on rights and responsibilities of foster parents.

V. D. 1. Therapeutic Foster Care

Therapeutic foster family home certification requirements are found at IC 31-27-4-2. Applicants for a therapeutic foster family home certificate must: (1) be licensed as a foster parent under IC 31-27 and 465 IAC 2-1-1 et seq,; (2) participate in preservice training that includes: (A) preservice training to be licensed as a foster parent under 465 IAC 2-1-1 et seq.; and (B) additional preservice training in therapeutic foster care. IC 31-27-4-2(d). Therapeutic foster family homes may not care for more than two foster children at the same time, but DCS may grant an exception for sibling placement or the best interests of the foster children. IC 31-27-4-2(f). IC 31-27-4-2(h) states that a therapeutic foster family home may provide care for an individual receiving collaborative care under IC 31-28-5.8. The definition of "therapeutic foster family home" at IC 31-9-2-129.5 states:

> "Therapeutic foster family home," for purposes of IC 31-27, means a foster family home:
>
> (1) that provides care to:
>
> (A) a child; or
>
> (B) an individual at least eighteen (18) but less than twenty (20) years of age receiving collaborative care under IC 31-28-5.8;
>
> who has serious emotional disturbances, significant behavioral health needs and functional impairments, or developmental or physical disabilities;
>
> (2) in which the child or individual receives treatment in a family home through an integrated array of services supervised and supported by qualified program staff from:
>
> (A) the department of child services;

(B) a managed care provider that contracts with the division of mental health and addiction; or
(C) a licensed child placing agency; and
(3) that meets the additional requirements of IC 31-27-4.2

V. D. 2. Foster Care Appropriate to Child's Cultural Needs

In **E.R. v. Office of Family and Children**, 729 N.E.2d 1052 (Ind. Ct. App. 2000), the parents claimed it was error not to place their Hispanic children with relatives or Spanish speaking foster parents. Id. at 1059. On appeal, the Court agreed that "every effort should be made to design a system that is sensitive to non-English speaking culturally diverse" people, but the Court did not find that only Hispanic foster parents can provide "culturally appropriate" care for Hispanic children, and the Court noted that the office of family and children had made efforts to provide Hispanic counselors for the children. Id. at 1061. The Court did not find error in the placement. Id.

V. D 3. Foster Care Sibling Visitation

Statutes on foster care sibling visitation are found at IC 31-28-5-1 through 5. "Sibling" is defined at IC 31-9-2-117.3 for purposes of IC 31-28-5 as a "brother or sister by blood, half-blood, or adoption." IC 31-28-5-1 states that this chapter applies to a child who receives foster care that is funded by DCS or a local office, and a sibling of the child. IC 31-28-5-2 states that DCS shall make reasonable efforts to promote sibling visitation for every child who receives foster care, including visitation for a sibling who does not receive foster care. IC 31-28-5-3 authorizes the following persons and entities to request DCS to permit sibling visitation: (1) a child; (2) a child's foster parent; (3) a child's guardian ad litem/court appointed special advocate; (4) an agency with the legal responsibility to care for, treat, or supervise a child. IC 31-28-5-3 requires DCS to permit sibling visitation and establish a visitation schedule if DCS finds that the sibling visitation is in the best interests of each child who receives foster care. IC 31-28-5-4(a) allows the child's guardian ad litem or court appointed special advocate to petition the juvenile court with jurisdiction in the county in which the child who is receiving foster care is located for an order requiring sibling visitation if DCS denies the request. IC 31-28-5-4(b) states that the juvenile court shall order sibling visitation and establish a sibling visitation schedule if the juvenile court determines it is in the best interests of the child receiving foster care to have sibling visitation. IC 31-28-5-5 states that the juvenile court may appoint a guardian ad litem or court appointed special advocate if a child receiving foster care requests sibling visitation, and that the provisions of IC 31-17-6 [dissolution statutes on guardians ad litem and court appointed special advocates] apply to the guardian ad litem or court appointed special advocate so appointed. See Chapter 6 at II.D. for practice notes on the role of the guardian and litem/court appointed special advocate in sibling visitation cases.

V. E. Shelter Care, Group Home, Child Caring Institution, and Secure Facility Placements

A shelter care facility is defined at IC 31-9-2-117(a) as a place of residence that:

(1) is licensed under the laws of any state; and
(2) is not locked to prevent a child's departure unless the administrator determines that locking is necessary to protect the child's health.

A youth shelter or other residential facility or institution may qualify as a shelter care facility. The facility may be public or private. IC 31-34-6-1(1) precludes detention of a CHINS in a secure detention facility. Under the detention statute, IC 31-34-6-1(4), a CHINS cannot be placed in a shelter care facility that houses persons charged with, imprisoned for, or

incarcerated for crimes. This does not prevent commingling of CHINS and delinquents, since a delinquent act does not constitute a crime. See IC 31-32-2-4.

IC 31-9-2-117(b) states that a shelter care facility, "for purposes of IC 31-27-3 and IC 31-27-5, means a child caring institution or group home that provides temporary services twenty-four hours a day for not more than twenty consecutive days to a child: (1) who is admitted to a residential facility on an emergency basis; and (2) who is: (A) receiving care and supervision under an order of a juvenile court; (B) voluntarily placed by the parent or guardian of the child; or (C) self-referred."

"Group home" is defined at IC 31-9-2-48.5 as a residential structure in which care is provided on a twenty-four hour basis for not more than ten children. "Child caring institution" is defined at IC 31-9-2-16.7 as: (1) a residential facility that provides child care on a twenty-four hour basis for more than ten children; or (2) a residential facility with a capacity of not more than ten children that does not meet the residential structure requirements of a group home. "Secure private facility" is defined at IC 31-9-2-115 and means (1) a facility that is licensed under IC 31-27 to operate as a secure private facility; or (2) a private facility that is licensed in another state to provide residential care and treatment to one (1) or more children in a secure facility other than a detention center, prison, jail, or similar correctional facility.

Statutes on regulation of child caring institutions are found at IC 31-27-3-1 et seq. Statutes on regulation of group homes are found at IC 31-27-5-1 et seq. Licenses expire four years after issuance. (IC 31-27-3-13 for institutions; IC 31-27-5-14 for group homes). IC 31-27-3-3 (institutions) and IC 31-27-5-4 (group homes) state that DCS or an applicant at DCS's discretion shall conduct criminal history checks of volunteers and employees.

IC 31-40-1-2(d) provides that DCS is not responsible for payment of any costs or expenses for child services for a child placed in a child caring institution, a group home, or a private secure facility if the entity does not have an executed contract with DCS, unless the child services to be provided by the entity are recommended or approved by the director or the director's designee in writing prior to the placement. IC 31-40-1-2(e) states that DCS is not responsible for payment of any costs or expenses for housing or services provided to or for the benefit of a child placed by a juvenile court in a home or facility located outside Indiana, if the placement is not recommended or approved by the DCS director or the director's designee. In **A.B. v. State**, 949 N.E.2d 1204 (Ind. 2011), the Indiana Supreme Court opined that if DCS wants to disapprove and thereby not pay for out of state placement pursuant to IC 31-40-1-2, such decision is subject to appellate review on an arbitrary and capricious showing. Id. at 1220.

V. E. 1. Shelter Care Placement in County of Child's Residence

IC 31-34-6-3 prohibits the court or DCS from placing a child in a shelter care facility outside of the child's county of residence unless a comparable facility with adequate services is unavailable or the child's county of residence does not have an appropriate comparable facility with adequate services.

V. E. 2. Selection and Availability of Placement Options

The selection of placements for children who have been adjudicated CHINS is limited by IC 31-40-1-2(d) because DCS, which is the source of payment for placements, is responsible only for payment of expenses for children who have been placed with entities which have executed contracts with DCS or which have been approved by the DCS director or the director's designee. Additionally, IC 31-40-1-2(e) provides that DCS is not responsible for payment of expenses of children who have been placed in a home of

facility located outside Indiana, unless the placement has been approved by the DCS director or the director's designee. There is also a statutory presumption in favor of DCS recommendations for placement of children. See this Chapter at III.C. for a complete discussion of the statutory presumption at IC 31-34-19-6.1.

Y.A. by Fleener v. Bayh, 657 N.E.2d 410 (Ind. Ct. App. 1995), *trans. denied*, was a class action suit brought against state officials by seriously emotionally disturbed youths under the age of eighteen who alleged the state violated the Indiana Constitution and their due process rights by failing to provide specialized mental health residential placements. The Court rejected the claim. Id. at 420. The Court found that a child in the custody of state officials has the constitutional right to be free from abuse or neglect, but this did not include the right to be free from some form of undifferentiated harm separate and apart from physical abuse or neglect. Id. at 419. The Court found no constitutional right to a specific residential placement. Id.

V. E. 3. Role of Persons Who Receive Placement of Child

IC 31-34-19-8 requires that the court send a copy of the predispositional report to any person receiving placement or wardship of the child. It is recommended that all child placement facilities be given advance notice of review hearings, submit progress reports to the court, participate in case conferences and team meetings regarding the child and family, and appear at review hearings.

V. E. 4. Reasonable and Prudent Parent Standard

The reasonable and prudent parent standard is defined at IC 31-9-2-101.5 as "the standard characterized by careful and sensible parental decisions that maintain the health, safety, and best interests of a child." In making decisions regarding a foster child's engagement in extracurricular, enrichment, cultural, and social activities, the reasonable and prudent parent standard is required of any child caring institution (IC 31-27-3-18.5), foster home (IC 31-27-4-20.5), child placing agency (IC 31-27-6-14.5), or group home (IC 31-27-5-17.5) which is responsible for the child's care and supervision. IC 31-34-15-7(c) states that the child may select a representative who is a member of the case planning team to also be the child's advisor and advocate with respect to the application of the reasonable and prudent parent standard to the child. See this Chapter at I.F.3. for further discussion on the child representatives.

Practice Note: The child's guardian ad litem/court appointed special advocate could serve as the child's advisor and advocate on the application of the reasonable and prudent parent standard.

VI. VISITATION AND PARENTING TIME

The juvenile code does not set standards or requirements for parent-child visitation. However, it does require the court under IC 31-34-21-5 to consider at each review hearing "(5) the extent to which the parent, guardian, or custodian has visited the child, including the reasons for infrequent visitation" and "(13) the extent to which the child's parent, guardian, or custodian has participated or been given the opportunity to participate in ... visitation." Various other provisions of the juvenile court also discuss parent-child visitation. Parent-child visitation is usually essential to the reunification effort required by IC 31-34-21-5.5(b)(2), and the dispositional guidelines at IC 31-34-19-6 emphasize orders that are the least restrictive and the least disruptive to family life.

VI. A. Standard for Determining Visitation and Applicability of Parenting Time Guidelines

In the absence of clear standards on visitation, some CHINS cases state that the amount and type of visitation between the child and parent is dependent upon the "best interest" of the child. See **In Re J.J.,** 711 N.E.2d 872, 875 (Ind. Ct. App. 1999) (dispositional guidelines clarify that orders and visitation considerations should be based on best interests of child); **Matter of A.C.B.,** 598 N.E.2d 570 (Ind. Ct. App. 1992) (visitation with incarcerated Father denied because not in child's best interests); **Matter of Joseph**, 416 N.E.2d 857 (Ind. Ct. App. 1981) (visitation between abused child and Father properly denied on grounds it was not in best interests of child). A counter argument is that the goal of reunification of child and parent must be reflected in any visitation decision, and therefore parental visitation should only be denied or restricted if there is proof that the visitation would endanger the child's physical health or significantly impair the child's emotional development as set out in dissolution and paternity statutes, IC 31-17-4-1 and IC 31-14-14-1. See also **In Re E.W.** 26 N.E.3d 1006, 1009-10 (Ind. Ct. App. 2015) (while there is no statute specific to the CHINS context relating to parenting time, the Court found the general family law statute at IC 31-17-4-2 instructive in determining whether the child's visitation with Mother should be terminated; Court affirmed orders terminating Mother's visitation).).

The Indiana Supreme Court adopted the Indiana Parenting Time Guidelines with an effective date of March 31, 2001. The Scope of Application of the Guidelines states that the Guidelines are applicable to all custody situations, including paternity cases and cases involving joint legal custody where one person has primary physical custody. The Guidelines are "not applicable to situations involving family violence, substance abuse, risk of flight with a child, or any other circumstances the court reasonably believes endanger the child's physical health or safety, or significantly impair the child's emotional development." The Scope section further states that "[d]eviation from these Guidelines by either the parties or the court that result in less than the minimum time set forth below must be accompanied by a written explanation indicating why the deviation is necessary or appropriate in the case." CHINS cases would usually fall within the exceptions listed in the Scope exception.

On January 4, 2013, the Indiana Supreme Court amended the Indiana Parenting Time Guidelines. The amendment was effective March 1, 2013. The Court amended item 1 of the Scope of Application section of the Guidelines, adding that in cases of family violence, substance abuse, risk of flight, or other circumstances that endanger the child's health or safety, "one or both parents may have legal, psychological, substance abuse or emotional problems that may need to be addressed before these Guidelines can be employed." The Court also stated in item 2 of the Scope of Application section that "[e]xisting parenting time orders on the date of adoption of these amendments shall be enforced according to the parenting time guidelines that were in effect on the date the parenting time order was issued." The Commentary to item 2 states that parents who agree that the current changes to the Indiana Parenting Time Guidelines are in their child's best interests should file their written agreement with the court for approval and that parents may agree to some or all of the changes and should be specific in their written agreement. Among the most recent Amendments are: (1) parents shall exchange email addresses; (2) electronic communications between a child and parent should not be obstructed by the other parent, but this provision shall not be construed to interfere with the authority of either parent to impose reasonable restrictions to a child's access to the internet; (3) if a parent accepts the opportunity for additional parenting time, it shall not affect child support; (4) each parent is responsible for establishing a relationship with the child's school, health care provider, and other service provider; (5) alternating weekends shall be maintained throughout the year, and if a parent misses a regular weekend because it is the other parent's holiday, it will be lost; (6) a parent may receive three consecutive weekends due to a holiday; (7) Martin Luther King Day, President's Day, and Fall Break have been added to the list of holidays for parents to share time with the child;

(8) directions on parenting time when the child attends a year-round or balanced calendar school are provided; (9) a model Parallel Parenting Plan order is included for high conflict situations. The most recent amendments set out Rules for Parenting Time Coordinators and were effective January 1, 2017.

VI. A. 1. Family Law Statutes and Case Law on Parenting Time Guidelines

Statutes at IC 31-14-14-1 through 6 (paternity) and IC 31-17-4-4-1 through 11 (dissolution) use the term "parenting time" instead of "visitation". IC 31-9-2-88.5 defines the term "parenting time" as "the time set aside by a court order for a parent and child to spend together." Parenting Time statutes at IC 31-14-14-1 (paternity) and IC 31-17-4-1 (dissolution) permit the court to interview the child in chambers to assist the court in determining the child's perception of whether parenting time might endanger the child's physical health or significantly impair the child's emotional development. Child in Need of Services statutes use the term "visitation" instead of "parenting time". See IC 31-34-21-5(b)(5) and (b)(13) in which the term "visitation" is used.

IC 31-14-14-5 (paternity) and IC 31-17-2-8.3 (dissolution) provide that if the court finds that the noncustodial parent has been convicted of a crime involving domestic or family violence that was witnessed or heard by the noncustodial parent's child, there is created a rebuttable presumption that the court shall order that the noncustodial parent's parenting time with the child must be supervised: (1) for at least one year and not more than two years immediately following the crime involving domestic or family violence; or (2) until the child become emancipated; whichever comes first. "Domestic or family violence", defined at IC 31-9-2-42, states:

> "Domestic or family violence" means, except for an act of self defense, the occurrence of one (1) or more of the following acts committed by a family or household member:
>
> (1) Attempting to cause, threatening to cause, or causing physical harm to another family or household member without legal justification.
>
> (2) Placing a family or household member in fear of physical harm without legal justification.
>
> (3) Causing a family or household member to involuntarily engage in sexual activity by force, threat of force, or duress.
>
> (4) Beating (as described in IC 35-46-3-0.5(2)), torturing (as described in IC 35-46-3-0.5(5)), mutilating (as described in IC 35-46-3-0.5(3)), or killing a vertebrate animal without justification with the intent to threaten, intimidate, coerce, harass, or terrorize a family or household member.
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> For purposes of IC 22-4-15-1 and IC 34-26-5, domestic or family violence also includes stalking (as defined in IC 35-45-10-1) or a sex offense under IC 35-42-4, whether or not the stalking or sex offense is committed by a family or household member.

IC 31-9-2-44.5(a) broadly defines "family or household member" of another person if the individual: (1) is a current or former spouse of the other person; (2) is dating or has dated the other person; (3) is engaged or was engaged in a sexual relationship with the other person; (4) is related by blood or adoption to the other person; (5) is or was related by marriage to the other person; (6) has or previously had an established legal relationship with the other person as guardian, ward, custodian, foster parent, or in a similar capacity; or (7) has a child in common with the other person. IC 31-9-2-44.5(b) states that an individual is a "family or household member" of both persons to whom one of the relationships listed at IC 31-9-2-

44.5(a) applies if the individual is a minor child of one of the persons. "Crime involving domestic or family violence" is defined at IC 31-9-2-29.5 as a crime that occurs when a family or household member commits, attempts to commit, or conspires to commit any of the following crimes against another family or household member: (1) a homicide offense; (2) a battery offense; (3) kidnapping or confinement; (4) a sex offense; (5) robbery; (6) disorderly conduct; (7) intimidation or harassment; (8) voyeurism; (9) stalking; (10) bigamy; (11) incest; (12) neglect of a dependent or child selling; (13) nonsupport of a child, spouse, or parent; (14) invasion of privacy; (15) contributing to the delinquency of a minor; (16) exploitation of an endangered adult; (17) violation of a CHINS or delinquency no contact order.

Although IC 31-14-14-5 and IC 31-17-2-8.3 apply to paternity and dissolution cases, they may also provide relevant guidance in determining visitation in CHINS cases involving domestic and family violence. IC 31-14-4-5(c) and IC 31-17-2-8.3(c) state that, as a condition of granting the noncustodial parent unsupervised parenting time, the court may require the noncustodial parent to complete a batterer's intervention program, certified by the Indiana Coalition Against Domestic Violence.

IC 31-14-14-1(c), a paternity parenting time statute, establishes a rebuttable presumption that a person who has been convicted of child molesting (IC 35-42-4-3) or child exploitation (IC 35-42-4-4(b)) might endanger the child's physical health and wellbeing or significantly impair the child's emotional development. IC 31-14-14-1(d) states that, if a court grants parenting time rights to a person who has been convicted of child molesting or child exploitation, there is a rebuttable presumption that the parenting time with the child must be supervised. No similar statute was enacted for parenting time in dissolution cases.
Practice Note: An argument could be made that the parenting time restrictions in IC 31-14-14-1(c) could be applied in dissolution cases when parenting time is an issue. See **Sills v. Irelan**, 663 N.E.2d 1210, 1214 (Ind. Ct. App. 1996) (Court opined paternity and dissolution child custody and visitation statutes are in pari materia and are appropriately construed together).

The Court of Appeals has issued several opinions on the applicability of and definitions within the Indiana Parenting Time Guidelines. In **Shelton v. Shelton**, 835 N.E.2d 513, 517-18 (Ind. Ct. App. 2005), *summarily affirmed*, 840 N.E.2d 835 (Ind. 2006), a dissolution case, the Court clarified that the definition of "family member" for purposes of section I(C)(3) of the Guidelines must be limited to a person within the same household as the parent with physical custody. The Court went on to state that when the parent with physical custody or a responsible member of that parent's household cannot care for the child, the noncustodial parent is to be offered the "right of first refusal" regardless of whether a non-household family member can care for the child without cost. Note that the Guidelines use the term "opportunity for additional parenting time" instead of "right of first refusal." The Commentary to Section I. C. 3. of the Guidelines explains that the household family member is defined as an adult who is related to the child by blood, marriage, or adoption. In **Haley v. Haley**, 771 N.E.2d 743, 751-52 (Ind. Ct. App. 2002), a dissolution case, the Court opined that even if the original custody determination was made before the Guidelines went into effect, the Guidelines apply to a modification of custody. The Guidelines are only a presumption which may be overcome by facts particular to the circumstances, but the trial court must provide a written explanation of the deviation. Parenting Time Guidelines Scope of Application, 2. In **Kaplan v. Cunningham**, 757 N.E.2d 1026, 1029 (Ind. Ct. App. 2001), *trans. denied*, the Court opined that adherence to the Guidelines is not mandated in cases that involve modification of visitation orders that were in existence prior to the effective date of the Guidelines. In **Saalfrank v. Saalfrank**, 899 N.E.2d 671, 682 (Ind. Ct. App. 2008), the

Court held that the Guidelines demonstrate a preference for sharing in transportation costs where the distance between parents is significant, and the trial court did not abuse its discretion in requiring the custodial parent to contribute eighty hours of driving time annually to meet the relocating noncustodial parent half-way for parenting time exchanges. In **Dumont v. Dumont**, 961 N.E.2d 495, 501(Ind. Ct. App. 2011), *trans. denied*, the Court affirmed the trial court's denial of Father's contempt petition and request for additional parenting time. Mother was occasionally required to work overtime at her factory job with little notice, and for overtime work, she needed to come to work at 4:00 a.m. On these occasions, Mother had been dropping off the three-year-old sleeping child at 3:45 a.m. to the home of his daycare provider, where the child slept until his normal waking time of 7:30 a.m. Father argued that the trial court abused its discretion by not ordering additional parenting time. The Court noted that the Guidelines provide a "right of first refusal" in favor of the noncustodial parents in the event that child care is necessary, but it is subject to practicality in terms of distance, transportation, or time. Id. at 500. The Court agreed with the trial court that Mother's election to drop the child off early at day care on those occasional mornings when she went to work early did not constitute a breach of the parties' agreement or the Guidelines. Id.

VI. A. 2. Family Law Cases on Restricting Parenting Time

In **Patton v. Patton**, 48 N.E.3d 17 (Ind. Ct. App. 2015), the Court affirmed the trial court's order that parenting time between Father and his son continue to be supervised. Id. at 22. Mother and Father divorced in 2013, after Father was convicted of child solicitation for fondling their oldest daughter's breasts. Father was awarded supervised parenting time with his son, to take place at a supervising agency. Father petitioned the trial court for modification of parenting time, asking that it no longer be supervised. Mother requested a psychological evaluation for Father, and Father was seen by a psychologist. In his report, the psychologist did not explicitly recommend supervised or unsupervised parenting time, but recommended that if unsupervised parenting time was ordered, Father and the child should attend counseling together. Based in part on the psychologist's report, the trial court ordered that supervised parenting time continue, but permitted Paternal Grandmother to supervise Father's parenting time, and allowed Mother and Father to select an agreed-upon supervisor as needed. The trial court also ordered that unsupervised parenting time should begin only after Father and son had jointly met with a professional counselor and only upon the written recommendation of the counselor. Father appealed, arguing that the trial court abused its discretion in denying his request for unsupervised parenting time. The Court noted that the psychologist did not make a specific recommendation as to supervised parenting time but that the psychologist's report stated that Father failed to take responsibility for the actions that led to his child solicitation conviction and had given his son comics with satanic and sexual references that were inappropriate for the child's age, which was a sign of Father's poor judgment. Id. at 21-22. The Court held that the trial court did not abuse its discretion in requiring that supervised parenting time continue. Id. at 21. The Court concluded that the record was sufficient to sustain the trial court's decision not to immediately provide Father with unsupervised parenting time and that the court found unsupervised parenting time would endanger the son. Id. at 22. The Court observed that the trial court "took a thoughtful approach" and "struck a balance" which adequately addressed the concerns of all involved while providing father with opportunities for more rewarding parenting time immediately and in the future. Id.

In **In Re Paternity of Snyder**, 26 N.E.3d 996 (Ind. Ct. App. 2015), the Court affirmed the trial court's order on Father's parenting time but reversed the trial court's order denying Father's request to tell the child that he is her father. Id. at 1000. The trial court entered an order approving the parties' agreed order that Father's parenting time would be supervised by

Therapist. Fourteen months later, Father sought to extend his parenting time, change therapists, allow regular communication with the child via Skype, and allow Father to tell the child he is her father. The trial court ordered that: (1) supervision should continue; (2) Father and the child could communicate via Skype once per week under supervision; (3) Therapist should continue to be the visitation supervisor; and (4) Father's request to identify himself to the child as her father was denied. The Court found that Father had not demonstrated there was a change in circumstances to warrant a modification in parenting time beyond the modification that permitted him to talk to the child via Skype one time per week. Id. at 999. The Court noted IC 31-17-4-2, which states, "[t]he court may modify an order granting or denying parenting time rights whenever the modification would serve the best interest of the child." Id. at 998. The Court said that, while a party requesting a restriction on parenting time initially has the burden to prove endangerment or impairment, Father's petition to remove the restrictions to which he had agreed was a request to modify the original agreement. Id. The Court therefore applied the standard of review for modification of the trial court's order as to these restrictions. Id. Quoting Julie C. v. Andrew C., 924 N.E.2d 1249, 1256 (Ind. Ct. App. 2010), the Court observed that a petitioner seeking subsequent modification bears the burden of demonstrating that the existing custody should be altered. Id. at 998. Regarding Father's request to identify himself to the child as her father, the Court found no evidence in the record suggesting how the child's physical health or emotional development would be impaired by telling the child that Father is her biological father, and reversed that portion of the trial court's decision. Id. at 999-1000.

In **E.W. v. J.W.**, 20 N.E.3d 889 (Ind. Ct. App. 2014), the Court affirmed the trial court's order that Mother's supervised parenting time should continue. Id. at 892. After Mother refused to submit to a hair follicle drug test, Father moved to terminate Mother's parenting time. For the six months preceding hearings on the parenting time issue, Mother had not been involved in any abusive relationships and had been drug-free. By the time of the hearing, Father had refused to allow Mother any visitation with the child for a full year, despite a court order that she be given three hours of supervised parenting time per week. The trial court ordered that Mother's parenting time should continue, and the Court affirmed, reasoning that IC 31-17-4-2 and D.B. v. M.B.V., 913 N.E.2d 1271, require courts to "approach requests for an outright restriction on parenting time with caution and such a restriction requires a finding that the parenting time 'might endanger the child's physical health or significantly impair the child's emotional development.'" E.W. at 897-98. Noting that the Court gives great deference to the trial court in a decision regarding modification of parenting time, the Court found that the record "supports the trial court's finding that Mother is drug free, is no longer in an abusive relationship and is receiving mental health treatment." Id. at 898 (internal citations omitted). The Court held that based on the record, the trial court's denial of Father's request to terminate Mother's parenting time was not an abuse of discretion. Id.

In **In Re B.J.**, 19 N.E.3d 765 (Ind. Ct. App. 2014), a guardianship case, the Court affirmed the trial court's order restricting Father's parenting time with his four-year-old child and ordering that it be supervised. Id. at 770. The Court noted that the following evidence was sufficient to support the court's determination that unsupervised parenting time with Father posed a danger to the child's physical health: (1) Father had a history of drug and alcohol addiction; (2) Father had a history of failing to take acceptable care of his other child; and (3) Father allowed the child to ride a moped, which eventually fell on top of her. Id.

In **Meisberger v. Bishop**, 15 N.E.3d 653 (Ind. Ct. App. 2014), the Court remanded the case to the trial court to determine and make one or more findings on whether the child's physical health or safety would be endangered or whether there would be significant impairment of the

child's emotional development by allowing Father, who was incarcerated for murder and theft, to have parenting time. Id. at 660. The Court said that, although some of Father's arguments are waived, his challenge as to whether the trial court made the requisite findings pursuant to IC 31-17-4-2 presented the Court with a question of law. Id. at 559. The Court observed that IC 31-17-4-2 governs the modification, denial, and restriction of parenting time rights and provides that "the court shall not restrict a parent's parenting time unless the court finds that the parenting time might endanger the child's physical health or significantly impair the child's emotional development. Id. The Court said that the trial court found only that Father had been a part of the child's life for one year, and that it was not in the child's best interest to have in-person parenting time at the DOC facility. Id. The Court observed that the trial court at least implied that its decision was based in part on the reluctance of Mother and grandparents to transport the child to Father. Id. The Court said that it had addressed a similar issue in Rickman v. Rickman, 993 N.E.2d 1166 (Ind. Ct. App. 2013). In Rickman, Father had been sentenced to an aggregate term of fifty years for eight counts of child molesting as class A felonies, child molesting as a class C felony, and criminal confinement as a class C felony, and filed a verified petition for modification of the visitation order twelve years after his sentencing requesting that the court grant him telephone and mail privileges with his child. Rickman at 1167. Meisberger at 159-160. The Rickman Court observed at 1169-1170 that it was "necessary" that the trial court discuss its factual basis sand make findings on potential endangerment of the child's physical health or safety or significant impairment of the child's emotional development. Meisberger at 160.

In **Perkinson v. Perkinson**, 989 N.E.2d 758 (Ind. 2013), the Indiana Supreme Court reversed the trial court's decision which prohibited Father from exercising any parenting time with the child and provided no means by which he could earn parenting time. Id. at 760. Father and Mother were divorced when the child was an infant. Their dissolution decree included an agreement in which Father agreed to waive his parenting time rights in exchange for Mother assuming sole financial responsibility for the child and waiving enforcement of Father's child support arrearage. The agreement, which was approved by the trial court, also set out that if Father sought parenting time in the future, he was obliged to pay any support arrearage through the date of the trial court's approval of the agreement. Subsequently, Father filed two verified petitions for modification of parenting time, both of which were denied by the trial court. The Supreme Court declared that an agreement to forego parenting time in exchange for relief from child support is void as against public policy. Id. The Court said that "[a]ttorneys should refuse to be a part of such discussion and should advise their clients that any such discussion is unacceptable." Id. The Court also opined that the evidence present by Mother to the trial court was insufficient to deny parenting time to Father. Id. at 766. The Court observed that the only evidence before the trial court regarding endangerment to the child was Mother's testimony that, six years previously, Father was verbally abusive to Mother and Father's oldest child from a prior relationship and that Father threatened to destroy the relationship between Mother and the child in this case. Id. The Court noted that there was no evidence presented by Mother from a guardian ad litem, DCS reports, a therapist, or expert testimony to show that parenting time would not be in the child's best interests. Id. The Court said that, while under the right circumstances, one parent's testimony alone could be sufficient, here the evidence was not sufficient. Id. The Court opined that "[e]xtraordinary circumstances must exist to deny parenting time to a parent, which necessarily denies the same to the child." Id. at 765. The Court said that, if the trial court finds that such extraordinary circumstances do exist, then the trial court shall make specific findings regarding its conclusion that parenting time would endanger the child's physical health or significantly impair the child's emotional development. Id.

In **In Re Paternity of W.C.**, 952 N.E.2d 810 (Ind. Ct. App. 2011), the Court reversed and remanded the trial court's order which immediately suspended Mother's parenting time and any other contact with her ten-year-old autistic child. Custody of the child was modified from Mother to Father when the child was nine years old. The Court then modified Mother's parenting time about ten months later to visits on Sundays from noon to 1:00 p.m. at McDonald's, supervised by Father, and telephone contact on Wednesdays between 3:00 p.m. and 5:00 p.m. with the length of the calls limited to the child's attention span. Mother was ordered to treat the child appropriately for his age and to refrain from discussing adult topics with him. At a review hearing based only on evidence from Father's journal, and statements from Mother and Father, the trial court suspended Mother's parenting time and granted a protective order against Mother until the child would be twenty years old. The trial court found that Mother: (1) engaged in a pattern of conduct that causes the child be upset and anxious; (2) brought calendars to the visits showing the next court dates and discussed those dates with the child; (3) told the child that he would be coming home with her soon; (4) spoke to the child about past memories of when he lived with her, which resulted in making the child cry; and (5) spoke "baby talk" to the child, fed him, and brought books and toys that were for children many years younger than the child. The trial court also found that not interacting on an age appropriate level with the child had resulted in the child's behavior regressing. The trial court also invited Mother to petition the court for reinstatement of her parenting time when she had gained the appropriate skills for a special needs child and gone through counseling, therapy, and parenting education. On appeal, the Court said that Father bore the burden of presenting evidence justifying the termination of Mother's parenting time rights, and that Father failed to do so. Id. at 816. The Court noted that Father's evidence consisted of his own three-page journal of Mother's conduct during two months of parenting time and his additional comments at the hearing, and that the court heard no testimony from a guardian ad litem, therapist, or any other professional or objective witness. Id. The Court acknowledged that the child is an autistic child with special needs and that Mother needed to improve her parenting skills. Id. at 817. The Court opined that the record "does not approach the egregious circumstances in which we have previously found that parenting time may be terminated, such as when a parent sexually molests a child." W.C. at 817, quoting D.B. v. M.B.V., 913 N.E.2d 1271, 1275 (Ind. Ct. App. 2009). The Court noted that Father's evidence showed that Mother loved the child, wanted to be a part of his life, and brought him gifts. W.C. at 817. The Court did not minimize the behavioral issues the child has exhibited following Mother's parenting time, but found that Father simply had not presented evidence justifying termination of what little parenting time Mother had left. Id. The Court opined that the record would support an order for the parenting time to be supervised by a third party and for Mother to attend parenting classes, therapy, or counseling, and encouraged the trial court to consider such orders on remand. Id.

In **In Re Paternity of P.B.**, 932 N.E.2d 712 (Ind. Ct. App. 2010), the trial court concluded that the applicable burden of proof that Mother had to meet in seeking to terminate Father's parenting time was the "clear and convincing" standard required to involuntarily terminate parental rights. The Court reversed and remanded for further proceedings, concluding that the "preponderance of the evidence" standard is the appropriate burden of proof in this situation. Id. at 720-21. The Court said that the trial court must consider and weigh the conflicting evidence and determine whether the evidentiary balance tips in favor of Mother, that is, whether it is more likely than not that visitation with Father would endanger the child's physical health or well-being or significantly impair his emotional development. Id. at 721.

In **D.B. v. M.B.V.**, 913 N.E.2d 1271 (Ind. Ct. App. 2009), the Court found that the trial court's denial of parenting time to Father was contrary to statutory authority. Id. at 1275. The

Court directed that, on remand, if the trial court restricted Father's parenting time upon entry of the requisite statutory find of endangerment, the trial court was encouraged to order that the parenting time be supervised. Id. The Court noted: (1) IC 31-17-4-2 provides that: (1) the court may modify an order granting or denying parenting time rights whenever modification would serve the best interests of the child, but the court shall not restrict a parent's parenting time rights unless the court finds that the parenting time might endanger the child's physical health or significantly impair the child's emotional development; (2) the trial court articulated no specific finding that parenting time would cause harm to the children; (3) the record disclosing the past interaction between Father and his children did not approach the egregious circumstances in which the Appellate Courts have previously found that parenting time may be terminated, such as when a parent sexually molests a child; and (4) clearly, the parenting time statute does not provide for the elimination of parenting time because reunification counseling has proved unusually challenging or because teenagers do not wish to interact with a parent while accepting substantial financial benefits from that parent. Id. at 1274-75. The Court also opined that, while the complete termination of parenting time was not supported by the evidence, the record would support an order for supervised parenting time, and such an order would be appropriate given the volatile relationship between the parties, the ages of the children, and the concern of one therapist that supervision of parenting time would protect Father from unfounded accusations. Id. at 1275.

In **Walker v. Nelson**, 911 N.E.2d 124 (Ind. Ct. App. 2009), a paternity case, the trial court modified physical custody of the thirteen-year-old child from Mother, who lived in Lake County, Indiana, to Father, who lived in Indianapolis. Custody was modified due to the child's failure to attend school and school suspensions, falling grades, and poor attitude around Mother. The trial court also modified parenting time, providing that Mother would have parenting time one weekend per month. The Court reversed and remanded because the trial court did not make a specific finding that visitation with Mother would endanger the child's physical health or well-being or significantly impair his emotional development. Id. at 130. The Court instructed the trial court to either: (1) enter an order containing findings sufficient to support a visitation restriction under IC 31-14-14-1 based on the evidence already in the record or; (2) enter an order that does not contain a visitation restriction. Id.

In **Shady v. Shady**, 858 N.E.2d 128 (Ind. Ct. App. 2006), a dissolution case, the Court opined that the trial court's order requiring that Father's parenting time with his five-year-old child be supervised by Mother or her designee was not an abuse of discretion. Id. at 143. Father, an Egyptian national who had become a U.S. citizen, had threatened to take the child to Egypt and not return. A psychologist evaluator opined that Father had the potential of being the kind of person who would abduct a child. A second witness, an expert in the field of international child abduction, opined that there was a grave risk of abduction, the child could travel to Egypt on Father's or a male relative's passport, that children abducted or retained in Egypt usually never see their other parent again, and Egypt is not a signatory to The Hague Convention on Civil Aspects of International Child Abduction. Father argued that allowing Mother or her designee to supervise parenting time would have a detrimental impact on his relationship with the child because of Mother's and maternal relatives' distrust, hostility, and negative attitudes toward him. The Court was not persuaded by this argument, noting that supervision of parenting time had no impact on the frequency or continuation of the child's contact with Father, that Father had not been denied parenting time, and that parenting time was ordered to be supervised to protect the child's best interests based on the trial court's finding that deviation from the Indiana Parenting Time Guidelines was warranted to insure the child's wellbeing. Id.

In **J.M. v. N.M.**, 844 N.E.2d 590 (Ind. Ct. App. 2006), *trans. denied*, the Court affirmed the dissolution court's order that restricted Father's parenting time with the child to therapeutic parenting time with an agency. Id. at 602. The Court noted the following evidence in support of the order: (1) the child had been so devastated by Father's tirade after soccer that the child had reverted to bedwetting; (2) after Father's attempt to pry out the child's loose tooth with scissors, the child was left in fear of Father. Id. at 600. Other evidence offered during the two day binding arbitration hearing included counseling records regarding Father's treatment for severe anxiety, obsessive compulsive disorder, major depression, post traumatic stress disorder, and an alcohol problem. A recent alcohol assessment noted that Father had reported that his last usage of alcohol had been eight days before the assessment. The supervised parenting time counselors and guardian ad litem recommended supervised parenting time. The Court noted that supervised parenting time within parameters designed to protect the child's best interests was not denial of parenting time. Id. The Court further opined that the trial court's finding that Father's behavior continued to be detrimental to the child's mental health, well being, emotional stability, and development was tantamount to a finding that unsupervised parenting time would significantly impair the child's emotional development, as required by IC 31-17-4-2. Id.

In **Duncan v. Duncan**, 843 N.E.2d 966 (Ind. Ct. App. 2006), *trans. denied*, a post decree dissolution parenting time case, the Court affirmed the trial court's order denying Father's post decree request for parenting time with his two sons. Id. at 974. The dissolution had been the result of Father's sexual abuse of the oldest child, a daughter, which was substantiated by Monroe County Division of Family and Children. The dissolution decree provided that Mother would have sole custody of the three children and that Father would have no visitation. Criminal charges of child molestation were filed against Father, but were dismissed without prejudice when he suffered a stroke while incarcerated. After a hearing on Father's request to establish parenting time with his sons, the trial court concluded that visitation with Father would pose a danger to the physical health and safety of the two sons and might significantly impair their emotional development. The Court noted the following evidence in its opinion: (1) the daughter's in camera testimony about years of sexual abuse; (2) DFC substantiation of abuse; (3) Father's adamant denial of wrongdoing and insistence on unsupervised visitation; (4) the older son knew about the sexual abuse, disagreed with Father and had run away; (5) Father pressured the older son to quit therapy after one session; (6) the younger son had behavioral problems, but had improved since he began therapy and ADHD medication; (7) neither son desired to re-establish contact with Father; (8) Father had threatened the daughter with a loaded gun and refused to attend counseling. Id. at 970-72. The Court opined that case law did not provide a definite conclusion in this case, i.e., where a father alleged to have molested one child seeks parenting time with other children. Id. at 971. The Court went on to say that, when confronted with a new situation, courts must ensure that the action taken corresponds with the danger presented to fairly and fully protect parent's visitation rights and the child's health and welfare. Id.

In **Appolon v. Faught**, 796 N.E.2d 297 (Ind. Ct. App. 2003), a dissolution case, the Court affirmed the trial court's order denying any visitation to Father. Id. at 300. The evidence showed that Father, a native of Haiti, had physically abused Mother, raped her, threatened to take the children and run, and had admitted in writing that he had molested the children. The magistrate determined that visitation would be harmful to the children. Father contended that IC 31-17-2-8.3, which creates a rebuttable presumption of supervised visitation for a noncustodial parent who has been convicted of a crime involving domestic violence that was witnessed or heard by the child, requires courts to presume, no matter what the circumstances, that all non-custodial parents should be granted at least supervised visitation

rights. The Court was not persuaded, finding that Father's argument would abrogate the discretion entrusted to the courts by IC 31-17-4-1, which states, "a parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation by the noncustodial parent might endanger the child's physical health or significantly impair the child's emotional development." Id. at 300. The Court stated that supervised visitation is not the lowest common denominator, and the circumstances in this case supported that the trial court was within its discretion when it denied visitation altogether. Id. *Practice Note*: Some CHINS cases may have facts similar to those recited in Appolon and it may be appropriate to deny any visitation.

In **Downey v. Muffley**, 767 N.E.2d 1014 (Ind. Ct. App. 2002), a dissolution case, the Court reversed the trial court's order which imposed a standard restriction of non-relative overnight guests when the children were in the custody of their lesbian mother. Id. at 1012. The Court held that imposing a standard restriction without a finding of harm to or adverse effect on the children was an abuse of discretion. Id.

In **Marlow v. Marlow**, 702 N.E.2d 733 (Ind. Ct. App. 1998), a dissolution case, the trial court imposed two restrictions on Father during his visitation with this sons: (1) Father should not have any non-blood related person at his home overnight; and (2) Father should not include in the children's activities any social, religious, or educational functions sponsored by or promoting the homosexual lifestyle. The Court affirmed the trial court's restrictions, despite Father's claims of lack of evidence and unconstitutionality. Id. at 738. The Court held that the record revealed a rational basis supporting the restrictions based on: (1) the sons exhibited behaviors showing emotional distress after overnight visits with Father and his male partner in a one bedroom apartment; and (2) due to their young ages, the sons lacked the cognitive ability to reconcile Father's new lifestyle with their conservative upbringing by Father and Mother before the divorce. Id. at 736-38. The Court found Father's constitutionality claim that the decision was based on private bias was without merit because the record reflected that the trial court's foremost consideration was the sons' best interests. Id. at 737.

In **Pennington v. Pennington**, 596 N.E.2d 305 (Ind. Ct. App. 1992), *trans. denied*, a dissolution case, the trial court restricted Father's overnight visitation with his son by ordering that Father's male friend not be present during visitation because the Court specifically found that the friend's presence would be injurious to the son's emotional development. Father appealed the restriction, but the Court found the record revealed a rational basis for the restriction, and the trial court acted within its discretion. Id. at 307.

VI. B. Visitation and Parenting Time Rights Protected

In **Matter of Adoption of Topel**, 571 N.E.2d 1295 (Ind. Ct. App. 1991), the Court relied on Stewart v. Stewart, 521 N.E.2d 956, 960 (Ind. Ct. App. 1988), in stating that "the right of a parent to visit his child is a 'sacred and precious privilege.'" Topel at 1299.

VI. B. 1. Family Law Cases Supporting Parenting Time

The Court reversed the order giving Mother discretion to restrict Father's parenting time based on her determination of potential harm from a sibling in Father's custody in **Barger v. Pate**, 831 N.E.2d 758 (Ind. Ct. App. 2005). The Court found that the parenting time restriction was clearly erroneous and contravened statutory authority, namely IC 31-17-4-2. Id. at 763. The Court also reversed the order regarding appointment of a conditional temporary custodian, stating it was clearly erroneous since Father's parenting time rights had

been neither "supervised" nor "suspended" as required by the conditional temporary custodian statute, IC 31-17-2-11. Id. at 765-66.

In **Appolon v. Faught**, 796 N.E.2d 297 (Ind. Ct. App. 2003), the Court stated that the right of noncustodial parents to visit with their children is a "sacred and precious privilege" and opined that the Court's holding "did not countenance the unwarranted denial of appropriate access to the children of a non-custodial parent." Id. at 300. The Court opined that, in the future, Father might demonstrate to the trial court that he no longer posed a threat to his children's physical health or emotional development, at which time the decision regarding visitation should be re-evaluated. Id.

See also **In Re Paternity of P.B.**, 60 N.E.3d 1092, 1099 (Ind. Ct. App. 2016) (fourteen-year-old child refused parenting time; Court opined that trial court should use its authority to ensure orders are obeyed; compliance with parenting time order is not optional); and **Hatmaker v. Hatmaker**, 998 N.E.2d 758, 762-62 (Ind. Ct. App. 2013) (Court opined that order for supervised visitation without finding of endangerment and modifiable on agreement of parties was erroneous, as it was inconsistent and in contravention of statutory authority).

VI. B. 2. Visitation and Parenting Time With Incarcerated Parents in Family Law Cases

Incarcerated sex offender parents of children in CHINS and family law cases may be precluded from visitation with any minors by IC 11-11-3-9. IC 11-11-3-9(b) allows the DOC to restrict any person less than eighteen years of age from visiting certain offenders if: (1) the offender has been convicted of a sex offense or adjudicated delinquent as a result of an act that would be a sex offense if committed by an adult; and (2) the victim of the sex offense was less than eighteen years of age at the time of the offense. ED 02-01-102, a Correction policy, establishes criteria which the offender must meet for the DOC to determine whether an offender may be eligible for visitation with minors. The criteria include: (1) whether the offender has had any disciplinary code violations for twelve months; (2) the offender has not been adjudicated/ convicted of any other sexual offense and there is no documentation that the offender has had multiple victims; (3) the offender has not had any other visitation restrictions for sexually related activities within the past twelve months; (4) there are no known court orders restricting the offender from visiting the intended minor visitor; (5) the intended visitor is the offender's child, stepchild, sibling, or grandchild who was not the victim of the offense; (6) circumstances surrounding the adjudication/conviction indicate that the minor, though legally incapable of consenting, was not compelled by force or threat. If an offender meets the above criteria, a case management review will be completed by DOC's sex offender management and monitoring program. Administrative appeal of denial of visitation is available to the offender. Offenders are also permitted to have visitation with minors who are immediate family members when the offender is in the last stages of a terminal illness or when a therapeutic visit is requested by the victim's licensed therapist.

In **Rickman v. Rickman**, 993 N.E.2d 1166 (Ind. Ct. App. 2013), the Court reversed and remanded the trial court's denial of incarcerated child molester Father's petition for telephone and mail communication with his sixteen-year-old child. Id. at 1170. Father was serving a fifty year sentence for multiple felony counts of child molesting and one count of class C felony criminal confinement. Father's child was not a victim of Father's offenses. The trial court had denied Father's petition without a hearing, and the chronological case summary merely stated that Father was incarcerated on child molesting charges. The Court reversed the trial court's order because the order did not state why the petition was denied, whether it was denied pursuant to IC 31-17-4-2, whether the trial court considered the Parenting Time Guidelines, and did not include a necessary finding as to potential endangerment of the

child's physical health or safety or significant impairment of his emotional development. Id. at 1169. The Court noted that, absent potential endangerment or significant impairment of the child's health, safety, or emotional development, the plain language of the Parenting Time Guidelines presumes that the Guidelines would apply in this case. Id. The Court opined that if, on remand, the trial court determines the Guidelines to be applicable, it must then proffer an explanation for its departure from the Guidelines. Id. The Court said that the trial court must reflect upon the best interests of the child and the possible consequences of its departure from the provisions of Indiana Parenting Time Guideline I(A). Id. The Court said that these actions by the trial court would enable the Court of Appeals to thoroughly and appropriately review the trial court's deviation and the reasons behind it. Id.

In **Burkett v. W.T.**, 857 N.E.2d 1031, 1033 (Ind. Ct. App. 2006), a paternity case, Father was incarcerated for forty years due to his convictions for rape, criminal deviate conduct, sexual battery, and criminal confinement. The child's Mother was the victim of the offenses. Father petitioned for visitation with the child and the trial court denied his petition without a hearing based on the Doe v. Donahue, 829 N.E.2d 99 (Ind. Ct. App. 2005), *trans. denied*, decision. The Court opined that the Doe decision and the Department of Correction Executive Directive 02-01 applied only to offenders who have been convicted of a sex offense involving a minor. The Court reversed and remanded the case for the trial court to conduct an evidentiary hearing on Father's petition, finding that: (1) the trial court's decision on Doe v. Donahue, 829 N.E.2d 99 was misplaced; and (2) IC 31-14-14-1 states that Father was entitled to a hearing. The Court noted that, in light of the offenses Father committed against the Mother, the trial court might well find after a hearing that allowing visitation would either endanger the child's mental health or significantly impair his emotional development.

In **Doe v. Donahue**, 829 N.E.2d 99, 108-11 (Ind. Ct. App. 2005), *trans. denied, cert. denied sub nom.* Roe v. Donahue, 126 S.Ct. 2320, 164 L.Ed.2d 839 (2006), the Court affirmed the grant of summary judgment to the Department of Correction Commissioner in a class action suit brought by prisoners who challenged ED 02-01 on constitutional grounds. The Court opined that ED 02-01 is not in violation of IC 11-11-3-9, nor does it violate the First, Fourteenth, or Eighth Amendments to the United States Constitution.

In **Pence v. Pence**, 667 N.E.2d 798 (Ind. Ct. App. 1996), the Court ruled that an incarcerated parent had a right to a hearing on whether he could have visitation with his child throughout the period of the incarceration.

VI. C. CHINS and Termination Cases Addressing Visitation Issues

Cases are cited below for various visitation issues arising in CHINS and Termination cases. For additional cases, see Chapter 11 at IX.H. on the effect of CHINS visitation orders in termination cases.

VI. C. 1. Visitation Conditioned and Visitation Suspended

In **In Re E.W.**, 26 N.E.3d 1006 (Ind. Ct. App. 2015), the Court found that the evidence readily supported the juvenile court's order ceasing visitation and phone contact between Mother and the child. Id. at 1010. While there is no statute specific to the CHINS context related to parenting time, the Court found the general family law statute to be instructive. Id. at 1009. The Court noted IC 31-17-4-2, which states that the court shall not restrict a parent's parenting time rights *unless the court finds that the parenting time might endanger the child's physical health or significantly impair the child's emotional development* (emphasis in opinion). Id. The Court found the record to be replete with evidence supporting the juvenile court's conclusion that cessation of the visits would be in the child's best interests. Id. at

1010. Among the evidence noted by the Court was: (1) Mother had behaved inappropriately during visits, inserted herself between the child and the foster parent in inappropriate ways, and refused to participate in services designed to make her a better parent; (2) the child's therapist, family case manager, and court appointed special advocate all testified that further contact with Mother was detrimental to the child's well-being and that cessation of contact was in the child's best interest; (3) the visitation supervisor testified that at least half of the visits had been detrimental to the child and that Mother made no improvement in her parenting abilities in ten months. Id. The Court noted the juvenile court's finding: "[t]he Mother has visited the child consistently; however, these visits have proven to be detrimental to the well-being of the child due to Mother's inappropriate behaviors during the visits." Id. at 1009. The Court observed that, while the juvenile court did not use the precise words of IC 31-17-4-2, *which may not even apply directly to a CHINS case*, the clear import of the finding was synonymous with the statutory language (emphasis added). Id. at 1010.

In **Lang v. Starke Cty. Office of Fam. Children**, 861 N.E.2d 366 (Ind. Ct. App. 2007), a termination case, Father appealed the order terminating his parental rights to his three children, arguing, inter alia, that his due process rights had been violated because DCS had unilaterally and unlawfully denied him visitation. Father had been convicted of class D felony battery because he had hit one of the children with a belt, leaving bruises and marks and affecting her ability to walk. Father refused to agree not to use corporal punishment on his children; therefore, he was denied unsupervised home visitation with one of the children. Later the court ordered Father to contact DCS to arrange supervised visitation with the children. DCS informed Father that supervised visitation would be contingent on his agreement to not discuss the pending termination case with the children because caseworkers believed this discussion would cause psychological harm to the children. Father refused to agree to this condition and, as a result, neither requested nor received visitation for over two years. With regard to Father's due process claim, the Court opined that the requirement that Father not discuss termination proceedings with the children was not unreasonable or in violation of his due process rights. The Court emphasized that Father was not prevented from visiting the children, but it was Father's refusal to abide by reasonable conditions of not using corporal punishment or discussing termination proceedings that led to Father's lack of contact with the children. Id. at 377. With regard to Father's claim that the conditions placed on his visitation were illegal, the Court "found no authority for the proposition that a parent's right to use reasonable corporal punishment is absolute and cannot in some instances be subordinated to a child's interests." Id. at 378. The Court noted that, where a parent who has a history of using *unreasonable* corporal punishment, but refuses to recognize that his previous conduct was impermissible and refuses to work with DCS to improve his conduct, DCS is left with little choice but to require that the parent repudiate all forms of corporal punishment before allowing children in their care to be released to the parent for unsupervised visitation. Id. The Court also found that the DCS condition that Father not discuss the termination proceedings with the children was justified if the discussion would cause psychological harm to the children. Id. at 370. The Court stated that, although DCS has a duty to make reasonable efforts to maintain or reunite families, its primary duty is to protect children from harm. Id. The Court concluded that, regardless of the condition's legality, it had no effect on the result of the termination hearing and any error was harmless. Id.

In **In Re E.S.**, 762 N.E.2d 1287 (Ind. Ct. App. 2002), the Court reversed the trial court's order terminating the parent-child relationship, finding that the Miami County DFC had not presented clear and convincing evidence on each of the required termination factors. Id. at 1292. Although the trial court's order suspending Mother's visitation with the child during the CHINS process was not specifically argued on appeal, Mother claimed that a variety of

factors, including a change of foster homes, a change of therapists and therapy methods, and putting the child on psychotropic medication, could have contributed to the child's improved behavior after her visitation was terminated. The court appointed special advocate also questioned whether visitation should be attempted to know whether reunification was possible. The Court opined that, given the changes in the child's treatment around the same time Mother's visitation was terminated and the fact that visitation was never reintroduced after those changes, the evidence was insufficient to prove that maintenance of the relationship posed a threat to the child's well-being. Id. at 1291-92.

In **A.P. v. PCOFC**, 734 N.E.2d 1107 (Ind. Ct. App. 2000), *trans. denied*, the Court ruled that the juvenile court erred in failing to issue findings and reasons supporting its order that an incarcerated father could have no contact with the child. Although the case hinges on compliance with the protective order statute, it suggests the need for judicial findings when parental visitation is denied.

In **In Re L.S.**, 717 N.E.2d 204 (Ind. Ct. App. 2000), the facts show that parental visitation with the children was suspended during the CHINS case due to severe parental conflict during visitations and Father's refusal to comply with court imposed limitations that Father, who was participating in gender reassignment, dress as a man or in a gender neutral manner during visits with the children.

In **In Re J.J.**, 711 N.E.2d 872 (Ind. Ct. App. 1999), Father appealed the termination of parental rights judgment on the grounds that the juvenile court's order that Father could not visit the child until he completed a psychiatric evaluation was in violation of the dispositional guidelines favoring visitation. The Court rejected Father's position, noting that the dispositional guideline statute "clarifies that the court should fashion a judgment that is first and foremost in the child's best interest." Id. at 875. The trial court's ruling requiring Father to complete the psychological evaluation was the least restrictive option to ensure the safety of the child that was still consistent with the best interests of the child. Id.

In **Adams v. Office of Fam. & Children**, 659 N.E.2d 202 (Ind. Ct. App. 1995), Mother's visitation with the children was suspended during the CHINS proceeding because of her attempt to persuade the oldest daughter to retract the sexual abuse allegations.

In appealing the judgment terminating his parental rights, the incarcerated Father argued in **Matter of A.C.B.**, 598 N.E.2d 570 (Ind. Ct. App. 1992), that he had been denied visitation with his child because he was a "non-adjudicated father". Id. at 572. The Court noted that failure to establish paternity was a factor in the visitation decision, but clarified that it was not the sole factor and that visitation with incarcerated Father was denied because it was not in the child's best interests. With regard to the effect of incarceration on visitation the Court stated that Father's:

> ...inability to bond and visit with A.B. [child] is due more to his own actions, which resulted in his incarceration, than with his failure to establish legal paternity. Individuals who pursue criminal activity run the risk of being denied the opportunity to develop positive and meaningful relationships with their children.

Id. at 572.

VI. C. 2. Visitation With Foster Parent

In **Worrell v. Elkhart Cty. Office of Family**, 704 N.E.2d 1027 (Ind. 1998), the Indiana Supreme Court, in a matter of first impression, ruled that foster parents do not have

standing to request visitation with children who previously lived with them as foster children. Id. at 1029.

VI. C. 3. Dissolution Parenting Time Order Not Binding on CHINS Court

In **Hallberg v. Hendricks Cty. Office**, 662 N.E.2d 639 (Ind. Ct. App. 1996), the Court rejected Father's argument that the divorce visitation order issued in Allen County was binding on the CHINS proceeding in another county. Id. at 644. The Court held that the juvenile court had exclusive jurisdiction in CHINS proceedings, and the contrary divorce visitation order was not binding in the CHINS case. Id.

VI. C. 4. Grandparent Visitation in CHINS Cases

In **In Re G.R.**, 863 N.E.2d 323 (Ind. Ct. App. 2007), the maternal grandmother and step-grandfather filed a petition for grandparent visitation rights in the CHINS case on the same day that Mother's parental rights were terminated. In affirming the trial court's denial of the motion without hearing evidence from the maternal grandmother and step-grandfather, the Court opined that the grandmother lost her status as parent of the child's parent (as defined by IC 31-9-2-77) when Mother's parental rights were terminated. Id. at 328. See Chapter 2 at I.G.4. for further discussion of this case.

VI. D. Visitation Issues Raised in Other Family Law Cases

Visitation issues frequently arise in dissolution, paternity, and guardianship cases. The applicability of this case law to CHINS cases will vary on a case-by-case basis.

VI. D. 1. Visitation with Stepparents, Former Domestic Partners, and Former Custodians

Visitation has been awarded to stepparents who can show that they had a custodial or parental relationship with the child, and that visitation would be in the best interests of the child. More recent case law indicates that visitation has also be awarded to a parent's former domestic partner.

In **Brown v. Lunsford**, 63 N.E.3d 1057 (Ind. Ct. App. 2016), the Court reversed the trial court's order granting visitation with Brown's daughter to Lunsford, Brown's former boyfriend, who is not related to Brown's daughter. Id. at 1065. Quoting Collins v. Gilbreath, 403 N.E.2d 921, 923 (Ind. Ct. App. 1980), the Court noted that Indiana courts have been cautious not to "open the door and permit the granting of visitation rights to a myriad of unrelated persons…who happen to feel affection for a child." Brown at 1062. Quoting Worrell v. Elkhart Cnty. Office of Family and Children, 704 N.E.2d 1027, 1028 (Ind. 1989), the Court said that "[b]efore a court may proceed to the substance of the visitation request, the party must satisfy the threshold requisite of a custodial and parental relationship." Brown at 1062. The Court noted that, pursuant to Collins, the Court has declined to extend standing to third parties who have not acted in a custodial or parental capacity. Brown at 1062. The Court opined that the trial court's order did not take into consideration the decision that Brown, a fit parent, made to deny Lunsford visitation with her daughter. Id. The Court found no indication that Lunsford presented evidence compelling enough to overcome the presumption that Brown's decision to terminate her daughter's visitation with Lunsford was in her daughter's best interest. Id.

In **Gardenour v. Blondelie**, 60 N.E.3d 1109 (Ind. Ct. App. 2016), *trans. denied*, Kristy Gardendour and Denise Blondelie entered into a registered domestic partnership agreement in accordance with California law in 2006. The California Domestic Partnership Act provided that registered domestic partners had the same rights, protections, and benefits, and the same responsibilities, obligations, and duties under law as are guaranteed to spouses, and that the rights and obligations with respect to a child of either of them should be the same as those of

spouses. The couple moved to Indiana and agreed to co-parent a child. Kristy was artificially inseminated and gave birth to the child. After their relationship ended, Denise returned to California and Kristy filed a petition for dissolution of marriage. The trial court: (1) found that Kristy and Denise agreed to enter into a California domestic partnership, which was a spousal relationship; (2) found that Denise is the child's legal parent; and (3) awarded joint legal custody of the child to Kristy and Denise, physical custody to Kristy, and parenting time to Denise. Kristy appealed, and the Court affirmed the trial court's orders. Id. at 1120-21. The Court held that Kristy and Denise, as spouses, knowingly and voluntarily consented to artificial insemination with Kristy as the birth parent, and that Denise is the child's legal parent. Id. at 1120. The Court concluded the trial court did not err in awarding Denise joint legal custody and parenting time nor did it err in ordering Denise to pay child support. Id.

In **Richardson v. Richardson**, 34 N.E.3d 696 (Ind. Ct. App. 2015), the Court affirmed the dissolution court's order granting Husband visitation with stepdaughter, who was Wife's child from a former relationship. Id. at 704. On appeal, Wife asserted that the dissolution court's order conflicted with the paternity order for the child, which allowed the child's adjudicated father to have parenting time with the child. The Court noted that the dissolution court's order adjudicated visitation of the child between Wife and Husband, and that Husband's exercise of visitation might be only to the detriment of Wife's custodial time with the child. Id. at 701-02. The Court said that the orders in the dissolution and paternity matters were wholly separate, there was no conflict between the orders, and the dissolution court had authority to grant stepparent visitation rights to Husband. Id. at 702. The Court opined that the following evidence supported the dissolution court's finding that visitation with Husband was in the child's best interests: (1) Husband had provided financial, emotional, physical, and educational support to the child for almost eight years; (2) Husband came into the child's life when she was two years old, and was essentially the only father she had ever known; (3) the child referred to Husband as "dad" or "daddy"; (4) Husband had been awarded sole legal and physical custody of the child's half-brother, and the visitation order provided for the child to spend time with her half-brother on the weekends that he was with Husband; and (5)the child and her half-brother had grown up together, and it was in their best interest to spend time together. Id. at 702-03.

In **A.C. v. N.J.**, 1 N.E.3d 685 (Ind. Ct. App. 2013), the Court reversed the trial court's conclusion that Mother's same sex domestic Partner (Partner) lacked standing to seek visitation with Mother's child. Id. at 697. During the course of their same-sex domestic partnership, Mother and Partner decided to have a child together. Mother was artificially inseminated with donor semen and gave birth to the child. For a time, Mother, Partner, and the child functioned as a family unit, but Mother and Partner ended their relationship when the child was two years old. Partner then exercised regular visitation with the child for the next nine months, and the child typically spent two or three overnights per week with Partner. Thereafter, Mother ended all contact between Partner and the child due to concerns about instability in Partner's living arrangements and possible drug use. Partner petitioned for custody of the child and, when the matter came to trial, Partner clarified that she was seeking joint custody and visitation rather than sole custody. The trial court denied Partner's requests for joint custody and visitation. The Court of Appeals believed that the Indiana Supreme Court's decision in King v. S.B., 837 N.E.2d 965 (Ind. 2005) "signaled its amenability to expanding the class of petitioners with standing to seek third-party visitation to include individuals situated similarly to Partner." A.C. v. N.J. at 697. The Court said that, in the particular factual circumstances of this case, a partner who did not give birth to the child had standing to seek visitation with the child. Id. The Court also said that a former domestic partner was not automatically entitled to visitation in these circumstances and that

it must still be established that visitation was in the child's best interests. Id. The Court reversed the trial court's conclusion that Partner lacked standing to seek visitation with the child and remanded with instructions to reconsider Partner's request for visitation under the standard set forth in third-party visitation cases. Id.

In **In Re I.E.**, 997 N.E.2d 358 (Ind. Ct. App. 2013), the trial court terminated the guardianship and modified custody to Father, but awarded Guideline visitation with the child to the child's former Guardians. The Court reversed the visitation order, finding that it was void. Id. at 366. The Court cited Kitchen v. Kitchen, 953 N.E.2d 646, 650 (Ind. Ct. App. 2011), which reaffirmed that only parents, stepparents, and grandparents have standing to be granted visitation rights, in support of its decision. I.E. at 366.

In **K.S. v. B.W.**, 954 N.E.2d 1050 (Ind. Ct. App. 2011), the trial court granted alternate weekend visitation with the child to Mother's former Boyfriend, who lived in West Virginia. Mother, the child, and Boyfriend had lived together in West Virginia for over three years. The child had called Boyfriend "Daddy" and Boyfriend had been listed on the child's school enrollment papers as the child's "Dad." After her relationship with Boyfriend ended, Mother allowed Boyfriend regular visits with the child. Mother later married a different man, and Mother and the child moved to Indiana. Boyfriend filed a Motion to Establish De Facto Parent and Grant Parenting Time. Mother moved to dismiss for failure to state a claim. The trial court denied Mother's motion to dismiss and Boyfriend's request to be named as the child's *de facto* parent. On Mother's appeal, the Court reversed the grant of visitation to Boyfriend, stating that Indiana law does not provide for an order of visitation under this circumstance. Id. at 1052.

In **Kitchen v. Kitchen**, 953 N.E.2d 646 (Ind. Ct. App. 2011), the Court found that the trial court lacked authority to grant visitation for maternal Aunt and Uncle with the child, because Aunt and Uncle did not have standing to petition for visitation. Id. at 651. The child and Mother had lived with Aunt and Uncle until Mother's death after an extended illness. At the time the trial court entered the visitation order, the child was living with Father. The Court adhered to the limitation of Indiana statutes and case law which confer standing on visitation only to parents, grandparents, and stepparents. Id. at 650.

In **M.S. v. C.S.**, 938 N.E.2d 278 (Ind. Ct. App. 2010), the Court affirmed the trial court's order which vacated the trial court's previous order approving an agreement signed by Mother and her former same sex Domestic Partner (Partner). Id. at 287. The agreement provided that Mother and Partner had joint legal custody of Mother's child, Mother was the child's primary physical custodian, and Partner had parenting time with the child as the parties agreed or according to the Indiana Parenting Time Guidelines if the parties did not agree. Eighteen months after the trial court approved their agreement, Mother and Partner ended their relationship after a heated argument during which Partner physically attacked Mother in the child's presence. Mother filed a "Revocation of Any and All Consents to Joint Custody of Minor Child" with the trial court. The court held an evidentiary hearing, suspended Partner's parenting time with Mother's child, and issued an order vacating the order which approved the parties' agreement. Partner argued on appeal that she was entitled to parenting time with Mother's child. Assuming without deciding that third-party visitation is not limited to former stepparents based on King v. S.B., 837 N.E.2d 965, 967 (Ind. 2005), the Court concluded the trial court's finding that continued contact with Partner was not in the child's best interests was amply supported by the evidence. M.S. v. C.S. at 287. The Court noted the following evidence: (1) Partner threw things at Mother and pushed her to the ground in the child's presence; (2) Partner threatened Mother's life in the child's presence;

and (3) Partner's actions were so threatening that the six-year-old child tried to intervene by holding onto Partner and telling Mother to leave. Id.

In **Schaffer v. Schaffer**, 884 N.E.2d 423 (Ind. Ct. App. 2008), the Court affirmed the trial court's order reducing Stepfather's visitation with the child from that set forth in the Indiana Parenting Time Guidelines, but not terminating it as requested by Mother. Id. at 424. The Court found that where, as here, the issue is merely modifying visitation, whether increasing, decreasing, or terminating it altogether, the only relevant inquiry is the best interests of the child, and the party requesting the modification or termination bears the burden of proof. Id. at 428. The Court noted that: (1) Mother did not introduce any evidence from a child psychologist, licensed clinical social worker, counselor, or therapist to substantiate her assertion that terminating Stepfather's visitation was in the child's best interests; (2) it was undisputed that Stepfather was not unfit; and (3) Mother did not introduce evidence that Stepfather would endanger the child. Id. at 429.

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

See Chapter 2 at I.G. for additional discussion of the above case law.

VI. D. 2. Parenting Time Not Tied to Child Support

In **Perkinson v. Perkinson**, 989 N.E.2d 758 (Ind. 2013), the Supreme Court declared that an agreement to forego parenting time in exchange for relief from child support was void against public policy, and reversed and remanded the trial court's decision denying Father's parenting time based on such an agreement. The Court opined that the concept of parents negotiating away parenting time as a means to eliminate the obligation to pay child support is repugnant and contrary to public policy. Id. at 760. The Court said that attorneys should refuse to be a part of such discussion and should advise their clients that any such discussion is unacceptable. Id. The Court found it "incomprehensible to imagine" that either parent would ever stipulate to give up parenting time in lieu of not paying child support. Id. at 762. The Court said that, "[e]very child deserves better than to be treated as nothing more than a bargaining chip." Id. at 765.

In **Farmer v. Farmer**, 735 N.E.2d 285 (Ind. Ct. App. 2000), a dissolution contempt case, the trial court erred in ruling that Father's suspended jail time due to contempt for failure to pay child support could be revoked on the basis of his failure to visit the child. Id. at 288. The Court clarified that payment of child support is not tied to the right to visit the child, and failure to pay child support is not grounds for terminating visitation. Id. The Court noted that there is no duty requiring a parent to visit or maintain a relationship with a child, and a parent should not be forced to visit his child under threat of imprisonment. Id. at 289-90. See also **Rendon v. Rendon**, 692 N.E. 2d 889 (Ind. Ct. App. 1998) (child support and visitation are separate issues and obligations).

VI. D. 3. Violating Parenting Time Order Due to Child's Desires or Endangerment

In **In Re Paternity of P.B.**, 60 N.E.3d 1092 (Ind. Ct. App. 2016), Father contended that the trial court erred when it failed to enforce its previous parenting time orders. The trial court found that Father had not had parenting time with the child for over five years due to Mother's denial of parenting time and the child's desires not to see Father. The Court noted that the trial court did *not* find that parenting time by Father would endanger the child's

physical health or significantly impair his emotional development (emphasis in opinion). Id. at 1099. The Court had little choice but to conclude that the trial court abused its discretion when it found that Mother was not in contempt for failing to abide by the previous parenting time and reunification orders. Id. The Court held that "the trial court should have used its authority to ensure that its orders are obeyed and not disregarded as mere suggestions." Id. The Court said that no one, especially not a parent, should be under the impression that compliance with the trial court's parenting time order is optional. Id.

In **Malicoat v. Wolf**, 792 N.E.2d 89 (Ind. Ct. App. 2003), the Court affirmed the dissolution court's order requiring visitation despite the children's unwillingness to visit and their therapist's testimony that they appeared to have a stress reaction attributable to visitation. Id. at 94. The Court quoted Indiana Parenting Time Guideline I.E.3 which admonishes parents: "If a child is reluctant to participate in parenting time, each parent shall be responsible to ensure the child complies with the scheduled parenting time. *In no event shall a child be allowed to make the decision on whether scheduled parenting time takes place.*" (Emphasis in opinion.) Id. at 92. The Court also stated that, if Mother believed that the children were being harmed by the scheduled visitation with Father, her remedy was to seek a modification of the order instead of defying the order. Id. at 93.

In **MacIntosh v. MacIntosh**, 749 N.E.2d 626 (Ind. Ct. App. 2001), *trans. denied*, the court heard evidence and conducted an in camera interview with the children, whose ages were fifteen and sixteen, regarding Father's petition for an order requiring the children to accompany him on a trip to Switzerland. The trial court ordered the visitation but, on the day before the scheduled trip, Mother obtained a psychiatric examination and medical examination which indicated that the children should not be required to go to Switzerland. Mother did not seek court intervention, neither child went to Switzerland, and Mother was subsequently found in contempt. The Court affirmed the contempt finding, stating that, as the custodial parent, Mother was impliedly ordered to make reasonable efforts to insure that the children complied with the scheduled parenting time. Id. at 630. The Court "rejected the notion that a custodial parent may justify inaction simply because a child refuses to cooperate with a visitation order." Id. The Court was not persuaded by Mother's argument that the children's health required that she disregard the order, noting that the trial court had conducted multiple hearings regarding the trip, the younger child's pre-trip surgery and the older child's relationship with Father. Id. The Court noted that, placed in context, the trial court found the medical documents "highly suspect" and rejected Mother's reasons as a valid basis for her refusal to comply with the court order. Id. The Court noted that there is no advice-of-medical provider defense that excuses disobeying a court order and opined that Mother's remedy, if the order were no longer appropriate, was to seek a modification of the court order, not to defy it. Id. at 631.

In **Piercey v. Piercey**, 727 N.E.2d 26 (Ind. Ct. App. 2000), the Court reiterated that it is not legitimate to terminate visitation without court approval, but if a custodial parent's violation of a court order was not willful due to children's expressed fears of the noncustodial parent, it was within the court's discretion to not find the custodial parent in contempt. Id. at 32

In **Williamson v. Creamer**, 722 N.E.2d 863 (Ind. Ct. App. 2000), the Court ruled that if a parent is concerned for the safety of the child during visitation, the appropriate remedy is to seek a modification of the visitation order. Id. at 866.

See this Chapter at XI. for discussion on contempt.

VI. D. 4. Medical Conditions and Disabilities

In **Stewart v. Stewart**, 521 N.E.2d 956 (Ind. Ct. App. 1988), the Court reversed the trial court's ruling denying visitation for a divorced AIDS infected father, and directed the trial court to fashion a visitation order that did not preclude visitation solely on the basis of AIDS. In **Clark v. Madden**, 725 N.E.2d 100 (Ind. Ct. App. 2000), the Court ruled it was error to require that a blind father had to be accompanied by another adult when the child was in his custody.

VII. DISPOSITIONAL PROTECTIVE ORDERS AND NO CONTACT ORDERS

The juvenile code contains several provisions for protecting children from contact with specified persons. Pursuant to IC 31-32-13-1, a motion can be made to "control the conduct of any person in relation to the child", but IC 31-32-13-4 requires that the court find "good cause" to issue the order. IC 31-34-20-1(a)(7) authorizes the court to "[o]rder a person who is a party to refrain from direct or indirect contact with the child" as part of the dispositional order. IC 31-34-20-1(a)(8) authorizes the court to "[o]rder a perpetrator of child abuse or neglect to refrain from returning to the child's residence" as part of a dispositional order.

VII.A. Emergency Protective Orders

IC 31-32-13-7 and 8 contain procedures for issuance of an emergency protective order without a hearing or notice to the parties or other persons whose conduct is to be affected. Nothing limits the emergency procedures to a particular stage of the CHINS proceeding. See Chapter 5 at II.A. for discussion of IC 31-34-2.3-1 through 8, the statutes on removing the alleged perpetrator from the child's home. See Chapter 5 at II.E.2. for discussion of emergency protective orders.

VII.B. Protective Order/No Contact Order as Dispositional Option

The court should include the reasons for the protective order in the written findings and conclusions required by IC 31-34-19-10 for the dispositional hearing. When the judge issues a protective order under IC 31-34-20-1(a)(7), IC 31-34-20-2 requires that the person who petitioned for the protective order shall file a confidential form with the clerk as prescribed by the division of state court administration. IC 31-34-20-2(1) and IC 31-34-20-4(b) require the clerk to comply with IC 5-2-9, and provide that protective orders can be removed from the protective order depository after the later of one of these occurs: a lapse of one year after the decree is entered, or on the date specified in the decree

VII.C. Protective Order/No Contact Order Under IC 31-34-25

IC 31-34-25 authorizes issuance of no contact orders. The no contact orders may be requested to prevent contact with an adjudicated CHINS or a member of a foster family. The following procedures are required.

VII.C. 1. Petition

IC 31-34-25-2 requires that the petition must be verified. IC 31-34-25-3 provides that a petition seeking to refrain a person from contact must be entitled "In the Matter of a No Contact Order for__". The petition must allege the following:

(1) That the respondent is likely to have direct or indirect contact with the child in the absence of an order under this chapter.
(2) That the child has been adjudicated a child in need of services.
(3) That the best interests of the child will be served if the person refrains from direct or indirect contact with the child.

VII.C. 2. Standing

IC 31-34-25-1 provides that the DCS attorney or the guardian ad litem/court appointed special advocate may sign and file a petition to require a person to refrain from direct or indirect contact with the child or a member of a foster family

VII.C. 3. Notice, Hearing, Standard of Proof, and Findings

IC 31-34-25-4 provides that a hearing "may" be held on the petition concurrently with a dispositional hearing or a hearing to modify a dispositional decree. The discretionary language should be interpreted to give the court the authority to address the issues at one of those hearings, not the discretion to avoid holding a hearing. To insure due process, notice and an opportunity to be heard should be provided to parties whose behavior will be regulated by the requested order. The court shall grant the petition for a protective order if it finds that the allegations required by statute are true. The burden of proof is the preponderance of the evidence. See IC 31-34-12-3.

VII.C. 4. Protective Order Registry

IC 31-34-25-5 provides that the clerk shall comply with IC 5-2-9 if the court enters a decree that requires a person to refrain from direct or indirect contact with the child. The Indiana protective order registry was established at IC 5-2-9-5.5. The division of state court administration maintains the registry.

VII.D. Violations of Protective Orders and No Contact Orders

The juvenile court and the parties may use contempt proceedings to deal with violations of protective orders. See this Chapter at XI. for discussion on contempt. IC 35-46-1-15.1 defines the crime "invasion of privacy", which includes a violation of CHINS and delinquency no contact orders issued under IC 31-34-20-1 [CHINS disposition], IC 31-37-19-1 [delinquency disposition], IC 31-37-5-6 [delinquency detention], or IC 31-32-13 [CHINS protective order]. Invasion of privacy is a Class A misdemeanor. The offense is a level 6 felony if a person has a prior unrelated conviction for invasion of privacy.

VII.E. Termination Case Law on Protective Orders

In **A.P. v. PCOFC**, 734 N.E.2d 1107 (Ind. Ct. App. 2000), *trans. denied*, the Court reversed the termination judgment due to a combination of procedural errors in the CHINS case. Id. at 1119. The Court discussed three concerns about the order issued in the CHINS case barring incarcerated Father's contact with the child: (1) there was no verified petition for the issuance of a protective order; (2) there was no statement of need or request for a no contact order in the reports filed with the court by the office of family and children or the court appointed special advocate; and (3) there were no written findings by the court that contact with Father would pose a threat to the child or that a protective order was in the best interest of the child. Id. at 1116. The Court indicated that these procedures were required by IC 31-34-17-2 and 3 for issuance of a protective order. The Court questioned whether contact with incarcerated Father would be harmful to the child, and noted the effect of the no contact order on the child's relationship to Father. Id. at 1116. The Court stated:

> During the time the [protective] orders were in effect, Elvis [father] was incarcerated and thus could not have posed a physical threat to A.P. [child], and we can find no indication in the record that Elvis was verbally threatening A.P. from prison. There may have been other reasons for issuing the orders but the trial court has not provided us with a finding on the record that supports those orders. While we cannot speculate whether Elvis would have maintained contact with A.P. from prison but for the no-contact orders, they effectively

> precluded that opportunity altogether and thus could have contributed to A.P.'s estrangement from Elvis.

Id. at 1116-1117.

See also **In Re T.F.**, 743 N.E.2d 766 (Ind. Ct. App. 2001) (Mother's violation of court order that children were to have no contact with her husband supported the termination judgment).

Parental violations of protective orders in CHINS cases have been noted in Appellate Court opinions as one of the factors which supported their findings that there was sufficient evidence to terminate the parent-child relationship. See **In Re A.I.**, 825 N.E.2d 798, 817 (Ind. Ct. App. 2005) (Father's violation of protective orders regarding Mother and child caused justifiable concern by OFC and trial court and supported termination judgment), *trans. denied*; **McBride v. County Off. Of Family and Children**, 798 N.E.2d 185, 191-92, 202 (Ind. Ct. App. 2003) (Mother's violation of protective order regarding herself and Father, her decision to live with Father, and her falsehoods to service providers about her contact with Father supported termination judgment).

VII.F. Other Case Law on Protective Orders

Other cases in which a person's behavior warranted the issuance of a protective order include **Solms v. Solms**, 982 N.E.2d 1(Ind. Ct. App. 2012) (trial court erred in denying former wife's petition for protective order; former husband's statement to deputy sheriff in front of former wife and four children that former wife had no morals and it was "too bad you can't shoot people that have no morals" demonstrated domestic or family violence against family or household member); **Hanauer v. Hanauer**, 981 N.E.2d 147 (Ind. Ct. App. 2013) (trial court did not err in granting protective order on evidence that husband yelled at wife, stood over her with clenched fists, stood over her when she was sleeping in bed and turned lights off and on, banged on computer, slammed door and baby gate and threatened to kill himself; husband had severe anxiety disorder and insomnia and consumed marijuana and prescription drugs); **A.N. v. K.G.**, 3 N.E.3d 989 (Ind. Ct. App. 2014) (Court affirmed trial court's decision finding violation of protective order and ordering 120 day executed sentence and home detention; Court concluded that trial court did not improperly act as advocate for protectee and there was no denial of due process right to a fair trial before an impartial tribunal); **A.N. v. K.G.**, 10 N.E.3d 1270 (Ind. Ct. App. 2014), *on rehearing*, (Court found 28 year protective order unreasonable and remanded to determine reasonable extension of protective order).

See also **A.G. v. P.G**., 974 N.E. 2d 598 (Ind. Ct. App. 2012) (Court affirmed extension of protective order on evidence that Father had made threats to his and Mother's children that he would kill Mother and her friend); **Mysliwy v. Musliwy**, 953 N.E. 2d 1072 (Ind. Ct. App. 2011) (Court affirmed issuance of protective order on evidence that Father, a mechanical engineer, committed domestic violence by damaging bathtub drain pipe and furnace in Mother's house, slashing her couch, and damaging her carpet and clothes with bleach, which caused Mother to be very concerned for safety of herself and her children), *trans. denied*; **A.S. v. T.H.**, 920 N.E.2d 803 (Ind. Ct. App. 2010) (Court affirmed issuance of protective order requested by former boyfriend for himself and other household members on evidence that former girlfriend committed stalking by striking boyfriend in the mouth, kneeing him in the groin, repeatedly driving by his residence yelling obscenities, and repeatedly telephoning the residence); **McKinney v. McKinney**, 820 N.E. 2d 682 (Ind. Ct. App. 2002 (Court affirmed issuance of protective order on evidence that husband made two telephone calls to wife threatening to harm the children); **Aiken v. Stanley**, 816 N.E.2d 427 (Ind. Ct. App. 2004) (protective order supported by former fiancé's acts of grabbing woman's hand, pushing her against a bar, pushing her arm against a car door, and verbally abusing woman's young child); **Tons v. Bley**, 815 N.E.2d 508 (Ind. Ct. App. 2004) (physically striking his child and threatening to beat his child "black and blue" supported issuance

of protective order between Father and child but not between Father and Mother or Father and Stepfather); **Sills v. Irelan**, 663 N.E.2d 1210 (Ind. Ct. App. 1996) (despite Mother's claim that trial court had violated her First Amendment right to freedom of association, Court held trial court did not abuse discretion in ordering Mother, as a condition of retaining custody of child, not to have contact with Boyfriend, who was under criminal investigation for severely injuring child).

But see **C.H. v. A.R.**, 72 N.E.3d 996 (Ind. Ct. App. 2017) (Court affirmed trial court's dismissal of noncustodial Grandmother's ex parte protective order for Grandson against custodial Mother because Grandmother was not a "legal representative" of Grandson); **Cruse v. C.C.**, 58 N.E.3d 974 (Ind. Ct. App. 2016) (Court reversed trial court's protective order which prohibited divorced Father from communicating with Mother except on parenting time issues; Court found insufficient evidence that Mother was actually terrorized, frightened, intimidated, or threatened); **J.K. v. T.C.**, 25 N.E.3d 179 (Ind. Ct. App. 2015) (Court held there was insufficient evidence that issuing a new five year protective order was currently necessary to bring about the cessation of domestic violence or the threat of such violence); and **Maurer v. Cobb-Maurer**, 994 N.E.2d 753 (Ind. Ct. App. 2013) (wife who was seeking protective order did not testify at hearing; therefore, Court reversed order, finding that there was not sufficient probative evidence presented to support the trial court's finding that email contacts from husband caused her to feel terrorized, frightened, intimidated, or threatened).

In **Spencer v. Spencer**, 990 N.E.2d 496 (Ind. Ct. App. 2013), the Court of Appeals reversed the trial court's denial of the parties' Agreed Order Dismissing the Order of Protection. The Court opined that IC 34-26-5-12 does not permit the trial court discretion to deny the parties' written request to dismiss a protective order. Id. at 497.

VIII. PARENTAL PARTICIPATION

The juvenile code places strong emphasis on enabling the parents, guardian, or custodian to change their abusive or neglectful behavior so that the family unit can be restored. The juvenile code states that it is the policy of the juvenile code "to strengthen family life by assisting parents to fulfill their parental obligations." IC 31-10-2-1(4). The dispositional guidelines require the court to provide a reasonable opportunity for parental participation in the care, treatment, and rehabilitation of the child. IC 31-34-19-6. The dispositional hearing statute requires the court to consider the necessity, nature, and extent of parental participation. IC 31-34-19-1(a)(2). The reasonable efforts statutes require that DCS "shall make reasonable efforts to preserve and reunify families," unless there has been a determination that reasonable efforts toward reunification are not required. See IC 31-34-21-5.5(b); IC 31-34-21-5.6(b); IC 31-34-21-5.8.

VIII.A. Jurisdiction

IC 31-30-1-1(5) states that the juvenile court has exclusive jurisdiction in "[p]roceedings governing the participation of a parent, guardian, or custodian in a program of care, treatment, or rehabilitation of a child under IC 31-34-16 [CHINS] or IC 31-37-15 [delinquency]."

VIII.B. Standing to File Petition

The persons who have standing to file a parental participation petition are the attorney for DCS and the guardian ad litem or court appointed special advocate. IC 31-34-16-1.

VIII.C. Parental Participation Petition

The petition shall be verified. IC 31-34-16-2. The petition shall be entitled "In the Matter of the Participation of _____ the Parent, Guardian, or Custodian of_____". The petition must allege: (1) that the respondent is the child's parent, guardian, or custodian and (2) that the child

has been adjudicated a child in need of services. IC 31-34-16-3(a). IC 31-34-16-3(b) states that a petition seeking participation of a parent, guardian, or custodian may include a recommendation that the parent, guardian, or custodian should do one or more of the following:

(1) obtain assistance in fulfilling obligations as a parent, guardian, or custodian;
(2) provide specified care, treatment, or supervision for the child;
(3) work with a person providing care, treatment, or rehabilitation for the child;
(4) refrain from direct or indirect contact with the child.
(5) participate in a mental health or addiction treatment program.

IC 31-34-16 does not clarify if the petitioner must particularize the services, or other participation sought in the parental participation petition. It is preferable that the petition state exactly what participation is sought, any relevant standards or quality of participation, and the reasons for the participation.

In **In Re A.M.-K.**, 983 N.E.2d 210 (Ind. Ct. App. 2013), the Court affirmed the juvenile court's parental participation order in part, reversed the court's order in part, and remanded the case for further proceedings. Id. at 217. The trial court found that the child was a CHINS on evidence that: (1) Mother had been found by Police Officer in a state of nudity after swimming nude in a nearby creek; (2) Police Officer became concerned for Mother's mental health when he observed that Mother was demonstrating odd behavior, such as emotional swings from crazed laughter to yelling into the sky; (3) Police Officer detained Mother to take her to a hospital for mental health evaluation and treatment; (4) Mother had left the child's sister alone in a hotel; (5) Mother had been diagnosed with post-traumatic stress disorder, a pseudo-seizure disease, and a neurocardio disease, but had stopped taking her medication; (6) the child's sister had previously been adjudicated a CHINS due to Mother's attempted suicide by overdosing on prescription medications and alcohol; (7) Mother had threatened to jump off a balcony; and (8) Mother had told the child's sister to chew on pieces of wood when the sister said that she was hungry. A dispositional hearing was held and DCS submitted a pre-dispositional report that included all of its recommendations for the child and Mother. DCS recommended that Mother participate in a number of services, including a psychiatric evaluation, that Mother follow all recommendations from that evaluation, and that Mother meet all her personal, medical, and mental health needs, including taking prescription medications as prescribed. The guardian ad litem concurred in these recommendations. DCS failed to submit a parental participation petition as to Mother. Mother raised no objections to most of DCS's recommendations, but she specifically objected to the provision directing her to take all medications as prescribed. The juvenile court ordered Mother to comply with the DCS's recommended plan of participation in its entirety. Mother appealed.

The Court concluded that DCS's failure to file a parental participation petition did not require that the Court vacate the entire participation order, including the requirement that Mother participate in a psychiatric evaluation. Id. at 216. Mother did not challenge the CHINS determination, but challenged the authority of the juvenile court to enter a parental participation order. Mother also challenged the court's authority to order Mother to take any medications as prescribed. The Court first examined Mother's contention that, because DCS filed to submit a parental participation petition prior to the dispositional hearing, the trial court was without authority to enter a parental participation order at all. The Court noted that IC 31-34-19-1(a)(2) provides that one of the purposes of a dispositional hearing is to consider "the necessity, nature, and extent of the participation by a parent, a guardian, or a custodian in the program of care, treatment, or rehabilitation of the child." Id. at 215. The Court observed that a few cases from different panels of the Court have held that the filing of a parental participation petition is jurisdictional, and that,

without it, the juvenile court has no authority to order parental action. Id., citing Mikel v. Elkhart Cnty. Dep't. of Public Welfare, 622 N.E.2d 225, 229 (Ind. Ct. App. 1993) and In Re M.R., 934 N.E.2d 1253, 1256 (Ind. Ct. App. 2010). The Court found these cases distinguishable from the present case. Id. The Court noted that, although DCS failed to file a formal parental participation petition as described in IC 31-34-16-3, it did file a predispositional report that included all of its recommendations for the proposed plan of care, treatment, rehabilitation and placement of the child and also summarized recommendations for how Mother should obtain assistance in fulfilling her parental obligations and explained why such assistance was necessary. Id. The Court also noted that: (1) the DCS family case manager who prepared the predispositional report was present at the dispositional hearing and available for cross examination about the recommendations contained within the report; (2) Mother specifically agreed to almost all of the recommendations, objecting only to the provision that required Mother to take any medications as prescribed; (3) Mother acquiesced in the procedures utilized by the juvenile court in ordering her to complete various services and treatments. Id. at 215-216. The Court said that it appeared that the DCS predispositional report, although it did not have the statutorily required title for a parental participation petition, nonetheless substantially complied with the requirements of IC 31-34-16-3. Id. at 216.

In **In Re M.R.**, 934 N.E.2d 1253 (Ind. Ct. App. 2010), the Court vacated the juvenile court's parental participation decree with regard to Alleged Father. Id. at 1257. The Court opined that because the proper procedures were not followed, including the filing of a proper verified parental petition, the juvenile court did not have authority to order Alleged Father's parental participation as part of its CHINS disposition. Id. at 1256. The Court discussed the following procedural requirements that must be met before parental participation can be ordered as part of a CHINS disposition: (1) a verified petition, signed by the attorney for DCS or the guardian ad litem or court appointed special advocate must be filed (IC 31-34-16-1 and -2); (2) the form and substance of the petition as set out at IC 31-34-16-3 must be followed; (3) after the verified petition is filed, IC 31-34-16-4 provides that the court may hold a hearing and shall advise the parent that failure to participate as required by an order issued under IC 31-34-20-3 can lead to termination of the parent-child relationship. Id. at 1255-56.

IC 31-26-3.5-1.5 provides that "child welfare substance abuse services" include: (1) addiction counseling; (2) inpatient detoxification; (3) medication assisted treatment, including a federal Drug Administration approved long acting, nonaddictive medication for the treatment of opioid or alcohol dependence. IC 31-29-3.5-2 authorizes DCS to establish and fund child welfare substance abuse treatment services for families and children who have an open CHINS or delinquency case. IC 31-26-3.5-2.5 requires that information and training about child welfare substance abuse treatment services shall be provided to judges, DCS employees, and public defenders.

VIII.D. When to File Petition

Since IC 31-34-16-3(2) requires the petitioner to allege in the parental participation petition that the child has been adjudicated a CHINS, it appears that the petition should not be filed until there is an admission of CHINS or a judgment of CHINS in the factfinding hearing. IC 31-34-16-4(a) does not set a time requirement for filing the petition, but suggests that the petition may be filed in advance of the dispositional hearing and anytime thereafter.

VIII.E. Notice

The juvenile code does not specifically provide for service of the parental participation petition upon the parent, guardian or custodian, but that is the best practice to insure due process of law. It is necessary for the party seeking parental participation to give advance

notice of the requested participation so that the parent, guardian, or custodian can be adequately prepared to "controvert any allegations made at the child's dispositional or other hearing concerning his participation" as is the parent's right under IC 31-34-10-5(3)(A) and IC 31-32-2-3.

VIII.F. Hearing, Standard of Proof, Hearsay, Advisement of Consequences

IC 31-34-16-4 provides that the "court may hold a hearing on a [participation] petition concurrently with a dispositional hearing or with a hearing to modify a dispositional decree." The hearing is necessary to allow the parent, guardian, or custodian to cross-examine witnesses, subpoena witnesses and tangible evidence, and present evidence regarding parental participation as is guaranteed under the rights statute, IC 31-32-2-3. IC 31-34-16-4(c) provides that if the court finds that the allegations in the parental participation petition are true, the court shall enter a decree. IC 31-34-16-4(b) provides that the court shall advise the parent that failure to participate as required by a participation order can lead to the termination of the parent-child relationship.

Practice Note: The juvenile code and case law do not directly address the admissibility of hearsay in the parental participation hearing. Usually, probative hearsay is admissible in all post-adjudication hearings. Hearsay relevant to participation may be contained within the predispositional report, if probative. IC 31-34-19-2(a). The counter argument to the admissibility of hearsay is the right of the parent, guardian, or custodian to cross-examine witnesses in parental participation proceedings. IC 31-32-2-3(b). The admission of hearsay limits the right of cross-examination.

The statutes regarding parental participation for children in need of services (IC 31-34-16-1 through 4) and delinquency (IC 31-37-15-1 through 4) are very similar, so delinquency case law can provide guidance. In **In Re A.W.**, 756 N.E.2d 1037 (Ind. Ct. App. 2001), a delinquency case, the Court reversed and remanded the trial court's permanency plan delinquency order which required Father and Stepmother to participate in assessments and counseling due to sexual abuse allegations made concerning Father by the child. Id. at 1046. The Court held that the juvenile court's authority to require parental participation pursuant to IC 31-37-18-9 is tempered by statutory due process considerations. Id. at 1045. The Court noted IC 31-32-2-3 provides that, in proceedings to determine whether the parent, guardian or custodian should participate in a program of care, treatment or rehabilitation for the child, the parent is entitled: (1) to cross-examine witnesses; (2) to obtain witnesses or tangible evidence by compulsory process; and (3) to introduce evidence on behalf of the parent, guardian or custodian. Id. at 1044-45. The Court found that the Montgomery County DFC's conclusion that the child's allegations of sexual abuse were substantiated was based on the caseworker's conversations with others, reports by others and a polygraph examination, and the child did not testify to the sexual abuse allegations at the permanency hearing. Id. at 1045. The Court opined that, because delinquency proceedings allow as evidence reports that would otherwise be inadmissible, serious due process concerns arise when the allegations constitute criminal conduct or conduct impairing parental rights. Id. Among the failures of due process discussed by the Court were: (1) no parental participation petition had been filed; (2) there was no notice to Father and Stepmother that the court might make an adjudication affecting them; (3) Father and Stepmother were not allowed to exercise their statutory due process rights; (4) Father and Stepmother were not parties to or informed of the child's polygraph; (5) Father and Stepmother could not properly and effectively cross-examine the witnesses who filed reports stating that the child's allegations of sexual abuse were credible and substantiated. Id. at 1044.

In **A.E.B. v. State**, 756 N.E.2d 536 (Ind. Ct. App. 2001), the Court affirmed the delinquency finding, but reversed the parental participation order because a proper verified parental

participation petition had not been filed. Id. at 543. The Court also held that because a parental participation order can direct the parent-child relationship and affect their mutual interests, a child can challenge a parental participation order. Id. at 542. See also **S.S. v. State**, 827 N.E.2d 1168, 1173 (Ind. Ct. App. 2005) (juvenile court erred in failing to inform Mother of her right to contest the parental participation order), *trans. denied*.

VIII.G. Scope of Parental Participation Orders

The scope of parental participation orders is set out at IC 31-34-16-3. IC 31-34-20-1(a)(6) provides that the court may "[o]rder the child's parent, guardian, or custodian to complete services recommended by the department and ordered by the court under IC 31-34-16 [parental participation petition], IC 31-34-18 [predispositional report], and IC 31-34-19 [dispositional hearing]." The scope of parental participation may be limited by IC 31-34-19-6, which requires that the dispositional decree should provide the least interference and disruption of family life and the least restraint on the freedom of the child and the child's parent, guardian, or custodian that is consistent with the safety of the community and the best interest of the child.

VIII.G. 1. Possible Participation Orders

In addition to the traditional participation orders for counseling, parenting programs, child care, visitation, and cooperation with DCS and other service providers, the broad language of IC 31-34-16-3 and IC 31-34-20-3 would support parental participation orders to obtain (or seek) employment, housing, mental health and addiction treatment, and income supplements (such as TANF, SSI) as could be considered necessary to fulfill parental obligations. The statute would authorize orders specifying the manner in which the child is to be supervised and possibly setting housing and cleanliness standards, if neglect was an issue. The participation order should contain language that parents must keep the court, DCS, and service providers informed of current addresses and phone numbers, and maintain regular contact with DCS and service providers.

IC 31-34-16-3(b)(5) provides that the parental participation petition may include the recommendation that the parent, guardian, or custodian participate in a mental health or addiction treatment program. Numerous termination of parental rights opinions reflect that juvenile courts regularly order parents to participate in testing, counseling, and other forms of treatment for mental, emotional, drug, and alcohol problems.

VIII.G. 2. Case Law

In **In Re A.M.-K.**, 983 N.E.2d 210 (Ind. Ct. App. 2013), the Court reversed the portion of the trial court's dispositional order that required Mother, who had exhibited odd behavior and had been diagnosed with bipolar disorder during a recent involuntary commitment, to take all medications as prescribed. Id. at 217. Mother had presented evidence of serious side effects and religious beliefs in support of her objection to the order, contending that the order violated her constitutional right to direct her own medical treatment. The Court noted that DCS had presented no testimony from a psychiatrist that an order directing Mother to take any particular medication was necessary for Mother to be stable enough to adequately parent the child. Id. The Court believed that there was an inherent problem where the parental participation order did not direct Mother to take a specifically recommended medication on the basis of a doctor's evaluation of her mental health but required her to take "any and all medications" without regard to her objections and the possible side effects. Id. The Court opined that DCS presented sufficient evidence to support the court's remaining orders, including that Mother participate in a psychiatric evaluation, which was "reasonably related" to the evidence presented at the factfinding and dispositional hearings. Id. The Court said that, once such an evaluation takes place, DCS may have sufficient information to move for a

modification of the dispositional order to require that Mother take specifically recommended medications deemed necessary for reunification. Id.

In **In Re V.H.**, 967 N.E.2d 1066 (Ind. Ct. App. 2012), the Court vacated the participation order as a matter of course, since it had reversed the CHINS adjudication. Id. at 1074. The Court noted that, even if the CHINS adjudication had been affirmed, it would have vacated the participation order because of procedural errors and because the requirements ordered were unrelated to the CHINS adjudication. Id. at 1073. In reaching its decision, the Court noted the following facts: (1) a different magistrate presided over the dispositional hearing than was at the factfinding hearing; (3) the new magistrate did not have the transcript from the factfinding hearing, which led Mother to move for a continuance; and (3) the juvenile court at the dispositional hearing failed to see the relevance of the transcript because DCS was only recommending "standard services." Id. The Court felt that the transcript from the factfinding hearing was relevant at the dispositional hearing, especially because the dispositional hearing was presided over by a different magistrate than the one who presided over the CHINS adjudication hearing. Id. The Court opined that the evidence that was produced at the factfinding hearing should have influenced the services and requirements that were ordered in the participation order. Id. The Court also observed that Mother was ordered to complete requirements and accept services that were not supported by the record because DCS recommended only "standard services". Id. at 1074. The Court noted some of examples of these services and requirements as: (1) permitting the DCS family case manager to make unannounced visits to ensure the child's safety, even though the child's safety was not an issue; (2) maintaining a stable job and residence when her house was already determined to be suitable, and Mother had always been employed full-time; (3) putting in place a plan to protect the child from abuse or neglect from any person when there was no evidence of abuse or neglect; (4) reimbursing DCS $25 a week for services, even though Mother had to schedule the child's psychological evaluation on her own because DCS failed to do so in a timely manner. Id. The Court discouraged juvenile courts from using such boilerplate requirements. Id.

In **In Re A.C.**, 905 N.E.2d 456 (Ind. Ct. App. 2009), the Court held that there was sufficient evidence to support the CHINS adjudication, but the evidence did not support the requirements of the participation decree that Mother submit to drug and alcohol assessment, random drug testing, and substance abuse treatment; and the trial court's findings of fact did not support the participation decree order that Mother establish paternity for the child. Id. at 464-65. Consequently, the Court remanded with instructions to vacate the portions of the participation decree consistent with the opinion. Id. at 465. The Court noted that (1) the trial court's findings of fact found that "[Mother] agreed that she needed the services being proposed by the [DCS] but disagreed that she needed any substance evaluation services," and determined that paternity had already been established; (2) the judgment of paternity and support was entered into evidence; (3) there was no other reference to any alleged substance abuse in the findings of fact or conclusions of law; and (4) a review of the record disclosed no allegation or even an indication that Mother had a substance abuse problem. Id. at 464. The Court opined that (1) the trial court was using mere boilerplate language in its participation decree; (2) such use can make the citizenry cynical about the requirements necessary to achieve the goals of a CHINS adjudication; (3) the requirements the trial court determines for the participation of parents must relate to some behavior or circumstance that was revealed by the evidence; (4) the permanency plan of reunification was not furthered by ordering Mother to participate in services that were unnecessary to address a behavior or circumstance that was relevant to the child's removal from her care; (5) forcing

unnecessary requirements upon parents whose children have been adjudicated as CHINS could set parents up for failure with the end result being not only failure to achieve the goal of reunification but potentially the termination of parental rights; and (6) these possible ramifications are inconsistent with the general requirement that "the [DCS] shall make reasonable efforts to preserve and reunify families," and not unduly interfere with the parent-child relationship. Id. at 464-65

In **Wardship of J.C. v. Allen Cty. Office**, 646 N.E.2d 693 (Ind. Ct. App. 1995), the Court opined that the office of family and children is not required to file a parental participation plan in the CHINS case as a precondition to seeking termination of parental rights. Id. at 695. The Court noted that the "participation plan serves as a useful tool in assisting parents in meeting their obligations" and in clarifying the rehabilitation services to be provided by the welfare department, but termination of parental rights can occur without a participation plan if the necessary elements of the termination statute are met. Id.

VIII.H. Department of Child Services Obligation to Assist in Parent Rehabilitation

The juvenile code obligates DCS to assist in parental rehabilitation. IC 31-34-21-5.5(b) requires DCS to make reasonable efforts to preserve and reunify families unless the court has made a finding pursuant to IC 31-34-21-5.6 that reasonable efforts are not required. DCS is required at dispositional and case review hearings to recount to the court the reunification and rehabilitation services that have been provided. See IC 31-34-19-10(a)(4); IC 31-34-21-5(a)(2) and (b)(2), (b)(3), and (b)(14). Other statutes also require the provision of services by DCS. For example, IC 31-25-2-7(a)(4) and (5) provide that DCS is responsible for providing and administering family services and family preservation services. See also IC 31-25-2-11(b), which provides that, in accordance with a local plan for child protection services, DCS shall, by juvenile court order... (2) provide for or arrange for and coordinate and monitor the provision of the services necessary to ensure the safety of children. IC 31-25-2-11(c) states that "[r]easonable efforts must be made to provide family services designed to prevent a child's removal from the child's parent, guardian, or custodian." IC 31-40-1-2(a) states that "[e]xcept as otherwise provided in this section and subject to: (1) this chapter; and (2) any other provisions of IC 31-34, IC 31-37, or other applicable law relating to the particular program, activity, or service for which payment is made by or through the department; the department shall pay the cost of any child services provided by or through the department for any child or the child's parent, guardian, or custodian".

In **C.T. v. Marion Cty. Dept. of Child Services**, 896 N.E.2d 571 (Ind. Ct. App. 2008), *trans. denied*, a termination case, the Court specifically cautioned MCDCS that a juvenile court's determination that reunification services are no longer required pursuant to IC 31-34-21-5.6 neither abolishes a parent's fundamental right to family integrity, nor absolves MCDCS of its responsibility to properly oversee and manage the case. Id. at 588.

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

conditions resulting in the child's removal would not be remedied and the termination order was affirmed. Id. at 870-72.

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

In **In Re E.S.**, 762 N.E.2d 1287 (Ind. Ct. App. 2002), the Court reversed the termination judgment, and agreed with Mother's contention that DFC did not provide sufficient evidence to support a finding that the conditions which resulted in the child's removal or the reasons for placement outside Mother's care would not be remedied. Id. at 1292. The Court noted that DFC did not provide Mother with any services or conduct any type of evaluation of the progress she was making in counseling. Id. at 1291. The Court found that, even though the DFC did not mandate that Mother obtain services, she actively sought assistance on her own, including regularly attending counseling and parenting classes. Id.

Indiana termination case law has recognized that DCS is unable to provide rehabilitative services to incarcerated parents. See **In Re B.H.**, 44 N.E.3d 745, 752 n.7. (Ind. Ct. App. 2015) (Court said that, to the extent Father argued that reversal of the termination order was warranted because DCS did not provide him with services during his incarceration, it is well established that DCS is not required to provide services before commencing termination proceedings), *trans. denied*; **In Re Z.C.**, 13 N.E.3d 464, 470 (Ind. Ct. App. 2014) (Court was unable to address alleged inadequacies of services offered to incarcerated Mother during CHINS proceeding because that issue is unavailable during termination appeal); **In Re H.L.**,915 N.E.2d 145, 148 n.3. (Ind. Ct. App. 2009) (Court observed that failure to provide services for incarcerated Father did not serve as a basis on which to directly attack termination order as contrary to law); **Castro v. Office of Family and Children**, 842 N.E.2d 367, 375 (Ind. Ct. App. 2006) (in response to Father's argument that services were not provided to him, Court agreed that office of family and children did everything it could to the best of its ability given its resources and Father's incarceration), *trans. denied*; and **Rowlett v. Office of Family and Children**, 841 N.E.2d 615, 622 (Ind. Ct. App. 2006), (OFC did not, nor was it required to provide incarcerated Father with services directed at reuniting him with his children) *trans. denied*.

See Chapter 4 at VI. for information on reasonable services to preserve and reunify families.

IX. FINANCIAL RESPONSIBILITY FOR SERVICES, PLACEMENT, AND CHILD SUPPORT

IX. A. DCS Responsibility

IC 31-40-1-2 addresses the obligation of DCS to "pay the cost of any child services provided by or through the department for any child or the child's parent, guardian, or custodian." IC 31-40-1-2 states:

(a) Except as otherwise provided in this section and subject to:
(1) this chapter; and

(2) any other provisions of IC 31-34, IC 31-37, or other applicable law relating to the particular program, activity, or service for which payment is made by or through the department;

the department shall pay the cost of any child services provided by or through the department for any child or the child's parent, guardian, or custodian.

(b) The department shall pay the cost of returning a child under IC 31-37-23 or IC 11-13-4.5-1.5[the interstate compact on juveniles].

(c) Except as provided under section 2.5 of this chapter, the department is not responsible for payment of any costs of secure detention.

(d) The department is not responsible for payment of any costs or expenses for child services for a child placed in a child caring institution, a group home, or a private secure facility if the entity does not have an executed contract with the department, unless the child services to be provided by the entity are recommended or approved by the director of the department or the director's designee in writing prior to the placement.

(e) The department is not responsible for payment of any costs or expenses for housing or services provided to or for the benefit of a child placed by a juvenile court in a home or facility located outside Indiana, if the placement is not recommended or approved by the director or the director's designee.

(f) If a county is responsible for the payment of:

(1) any costs or expenses of services for or the placement of a child in need or services; or

(2) the costs or expenses of services for or the placement of a delinquent child;

the court may order the parents to reimburse the county as set forth in section 3.8 of this chapter.

IC 31-40-1-2.5 addresses payment by DCS for an adjudicated CHINS who is receiving DCS funded services under a case plan and dispositional decree and who is placed in a secure detention facility by juvenile court due to a delinquency proceeding. IC 31-40-1-2.5(b) allows DCS, by agreement with the probation office of the juvenile court in which the delinquency case is pending, to pay the cost of specified services for a child during the time a child is placed in secure detention. IC 31-40-1-2.5(e) provides that the agreement shall be signed by the DCS director and the judge of the juvenile court that ordered or approved placement of the child in the secure detention facility.

In **A.B. v. State**, 949 N.E.2d 1204 (Ind. 2011), a delinquency case, the Supreme Court affirmed the trial court's order placing the adjudicated delinquent child in an out-of-state placement at Canyon State Academy in Arizona. Id. at 1208. The Court held, inter alia, that DCS was ordered to pay for this placement despite DCS's refusal to pay for the placement pursuant to IC 31-40-1-2. Id. at 1220. At the time the A.B. case was heard, IC 31-40-1-2(f) provided that DCS was not responsible for out-of-state placements that were not recommended or approved by the DCS director or the director's designee. Id. at 1218. The Court opined that the appropriate standard for review of the DCS director's decision that did not approve the out-of-state placement is provided by Indiana's Administrative Orders and Procedures Act (AOPA), IC 4-21.5. Id. at 1216. The Court noted that IC 4-21.5-2-3 states that "[t]his article applies to an agency, except to the extent that a statute clearly and specifically applies otherwise." Id. The Court did not believe it was necessary to hold that disapproving decisions by the DCS Director under IC 31-40-1-2(f) were subject to the AOPA, but the Court applied AOPA standards in appellate review of those decisions. Id. at 1217. The Court noted that AOPA specifies five instances under which judicial relief should be granted due to prejudice by an agency action, one of which is if the agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."

IC 4-21.5-5-14(d). Id. at 1217. The Court, quoting City of Indianapolis v. Woods, 703 N.E.2d 1087, 1091 (Ind. Ct. App. 1998), said that an arbitrary and capricious decision is one which is "patently unreasonable" and is "made without consideration of the facts and in total disregard of the circumstances and lacks any basis which might lead a reasonable person to the same conclusion." A.B. at 1217. The Court opined that, in reviewing the actions of DCS in making placement recommendations that are not in agreement with the trial court, the Court will review the DCS action to determine if it was in conformity with IC 4-21.5-5-14. Id.

The Court said that the DCS action in denying out-of-state placement was arbitrary and capricious. Id. at 1219. The Court noted the following evidence in support of its conclusion: (1) the Arizona placement was more cost effective than any placement option in Indiana, and the placement was offering a scholarship to help defray the costs; (2) the Arizona placement included costs of transition out of the restrictive placement and costs of after-care services, while none of the Indiana placements either provided or could guarantee those same services would be provided; (3) the juvenile probation officer believed that out-of-state placement would help the child, as the child had absconded from previous placements in Indiana; (4) the Arizona placement allowed for the child to learn vocational skills, complete his education, learn independent living skills, transition to employment, and explore secondary education options; and (5) the child was willing to go to the Arizona placement and his family was willing for him to go there. Id. at 1219-20. The Court observed that the only rationale for DCS opposing the out-of-state placement appeared to be based on the decision to keep the child in Indiana. Id. at 1219. The Court said that, from its review of the record, the Arizona placement could provide for all of the child's needs better than the Indiana placements. Id.

In **In Re M.W.**, 913 N.E.2d 784 (Ind. Ct. App. 2009), a delinquency case, the Court reversed the trial court's order mandating the Indiana Department of Child Services (DCS) to pay the costs of the child's secure detention and weekly child support while she was incarcerated at Department of Correction (DOC). Id. at 789. The fifteen-year-old child was a ward of DCS and residing in a foster home because her parents' parental rights had been terminated five years earlier. She was charged with possession of a stolen vehicle and operating a vehicle never licensed, a Class D felony and a Class C misdemeanor, respectively, if committed by an adult. The child admitted to the charges and the trial court awarded wardship of the child to DOC. The trial court also ordered that DCS was to reimburse Hendricks County for all costs of detention and to pay DOC weekly guideline child support. DCS appealed the order's provisions regarding DCS. The Court held that, based on unambiguous statutory provisions, DCS was not responsible to carry the costs of the child's secure detention unless there was a written agreement. Id. at 787. Since no such written agreement ever existed, DCS could not be held liable to pay the child's costs of secure detention to Hendricks County. Id. The Court opined that the trial court erred in finding that DCS was required to pay weekly child support for the child. Id. at 789.

IX. A. 1. Financial Responsibility for GAL Fees

In **In Re N.S.,** 908 N.E.2d 1176 (Ind. Ct. App. 2009), the Court reversed and remanded for further proceedings two consolidated cases in which the trial court had erroneously ordered that DCS pay the guardian ad litem fees associated with the underlying CHINS proceedings. Id. at 1182-83. In each of these two cases, In Re N.S. and In Re J.M., the trial court determined that there was probable cause to believe the child was a CHINS, appointed a guardian ad litem, and ordered DCS to pay a $300.00 preliminary guardian ad litem fee. DCS appealed the trial court's orders that it pay the preliminary guardian ad litem fee, and moved that the cases be consolidated for appeal. The consolidation request was granted. The Court concluded that IC 31-40-3-2 clearly states that the fiscal body of the county shall appropriate

money for use by the courts in providing guardian ad litem or court appointed special advocate services, and that IC 33-24-6-4 supports the proposition that the burden of financially supporting guardian ad litem and court appointed special advocate programs lies with the county. Id. at 1180-82. The Court held that the trial court erred in ordering DCS to pay the fees associated with the services provided by the guardians ad litem in the two cases. Id. at 1182.

IX. A. 2. DCS Responsibility Ends When Reason For CHINS Ends

In **Lake County FCS v. Charlton**, 631 N.E.2d 526 (Ind. Ct. App. 1994), the Court reversed the juvenile court's order refusing to close the wardship of a CHINS at a status review hearing. Id. at 528. The Court ruled that the office of family and children was not responsible to reimburse the parents for expenses incurred after the status hearing, since the evidence presented at the status hearing showed that the parents were now financially able to meet the child's needs; therefore, the child no longer met the legal definition of a CHINS. Id.

IX. A. 3. DCS Responsibility For Costs of Mental Health Services

IC 12-24-13-6 provides that DCS "is responsible for the cost of treatment or maintenance of a child under the department's custody or supervision who is placed in a state institution only if the cost is reimbursable under the state Medicaid program under IC 12-15."

IX. B. Responsibility of Court and DCS to Seek Parental Reimbursement and Child Support

IC 31-34-18-3 obligates DCS to submit information regarding the parent's financial situation to the court for the dispositional hearing. The court is obligated to raise the issue of child support once the child has been removed from the home. IC 31-40-1-5(b) and (c). The court "shall" address reimbursement for services ordered for the child, parent or custodian, beginning with the detention hearing. IC 31-40-1-3(c). The juvenile code does not specifically require DCS to seek reimbursement or child support orders. The best practice is for DCS to file a motion seeking reimbursement or child support.

IC 31-40-1-5(a) applies whenever the court approves removal of a child from the home of a child's parent or guardian and places the child in a child caring institution, a foster family home, a group home, or the home of a relative that is not a foster home. IC 31-40-1-5(b) states that the court shall order existing support payments to be assigned to DCS for the duration of the out-of-home placement. The juvenile court shall also notify the court that entered the existing support order or had jurisdiction to modify or enforce the support order of the assignment and the juvenile court's assumption of jurisdiction. IC 31-40-1-5(c) states that, if an existing support order is not in effect, the court shall order support to be paid by each of the child's parents or the guardians of the child's estate, based on the Indiana Supreme Court Child Support Guidelines. IC 31-40-1-5(c)(2) states that the court does not need to order child support if the court finds that the entry of a support order based on the Guidelines would be unjust or inappropriate, considering the child's best interests and other necessary obligations of the child's family, or DCS does not make foster care maintenance payments for the child. IC 31-40-1-5(g) states that, at or after a hearing, the court may order the parents or the guardian of the child's estate to reimburse DCS for all or any portion of the expenses paid by DCS for the child's benefit during the placement.

Practice Note: IC 31-40-1-5 is a lengthy statute so the above is only a summary of its provisions.

IX. C. Responsibility of Parent or Guardian For Child Support

IC 31-40-1-5(e) provides that the Title IV-D agency shall establish, modify, or enforce child support orders assigned or entered by a court and DCS shall, if requested, assist the Title IV-D agency in doing this.

In **Perkinson v. Perkinson**, 989 N.E.2d 758 (Ind. 2013), a dissolution case, the Indiana Supreme Court opined that an agreement to forego parenting time in exchange for relief from child support is void and against public policy. Id. at 760. The Court said that the concept of parents negotiating away parenting time as a means to eliminate the obligation to pay child support is repugnant, and that attorneys should refuse to be a part of such discussion and should advise their clients that any such discussion is unacceptable. Id.

In **Marriage of Snow v. England**, 862 N.E.2d 664 (Ind. 2007), the Indiana Supreme Court held, as a matter of first impression, that when a relationship of *in loco parentis* exists, that status alone is an insufficient basis for imposing a child support obligation on the stand-in parent. Id. at 667. The Court saw a number of public policies that militate against imposing a child support obligation on a custodian or guardian, and noted that Indiana policy disfavors entering a support order against adults who are not natural parents. Id.

IX. C. 1. Child Support Requirements and Exceptions

IC 31-40-1-5(a) indicates that the child support provisions apply whenever a court issues an order removing the child from the home of the child's parent or guardian, and placing the child in a child caring institution, group home, foster family home, or the home of a relative that is not a foster family home. The juvenile court's responsibilities with regard to child support vary depending upon whether or not there is an existing child support order.

IX. C. 1. a. Requirements if Already Existing Child Support Order

IC 31-40-1-5(b) provides that if there is an existing child support order for a child, the court shall order that the support payments be assigned to DCS for the duration of the child's placement outside of the home. The juvenile court shall give notice of the assignment of support and of its assumption of jurisdiction to the court that previously had jurisdiction to modify or enforce the child support order. The statute does not address the fact that usually only one parent will be obligated to pay support under a divorce or paternity child support order, and therefore does not seem to require the court to order the previous custodial parent to pay child support while the child is out of the home. However, the provision of the statute that deals with determining child support when there has been no prior support order, IC 31-40-1-5(c)(2), indicates that the court should order "each" of the child's parents or the guardians of the child's estate to pay support.

IX. C. 1. b. Requirements if No Existing Child Support Order and Support Order Exceptions

If an existing support order is not in effect, IC 31-40-1-5(c) provides that the court shall include in its order for removal of the child or for out-of-home placement of the child, an assignment of any right to child support or payment of medical costs to DCS. The court shall order "each" of the child's parents or the guardian of the child's estate to pay child support based on the child support guidelines, unless one of the following exceptions applies: (1) the court finds that an order based on the Indiana child support guidelines would be "unjust or inappropriate considering the best interests of the child and other necessary obligations of the child's family," or (2) DCS does not make foster care maintenance payments to the child's custodian.

IX. C. 2. Child Support Payments Made to Clerk and Distribution of Payments

IC 31-40-1-5(d) states that child support payments shall be paid to the clerk of the circuit court as trustee for remittance to DCS or to the state central collection agency established in

IC 31-25-3-1. IC 31-40-1-5(e) provides that the Title IV-D Child Support Enforcement Agency shall establish, modify, or enforce child support orders, and DCS shall assist the Title IV-D agency if requested.

IX. D. Responsibility of Parent or Guardian to Reimburse DCS For Expenditures

IX. D. 1. Standards and Conditions For Ordering Reimbursement

IC 31-40-1-3(a) provides that a parent or guardian of the estate of an adjudicated delinquent or CHINS or a participant in a program of informal adjustment is financially responsible for any services provided by or through DCS. IC 31-40-1-3(b) requires the parent or guardian of the child's estate to furnish the court and DCS with an accurately completed and current child support worksheet. IC 31-40-1-3(c) states that the court shall order the parents or the guardians of the child's estate to pay for or reimburse the costs of services provided to the child, parent, or guardian, unless the court specifically finds that the parent or guardian is unable to pay or that justice would not be served by ordering payment. IC 31-40-1-3(d) and (e) address the payment of parental reimbursement to DCS. IC 31-40-1-3(d) states:

> (d) Any parental reimbursement obligation under this section shall be paid directly to the department and not to the local court clerk so long as the child in need of services case, juvenile delinquency case, or juvenile status offense case is open. The department shall keep track of all payments made by each parent and shall provide a receipt for each payment received. At the end of the child in need of services, juvenile delinquency, or juvenile status action, the department [DCS] shall provide an accounting of payments received, and the court may consider additional evidence of payment activity and determine the amount of parental reimbursement obligation that remains unpaid. The court shall reduce the unpaid balance to a final judgment that may be enforced in any court having jurisdiction over such matters.

IC 31-40-1-3(e) states:

> (e) After a judgment for unpaid parental reimbursement obligation is rendered, payments made toward satisfaction of the judgment shall be made to the clerk of the court in the county where the enforcement action is filed and shall be promptly forwarded to the department in the same manner as any other judgment payment.

IC 31-40-1-3.8 addresses parental responsibilities for reimbursement to the county if the county is responsible for costs or expenses of services or the placement of a CHINS or delinquent child. IC 31-40-1-3.8(a) states that the juvenile court shall use the child support obligation worksheet to determine what each parent should pay, and a parent who participates in a treatment plan developed by DCS or the court is entitled to receive a parenting time credit under the Child Support Guidelines. IC 31-40-1-3.8(b) states that each parent shall furnish the court with a child support obligation worksheet before a detention hearing, a hearing held after payment of costs by the county, the dispositional hearing or a dispositional modification hearing. IC 31-40-1-3.8(c) states that the juvenile court shall order the parents to pay for, or reimburse the county for the costs of services provided to the child or the parent unless the court specifically finds that the parent is unable to pay or that justice would not be served by ordering payment from the parent. IC 31-40-1-3.8(d) states that parental reimbursement shall be made to the clerk of the court, which shall "keep track" of all payments and provide a receipt for each payment received.

IC 31-40-1-4 provides that the parent or guardian of the child's estate shall reimburse DCS for all costs that the court orders the parent or guardian to pay under IC 31-40-1-3 when a child is returned to Indiana under the interstate compact on juveniles (IC 31-37-23). This reimbursement statute applies regardless of whether the child has been adjudicated a delinquent or CHINS.

In **In Re M.L.K**, 751 N.E.2d 293 (Ind. Ct. App. 2001), the Court reversed and remanded the order requiring Parents of an adjudicated CHINS to reimburse Wells County OFC over $21,000 in costs expended for the child's care. Id. at 299. Parents argued that their due process rights had been violated because the notice of wardship termination hearing they had received did not state that the subject of reimbursement of OFC expenses would be litigated. The Court opined that, although IC 31-40-1-3 provides for reimbursement determination at any hearing, due process required that Parents receive notice that reimbursement would be litigated at the hearing. Id. at 296. The apparent reason for the hearing was OFC's request to terminate wardship of the child due to her emancipation by marriage. Under the circumstances, the notice of wardship hearing would not give a reasonable person actual notice that reimbursement would be litigated. Id. at 298. The Court quoted Aldon Builders, Inc. v. Kurland, 284 N.E.2d 826, 872 (Ind. Ct. App. 1972) for the principle that:

> A party is entitled to some notice that an issue is before the court which has not been pleaded or has not been agreed to in a pre-trial order. This is especially true where the new issue is not unequivocally clear by the evidence being submitted. This is not being technical. This is being fair. A party should be given an opportunity to meet the issues which the court is considering.

M.L.K. at 296. The Court further recommended that OFC file a petition specific to the reimbursement issue, stating that this had been done in other cases and "is the preferable procedure." Id. at 297.

IX. D. 2. Exceptions For Financial Reimbursement

IC 31-40-1-3(c) provides that the court "shall" order reimbursement, "unless the court finds that the parent or guardian is unable to pay or that justice would not be served by ordering payment from the parent or guardian."

IX. D. 3. Information Provided to Court For Reimbursement Decision

IC 31-34-18-3 requires the caseworker to prepare a financial report on the parent or the child's estate for the dispositional hearing. The purpose of the report is to assist the juvenile court in determining the person's financial responsibility for services provided for the child or the person. IC 31-40-1-3(b) requires the parent of a CHINS or a delinquent child to "furnish the court with an accurately completed and current child support obligation worksheet on the same form that is prescribed by the Indiana Supreme Court for child support orders."

IX. D. 4. Jurisdiction, Notice and Reimbursement Hearing

Satisfying the statutory requirements for subject matter jurisdiction in the CHINS case and obtaining personal jurisdiction over the parents or the guardian through appropriate notice are prerequisites to an order for financial responsibility. In **In Re Heaton**, 503 N.E.2d 410 (Ind. Ct. App. 1986), the juvenile court adjudicated a child to be in need of services without the filing of a CHINS petition and without notice to Parents. The juvenile court subsequently ordered Parents to reimburse the county for the cost of the child's care in a residential facility. On appeal, the Court ruled that the juvenile court lacked subject matter jurisdiction in the

absence of the CHINS petition; therefore, its order for payment was void and could be attacked at any time. Id. at 414. In **Mafnas v. Owen County Office of Family**, 699 N.E.2d 1210 (Ind. Ct. App. 1998), the Court ruled that the juvenile court lacked jurisdiction to order Parents to reimburse the office of family and children for the financial costs of a child who was not adjudicated CHINS prior to his eighteenth birthday. Id. at 1213.

Determining financial responsibility requires a hearing. See IC 31-40-1-3(c) (financial responsibility shall be determined at detention, dispositional or modification hearing); IC 31-32-2-3(3) and IC 31-34-10-5(3)(B) (right of parent, guardian, or custodian to controvert allegations regarding financial responsibility); and **L.J.F. v. Lake County Dept. of Pub. Welfare**, 484 N.E.2d 40, 41 (Ind. Ct. App. 1985) (reimbursement hearing required to determine Parent's financial responsibility for child's residential costs).

Case law has not dealt with hearsay in the context of the reimbursement hearing. The financial report required by IC 31-34-18-3 may qualify as a predispositional report, and IC 31-34-19-2(a) provides that "any predispositional report may be admitted into evidence to the extent that it contains evidence of probative value even if it would otherwise be excluded." Therefore the financial report can contain probative hearsay. The parents' statements about their income can be considered statements by a party-opponent, which are not hearsay according to Ind. Evidence Rule 801(d)(2).

Appropriate notice, preferably through a petition for reimbursement, is required to obtain a valid reimbursement order. See **In Re M.L.K**, 751 N.E.2d 293, 297 (Ind. Ct. App. 2001), discussed in detail in this Chapter at D.1. In M.L.K. the Court also reversed the trial court's determination that the reimbursement was not dischargeable in bankruptcy. Citing In Re Platter, 140 F.3d 676 (7th Cir. 1998), the Court opined that the debt was owed to OFC under the current statutory framework and was dischargeable in bankruptcy. M.L.K. at 298.

IX. E. Issues on Reimbursement and Child Support

The case law is in conflict on whether the court is obligated to hear evidence on the parent's ability to make financial reimbursement before it can hold the parent responsible, or whether the parent is obligated to raise the parent's inability to pay as an affirmative defense to avoid financial responsibility. Because the reimbursement statute, IC 31-40-1-3, and the child support statute, IC 31-40-1-5, appear to create separable and independent financial obligations, the court should clarify whether payment is being ordered as weekly child support that will end when the child is returned home, or as full or partial reimbursement toward the child's expenses, including significant placement costs. Whether an order is labeled as child support or as reimbursement may affect whether the obligation is dischargable in bankruptcy. There is a need to give the parents clear direction as to the purpose, and the ongoing or definitive nature of orders for monthly payments regarding children in placement.

In **In Re M.L.K.**, 751 N.E.2d 293, 298 (Ind. Ct. App. 2001), the Court opined that the order requiring parents to reimburse OFC for the entire cost of care for an adjudicated child in need of services was an obligation owed to OFC and, under the current statutory framework, was dischargeable in bankruptcy.

IX. E. 1. Judicial Obligation to Consider Parents' Ability to Reimburse

In **In Re M.L.K.**, 751 N.E.2d 293 (Ind. Ct. App. 2001), the Court reversed the reimbursement order to OFC on due process grounds, but also addressed other issues because they were likely to recur on remand. Id. at 299. The Court noted that the OFC's right to seek reimbursement is not unlimited and the juvenile court must comply with the statutory

requirements of IC 31-40-1-3(c) which state that reimbursement shall be ordered "…unless the court finds that the parent or guardian is unable to pay or that justice would not be served by ordering payment…" Id. at 298. The Court noted the importance of an inquiry into the ability to pay, noting that the trial court had heard absolutely no evidence regarding Parents' income, assets or financial status beyond their history of payment of the weekly court-ordered child support. Id. at 299. The Court concluded the trial court had no basis for determining whether Parents were financially able to pay the judgment. Id.

In **Matter of C.K.**, 695 N.E.2d 601 (Ind. Ct. App. 1998), *trans. denied*, a delinquency case, the juvenile court ordered the Father to pay $100 per week as reimbursement for the child's placement costs, based upon the child support guidelines. Subsequently, the office of family and children petitioned for reimbursement for the full cost of the child's care which totaled $59,116. The juvenile court granted the petition and ordered Father to pay the requested amount, less the weekly support he had already paid. Father appealed. The Court ruled that the court can enter judgment against the parent for the full amount of the placement costs beyond the weekly support amount ordered, but the court's earlier determination of the weekly support was "inadequate to constitute consideration of Father's ability to pay the entire reimbursement amount when reduced to judgment." Id. at 605. The case was reversed and remanded to the juvenile court to consider (1) Father's ability to pay the entire reimbursement sought, and (2) whether justice would be served by ordering reimbursement of the full amount. Id.

In **Carnahan v. State**, 558 N.E.2d 845 (Ind. Ct. App. 1990), the juvenile court ordered Parents of a delinquent child to reimburse the Indiana Department of Correction for the cost of the child's incarceration at the Indiana Boys School. On appeal, the Court noted that parental reimbursement must be ordered in compliance with statutory procedures, and it is not available as a matter of common law. Id. at 848. Reviewing the record of the case, the Court reversed the reimbursement order on the following grounds: (1) there was no evidence that the child had been adjudicated delinquent; (2) there was no evidence to support a finding that Parents were financially able to reimburse the expenses related to the child's incarceration; and (3) there was no evidence that Parents had received notice of the reimbursement proceeding, which is fundamental to due process. Id. 847-48.

In **L.J.F. v. Lake County Dept. of Public Welfare**, 484 N.E.2d 40 (Ind. Ct. App. 1985), the Court indicated that the trial court must determine the appropriateness of financial responsibility, rather than merely order it. The following quote shows the Court's dissatisfaction with the procedure used by the juvenile court, although the Court did not specify the error.

> Instead the hearing of November 21st commenced with the referee advising L.J.F.'s father that he was responsible for repaying the entire cost of placing L.J.F. at Excelsior. The father indicated that at that time he could afford to pay $100 per month for L.J.F.'s care but he did not know how long that would continue. No evidence was presented as to the family's other assets or needs. Incredibly, when the father indicated he felt he could not afford the entire expense and asked the referee how he could secure financial aid in caring for L.J.F., the referee responded, "Oh, I haven't the faintest idea, sir." (footnote omitted). The procedures employed at the reimbursement hearing were clearly contrary to law.

Id. at 41.

IX. E. 2. Burden to Prove Reimbursement Exception

In **In Re M.L.K.**, 751 N.E.2d 293 (Ind. Ct. App. 2001), the Court discussed the requirement that the party who alleges an inability to pay reimbursement has the burden of raising the defense and proving it by a preponderance of the evidence as stated in J.W. v. Hendricks County Office, 697 N.E.2d 480 (Ind. Ct. App. 1998). M.L.K. at 298. The Court "recognized the logic" behind the J.W. opinion, but felt that sound public policy dictated that the trial court consider the statutory factors and state its findings thereon before placing such a large burden on the child's parents. M.L.K. at 298. The Court opined that the approach adopted in Matter of C.K., 695 N.E.2d 601, 605 (Ind. Ct. App. 1998), was "more consistent with the legislative purpose in including the ability to pay inquiry in the statute." M.L.K. at 298-99.

IX. E. 3. Order Must Clarify Whether Parent is Responsible For Child Support Payment or Full or Partial Costs of Placement

In **Washburn v. Office of Family & Children**, 726 N.E.2d 361 (Ind. Ct. App. 2000), the office of family and children sought reimbursement for the residential costs of a delinquent child from Parents in an amount consistent with the child support guidelines. Parents were ordered to pay $40 per week. At subsequent hearings evidence was presented that the total costs of residential care exceeded $90,000, and the court ordered Parents to pay $500 per month. The office of family and children subsequently filed a Motion for Proceedings Supplemental, which the court granted and issued garnishment orders against Parents. On appeal, the Court clarified that proceedings supplemental under Ind. Trial Rule 69 are dependent upon a valid and enforceable judgment under Ind. Trial Rule 58. Id. at 363. The Court found that the trial court's ruling was unclear as to whether it had issued a final judgment for full or partial reimbursement of the child's residential costs. Id. at 364. The Court reversed and remanded for further proceedings to determine the amount, if any, owed by Parents to the office of family and children in compliance with the reimbursement statutes and the Indiana Child Support Guidelines. Id. The opinion noted that the Child Support Guidelines contemplate that child support will end when a child is emancipated or attains the age of 21, but reimbursement orders under IC 31-40 are not limited to weekly support only during the child's minority or the child's placement. Id. at 364 n.3. The Court also noted that the right to reimbursement is not unlimited, and the court must consider the parent's ability to pay and whether justice would be served "by an order in excess of that which a parent would have paid under child support orders during the child's minority." Id. at 364.

IX. E. 4. Effect of SS, SSI, Annuity or Other Payments or Reimbursement on Child Support

The Definition of Weekly Gross Income in Guideline 3A of the Indiana Child Support Guidelines specifically excludes benefits from means-tested public assistance programs, including, but not limited to Temporary Aid to Needy Families (TANF), Supplemental Security Income (SSI), and food stamps from the definition of weekly gross income of the parent. Guideline 3A also states that Social Security and V.A. pensions should be included. Survivor benefits paid to or for the benefit of children are not included.

In **In Re R.C.**, 713 N.E.2d 285 (Ind. Ct. App. 1999), a CHINS case, Mother assigned her child support from Father to the office of family and children while the child was in residential care. At a reimbursement hearing, the court ordered Father to pay one half of the costs of the child's residential care, which included credit for the child support payment, and the court determined that Father was able to pay $40 per week toward the reimbursement owed. On appeal, Father alleged that income from annuities paid as part of a settlement of medical malpractice for injuries he incurred should not have been considered in determining his ability to reimburse the office of family and children. The Court affirmed the trial court order, finding that it was not improper to include the annuities income. Id. at 287. The

evidence showed that Father was working part-time and not medically prevented from working additional hours, Father's wife was employed and they paid $575 in monthly rent, and Father had spent $90,000 on himself and his daughter from the proceeds of a medical malpractice award. Id.

In **Ritter v. Bartholomew County DPW**, 564 N.E.2d 329 (Ind. Ct. App. 1990), the juvenile court ordered Father to pay support to the welfare department for the care of his delinquent child. Father failed to pay support and the juvenile court found him in contempt. On appeal, Father argued that he was unable to pay support because the social security benefits he received for his son could not be used for that purpose. The Court affirmed the contempt finding and ruled that the social security benefits paid to Father on behalf of the child were a proper subject of a support order. Id. at 329.

In family law cases, the Court ruled that disability benefits should not be considered in holding a parent in contempt for failure to pay child support. In **Anderson v. Anderson**, 955 N.E.2d 236, 241 (Ind. Ct. App. 2011), the Court held that the amount of the lump-sum Social Security disability benefits received by the child and the amount of periodic Social Security disability benefits received by the child were income and thus were creditable against Father's existing child support arrearage. In **Cox v. Cox**, 654 N.E.2d 275 (Ind. Ct. App. 1994), noncustodial Father was disabled and received Supplemental Security Income (SSI). The trial court ordered him to pay child support based on potential income as if he were employed forty hours per week at minimum wage. The court subsequently found Father in contempt for failure to pay, and ordered him to serve a thirty day jail sentence unless he paid the child support as ordered. On appeal, the Court held that an SSI recipient as a matter of law lacks the money or means to satisfy his child support obligation. Id. at 277. In order to obtain SSI, Father had proven that he was unable to do any substantial gainful activity by reason of a medically determinable physical or mental impairment. Id. The Court reversed the trial court's decision, stating that it was clearly erroneous or contrary to law because it effectively constituted an impermissible collateral attack upon the determination of Father's entitlement to SSI benefits. See also **Cannon v. Caldwell**, 74 N.E.3d 255 (Ind. Ct. App. 2017) (Court held that as a matter of law, SSI recipients lack the money or means to satisfy child support obligations, so the court reversed and remanded the dissolution court's child support modification order requiring Father, an SSI recipient, to pay child support of $35 per week); **Esteb v. Enright by State**, 563 N.E.2d 139 (Ind. Ct. App. 1990) (Father's SSI should not be considered income for purposes of determining contempt for failing to pay child support).

IX. E. 5. Support Can Be Modified While Parent Incarcerated

In **Nunley v. Nunley**, 955 N.E.2d 824 (Ind. Ct. App. 2011), *trans. denied*, and in **Douglas v. State**, 954 N.E.2d 1090 (Ind. Ct. App. 2011), *trans. denied*, the Court considered the specific situation when parents have been incarcerated for nonsupport of dependent children and parents request courts to reduce their child support obligations based on a change in circumstances. In both cases, the Court examined the Indiana Supreme Court's decisions in Lambert v. Lambert, 861 N.E.2d 1176 (Ind. 2007) and Clark v. Clark, 902 N.E.2d 813 (Ind. 2009). The Court "declined to create an exception to the rules set forth" in Lambert and Clark for parents convicted of the crime of nonsupport of a dependent. Nunley at 826-27. Douglas at 1098. The Court also noted that the trial court may order parents' support obligations to automatically revert to the pre-incarceration level upon parents' release from prison. Nunley at 827. Douglas at 1098.

In **Lambert v. Lambert**, 861 N.E.2d 1176 (Ind. 2007), the Indiana Supreme Court adopted a non-imputation of income approach for the purpose of determining the amount of child

support to be paid by an incarcerated parent while incarcerated. The Court opined that this approach "allows courts to comply with the Guidelines by imposing at least the minimal support order as provided by the Ind. Child Support Guideline 2." Id. at 1181-82. The Court noted research from the Re-Entry Policy Council of the Council of State Governments, which indicates that, when high support orders continue through a period of incarceration and thus build arrearages, the response by the obligor is to find more methods of avoiding payments. Id. at 1181. The Court stated that, to the extent an order fails to take into account the real financial capacity of a jailed parent, the system fails the child by making it statistically more likely that the child will be deprived of adequate support over the long term. Id. The Court opined that the trial court could prospectively order that child support return to the pre-incarceration level upon a prisoner's release because the parent is theoretically able to return to that wage level, thus placing the burden on the obligor to seek modification if such is warranted. Id. at 1179, 1182. The Court also noted that this decision does not preclude the trial court from setting support orders that reflect the actual income or resources of an incarcerated parent; "it merely counsels against imputing pre-incarceration wages, salaries, commissions, or other employment income to the individual." Id. at 1182.

In **Clark v. Clark**, 902 N.E.2d 813 (Ind. 2009), the Indiana Supreme Court held that, in light of its analysis in Lambert v. Lambert, 861 N.E.2d 1176 (Ind. 2007), regarding petitions to modify a support order, incarceration may serve as a changed circumstance so substantial and continuing as to make the terms of the support order unreasonable pursuant to IC 31-16-8-1. Clark at 817. The Court also concluded that a support obligation should be based on the obligated parent's actual earnings while incarcerated as well as other assets available to the incarcerated person, and disapproved prior opinions of the Court of Appeals which are inconsistent with this conclusion. Id. According to the Court, a trial court may order the child support obligation to revert to the preincarceration level upon release, consistent with the modification recommendation, thus, relieving the custodial parent from the burden of obtaining a new modification order when the obligated parent is released. Id.

In **Becker v. Becker**, 902 N.E.2d 818 (Ind. 2009), the Indiana Supreme Court held that Lambert v. Lambert, 861 N.E.2d 1176 (Ind. 2007) and Clark v. Clark, 902 N.E.2d 813 (Ind. 2009) do not apply retroactively to modify child support orders already final, but only relate to petitions to modify child support granted after Lambert was decided. Becker at 820-21. The Court explained that a trial court only has the discretion to make a modification of child support due to incarceration effective as of a date no earlier than the date of the petition to modify. Id. at 821. The Court opined that the date on which Becker instituted his request for relief was the earliest date the abatement could become effective. Id.

In **In Re Guardianship of R.M.M.**, 901 N.E.2d 586 (Ind. Ct. App. 2009), the Indiana Supreme Court found its holding in Lambert v. Lambert, 861 N.E.2d 1176 (Ind. 2007) to be applicable, and reversed and remanded the trial court's denial of Father's petition to modify his weekly child support obligation. R.M.M. at 589-90. When both Father and Mother were incarcerated, their five-year-old child's great uncle and aunt were awarded guardianship, and the trial court ordered each parent to pay $15 per week child support. A month later, the guardians filed a petition to modify the support order, which resulted in the trial court modifying the order so that each parent was to pay $67 per week. The trial court found that the parents were "each imputed to have a weekly gross income of $210." Father filed a pro-se petition to modify child support, which the trial court denied. The Court found that the development in Indiana child support law that made the terms of Father's support order unreasonable satisfied the "substantial change in circumstances" requirement which must be met before a child support obligation can be modified, as set forth in IC 31-14-11-8(1). Id. at

588-89. The Court noted that: (1) Father was not attempting to reduce an existing child support order after being incarcerated; (2) Father was incarcerated at the time of the calculation of the initial order, had his support increased while incarcerated, and had been incarcerated throughout the entire course of this litigation; (3) Father's support obligation was not based on the actual income and assets available to him as Lambert instructs child support obligations should be; (4) Father presented evidence that he was earning approximately $6 per month; (5) no facts in the record indicated Father had any additional available assets; (6) the evidence before the trial court indicated that the previous child support obligation of $15 per week was more appropriate than the $67 subsequently ordered, especially considering the Lambert decision; and (7) Father was not attempting to avoid his child support obligations and candidly admitted his willingness to pay a lesser amount. Id. at 589-90.

In **Strowmatt v. Rodriguez**, 897 N.E.2d 500 (Ind. Ct. App. 2008), the Court affirmed the trial court's denial of Father's petition to recalculate his child support arrearage to eliminate the amounts accrued during several periods of incarceration based on Lambert v. Lambert, 861 N.E.2d 1176, 1181 (Ind. 2007). Strowmatt at 502-03. The Court found this case distinguishable from Lambert in that (1) the trial court did not impute income to Father when it ordered his child support obligation; and (2) Father was not seeking to modify or abate his child support obligation, but was seeking to eliminate his child support arrearage due to his past incarceration. Id. The Court opined that, with limited exceptions not applicable in this case, Indiana has long held that after support obligations have accrued, a court may not retroactively reduce or eliminate those obligations. Strowmatt at 503.

In **In Re Paternity of E.C.**, 896 N.E.2d 923 (Ind. Ct. App. 2008), the Court concluded that the reasoning supporting the Indiana Supreme Court decision in Lambert v. Lambert, 861 N.E.2d 1176, 1181 (Ind. 2007) applied equally to requests for modification of child support due to incarceration. E.C. at 926. Because Father demonstrated a showing of changed circumstances so substantial and continuing as to make the terms of the current child support order unreasonable, the Court found that the trial court erred when it denied Father's request for modification of child support. Id. at 926-27.

In **In Re Paternity of N.C.**, 893 N.E.2d 759 (Ind. Ct. App. 2008), the Court affirmed the trial court's order requiring incarcerated Father to pay $6 per month child support. Id. at 761. Contrary to Father's contention, the Court found the support order to be consistent with Lambert v. Lambert, 861 N.E.2d 1176, 1177 (Ind. 2007), where the Supreme Court held that "in determining support orders, courts should not impute potential income to an imprisoned parent based on pre-incarceration wages or other employment related income, but should rather calculate support based on the actual income and assets available to the parent." N.C. at 760-61. The Court noted the Lambert Court emphasized that the child support system is not meant to be punitive, but is an economic system designed to measure the relative contribution each parent should make and is capable of making, to share fairly the economic burdens of child rearing. Lambert at 1179. N.C. at 761.

IX. F. Enforcement of Reimbursement and Child Support Orders

IC 31-40-1-6(a) authorizes DCS to contract with the prosecuting attorney, an attorney licensed to practice in Indiana (if the attorney is not a DCS employee), or a private collection agency for the enforcement of parental reimbursement orders. IC 31-40-1-6(d) states that the contract must be in writing; include all fees, charges, and costs; include the right of DCS to cancel the contract any time; and require the contractor to update DCS on the source and form of each payment received and the amount and percentage deducted as a fee from each payment. The contract may be a

contingency contract with a fee that does not exceed 15% of the reimbursement collected per case, and must have a term of not more than four years.

IX. G. Continuing Jurisdiction to Enforce Reimbursement Orders

The continuing jurisdiction statute, IC 31-30-2-1(c), provides that the juvenile court retains jurisdiction over the parent or guardian of a child's estate until the parent or the estate has satisfied any financial obligation ordered under IC 31-40.

IX. H. Contempt

A parent or guardian may be held in contempt of court for failure to comply with financial responsibility orders, and the juvenile court may enter judgment for the amount due. IC 31-40-4-1. See this Chapter below at XI. for full discussion on contempt.

In **Mafnas v. Owen County Office of Family**, 699 N.E.2d 1210 (Ind. Ct. App. 1998), the office of family and children filed a petition for reimbursement of the cost of services provided for the children, including the costs related to the oldest child. The court issued a judgment against Parents for $24,518.33, and ordered Parents to pay $25 per month toward the judgment. On a motion for rule to show cause for failure to make the monthly payments, the court found Parents in contempt of court and ordered them to serve a thirty day jail sentence. On appeal, the Court ruled that the trial court lacked jurisdiction over the oldest child because he was not adjudicated a CHINS prior to his eighteenth birthday, even though the CHINS petition had been filed prior to his eighteenth birthday. Id. at 1213. The Court determined that the statutory authority for reimbursement for county expenditures applies only to a child who is adjudicated a CHINS; therefore, the trial court was without authority to order reimbursement for the care of the oldest child. Id. at 1214. The Court ruled that the trial court had authority to hold Parents in contempt for their failure to reimburse the county for money expended for the other three children who had been adjudicated CHINS prior to their eighteenth birthdays. Id. Despite the general rule that money judgments are not enforceable by contempt, the Court determined that the costs in this case were in the nature of child support and therefore payment could be enforced by contempt. Id. at 1213. The Court quoted Pettit v. Pettit, 626 N.E.2d 444, 447 (Ind. 1993), that "contempt is always available to assist in the enforcement of child support, at least in respect of unemancipated children, including orders to pay accrued arrearage and money judgments against delinquent parents for past due amounts." Mafnas at 1213. Further, the Court ruled that the proscription against incarceration for debt in the Indiana Constitution does not prevent the use of contempt and incarceration to enforce child support obligations. Id. at 1214.

In **Richardson v. Lake Cty. Dept. of Pub. Welfare**, 439 N.E.2d 722 (Ind. Ct. App. 1982), the Court acknowledged that the contempt power could be used to enforce a court order for the support of a child adjudicated "dependent and neglected,"(which was the legal designation before legislation changed the term to Child in Need of Services). The Court ruled that a support order for reimbursement to the welfare department was not enforceable by contempt once the child was emancipated, reached her majority, or was deceased. Id. at 724. The available remedy in those situations is execution or attachment. Id.

IX. I. Civil Liability of Parents for Necessities of Child

In **Schmidt v. Mutual Hosp. Services, Inc.**, 832 N.E.2d 977 (Ind. Ct. App. 2005), the hospital, through a collection agency, filed a lawsuit against Parents seeking to collect $171,816.99 for medical services provided to their child, who required seventy-five days of hospitalization in the neonatal intensive care unit after birth. Law enforcement officers had facilitated hospitalization of the child's pregnant Mother despite Father's religious objections to medical treatment. The child was born in the hospital with potentially life-threatening ailments. The Court opined that the

hospital had a continuing duty to treat the child, notwithstanding the circumstances surrounding her admission and birth. Id. at 982. The Court stated that "parents do not have the right to refuse life-saving treatment and therefore the hospital had to act and had to act immediately." Id. The Court opined that, even though Parents specifically declined medical treatment due to their religious objections to treatment and stated that they would not pay for services provided without their consent, Parents were nevertheless responsible for the cost of the child's medical treatment. Id. The Court affirmed the trial court's granting of summary judgment to the hospital's collection agency due to Parents' obligation as a matter of law to pay for medical services provided to their child, even over their objection. Id. at 983-84.

In **St. Mary's Medical Center, Inc. v. Bromm**, 661 N.E.2d 836 (Ind. Ct. App. 1996), the hospital appealed the trial court's denial of its motion for summary judgment and grant of Father's motion for summary judgment regarding prenatal and childbirth expenses for Father's sixteen-year-old daughter. Father, who was the noncustodial parent, argued the following: (1) he had not consented to pay for any services provided to his daughter; (2) he had informed his daughter and Mother that he would not be responsible for any bills if his daughter became pregnant; (3) he had no opportunity to control his daughter's behavior and therefore should not be required to pay for the results of that behavior. The Court opined that the hospital was entitled to seek payment from Father for his daughter's medical services, noting that the Indiana Supreme Court had recognized a parent's duty to support his minor child, including the provisions of reasonable and necessary medical services. Scott Co. School District No. 1 v. Asher, 324 N.E.2d 499 (Ind. 1975). St. Mary's at 837. The Court reversed and remanded the case with instructions for the court to hold a hearing and make a factual determination regarding which, if any, of the charged expenses resulted from care provided to the grandchild and to enter judgment in favor of St. Mary's in the amount of the charges resulting from care provided to the daughter. Id. at 838. Father's obligation to support his daughter did not extend to any medical expenses for services provided to his grandchild. Id. But see **Bryant v. Mutual Hosp. Services** 669 N.E.2d 427, 428 (Ind. Ct. App. 1996), in which the Court reversed the trial court's granting of summary judgment in favor of the hospital, which sought to re-cover compensation from Mother for medical services provided to her seventeen-year-old child for venereal disease and depression. The Court opined that Mother was not liable for medical services provided to the child which were necessitated by the child's refusal to submit to the reasonable restraints imposed by Mother. Id. at 430.

X. MENTAL HEALTH COMMITMENT AND VOLUNTARY PLACEMENT

X. A. Options For Treating Children with Mental Illnesses

The juvenile dispositional statutes authorize outpatient services for children with mental health problems. IC 31-34-20-1(a)(2). For a child with greater mental health needs, the court can authorize DCS to place the child into a placement with specialized mental health programming under the authority of the dispositional statute, IC 31-34-20-1(3). Alternatively, the court can authorize a voluntary placement of a child into a mental health facility or facilitate a civil mental health commitment proceeding in the juvenile court or the probate court.

X. B. Voluntary Mental Health Placement

A voluntary mental health placement is obtained by an application to a state mental health facility, and the consequent determination by the superintendent or a physician that the child "has a mental illness or has symptoms of mental illness" and is appropriate for placement. IC 12-26-3-1. The parent or legal guardian of a child under the age of eighteen may apply for the voluntary mental health placement. IC 12-26-3-2(a). No hearing is required. See **Parham v. J.R.**, 442 U.S. 584, 99 S. Ct. 2493 (1973).

IC 31-34-19-5 states that, if the court authorizes a child who is under the custody or supervision of DCS or a local office to be placed in a state institution for voluntary treatment in accordance with IC 12-26-3, the court may not release DCS from further obligations to the child until a parent, guardian, or other responsible person approved by the court assumes the obligations.

X. C. Mental Health Commitment

A temporary civil commitment may be appropriate when a child has a mental illness and is either gravely disabled or dangerous to himself or others. IC 12-26-6-1. Mental illness is defined at IC 12-7-2-130 as "a psychiatric disorder that substantially disturbs an individual's thinking, feeling, or behavior; and impairs the individual's ability to function." The term "includes intellectual disability, alcoholism, and addiction to narcotics or dangerous drugs." There are four different types of detention under the commitment law: immediate police detention (IC 12-26-4); emergency detention for seventy-two hours (IC 12-26-5); temporary commitment for less than ninety days (IC 12-26-6); and regular commitment for a person who is suffering from a chronic mental illness which is reasonably expected to require custody, care, or treatment for a period in excess of ninety days (IC 12-26-7). Any person over the age of eighteen can initiate a temporary commitment proceeding by filing a petition with an attached written statement from a physician indicating the need for commitment.

If the juvenile court determines that a mental health commitment is necessary, the court can either refer the matter to probate court for the commitment, or it can initiate its own commitment proceeding. IC 31-34-19-3; IC 31-30-1-5. However, the juvenile court only has the statutory authority to place a committed child into a "child caring institution" and cannot place the child into a community or state facility under the direction of the Division of Mental Health (DMH). If the juvenile judge believes that a DMH facility is more appropriate for the child, then the judge shall transfer the commitment proceeding to the probate court. IC 12-26-1-4(b); IC 31-34-19-3(1).

In **In Re R.L.H.**, 831 N.E.2d 250 (Ind. Ct. App. 2005), the Court reversed the orders of the St. Joseph Probate Court in three juvenile delinquency cases where the trial court had, as a dispositional order, committed the delinquent children to Larue Carter State Hospital, a facility operated by the Department of Mental Health and Addiction (DMHA). Id. at 251. The Court found that the St. Joseph Probate Court, which has both juvenile and probate jurisdiction, exceeded its statutory authority by failing to follow the commitment procedures set forth at IC 12-26-7 and IC 12-26-8:

> First, a regular commitment proceeding begins with the filing of a written petition, which must include a physician's written statement that he or she believes that the individual is (1) mentally ill and either dangerous or gravely disabled; and (2) in need of custody, care, or treatment in a facility for a period expected to be more than ninety days. IC 12-26-7-3(a)(2). If the commitment is to a state institution administered by DMHA, such as Larue Carter, the record must include a report from a community mental health center stating that the center has evaluated the individual and that commitment to such an institution is appropriate. IC 12-26-7-3(b). The court is also required to hold a hearing before ordering the regular commitment of an individual. IC 12-26-7-4.

Id. at 257.

X. D. Outpatient Mental Health Commitment

IC 12-26-14-1 and IC 12-26-14-2 provide that if a mental health commitment hearing has been appropriately conducted, the court can order an outpatient commitment if the court finds, among other things, that (1) the individual is likely to benefit from outpatient therapy designed to

decrease the individual's dangerousness or disability and (2) the outpatient program representative testifies that the program can accept the individual immediately. An outpatient commitment is often appropriate for an individual who can function safely in society on a strictly enforced medication regimen.

J.M.F. v. State, 721 N.E.2d 267 (Ind. Ct. App. 1999), involved a minor who was placed in a residential facility by the juvenile court following a delinquency charge that he had molested his younger sister. Id. at 268-69. Subsequently, the deputy prosecutor filed a petition for the involuntary civil commitment of the minor, and the minor was committed to an outpatient treatment program. Id. at 269. The Court reversed the commitment on the grounds that the trial court could not commit the child to an outpatient program without the recommendation of the child's examining physician and without testimony that the child would be guaranteed immediate placement into the outpatient program. Id. at 269-70.

X. E. Responsibilities of Guardian ad Litem/Court Appointed Special Advocate and DCS in Commitments

IC 12-26-8-1(a) requires the juvenile court to appoint a guardian ad litem or court appointed special advocate for the child before it commences any commitment proceedings. IC 12-26-8-1(e) provides that an "advocate shall represent and protect the best interests of the child." IC 12-26-8-3(a) states the guardian ad litem/court appointed special advocate may be represented by an attorney. If necessary to protect the child's best interests, IC 31-12-26-8-3(b) states the court may appoint an attorney to represent the advocate. IC 12-26-2-7 provides that, except for gross misconduct, the advocate is immune from civil liability if the advocate performs his/her duties in good faith.

IC 12-26-8-6 grants the guardian ad litem/court appointed special advocate access to all reports relevant to the child. IC 12-26-8-4 requires the guardian ad litem/court appointed special advocate to visit the facility where the child is committed and evaluate the child's placement within thirty days after commitment, sixty days after commitment, six months after commitment, and every six months thereafter. IC 12-26-8-5 requires the guardian ad litem/court appointed special advocate to submit a report of each review of the child's commitment to the juvenile court, the warden of the facility where the child is committed, DCS, and each party to the commitment proceeding.

In **In Re R.L.H.**, 831 N.E.2d 250 (Ind. Ct. App. 2005), the Court noted the statutory requirement of appointment of a court appointed special advocate or guardian ad litem and the statutory duties as provided in IC 12-26-8-1 et seq. in commitment proceedings. Id. at 257. The Court also noted that DCS or the probation department are required to periodically report to the trial court on the progress made in implementing the commitment pursuant to IC 12-26-8-9. Id. See this Chapter at X.C. above for further discussion.

X. F. Responsibility of DCS in Mental Health Placements

IC 31-34-19-4 provides that when a commitment proceeding involving a CHINS is pending in either the probate court or juvenile court, the juvenile court shall discharge the child or continue the court's CHINS proceeding under the juvenile law. If the child is under the custody or supervision of DCS, the juvenile court may not release DCS from its obligations to the child pending the outcome of the commitment proceeding. IC 31-34-19-5 provides that when a voluntary mental health placement is made, the court cannot release DCS from its obligations to the child until a parent, guardian, or other responsible person, approved by the court, assumes those obligations. IC 12-24-13-6 states that DCS is only responsible for the cost of treatment or

maintenance of a child under DCS custody or supervision who is placed in a state institution if the cost is reimbursable under the state Medicaid program under IC 12-5.

In **In Re E.I.**, 653 N.E.2d 503 (Ind. Ct. App. 1995), the Court reversed the juvenile court's joinder of the Department of Education (DOE), the Indiana Department of Mental Health (IDMH), and the Indiana Family and Social Services Administration (FSSA) as necessary parties to the CHINS proceeding involving a thirteen-year-old autistic and developmentally delayed child in need of an appropriate mental health placement. Id. at 506, 510. The Court ruled that Marion County Office of Family and Children (MCOFC) was responsible for the needs and placement of the child. Id. at 511. The Court held that the trial court lacked the authority to order IDMH and DOE to share in the costs of the child's residential placement, as MCOFC, rather than those designated state agencies, was responsible for those costs. Id. at 512.

X. G. Responsibility of Division of Mental Health and State of Indiana for Children with Mental Illnesses

Y.A. by Fleener v. Bayh, 657 N.E.2d 410 (Ind. Ct. App. 1995), was a class action suit brought against state officials by seriously emotionally disturbed youths under the age of eighteen alleging the need for residential placement. The plaintiffs sought mandatory injunctive relief and a court order declaring a duty on the state to provide safe, appropriate, and therapeutic placements. The plaintiffs argued that: (1) the Indiana Constitution, Article 9 section 1, and Indiana statutes imposed an affirmative obligation upon the state to develop and provide residential services for emotionally disturbed children, and (2) the state violated plaintiffs' due process rights by not safeguarding them from harm or providing them with minimally adequate treatment. The Court affirmed the trial court's grant of summary judgment in favor of the state officials and rejected the plaintiffs' claimed right to placements. Id. at 419-20. The Court reviewed IC 12-21-1-1 through 3 and IC 12-8-8-1 through 8 and concluded that "the legislature did not intend to provide the comprehensive residential services demanded by the plaintiffs." Id. at 416. The Court opined that "the statutes describing services to be provided by the Division of Mental Health reflect a conscious effort to limit services to those available under existing appropriations." Id. The Court reasoned, "we are not at liberty to fashion a degree of care for a particular segment of the class, nor are we enabled to direct the General Assembly to raise funds adequate for the executive to care for all members of the class in an unlimited fashion." Id. at 417-418. In ruling on the plaintiffs' due process claim, the Court found that a child in the custody of state officials has the constitutional right to be free from physical abuse or neglect, but did not extend this right to be free from some form of undifferentiated harm separate and apart from physical abuse or neglect. Id. at 419. The Court found no constitutional right to specific residential placement. Id.

For additional case and statutory law on the responsibility of the Division of Mental Health see the following: **Matter of Garrett**, 631 N.E.2d 11 (Ind. Ct. App. 1994) (Department of Mental Health is not responsible for mental health costs of juveniles); **In Re Commitment of T.J.**, 614 N.E.2d 559 (Ind. Ct. App. 1993) (probate court orders to the Department of Mental Health regarding placement of a mentally ill child were voidable for failure to join the Department as a party to the involuntary commitment, but a mandate procedure is appropriate to compel the Department of Mental Health to perform a duty prescribed by law); **In Re Commitment of A.N.B.**, 614 N.E.2d 563 (Ind. Ct. App. 1993) (probate court can use mandate procedure to force Department of Mental Health to make arrangements for child's admission to appropriate state facility, but Department of Mental Health is not generally responsible for the costs of child's commitment or placement as that financial obligation falls upon the child's parents or other "responsible parties").

XI. CONTEMPT

XI. A. Juvenile Court Authority in Contempt

IC 31-32-14-1 provides that the juvenile court may punish a person for contempt of court under IC 34-47.

XI. B. Criminal Contempt

Criminal contempt can be either direct or indirect and may be punishable by fine or imprisonment. **B.L. v. State**, 688 N.E.2d 1311, 1313 n. 2 (Ind. Ct. App. 1997). In **Matter of Lemond**, 413 N.E. 2d 228 (Ind. 1980), the Indiana Supreme Court held the juvenile court judge and an attorney and his client in indirect criminal contempt for circumventing its ruling under the Uniform Child Custody Jurisdiction Act through a "sham" CHINS proceeding. In that case the court defined indirect criminal contempt as follows:

> A criminal contempt can be any act which manifests a disrespect for and defiance of a court. The willful and intentional disobedience of the orders of these courts can constitute indirect criminal contempt. In Re Perrello, (1973) 260 Ind. 26, 291 N.E.2d 698. See Denny v. State, (1932) 203 Ind. 682, 182 N.E. 313.

Lemond, 413 N.E.2d at 231.

In **Metzger v. State**, 6 N.E.3d 485 (Ind. Ct. App. 2014), *trans. denied*, the Court affirmed the trial court's finding that the defendant, who had been arrested for operating a vehicle while intoxicated, committed criminal contempt for refusing to comply with a court order to submit to a blood draw. Id. at 488. The Court opined that, based on the defendant's uncooperative actions, it could be reasonably inferred that the defendant had no intent to comply with the court's order. Id. The Court said that the defendant's act was clearly directed against the authority of the court and hindered the execution of the trial court's warrant. Id.

In **Jones v. State**, 847 N.E.2d 190 (Ind. Ct. App. 2006), *trans. denied*, the Court affirmed the trial court's finding that the sole witness in a murder case, who failed to appear in response to a subpoena for a pre-trial deposition, committed indirect criminal contempt. The Court opined that the contempt was criminal because it was an act directed against the dignity and authority of the court that obstructed the administration of justice and tended to bring the court into disrepute. Id. at 199. The contempt was indirect because the failure to appear at the deposition took place away from the courtroom and outside the personal knowledge of the court. Id. The one-hundred-and-two day sentence to the Marion County Jail as a sanction for the criminal contempt was affirmed as appropriate and reasonable. Id. at 202-203.

In **Davidson v. State**, 836 N.E.2d 1018 (Ind. Ct. App. 2005), the Court reversed the trial court's finding that a criminal defendant was in direct criminal contempt for refusing to sign the terms and conditions of his probation when a probation officer visited him in the county jail and for cursing the probation officer and judge. Direct contempt includes those actions occurring near the court, interfering with the business of the court, of which the judge has personal knowledge. Id. at 1020. Courts have inherent power to punish summarily acts of direct contempt without formal charges or an evidentiary hearing. Id. For direct criminal contempt, the Court must focus on two inquiries:

> (1) whether the act stands in disregard of judicial authority, thereby threatening the integrity of the court and impeding its work and (2) whether the judge possessed immediate and personal knowledge of the contemptuous act.

Id. at 1022. The Court opined that there was no immediate threat to the trial court; therefore, the defendant's acts did not warrant dispensation of the due process rights afforded to those accused of indirect contempt. Id. at 1023. The case was remanded for indirect contempt proceedings conducted pursuant to IC 34-47-3. Id. at 1024. See **In Re Guardianship of C.M.W.**, 755 N.E.2d 644, 650 (Ind. Ct. App. 2001) (any act which manifests a disrespect and defiance of the court may constitute direct criminal contempt; actions must interfere with the business of the court and judge must have personal knowledge of the actions). See also **Direct Criminal Contempt Proceedings**, 864 N.E.2d 425, 430 (Ind. Ct. App. 2007) (court clerk's alleged misrepresentation in a certification to the trial court that a bond had been released as the trial court had directed did not rise to the level of direct criminal contempt, which involves actions in the court's presence that disturb its business and proceedings), *trans. denied.*

XI. C. Direct Contempt

Direct contempt occurs when a person displays disruptive or unlawful behavior or creates a disturbance in the court. IC 34-47-2-1. The disturbance can be caused by talking, moving about, or by signs or gestures. IC 34-47-2-1(b)(2). Direct contempt can also occur when a witness refuses to testify. IC 34-47-2-2. Failure by a properly subpoenaed witness to appear may be dealt with summarily by issuance of an attachment order rather than through a contempt proceeding. IC 34-47-1-1(c). An attorney can be held in direct contempt of court for failure to appear for a hearing. See **In Re Nasser**, 664 N.E. 2d 93 (Ind. 1994) (Courts have inherent power to punish summarily acts of direct contempt without formal charges or evidentiary hearing). See also **Williams v. State Ex Rel. Harris**, 690 N.E. 2d 315, 317-18 (Ind. Ct. App. 1997) (Williams, a non-attorney, was not given an opportunity to explain his absence from court hearings and to purge himself of contempt; case remanded for indirect contempt proceedings); and IC 34-47-2-4.

In **Smith v. State**, 893 N.E.2d 1149 (Ind. Ct. App. 2008), the Court affirmed the trial court's finding of direct contempt where the defendant's use of an offensive epithet, continued outbursts, and flagrant disrespect of the trial court's authority interfered with the court's business and manifested a disrespect for and defiance of the court. Id. at 1154. The Court also found that the master commissioner had the authority to make the contempt finding, and the judge was not required to approve a final order by signature in this case. Id. at 1152. The Court concluded that the trial court was not required to appoint a neutral judge for the sole purpose of assessing sanctions for the contemptuous behavior, and its failure to do so did not violate the defendant's due process rights. Id. at 1153.

See the following cases in which direct contempt findings were reversed: **Troyer v. Troyer**, 867 N.E.2d 216, 221 (Ind. Ct. App. 2007) (in dissolution case, because there was no disturbance or disruption of the proceedings and thus no act of direct contempt, the Court reversed the trial court's order of direct contempt against Wife, who had filed six post-trial motions the day after the trial court warned her not to persist in conduct which it characterized as engaging in filing numerous frivolous pleadings); **Pryor v. Bostwick**, 818 N.E.2d 6, 12-13 (Ind. Ct. App. 2004), (Mother's profane, negative comments about the judge in a paternity case did not occur near or in the courtroom; therefore, judge lacked personal knowledge of alleged contemptuous conduct); **In Re Guardianship of C.M.W.**, 755 N.E.2d 644, 651 (Ind. Ct. App. 2001) (grandfather's misrepresentations to court in his emergency petition on guardianship case did not cause a disruption or disturbance of the proceedings; his actions were not directly contemptuous); **Srivastava v. Indianapolis Hebrew Cong.**, 779 N.E.2d 52, 60 (Ind. Ct. App. 2002 (no direct contempt in civil lawsuit because alleged actions had not happened in open court).

XI. D. Indirect Civil Contempt

Indirect civil contempt is not directed at a wrong against the court, but is an action to force compliance with a court order for the benefit of the party harmed by noncompliance. IC 34-47-3-1 provides that a person commits indirect contempt by "willful disobedience of any process, or any order lawfully issued." Indirect contempt can also occur as follows: interference with execution of process or an order (IC 34-47-3-2); influencing testimony (IC 34-47-3-3); or making a false or inaccurate report of a case (IC 34-47-3-4).

In **In Re A.S.**, 9 N.E.3d 129 (Ind. 2014), the Indiana Supreme Court reversed the trial court's order which found A.S.'s co-worker, Townsend, in indirect contempt pursuant to IC 34-47-3-2, and imposed sanctions upon Townsend. Id. at 134. Townsend had completed an application for court ordered emergency detention for A.S., alleging that A.S. was mentally ill and dangerous or gravely disabled, and claimed that A.S. had threatened suicide. After the trial court ordered A.S. detained at the hospital, the doctors determined that A.S. was not exhibiting any of the symptoms alleged in Townsend's application, and A.S. was discharged from the hospital. The trial court issued a citation to Townsend, ordering her to appear and show cause why she should not be held in contempt. After hearing evidence, the trial court found Townsend in indirect contempt and ordered her to pay A.S.'s hospital bill and attorney fees, fined Townsend $500.00, and ordered her to write letters of apology to A.S. and the hospital. The Court held: (1) the trial court acted outside of its statutory authority in finding Townsend in indirect contempt; (2) there was no lawful process or court order in place when Townsend acted, and it is axiomatic that she could not be guilty of willfully resisting, hindering, or delaying execution of any lawful process or court order, as required by IC 34-47-3-2; (3) it is not the trial court's role to independently investigate the validity of reports that initiate legal proceedings, compel witnesses to appear before it, and mete out punishment when it finds those reports to be unsubstantiated. Id. at 132-34.

In **In Re Paternity of N.T.**, 961 N.E.2d 1020 (Ind. Ct. App. 2012), the Court held that the paternity court had the inherent power to subject Stepfather, a nonparty, to contempt proceedings for violation of its orders. Id. at 1023. Mother and Stepfather had hidden the child from Father and the State from August 2003 to December 2007 to evade a change of custody order issued by the paternity court. The Court also disagreed with the trial court's decision that service of Father's application for contempt against Stepfather elevated Stepfather to the status of a party in the underlying paternity case, entitling Stepfather to a change of venue from the judge pursuant to T.R. 76. Id. at 1023.

XI. D. 1. Initiating an Indirect Contempt Proceeding: Rule to Show Cause and Contempt Citation

IC 34-47-1-1 provides that the statutory procedures set out in IC 34-47-2 and 3 shall apply to all proceedings for contempt in all courts of record in Indiana, except the Indiana Supreme Court. IC 34-47-3-5(a) provides that a person charged with indirect contempt is entitled to be served with a "rule of the court" against which the contempt was alleged to have been committed. The rule to show cause must set forth the facts constituting the alleged contempt with specificity and reasonable certainty, and specify a time and place for the alleged contemnor to show cause why he should not be held in contempt. IC 34-47-3-5(d) provides that the rule to show cause must be supported by an information and fully verified by the oath or affirmation of some officer of the court or other responsible person. But see **Crowley v. Crowley**, 708 N.E.2d 42, 53 n.8 (Ind. Ct. App. 1999) (procedural requirements of IC 34-47-3-5 are binding in contempt actions, but failure to issue rule to show cause upon contemnor prior to contempt citation did not violate contemnor's rights in this particular case). IC 34-47-4-1 provides that the court may order a citation issued to the sheriff for service upon the person alleged to be guilty of contempt, directing the person to appear before the court at the time fixed in the citation, and to show cause why

the person should not be punished for contempt of court. The citation shall be served by the sheriff in the same manner as a summons is served in a civil proceeding, and return should be made to the court issuing the citation.

In **Stanke v. Swickard**, 43 N.E.3d 245 (Ind. Ct. App. 2015), the trial court found Father in contempt because: (1) he had not returned the two children to Mother after his midweek parenting time; (2) he had taken the children out of state without giving Mother the information required by the Indiana Parenting Time Guidelines; and (3) he had failed to pay child support. The trial court's rule to show cause order failed to set forth the facts and allegations clearly and distinctly, and did not comply with IC 34-47-3-5(b) or provide the history of Father's child support payments or the amount of his arrearage as required by IC 31-16-12-6(c). Id. at 249. The Court noted that Father was unemployed, did not admit that he had the ability to pay support, and thus did not admit to the factual basis of the contempt allegations regarding nonpayment of child support. Id. The Court concluded that Father's due process rights were violated and the trial court erred in finding him in contempt of court. Id.

In **In Re Benson**, 955 N.E.2d 215 (Ind. Ct. App. 2011), *trans. denied*, the Court declined to reverse Benson's motion to dismiss the contempt petition for lack of verification as required by IC 34-47-3-5(d)(2). Id. at 220. An amended petition that was properly verified had been filed before the contempt hearing. The Court could not say that any error in the verification process affected Benson's substantial rights. Id.

In **S.W. Ex Rel. Weslowski v. Kurtic**, 950 N.E.2d 19 (Ind. Ct. App. 2011), the Court reversed the trial court's decision to deny the protected person's request for a hearing on her contempt petition and remanded the case for the trial court to hold a hearing. Id. at 20-21. The protected person, a developmentally disabled adult, had sought a protective order by her sister and next friend against Kurtic, who had repeatedly banged on the protected person's door and tried to enter her apartment. The trial court had issued a two-year ex parte protective order prohibiting Kurtic from stalking, harassing, annoying, contacting, and visiting the protected person's residence. Kurtic was served with the protective order, but he later returned to the protected person's apartment twice and pounded on the door. The protected person's sister, acting as her next friend, filed a petition, supported with affidavits, for Kurtic to appear for a hearing to show cause why he should not be held in contempt for violating the protective order. The trial court denied her contempt petition without a hearing, stating that protective order violations were criminal matters and that she should contact the prosecutor's office. The Court said that the decision to grant or deny a civil contempt petition should not be based on collateral criminal matters. Id. at 22-23. The Court opined that the petition should be evaluated independently, without reference to other proceedings that may or may not otherwise protect the person for whom the original protective order was issued. Id. at 23.

In **Henderson v. Henderson**, 919 N.E.2d 1207 (Ind. Ct. App. 2010), the Court reversed and remanded the trial court's finding that Father was in contempt of the trial court's provisional parenting time order. Id. at 1209. The court's parenting time order specified that, in order to exercise parenting time, Father needed the proper equipment, including car seats, diapers, food, clothing, and other necessities for the children. The Court noted that: (1) no information verified by oath or affirmation was ever filed; (2) no rule to show cause was issued; (3) Mother did not initiate contempt charges against Father; (4) Father's contempt allegations against Mother did not put him on notice that he could be found in contempt; and (5) Father did not know that he should present evidence on his compliance with the provisional dissolution order. Id. at 1212.

In **Paternity of J.T.I.**, 875 N.E.2d 447 (Ind. Ct. App. 2007), the Court reversed and remanded the trial court's contempt finding against Mother because there was no compliance with the "rule to show cause statute," IC 34-47-3-5. Id. at 453.

In **Carter v. Johnson**, 745 N.E.2d 237 (Ind. Ct. App. 2001), a civil protective order case, the Court found that the trial court was without authority to order a protective order respondent arrested and incarcerated for indirect contempt. Id. at 451. The Court opined it was undisputed that the respondent had received none of the due process protections which are part of the indirect contempt statutory scheme. Id. at 241. The Court noted that it is the "rule to show cause" provision of IC 34-47-3-5 that fulfills the due process requirement of providing a contemnor with adequate notice and opportunity to be heard. Id. at 241.

In **Zillmer v. Lakins**, 544 N.E.2d 550 (Ind. Ct. App. 1989), the Court dealt with the problem of giving notice of contempt proceedings to persons who do not keep the court, their attorneys, and other parties advised of their whereabouts. Father attempted to serve Mother, who lived out of state, with a rule to show cause for her failure to comply with visitation orders, but service could not be obtained because Mother had changed addresses without notifying the court, her counsel, or Father. The Court ruled that a party is obliged to know and keep advised about the activities of an ongoing lawsuit, and the party cannot frustrate the enforcement of the court's orders by failing to advise the other parties or the court about address changes. The contempt ruling against Mother was affirmed despite failure to give her actual notice of the contempt proceedings. Id. at 552.

XI. D. 2. Right to Counsel

In **Moore v. Moore**, 11 N.E.3d 980 (Ind. Ct. App. 2014), the Court reversed and remanded the trial court's contempt finding against Father who had failed to pay child support. Id. at 981. Father appeared at the contempt hearing pro se and requested that an attorney be appointed to represent him because he faced jail time. The trial court denied Father's request because any jail sentence would be suspended. The Court opined that Father, if indigent, had the right to appointed counsel and to be informed of that right prior to the commencement of the contempt hearing. Id. The Court held that, even though the trial court suspended Father's sentence and indicated that it would reconsider the issue of appointing counsel prior to a scheduled compliance hearing, Father clearly risked the possibility of losing his physical liberty as a result of the trial court's contempt finding. Id.

In **Marks v. Tolliver**, 839 N.E.2d 703 (Ind. Ct. App. 2005), the Court reversed the trial court's order finding Father in contempt for failure to pay child support. Id. at 708. Among the issues addressed was Father's claim of indigency and that he was in jeopardy of incarceration for contempt. The Court opined that a person may not be incarcerated without first being advised of the constitutional rights to counsel, and, if the person in jeopardy of incarceration is indigent, he may not be incarcerated without having counsel appointed to represent him prior to the contempt hearing. Id. at 706.

In **Branum v. State**, 822 N.E.2d 1102 (Ind. Ct. App. 2005), *clarified on rehearing* at 829 N.E.2d 622 (Ind. Ct. App. 2005), a civil child support contempt case, the trial court's failure to advise Father of his right to counsel required reversal of the contempt finding. Id. at 1104. The Court opined that "[i]t is crystal clear that a person may not be incarcerated by the state without first being advised of his constitutional right to counsel, and, if indigent, without having counsel appointed to represent him, whether the contempt proceedings are initiated by a private person or the state." Id.

In **In Re Marriage of Stariha**, 509 N.E.2d 1117, 1122 (Ind. Ct. App. 1987), the Court held that an indigent parent charged with contempt of court for failure to pay child support had a right to court appointed counsel and to be informed of that right before the contempt hearing.

XI. D. 3. Required Elements and Burden of Proof

In **In Re Marriage of Steele-Giri and Steele**, 51 N.E.3d 119 (Ind. 2016), the Indiana Supreme Court affirmed the trial court's order denying Mother's motion for custody modification and motion for contempt. Id. at 130. Mother and Father lived in different states and shared joint custody of their child. Mother argued that Father was in contempt of court because he failed to update Mother about the child's school, report cards, and before and after school care. The Court, noting that a trial court is due great deference in contempt determinations, affirmed the trial court's ruling against a finding of contempt. Id. at 129. The Court found there was evidence in the record to support the trial court's determination that Father's disobedience of the court order was not willful. Id.

In **In Re Marriage of Akiwumi**, 23 N.E.3d 734 (Ind. Ct. App. 2014), the Court affirmed the trial court's order finding that Mother was in contempt of the dissolution decree by failing to allow Father, who lived in Illinois, to exercise his parenting time when he visited Florida, where Mother and the child resided. Id. at 741. The Court disagreed with Mother's argument that her counsel's inability to review one of Father's admitted exhibits, which consisted of emails between Mother and Father on Father's attempts to set up a location and time for a parenting time exchange, was prejudicial. Id. at 738-39. Noting that her reliance on Indiana Evidence Rule 106 was insufficient to demonstrate error, the Court opined that Mother's substantial rights were not affected, since there was no evidence that the exhibit of the email exchanges was incomplete. Id. at 739. The Court also dismissed Mother's argument that the trial court had made its determination that Mother was in contempt before she had the opportunity to testify on her own behalf. Id. at 740. The Court observed that the trial court's dismissal of Mother's defense was based on a sound disagreement with her theory of the case, and the record supported the trial court's conclusion that Mother's conduct was willfully in violation of the dissolution decree. Id. at 740-41.

See also **Williamson v. Creamer**, 722 N.E.2d 863, 866 (Ind. Ct. App. 2000) (Mother had burden of showing her refusal to allow visitation was not willful); **Crowl v. Berryhill**, 678 N.E.2d 828, 830 (Ind. Ct. App. 1997) (Court stated evidence that a party is aware of a court order and willfully disobeys the order is sufficient to support a finding of contempt, and even an erroneous order must still be obeyed until modified by court order or reversed on appeal; court shall give the contemnor an opportunity to purge himself of the contempt); **Moore v. Ferguson**, 680 N.E.2d 862, 866 (Ind. Ct. App. 1997) (the only limit on a sentence for indirect civil contempt is that court must give contemnor opportunity to purge himself from contempt);.**Pitts v. Johnson Cty. Dept. of Public Welfare**, 491 N.E.2d 1013, 1016 (Ind. Ct. App. 1986) (court erred in not permitting Mother to conform to court's original order requiring her to release confidential mental health records).

In **Heagy v. Kean**, 864 N.E.2d 383 (Ind. Ct. App. 2007), *trans. denied.*, the Court affirmed the trial court's decision that Mother was not in contempt of the court's order to maintain a smoke-free environment for the parties' child in her home and automobile. Id. at 392. The Court held that (1) the evidence could support the trial court's apparent finding that, while Mother violated the trial court order with regard to allowing smoking in the child's environment, Mother did not do so as an act of willful disobedience; and (2) as Mother was

ordered to pay a portion of Father's attorney fees, Father had not explained how he was prejudiced by the court's failure to find Mother in contempt. Id. at 386-88.

Court orders must be clear. To be punished for contempt of a court's order, there must be an order commanding the accused to do or refrain from doing something. A person may not be held in contempt for failing to comply with an ambiguous or indefinite order. See **City of Gary v. Major**, 822 N.E.2d 165, 170 (Ind. 2005). Also, a person cannot be held in contempt for failure to obey an order the trial court lacked jurisdiction to give; such order is void and unenforceable. City of Gary, 822 N.E.2d at 169. In **Pryor v. Bostwick**, 818 N.E.2d 6 (Ind. Ct. App. 2004), a paternity case, the trial court's finding that Mother was in indirect contempt for refusing to allow Father visitation was reversed. Id. at 13. The Court opined that, because paternity had not yet been established, there was no visitation order in effect at the time of Father's filing of the motion to show cause or the finding of contempt. Id. at 8-11. The Court stated that it knew of no basis for making a visitation order retroactive. Id. at 11. The Court opined that the trial court also erred when it found Mother in direct contempt of court for her conduct, which occurred outside of the courtroom and was not within the judge's personal knowledge. Id. at 13. In **Burrell v. Lewis**, 743 N.E.2d 1207, 1213 (Ind. Ct. App. 2001), a dissolution case, the court's order finding Father in contempt was reversed because the underlying order was ambiguous and therefore failed to provide Father with one clear mandate to obey.

Practice Note: Practitioners should be sure that court orders are clear and were communicated to the alleged contemnor before initiating contempt proceedings.

The alleged contemnor must also be able to comply with the court order before contempt can be found. For example, contempt for non-payment of child support is not appropriate unless the parent has the ability to pay the support due and his failure to do so was willful. See **J.M. v. D.A.**, 935 N.E.2d 1235, 1244 (Ind. Ct. App. 2010) (trial court's contempt finding reversed; court did not make finding regarding Father's ability to pay child support); and **Marks v. Tolliver**, 839 N.E.2d 703, 707 (Ind. Ct. App. 2005) (Father was indigent and disabled; no evidence his failure to pay support was willful).

A court order must be obeyed even if a party believes the order is incorrect. Contempt proceedings are not actions designed to correct errors previously made by trial courts. In **In Re Adoption of A.A.**, 51 N.E.3d 380 (Ind. Ct. App. 2016), a grandparent visitation case, Parents, who had been found in contempt of the trial court's grandparent visitation orders, argued that it was not willful disobedience to do what was in the children's best interests when the court ordered grandparent visitation would harm the children. The Court said that, by raising the same evidence and arguments already presented to the trial court, Parents were attempting to collaterally attack the trial court's prior finding that a relationship with Grandparents was in the children's best interests. Id. at 387. The Court opined that Parents' continuing disagreement with the trial court's finding was not a valid justification for disobeying the order, and affirmed the trial court's contempt finding. Id. In **Martin v. Martin**, 771 N.E.2d 650 (Ind. Ct. App. 2002) the Court said that collateral attack of a previous order is allowed in a contempt proceeding only if the trial court lacked subject matter or personal jurisdiction to enter the order. Id. at 653. A party's remedy for an erroneous order is appeal; disobedience of the order is contempt. Id.

XI. D. 4. Remedies

Punishment is not the objective of civil contempt. Civil contempt remedies may be used to coerce compliance with the court order or to compensate the injured party for violations of

the court order. See **Crowl v. Berryhill**, 678 N.E.2d 828, 832 (Ind. Ct. App. 1997) (trial court's order to Mother to pay Grandparents' attorney fees was proper remedy to compensate Grandparents for expenses incurred due to Mother's contempt in violating court ordered grandparent visitation); **Clark v. Atkins**, 489 N.E.2d 90, 98 (Ind. Ct. App. 1986) (Mother ordered to pay Father's travel expenses that were the result of Mother's non-compliance with visitation order).

Incarceration can be used to coerce compliance with a court order as a remedy in indirect civil contempt cases. If the court uses incarceration to coerce a contemnor to do an affirmative act, the court must provide that the incarceration will end as soon as the contemnor complies; the contemnor must have the "key of his prison in his own pocket." **Moore v. Ferguson**, 680 N.E.2d 862, 865 (Ind. Ct. App. 1997). See also **Williamson v. Creamer**, 722 N.E.2d 863 (Ind. Ct. App. 2000) (Mother ordered incarcerated for thirty-two days for violating visitation order); **Ritter v. Bartholomew County DPW**, 564 N.E.2d 329, 330 (Ind. Ct. App. 1990) (Father sentenced to fifteen days in jail with opportunity to purge himself of contempt by paying the arrearage, the attorney fees, and a bond fee).

Sanctions in a civil contempt proceeding may seek both to coerce behavior and to compensate an aggrieved party. **Norris v. Pethe**, 833 N.E.2d 1024, 1031 (Ind. Ct. App. 2005). Penalties designed to compel future compliance with a court order are considered to be coercive and avoidable through obedience. **MacIntosh v. MacIntosh**, 749 N.E.2d 626, 631 (Ind. Ct. App. 2001), *trans. denied*. In **Marks v. Tolliver**, 839 N.E.2d 703, 708 (Ind. Ct. App. 2005), the Court reversed the trial court's order which provided for Father's summary incarceration upon his failure to pay a single future installment of child support without inquiry into his ability to pay. The Court opined that, in essence, the order presumed willful non-compliance and contravened the Indiana Supreme Court holding in Pettit v. Pettit, 626 N.E.2d 444, 448 (Ind. 1993) that contempt power could be used only when the parent has the ability to pay and failure to do so is willful. Marks at 708.

In **Bartlemay v. Witt**, 892 N.E.2d 219 (Ind. Ct. App. 2008), the Court reversed and remanded with instructions the trial court's judgment finding Father in civil contempt of court for allegedly violating previous orders stemming from the post-dissolution proceedings. Id. at 232. Holding that the order improperly imprisoned Father for future noncompliance and did not give him an opportunity to purge himself of the contempt with compliance, the Court reversed the trial court's order which sentenced Father to ten days imprisonment and suspended the sentence contingent on his compliance with future court orders. Id. at 228. The Court also reversed the trial court's contempt finding resulting from Father's removal of his daughters from school so they could testify at the hearing without first obtaining Mother's permission, which was a violation of the parties' previous agreement. Id. The Court concluded that Father had the right to present evidence at the hearing, including the viewpoints of his daughters. Id.

In **Norris v. Pethe**, 833 N.E.2d 1024 (Ind. Ct. App. 2005), a dissolution case, Mother and the children had failed to participate actively in court ordered counseling with a psychologist to resolve anger and hostilities and visitation issues. The trial court found Mother in contempt and imposed a thirty day jail sentence, which was suspended on the condition that Mother and the children actively cooperate with and constructively participate in counseling. When the trial court found at subsequent hearings that Mother had failed to follow the earlier order, the court ordered seven days of executed jail time for Mother, converted the remaining twenty-three days from the thirty day suspended sentence to 180 hours of community service, and ordered Mother to reimburse Father the entire cost of counseling. On appeal, the Court

affirmed this portion of the order, holding that the remedies served the coercive purpose of compliance and exercised the court's inherent authority to compensate an aggrieved party. Id. at 1032. The trial court also ordered Mother to perform another eighty hours of community service and to pay eighty percent of the guardian ad litem fees. The Court reversed and remanded this portion of the order for the sole purpose of determining a proper division of the guardian ad litem fees between the parties. Id. The Court explained that the imposition of the additional eighty hours of community service and payment of eighty percent of the guardian ad litem fees were inappropriate because they could not be avoided through obedience but instead were immediately executed. Id.

See the following cases where incarceration for contempt was inappropriate and court orders were reversed: **Stanke v. Swickard**, 43 N.E.3d 245, 249 (Ind. Ct. App. 2015) (portion of trial court's order which required Father to serve jail time for failing to return children to Mother after parenting time and for taking children out of state without providing required information to Mother contained no opportunity for Father to purge himself of contempt, rendering orders purely punitive and impermissible); **In Re Paternity of C.N.S.**, 901 N.E.2d 1102, 1105-06 (Ind. Ct. App. 2009) (trial court erred in finding Father in indirect contempt and imposing a sentence of 30 days' incarceration, with 29 days suspended and one to be served, for failure to pay child support without a rule to show cause first being issued in accordance with IC 34-47-3-5, without advising him of his right to counsel, and by failing to give him an opportunity to purge himself of contempt); **Branum v. State**, 822 N.E.2d 1102, 1105 (Ind. Ct. App. 2005) (order for 120 day incarceration reversed because it did not include express provision whereby Father's release was conditioned upon his compliance with child support order), *clarified on rehearing* at 829 N.E.2d 622, 623 (Ind. Ct. App. 2005); **Flash v. Holtsclaw**, 789 N.E.2d 955, 959 (Ind. Ct. App. 2003) (additional ninety day sentence for protective order contemnor reversed because order did not coerce compliance nor compensate aggrieved party for loss and did not offer opportunity for contemnor to purge himself), *trans. denied*; **Emery v. Sauter**, 788 N.E.2d 856, 861(Ind. Ct. App. 2003) (ninety day contempt sentence remanded because record incomplete as to whether Father's sentence was solely punitive or whether it was imposed to coerce compliance with child support order), *trans. denied*; **Evans v. Evans**, 766 N.E.2d 1240, 1245 (Ind. Ct. App. 2002) (post dissolution contempt order requiring former wife to pay former husband $52,000 when husband lost teaching job due to wife's failure to destroy pornographic photographs was punitive and did not consider husband's actual damages). But see **Dawson v. Dawson**, 800 N.E.2d 1000, 1006 (Ind. Ct. App. 2003) in which the trial court's sanction of a ninety day sentence to begin six weeks after the contempt order was appropriate because it gave the former husband the opportunity to purge himself of contempt by satisfying or refinancing mortgage in compliance with dissolution decree.

In **Francies v. Francies**, 759 N.E.2d 1106 (Ind. Ct. App. 2001), a third party custody case, Mother failed, despite numerous court orders, to return the child's belongings to custodial Grandmother. The Court reversed the amount Mother was ordered to pay to reimburse Grandmother and remanded with instructions for a lower reimbursement amount to be ordered because Mother had never been ordered to return the child's bed and weight lifting equipment, costs of which had been included in court's reimbursement order. Id. at 1120.

See also **In Re Adoption of A.A.**, 51 N.E.3d 380 (Ind. Ct. App. 2016) (in grandparent visitation case, Court found no abuse of discretion in trial court's order requiring Parents to pay additional $17,282.50 in Grandparents' attorney fees as sanction for contempt); **In Re Paternity of Jo.J.**, 992 N.E.2d 760 (Ind. Ct. App. 2013) (Court found no error with trial court's decision not to allow Father to once again avoid incarceration for contempt; Father

had been afforded numerous opportunities over period of several years to strictly comply with child support order, and had been repeatedly warned that his failure to do so could result in incarceration); **Winslow v. Fifer**, 969 N.E.2d 1087 (Ind. Ct. App. 2012) (trial court did not abuse discretion in ordering Mother, who had been found in contempt for failure to reimburse Father for child's college expenses, to pay $750 of Father's attorney fees), *trans. denied*; **Bessolo v. Rosario**, 966 N.E.2d 725 (Ind. Ct. App. 2012) (ten-day suspended jail sentence for future violations of court orders was error because sentence did not coerce compliance with specific court order), *trans. denied*; **In Re Paternity of M.P.M.W.**, 908 N.E.2d 1205 (Ind. Ct. App. 2009) (Court vacated Mother's two-year suspended sentence for contempt and remanded for resentencing, holding that sentence went beyond coercing action of a party and became punitive; length of contempt sentence fell within the sentencing range for a Class C felony, and sentence did not offer an opportunity for Mother to purge herself of contempt).

XI. E. Possible Contempt Actions Against Parents

XI. E. 1. Failure to Comply With Child Support or Reimbursement Orders

See this Chapter at IX.H. for contempt cases for failure to comply with child support or reimbursement orders.

In **In Re G.B.H.**, 945 N.E.2d 753 (Ind. Ct. App. 2011), the Court held that the evidence did not support a finding that Father willfully failed to pay child support; therefore, the trial court abused its discretion by finding him in contempt. Id. at 756. The Court noted that, when Father was receiving unemployment benefits, he was paying child support in the maximum amount that could be withheld from his unemployment check. Id. The Court observed that, during the time when he was involuntarily unemployed and had no income aside from unemployment benefits, Father paid what he was able to pay, but lacked the ability to pay his support obligation in full. Id. The Court also concluded that Father's failure to pay support while the income withholding order from his employment had not yet been implemented was not a willful violation of the support order because Father had not been advised of his obligation to make support payments on his own. Id.

XI. E. 2. Failure to Comply With Parental Participation Order or Other CHINS Orders

In **Mikel v. Elkhart County DPW**, 622 N.E.2d 225 (Ind. Ct. App. 1993), the juvenile court adjudicated the children to be CHINS and ordered Father to pay child support, participate in psychological testing, and finish parenting classes. The court found Father in contempt for failure to obey the orders and sentenced him to jail for 180 days, or alternatively to serve the sentence in a mental health facility. The Court reversed the contempt judgment because the state had not complied with the parental participation petition statute. Id. at 229. The Court ruled that the parental participation petition is jurisdictional, and compliance with that statute "is the only means a court may mandate parental involvement subject to contempt of court." Id. at 228.

XI. E. 3. Failure to Produce Child

In **Baltimore City Dept. of S.S. v. Bouknight**, 493 U.S. 549, 110 S. Ct. 900 (1990), the U.S. Supreme Court upheld a juvenile court's order of civil contempt due to Mother's failure to produce her child as earlier ordered by the juvenile court. The Supreme Court ruled that Mother's Fifth Amendment privilege against self-incrimination could not be invoked to avoid her compliance with the state's non-criminal regulatory scheme for the protection of children. The Baltimore City Department of Social Services (Department) obtained an adjudication in the juvenile court that infant Maurice Bouknight (child) was a "child in need of assistance" due to Mother's abuse. The juvenile court ordered the child to continue in Mother's custody

upon her agreement to the conditions of a court-approved protective supervision order. When Mother violated the conditions of the order by refusing to reveal the location of the child to the Department of Social Services, the Department petitioned the court to remove the child from Mother. At the hearing on the removal request, the court ordered the removal of the child from Mother, issued an order to show cause why Mother should not be held in civil contempt for failure to produce the child, and issued a bench warrant for Mother's appearance. After several hearings, the juvenile court found Mother in civil contempt for failure to produce the child as ordered and directed that Mother be imprisoned until she purged herself of the contempt by producing the child or by telling the court his exact whereabouts.

XI. E. 4. Failure to Comply With Parenting Time (Visitation) Orders

In custody cases a parent may face contempt proceedings for denying parenting time in violation of a court order, even if the parent believes the child is at risk during the parenting time or the child does not want to participate in parenting time. The available remedy for the custodial parent is to request a modification or suspension of the parenting time order, not to unilaterally stop parenting time. See the following cases where parents were found in contempt for failing to make children available for parenting time (visitation): **Malicoat v. Wolf**, 792 N.E.2d 89 (Ind. Ct. App. 2003) (Mother acted with willful disobedience in failing to make reluctant children available for visitation with Father; if concerned about children's well-being, Mother's remedy was to seek modification of order); **MacIntosh v. MacIntosh**, 749 N.E.2d 626 (Ind. Ct. App. 2001) (Mother's argument that she could not force her children, ages fifteen and sixteen years, to comply with scheduled parenting time did not persuade Court to reverse contempt finding against her), *trans. denied*; **Hartzell v. Norman T.L.**, 629 N.E.2d 1292 (Ind. Ct. App. 1994) (Court affirmed contempt ruling against Mother for violation of visitation order, despite Mother's allegations that child did not want to visit Father and Mother's concern that Father had molested child). But see **Piercey v. Piercey**, 727 N.E.2d 26 (Ind. Ct. App. 2000) (no error in court not finding Mother in contempt for violating visitation order, because Mother's violation of order was not willful given her concern for safety of children).

In **In Re Paternity of P.B.**, 60 N.E.3d 1092 (Ind. Ct. App. 2016), the Court reversed and remanded the trial court's order denying Father's petition to hold Mother in contempt for her failure to cooperate with the court's reunification and parenting time order. Id. at 1100. The child, age fourteen, did not wish to have parenting time with Father. Father had not been able to exercise parenting time for five years due to Mother's refusal to comply with court orders. Mother admitted that she had not allowed Father to have parenting time. The Court held it had "little choice but to conclude that the trial court abused its discretion when it concluded that Mother was not in contempt for failing to abide by the trial court's previous parenting time and reunification orders." Id. at 1099. The Court sympathized with the dilemma with which the trial court was faced, but said that the proper solution was not to refuse to enforce its orders. Id. The Court observed that no one, especially a parent, "should be under the impression that compliance with the trial court's parenting time order is optional." Id.

In **Farmer v. Farmer**, 735 N.E.2d 285 (Ind. Ct. App. 2000), the Court found that the trial court erred in ruling that Father's suspended jail time on contempt for failure to pay child support could be revoked on the basis of Father's failure to pay attorney fees or visit the child. Id. at 289. On the issue of child visitation, the Court said that there is no duty requiring a parent to visit or maintain a relationship with the child and a parent should not be forced to visit his child under threat of imprisonment. Id. at 289-290. *Practice Note*: An argument could be made that this case would not apply to CHINS cases, in which parental visitation

would be critical to the reunification efforts. Civil contempt for failure to visit could be an appropriate remedy in light of the reunification goal.

XI. E. 5. Failure to Comply With Court Restrictions on Visitation or Custody

In **Bechtel v. Bechtel**, 536 N.E.2d 1053 (Ind. Ct. App. 1989), Mother alleged error in the trial court's finding that she was in contempt of court for violating the divorce order by allowing an unrelated male to stay overnight in her home. The Court reversed the trial court's contempt finding because the evidence did not support it. Id. at 1056.

XI. E. 6. Failure to Appear For Hearing

In **Williams v. State Ex Rel. Harris**, 690 N.E.2d 315 (Ind. Ct. App. 1997), the Court ruled that Father could be held in indirect civil contempt, but not direct contempt, for failure to appear at a child support review hearing. See also **Rice v. State**, 874 N.E.2d 988 (Ind. Ct. App. 2007) (defendant's failure to appear at sentencing hearing was not direct contempt).

XI. F. Contempt by a Child in Need of Services or Delinquent Status Offender

Case law holds that the court cannot incarcerate a CHINS or delinquent status offender for willful violations of court orders. In **L.J.F v. Lake County Dept. of Pub. Welfare**, 484 N.E.2d 40 (Ind. Ct. App. 1985), the Court stated that it was error to hold a child in need of services in contempt for running away from a court ordered placement. Id. at 42 n.1. In **W.M. v. State**, 437 N.E.2d 1028 (Ind. Ct. App. 1982), the child was charged with criminal contempt for running away from a court ordered placement while a delinquency runaway charge was pending. The Court stated that the juvenile contempt statute was intended to allow juvenile courts a means of keeping order in the court room and of obtaining jurisdiction over adults in some circumstances, but was not intended to allow incarceration of children for their noncriminal behaviors. Id. at 1033-34. In **B.L. v. State**, 688 N.E.2d 1311, 1315 (Ind. Ct. App.1997), the Court ruled that the inherent contempt power of the juvenile court could not be used to incarcerate a status delinquent who repeatedly violated the court's order to attend school, as the legislature has enacted separate statutes and procedures for the limited secure detention of repeat truants and runaways. See also **K.L.N. v. State**, 881 N.E.2d 39, 44 (Ind. Ct. App. 2008) (because adjudicated juvenile delinquent was found in civil contempt of court, trial court's punitive criminal sanction of increased days of confinement in juvenile center was unlawful). But see **T.T. v. State**, 439 N.E. 2d 655, 659 (Ind. Ct. App. 1982) (criminal contempt not offense for purpose of establishing juvenile delinquency, but juvenile court may use contempt power if necessary procedures are followed).

XII. EXPUNGEMENT

XII.A. Jurisdiction and Standing to Petition For Expungement

IC 31-39-8-1 through 6 provide for the court ordered expungement of juvenile court, law enforcement, and service provider records related to juvenile court proceedings. IC 31-39-8-1.5 provides that the juvenile court in the county of the original CHINS or delinquency action has exclusive original jurisdiction over petitions to expunge records of a child alleged to be a CHINS or a delinquent child. In **Dubois County Office of Family and Children v. Adams**, 671 N.E.2d 202, 203 (Ind. Ct. App. 1996), the Court clarified that the statutory expungement procedures are only applicable to the records regarding cases that are before the juvenile court. For statutes and case law on administrative and court ordered expungement of DCS assessment reports, see Chapter 4 at V.B.

IC 31-39-8-2(a) provides that "any person" may petition the court at any time to remove from the files of the court, law enforcement, or service providers the records pertaining to "the person's" involvement in juvenile court proceedings. IC 31-39-8-2(b) states that electronic records shall be

removed to a secure data base to which the public or another person who dies not have legal or statutory authority is not granted access.

XII.B. Petition Requirements, Procedures, and Factors for Court's Consideration

IC 31-39-8-3(a) provides that the petition must be verified and set forth: (1) the allegations and date, if applicable, of the delinquency or CHINS adjudications; (2) the court in which the delinquency or CHINS petitions were filed; (3) the law enforcement agency that employs the charging officer, if known; (4) the case number or court cause number; (5) the petitioner's date of birth; (6) the petitioner's Social Security number; (7) all delinquency or CHINS adjudications that occurred after the adjudication of the action sought to be expunged; (8) all pending CHINS or delinquency cases or criminal charges. IC 31-39-8-3(b) states the petition for expungement shall be served on the prosecuting attorney or the DCS attorney if there was a CHINS proceeding. IC 31-39-8-3(c) grants the prosecuting attorney or the DCS attorney thirty days in which to reply or object to the petition, but the court may reduce the time in which a response must be filed for good cause or within its discretion after a hearing is held. IC 31-39-8-3(d) states that the matter shall be set for hearing if the prosecuting attorney or DCS filed an objection to the petition. IC 31-39-8-3(d) also states that, if no objection is filed, the court may set the petition for hearing or rule on the petition without a hearing.

IC 31-39-8-3(e) sets out the following factors the court is to consider in reviewing a petition for expungement: the best interests of child; age of child during the child's contact with the system; nature of allegations regarding the child; whether there was an informal adjustment or adjudication; disposition of the case; manner in which the person participated in court ordered or supervised services; time during which the person has been without contact with the juvenile court or any law enforcement agency system; whether the person acquired a criminal record; and the person's current status. The juvenile code contains additional consideration for the expungement of child abuse or neglect information held by the court. IC 31-39-8-4 states:

> (a) Child abuse or neglect information may be expunged under this chapter if the probative value of the information is so doubtful as to outweigh the information's validity.
> (b) Child abuse or neglect information shall be expunged if the information is determined to be unsubstantiated after:
> (1) an investigation of a report of a child who may be a victim of child abuse or neglect by the child protection service; or
> (2) a court proceeding.

In **Dubois County Office of Family and Children v. Adams**, 671 N.E.2d 202 (Ind. Ct. App. 1996), a licensed foster parent (Adams) was accused of molesting two children for whom his wife was babysitting. The Dubois County Office of Family and Children (DCOFC) and the Jasper City Policy Department investigated and substantiated the allegations, but no criminal charges were filed against Adams. When the foster care licensing agency was notified of the substantiated allegations, the agency removed a foster child who was a ward of the Jasper County Office of Family and Children from the Adams home and ceased future foster care placements in the home. Adams filed a petition requesting that the Dubois County Juvenile Court order the DCOFC and other agencies to expunge records relating to the alleged sexual molestation. The DCOFC filed a motion to dismiss. The motion was denied and DCOFC filed an interlocutory appeal. The Court ruled in DCOFC's favor that the Dubois Juvenile Court lacked subject matter jurisdiction to order the expungement of DCOFC records. Id. at 203.

The Court said that IC 31-6-8-2 (recodified at IC 31-39-8-2) authorizes the juvenile court to order the expungement of records relating to proceedings before that court. Id. Neither the children who were alleged victims of molestation nor the former foster child was involved in juvenile proceedings in the Dubois Juvenile Court. Id.

XII.C. Procedure if Expungement Order Issued

IC 31-39-8-5 provides that if the court grants an expungement petition, the court shall order each law enforcement agency and service provider to send the records to the court. IC 31-39-8-6(a) provides that, subject to subsections (b) and (c), the records shall be destroyed if the court grants the expungement petition. IC 31-39-8-6(b) and (c) state that the data shall be maintained on a secure data base and may be used for statistical analysis, research, financial and auditing purposes.

XII.D. Administrative and Court Procedures to Request Expungement of DCS Records

Independent of the provisions in IC 31-39-8, a person can seek expungement of specific records held by DCS. IC 31-33-26-8 provides that DCS must notify the victim child's parent, guardian, or custodian and the identified perpetrator of substantiated DCS reports that there is an administrative hearing process to request expungement of records, and there are circumstances under which DCS shall amend or expunge substantiated assessment reports. IC 31-33-27-5 provides for court ordered expungement of DCS records upon a petition filed by the perpetrator. See Chapter 4 at V.A. and B. for: (1) statutes on administrative hearings regarding substantiated DCS assessments of child abuse and neglect [IC 31-33-26-8 through 15]; and (2) statutes and case law on petitioning the court for an order expunging substantiated assessments [IC 31-33-27-1 through 6].

XIII. APPEAL

XIII.A. Appeal of CHINS Judgment

IC 31-32-15-1 provides that "[a]ppeals may be taken as provided by law."

XIII.A. 1. Standing to Appeal

The parties to the CHINS case, listed at IC 31-34-9-7, have standing to file an appeal and should be named as a party to any appeal filed. The parties include the child, the child's parents, guardian, or custodian, DCS, the guardian ad litem/court appointed special advocate, and any others who were granted party status by the trial court.

XIII.A. 2. Findings of Fact and Conclusions of Law

In **In Re M.D.,** 906 N.E.2d 931 (Ind. Ct. App. 2009), *trans. denied*, prior to the CHINS fact-finding hearing, both parties filed motions requesting the trial court, pursuant to Indiana Trial Rule 52(A), to make specific findings of fact and conclusions thereon to support its decision after the fact-finding hearing. At the end of DCS's case, Parents orally moved to dismiss the CHINS petitions pursuant to Indiana Trial Rule 41(B). The trial court granted Parents' motion and issued an order dismissing the CHINS petitions without issuing any findings of fact and conclusions. DCS appealed. The Court opined that the trial court's order dismissing the CHINS petitions pursuant to Trial Rule 41(B) was a disposition of the case on the merits following a fact-finding hearing, and the trial court should have issued specific findings and conclusions to support such determination because it was requested to do so by the parties. Id. at 933. The Court asserted that the best practice and policy is for a trial court to issue findings supporting its decision to dismiss when requested to do so prior to a fact-finding hearing even when no subsequent request is made at the time of a motion under Trial Rule 41(B). Id. The Court concluded that requiring the parties to re-file their motions requesting findings at the

time that a motion to involuntarily dismiss is made serves no purpose in that a motion filed prior to a hearing encompasses the same intent as one filed simultaneously with a Trial Rule 41(b) motion to dismiss, which is to request findings and conclusions to support a trial court's decision on the merits following a fact-finding hearing. Id.

XIII.B. Mootness

In **In Re F.S.**, 53 N.E.3d 582 (Ind. Ct. App. 2016), Mother appealed the trial court's order, entered pursuant to IC 31-33-8-7, which compelled her to allow DCS to interview two of her children as part of the DCS assessment of four reports concerning drug use and domestic violence. As a threshold issue, the State argued that Mother's appeal was moot because: (1) at Mother's request, the trial court stayed its order pending the outcome of Mother's appeal; (2) three months after the entry of the order compelling the interview of the children, Mother was arrested after testing positive for methamphetamine and amphetamine, and she signed a consent for the children to be interviewed; (3) subsequently, the children were adjudicated CHINS after Mother admitted that she was unable to care for them due to her incarceration. Mother contended that her appeal should be addressed on its merits and not be dismissed due to mootness. The Court observed that: (1) Indiana courts have long recognized that a moot case may be decided on its merits when it involves questions of "great public interest"; (2) cases falling within the public interest exception typically contain issues which are likely to recur; (3) an appeal may be heard which otherwise might be dismissed as moot where leaving the judgment undisturbed might lead to negative collateral consequences (multiple citations omitted). Id. at 590. The Court declined to dismiss Mother's appeal as moot and opined that a decision on the merits would offer direction to courts in future cases where DCS seeks an order compelling an interview with children. Id. at 591. The Court reversed the trial court's order, concluding that the statute as applied in this case violated Mother's right to raise her family free from undue interference from the State. Id. at 599.

In **In Re S.D.**, 2 N.E.3d 1283 (Ind. 2014), the trial court adjudicated Mother's two-year-old special medical needs child to be a CHINS. Mother appealed. DCS moved to dismiss Mother's appeal, alleging that the appeal was moot because the child had been returned to Mother's care, the CHINS case had been closed, and no effective relief could be granted. The Indiana Supreme Court declined to find the case moot, and reversed the CHINS adjudication. Id. at 1291. On the issue of mootness, the Court observed that: (1) a CHINS finding on two occasions can relax the State's burden for terminating parental rights under IC 31-35-2-4(b)(2)(B)(iii); (2) a prior CHINS finding may preclude Mother from employment with any DCS contractor; and (3) a CHINS finding precludes Mother from becoming a licensed foster parent. Id. at 1290. The Court said that its reversal could not change the efforts Mother expended in complying with the CHINS case, but it afforded her meaningful relief by lifting those collateral burdens. Id.

In **In Re Des.B.**, 2 N.E.3d 828 (Ind. Ct. App. 2014), Mother appealed the CHINS adjudication of her two children, who were both under the age of three years. By the time of the CHINS dispositional hearing, the trial court found that Mother had completed all ordered services, had clean drug screens, and that there was a protection order and a no contact order in place, so the trial court closed the CHINS case. Nevertheless, the Court considered Mother's appeal and found that it was not moot. Id. at 834 n.3. Quoting Roark v. Roark, 551 N.E.2d 865, 867-68 (Ind. Ct. App. 1990), the Court said that it is well established that the reunification of children with their parent and the trial court's closure of the CHINS proceeding does not render an appeal from the CHINS determination moot because of the potentially devastating consequences of a CHINS determination. Des.B. at 834 n.3.

In **Roark v. Roark**, 551 N.E.2d 865 (Ind. Ct. App. 1990), the welfare department alleged that Father's appeal of the CHINS judgment was moot because Father had been reunited with the

family and the judge had closed the case at the last review hearing. The Court rejected the welfare department's argument, and agreed with Father that "a CHINS finding presents collateral consequences serious enough to justify consideration of this appeal on its merits." Id. at 867. The Court noted that IC 31-6-8-1 (recodified at IC 31-39-2) allows the release of CHINS records for a variety of reasons, and that the release of such information could be harmful to Father in the future. Thus, despite the reunification of the family and closure of the juvenile case, Father's appeal was not moot because of the "potentially devastating consequences of a CHINS determination." Id. at 868. See also **Mikel v. Elkhart County DPW**, 622 N.E.2d 225, 227 (Ind. Ct. App. 1993) (CHINS contempt ruling not moot even though Father had served contempt sentence); **Matter of Jordan**, 616 N.E.2d 388, 391 (Ind. Ct. App. 1993) (appeal not moot because CHINS detention case fell within public interest exception and issue was likely to recur).

XIII.C. Expedited Appeals

XIII.C. 1. Ind. Appellate Rule 14.1 Appeals

Ind. App. R. 14.1 established the expedited appeal process when the juvenile court enters CHINS or delinquency orders for services which are contrary to DCS's recommendations. The rule governs appellate review of IC 31-34-4-7(f) (services provided before entry of CHINS dispositional decree or approval of CHINS informal adjustment); IC 31-34-19-6.1(f) (CHINS dispositional decree); IC 31-37-5-8(g) (services provided before entry of delinquency dispositional decree or approval of delinquency informal adjustment); and IC 31-37-18-9(d) (delinquency dispositional decree). App. R. 14.1 also applies to modification of CHINS and dispositional decrees. IC 31-34-23-4 states that IC 31-34-19 also applies to the preparation and use of a modification report. App. R. 14.1 also applies to modification of a delinquency dispositional decree that requires DCS to pay any costs of programs, placements, or services for, or on behalf of the child.

Only DCS may file a Notice of Expedited Appeal, and the notice shall be filed with the trial court clerk within five business days after the court's order of placement or services is noted in the chronological case summary (CCS). DCS shall serve notice of the appeal on the following: (1) trial court judge; (2) court clerk; (3) court reporter if a transcript is requested; (4) county commissioners; (5) guardian ad litem/court appointed special advocate; (6) a child who is fourteen years of age or older; (7) child's counsel; (8) child's parents; (9) Attorney General; (10) any other party. In a juvenile delinquency matter, the Chief Probation Officer and Prosecutor shall also be served with notice. Any party who has received notice shall have five business days from service of notice to file an appearance and request any additional items to be included in the record. The trial court shall be considered a party to the appeal if it files a timely appearance. Failure to file an appearance shall remove that party from the appeal.

The Clerk's Record and Transcript shall be prioritized over all other appeal transcripts and records, completed, and filed within ten business days after the Notice of Appeal is noted in the CCS. The Record contains the pre-dispositional report and attachments and other documents required by Ind. Appellate Rule 2. DCS shall have five business days from the filing of the Notice of Completion of Transcript (or Clerk's Record if a transcript was not requested) to file a memorandum stating why the trial court's decision should be reversed. Any party shall have five business days after DCS has filed its memorandum to file a responsive memorandum stating why the decision should be sustained or reversed, and to file any accompanying supplemental Appendix. No reply memoranda shall be allowed. Extensions of time are not allowed. Rehearing of an appellate decision may not be sought. A

Petition to Transfer must be filed no later than five business days after the adverse decision of the Court of Appeals.

If DCS prevails on appeal, payment shall be made in accordance with IC 31-34-4-7(g), IC 31-34-19-6.1(g), IC 31-37-5-8(h), or IC 31-37-18-9(e), as the case may be. See this Chapter at III.C. for discussion of IC 31-34-19-6.1 and Chapter 4 at IV.A.5. for discussion of IC 31-34-4-7.

In **A.B. v. State**, 949 N.E.2d 1204 (Ind. 2011), a delinquency case, the Indiana Supreme Court reversed the trial court's order which declared that three juvenile delinquency statutes on payment by DCS for out-of-state residential placements were unconstitutional. Id. at 1214. The Court stated that the juvenile court judge still has and shall continue to have the final authority in making decisions for the juveniles. Id. The Court held the DCS requirement that the delinquent child be placed in Indiana rather than being placed in Arizona at Canyon State Academy was arbitrary and capricious and affirmed the trial court's placement of the child at Canyon State Academy. Id. at 1207-08. The Court also held that DCS should pay for the placement of the child at Canyon State Academy. Id. at 1208. One of the issues on appeal was the child's contention that DCS had improperly appealed the trial court's orders under Indiana Rule of Appellate Procedure 4(A)(1)(b) rather than under Indiana Appellate Rule 14.1. The Court clarified that Ind. Appellate Rule 14.1 governs only IC 31-34-4-7(f), IC 31-34-19-6.1(f), IC 31-37-5-8-g), and IC 31-37-18-9(d), and that "all other appeals concerning children alleged to be in need of services or children alleged to be delinquent are not covered by this rule." Id. at 1211. The Court explained that IC 31-34-4-7(f) and IC 31-34-19-6.1(f) apply only to CHINS cases, and IC 31-37-5-8(g) applies only to services and programs provided prior to the entry of a delinquency dispositional decree. Id. The Court concluded that IC 31-37-18-9(d) was the only statute applicable to the delinquent's out-of-state residential placement. The Court opined that DCS could appeal the trial court's order under Appellate Rule 4(A)(1)(b). Id.

In **In Re D.S.**, 910 N.E.2d 837 (Ind. Ct. App. 2009), *trans. denied*, a delinquency case, the Court affirmed the trial court's modified dispositional order placing the juvenile in an out-of-state shelter care facility against the recommendations of Indiana Department of Child Services (IDCS). Id. at 842. The fifteen-year-old juvenile was arrested for battery, pointing a firearm, and several other charges. His prior history as a delinquent included alcohol and drug abuse, expulsion from high school after having completed only the ninth grade, and significant involvement with a local gang and other "negative peer associations." The juvenile eventually pled guilty to the battery and pointing of a firearm charges, and the remaining three charges were dismissed. The Serious Habitual Offender Program Board later unanimously determined that the juvenile should be designated a Serious Habitual Offender based on his criminal history of handgun possession and involvement with gang activity. On the probation department's recommendation and contrary to the recommendation of IDCS, the trial court conducted a hearing and placed the juvenile in the Rite of Passage residential program in Arizona. IDCS timely filed a Notice of Expedited Appeal pursuant to Indiana Appellate Rule 14.1.

The Court held that the trial court's findings supported its placement decision; therefore, the trial court did not commit clear error in ordering the juvenile's placement in the out-of-state shelter care facility, Rite of Passage. Id. Citing In Re T.S., 906 N.E.2d 801, 804 (Ind. 2009), the Court explained that its review is a two tiered consideration of: (1) whether the evidence supports the findings, and (2) whether the findings support the judgment. Id. at 840. The Court observed that the dispositional order: (1) included specific written findings and

conclusions stating, among other things, that its placement decision was "consistent with the safety and the best interest of" the juvenile; (2) was consistent with IC 31-37-18-9(b), which provides that if IDCS does not agree with a probation officer's recommendation, and the trial court does not follow the IDCS's recommendations, the trial court shall accompany its dispositional decree with written findings that IDCS's recommendations are "unreasonable" based on the circumstances of the case or that they are "contrary to the welfare and best interests of the child"; and (3) complied with the requirements of IC 31-37-19-3, which provides that a court may not place a delinquent child in a non-secure detention facility outside of Indiana unless the court makes written findings, based on clear and convincing evidence, that the out-of-state placement is appropriate because there is no comparable facility with adequate services located in Indiana. Id. The Court noted as supporting the trial court's findings: (1) the testimony of the probation officer and the report of the county's chief probation officer which included the need to get the juvenile out of the community and into a structured environment; (2) the fact that the Indiana facilities recommended by IDCS were secure facilities geared toward sexual predators or persons with serious psychiatric disabilities, which the juvenile did not need; and (3) a comparison showing the per diem rates of the IDCS recommended facilities exceeded the per diem rates for the Arizona facility, which rates included travel costs for the juvenile's mother to visit quarterly. Id. at 841-42. In support of its holding, the Court explained that the trial court had (1) concluded IDCS's placement recommendations were contrary to the juvenile's best interests; (2) placed the juvenile in the Rite of Passage program; and (3) supported its order with specific factual findings based on ample evidence of the juvenile's history of drug abuse, gang affiliation, and expulsion from school; his athletic and leadership abilities; his family relationships; his wishes and those of his mother; and the probation department's formal recommendation. Id. at 842.

In **In Re T.S.,** 906 N.E.2d 801 (Ind. 2009), the Court affirmed the juvenile court's CHINS placement determination, and made several other findings regarding Indiana Appellate Rule 14.1. Id. at 805. This was the first appeal under Ind. App. R. 14.1. The Court held that: (1) Ind. App. R. 14.1 expedited appeals are available for the process of modifying dispositional decrees regarding child placement where a juvenile court does not follow DCS's recommendation; (2) the juvenile court must accept DCS's placement recommendations unless it finds by a preponderance of the evidence that the recommendation is "unreasonable" or "contrary to the welfare and best interests of the child," IC 31-34-19-6.1(d); (3) a finding by the juvenile court that DCS's recommendation is contrary to the child's welfare and best interests is reviewed on appeal for clear error; and (4) the juvenile court's placement determination was not clearly erroneous. Id. at 802. The Court concluded that what might have originally begun as a periodic case review became a modification hearing on the juvenile court's initial order of disposition. Id. at 803. The Court held that: (1) the juvenile court's order contrary to DCS's recommendations, which included making written findings, and concluding that it "is in [the child's] best interest to remain in current relative/foster placement until the end of the 2008-2009 school year," and that "[t]o immediately remove him from this home at this time would be disruptive, counterproductive to the progress he has been making and not in his best interests," was consistent with IC 31-34-19-6.1(d) and (e); (2) IC 31-34-19-6.1(f) makes a juvenile court's findings and decree under IC 31-34-19-6.1(d) and (e) appealable pursuant to any procedure for expedited appeal provided by the Indiana Rules of Appellate Procedure; (3) the juvenile court's placement order constituted a new dispositional decree, and DCS was appealing the juvenile court's placement order entered under IC 31-34-19-6.1; and (4) the clear language of Rule 14.1 permits an expedited appeal in cases of disagreement between the juvenile court and DCS. Id. Additionally, the Court agreed with DCS that: (1) IC 31-34-19-6.1(d) creates in the juvenile court a presumption of

correctness for DCS's final recommendations, relieving DCS of the burden of initially coming forward with evidence to support its findings and requiring that any resulting decision contrary to DCS's recommendations must be supported by a preponderance of the evidence; and (2) because of the statutory presumption favoring DCS's final recommendations, juvenile courts thus lack unfettered discretion to make a contrary decision. Id. at 804. The Court concluded that, once the juvenile court has appropriately considered DCS's recommendations in light of the relevant evidence and reached a contrary conclusion, the appellate function is governed by Indiana Trial Rule 52(A), which states that "the court on appeal shall not set aside the findings or judgment unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Id.

See also **In Re T.D.**, 912 N.E.2d 393, 398 n.2 (Ind. Ct. App. 2009) (Court concluded that trial court did not error in placing juvenile in non-secure detention facility outside of Indiana and that, at time of this case's disposition, IC 31-40-1-2(a) obligated DCS to pay the costs of this out-of-state placement; but, if disposition had been after the amendment to IC 31-40-1-2 effective July 1, 2009, DCS would not have been obligated to pay costs of out-of-state placement); **In Re D.M.**, 907 N.E.2d 582, 586 (Ind. Ct. App. 2009) (on appeal pursuant to Indiana Appellate Rule 14.1, Court affirmed the trial court's modified dispositional order placing the juvenile, previously adjudicated to be a delinquent, in an out-of-state shelter care facility against the recommendations of DCS).

XIII.C. 2. Policy for Expedited Appeals

In his January 17, 1996 State of the Judiciary address to the Indiana General Assembly, Chief Justice Randall T. Shepard announced a policy that all appeals involving the care of children should be given expedited consideration. This policy was noted in a grandparent visitation case, **In Re Walker**, 665 N.E.2d 586, 587 n.1. (Ind. 1996).

XIII.D. Final Appealable Judgments and Interlocutory Appeals

The dispositional order is the final appealable judgment for a CHINS case. See **Matter of J.L.V., Jr.**, 667 N.E.2d 186, 189 (Ind. Ct. App. 1996) (entry of dispositional order following dispositional hearing constitutes final appealable judgment, and appeals sought prior to issuance of dispositional order are interlocutory in nature and must accord with procedures required for certification of interlocutory appeal under Ind. Appellate Rule 4(B)); **T.Y.T. v. Allen County Div. of Family**, 714 N.E.2d 752, 756 n.3 (Ind. Ct. App. 1999) (Court acknowledged that dispositional order rather than factfinding judgment is final appealable order, but since dispositional hearing was conducted eight days after factfinding hearing, Court properly proceeded to hear appeal on merits). But see **Hallberg v. Hendricks Cty. Office**, 662 N.E.2d 639 (Ind. Ct. App. 1996), in which the Court rejected the argument of the office of family and children that the appeal was premature because the court had not conducted a dispositional hearing. The Court noted that the trial court had entered a judgment of CHINS following a factfinding hearing, and the court had determined that the children should remain in the custody of Mother and receive services recommended by the office of family and children. Id. at 643. The Court stated:

> Thus, although the trial court did not hold a separate dispositional hearing, we believe that the trial court's order finally determined the rights of the parties. Accordingly, a final and appealable judgment exists and we will address the merits of Glenn's [father's] appeal. Id. at 643.

In **In Re D.J. v. Department of Child Services**, 68 N.E.3d 574 (Ind. 2017), the Indiana Supreme Court reversed the trial court's CHINS determination. Id. at 581. The Court held the trial court's

findings amply supported its conclusion that Parents required the court's coercive intervention *early* in the CHINS process, but the findings did not show that Parents needed *ongoing* coercive intervention throughout the process, and certainly did not show that Parents needed such intervention by the time of the factfinding hearing (emphasis in opinion). Id. The Court also held that: (1) a CHINS determination is not a final appealable judgment; (2) by filing notices of appeal from a non-final CHINS judgment, Parents forfeited their right to appeal; but (3) given the Court's preference for deciding cases on their merits and the important parental interest at stake, the Court chose to disregard Parents' forfeiture and decide the merits of the case. Id. at 578-80.

In **In Re R.H.**, 55 N.E.3d 304 (Ind. Ct. App. 2016), the Court considered on its merits Mother's appeal of the juvenile court's order finding that reasonable efforts to reunify her with her child were not required. Id. at 309. The Court looked to the effect of the orders which the trial court had entered prior to Mother's notice of appeal, noting that: (1) the court had determined that the child was a CHINS and placed her in foster care; (2) in addition to finding that DCS need not make reunification efforts, the no reasonable efforts order suspended Mother's visitation with the child; and (3) the permanency order changed the plan from reunification to adoption. Id. at 308. The Court found that, whether the court's orders were technically a final judgment, they certainly operated as one. Id. at 309.

In **In Re E.W.**, 26 N.E.3d 1006 (Ind. Ct. App. 2015), the trial court had determined that a permanency plan of Another Planned Permanent Living Arrangement (APPLA) was in the fourteen-year-old child's best interests. After the permanency hearing, the trial court held another hearing on whether the child should have ongoing contact with Mother. The trial court ordered that all contact between Mother and the child cease, and Mother appealed. The Court first considered whether Mother's appeal was from a final judgment, thereby allowing the Court of Appeals to have jurisdiction over the case. The Court explained that, by ordering that all contact between Mother and the child cease, the trial court was effectively ending that relationship until the child became a legal adult. Id. at 1009. The Court concluded that, whether or not the trial court's order was technically a final judgment, it certainly operated as one. Id. The Court decided to consider Mother's appellate argument. Id. The Court affirmed the trial court's order ceasing Mother's visits with the child. Id. at 1010.

In **G.B. v. Dearborn Cty. Div. of Fam. & Child.**, 754 N.E.2d 1027 (Ind. Ct. App. 2001), *trans. denied*, the child was found to be a CHINS. The trial court's dispositional order issued from the December continued dispositional hearing placed the child in foster care as a ward of Dearborn County OFC with visitation at OFC's discretion and found that reasonable efforts to reunify the child with Parents or preserve the child's family were not required. Two years previously, the court had terminated Parents' rights to three other children. Parents appealed the constitutionality of IC 31-34-21-5.6, which allows the court to dispense with reasonable efforts in certain situations, including a previous involuntary termination judgment. As a preliminary matter, the OFC argued that the December order, entered eighteen days after the original dispositional order in November, was not an appealable order. The Court disagreed with the OFC's argument that the order was an unappealable reasonable efforts ruling. Id. at 1030. The Court concluded that the December hearing was a continuation of the November dispositional hearing and the December order was an appealable dispositional order. Id.

But see **In Re K.F.**, 797 N.E.2d 310 (Ind. Ct. App. 2003), the children were diagnosed with "failure to thrive" and lacked proper immunizations so a CHINS petition was filed. At the subsequent permanency hearing the trial court found that it was in the children's best interests that the LaPorte County OFC proceed with termination of parental rights. Parents appealed the permanency order, and the Court addressed the question of whether a permanency plan is

appealable. The Court opined that a permanency plan order is not a final judgment as defined by Appellate Rule 2(H) which states:

> A judgment is a final judgment if: (1) it disposes of all claims as to all parties; (2) the trial court in writing expressly determines under Trial Rule 54(B) or Trial Rule 56(C) that there is no just reason for delay and in writing expressly directs the entry of judgment (i) under Trial Rule 54(B) as to fewer than all the claims or parties, or (ii) under Trial Rule 56(C) as to fewer than all the issues, claims or parties; (3) it is deemed final under Trial Rule 60(C); (4) it is a ruling on either a mandatory or permissive Motion to Correct Error which was timely filed under Trial Rule 59 or Criminal Rule 16; or (5) it is otherwise deemed final by law.

Id. at 314-15. The Court went on to state that the only way in which the permanency plan affected Parents was that it approved the initiation of proceedings which *could* result in termination of parental rights (emphasis in opinion), but such proceedings would not prejudice the parents unless and until termination occurred. Id. at 315. The Court dismissed the appeal, concluding that the permanency plan order was not an appealable final judgment. Id. See Chapter 9 at III. for further discussion of permanency hearings.

Appeals may be taken from interlocutory orders prior to final judgment in compliance with Ind. Appellate Rule 4(B)(6). The case law is not clear whether a placement ruling subsequent to a dispositional hearing is a final appealable order, or subject to an interlocutory appeal. In **E.R. v. Office of Family & Children**, 729 N.E.2d 1052 (Ind. Ct. App. 2000), the Court certified for interlocutory appeal the court's post-dispositional order, which provided in part for the continued foster care placement of four of the children and ordered foster care placement for a fifth child. In determining that the interlocutory appeal was appropriate, the Court stated:

> The placement decisions are subject to change while the CHINS proceedings are pending, and do not finally determine placement of the children. The requirement that the juvenile court must hold a formal hearing for each periodic review, however, results in a formal determination regarding placement. Because Lopez and Rivera [parents] timely filed their praecipe after the May 3, 1999 placement decision as to J.O.R. [child] and the periodic review of the other children's placement, we find that the placement decisions are reviewable in this interlocutory appeal.

Id. at 1060.

In **In Re Tr. S.**, 63 N.E.3d 1065 (Ind. Ct. App. 2016), Mother appealed the trial court's review and permanency hearing orders which (1) continued the suspension of Mother's parenting time with her children; (2) provided that DCS was no longer required to provide reunification services with the exception of random drug screens; (3) changed the permanency plan from reunification to termination of Mother's parental rights; (4) found that, in the best interests of the children, DCS should initiate proceedings for termination of the parent-child relationship. The Court dismissed Mother's appeal because it was not an appeal from a final appealable judgment and Mother had not followed the proper procedure to seek a discretionary interlocutory appeal. Id. at 1069.

In **In Re D.W.**, 52 N.E.3d 839 (Ind. Ct. App. 2016), in which the Court dismissed Mother's appeal of the trial court's order denying her motion to modify the permanency plan. Id. at 842. Visitation between Mother and the child was suspended ten months after the CHINS adjudication. A year after the child's CHINS adjudication, the trial court changed the permanency plan to termination of parental rights. Before the termination petition was heard, the court held multiple

hearings on Mother's motion for modification of the permanency plan, for reinstatement of visitation, and for a bonding assessment. The trial court denied Mother's motion to modify the permanency plan, granted DCS's motion to discontinue visitation, ordered that all parenting time between Mother and the child cease, and ordered counsel to coordinate with the trial court regarding a termination hearing. Mother appealed the trial court's order, characterizing it as a final, appealable judgment. The Court looked to Indiana Appellate Rule 2(H), which states that a judgment is a final judgment if: (1) it disposes of all claims as to all parties; (2) the trial court in writing expressly determines under Trial Rule 54(B) or 56(C) that there is no just reason for delay and in writing expressly directs the entry of judgment; (3) it is deemed final under Trial Rule 60(C); (4) it is a ruling upon either a mandatory or permissive Motion to Correct Error which was timely filed; or (5) it is otherwise deemed final by law. Id. at 841. The Court found that the trial court's order did not meet any of the qualifications listed at Appellate Rule 2(H). Id.

In **In Re K.B.**, 793 N.E.2d 1191 (Ind. Ct. App. 2003), a CHINS case, the Court found that the LaPorte County OFC had failed to preserve the issue of the juvenile court's denial of OFC's first motion to dismiss the CHINS petition when OFC failed to file a formal request for a permissive interlocutory appeal pursuant to Ind. Appellate Rule 14(B). Id. at 1198 n.4.

XIII.E. Standard of Appellate Review

In reviewing the sufficiency of the evidence, the Appellate Courts will not reweigh the evidence or judge the credibility of witnesses. **In Re C.K.**, 70 N.E.3d 359 (Ind. Ct. App. 2016); **In Re C.W.**, 723 N.E.2d 956 (Ind. Ct. App. 2000); **Alexander v. La Porte Co. Welfare Dept.**, 465 N.E.2d 223 (Ind. Ct. App. 1984). The ruling of the trial court will not be set aside unless it is clearly erroneous. **In Re Wardship of B.C.**, 441 N.E.2d 208 (Ind. 1982). The Appellate Court will consider the evidence most favorable to the judgment. **J.K.C v. Fountain County Dept. of Pub. Wel.**, 470 N.E.2d 88 (Ind. Ct. App. 1984).

Findings of fact and conclusions of law are required for all termination judgments. See IC 31-35-2-8(c).

In **Hallberg v. Hendricks Cty. Office**, 662 N.E.2d 639 (Ind. Ct. App. 1996), a CHINS case, the Court reiterated the standard of appeal when the court issues specific findings of facts:

> When reviewing a trial court's findings of fact and conclusions of law, we engage in a two-tier standard of review. We must first determine whether the evidence supports the findings and second, whether the findings support the judgment. The judgment will be reversed only if it is clearly erroneous, and the judgment is clearly erroneous only when it is unsupported by the findings of fact and conclusions of law entered on those findings. [citations omitted]

Id. at 643.

In **In Re E.M.**, 4 N.E.3d 636 (Ind. 2014), a termination of parental rights case, the Indiana Supreme Court addressed the heightened "clear and convincing" burden of proof that DCS must meet in termination cases. Id. at 642. The Court clarified that weighing the evidence under that heightened standard is the trial court's prerogative, in contrast to the Supreme Court's well-settled highly deferential standard of review. Id. The Court observed that reweighing whether the evidence "clearly and convincingly" supports the findings or the findings "clearly and convincingly" support the judgment is not a license to reweigh the evidence. Id. The Court said that its review "must give 'due regard' to the trial court's opportunity to judge the credibility of the witnesses firsthand," and "not set aside [its] findings or judgment unless clearly erroneous." E.M. at 642, quoting K.T.K. v. Indiana Dept of Child Servs., 989 N.E.2d 1225, 1229 (Ind. 2013).

See also **In Re I.P.**, 5 N.E.3d 750, 752 (Ind. 2014) and **In Re S.B.**, 5 N.E.3d 1152, 1153 (Ind. 2014), in which the Indiana Supreme Court stated that it is precisely because the judge or magistrate presiding at a termination hearing has a superior vantage point for assessing witness credibility and weighing evidence that the Court gives great deference to a trial court's decision to terminate parental rights.

In **Bester v. Lake County Office of Family**, 839 N.E.2d 143 (Ind. 2005), the Indiana Supreme Court reiterated that when reviewing the termination of parental rights, the Court does not reweigh the evidence or judge witness credibility, citing Doe v. Daviess County, 669 N.E.2d 192, 194 (Ind. Ct. App. 1996). Bester at 147. The Court noted that a trial court's judgment will be set aside only if it is clearly erroneous. Id. The Court opined that the OFC has the burden of proving the termination allegations outlined at IC 31-35-2-4(b)(2) by clear and convincing evidence, citing In Re R.J., 829 N.E.2d 1032, 1035 (Ind. Ct. App. 2005). Bester at 148. The Court said that several of the trial court's findings were either misleading or unsupported by the evidence and that the remaining findings which were supported by the evidence did not support the trial court's judgment. Id. at 153. The Court held the trial court's conclusion that there was a reasonable probability that the continuation of the parent-child relationship posed a threat to the child's well-being had not been demonstrated by clear and convincing evidence, and was clearly erroneous, warranting reversal. Id.

In **In Re T.H.**, 856 N.E.2d 1247 (Ind. Ct. App. 2006), the CHINS adjudication was reversed. Id. at 1248. The Court stated that, according to case law, the reviewing Court must first determine whether the evidence supported the findings, and second, whether the findings supported the judgment. Id. at 1250. The Court observed that, in practical terms, the Court may look first to determine whether the judgment is supported by the findings, and if it is not so supported, appellate review is concluded. Id. The Court concluded that the trial court's findings and conclusions in the T.H. case did not support the CHINS judgment. Id. The Court did not inquire into whether the evidence supported the findings. Id.

In **In Re J.Q.**, 836 N.E.2d 961 (Ind. Ct. App. 2005), the Court reversed the trial court's CHINS adjudication, holding that the trial court's limited findings made it difficult to determine whether or not a mistake had been made. Id. at 966. The Court stated that its review of the record yielded evidence that could support either outcome, but the Court was in no position to reweigh the evidence. Id.

XIII.F. Waiver of Appealable Issues

Issues may be waived by failure to file a timely appeal. In **E.R. v. Office of Family & Children**, 729 N.E.2d 1052 (Ind. Ct. App. 2000), the Court ruled that Parents waived appeal of the CHINS judgment on their four older children by failing to file the appeal in a timely manner following the CHINS judgment.

A party may also waive an error if the Court determines that the party invited the error by its own action or inaction. In **A.D. v. Clark**, 737 N.E.2d 1214 (Ind. Ct. App. 2000), the Court ruled that by failing to object to continuances of the hearing, the guardian ad litem waived the statutory requirement that the termination trial commence ninety days after the filing of the termination petition. Id. at 1217. The Court determined that any error in failing to schedule the hearing within the ninety days, and the trial court's subsequent stay of the termination case until the adoption case involving the same child was completed, was invited by the guardian ad litem and thereby waived. Id. at 1216-17. The Court stated that "A party may not take advantage of an error which he commits, invites, or which is the natural consequence of his own neglect or misconduct." Id. at 1217. In **E.R. v. Office of Family & Children**, 729 N.E.2d 1052, 1061 (Ind. Ct. App. 2000), the

Court ruled that any error in the trial court's failure to place Hispanic children with paternal grandparents in Mexico was invited, and thus waived, by Parents' failure to provide adequate information about the grandparents to the trial court.

In termination cases, procedural issues from the CHINS case have been successfully raised on appeal under a theory of denial of due process. In **A.P. v. PCOFC**, 734 N.E.2d 1107 (Ind. Ct. App. 2000), *trans. denied*, the Court reversed the termination judgment due to multiple procedural errors, with the bulk of those errors occurring in the underlying CHINS case in which there had been no appeal. Id. at 1118-19. The Court noted that the CHINS and termination statutes are "interlocking" and not independent of one another, and stated:

> Thus, procedural irregularities in a CHINS proceeding may be of such import that they deprive a parent of procedural due process with respect to the termination of her parental rights. It would be incongruous to hold that a county, with the assistance of a juvenile court, may commence CHINS proceedings for a child and removal a child from his or her home, yet disregard various portions of the CHINS and termination statutes on several occasions and still terminate parental rights following the passage of time after a CHINS dispositional decree and a child's removal from home.

Id. at 1112-1113.

In the A.P. case the following issues were neither raised on appeal in the CHINS case nor directly raised by the parties on appeal in the termination case: (1) the CHINS petition was unsigned and unverified; (2) there was no issuance of an original or modified dispositional decree containing the requisite findings on the removal of the children from the home; (3) no permanency hearing was held to examine whether Parents' procedural rights were being safeguarded; (4) there was no compliance with the protective order statute due to failure to list findings supporting the no contact order against Father; and (5) incarcerated Father was not transported to review hearings and hearings on no contact orders. Id. at 1115-17. See also **In Re G. P.**, 4 N.E.3d 1158 (Ind. 2014) (Court vacated judgment terminating Mother's parental rights because she was denied her statutory right to counsel during the course of the CHINS proceedings); and **Matter of R.R.,** 587 N.E.2d 1341 (Ind. Ct. App. 1992) (Court granted Mother's motions for relief from judgments to reverse both termination and underlying CHINS judgments based, in part, on procedural errors that had not been timely appealed in the CHINS case).

A party may waive allegations of due process violation by failing to raise the due process issues during the CHINS or termination proceedings or by failing to present cogent argument in an appellate brief. It is well established law that the Appellate Courts may consider a party's constitutional claim waived when it is raised for the first time on appeal. See **N.C. v. Indiana Dept. of Child Services**, 56 N.E.3d 65 (Ind. Ct. App. 2016) (Court found that Father's termination appeal issue was waived for failure to develop an argument supported by cogent reasoning and because issue was raised for the first time on appeal); **In Re A.G.**, 6 N.E.3d 952, 957-58 (Ind. Ct. App. 2014) (Mother urged the Court to hold that the rule on negative inferences which could be drawn in a civil case from her refusal to testify based on her Fifth Amendment right should not be applied in a CHINS case, but did not support her contention with relevant authority or cogent argument; thus, the issue was waived); **S.L. v. Indiana Dept. of Child Services**, 997 N.E.2d 1114, 1121 (Ind. Ct. App., 2013) (Court found that incarcerated Father's due process claim was waived because it was never raised at termination trial); **In Re Involuntary Term. Paren. of S.P.H.**, 806 N.E.2d 874, 877-78 (Ind. Ct. App. 2004) (incarcerated Father's allegations that he did not receive notices of CHINS hearings, DCS failed to negotiate with him before filing case plan and that he was not transported to CHINS hearings were waived on appeal due to failure of Father's counsel to address these allegations at the termination

hearing); **McBride v. County Off. Of Family & Children**, 798 N.E.2d 185, 194-95 (Ind. Ct. App. 2003) (Mother had counsel for CHINS and termination proceedings, but failed to object to any alleged deficiencies in the CHINS process during the CHINS proceedings nor to argue them during the termination proceedings, so her constitutional challenge was waived); **Carter v. KCOFC**, 761 N.E.2d 431, 438 (Ind. Ct. App. 2002) (Mother waived her federal drug and alcohol records privilege at CHINS proceeding; therefore it was not error for trial court to consider records at termination); **In Re K.S.**, 750 N.E.2d 832, 834 n.1(Ind. Ct. App. 2001) (Mother waived her allegations of due process errors concerning trial court's noncompliance with permanency hearing, case plan and dispositional order by raising allegations for the first time on appeal); **Bergman v. Knox County OFC**, 750 N.E.2d 809, 810-811 (Ind. Ct. App. 2001) (Mother contended trial court erred in admission of litigation-oriented documents over her hearsay objections but provided only an incomplete statement to shore up her claim; hence, issue was waived.)

XIII.G. Stay Pending Appeal

In **In Re Invol. Term. of Parent-Child Rel.[A.K.]**, 755 N.E.2d 1090 (Ind. Ct. App. 2001), Mother appealed the trial court's judgment terminating the parent-child relationship and also appealed the trial court's denial of her motion to stay the termination pending appeal. The children's foster mother desired to adopt them and the children had bonded to her. Mother argued that the trial court had abused its discretion in denying her motion for a stay. Mother contended the following: (1) the children would better served by continuing them in foster care until the appeals process was completed instead of allowing adoption proceedings to begin immediately; (2) the stay would not prejudice anyone because if the termination order were overturned the adoption would also be overturned; and (3) denial of the stay could damage the relationship between the children and their parents. The Court stated that it applies an abuse of discretion standard in reviewing a motion to stay proceedings. Id. at 1098. Citing Matter of R.R., 587 N.E.2d 1341, 1343 (Ind. Ct. App. 1992), the Court noted that an abuse of discretion is found when the trial court's action is clearly erroneous, against the logic and effect of the facts before it and the inferences which may be drawn from it. Invol. Term. at 1098. The Court found that the trial court had not abused its discretion by denying the stay and thus immediately creating a stable environment for the children. Id. The Court noted the following evidence: (1) Mother offered only general arguments as to why the trial court's denial of her request for a stay was an abuse of discretion; (2) Mother never had a relationship with her children nor did she attempt to have one; (3) Mother did not inquire of the children's foster mother concerning the children; (4) the foster mother had created a safe and stable environment for the children and the children had bonded to each other and to the foster mother. Id.

XIV. MOTION FOR RELIEF FROM JUDGMENT

In **In Re Adoption of T.L.W.**, 835 N.E.2d 598 (Ind. Ct. App. 2005), the Court affirmed the trial court's denial of Birth Mother's motion to enforce a visitation agreement which she claimed had been negotiated and promised by the Indiana Family and Social Services Administration prior to her voluntary termination of her parental rights. Id. at 602. Birth Mother asserted that the adoption order failed to include the negotiated agreement regarding visitation and correspondence with her children and that the trial court erred in not reviewing the adoption order pursuant to Ind. Trial Rule 60(B)(2) or Ind. Trial Rule 60(B)(8). The children had been adopted for over one year before Birth Mother filed her motion. The Court found that Birth Mother was not due relief under T.R. 60(B)(2) because relief under this rule is expressly available only if the motion is filed within one year from the date of the order. Id. at 601. The Court noted that a party must affirmatively demonstrate some extraordinary circumstances to qualify for relief under T.R. 60(B)(8). Id. The Court noted that, when making a determination regarding a T.R. 60(B) motion, a trial court is required to balance the alleged injustice

suffered by the party moving for relief against the interests of the winning party and society in the finality of litigation, and concluded that permanency for the children outweighed the alleged injustice suffered by Birth Mother. Id.

In **K.E. v. MCOFC**, 812 N.E.2d 177 (Ind. Ct. App. 2004), *trans. denied*, Birth Mother filed a pro se motion to set aside the court's judgment terminating the parent-child relationship two years after the entry of the judgment. At the time of Birth Mother's filing, the children had been adopted for almost one year along with two of their siblings who were the subjects of separate termination proceedings. Although Birth Mother's motion to set aside did not specifically mention Ind. Trial Rule 60(B), the Court considered her claim under T.R. 60(B)(8). Birth Mother had been present and was represented by counsel on the dates of the termination hearing, and the termination judgment was issued seven days after the conclusion of the termination hearing. At the time of the hearing on her motion, Birth Mother was incarcerated and hoped to be released in five months. She testified that she was unaware that she had thirty days to appeal the trial court's judgment and that she wanted to reintroduce herself into her children's lives upon her release from incarceration. Birth Mother was unaware of the children's current circumstances and did not know whether the children wanted contact with her. The Court affirmed the trial court's order denying Birth Mother's motion to set aside, finding that Birth Mother's two-year delay in challenging the termination judgment did not meet the requirements of T.R. 60(B)(8) that the "motion shall be filed within a reasonable time" and must allege a "a meritorious claim or defense." Id. at 180. The Court opined that the Marion County OFC's interest in the children's placement in a stable home environment coupled with society's interest in the finality of litigation involving such placement counseled in favor of denying Birth Mother's motion to set aside the termination judgment. Id.

In **In Re Adoption of Infant Female Fitz**, 778 N.E.2d 432 (Ind. Ct. App. 2002), Putative Father filed a motion for relief from judgment in an adoption proceeding pursuant to Ind. Trial Rule 60(B). The trial court entered an order finding that Putative Father's consent to adoption was irrevocably implied because he had filed his paternity action one day too late. Putative Father contended that the trial court had erred in striking his motion to set aside the judgment because the affidavits submitted in support of his T.R. 60(B) motion supported the conclusion that the trial court's order had been procured by fraud. Putative Father alleged that at the time of the hearing, the adoption attorney had no client because the adoptive petitioners had returned the child to the adoption agency. The Court concluded that if Putative Father's allegations were true, he had established fraud on the court and had made a prima facie showing of a meritorious defense. The Court reversed and remanded with instructions for the trial court to hold a hearing on Putative Father's motion for relief from judgment. Id. at 439.

In **Matter of R.R.**, 587 N.E.2d 1341 (Ind. Ct. App. 1992), the Court ruled that the trial court abused its discretion when it denied Mother's motions for relief from the CHINS and termination judgments. Id. at 1343. The Court noted that Ind. Trial Rule 60(B) is addressed to the equitable discretion of the trial court. Id. at 1342-43. The motion may not deal with the substantive legal merits of the judgment, but is limited to the "procedural, equitable grounds justifying relief from the finality of the judgment." Id. at 1343. A trial court ruling on a motion for relief from judgment is reviewed on appeal under the abuse of discretion standard. Id. The grounds for the motion for relief from judgment in the CHINS case included: (1) failure to appoint a guardian ad litem for the child; (2) failure to follow CHINS and termination statutory procedures; and (3) failure to appoint counsel for Mother. Id. at 1344-45.

XV. MODIFICATION OF DISPOSITIONAL DECREE

XV.A. Overview

Modification refers to the process of changing the court's dispositional orders for the child and family. IC 31-34-19-9 requires that the court advise the child and the child's parent, guardian, or custodian at the dispositional hearing of the modification statutes. The modification statutes at IC 31-34-23 provide that the parties may seek, or the court may order, modifications at any dispositional hearing. Often modifications are requested and ordered at review hearings.

In **In Re G.P.**, 4 N.E.3d 1158, 1163 (Ind. 2014), the Indiana Supreme Court opined that IC 31-34-4-6 explicitly provides for a statutory right to court appointed counsel for a parent in a CHINS case if the parent requests the appointment of counsel and the trial court finds that the parent is indigent. This right also applies if the parent first requests court appointed counsel at the dispositional modification hearing.

XV.B. Jurisdiction

IC 31-34-23-1 provides that a dispositional decree may be modified as long as the court retains jurisdiction. IC 31-30-2-1 provides that the juvenile court retains jurisdiction over the child and the parent, guardian, or custodian until the child attains the age of twenty-one unless the parties are discharged by the court at an earlier time.

XV.C. Standing to Seek Modification

IC 31-24-23-1 lists the persons who can move the court for modification of any dispositional decree. The court can modify the dispositional decree on its own motion or upon motion of any of the following: the child; the child's parent, guardian, or custodian; the guardian ad litem/court appointed special advocate; the DCS attorney; and any person providing services to the child or to the child's parent, guardian, or custodian under a decree of the court.

XV.D. Types of Modifications

IC 31-34-23-3 provides for two types of modifications: (1) emergency change in the child's residence, and (2) any other modification of the dispositional decree. The court may issue a temporary order on an emergency change of the child's placement, but DCS shall then give notice "to the persons affected" and the court shall hold a hearing on the change of placement if requested. IC 31-34-23-3(b) requires DCS to give notice to persons affected if the motion requests any other modification. The juvenile court shall hold a hearing on the motion. See this Chapter at XV.G. for procedures and hearings on modifications.

XV.E. Adding New Allegations to CHINS Case Through the Modification Process

The modification process can be used to add a new allegation of child abuse or neglect to the existing CHINS case. For example, a child may have been adjudicated CHINS due to parental neglect, but it is subsequently learned that the child is being sexually molested by one of the parents. The molestation issues can be alleged in a modification petition, rather than filing a new CHINS petition. There may be consequences for failing to bring "later discovered" allegations formally before the court in this manner, i.e.: (1) the parent does not have a fair opportunity to refute the allegations; (2) the parent does not receive the services necessary to resolve the newly identified parenting problem; and (3) DCS will be unable to use unproven allegations as grounds for contesting discharge of the child or in seeking termination of the parent-child relationship. The modification process can keep the court record current on the services offered to the parents and further efforts needed to secure parent-child reunification.

In **Matter of D.T.**, 547 N.E.2d 278 (Ind. Ct. App. 1989), a termination case, the CHINS petition and adjudication regarding Mother's four children dealt with sexual abuse and neglect of the children, but only one child was initially removed from the home. At the six month review hearing, the office of family and children obtained a modification to remove the three remaining children from the home due to Mother's psychological problems that prevented her from fulfilling her parental obligations. In its order following the hearing, the court approved the review, modified the dispositional order, and incorporated the case plan in its order. Id. at 284. The case plan provided for Mother to cooperate with the office of family and children and to participate in counseling, home-based services, and homemaker services. A termination petition was filed and granted after a hearing. Mother claimed on appeal that she did not have notice of all the conditions she needed to remedy, including her low income and inadequate housing. The Court rejected Mother's argument. Id. at 284. It ruled that the dispositional modification order gave Mother adequate notice of the conditions she had to remedy to obtain reunification with her children and to avoid the termination of her parental rights. Id. The Court stated:

> We conclude, based upon our review of the original CHINS adjudication and dispositions, that Lola [mother] had adequate notice that the reason for the court's adjudication was her inability to care for and provide for her children, including but not limited to her lack of income and ability to provide shelter. If her situation did not improve, she faced the possibility that her parental rights would be terminated. While it is true that J.B.'s [child's] removal from the home was initially the result of sexual abuse, it became obvious that independent of, and perhaps because of the sexual abuse, Lola was unable to provide her four children with the care and necessities they needed. It is not necessary that new CHINS proceedings be initiated once new grounds for intervention by the DPW are discovered.

Id. at 284 (citations omitted).

The Court of Appeals indicated that new CHINS proceedings need not be initiated each time an additional reason for intervention is discovered in the termination cases **Matter of Y.D.R.**, 567 N.E.2d 872, 876 (Ind. Ct. App. 1991) and **Matter of C.D.**, 614 N.E.2d 591, 593 (Ind. Ct. App. 1993).

In **In Re A.I.**, 825 N.E.2d 798 (Ind. Ct. App. 2005), *trans. denied*, a termination of the parent-child relationship case, Parents argued the trial court's finding that the reasons for the child's removal were not likely to be remedied was clearly erroneous because the alleged conditions materialized after the child's removal from Mother. The Court opined that the trial court properly considered the conditions leading to the continued placement outside of the home rather than simply focusing on the basis for the child's initial removal. Id. at 807. The Court opined that a new CHINS petition was not required for each additional ground for intervention that was discovered. Id.

XV.F. Modification Guidelines and Standard

The modification statutes at IC 31-34-23 do not provide criteria or guidelines for determining when modification is appropriate. It seems reasonable that the dispositional guidelines stated at IC 31-34-19-6 are applicable to the modification of a dispositional order. See this Chapter at II.H. for the list of dispositional guidelines. IC 31-34-23-4 provides that, if a modification hearing is required, IC 31-34-18 [predispositional report] and IC 31-34-19 [dispositional hearing] apply to the preparation and use of the report. IC 31-34-19-6.1 applies to modification hearings as well as to dispositional hearings. See this Chapter at III.C. for a further discussion of IC 31-34-19-6.1, which requires the prioritization of DCS's recommendations as part of the court's decision making process.

XV.G. Procedures For Modification

XV.G. 1. Modification Motion

IC 31-34-23-1 provides that the person seeking to modify the dispositional decree shall make a motion for modification. The statute does not prescribe a format for the pleading. It is recommended that the pleading state the specific modification sought and the facts supporting the request for modification. Specificity in pleading and an attached affidavit with relevant facts are recommended. When evidence at the review hearing indicates the need for modification, the parties, or the court, on its own motion, can orally request the modification. IC 31-34-23-1. The opposing parties may object to proceeding on the motion at the review hearing due to lack of advance notice and lack of modification report. See IC 31-34-23-3(b) (notice of modification petition required), and IC 31-34-23-4 (DCS required to prepare report when modification recommended).

XV.G. 2. Notice and Opportunity to Be Heard

IC 31-34-19-9 requires the court to give oral notification of the modification statutes and procedures to the child and the child's parent, guardian, or custodian at the dispositional hearing. IC 31-34-23-3 requires DCS to give notice of all requested modifications to "the persons affected." Notice should be given to all parties. IC 31-34-23-3(a) provides that the court can issue an order without a hearing on a request for an emergency change of the child's residence, but DCS shall then give notice "to the persons affected." IC 31-34-23-3(b) states that if the motion requests any other modification, the juvenile court shall hold a hearing. IC 31-34-23-4 states that notice of a modification hearing shall be given in accordance with IC 31-34-19-1.3, the dispositional notice statute. Since IC 31-34-23-4 states that notice shall be given in accordance with IC 31-34-19-1.3, it is logical that those who receive notice also have the opportunity to be heard and to make recommendations pursuant to IC 31-34-19-1.3. IC 31-34-19-1.3(a) requires DCS to give notice of the date, time, place, and purpose of the dispositional hearing to: (1) each party or person for whom a summons is required to be issued under IC 31-34-10-2 (child, parent, guardian, custodian, guardian ad litem/court appointed special advocate, other person necessary for proceedings); and (2) each foster parent or other temporary caretaker.

In **Matter of C.B.**, 616 N.E. 2d 763 (Ind. Ct. App. 1993), the Court reversed a juvenile court dispositional modification order requiring the return of a child who was an adjudicated CHINS to Indiana from Tennessee. Id. at 770. The juvenile court had placed the child in Tennessee with her uncle under the Interstate Compact on the Interstate Placement of Children. Although the Court ruled that the Indiana juvenile court did have jurisdiction under the Interstate Compact to order the return of the child, the court's order for return of the child was invalid because the court had not given notice to the child's uncle (custodian/guardian) in Tennessee regarding the modification. Id. at 769. The C.B. opinion notes that the court has the authority to modify the disposition, but notice must be given. Id.

XV.G. 3. Modification Report

Several different statutes refer to the preparation of a written modification report. IC 31-34-21-1(a) provides that the court may order DCS to file a progress report at any time after the date of the original dispositional decree. IC 31-34-21-1(c) states that if, after reviewing the modification report, the juvenile court seeks to consider modification of the dispositional decree, the court shall proceed under the modification statutes at IC 31-34-23. IC 31-34-22-1(c) states that if modification of the dispositional decree is recommended, DCS shall prepare a modification report containing the information required by IC 31-34-18 [predispositional report] and request a formal court hearing. IC 31-34-23-4 states that

if a hearing is required, IC 31-34-18 [predispositional report] and IC 31-34-19 [dispositional hearing] govern the preparation and use of a modification report. The report shall be prepared if DCS or any person other than the child or the child's parent, guardian, guardian ad litem, or custodian is requesting the modification.

The modification report shall be prepared based on the predispositional report statutes set out at IC 31-34-18 which require consideration of: (1) the needs of the child; (2) the need and extent of parental participation; (3) financial responsibility; and (4) the dispositional guidelines. IC 31-34-18-5 provides that the court can order an examination of the child, and also order an examination of the child's parent, guardian or custodian if that person consents. Pursuant to IC 31-34-18-6, the report should be made available to the child and parties within a reasonable time before the hearing, unless it is determined on the record that the report should not be provided to the child or the child's parent, guardian or custodian.

See this Chapter at III.C. for discussion of IC 31-34-19-6.1, which establishes the procedures to be followed when the court disagrees with DCS's dispositional recommendations.

XV.G. 4. When is a Modification Hearing Required?

IC 31-34-23-3(a) requires that a hearing be held after the court has granted an emergency change in the child's residence, if the parties request a hearing. It is recommended that changes in the placement of a child who has been adjudicated a CHINS, whether of an emergency nature or not, should involve notice and a hearing. This may be a separate hearing or the issue may be addressed at an already scheduled review or status hearing. Federal law at 42 U.S.C. 675(5)(C) provides that "procedural safeguards shall also be applied with respect to parental rights pertaining to the removal of the child from the home of his parents, [and] to change in the child's placement." When a change of placement involves the removal of the child from the parent's home, the court should enter findings supporting the need for the removal of the child from the home as a dispositional modification. See this Chapter at XV.G.6. for discussion on the need for findings when the court modifies the child's placement.

For modification issues that do not include changes in the child's placement, the modification statute, IC 31-34-23-3(b), provides that DCS shall give notice of any requested modification and the court "shall" hold a hearing. The initial hearing statute, IC 31-34-10-5(3), requires the court to notify the parent, guardian or custodian of the right to controvert any allegations concerning parental participation and financial responsibility during the CHINS proceeding. IC 31-32-2-3 provides that the parent, guardian, or custodian has the right to subpoena witnesses and tangible evidence, cross-examine witnesses, and present evidence in any proceeding to determine parental participation or financial participation. These procedural rights are tantamount to the right to a hearing, unless the parents have otherwise agreed to the requested modification in parental participation or financial responsibility and the agreement is submitted to and approved by the court.

XV.G. 5. Hearsay in Modification Report

Statutes support the admission of hearsay evidence in modification reports. IC 31-34-23-4, the modification report statute, states that IC 31-34-18 and IC 31-34-19 "apply to the preparation and use of a modification report." IC 31-34-19-2(a) allows any predispositional report to be admitted into evidence to the extent that the report contains evidence of probative value even if the report would otherwise be excluded. Therefore, hearsay of probative value can be admitted into evidence in modification reports.

Practice Note: Practitioners should strictly follow the guidelines for filing reports in modification hearings, and note that hearsay evidence should be of probative value to be admissible in modification hearings. See **In Re C.B.**, 856 N.E.2d 1068, 1072 (Ind. Ct. App. 2007), in which the Court held that the juvenile court was permitted to admit the dispositional report into evidence despite its inclusion of hearsay as long as the report contained evidence of probative value.

XV.G. 6. Required Findings in Support of Modification

Practice Note: Although the statute for modification does not specifically require the court to enter findings in support of the modification, the reference to IC 31-34-19 in IC 31-34-23-4 supports the principle that findings should be issued as required by IC 31-34-19-10. Findings are always needed if a child is removed from his parents' home at the modification hearing. See Chapter 5 at IV.I. for information on required findings when a child is removed from home.