



## **Guardianship, Third Party Custody, and CHINS Law<sup>1</sup>**

Katherine Meger Kelsey, J.D.

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This paper addresses the interplay between CHINS, guardianship, and third party custody cases. A guardianship or a third party custodianship may be a potential resolution to a CHINS proceeding or may be a preventative solution to the filing of a CHINS petition. However, these areas of law are often complex and must be examined closely for which proceeding type is appropriate, or in which case a request must be made. Additionally, there are significant differences between third party custody law (which includes paternity and dissolution of marriage cases) and guardianship law (which is exclusive to Title 29 and determined by courts with probate jurisdiction), and how these areas of law interact with CHINS proceedings.

First, jurisdiction between guardianship and third party custody is addressed; next, the intersection between CHINS and Guardianship cases; and lastly, the intersection between CHINS and third party custody cases is discussed.

### **I. Jurisdiction Between Guardianship and Third Party Custody**

Many people use the term guardianship to apply to both legal guardianship and third party custody. For jurisdiction purposes, it is important to determine which proceeding is the correct proceeding to file, as it affects which court in which the case is filed. Generally, if there is an already existing court cases addressing child custody matters, that is where any requests for custody by non-parents should be filed.

In general, non-parents who desire “custody” of a child should petition for guardianship and proceed under Title 29 of the Indiana Code in the following situations:

1. Both of the child's parents are deceased.
2. There was a dissolution of marriage, but one of the parents is now deceased.
3. The child's parents remain married to each other.
4. The child was born out of wedlock and paternity has not been established in court.
5. The child has not been adjudicated a Child in Need of Services or the juvenile court does not currently have jurisdiction over the child's custody.

If there is a paternity or dissolution proceeding for the children, attorneys should petition for third party custody in the paternity or dissolution proceeding which has been previously filed

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<sup>1</sup> Disclaimer: This paper is not legal advice. You should consult your own attorney before taking or failing to take any legal action based on the content of this document or any other communications with Kids' Voice of Children's Law Center staff.

rather than in the court which has jurisdiction over guardianship. The court in which the dissolution or paternity proceeding was filed has continuing jurisdiction over the child. The paternity or dissolution court has jurisdiction to award custody to a third party or to modify custody to a third party.

The court with probate jurisdiction has exclusive original jurisdiction over non-CHINS guardianships. IC 29-3-1-3; IC 29-3-2-1(b). The court with probate jurisdiction has jurisdiction over guardianship petitions but does not have jurisdiction over children who have had paternity adjudications or whose parents have filed a dissolution proceeding. IC 29-3-2-1(d). Once jurisdiction has been asserted in a case by the paternity court or the dissolution court, that court retains original and continuing jurisdiction over custody matters relating to the children in those cases with some exceptions. **Murdock v. Estate of Murdock**, 935 N.E.2d 270 (Ind. Ct. App. 2010) and **Atteberry v. Atteberry**, 597 N.E. 2d 355 (Ind. Ct. App. 1992) hold that the dissolution court loses jurisdiction after a parent's death. With no reference to **Atteberry**, the Court of Appeals in **In Re Custody of G.J.**, 796 N.E.2d 756 (Ind. Ct. App. 2003), *trans. denied*, allowed the child's uncle to pursue custody in the dissolution court after the death of the father. See IC 31-14-5-5 and IC 31-14-5-8, which provide that paternity court jurisdiction survives the death of a parent.

The execution of a paternity affidavit pursuant to IC 16-37-2-2.1 legally establishes paternity and gives rise to parental rights and responsibilities which explicitly include reasonable parenting time, unless another determination is made by the court with paternity jurisdiction. However, this is accomplished with no court action. Because establishing paternity with a paternity affidavit does not involve a court proceeding, if paternity was established by a paternity affidavit alone, a guardianship proceeding in probate court should be initiated in order for a third party be appointed guardian.

For cases discussing jurisdiction between dissolution, and paternity, and guardianship/third party custody cases, see **In Re B.C.**, 9 N.E.3d 745, 752-54 (Ind. Ct. App. 2014) (Marion County Probate Court had jurisdiction to enter its guardianship order; Montgomery Circuit Court had jurisdiction to enter the agreed paternity order; because the subject of child custody was properly before the Marion Probate Court, the Montgomery Circuit Court was precluded from making a custody determination in the subsequently filed paternity action; because IC 31-19-2-14 governs the exclusive jurisdiction when a petition for adoption and a paternity action are pending at the same time, the Marion Probate Court, the court in which the petition for adoption had been filed, had exclusive jurisdiction over the child's custody); **In Re Adoption of L.T.**, 9 N.E.3d 172, 177 (Ind. Ct. App. 2014) (Hamilton County Court did not lack subject matter jurisdiction to conduct the guardianship proceedings and that the dispositive issue was proper venue; although the proceeding was commenced in the wrong venue, the proper remedy was transfer of the case to the correct venue, which was Marion County Paternity Court. The Court noted that IC 29-3-2-2(c) directs that a guardianship proceeding that was commenced in the wrong county may be transferred to another county in Indiana, and, upon transfer, the receiving court must complete the proceeding as if it were originally commenced in that court); **In Re Marriage of Huss**, 888 N.E.2d 1238, 1241 (Ind. 2008) (Dissolution Court did not err by failing to give effect to the intervening paternity judgment by the Paternity Court, where the subject matter of child custody of all four children, including the child who was the subject of the paternity judgment, was

before the Dissolution Court from the inception of the dissolution action which was pending prior to Wife's initiation of the paternity proceedings; determinative issue was whether the Paternity Court was authorized to adjudicate a custody issue that was already pending before another court, rather than whether the Dissolution Court had improperly failed to honor a judgment of a sister court); **In Re Custody of G.J.**, 796 N.E.2d 756, 762-64 (Ind. Ct. App. 2003), *trans. denied* ((1) the child's paternal uncle had standing to file a direct action pursuant to IC 31-17-2-3(2) for custody of the child; and (2) the child custody statute allows any person other than a parent to seek custody of the child by initiating an independent cause of action for custody that is not incidental to a marital dissolution, legal separation, or child support action. Thus, IC 31-17-2-3(2) provides third parties with the option to pursue custody of a child in a direct cause of action); **Christian v. Durm**, 866 N.E.2d 826 (Ind. Ct. App. 2007) (trial court did not err by proceeding with merits of third party custodian's claim despite dismissal of underlying dissolution petition), *trans. denied*; **Nunn v. Nunn**, 791 N.E.2d 779, 785 (Ind. Ct. App. 2003) (Court remanded custody decision to trial court to determine whether child's stepfather, who had been found not to be child's biological father as a result of DNA testing during dissolution/paternity proceeding, should be granted custody because he met definition of de facto custodian).

## II. **Intersection Between Guardianship and CHINS Cases**

### *a. Jurisdiction*

The court with probate jurisdiction has exclusive original jurisdiction over non-CHINS guardianships. IC 29-3-1-3; IC 29-3-2-1(b). However, the creation of a legal guardianship is a possible permanency plan for a child who is a CHINS. IC 31-34-21-7.5. When a child has been adjudicated a Child in Need of Services (CHINS) and remains under the jurisdiction of the juvenile court, the juvenile court has jurisdiction over a guardianship of the person of the child if the juvenile court has approved a permanency plan under IC 31-34-21-7 that provides for the appointment of a guardian of the person. IC 31-30-1-1(10).

If a guardianship is pending in a probate court, then the probate court must transfer the proceedings to the juvenile court. IC 31-34-21-7.7(b).

Most guardianships end by operation of law at age eighteen. If a guardianship continues after the child reaches the age of eighteen or nineteen, the juvenile court shall transfer the guardianship case to the court's probate docket or to the court which has probate jurisdiction in the county where the guardian resides. IC 31-30-2-1(d). With the consent of a probate court, the juvenile court may transfer the guardianship of the person proceeding and any child support order initiated in the juvenile court to the probate court. IC 31-30-2-1(f). The juvenile court may retain jurisdiction over an older youth (defined at IC 31-28-5.8-4 as an eighteen-year-old or a nineteen-year-old) who is the recipient of kinship guardianship assistance or other financial assistance. IC 31-30-2-1(g).

### *b. Juvenile Statutes*

If a juvenile court approves a permanency plan that provides for the appointment of a guardian for the child, juvenile court may appoint a guardian of the person and administer a guardianship under IC 29-3. IC 31-34-21-7.7(a). When a juvenile court creates a guardianship, that court may

include its order creating the guardianship any requirements, terms, and conditions described in IC 29-3-8-9(a). IC 31-34-21-7.7(c). Those terms and conditions include: (1) a requirement that the minor must reside with the guardian until the guardianship is modified or terminated; and (2) any terms and conditions that a parent must meet in order to seek modification or termination of guardianship. IC 29-3-8-9.

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 if the person is a sexually violent predator (as described in IC 35-38-1-7.5) or has been convicted of specific crimes which are listed at IC 31-30-1-2.5(2) and (3).

If the juvenile court closes the CHINS case after creating a guardianship, then the guardianship survives the closure of the CHINS case. IC 31-34-21-7.7(d). The probate court may then assume or reassume jurisdiction of the guardianship and take further action as necessary. IC 31-34-21-7.7(e).

### *c. Guardianship Statutes Impacting CHINS Cases*

In guardianship law, a minor is a person under eighteen years of age who is not emancipated. IC 29-3-1-10. A minor may be emancipated by marriage, military service, or a court order as a disposition of a CHINS or delinquency proceeding. Any person may petition for the appointment of a guardian for a minor. IC 29-3-5-1(a). The person who petitions may be an individual, a government entity such as DCS, or a corporation. IC 29-3-1-12. The person who files the petition need not be the person who is seeking to be appointed guardian.

The petition for guardianship must include information on whether a CHINS petition or a program of informal adjustment has been filed regarding the minor or is open at the time the petition is filed. IC 29-3-5-1(a)(13). A guardianship petition must have a description of what efforts to use less restrictive alternatives to guardianship were attempted; this provision does not specify whether it applies to just incapacitated adults or to minors as well. IC 29-3-5-1(a)(11).

The guardianship court must notify DCS of a hearing regarding the guardianship of a minor if a CHINS petition has been filed regarding the minor or a program of informal adjustment is pending. IC 29-3-5-1(g). Any person may apply for permission to participate in the guardianship proceeding and the court may grant this request with or without a hearing if the participation will serve the minor's best interest. IC 29-3-5-1(f). DCS may participate in the guardianship hearing if a CHINS petition has been filed or a program of informal adjustment is pending. IC 29-3-5-1(g). Legal notice of the guardianship petition must be served by the petitioner on any living parent of the minor (unless parental rights have been terminated), on any person who has had principal custody of the minor during the sixty days before a petition is filed, and on the minor who is fourteen years of age or older. IC 29-3-6-1(a)(3).

Certain provisions apply when the allegations in a petition for guardianship or allegations produced at guardianship proceedings indicate that the child for whom the guardianship is requested meets the definition of a CHINS. The guardianship court, on its own motion or at the request of a party, must: (1) send the petition for guardianship or the record of guardianship to DCS; and (2) direct DCS to initiate an assessment to determine whether the child is a CHINS.

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

A person may not be appointed or continue to serve as a guardian if the person is a sexually violent predator as described in IC 35-38-1-7.5 or has been convicted of a specifically listed sex crime. IC 29-3-7-7.<sup>2</sup>

In appointing a guardian, the court may specify or limit the guardian's powers. The guardian may be appointed to provide a home for the minor or to oversee and conserve the minor's property, or both. A probate or juvenile court may include in its order creating a guardianship the requirement that the minor must reside with the guardian until the guardianship is terminated. IC 29-3-8-9(a)(1). The court creating the guardianship may also include in its order creating guardianship any terms and conditions that a parent must meet in order to seek modification or termination of the guardianship. IC 29-3-8-9(a)(2).

DCS or the proposed guardian must notify the guardianship court if DCS has approved financial assistance to the guardian, and provides that, if the guardian will be provided assistance, the court shall order the guardian to provide financial support to the minor if guardianship property, child support, or DCS financial assistance do not fully support the minor. IC 29-3-8-9(f).

The guardianship court must notify DCS of the filing of a petition to modify, terminate, or remove a guardian and any hearings related to a petition to modify, terminate, or remove a guardian when the minor was the subject of a CHINS proceeding or participated in an informal adjustment program. IC 29-3-8-9(d). The court must also notify DCS if the minor was the subject of a CHINS petition or participated in an informal adjustment program and the guardian later dies or petitions to resign.

The court may terminate the guardianship if it is no longer necessary, even if the guardian remains suitable. IC 29-3-12-1(c)(4). In most situations, the court shall terminate the guardianship of a minor when the minor reaches the age of eighteen years or dies. IC 29-3-12-1(a). If a minor has been adjudicated an incapacitated person (defined at IC 29-3-1-7.5, which includes a person who has a developmental disability), the court may not terminate the guardianship when the minor attains eighteen (18) years of age. IC 29-3-12-6(a). If a minor is a recipient or beneficiary of financial assistance provided by DCS, the court may not terminate the guardianship when the minor attains eighteen years of age. IC 29-3-12-6(b). A guardianship court may extend a minor's guardianship until the minor reaches the age of twenty-two if the

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<sup>2</sup> IC 29-3-7-7, provides that a court may not appoint a person to serve as the guardian or permit a person to continue to serve as a guardian if the person: (1) is a sexually violent predator (as described in IC 35-38-1-7.5); (2) was at least eighteen years of age at the time of the offense and was convicted of child molesting (IC 35-42-4-3) or sexual misconduct with a minor (IC 35-42-4-9) against a child less than sixteen (16) years of age: (A) by using or threatening the use of deadly force; (B) while armed with a deadly weapon; or (C) that resulted in serious bodily injury; or (3) was less than eighteen years of age at the time of the offense and was convicted as an adult of: (A) an offense described in IC 35-42-4-1, IC 35-42-4-2, IC 35-42-4-3 at certain felony levels, IC 35-42-4-5(a)(1), IC 35-42-4-5(a)(2), IC 35-42-4-5(a)(3), IC 35-42-4-5(b)(1) at certain felony levels, IC 35-42-4-5(b)(2), or IC 35-42-4-5(b)(3) at certain felony levels.

minor who is at least seventeen years old and the guardian jointly petition the court to extend the guardianship beyond the minor's eighteenth birthday. IC 29-3-12-7.

Termination of a guardianship is initiated by the filing of a verified petition for termination with the court. A juvenile or probate court which creates a minor's guardianship may include in its order any terms and conditions that a parent must meet in order to seek modification or termination of the guardianship; presumably, those terms and conditions must be met prior to the termination of the guardianship. IC 29-3-8-9(a)(2). Except as provided by IC 29-3-12, the Court may modify or terminate the guardianship only if the parent complies with the terms and conditions and proves the parent's current fitness to assume all parental obligations by a preponderance of the evidence. IC 29-3-8-9(b).

There are also specific requirements for DCS involvement in guardianship cases only when the minor was the subject of a CHINS case or participated in a program of informal adjustment. IC 29-3-8-9. If the petition for modification, resignation, or removal of the guardian or termination of the guardianship is filed before the parent complies with the court ordered terms and conditions described in IC 29-3-8-9(a)(2), the court shall refer the petition to DCS for DCS to determine the placement of the child in accordance with the best interests of the child. IC 29-3-8-9(c). The guardianship court shall do the following at a hearing on a petition for modification, resignation (including resignation due to the guardian's death), or removal of guardian or termination of guardianship: (1) consider the position of DCS; and (2) if requested by DCS, allow DCS to present evidence on whether the guardianship should be modified or terminated; the parent's fitness to provide care and supervision of the minor at the time of the hearing; the appropriate care and placement of the child; and the child's best interests. IC 29-3-8-9(e).

### **III. Intersection Between Third Party Custody and CHINS Cases**

#### ***a. Jurisdiction***

In the event there is an already existing dissolution of marriage or paternity case regarding the child and placement with a parent is not possible, a likely long-term solution is the creation of a third party custodianship. The statutes addressing jurisdiction between CHINS and paternity or dissolution cases provide for several scenarios, addressing the ability of dissolution or paternity court to enter orders while a CHINS case is pending, the survival of CHINS orders after the close of the CHINS case, and the ability of the dissolution or paternity court to reassume jurisdiction.

A court which has jurisdiction under the dissolution of marriage code of a child custody, parenting time, or child support proceeding in a marriage dissolution case has concurrent original jurisdiction with the juvenile court for the purpose of modifying custody, parenting time or child support of a child who is under juvenile court jurisdiction due to a CHINS or delinquency proceeding. IC 31-30-1-12(a). Any dissolution modification order entered by the dissolution court while the child is under the juvenile court's jurisdiction is effective only when the juvenile court enters an order adopting and approving the modification or terminating the CHINS proceeding. IC 31-30-1-12(b). A juvenile court order that modifies custody, child support or parenting time survives the termination of the CHINS or delinquency proceeding until the dissolution court having concurrent or original jurisdiction assumes or reassumes primary

jurisdiction of the case. IC 31-30-1-12(c). The dissolution court which assumes or reassumes jurisdiction under subsection (c) may modify custody, child support, or parenting time in accordance with applicable modification statutes. IC 31-30-1-12(d).

A court which has jurisdiction under the paternity code over the establishment or modification of paternity, child custody, parenting time, or child support in a paternity case has concurrent original jurisdiction with the juvenile court for the purpose of establishing or modifying paternity, custody, parenting time, or child support of a child who is under juvenile court jurisdiction due to a CHINS or delinquency proceeding. IC 31-30-1-13(a). Any paternity establishment or modification order entered by the paternity court while the child is under the juvenile court's jurisdiction is effective only when the juvenile court enters an order adopting and approving the modification or terminating the CHINS proceeding. IC 31-30-1-13(b). A juvenile court order that establishes or modifies paternity, custody, child support, or parenting time survives the termination of the CHINS or delinquency proceeding until the paternity court having concurrent original jurisdiction assumes or reassumes primary jurisdiction of the case. IC 31-30-1-13(c). The paternity court which assumes or reassumes jurisdiction under subsection (c) may modify custody, child support, or parenting time in accordance with applicable modification statutes. IC 31-30-1-13(d).

#### ***b. Juvenile Statutes***

IC 31-34-21-7.5(c)(1)(C) creates the concept of a permanent custodian. This option seemingly applies only to placements with adults who are willing to make a commitment to a permanent relationship. A child may be placed with a responsible person, including: (1) an adult sibling; (2) a grandparent; (3) an aunt; (4) an uncle; (5) a custodial parent of the child's sibling; or (6) another relative who is willing and able to act as the child's permanent custodian and carry out the responsibilities required by the permanency plan. IC 31-34-21-7.5(c)(1)(C).

If the juvenile court has jurisdiction as described above, parties seeking guardianship or third party custody of the child should do so in the juvenile court proceeding. Those third parties' interests might best be advanced by contacting the child's Department of Child Services (DCS) case manager and the child's Court Appointed Special Advocate/Guardian ad Litem to express interest, and to request criminal history checks, a home study, and foster parent training for themselves.

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 if the person is a sexually violent predator (as described in IC 35-38-1-7.5) or has been convicted of specific crimes which are listed at IC 31-30-1-2.5(2) and (3).

If the child is in the care of the third parties, they should receive notice of any periodic case review hearing or permanency in the CHINS proceeding and have an opportunity to be heard and to make recommendations to the court. IC 31-34-21-4. Foster parents and other temporary caretakers of CHINS must be given notice of detention, initial, dispositional, periodic case review, permanency, and termination of the parent-child relationship hearings and shall have an opportunity to be heard and to make recommendations to the court at those hearings. IC 31-34-5-1; IC 31-34-5-1.5; IC 31-34-10-2(g); IC 31-34-19-1.3; IC 31-34-21-4; IC 31-35-2-6.5. The court

shall also provide a foster parent or other temporary caretaker with notice of and the opportunity to be heard at the factfinding hearing. IC 31-34-11-1(c). Formal intervention in the CHINS proceeding may be pursued through a motion to intervene, pursuant to Ind. Trial Rule 24, but intervention may not be necessary if DCS favors placement with the third parties.

### *c. Third Party Custody Statutes*

A custody proceeding can be initiated by a person other than a parent. IC 31-17-2-3(2). A custodian “may determine the child’s upbringing, including the child’s education, health care, and religious training.” IC 31-17-2-17. The custodian’s rights and duties may be limited as agreed by the parties in writing or if the court determines that the child’s physical health would be endangered, or emotional development would be significantly impaired otherwise. In paternity proceedings, IC 31-14-10-1 provides that upon finding that a man is the child’s biological father, the court shall conduct a hearing on the issues of support, custody and visitation. This statute does not appear to preclude a third party from seeking custody. In paternity cases, a third party can, in some circumstances, move to establish paternity as the child’s “next friend”.<sup>3</sup> IC 31-14-5-2(a).

A non-parent can file a petition for custody under emergency provisions when a custodial parent or guardian dies or is unavailable to care for a child. IC 31-17-2-25(a). Except as otherwise provided, if a nonparent files a petition seeking custody or modification of custody of a child, that person can request an initial hearing alleging any facts or circumstances that warrant emergency placement with the nonparent, pending a final determination. IC 31-17-2-25(b). A court is not required to set an initial hearing if it appears from the pleadings that no emergency exists requiring placement with a nonparent, or if it appears that the nonparent will likely not succeed on the merits, or other manifest injustice would result. IC 31-17-2-25(d).

Persons seeking third party custody in dissolution or paternity proceedings should petition for intervention to obtain party status pursuant to Ind. Trial Rule 24. See In Re Paternity of E.M., 654 N.E.2d 890 (Ind. Ct. App. 1995) for a discussion of Indiana’s three part test for intervention as a matter of right. The intervenor must demonstrate that he has an interest in the subject of the action, that disposition in the action may as a practical matter impede protection of that interest, and that representation of the interest by existing parties is inadequate. Permissive intervention under T.R. 24B may be granted by the court when a statute confers a conditional right to

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<sup>3</sup> For limitations on who has standing to file as next friend, see R.J.S. v. Stockton, 886 N.E.2d 611 (Ind. Ct. App. 2008) (Court found that child’s alleged paternal grandparents did not have standing to file paternity petition as child’s next friends; cited its reasoning in J.R.W. ex rel. Jemerson v. Watterson, 877 N.E.2d 487, 491, 492 (Ind. Ct. App. 2007); and stated that (1) it did not believe the legislature could have intended absolutely unfettered discretion by anyone to intervene in the life of a child by filing a paternity petition, (2) although it was conceivable that there could be a situation where a child had no physically present natural parents and no court-appointed guardian, and thus a third party could initiate a paternity proceeding on the child’s behalf as a next friend, here, the child had a living natural mother and two court-appointed guardians with whom the law had entrusted the safeguarding of the child’s interests; and (3) Petitioners were not entitled to circumvent the authority entrusted in the child’s natural and court-appointed guardians by filing a paternity action as his next friend); and J.R.W. ex rel. Jemerson v. Watterson, 877 N.E.2d 487, 491, 492 (Ind. Ct. App. 2007) (Court held that (1) its own research supported Father’s contention that only parents, guardians, guardians ad litem, and prosecutors may bring paternity actions as next friends of children; and (2) in this case, because both Father and biological father bore duty of acting on behalf of child, no proper basis existed upon which Maternal Aunt and Uncle (Petitioners) might assert standing as child’s next friends).



intervene or when an applicant's claim or defense and the main action have a question of law or fact in common.

Indiana law requires that notice be given to the court which has jurisdiction over a custody case that involves: (1) a child who has been determined to be a CHINS or who has been involved in an informal adjustment; (2) a child who has been the subject of a substantiated report of child abuse or neglect; or (3) a party to the case who has been determined to be a perpetrator of a substantiated report of child abuse or neglect. IC 31-14-14-6; IC 31-17-2-26. If any of the three listed circumstances apply, any person who is a party to the custody proceeding and has knowledge of any of the listed circumstances shall submit the information to the court in writing under seal. IC 31-14-14-6; IC 31-17-2-26. A court reviewing a petition to establish or modify custody of a child may request information from DCS regarding the CHINS case, informal adjustment case, or the substantiated report of child abuse or neglect. IC 31-14-14-6; IC 31-17-2-26. DCS shall provide the response to the court's request for information under seal not later than ten days after DCS receives the court's request. IC 31-14-14-6; IC 31-17-2-26.

Both the dissolution and paternity custody statutes, IC 31-17-2-8 and IC 31-14-13-2, require the court to consider evidence that a child has been cared for by a de facto custodian as one of the custody determination factors. Additionally, IC 31-17-2-8 also provides that a court must consider a designation in a power of an attorney. A de facto custodian is defined as a person who has been the primary caregiver and the financial support of a child for six months if the child is under three years of age, and for one year if the child is at least three years of age. IC 31-9-2-35.5. If a court determines by clear and convincing evidence that the child has been cared for by a de facto custodian, the court shall make the de facto custodian a party to the proceeding. IC 31-17-2-8.5 and IC 31-14-13-2.5. The statutes further provide that the court shall award custody to the de facto custodian if, after considering the required factors listed in subsection (b) of each statute, the court determines that such an award is in the best interests of the child. If the court awards custody to a de facto custodian, the de facto custodian is considered to have legal custody of the child under Indiana law.

For recent case law discussing a de facto custodian, *see* **Paternity of M.S.**, 146 N.E.3d 951, 959, 962 (Ind. Ct. App. 2020) (trial court erred in not finding Alleged Paternal Grandmother to be a de facto custodian; consequently, the trial court erred in not allowing her to intervene, and in not considering other relevant custody modification factors); **In Re Paternity of T.P.**, 920 N.E.2d 726, 731 (Ind. Ct. App. 2010), *trans. denied* (affirming trial court's conclusion that the intervenor Caretakers did not qualify as the child's de facto custodians); **In Re Custody of J.V.**, 913 N.E.2d 207, 210-11 (Ind. Ct. App. 2009) (evidence supported the trial court's conclusion that Grandmother was the four-year-old child's de facto custodian); **A.J.L. v. D.A.L.**, 912 N.E.2d 866, 870-71 (Ind. Ct. App. 2009) (trial court did not err when it concluded that Aunt and Uncle are the de facto custodians of the children).

But *see* the discussion in **In Re Guardianship of L.L.**, 745 N.E.2d 222, 229-230 (Ind. Ct. App. 2001), *trans. denied*, on the de facto custodian laws. Although noting that the de facto custodian laws are not specifically applicable to guardianship cases, the Court explored the intent, meaning, and significance of the laws. The Court concluded that the laws are not intended "to

displace the parental preference presumption” and they did not change the common law regarding custody disputes between natural parents and third parties.

For case law discussing CHINS and third party custody cases, see:

In **In Re Custody of M.B.**, 51 N.E.3d 230, 236 (Ind. 2016), the Indiana Supreme Court reversed and remanded the circuit court’s dismissal of paternal Aunt and Uncle’s petition seeking custody of the child, an adjudicated CHINS, who was born out of wedlock, and for whom no paternity had been established. The Court found the circuit court’s determinations that: (1) Aunt and Uncle lacked standing to file the custody action; and (2) the circuit court lacked subject matter jurisdiction to hear the custody proceedings, were both incorrect. The Court held that Aunt and Uncle had standing to bring an independent custody action with respect to the child. The Court also held that the circuit court had subject matter jurisdiction over Aunt and Uncle’s petition for custody but must stay its jurisdiction pending the conclusion of the child’s CHINS case.

The **In Re J.B.**, 55 N.E.3d 903 (Ind. Ct. App. 2016) opinion was issued prior to the amendment to IC 31-30-1-13, which addressed the concerns and issues noted in the opinion. At the time, the statute only referenced modifying paternity, and not child custody, parenting time, or child support. The Court initially 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, it lost jurisdiction, and the Superior Court’s joint custody order in the paternity case controlled. The Court concluded that, because it appeared 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 CHINS case for further proceedings. In its opinion on rehearing, **In Re J.B.**, 61 N.E.3d 308 (Ind. Ct. App. 2016), the Court discussed two possible meanings of the term “modify paternity” used in IC 31-30-1-13(d). The Court concluded that, given that there are problems with each reading of IC 31-10-1-13(d), the Court would not guess what the legislature meant when it said “[a]n order establishing or modifying paternity of a child by a juvenile court survives the termination of the [CHINS] proceeding.” The Court asked the legislature to take a deeper look at IC 31-30-1-12 and -13.