Guardianship and Third Party Custody Law[1]

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People may seek guardianship or third party custodianship of a child either out of concerns for the child's welfare and safety; most often, but not always, people seeking guardianship or third party custody are related to the child. Sometimes the child has previously been adjudicated a Child in Need of Services and the permanency plan of guardianship or third party custody has been identified. See IC 31-34-21-7; IC 31-34-21-7.5(c)(1)(D) and (E); IC 31-34-21-7.7.

Title 29 specifically governs guardianships but not third party custodianships. This paper discusses: (1) whether third party custody or guardianship is needed in a given case; (2) relevant statutes for both guardianship and third party custody; (3) case law standards for determining whether a guardian or third party custodian should be appointed; (4) the information that should be included in a court order which appoints a guardian or a third party custodian; (5) case law standards for determining whether to terminate guardianship or modify custody from the third party back to the parents; (6) parenting time standards in guardianships and third party custodianships; and (7) practice tips for success in securing orders appointing guardians or third party custodians.

Guardianship v. Third Party Custody

Many people use the term guardianship to apply to both legal guardianship and third party custody. Legally, it is important to determine which type of proceeding to file. 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.[2]
3. The child's parents have remained 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.

[1] 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.

[2] But see **In Re Custody of G.J.**, 796 N.E. 2d 756 (Ind. Ct. App. 2003), *trans. denied*, discussed in detail below, in which the Court held that, as a matter of apparent first impression, the child's paternal uncle had standing to file, in the dissolution court, a direct action pursuant to IC 31-17-2-3(2) for custody of the child after the death of Husband who was the child's father.

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 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. See 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 (IC 31-14-10) or whose parents have filed a dissolution proceeding (IC 31-17-2-1). See 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. This is accomplished with no court action. If a paternity affidavit is executed after July 1, 2010, IC 16-37-2-2.1(j)(2)(B) clarifies that the paternity affiant father has parenting time with the child according to the Indiana Parenting Time Guidelines unless another determination is made by a court in a proceeding under IC 31-14-14.

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. It should also be noted that the mother has the sole legal custody of a child born out of wedlock in the absence of a contrary court order or statute. See IC 31-14-13-1.

Cases about dissolution and paternity court jurisdiction in guardianship and third party custody cases are discussed below.

In **Hays v. Hockett**, 94 N.E.3d 300 307-8 (Ind. Ct. App. 2018), the Court held that (1) Paternal Grandparents waived their claim that the Oklahoma Court had jurisdiction; and (2) the Indiana trial court did not abuse its discretion by assuming jurisdiction of the case. The Court held that Indiana case law, on whole, provides that the Uniform Child Custody Jurisdiction Act (UCCJA) does not confer subject matter jurisdiction, and as such, the jurisdiction it does confer is waivable. Id. at 306. The Court then held that neither Indiana nor Oklahoma were the child's home state, and that the "significant connections" provisions of the UCCJA found at IC 31-21-5-1(2) properly allowed the Indiana trial court to assume jurisdiction.

In **In Re Paternity of B.J.N.,** 19 N.E.3d 765, 768-69 (Ind. Ct. App. 2014), a consolidated appeal from orders issued by the Decatur Circuit Court (Decatur Court) and the Hendricks Circuit Court (Hendricks Court), the Court of appeals affirmed the Decatur Court's judgment and affirmed the Hendricks Court's judgment in part. The Court of Appeals found that the Decatur Court had subject matter jurisdiction over the guardianship action. The Court held that, because Father had consented to Guardian being appointed as the child's guardian in the Decatur Court, he had waived any objection to the Decatur Court's exercise of jurisdiction over this particular matter. The Court noted Father's allusion to the Uniform Child Custody Jurisdiction Act (IC 31-21) that the Kankakee Court, having made an initial child custody determination, would have continuing jurisdiction over the case, but found that Father was incorrect to the extent that this made the Decatur Court's order void. Noting that the Indiana Supreme Court has held that jurisdiction for UCCJA purposes does not amount to subject matter jurisdiction, the Court said that judgments rendered by this type of jurisdiction are only voidable.

In **In Re B.C.**, 9 N.E.3d 745, 752-54 (Ind. Ct. App. 2014), the Court reversed the Montgomery Circuit Court's paternity custody order and also reversed orders of the Marion Superior Court, Probate Division (Marion Probate Court) which dismissed the guardianship and dismissed Guardians' adoption petition. The Court found that Marion Probate Court had jurisdiction to enter its July 31, 2012 order appointing Guardians as guardians of the child. The Court found that the Montgomery Circuit Court had jurisdiction to enter the agreed paternity order on December 20, 2012, which established Father's paternity of the child. The Court noted that a juvenile court has exclusive original jurisdiction in proceedings concerning the paternity of a child under IC 31-14 as set forth in the juvenile court jurisdiction statute, IC 31-30-1-1(3). The Court held that, 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. Quoting In Re Marriage of Huss, 888 N.E.2d 1238, 1241 (Ind. 2008), which quoted In Re Paternity of Fox, 514 N.E.2d 639, 641 (Ind. Ct. App. 1987), *trans. denied*, the Court observed that "it is well settled that two courts of concurrent jurisdiction cannot deal with the same subject matter at the same time. Once jurisdiction over the parties and subject matter has been secured, it is retained to the exclusion of other courts of equal competence until the case is resolved, and the rule applies where the subject matter before the separate courts is the same, but the actions are in different forms." The Court also held that, 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 **In Re Adoption of L.T.**, 9 N.E.3d 172, 177 (Ind. Ct. App. 2014), the Court reversed the Marion Superior Court, Probate Division's order which dismissed Maternal Grandparents' guardianship of the child for lack of subject matter jurisdiction and granted Father immediate custody of the child. The Court remanded for a hearing on the child's best interests. The Court of Appeals opined that the Hamilton County Court did not lack subject matter jurisdiction to conduct the guardianship proceedings and that the dispositive issue was proper venue. The Court noted IC 29-3-2-2, which provides that the proper or preferred venue for cases involving a guardianship over a minor is the county where the minor resides and it was stipulated that the child was not a Hamilton County resident. The Court held that, 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 (emphasis in opinion).

In **In Re Guardianship of S.M.**, 918 N.E.2d 746, 749-50 (Ind. Ct. App. 2009), the Court reversed and remanded the trial court's order appointing Aunt the permanent guardian of two children. The S.M. Court looked to the Uniform Child Custody Jurisdiction Law (UCCJL) codified at IC 31-21 and determined that the trial court lacked subject matter jurisdiction to issue a temporary emergency order; therefore, the temporary emergency order was void ab initio. IC 31-21-5-4 provides an Indiana trial court with temporary emergency jurisdiction if the children are present in Indiana and have been abandoned or if it is necessary to protect them because they are "subjected to or threatened with mistreatment or abuse.". The Court noted there was no evidence that the children were abandoned or threatened with mistreatment. The Court said that, to the contrary, a surviving parent has the right to custody of his or her children, unless otherwise determined in a dissolution decree or in another proceeding authorized by law. The Court opined that, due to the UCCJL (IC 31-21-5-3), the trial court lacked subject matter jurisdiction to modify the Illinois court's child custody order because Father resides in Illinois. The order appointing Aunt as the children's permanent guardian was void ab initio. The Court remanded the case with instructions for the trial court to issue an order denying the petition for guardianship and directing that custody be with Father.

In Re Marriage of Huss, 888 N.E.2d 1238, 1241-43 (Ind. 2008), touched on several jurisdiction-related issues in third party custody cases. The Indiana Supreme Court affirmed the Dissolution Court's award to Husband of the custody of all four of Wife's children, including the youngest child who was not the biological child of Husband. The Court held that the 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. The 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. The Court concluded: "Because the subject of child custody was first properly before the Adams Circuit Court in the dissolution proceeding, we conclude that the Wells Circuit Court was precluded from making a custody determination regarding the same child in the subsequently filed paternity action." In reaching its conclusion, the Court observed that (1) the subject matter of child custody of all four children was unquestionably before the Dissolution Court from the dissolution action's inception; (2) Wife could have, but did not, seek a determination in the dissolution proceeding that Husband was not the biological father of the child; (3) Wife's subsequent prosecution of a separate paternity action in the different court could not, and did not, operate to interrupt or supersede the authority of the Dissolution Court to determine the custody of all four children, including the child who became the subject of the paternity action; and (4) the Dissolution Court was entitled to complete its handling of the previously filed dissolution action, including its determination of custody of all four children.

The Huss Court also held that the Dissolution Court had jurisdiction over the child of whom Husband was not the biological father. The Court distinguished Russell v. Russell, 682 N.E.2d 513, 517 (Ind. 1997), which holds that a dissolution court does not have jurisdiction to enter a custody order regarding children born during a marriage but whose biological father was not the husband. The Court opined, "While Russell imposed limits on a dissolution court's power to consider such a child as a child of the marriage, Russell did not involve a non-biological father's request for custody predicated on the child's best interests…," which determination was actually the ultimate basis for the Dissolution Court's decision to award Husband custody of the child whom he did not father. The Dissolution Court's authority to determine custody of all four children, including the child of whom Husband was not the biological father, was not impaired by the paternity statute's general presumption of sole custody for the biological mother; and, even if Wife were to be considered sole custodian of the child by reason of the paternity judgment or the operation of the paternity statute, the Dissolution Court in this case would be authorized to consider whether to make a superseding award of child custody to Husband as a non-biological parent of the child. The Court also noted that because Wife had not asserted any appellate claim that de facto custodian status was a necessary prerequisite to awarding third party custody of the youngest child to Husband, the correctness of the trial court's finding of de facto status was not a determinative issue.

In **In Re Custody of G.J.**, 796 N.E.2d 756, 762-64 (Ind. Ct. App. 2003), *trans. denied*, the Court held that, as a matter of apparent first impression: (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. In G.J. the parents filed for dissolution, but the father died before the dissolution was final. The mother remarried. The child's paternal uncle filed a petition for custody of the child, alleging that (1) the child's new stepfather was a convicted child molester who collected child pornography; (2) a court order in the dissolution proceeding between the parents had prohibited the mother from allowing contact between the child and stepfather; and (3) the mother had lost custody of other children to the Tippecanoe County Office of Family and Children. Mother moved to dismiss the paternal uncle's petition, arguing lack of standing. The trial court granted the motion, concluding that IC 31-17-2-3 related only to dissolution of marriage, and indicating its belief that the paternal uncle would properly file under the guardianship statute. The Court reversed the trial court's dismissal of the paternal uncle's petition and concluded that the uncle had standing to file a direct action for custody of the child. The Court opined that allowing a third party to seek custody of a child by filing a direct cause of action pursuant to child custody statutes is wholly consistent with Indiana public policy. Public policy has long recognized that if a parent is unfit or otherwise unable to care for a child, it may be in the child's best interests to be placed in the custody of a third party.

See also **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).

Guardianship, Third Party Custody, and CHINS Cases

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. See IC 31-30-1-1(10). IC 31-34-21-7.7(a) states that if 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(c) states that the juvenile court may include in an order creating a guardianship the requirements, terms, and conditions described in IC 29-3-8-9(a). IC 29-3-8-9 states, inter alia, that a probate or juvenile court may include in its order creating a guardianship: (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 31-34-21-7.7(d) and (e) state that, if the juvenile court closes the CHINS case after creating a guardianship: (1) the guardianship survives the closure of the CHINS case; and (2) the probate court may assume or reassume jurisdiction of the guardianship and take further action as necessary.

If the child has been adjudicated a CHINS or a delinquent child, the dissolution or paternity court has only concurrent original jurisdiction with the juvenile court for the purposes of modifying custody. Any dissolution or paternity "child custody" modification order entered by the dissolution or 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. See IC 31-30-1-12(b) (dissolution); IC 31-30-1-13(b) (paternity).

IC 31-30-1-12(a) provides that a court which has jurisdiction under IC 31-17-2 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(c) provides that a juvenile court order modifying 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(d) states that 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 31-30-1-13(a) provides that a court which has jurisdiction under IC 31-14 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(c) provides that a juvenile court order establishing or modifying 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. 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).

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. 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 head 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.

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." (Emphasis in opinion.) The Court asked the legislature to take a deeper look at IC 31-30-1-12 and -13.

Relevant Statutes for Third Party Custody

IC 31-17-2-3(2) provides that a custody proceeding can be initiated by a person other than a parent. IC 31-17-2-17 provides that a custodian "may determine the child's upbringing, including the child's education, health care, and religious training." 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".[3] See IC 31-14-5-2(a).

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

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

[3] 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).

consider a designation in a power of an attorney. A de facto custodian is defined at IC 31-9-2-35.5 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 31-17-2-8.5 and IC 31-14-13-2.5 provide that if the 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. 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.

In **Paternity of M.S.**, 146 N.E.3d 951, 959, 962 (Ind. Ct. App. 2020), the Court held that the trial court erred in 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. The trial court denied Alleged Paternal Grandmother's motion to intervene and it determined that she was not a de facto custodian. In so finding, the trial court examined the definition of a de facto custodian and determined that the proceeding commenced in 2011, so no time after that 2011 date could count towards Alleged Paternal Grandmother's time to qualify as a de facto custodian.

The M.S. Court held that "the six-month required minimum period under Indiana Code Section 31-9-2-35.5 can be established either before a child custody proceeding has been commenced or after such an initial proceeding has been concluded." The trial court erred when it determined Alleged Paternal Grandmother was not L.S.'s de facto custodian. IC 31-9-2-35.5 defines de facto custodian as a: person who has been the primary caregiver for, and financial support of, a child who has resided with the person for at least:

> (1) six (6) months if the child is less than three (3) years of age; or
> (2) one (1) year if the child is at least three (3) years of age.
>
> Any period after a child custody proceeding has been commenced may not be included in determining whether the child has resided with the person for the required minimum period. The term does not include a person providing care for a child in a foster family home (as defined in IC 31-9-2-46.9)

The Court noted that the State sought a paternity action for L.S., and paternity was confirmed in a court proceeding in April 2011; L.S. began living with Alleged Paternal Grandmother in June 2011. L.S. was still living with Alleged Paternal Grandmother in March 2018 when Father filed his petitions to modify; the trial court determined that the proceeding commenced in 2011 rather than 2018, which meant that Alleged Paternal Grandmother could not meet the burden of showing that the child had lived with her for the required minimum amount of time before any proceedings commenced. The Court opined that this implied that the six-month minimum can only run before any custody determination and can never run after a custody determination; the Court determined that this did not account for the fact that the 2011 cases began in February, and a custody order issued in April, thus concluding that particular custody determination. "The trial court's finding would mean that, after a child custody proceeding has been commenced, the required minimum period for a de facto custodian determination is forever tolled and cannot be

restarted. Under that interpretation, once a child is subject to an initial custody determination, the child could never have a de facto custodian." The M.S. Court noted that the evidence was undisputed that L.S. lived with Alleged Paternal Grandmother from June 2011 to present; that the State filed a petition for child support in February 2011, which resulted in Mother being granted custody in April 2011 when the case was closed; and that the child custody proceeding had concluded by the time Mother gave L.S. to Alleged Paternal Grandmother. "We conclude that the time period relevant to establishing a de facto custodianship excludes any period of time after a child custody proceeding has been commenced and while it is pending. After a child custody proceeding has been commenced and has concluded, however, the calculation of the time relevant to a de facto custodian determination is not tolled."

The M.S. Court concluded that because the trial court erred in determining Alleged Paternal Grandmother was not a de facto custodian, it also erred in not allowing her to intervene and in not making her a party to the proceedings. IC 31-14-13-2.5(c) provides that is a court determines "a child is in the custody of a de facto custodian, the court shall make the de facto custodian a party to the proceeding." Thus, the trial court abused its discretion by not allowing Alleged Paternal Grandmother to intervene. This was not a harmless error because the trial court proceeded to not follow the applicable custody modification laws with respect to de facto custodians, tainting the proceedings and harming Alleged Paternal Grandmother. IC 31-14-13-6 provides that a modification of custody may only occur when it is in the child's best interests, and there is a substantial change in one or more of the best interests factors at IC 31-14-13-2 and if applicable, 2.5. Among other factors, IC 31-14-13-2 lists the following as a factor a trial court must consider: "Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 2.5(b) of this chapter." IC 31-14-13-2.5 provides

> (a) This section applies only if the court finds by clear and convincing evidence that the child has been cared for by a de facto custodian.
> (b) In addition to the factors listed in section 2 of this chapter, the court shall consider the following factors in determining custody:
>> (1) The wishes of the child's de facto custodian.
>> (2) The extent to which the child has been cared for, nurtured, and supported by the de facto custodian.
>> (3) The intent of the child's parent in placing the child with the de facto custodian.
>> (4) The circumstances under which the child was allowed to remain in the custody of the de facto custodian, including whether the child was placed with the de facto custodian to allow the parent seeking custody to:
>>> (A) seek employment;
>>> (B) work; or
>>> (C) attend school.
>
> (c) If a court determines that a child is in the custody of a de facto custodian, the court shall make the de facto custodian a party to the proceeding.
> (d) The court shall award custody of the child to the child's de facto custodian if the court determines that it is in the best interests of the child.
> (e) If the court awards custody of the child to the child's de facto custodian, the de facto custodian is considered to have legal custody of the child under Indiana law.

The M.S. Court opined that the trial court's failure to label Alleged Paternal Grandmother as a de facto custodian resulted in her not being made a party to the case, and in the trial court failing to examine relevant de fact custodian statutes, factors, and case law. This prejudiced her rights in a substantial way.

In **In Re Paternity of T.P.**, 920 N.E.2d 726, 731 (Ind. Ct. App. 2010), *trans. denied*, the Court affirmed the trial court's conclusion that the intervenor Caretakers did not qualify as the child's de facto custodians. Caretakers claimed that they had cared for the child for 244 days during the time period of May 2007 to September 2008, but the Court noted that this was not a majority, much less a significant majority, of the time. The Court observed that, while there was evidence that Caretakers provided basic needs and financial support for the child, Caretakers point to no evidence demonstrating that this constituted a majority of the child's total needs and support. The Court also observed that, even if they qualified as de facto custodians, Caretakers were still required to overcome the natural parent presumption in order to gain custody of the child.

In **In Re Custody of J.V.**, 913 N.E.2d 207, 210-11 (Ind. Ct. App. 2009), the Court found that the following evidence supported the trial court's conclusion that Grandmother was the four-year-old child's de facto custodian: (1) the child resided in Grandmother's home for ten months during which time Grandmother was the child's primary caretaker and provided basic necessities for the child, including food, diapers, and clothing; (2) from May 2006 to May 2007, the child, Mother, and putative father lived three houses away from Grandmother, but the child continued to reside with Grandmother at least three to four days per week; (3) after Mother and child moved out of the house which was near Grandmother's house, the child continued to stay with Grandmother at least three to four days per week; (4) Grandmother provides financial support for the child, takes her to doctor's appointments, and pays for the child's babysitters when Grandmother is working.

In **A.J.L. v. D.A.L.**, 912 N.E.2d 866, 870-71 (Ind. Ct. App. 2009), the Court affirmed the trial court's award of custody of the children, ages twelve, eleven, and seven, to Father's Aunt and Uncle, who had filed to intervene in the parents' dissolution case in May 2008 and requested custody. The Court opined that the trial court did not err when it concluded that Aunt and Uncle are the de facto custodians of the children. The Court noted the extended times the children lived with Aunt and Uncle since January 2006, and that during those periods: (1) Aunt and Uncle provided for the children's food, and together with other family members, provided for the children's clothing and medical expenses; (2) Aunt and Uncle paid for babysitters they hired to watch the children when they were out; (3) Mother did not provide financial assistance; (4) when the children were with Mother, Aunt and Uncle occasionally provided food or other household items, paid one of Mother's utility bills and occasionally gave Mother "a dab of money;" (5) Aunt met with the oldest child's teacher twenty-five to thirty times from February 2008 to May 2008, to address the child's failing grades; and (6) Uncle regularly helped the oldest child with his math homework. The evidence was sufficient to show by clear and convincing evidence that the children resided with Aunt and Uncle a majority of the time for unspecified non-consecutive periods over the preceding two years and that Aunt and Uncle provided the basic necessities for the children during that period.

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.

Relevant Statutes for Guardianship

Guardianships may be granted to protect minors or incapacitated adults. IC 29-3-3-3 states that, except as otherwise determined in a dissolution of marriage proceeding, guardianship proceeding, or other proceeding authorized by law, the parents have the right to custody of their child. The parents also have the statutory right to execute legal documents concerning the child and to consent to medical care, or other professional care, treatment or advice for the child's health and welfare. 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 the Department of Child Services, 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 Child in Need of Services (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). IC 29-3-5-1(a)(11) includes a provision that the 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. Consequently, some courts may require practitioners to adhere to this requirement, though it is arguable it only applies to incapacitated adults.

The guardianship court shall 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). The court may grant a temporary guardianship without notice for up to ninety days if a minor has no guardian, an emergency exists, the welfare of the minor requires immediate action, and no one else appears to have the authority to act. IC 29-3-3-4(a).

IC 31-30-1-6 directs the court's actions when 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. IC 31-30-1-6(a) provides that the court on its own motion or on the request of a party shall: (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(d) provides that 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.

A parent may consent to the appointment of the guardian, or a guardianship may be granted if the parents' whereabouts are unknown or if they do not contest the guardianship. If the parents do not consent to the guardianship and wish to contest it, the legal standard which the court is required to use is found in Indiana case law which is discussed below at part IV.

If the parents are deceased or have consented to the guardianship, or the court has found that the case law standards for appointing a guardian without a parent's consent have been met, the court must then determine who is most appropriate to be guardian. In deciding who shall be guardian, the court is required to appoint the most suitable and willing person to serve. IC 29-3-5-4. Consideration should be given to the blood relationship between the minor and the proposed guardian, but the court is not required to prefer or appoint a blood relative. See **In Re Guardianship of Stackhouse**, 538 N.E.2d 990, 992 (Ind. Ct. App. 1989) (once the search for a custodian extends beyond the child's natural parents, a host of other factors, including personal attributes of the proposed guardian, become relevant in determining the person most suitable to discharge obligations of that office). The court may consider the proposed guardian's relationship with the minor, and the minor's best interest. IC 29-3-5-4.

The court shall also consider a request made for a minor by the minor's parent or de facto custodian, including a designation in a power of attorney, any request contained in a will or other written instrument, a designation of stand by guardian, and any request by a minor who is at least fourteen years of age. IC 29-3-5-4. IC 29-3-7-7 provides that a person may not be appointed, or 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.[4] See **In Re Guardianship of A.L.C.**, 902 N.E.2d 343, 353-55 (Ind. Ct. App. 2009), where the Court affirmed the trial court's award of guardianship of the child's person to Maternal Grandmother and Maternal Step-Grandfather and guardianship of the child's estate to Maternal Grandmother, Maternal Step-Grandfather and Maternal Grandfather. The Court held that Paternal Grandparents were bound by the temporary

[4] 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.

guardianship orders because an intervenor is not permitted to relitigate matters already determined in the case. With regard to the permanent guardianship, Paternal Grandparents were not "entitled" to be appointed co-guardians as a matter of law by virtue of Father's request that they be appointed guardians of the child's person and estate, because the best interest of the child is the overriding factor the trial court must consider when appointing a guardian.

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. IC 29-3-8-9 provides that 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 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).

IC 29-3-8-9(f) requires the DCS or the proposed guardian to notify the court creating a guardianship 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. Separate individuals may be appointed to provide for the minor's physical needs (guardian of the person) and to manage the minor's income (guardian of the estate). The guardian may be required to report to the court regarding the minor's physical and mental condition. IC 29-3-8-1(a)(4).

The guardian must file an inventory and an accounting regarding the minor's property with the court. IC 29-3-9-5; IC 29-3-9-6. The minor's property may be ordered to be placed in a restricted account, and the guardian may need to ask the court for permission to spend the minor's money for education, health care, or other special needs on an individual basis as each need arises.

A guardian of a minor has all the responsibilities and authority of a parent and must become knowledgeable about the minor's capabilities, disabilities, needs, and physical and mental health. IC 29-3-8-1. Some health insurance plans require guardianship of the minor by the insured person in order to have the minor covered by the guardian's health insurance. Guardians are not required to use their own funds to care for the minor. Guardians may apply for Social Security or other benefits for the minor. Guardianship will not always make a guardian eligible for government financial assistance such as Temporary Assistance to Needy Families (TANF) benefits for the child. The guardian will also be required to be legally related to the child in the degree of relationship required by TANF rules.

At any time after the appointment of a guardian, any person may serve upon the guardian's attorney and file with the clerk of the court in which the guardianship proceedings are pending, a written request for notice of all hearings and copies of all proceedings in connection with the removal, suspension, or discharge of the guardian or termination of the guardianship. IC 29-3-6-3. Unless the court directs otherwise, the guardian or guardian's attorney shall comply with the request.

IC 29-3-8-9(d) requires the court to 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. 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 remove a guardian on its own motion or on the petition of the minor or any person interested in the guardianship (which includes the minor's parents and relatives), after notice and hearing. The appointed guardian may resign. IC 29-3-12-4(a). Reasons for removing a guardian include incapacity or unsuitability of the guardian, failure to perform legal duties or not following court orders or moving outside the state. IC 29-3-12-4(a); IC 29-1-10-6. See also **Schwartz v. Schwartz**, 773 N.E.2d 348, 352 (Ind. Ct. App. 2002) (guardian of incapacitated adult's estate removed due to mismanagement of assets, failure to file quarterly accountings, and failure to follow court orders). A removal proceeding is initiated by the filing of a verified petition for removal with the court in which the guardian was appointed. A copy of the removal petition and notice of the hearing date should be served on the guardian and on any other person the court directs. See IC 29-1-1-12 through IC 29-1-1-14 and IC 29-3-6-1(b).

A guardian who is removed shall give a final accounting to the court. IC 29-3-12-4(a). The court may appoint a successor guardian when the original guardian is removed. IC 29-3-12-4(b). IC 29-3-3-4(b) provides that, if the court finds that that a previously appointed guardian is not effectively performing fiduciary duties and the welfare of the minor requires immediate action, the court may suspend the authority of the previously appointed guardian. The court may appoint a temporary guardian for any period fixed by the court. The temporary guardian has only the powers ordered by the court. The court shall order only those powers that are necessary to prevent immediate and substantial injury or loss to the minor's person or property. IC 29-3-3-4(c).

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). IC 29-3-12-6 and IC 29-3-12-7 limit the court's ability to terminate a minor's guardianship at age eighteen. IC 29-3-12-6(a) states that 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(b) states that if the 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 29-3-12-7 allows the court to extend a minor's guardianship until the minor reaches the age of twenty-two if the 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(c) requires that the petition be verified. IC 29-3-12-7(d) states that the court, after notice and hearing, may extend a guardianship if the court finds that extending the guardianship is in the protected person's best interests.

Termination of a guardianship is initiated by the filing of a verified petition for termination with the court. The guardian and other persons whom the court directs should receive a copy of the petition. See IC 29-1-1-12 through IC 29-1-1-14 and IC 29-3-6-1(b). IC 29-3-8-9(a)(2) states that 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. 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).

IC 29-3-8-9 also creates 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(c) states that 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(e) states that the 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. The powers of the guardian cease upon termination of the guardianship except for payment of claims and expenses approved by the court and the exercise of other fiduciary powers, such as delivery of the minor's property to the person having custody of the minor or as the court directs. IC 29-3-12-1(d).

Guardians ad Litem in Title 29 Guardianship Actions

The Guardian ad Litem (GAL) statute for guardianship proceedings requires the court to appoint a GAL for a minor if the court determines that the minor is not represented or not adequately represented by counsel. IC 29-3-2-3(a). IC 29-3-2-3(b) provides that the court may waive the appointment of a GAL for the minor if the following are all true:

1. The minor has property, which a guardian needs to preserve;
2. The proposed guardian is capable of handling the property;
3. The guardianship petition is uncontested;
4. No other guardianship petition has been filed.

In guardianship proceedings involving the child of a surviving non-custodial parent whose visitation had been ordered suspended or supervised, the court must appoint a GAL or court appointed special advocate. IC 29-3-3-6(c). The term "court appointed special advocate" is used in guardianship law only at IC 29-3-3-6(c). This is one of the two mandatory GAL appointments in civil cases except for CHINS proceedings, where a GAL or court appointed special advocate must always be appointed. The other mandatory appointment is in all cases where a party seeks to overcome the presumption that a child born in wedlock is legitimate. See **Matter of H.J.F.**, 634 N.E.2d 551, 555 (Ind. Ct. App. 1994)).

There is no specific statutory provision for a GAL fee or the amount of a GAL fee in a guardianship proceeding. Indiana case law which discusses and supports a GAL fee in a guardianship proceeding includes **United Farm Bureau Family Life Ins. v. Fultz**, 375 N.E.2d 601 (Ind. Ct. App. 1978); **State ex rel. Keating v. Bingham, Judge**, 233 Ind. 504, 121 N.E.2d 727 (Ind. 1954); and **Whinery v. Hammond Trust and Savings Bank**, 80 Ind. App. 282, 140 N.E. 451 (Ind. Ct. App. 1923).

There is no statutory provision concerning the filing of a GAL report in guardianship proceedings. The Court may request a report or the GAL may wish to file a report. The report should be filed and distributed ten days in advance, following the procedure outlined for the dissolution reports at IC 31-17-2-12. There is no statutory provision that allows hearsay evidence to be considered by the Court if it is included in a GAL guardianship report. The Court may choose to apply the dissolution statute and allow the Guardian ad Litem guardianship report to be entered into evidence. (But see **In Re Guardianship of Hickman**, 805 N.E.2d 808 (Ind. Ct. App. 2004), *trans. denied*, for a general discussion of the admissibility of a GAL report in guardianship proceedings.) The GAL may include reliable hearsay in the guardianship report, and the source of the hearsay should be noted, such as "according to therapist Ms. Jones" or "according to teacher Mr. Smith." The GAL guardianship report should include a recommendation as to whether the guardianship should be granted or denied, whether it should be temporary (for less than 90 days) or permanent, the type and amount of parenting time which should be ordered, and whether a review hearing should be set. The term "custody" is not usually used in guardianship proceedings.

Standards for Determining Whether to Grant Third Party Custody or Guardianship Request

The standards for determining whether a petition for either guardianship or third party custody should be granted are entirely found in case law, and are the same for both types of cases. See **K.I. Ex Rel. J.I. v. J.H.**, 903 N.E.2d 453 (Ind. 2009) (discussing guardianship cases in the context of a third party custody case); **T.H. v. R.J.**, 23 N.E.3d 776, 786-87 (Ind. Ct. App. 2014) (a third party custody case discussing the standard used to determine whether a third party custody request should be granted, and citing to the Guardianship of B.H. standard); **Parks v. Grube**, 934 N.E.2d 111, 113, 118 (Ind. Ct. App. 2010) (a third party custody case discussing the standard used to determine whether a third party custody request should be granted, and citing to the Guardianship of B.H. standard).

In **In Re Guardianship of B.H.**, 770 N.E.2d 283 (Ind. 2002), the Indiana Supreme Court addressed the case law standards regarding the nature and quantum of evidence required to overcome the strong presumption that the child's best interests are ordinarily served by placement in the custody of the natural parent. The Court reviewed the considerations outlined in Hendrickson v. Binkley, 316 N.E.2d 376, 380 (Ind. Ct. App. 1974).

> First, it is presumed it will be in the best interests of the child to be placed in the custody of the natural parent. Secondly, to rebut this presumption it must be shown by the attacking party that there is, (a) unfitness, (b) long acquiescence, or (c) voluntary relinquishment such that the affections of the child and third

> party have become so interwoven that to sever them would seriously mar and endanger the future happiness of the child. The third step is that upon a showing of one of these above three factors, then it will be in the best interests of the child to be placed with the third party.

Hendrickson at 380.

The Supreme Court held in B.H.:

> [T]hat, before placing a child in the custody of a person other than the natural parent, a trial court must be satisfied by clear and convincing evidence that the best interests of the child require such a placement. The trial court must be convinced that placement with a person other than the natural parent represents a substantial and significant advantage to the child. The presumption will not be overcome merely because "a third party could provide the better things in life for the child."

B.H. at 287. Regarding the Hendrickson considerations, the Supreme Court stated: "In a proceeding to determine whether to place a child with a person other than the natural parent, evidence establishing the natural parent's unfitness or acquiescence, or demonstrating that a strong emotional bond has formed between the child and the third person, would of course be important, but the trial court is not limited to these criteria." B.H. at 287. The Court reasoned, "The issue is not merely the 'fault' of the natural parent. Rather, it is whether the important and strong presumption that a child's interests are best served by placement with the natural parent is clearly and convincingly overcome by evidence proving that the child's best interests are substantially and significantly served by placement with another person." Id. The Court also held that "this determination falls within the sound discretion of our trial courts, and their judgments must be afforded deferential review." Id. But the Court noted that, "A generalized finding that a placement other than with the natural parent is in the child's best interests, however, will not be adequate to support such determination, and detailed and specific findings are required." Id.

In **In Re Marriage of Huss**, 888 N.E.2d 1238, 1248 (Ind. 2008), the Indiana Supreme Court affirmed the Dissolution Court's custody judgment granting custody of all four of Wife's children to Husband, including the youngest child who was not the biological child of Husband. The Court found that the evidence was sufficient to support the Dissolution Court's award of custody to Husband, a "non-parent third party," rather than to Wife as the child's biological mother. The Court noted the following facts: (1) during the marriage, Husband was at home evenings and spent time helping the children with their homework; (2) Husband prepared meals and shared doing the laundry and shopping with Wife; (3) during the almost one year period following the provisional order granting him custody, Husband was primary caretaker for all four children; (4) Husband fully accepted the subject child as his own, and treated all four children equally; (5) Husband regularly made several trips to school each day to facilitate the children's participation in extracurricular activities; (6) there was considerable testimony regarding the close relationship between the four children and both parties' extended families nearby; (7) Wife's mother's testified that what the children needed was stability, and they were getting that from being with Husband; (8) there was testimony about Wife's plans to move with the

youngest child to Louisiana, and how this would negatively impact the child's stability and family relationships; and (9) the Dissolution Court interviewed the children in chambers.

In **T.H. v. R.J.**, 23 N.E. 3d 776, 786-87 (Ind. Ct. App. 2014), the Court affirmed the juvenile court's denial of Grandparents' request for third party custody of the child. On appeal, Grandparents argued that the trial court applied an incorrect legal standard in reaching its conclusion that Mother and Stepfather should have custody of the child because the trial court did not address the factors listed in Hendrickson v. Brinkley, 316 N.E.2d 376 (Ind. Ct. App. 1974). The Court determined that this argument failed, since the Indiana Supreme Court held in In Re Guardianship of B.H., 770 N.E.2d 283 (Ind. 2002) that the Hendrickson factors, while useful, were not the only factors that a trial court could consider in determining whether or not a third party has rebutted the presumption in favor of the natural parent. Since the trial court was not required to limit itself to those factors, it could not have erred in failing to analyze the evidence in light of those factors. The Court held that the juvenile court did not err in concluding that Grandparents failed to overcome the presumption in favor of the natural parents. The Court noted that in addition to showing that they overcame the parental presumption, Grandparents would also need to show that placing the child with them gave the child a substantial and significant advantage. The Court opined that Grandparents had failed to do so and noted testimony in the record where Grandfather admitted he did not believe that either Mother or Stepfather had abused the child, but rather, he thought he and Grandmother could do a better job with raising the child than the parents were doing. The Court held that the juvenile court did not err by not considering the best interests and de facto custodian factors provided at IC 31-14-13-2.5. The Court opined that when a third party seeks custody of a child, a general best interest analysis does not begin until the third party has rebutted the presumption in favor of the natural parent.

In **Fry v. Fry**, 8 N.E.3d 209, 215-17 (Ind. Ct. App. 2014), the Court affirmed the trial court's order which modified custody of Mother's daughter (Daughter) to Mother's former husband (Husband). Husband was not the father of Daughter, but Husband was awarded parenting time with Daughter whenever he exercised parenting time with the child of his marriage to Mother. Husband eventually filed an emergency petition requesting physical custody of both Daughter and the child of his marriage to Mother. Husband alleged that Mother had been diagnosed with Huntington's Disease, which had progressively diminished her ability to care for the children physically, mentally, and emotionally. The trial court modified physical custody of both children to Husband and ordered supervised parenting time for Mother. Mother filed a Trial Rule 60 motion seeking to declare the court's orders relating to Daughter void, as the trial court had no jurisdiction to award custody of Daughter to Husband. The Court concluded that the trial court did not commit any legal error in considering Husband's emergency petition and affirmed the order awarding custody of Daughter to Husband. The Court opined that Mother's claim was not a true jurisdictional claim, and the judgment was not void due to lack of jurisdiction. In support of its opinion, the Court observed: (1) IC 31-17-2-25 allows for emergency placement of a child with a person other than a parent; therefore, Husband had a legal right pursuant to this statute to seek such relief; (2) a trial court adjudicating a dissolution may award custody to a de facto custodian, citing In Re Custody of G.J., 796 N.E.2d 756, 762 (Ind. Ct. App. 2003), *trans. denied*, and IC 31- 9-2-35.5 (definition of de facto custodian); (3) Husband was entitled to consideration in custody matters as a de facto custodian; (4) instead of appealing the trial court's order which

gave emergency custody to Husband as erroneous, Mother had acquiesced in the custody order, seeking only to exercise her parenting time as the court ordered.

In **Parks v. Grube**, 934 N.E.2d 111, 113, 118 (Ind. Ct. App. 2010) *trans. denied*, the Court found there was sufficient evidence to support the trial court's conclusion that Grandparents proved by clear and convincing evidence that the children's best interests were served by placement with Grandparents. The Court affirmed the trial court's order granting custody of three children to Grandparents after the custodial father's death. Citing In Re Guardianship of B.H., 770 N.E.2d 283, 288 (Ind. 2002), the Court opined that evidence of parental unfitness is important, but it is not the only criteria that a trial court may consider. The Court said that, accordingly, Grandparents were not required to prove that Mother is unfit. The Court noted the following evidence in support of the trial court's order: (1) Mother's two convictions for Operating a Vehicle While Intoxicated; (2) the children's testimony that Mother was intoxicated the day their father died; (3) one child's testimony about finding a beer can in Mother's purse and a bottle of vodka under Mother's trailer; (4) evidence from the children's journals that Mother yells at them, calls them names, and tells them she does not want to see them again when Mother is intoxicated; (5) testimony from Mother's boyfriend that Mother was usually intoxicated when she lived with him in 2007; (6) testimony from Mother's former friend and neighbor that the friend cared for the children when Mother would "come home drunk with a stranger" during Mother's parenting time with the children.

In **In Re Paternity of L.J.S.**, 923 N.E.2d 458, 464-65 (Ind. Ct. App. 2010), *trans. denied*, the Court reversed the trial court's order awarding custody of the three-year-old child to Grandparents. The Court opined that the trial court's findings did not clearly and convincingly overcame the important and strong constitutional presumption that the child should be placed in Father's custody. The Court noted that most of the findings said nothing about Father's fitness as a parent nor did they suggest that Father abandoned the child, relinquished his rights, or otherwise abdicated his authority and were inadequate to clearly and convincingly overcome the important and strong presumption that the child's interests are best served by placement with Father. The Court also commented on the following trial court findings which pertained to Father: (1) although Father did not have much contact with the child for the first nine months of the child's life, Father testified that he refrained from visiting because he did not know the child was his son; (2) Father's employment changes did not reflect on Father's unfitness or instability because the employment changes were conscious changes to increase his salary and to enable him to live closer to the child; (3) the facts that Father worked in Kentucky but lived three hours away in Indiana and that the child's visitation with Father required extensive driving showed that Father wanted to see the child enough to travel great distances; (4) although Father smoked, he did not smoke in the house or car when the child was present and there was no finding or showing that Father's smoking had exposed the child to harm; (5) Father's failure to attend parenting classes and to timely reimburse Mother for the child's birth did not, as the trial court concluded, establish Father's disregard for the child's welfare. While it appeared that Grandparents had provided a stable and good home for the child, the issue was whether the important and strong presumption that the child's interests were best served by placement with Father were clearly and convincingly overcome by evidence proving that the child's best interests were substantially and significantly served by placement with Grandparents.

In **In Re Paternity of T.P.,** 920 N.E.2d 726, 732-34 (Ind. Ct. App. 2010), *trans. denied*, the Court affirmed the trial court's denial of intervenor Caretakers' petition for custody of the child, holding that Caretakers did not present clear and convincing evidence to overcome the parental presumption. The Court observed: (1) the trial court concluded Mother had permitted liberal visitation by Caretakers but had not acquiesced in their having custody of the child; and (2) the fact that the child and Caretakers had spent a great deal of time together and had a strong bond did not negate the finding that Mother and the child had similarly spent a great deal of time together and maintained a stronger bond. The Court also found no clear error in the trial court's decision not to use the factor of Mother's unfitness due to allegedly improper influences of drug use, sexual activity, and crime in Mother's neighborhood. The Court noted the following evidence in support of the trial court's determination regarding these issues: (1) the child's difficulties in school were attributed to her possible learning disability and the late start to her school year rather than to alleged dangerous influences at her home; (2) there was no evidence that Mother's present behavior included ongoing drug use following Mother's relapse during the summer of 2008; (3) sexual allegations were apparently deemed unsubstantiated by Child Protection Services; (4) medical evaluations did not raise concerns regarding Mother's care of the child; (5) Mother had taken steps to ensure the child's safety, including walking the child to and from school; (6) the child had adjusted to her community, and no community was immune from crime; (7) the child denied that Mother's drug use and sexual activity had occurred in front of the child. Id. The Court also found that Caretakers had not demonstrated clear error in the trial court's conclusion that Mother's housing was adequate, and that Mother's frequent moves demonstrated her ability to address and resolve problems. The Court noted the following evidence in support of the trial court's conclusion that Mother's history of unstable housing was largely justified and that her housing situation as of March 2009 was fully adequate: (1) Mother's testimony that all of her homes had heat, working appliances, and, with the exception of one month-long residence, running water, and that the child was never required to sleep on the floor; (2) by the time of the February 12, 2009, hearing, the Guardian ad Litem reported that Mother's housing conditions were adequate; (3) while the pipes in Mother's residence apparently later burst, Mother found new housing which was fully adequate.

In **A.J.L. v. D.A.L.**, 912 N.E.2d 866, 872-74 (Ind. Ct. App. 2009), the Court affirmed the trial court's dissolution order that awarded custody of Father's and Mother's three children to Aunt and Uncle. Mother contended the evidence was insufficient to support the custody order, arguing that Aunt and Uncle have not rebutted the presumption that favors awarding custody of children to the natural parent. The Court disagreed with Mother's argument, noting the following evidence: (1) Mother's voluntary relinquishment of the children to the care of the Aunt and Uncle for fifty percent of the time from January 2006 through February 2007, sixty to seventy percent of the time from February 2007 to February 2008, and full-time since February 2008; (2) Mother lacked a stable residence, had no valid driver's license, and was unable to provide adequate support or care for the children; (3) Aunt and Uncle provided for the care and needs of the children without financial contribution from Mother; (4) the children were bonded emotionally to Aunt and Uncle; (5) the oldest child was a lot happier and his behavior had improved "100 percent" since living with Aunt and Uncle.

In **Christian v. Durm**, 866 N.E.2d 826, 830 (Ind. Ct. App. 2007), *trans. denied*, the Court affirmed the trial court's award of custody of the child to the third party custodian (Custodian)

rather than to Parents. Custodian petitioned to intervene in Parents' dissolution proceeding and sought custody of the child. Parents moved for dismissal of the dissolution petition and the dissolution petition was dismissed. Parents asserted that custody was not properly at issue because the dissolution petition had been dismissed. The trial court proceeded with the custody hearing and denied Parents' motions for dismissal of the custody petition. On appeal, the Court observed that, as an intervenor, Custodian enjoyed equal standing with the original parties (Parents) and had a pending claim to pursue. In finding that there was clear and convincing evidence that the child's best interests were substantially served by placement with Custodian, the Court noted: (1) the conditions of Parents' home from which the child was removed were deplorable; (2) the child was underweight, smelled bad, and suffered from a bad diaper rash; (3) Parents did not have full-time employment; (4) Father's efforts to obtain employment were hindered by the lack of a vehicle; (5) Parents had chronic problems with paying their rent and, prior to the hearing, their landlord had given them notice to vacate their apartment; (6) Mother was taking court-ordered anger management classes, but failed to control her son's aggression against the child; and (7) in Custodian's home, the child thrived, gained weight and attained age-appropriate motor skills. The Court also noted that the trial court was not required, as Father and Mother suggested, to make a specific finding of unfitness or abandonment.

Blasius v. Wilhoff, 863 N.E.2d 1223, 1226-27, 1231 (Ind. Ct. App. 2007), *trans. denied*, originated with the filing of an adoption petition. Mother had voluntarily terminated her parental rights, but Father established paternity and contested the adoption petition. The trial court dismissed the adoption petition but, following a custody hearing, issued special findings of fact and conclusions of law granting custody of the child to Adoption Petitioners as third party custodians. The Court noted the following evidence which supported the trial court's order: (1) the child's physical development was good, her immunizations were current, and she was flourishing in Adoption Petitioners' care; (2) the four-year-old child had lived with Adoption Petitioners since birth and knows them as her primary parents; (3) Father's drug usage, his criminal history, his lack of financial stability, and his maintenance of a lifestyle that does not provide a healthy environment for a small female child; (4) marijuana, cocaine, and stolen property were secreted at a residence owned and regularly visited by Father. The evidence supported the trial court's findings, and the trial court's findings provided support for its judgment to grant custody of the child to Adoption Petitioners. The trial court applied the standard of review set out in In Re Guardianship of B.H., and the trial court was clearly convinced that placement with the third party custodians represented a substantial and significant advantage to the child, "according the trial court the appropriate deference, as we must, we cannot conclude its findings are clearly erroneous or that its judgment is against the logic and effect of the evidence."

In **Truelove v. Truelove**, 855 N.E.2d 311, 314-15 (Ind. Ct. App. 2006), the Court affirmed the dissolution trial court's award of third party custody of the two children of the marriage to Grandparents. Mother challenged the custody award on appeal, arguing that the trial court was required to find that Grandparents were de facto custodians of the children, Mother was unfit, or Mother had long acquiesced to Grandparents' custody of the children, and the evidence did not support any of these particular findings. The Court noted that, although the trial court appropriately refrained from labeling Mother an "unfit" parent, there was clear and convincing evidence that the children's best interests were substantially served by placement with

Grandparents. The Court cited to the criteria of In re Guardianship of B.H., and noted that the trial court's findings addressed (1) the children's long-term placement with Grandparents; (2) Parents' lack of financial resources and payment of child support; and (3) Mother's sporadic involvement in the children's day-to-day lives.

The Court in **Allen v. Proksch**, 832 N.E.2d 1080, 1100-1103(Ind. Ct. App. 2005), affirmed the trial court's order granting custody of the child to Maternal Grandmother as third party custodian. The Court applied the holdings of In Re Guardianship of B.H., and found that the trial court's findings provided ample support for its order in granting custody of the child to Grandmother. The Court cited the following trial court findings: (1) Father's "sporadic" contact with the child from the time of the marriage dissolution when the child was less than one year old until the time when the child was approximately five years old; (2) Father told Mother that the child should not stay with him during the summer of 2001; (3) Father abandoned of any personal contact with the child in the summer of 2001 until 2003, when Mother petitioned the trial court to modify child support; (4) Father's minimal effort to contact Mother or the child; (5) allegations that Father had hit the child when the child had stayed with him prior to 2001; (6) the child's special behavioral and emotional needs and his need to be in a stable environment; (7) Grandmother's ability to provide the child with stability and her involvement with the child's mental health treatment and school activities; and (8) the child's attachment to Grandmother and his desire to remain with Grandmother. The Court also noted these facts: (1) the GAL recommended that custody of the child should remain with Grandmother with a future goal of reunification with Father; (2) the child's therapist from Riley Hospital testified he had concerns that the child's mental health would decline if the child had an abrupt change in his living conditions and that it would be better to have the child ease into a relationship with Father; (3) the child's therapist testified that it was important for the child to have a stable environment and that Grandmother had been a stable influence, but that Father did not have stability with the child; and (4) despite his recommendation that Father should have custody, the psychologist hired by Father testified that Grandmother had provided stability to the child, had "possibly even saved his life", and that an abrupt change of custody of the child from Grandmother to Father would cause "more chaos" for the child and "would precipitate more damages."

In **Hinkley v. Chapman**, 817 N.E.2d 1288, 1293-94 (Ind. Ct. App. 2004), the Court (1) cited the standard in In Re Guardianship of B.H.; (2) held that based upon the facts delineated by the trial court, the trial court had concluded that the parties seeking guardianship, Half-sister and her Husband, had met their burden; (3) determined that the trial court could have concluded that the judgment was established by clear and convincing evidence; and (4) held that the trial court did not abuse its discretion in appointing Half-sister and her Husband as the child's guardians. The Court noted the trial court found that: (1) the child, although ten years old, was reading at a first grade level and performing mathematics at a third grade level; (2) citing the psychological evaluation, the child's developmental lag was not the result of a learning disability, but of Mother's failure to educate him using age-appropriate materials; (3) Mother's recent attempts to seek help for the child had been driven by Guardian's decision to intervene; (4) Mother's intention to enroll the child in public school in the future was insincere; and (5) Half-sister and her Husband had "legitimate concern for [the child]."

In **Nunn v. Nunn**, 791 N.E.2d 779, 784-85 (Ind. Ct. App. 2003), the Court found that the trial court had jurisdiction to decide the custody dispute between Wife and Husband, who was not the child's father, and remanded the case for resolution. The Court cited In Re Guardianship of L.L, 745 N.E.2d 222, 230-31 (Ind. Ct. App. 2001), *trans. denied,* for the propositions that, in cases involving a custody dispute between a natural parent and a third party, there is a presumption that the natural parent should have custody of the child, and the third party bears the burden of overcoming this presumption by clear and cogent evidence. Evidence which the Court found tended to rebut the parental presumption included: (1) Husband learned the child was not his biological child at the time of the dissolution proceeding when the child was five years old; (2) Husband had been a father figure to the child for her entire life; and (3) Husband and the child had developed a deep father-daughter bond. The Court also noted Husband's testimony that he was instrumental in the child's daily care and financial support.

Other third party custody cases on termination of guardianships and third party custodianships are discussed below.

Orders Appointing A Guardian or Third Party Custodian

When a guardianship or third party custodianship is being considered by the court, attorneys for the parties should submit case-specific proposed orders with findings of fact and conclusions of law. As the cases in the above section indicate, detailed findings support a trial court's decision to either grant or deny a request by a non-parent to have custody of a child. The proposed order should set forth and support the specific reasons indicating whether the parental presumption has been or has not been overcome. The order should also address in what ways the child's best interests are substantially and significantly served by placement with another person and how placement with the third party "represents a substantial and significant advantage to the child." **In Re Guardianship of B.H.**, 770 N.E.2d 283, 287 (Ind. 2002). A generalized finding that placement other than with the natural parent is in the child's best interests will not be adequate to support such determination, and detailed and specific findings will be required. Id. In **In Re Custody of J.V.**, 913 N.E.2d 207, 208, 211 (Ind. Ct. App. 2009), the Court remanded the case to the trial court to enter the required best interests findings to support its award of the child's custody to Grandmother. The J.V. Court observed that the evidence supported the trial court's determination that Grandmother was the child's "de facto custodian", but the trial court was also required to consider whether awarding custody of the child to Grandmother was in the child's best interests. The J.V. Court opined that "[s]uch findings are particularly important in this case given the significant burden a third party must overcome to rebut the presumption that the natural parent should have custody of his or her child." See also **Hinkley v. Chapman**, 817 N.E.2d 1288, 1294 (Ind. Ct. App. 2004) (affirming the trial court's order entering extensive findings in support of its conclusion that appointing guardians was in the child's best interest; although trial court did not make a specific finding that the guardianship appointment was "necessary as a means of providing care and supervision of the physical person or property of the … minor," the Court held that such a finding was implicit in the trial court's extensive findings in support of its conclusion that the appointment of the guardians was in the child's best interest. Thus, the statutory requirement for such a finding of necessity was met).

Similarly, there is also a need for detailed and specific findings by the trial court when it denies a petition to terminate guardianship. See **In Re Guardianship of A.R.S.**, 816 N.E.2d 1160, 1163 (Ind. Ct. App. 2004), in which the court's decision to deny a petition to terminate guardianship was reversed and remanded. The Court stated that special findings are especially important as a means of alerting parents of the reasons why their children are not being returned to their custody, thereby effectively putting parents on notice as to what steps they must take before their children will be returned to them.

Guardianship law (Title 29) specifically allows for an order granting a guardianship to include: (1) a requirement that the minor must reside with the guardian until the guardianship is terminated or modified and (2) 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).

Case Law Standards for Termination of Guardianship or Modification of Third Custodianship Back to Parent

Current case law holds that, in deciding whether to terminate a guardianship or modify a third party custodianship, the clear and convincing evidence standard must be used and detailed and specific findings must be made, rather than a generalized finding. See In Re Guardianship of A.R.S., 816 N.E.2d 1160, 1163 (Ind. Ct. App. 2004) (holding special findings are especially important as a means of alerting parents of the reasons why their children are not being returned to their custody, thereby effectively putting parents on notice as to what steps they must take before their children will be returned to them). The two most crucial cases to read and utilize for ending a guardianship or third party custody arrangement are **K.I. Ex Rel. J.I. v. J.H.**, 903 N.E.2d 453 (Ind. 2009) and **In Re Guardianship of B.H.**, 770 N.E.2d 283 (Ind. 2002). K.I. references and relies upon the standard articulated in B.H.

In **K.I. Ex Rel. J.I. v. J.H.**, 903 N.E.2d 453, 459-61 (Ind. 2009), the Indiana Supreme Court spoke directly to the standard to be applied in determining whether to modify custody from the guardian or third party custodian back to a parent. The Court held that, when ruling on a parent's petition to modify custody of a child who is already in the custody of a third party, (1) although in a very technical sense, a natural parent seeking to modify custody has the burden of establishing the statutory requirements for modification by showing modification is in the child's best interest, and that there has been a substantial change in one or more of the enumerated factors, as a practical matter, this burden is minimal; and (2) once this minimal burden is met, the third party must prove by clear and convincing evidence "that the child's best interests are substantially and significantly served by placement with another person." In Re Guardianship of B.H., 770 N.E.2d 283, 287 (Ind. 2002). If the third party carries this burden, then custody of the child remains in the third party; otherwise, custody must be modified in favor of the child's natural parent.

The K.I. Court discussed In Re Paternity of Z.T.H., 839 N.E.2d 246 (Ind. Ct. App. 2005) and explicitly disapproved the Z.T.H. Court's conclusion that where a parent requests to modify a third party's custody, "a burden shifting approach is the most appropriate way to protect parental rights and the best interests of the child." The K.I. Court saw the central issues as: (1) what standard a trial court should apply when ruling on a parent's petition to modify custody of a child

who is already in the custody of a third party, and (2) what role, if any, the presumption in favor of the natural parent plays in a modification proceeding. The distinctions between the statutory factors required to obtain initial custody and those required for a subsequent custody modification are not significant enough to justify substantially different approaches in resolving custody disputes. Both require consideration of certain relevant factors, and Indiana courts have long held that even when a parent initiates an action to reobtain custody of a child who has been in the custody of another, the burden of proof does not shift to the parent, rather the burden of proof is always on the third party. The Z.T.H. approach of placing the non-parent on a level play field with a parent is inconsistent with Indiana's long standing precedent. Even though Father never had custody in the first place, he is the child's natural parent and the underlying rationale is the same.

The K.I. Court further noted that, even though IC 31-14-13-6 provides that a party seeking a change of custody must persuade the trial court that modification is in the best interests of the child and that there is a substantial change in one or more of the factors that the court may consider, this is a modest requirement when the party wanting to modify custody is the natural parent of a child who is in the custody of a third party. In accordance with B.H. at 287, the parent comes to the table with a "strong presumption that a child's interests are best served by placement with the natural parent" the first statutory requirement is met from the outset. Because a substantial change in any one of the statutory factors will suffice, "the interaction and interrelationship of the child with ... the child's parents" – one of the grounds on which the trial court relied in this case – satisfied the second statutory requirement.

In **Matter of Guardianship of A.Y.H.**, 139 N.E.3d 1050, 1055 (Ind. Ct. App. 2019), the Court affirmed the trial court's denial of Father's petition to terminate the guardianship, holding that the trial court's findings and conclusions supported the strong presumption that the trial court followed and properly applied the applicable law. The child was born to Mother and Father in 2010, and shortly after birth, began living with Guardians (maternal great aunt and uncle). Guardianship was granted to Guardians in November 2011. Father was incarcerated from February 2011 to February 2012, at which time Father and Mother divorced. From 2012 to 2015, neither Father nor Mother visited with or provided support to the child. In 2015, Father filed a petition to terminate the guardianship; an agreement was reached in 2017, where Guardians agreed to forego adopting the child, and the guardianship would continue until the child turned eighteen. The agreement gave Father phased in parenting time. Father filed a second petition to terminate the guardianship in 2018, and in July 2019, the trial court issued findings of fact and conclusion of law denying Father's petition to terminate the guardianship.

The A.Y.H. Court concluded that the trial court did not abuse its discretion in denying Father's petition to terminate the guardianship; the trial court's "findings and conclusions support the strong presumption that the trial court followed the applicable law and employed the presumption favoring the natural parent over the third parties but simply rendered a decision that is contrary to Father's desired outcome." A court may terminate a guardianship when it is no longer necessary. IC 29-3-1-(c)(4). Because Father neglected to provide a copy of the transcript of the trial court proceedings, he waived any allegations of error pertaining the accuracy or adequacy of the findings; the Court limited itself to determining whether the findings supported the judgment. The Court noted the standard for examining a termination of guardianship case:

the burden of proof does not shift to the parent, and the burden to show a change in circumstance is minimal; then, that the third party must overcome the presumption that placement with a parent is in the child's best interests by clear and convincing evidence, and that the child's best interests are substantially and significantly served by placement with the third party. Clear and convincing evidence sufficient for a third party to overcome the parental presumption can include evidence of unfitness, long acquiescence, or voluntary relinquishment, but the inquiry is not limited to these factors. The Court dismissed Father's argument that the trial court was required to specify that Guardians were subject to a clear and convincing standard in its order, noting that Father failed to cite any case law for this proposition. The Court also noted that trial courts are presumed to have considered the relevant factors and followed the applicable law, and the party challenging the trial court's conclusion must overcome this strong presumption.

The A.Y.H. Court noted the following findings: (1) Father waited three years to petition to terminate the guardianship; (2) Father then entered into an agreement continuing the guardianship until age eighteen; (3) Father again filed to terminate the guardianship; (4) the child lived with Guardians for eight years, since birth; (5) Father did not see the child for six years, and much of the time he was able to do so; (6) Father has never financially supported the child; (7) Father began his phased in parenting time, and the child began exhibiting adjustment problems; (8) Father declined to participate in child's counseling; (9) Father tells the child he will take the child to the police if the child does not behave; (10) Father has not engaged with the child's school at all; and (11) the child is very bonded to Guardians. Id. at Id. at 1055. The Court noted that these findings stand as proven, and that they were reasons supporting the trial court's decision to not terminate the guardianship.

In **Hays v. Hockett**, 94 N.E.3d 300, 309 (Ind. Ct. App. 2018), the Court held, *inter alia*, Paternal Grandparents failed to rebut the parental presumption in favor of Mother with clear and convincing evidence. The Court noted that the standard by which requests for guardianship or third party custody must be judged is found in In Re Guardianship of B.H.. It provides that in order to place a child in the custody of a third party, the third party must present clear and convincing evidence that the parental presumption must be overcome with clear and convincing evidence of a parent's unfitness, acquiescence, or a the formation of a strong emotional bond between the child and the third party such that severing it would harm the child. Once the third party has rebutted this presumption by clear and convincing evidence, then the trial court will move on to address the best interests of the child. The Court opined that the Paternal Grandparents' arguments amounted to requests to reweigh the evidence, which the Court would not do. The Court note the following evidence: (1) Mother was employed with a well-paying job; (2) Mother and the child would qualify for her health benefits; (3) Mother was subjected to random drug screen through her employer and passed a court ordered hair follicle test; (4) Mother submitted to a psychological exam that came back indicating Mother had no mental health problems; (5) Mother had child care for the child; (6) Mother lived with her own supportive parents and the child had his own room; (7) Mother and the child have a strong loving relationship; and (8) Paternal Grandparents also had a strong loving relationship with the child.

In **Manis v. McNabb**, 104 N.E.3d 611, 618 (Ind. Ct. App. 2018), the Court held that Mother's arguments about the trial court's finding supporting its order granting the guardianship were just an invitation to reweigh the evidence and re-judge the credibility of the witnesses. The Court

noted the following evidence: Mother lived with her grandparents; Mother was financially dependent on Grandparents for her needs; Mother was unable to support the child or provide for the child's needs; Grandmother kicked Mother out of her house for Mother's behavior and using credit cards without permission; Mother was using drugs; Mother was unemployed; Mother was responsible for three recent car accidents; Mother's living situations were unstable, she was not self-sufficient, and she was unable to make safe decisions.

In **Matter of Guardianship of I.R.**, 77 N.E.3d 810, 813-15 (Ind. Ct. App. 2017), the Court affirmed the trial court's order terminating Great Aunt's and Great Uncle's (Guardians') guardianship over Mother's four-year-old child. The trial court granted Guardians permanent guardianship of the child and ordered that Mother must meet certain terms and conditions before the guardianship could be terminated. Mother consented to guardianship and to the conditions. After an evidentiary hearing on Mother's request to terminate the guardianship, the trial court found that: (1) Mother had carried her burden to show that she had met all of the conditions; and (2) Guardians failed to carry their burden to overcome the parental presumption in favor of Mother. The trial court terminated the guardianship and Guardians appealed, contending that Mother failed to make a significant showing that she had met all the conditions and that Mother's evidence was only her own self-serving testimony. The Court quoted K.I. Ex Rel. J.I. v. J.H., which states, "Indiana courts have long held that '[e]ven when a parent initiates an action to reobtain custody of a child that has been in the custody of another, the burden of proof does not shift to the parent…[r]ather, the burden of proof is always on the third party.'" The Court concluded sufficient evidence was presented to show that Mother had met the conditions set forth in the order granting permanent guardianship. The Court also concluded that Guardians did not carry their burden to overcome the presumption in Mother's favor that the child's best interests were served by placement with Mother.

In **In Re Guardianship of M.N.S.**, 23 N.E.3d 759, 767 (Ind. Ct. App. 2014), the Court affirmed the trial court's order granting Father's motion to terminate the guardianship over the child, who was nine years old at the time guardianship order was terminated. The trial court concluded that Father had met his initial burden, but Guardian had not met her burden of showing by clear and convincing evidence that the child's interests were significantly served in continuing Guardian's primary custody. The court determined that it was in the child's best interests to be placed in Father's custody. The Court disagreed with Guardian's various assertions of error, noting that: (1) the trial court had specifically recognized the bond between Guardian and the child and the resulting difficulty that would be involved in severing that bond; and (2) the trial court addressed and specifically rejected Guardian's argument that Father had voluntarily relinquished custody of the child to Guardian or had acquiesced to the current custody arrangement. The Court found that Guardian's argument was nothing more than a request to reweigh the evidence and reassess the credibility of the witnesses, which the Court would not do.

In **In Re Adoption of L.T.**, 9 N.E.3d 172 178-79 (Ind. Ct. App. 2014), the Court reversed and remanded the probate court's order which summarily dismissed the guardianship and granted Father immediate custody of the child without hearing evidence. The Court opined that Father did not have an absolute right to custody upon the death of Mother, and the trial court erred in not conducting a hearing on the child's best interests and on changed circumstances that would warrant a modification of custody. The Court noted that Father signed consents to guardianship

after Mother's death and the order granting guardianship was valid; therefore, a hearing on the termination of guardianship was necessary.

In **In Re I.E.**, 997 N.E.2d 358, 362-63, 367 (Ind. Ct. App. 2013), the Court affirmed the trial court's order terminating the guardianship and modifying custody in the paternity case; both cases were heard at the same time. Guardians had taken the child home from the hospital after birth, and the guardianship continued until the child was approximately two years old, at which point the trial court terminated the guardianship and granted custody of the child to Father. The Court, citing K.I. Ex Rel. J.I. v J.H., said that: (1) Indiana courts have long held that even when a parent initiates an action to re-obtain custody of the child that has been in the custody of a third party, the burden of proof does not shift to the parent; the burden of proof is always on the third party; (2) this principle applies not only to parents seeking to re-obtain custody, but also to parents who never had custody in the first place; and (3) a burden-shifting regime that places the third party and the parent on a level playing field is inconsistent with this State's long-standing precedent; (4) a parent must show that modification is in the child's best interests and that there is a substantial change in one or more of the factors the court must consider in modifying custody, but these are modest requirements where the party seeking to modify custody is the child's natural parent; (5) the parent comes to the table with a strong presumption that the child's best interests are served by placement with the natural parent; (6) once this minimal burden is met, the third party must prove by clear and convincing evidence that the child's best interests are substantially and significantly served by placement with the third party.

The I.E. Court opined that Guardians were correct that the trial court applied an incorrect standard, at least in the technical sense. Father was required to prove that modification was in the child's best interests and that there was a substantial change in one or more of the custody factors that the court may consider under IC 31-14-13-2(2). The trial court's findings were sufficient to permit the Court to conclude that at least two of the factors in IC 31-14-13-2 were established because there had been a change with respect to Father's wishes concerning the child and a change with respect to the interaction and interrelationship between the child and Father. Id. Under the correct standard, Father carried his burden. At that point, the burden shifted to Guardians "to prove by clear and convincing evidence that the child's best interests are substantially and significantly served by placement with another person." The Court was satisfied that sufficient evidence supported the trial court's judgment.

Older cases include:

In **In Re M.K.**, 867 N.E.2d 271, 275 (Ind. Ct. App. 2007), the Court reversed and remanded the trial court's denial of Mother's petition to terminate the guardianship of her two children. The Court held that Guardians had not met their burden of rebutting the presumption in favor of Mother obtaining custody of her children. Evidence included Mother's contact with the children and her engagement in services to address addiction.

In **In Re Guardianship of J.K.**, 862 N.E.2d 686, 687 (Ind. Ct. App. 2007) affirmed the termination of the guardianship of the child. The Court held that the trial court's termination of the guardianship was not clearly erroneous because: (1) the trial court concluded that the circumstances warranting the guardianship had changed and the guardianship should be terminated; (2) the Court could not say that Guardians proved by

clear and convincing evidence that the guardianship should continue; (3) the evidence of the current fitness of Parents was conflicting; and (4) the Court could not reweigh the evidence and judge the witnesses' credibility. Evidence included parent's changed circumstances, end of probation, financial and housing stability, and amelioration of substance abuse.

In **In Re Guardianship of A.R.S.**, 816 N.E.2d 1160, 1163 (Ind. Ct. App. 2004), the Court reversed and remanded the trial court's denial of Mother's petition to terminate the guardianship of her two children by Maternal Grandfather and Step-grandmother. The Court held that a generalized finding that a placement other than with the natural parent is in a child's best interests will not be adequate to support such determination, and detailed and specific findings are required.

Parenting Time in Guardianship and Third Party Custody Cases

Parents are entitled to parenting time in a guardianship or third party custody case. See **Manis v. McNabb**, 104 N.E.3d 611 (Ind. Ct. App. 2018). Paternity and dissolution law provide that the noncustodial parent is entitled to reasonable parenting time rights unless the court finds, after a hearing, that parenting time by the noncustodial parent might endanger the child's physical health or significantly impair the child's emotional development. See IC 31-14-14-1; IC 31-17-4-1.[5]

The Indiana Supreme Court adopted the first Indiana Parenting Time Guidelines with an effective date of March 31, 2001. The Guidelines were amended most recently effective January 1, 2017. The Scope of Application of the Guidelines states that the Guidelines are applicable to all custody situations, but they 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." In such cases, "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 Scope section, number 3, further states that there is a "presumption that the Indiana Parenting Time Guidelines are applicable in all cases." "Deviation from the Guidelines by either the parties or the court that results in parenting time less than the minimum time set forth in the Guidelines must be accompanied by a written explanation indicating why the deviation is necessary or appropriate in the case."

A court which appoints the guardian or third party custodian may order specific parenting time to be provided to the parents by the guardian or custodian. Because of the reasons for the necessity

[5] Both paternity (IC 31-14-14-1) and dissolution law (IC 31-17-4-1) provide for rebuttable presumptions if the noncustodial parent has been convicted of child molesting (IC 35-42-4-3) or child exploitation (IC 35-42-4-4(b)). Both statutes provide two rebuttable presumptions: first, they establish a rebuttable presumption that the person might endanger the child's physical health and well-being or significantly impair the child's emotional development; and second, they establish that, if the court grants parenting time to the person, there is a rebuttable presumption that it must be supervised. There are also rebuttable presumptions for supervised parenting time found at IC 31-17-2-8.3 and IC 31-14-14-5 pertaining to convictions for domestic violence or family violence.

of the guardianship or third party custodianship, the court needs to balance the parents' right to parenting time against the child's right to safety and stability. The type and amount of parenting time which the proposed guardian or third party custodian must provide should be ordered by the court based on the circumstances of the particular case. If the parties have not reached an agreement on parenting time, the trial court should hear evidence at the guardianship or third party custody hearing about parenting time and enter an order on the frequency, conditions, location, and any conditions needed to implement parenting time, such as recent clean drug tests if parental substance abuse is a concern.

In **Prater v. Wineland**, (citation not available at time of writing) (Ind. Ct. App. 2020), the Court held that the trial court erred in denying Mother's motion for visitation without a hearing; the Court remanded the matter with instructions for the trial court to grant Mother a hearing to consider the visitation petition. Mother repeatedly wrote to the trial court requesting either the termination of the guardianship or visitation with her child. The trial court took no actions on these petitions, and at last, denied one with no hearing, stating that "As guardians of the child, the guardians may decide what is best for the child." The Court held that the trial court's summary denial of Mother's petition for visitation in the guardianship case was contrary to law and policy; Mother should have received a hearing on her petition. Indiana law recognizes the rights of parents to visit their children; it is a precious privilege for noncustodial parents. Noncustodial parents are generally entitled to parenting time, unless there is a finding after a hearing that the child's physical health is endangered by the parenting time, or their emotional development is significantly impaired by the parenting time. Since the statute IC 31-174-1 specifically requires a hearing, the trial court erred in denying Mother parenting time without a hearing. The Court noted recent prior case law as well; in Manis v. McNabb, 104 N.E.3d 611, 621 (Ind. Ct. App. 2018), the Court held that "a trial court has the authority to determine whether parenting time is warranted and order reasonable parenting time for a parent whose child is placed with a guardian." Furthermore, the trial court cannot allow a guardian to determine a parent's parenting time, as they often have a person agenda. The Court also looked to Blankenship v. Duke, 132 N.E.3d 410, 413 (Ind. Ct. App. 2019), which determined that by "making the parties agree upon parenting time, the trial court has essentially allowed the maternal grandparents to determine Father's parenting time with Children. It was error for the court to do so." The Court opined that the best practice was for trial courts to make specific findings in support of their parenting time orders.

In **Blankenship v. Duke**, 132 N.E.3d 410, 413 (Ind. Ct. App. 2019), the Court reversed and remanded the lower court's order of "parenting time as the parties agree", with instructions to order reasonable parenting time. The Court held that the trial court's order regarding parenting time was in error, as it allowed Grandparents to determine Father's parenting time. Grandparents obtained guardianship of the children of Mother and Father. After a continuance and a hearing, the trial court issued an order granting Grandparents guardianship. Grandparents had testified that they had a "no trespassing order" against Father, and that if they were allowed to determine Father's parenting time, they would leave it up to the children to decide whether to see Father or not. Grandparents also testified that they would only encourage a relationship with Father if they believed that they had changed, and they did not believe that he had at this point. Grandparents indicated it was not best for the children for Grandparents and Father to communicate, because they did not get along. Despite this testimony, the trial court ordered parenting time for Father as

agreed upon by the parties. The Court relied upon Manis v. McNabb, 104 N.E.3d 611 (Ind. Ct. App. 2018), stating that "when a trial court orders parenting time in a guardianship case, it cannot allow the guardian, who often has a personal stake in the matter, to determine the parent's parenting time with their child during the guardianship proceedings." Father argued that a parenting time order such as this would result in him having no parenting time at all, given the nature of the relationship between Grandparents and Father. Allowing one party to determine parenting time in this way "has the potential to deprive the parent and the child of time together and an opportunity to develop a meaningful relationship and bond. The Court opined that the evidence supported Father's argument and allowed Grandparents to decide when and whether Father would have parenting time.

In **Manis v. McNabb**, 104 N.E.3d 611, 619-20 (Ind. Ct. App. 2018), the Court held, *inter alia*, that the trial court erred when it refused to consider Mother's request for parenting time. After Guardian was appointed as the child's temporary guardian, Mother filed a petition to terminate the guardianship and a request for parenting time. Guardian was eventually appointed as the child's permanent guardian, and the trial court declined to address parenting time, stating that it was "leaving that issue to the discretion of the Guardian to act in the best interests of the minor child in maintaining meaningful contact with all family." Mother later requested parenting time again, but the trial court again declined, finding that it had no statutory or other authority under which it could order parenting time in a guardianship proceeding. On appeal, the Court opined that this was an issue of first impression, and that there is no statutory authority that either expressly permits of prohibits a trial court's authority to grant parenting time in a guardianship proceeding. Since other statutory law clearly indicates that it was the General Assembly's intent for noncustodial parents to have parenting time with their children, the Court held that that a trial court has the authority to determine and order parenting time for a parent whose child is placed with a guardian.

For other guardianship/third party custody cases which mention that parents had parenting time, See **In Re I.E.**, 997 N.E.2d 358, 360 (Ind. Ct. App. 2013) (Father's paternity was establishes and he was awarded Guidelines parenting time); **In Re M.K.**, 867 N.E.2d 271, 275 (Ind. Ct. App. 2007) (while children were living with guardians, they spent holidays and summers with Mother and she spoke to them at least three times per week); **Allen v. Proksch**, 832 N.E.2d 1080, 1095-97 (Ind. Ct. App. 2005) (trial court granted Father parenting time with child as provided in Indiana Parenting Time Guidelines for non-custodial parent where Grandmother was awarded custody of child as third-party custodian); **In Re Guardianship of A.R.S.**, 816 N.E.2d 1160, 1162-63 (Ind. Ct. App. 2004) (Crone, J., dissenting) (Mother abandoned earlier effort to terminate guardianship of her children after establishing a fixed visitation schedule); **Roydes v. Cappy**, 762 N.E.2d 1268, 1270 (Ind. Ct. App. 2002) (trial court entered an order requiring Mother and Guardian, who was maternal grandmother, to follow a visitation schedule); and **Harris v. Smith**, 752 N.E.2d 1283, 1288-90 (Ind. Ct. App. 2001) (order granting Grandparents custody of child stated Mother and Father "shall be entitled to visit [the child] at all reasonable and proper times agreeable to [third-party custodians]"). See also **In Re Guardianship of K.T.**, 743 N.E.2d 348, 352 (Ind. Ct. App. 2001) in which the Court stated that the Grandparent Visitation Act was the exclusive vehicle through which the former guardians of the child, the maternal grandparents, should have been granted visitation with the child. Accord **In Re Guardianship of J.E.M.**, 870 N.E.2d 517 (Ind. Ct. App. 2007).

Practice Tips

- Interview relatives who may have information about the parents and prepare affidavits for their signature.
- Obtain criminal histories, if any, on parents and prospective guardians, including certified copies of guilty pleas or guilty findings and sentencing orders.
- Consider the use of a professional evaluator to establish the above-described factors courts must rely on in deciding guardianship or third party custody cases. The evaluation may help to win your case. But see In Re Guardianship of L.L., 745 N.E.2d 222, 232 (Ind. Ct. App. 2001), *trans. denied*, in which the Court opined that a custody evaluation performed in a third party situation without consideration of the presumption favoring the natural parent should be looked at differently, with less deference given to an ultimate custody recommendation than might be given in a custody dispute between two parents. It is important that the custody evaluator in a guardianship or third party custody situation be given written guidance concerning the presumption and that counsel for all parties be sent copies of the communication to the evaluator.
- Consider asking the Court to appoint a court appointed special advocate or guardian ad litem to represent the child's best interests. But see In Re Guardianship of Hickman, 805 N.E.2d 808, 823-24 (Ind. Ct. App. 2004) in which the Court of Appeals discussed the admissibility of a guardian ad litem's opinion in an adult guardianship case.
- Obtain copies of any Department of Child Services assessment reports concerning the child. If your client has temporary custody or guardianship of the child, IC 31-33-18-2(8) authorizes parents, guardians, custodians or other persons responsible for the welfare of a child named in a report and an attorney of any of the above persons to obtain the Department of Child Services report. If your client does not have temporary custody or guardianship of the child, the court may conduct an in camera inspection of DCS records if the court determines that access to the records may be necessary for determination of an issue before the court. The court may order the records released if the court determines that public disclosure of the records is necessary for the resolution of an issue then pending before the court. IC 31-33-18-2(9).
- Obtain certified copies of CHINS adjudications and relevant orders if the child is or has been adjudicated a CHINS. Your client may be able to obtain these documents if your client has temporary custody or guardianship.
- Obtain child support payment records certified by the Clerk.
- Use discovery tools including motions for production of documents, interrogatories and requests for admissions.
- The parties seeking guardianship or third party custody should prepare and maintain a history of contact with the parents and child.
- If medical neglect is an issue, the parties seeking guardianship or third party custody should try to obtain the child's medical records to show the lack of care by the parents

and how the guardians or third party custodians have cared for the child if the child has been in their custody.

- Ensure that the trial court issues an order with detailed findings and conclusions to support the judgment.
- Ensure that a proper order regarding parenting time is issued.