

Children's Law Center of Indiana



The Department of Child Services and Its Effect on Dissolution, Paternity and Guardianship Cases¹ (Includes statutory changes effective July 1, 2009)

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The Department of Child Services (DCS) may receive an abuse or neglect report, conduct an assessment, and take other action concerning the children of your client whom you are representing in a dissolution, paternity or guardianship case. The purpose of this paper is to increase attorneys' understanding of how DCS functions, including how DCS assessments and actions can impact your client's case.

I. Reporting Child Abuse or Neglect

A. What must be reported?

Indiana law requires that an individual who has "reason to believe" that a child is a "victim of child abuse or neglect" shall make a report. IC 31-33-5-1. "Victim of child abuse or neglect" is defined at IC 31-9-2-133. "Victim of child abuse or neglect" refers to a child in need of services as described in IC 31-34-1-1 through IC 31-34-1-5; IC 31-34-1-10; or IC 31-34-1-11. The term does not include a child who is alleged to be a victim of a sexual offense under IC 35-42-4-3 (child molesting) unless the alleged offense

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involves the fondling or touching of the buttocks, genitals, or female breasts. The applicable child in need of services definitions are:

IC 31-34-1-1: Inability, refusal, or neglect of parent, guardian, or custodian to supply child with necessary food, clothing, shelter, medical care, education, or supervision

Sec. 1. A child is a child in need of services if before the child becomes eighteen (18) years of age:

- (1) the child's physical or mental condition is seriously impaired or seriously endangered as a result of the inability, refusal, or neglect of the child's parent, guardian, or custodian to supply the child with necessary food, clothing, shelter, medical care, education, or supervision; and
- (2) the child needs care, treatment, or rehabilitation that:
 - (A) the child is not receiving; and
 - (B) is unlikely to be provided or accepted without the coercive intervention of the court.

IC 31-34-1-2: Act or omission of parent, guardian, or custodian seriously endangering child's physical or mental health

Sec. 2. (a) A child is a child in need of services if before the child becomes eighteen (18) years of age:

- (1) the child's physical or mental health is seriously endangered due to injury by the act or omission of the child's parent, guardian, or custodian; and
- (2) the child needs care, treatment, or rehabilitation that:
 - (A) the child is not receiving; and
 - (B) is unlikely to be provided or accepted without the coercive intervention of the court.

(b) Evidence that the illegal manufacture of a drug or controlled substance is occurring on property where a child resides creates a rebuttable presumption that the child's physical or mental health is seriously endangered.

IC 31-34-1-3: Victim of sex offense

Sec. 3. (a) A child is a child in need of services if before the child becomes eighteen (18) years of age:

- (1) the child is the victim of a sex offense under:
 - (A) IC 35-42-4-1 [rape];
 - (B) IC 35-42-4-2 [criminal deviate conduct];
 - (C) IC 35-42-4-3 [child molesting];
 - (D) IC 35-42-4-4 [child exploitation; possession of child pornography];
 - (E) IC 35-42-4-7 [child seduction];
 - (F) IC 35-42-4-9 [sexual misconduct with a minor];
 - (G) IC 35-45-4-1 [public indecency; indecent exposure];

- (H) IC 35-45-4-2 [prostitution];
- (I) IC 35-46-1-3 [incest]; or
- (J) the law of another jurisdiction, including a military court, that is substantially equivalent to any of the offenses listed in clauses (A) through (I); and
- (2) the child needs care, treatment, or rehabilitation that:
 - (A) the child is not receiving; and
 - (B) is unlikely to be provided or accepted without the coercive intervention of the court.
- (b) A child is a child in need of services if, before the child becomes eighteen (18) years of age:
 - (1) the child lives in the same household as another child who is the victim of a sex offense under:
 - (A) IC 35-42-4-1 [rape];
 - (B) IC 35-42-4-2 [criminal deviate conduct];
 - (C) IC 35-42-4-3 [child molesting];
 - (D) IC 35-42-4-4 [child exploitation; possession of child pornography];
 - (E) IC 35-42-4-7 [child seduction];
 - (F) IC 35-42-4-9 [sexual misconduct with a minor];
 - (G) IC 35-45-4-1 [public indecency; indecent exposure];
 - (H) IC 35-45-4-2 [prostitution];
 - (I) IC 35-46-1-3 [incest]; or
 - (J) the law of another jurisdiction, including a military court, that is substantially equivalent to any of the offenses listed in clauses (A) through (I);
 - (2) the child lives in the same household as the adult who committed the sex offense under subdivision (1) and the sex offense resulted in a conviction or a judgment under IC 31-34-11-2;
 - (3) the child needs care, treatment, or rehabilitation that:
 - (A) the child is not receiving; and
 - (B) is unlikely to be provided or accepted without the coercive intervention of the court; and
 - (4) a caseworker assigned to provide services to the child:
 - (A) places the child in a program of informal adjustment or other family or rehabilitative services based upon the existence of the circumstances described in subdivisions (1) and (2) and the assigned caseworker subsequently determines further intervention is necessary; or
 - (B) determines that a program of informal adjustment or other family or rehabilitative services is inappropriate.

IC 31-34-1-4: Parent, guardian, or custodian allowing child's participation in obscene performance

Sec. 4. A child is a child in need of services if before the child becomes eighteen (18) years of age:

- (1) the child's parent, guardian, or custodian allows the child to participate in an obscene performance (as defined by IC 35-49-2-2 or IC 35-49-3-2); and
- (2) the child needs care, treatment, or rehabilitation that:
 - (A) the child is not receiving; and
 - (B) is unlikely to be provided or accepted without the coercive intervention of the court.

IC 31-34-1-5: Parent, guardian, or custodian allowing child to commit sex offense

Sec. 5. A child is a child in need of services if before the child becomes eighteen (18) years of age:

- (1) the child's parent, guardian, or custodian allows the child to commit a sex offense prohibited by IC 35-45-4 [public indecency, indecent exposure, public nudity, prostitution, patronizing or promoting prostitution, voyeurism]; and
- (2) the child needs care, treatment, or rehabilitation that:
 - (A) the child is not receiving; and
 - (B) is unlikely to be provided or accepted without the coercive intervention of the court.

IC 31-34-1-10: Child born with fetal alcohol syndrome or with controlled substance or legend drug in child's body

Sec. 10. Except as provided in sections 12 and 13 of this chapter, a child is a child in need of services if:

- (1) the child is born with:
 - (A) fetal alcohol syndrome; or
 - (B) any amount, including a trace amount, of a controlled substance or a legend drug in the child's body; and
- (2) the child needs care, treatment, or rehabilitation that:
 - (A) the child is not receiving; or
 - (B) is unlikely to be provided or accepted without the coercive intervention of the court.

IC 31-34-1-11: Risks or injuries arising from use of alcohol, controlled substance, or legend drug by child's mother during pregnancy

Sec. 11. Except as provided in sections 12 and 13 of this chapter, a child is a child in need of services if:

- (1) the child:
 - (A) has an injury;
 - (B) has abnormal physical or psychological development; or
 - (C) is at a substantial risk of a life threatening condition;that arises or is substantially aggravated because the child's mother used alcohol, a controlled substance, or a legend drug during pregnancy; and
- (2) the child needs care, treatment, or rehabilitation that:

- (A) the child is not receiving; or
- (B) is unlikely to be provided or accepted without the coercive intervention of the court.

IC 31-9-2-88 defines “parent” as a biological or adoptive parent. IC 31-9-2-49 defines “guardian” as “a person appointed by a court to have the care and custody of a child or the child’s estate or both.” IC 31-9-2-31 defines “custodian” for purposes of IC 31-34-1 [the child in need of services definition] very broadly for child abuse and neglect reporting and assessment. In summary, the term “custodian” includes (1) a member of the household of the child’s noncustodial parent; (2) an individual who has direct contact, on a regular and continuing basis, with a child for whom care and supervision is provided; (3) a license applicant or licensed foster home, residential child care facility, child care center, or child care home; (4) a person who is responsible for care, supervision, or welfare of children at a child care ministry, home, center or facility of a child care provider, or a school; (5) a child caregiver as defined by IC 31-9-2-6.4.

“Reason to believe” is defined at IC 31-9-2-101 as “evidence that, if presented to individuals of similar background and training, would cause the individuals to believe that a child was abused or neglected.” Only serious impairment, endangerment, sexual victimization or maternal drug or alcohol use that resulted in fetal alcohol syndrome diagnosis, the presence of a controlled substance in the child’s body, substantial risk of a life threatening condition to the child or abnormal physical or psychological development of the child should be reported to DCS. Disagreements about parenting styles and disciplinary techniques should not be reported unless the statutory criteria have been met.

B. Who must report?

The individual who has “reason to believe” that the child is a “victim of child abuse or neglect” must report. IC 31-32-11-1 abrogates the privileged communication between husband and wife; a health care provider (defined at IC 31-9-2-52) and patient; licensed social worker and client; licensed clinical social worker and client; licensed marriage and family therapist and client; licensed mental health counselor and client; licensed addiction counselor and client; licensed clinical addiction counselor and client; and school counselor or school psychologist and student. The abrogation of the above listed privileges covers

both reporting and testifying in any judicial proceeding resulting from a report of a child who may be a victim of child abuse or neglect. IC 35-37-6-8 states that the victim advocate – victim privilege does not relieve a victim advocate of any duty to report suspected abuse or neglect.

Attorneys and clergymen, who are required to maintain privileged information in specified situations, are not exempted from child abuse reporting requirements. Some attorneys believe that child abuse or neglect can be reported by an attorney because Ind. Professional Conduct Rule 1.6(b)(1) allows disclosure of privileged communications to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm; or... (6) to comply with other law or court order. Child abuse or neglect could be considered substantial bodily harm and reporting of child abuse or neglect as compliance with the law. An attorney could make a child abuse or neglect report without violating the Rules of Professional Conduct. See “Legal Ethics Committee of the Indiana State Bar Association, Informal Op. 2”, Vol. 40. No.11. Res Gestae, 13 (1997) (considerations in reporting a client for child abuse or neglect.). See also “When Must a Priest Report Under a Child Abuse Reporting Statute? Resolution to the Priest’s Conflicting Duties,” 21 Val. U. L. Rev 431 (1987).

C. To whom and when must the report be made?

IC 31-33-5-4 states that a person who has a duty to report shall immediately make an oral report to DCS or local law enforcement agency. IC 31-25-2-7 states that DCS is responsible for providing child protection services. IC 31-33-7-1 requires DCS to arrange for receipt, on a twenty-four (24) hour, seven (7) day per week basis, of all reports of suspected abuse or neglect. DCS shall cause to be inserted in each local telephone directory in the county the telephone number of the “child abuse hotline”. IC 31-33-7-3. The Statewide child abuse and neglect hotline number is 1-800-800-5556.

D. What are the immunities and penalties associated with reporting?

IC 31-33-6-1 states that a person, other than a person accused of child abuse or neglect, who makes or causes to be made a report of child abuse or neglect or who

participates in any judicial proceeding or other proceeding resulting from such report or relating to the subject matter of the report is immune from any civil or criminal liability that might otherwise be imposed because of such actions. IC 31-33-6-3 provides that a person who reports that a child may be a victim of child abuse or neglect or who assists in any requirement of article 33 is presumed to have acted in good faith. Immunity does not attach for a person who has acted maliciously or in bad faith. IC 31-33-6-2.

Knowing failure to report child abuse or neglect is a class B misdemeanor. IC 31-33-22-1. See Fisher v. State, 548 N.E. 2d 1177 (Ind. Ct. App. 1990), in which the Court of Appeals affirmed the defendant's conviction for failure to report but reversed his criminal neglect of a dependent conviction. Knowing, intentional false reporting is a Class A misdemeanor, but the offense is a Class D felony if the person has a previous unrelated conviction for knowing, intentional false reporting. IC 31-33-22-3(a). IC 31-33-22-3(b) allows for a court to order actual and punitive damages and an award of attorney's fees by the fact-finder in civil proceedings for knowing, intentional false reporting. See In Re V.C., 867 N.Ed.2d 167 (Ind. Ct. App. 2007) (Court affirmed order requiring mother, who coached child to report false sexual abuse allegations against father to therapist, knowing that therapist would be required to report allegations, to pay compensatory and punitive damages to father).

IC 31-33-22-5 provides that a person who is accused of committing child abuse or neglect is entitled to access to a report relevant to an alleged false accusation if the court finds that the report was unsubstantiated and was intentionally communicated to the department or law enforcement by a person who knew the report was false. See also Kinder v. Doe, 540 N.E. 2d 111 (Ind. Ct. App. 1989) (identity of reporter can be obtained in civil suit for malicious reporting, if plaintiff makes preliminary presentation of evidence to rebut presumption of reporter's good faith).

II. The Department of Child Services Assessment

A. What is the scope and timing of the assessment?

IC 31-33-7-4 requires that DCS shall make a written report of a child who may be a victim of abuse or neglect within forty-eight (48) hours after receipt of the oral report. The

report, which is made on state form 310, must include the following, if known: (1) the child's name, address, sex, age and the nature of child's injuries and neglect; (2) the names and addresses of the child's parents, guardian, custodian and care-giver; (3) the name of the alleged perpetrator; (4) the source of the report; (5) information about the abuse or neglect of the child's siblings; (6) the person making the report and how the reporter may be reached; (7) actions taken by the reporter. The 310 report shall immediately be made available to the prosecuting attorney and law enforcement, and the coroner in a case involving a child's death. IC 31-33-7-5. Law enforcement and DCS shall communicate and share information and may investigate jointly. IC 31-33-7-7; IC 31-33-8-2.

IC 31-33-8-6 provides that DCS shall promptly make an appropriately thorough assessment of every report received. The primary purpose of the assessment is to protect the child. IC 31-9-2-9.6 defines assessment as an initial and ongoing investigation or evaluation in which there is a review and determination of the safety issues that affect a child; an identification of the underlying causes of the safety issues; a determination whether child abuse, neglect, or maltreatment occurred; and a determination of the needs of a child's family in order for the child to either remain in the home safely, be returned to the home safely, or be placed in an alternative living arrangement. IC 31-33-8-1 provides the timelines for DCS to initiate an assessment. IC 31-33-8-1(c) states that the DCS assessment of a child abuse report shall be initiated immediately, but not later than twenty-four (24) hours after receipt of the report if abuse is alleged. IC 31-33-8-1(b) states that if DCS has reason to believe that the child is in imminent danger of serious bodily harm, an immediate onsite assessment shall be initiated within one hour of the receipt of the report. IC 31-33-8-1(d) states that if child neglect is alleged, the assessment shall be initiated within a reasonably prompt time, but not later than five days. If the report alleges that a child lives with a parent, guardian, or custodian who is married to or lives with a person who has either been convicted of neglect of a dependent under IC 35-46-1-4 or a battery offense under IC 35-42-4 or is required to register as a sex or violent offender under IC 11-8-8, then DCS shall initiate an assessment within a reasonably prompt time, but not later than five (5) days after DCS receives the report, with the primary consideration being the well-being of the child who is the subject of the report. IC 31-33-8-1(e). According to

IC 31-33-8-7 the assessment must include the following, to the extent that is reasonably possible: (1) the nature, extent and cause of the known or suspected abuse or neglect; (2) the identity of the alleged perpetrator; (3) the names and conditions of other children in the home; (4) an evaluation of the parent, guardian, custodian or other person responsible for the child's care; (5) the home environment and the relationship of the child to the parent, guardian, custodian or other persons responsible for the child's care. The assessment may include a home visit, an interview with the child, and a physical, psychological or psychiatric examination of any child in the home. When feasible, all allegations should be investigated together. The assistance of the juvenile court, upon good cause shown, may be sought by DCS to obtain admission by the caseworker to the child's home or school or a medical or physical examination or treatment of the child. IC 31-32-12-1 et seq. DCS or law enforcement can request a court order to remove the child from the home prior to the completion of the assessment pursuant to IC 31-33-8-8 and IC 31-32-13-1 et seq.

B. What do the assessment results mean?

After the assessment is completed, DCS shall classify reports as substantiated or unsubstantiated. IC 31-33-8-12. A written report of the assessment is required pursuant to IC 31-33-8-8 (b). This report is made on state form 311. IC 31-33-18-4 requires DCS to give verbal and written information to each parent, guardian or custodian of the child that reports relating to the abuse or neglect assessment are available upon request. Parents may be required to sign a written release form and pay reasonable copying costs as the only prerequisites to obtaining a copy of the DCS report.

“Substantiated” is defined at IC 31-9-2-123 and “means a determination regarding the status of a report made under IC 31-33 whenever facts obtained during an assessment of the report provide a preponderance of evidence that child abuse or neglect has occurred.” “Unsubstantiated” is defined at IC 31-9-2-132 and “means a determination regarding the status of a report made under IC 31-33 whenever facts obtained during an assessment of the report provide credible evidence that child abuse or neglect has not occurred.” Practitioners should note the following in assessing the relevance of the

“substantiated” or “unsubstantiated” designation: (1) DCS is investigating the specific allegations of the 310 and is not evaluating best interests of the child; (2) “unsubstantiated” reports are not the same as knowing, intentional false reports; (3) DCS family case managers will not usually substantiate abuse unless the case manager personally sees the bruises or the child reveals details about abuse to the case manager or DCS forensic interviewer; (4) some children may be too scared or too shy to reveal full details of physical or sexual abuse or neglect to the DCS case manager or forensic interviewer; (5) “unsubstantiated” does not mean that your client is lying about his concerns.

The “indicated” classification of abuse or neglect reports, defined at IC 31-9-2-58.5 as meaning that facts obtained provide significant indications that a child may be at risk for abuse or neglect or that abuse or neglect previously occurred, was repealed effective July 1, 2009.

C. How can I obtain a copy of my client’s 311 report?

IC 31-33-18-1 states that reports of child abuse or neglect, any other information obtained, reports written or photographs taken concerning the reports which are in the possession of the department are confidential. IC 31-33-18-2 lists the persons, agencies and institutions to whom the confidential reports shall be made available. These include (1) an individual named in the report who is alleged to be abused or neglected or the individual’s guardian ad litem or court appointed special advocate; (2) each parent, guardian, custodian, or other person responsible for the welfare of a child named in a report and an attorney for the parent, guardian, custodian or responsible person with protection for the identity of reporters and other appropriate individuals; and (3) a person about whom a report has been made, with protection for the identity of reporters and any other person if the person or agency making the information available finds that disclosure of the information would be likely to endanger the life or safety of the person. If the report is unsubstantiated, it is good practice for an attorney to obtain a copy of the unsubstantiated report promptly before the report is expunged. If allegations of abuse or neglect arise in the course of a dissolution, paternity, or guardianship case, it may be necessary to present evidence concerning the unsubstantiated report.

In Marion County, attorneys who need copies of their clients' child's DCS records should make a written request to Marion County Department of Child Services, Legal Division, 4150 N. Keystone Ave., Indianapolis, IN 46205, telephone 968-4300; facsimile number 542-1335. Be sure to include with your written request documentation, such as an appearance form, which shows that you are the parent's, guardian's or custodian's attorney. In other Indiana counties, contact the local DCS office to request the procedure for obtaining records.

D. What is the child protection index?

The child protection index is established and maintained by DCS for the purpose of organizing and accessing data regarding substantiated child abuse and neglect reports throughout Indiana. IC 31-33-26-2. IC 31-33-26-16(a)(4) states that the index may be accessed by persons or agencies to whom child abuse and neglect reports are available pursuant to IC 31-33-18.

IC 31-33-26-15(e) provides that unsubstantiated reports contained in the index shall be expunged not later than six (6) months after entry. IC 31-33-26-15(a) states that a substantiated report shall be expunged within ten (10) working days after the occurrence of any of the following: (1) the court with jurisdiction over the CHINS case determines that child abuse or neglect has not occurred; (2) an administrative hearing officer finds that the child abuse or neglect report is unsubstantiated; or (3) the juvenile court enters an expungement order under IC 31-33-7-6.5. IC 31-33-26-15(a)(2) states that a substantiated report shall be expunged not later than twenty (20) years after a CHINS adjudication based on the report. If none of the above circumstances applies, IC 31-33-26-15(c) states that DCS shall expunge the substantiated report not later than the date on which any child who is named in the report as a victim becomes twenty-four (24) years of age.

E. Can a Substantiated Determination be Appealed?

IC 31-33-26-8(b) provides that no later than thirty (30) days after the DCS enters a substantiated child abuse or neglect report into the index, DCS shall notify the parent, guardian or custodian of the child named in the report and any identified perpetrator who is

not a parent, guardian, or custodian, that DCS has entered the report into the index. The perpetrator may request an administrative hearing to contest the classification of the substantiated report pursuant to IC 31-33-26-8(c). The request must be received by DCS not more than thirty (30) days after receiving the notice. The time period may be extended if the perpetrator demonstrates that the failure to request the administrative hearing was due to excusable neglect or fraud. IC 31-33-26-8(d). IC 31-33-26-9 provides for the administrative hearing at which DCS must prove by a preponderance of credible evidence that the perpetrator is responsible for the child's abuse or neglect. If DCS fails to carry the burden of proof, DCS shall amend or expunge the child abuse or neglect report as ordered by the administrative hearing officer. IC 31-33-26-9(d). The administrative hearing shall be stayed if a Child in Need of Services hearing is pending or criminal charges are pending. IC 31-33-26-11(b); IC 31-33-26-12. The determination of the CHINS court is binding. IC 31-33-26-11(a). The alleged perpetrator is not entitled to an administrative hearing if a court has determined that the alleged child abuse or neglect did not occur or the person was not the perpetrator. IC 31-33-26-11(c).

III. Department of Child Services Actions as a Result of Substantiated Child Abuse/Neglect

DCS may take two actions based on its assessment that child abuse or neglect is substantiated. DCS may implement a program of informal adjustment or file a CHINS petition.

A. What is a program of informal adjustment?

IC 31-34-8-1 through 3, IC 31-34-8-6, and IC 31-34-8-7 provide for a program of informal adjustment, which is a signed agreement between DCS, the child, and the child's parent, guardian or custodian or attorney regarding court ordered services in which the parent, guardian or custodian will participate to remedy substantiated child abuse or neglect. The program of informal adjustment is submitted to the juvenile court for approval. The court may deny a program of informal adjustment or set a hearing regarding the informal adjustment. IC 31-34-8-1. The program of informal adjustment is considered

approved if the court does not deny the informal adjustment program or set it for a hearing within ten days. IC 31-34-8-1(c). If the court sets a hearing and no action is taken to approve or deny the program of informal adjustment within thirty days of the submission of the informal adjustment program, the informal adjustment is considered approved. IC 31-34-8-1(d). IC 31-34-8-6 provides that the program of informal adjustment may not exceed six months, but may be extended for an additional three months by approval of the juvenile court. IC 31-40-1-3 states that a participant in an informal adjustment program is financially responsible for services provided by DCS.

An informal adjustment may include service participation and compliance with certain rules regarding how a child may be disciplined or cared for or who may have access to the child. Informal adjustment does not involve placing the child in the custody or wardship of DCS. If DCS determines that the informal adjustment is not protecting the child, or subsequent allegations of abuse or neglect are substantiated, DCS may request authorization from the court to file a CHINS petition pursuant to IC 31-34-9-1.

DCS may also file a petition for compliance with the informal adjustment provisions, and a parent, guardian or custodian who fails to comply may be found in contempt pursuant to IC 31-34-8-3. DCS must file a report with the court indicating the extent of compliance five months after the informal adjustment is implemented. IC 31-34-8-7(a). If the informal adjustment is extended, a second report is required not later than eight months after the informal adjustment is implemented. IC 31-34-8-7(b).

B. What is a CHINS proceeding?

The CHINS petition filed by the attorney for DCS due to substantiated child abuse or neglect, is discussed at IC 31-34-9-1. The CHINS proceeding most often involves the removal of your client's children from the custodial home and placement in foster care, approved relative care, with the noncustodial parent, or institutional placement. The complex statutory scheme for CHINS proceedings begins at IC 31-34-5-1 and continues through many chapters of Title 31. The CHINS adjudication is very serious and may result in the involuntary termination of your client's parental rights. Extensive free information about CHINS and termination law may be found at www.kidsvoicein.org.

IV. Jurisdictional Issues Involving Guardianships and DCS Investigations and Actions

Issues of parental unfitness can be litigated in a guardianship case if there is not a pending CHINS proceeding. See Matter of Guardianship of Thompson, 514 N.E. 2d 618 (Ind. 1987) (probate court had jurisdiction to appoint a temporary guardian due to evidence that child's adoptive parents were not residents of Indiana and were not properly performing parental duties; appointing guardian did not constitute conflict between juvenile and probate court jurisdiction). IC 31-30-1-6(a) specifically states that Article 30, the jurisdiction article of Title 31, does not prohibit a probate court from exercising its jurisdiction over guardianship of a person who is less than eighteen (18) years of age. IC 31-30-1-6(b) provides that if allegations in the petition for guardianship or in the guardianship proceeding indicate that the child meets the definition of a child in need of services, the probate court, on its own motion or at the request of a party, shall send the guardianship petition and/or the record of guardianship proceedings to the DCS attorney and direct the DCS attorney to initiate an investigation and proceedings in juvenile court to determine whether the child is a child in need of services. IC 31-30-1-6(c) states that the probate court retains jurisdiction over the child until the juvenile court authorizes the filing of a CHINS petition. If the juvenile court does not assume jurisdiction, the probate court retains jurisdiction over the child.

If the juvenile court assumes or has assumed jurisdiction over the child, the probate court's guardianship jurisdiction ends because of the juvenile court's original, exclusive jurisdiction over CHINS proceedings. IC 31-30-1-1. See Matter of Guardianship of Bramblett, 495 N.E. 2d 798 (Ind. Ct. App. 1986) (probate court lacked jurisdiction to establish a relative guardianship for a child who was the subject of a CHINS case due to the juvenile court's exclusive jurisdiction). See also In Re C.S., 713 N.E. 2d 863 (Ind. Ct. App. 1999) (probate court was without jurisdiction to accept the grandmother's guardianship petition of an adjudicated CHINS or to conduct evidentiary hearings on the guardianship petition).

In 2001, the juvenile court's jurisdiction was modified to include jurisdiction of guardianship of the person proceedings for a child who has been adjudicated a CHINS; for

whom a juvenile court has approved a permanency plan under IC 31-34-21-7 that provides for the appointment of a guardian of the person; and who is the subject of a pending CHINS proceeding. IC 31-30-1-1 (10).

V. Jurisdictional Issues Involving Dissolution and Paternity Courts when CHINS Proceeding is Filed

In 1999, IC 31-30-1-1(2), the statute regarding the juvenile court's exclusive original jurisdiction in CHINS proceedings, including a child of divorced parents and proceedings concerning the paternity of a child, was modified. For dissolution cases IC 31-30-1-12 provides that a court having jurisdiction under IC 31-17-2 of a child custody proceeding in a marriage dissolution has concurrent original jurisdiction with the juvenile court for the purpose of modifying custody of a child who is under the jurisdiction of the juvenile court due to a CHINS proceeding. Whenever the dissolution court modifies custody, the modification is effective only when the juvenile court enters an order approving the custody modification order or terminates the CHINS proceeding. For paternity cases, IC 31-30-1-13 provides that a court having jurisdiction under IC 31-14 of a child custody paternity proceeding has concurrent original jurisdiction with another juvenile court with CHINS jurisdiction for the purpose of modifying custody of a child who is under the jurisdiction of the other juvenile court due to a CHINS proceeding. Whenever the paternity court modifies custody, the modification is effective only when the juvenile court with CHINS jurisdiction enters an order approving the custody modification or terminates the CHINS proceeding.

Previous cases which held that the dissolution court lacked jurisdiction to modify custody when there was a CHINS proceeding interpreted the former statute and are no longer applicable. Among these cases are Fox v. Arthur, 714 N.E. 2d 305 (Ind. Ct. App. 1999); In Re B.W., 709 N.E. 2d 370 (Ind. Ct. App. 1999); and Alexander v. Cole, 697 N.E. 2d 80 (Ind. Ct. App. 1998). For current case law on jurisdiction, see Reynolds v. Dewees, 797 N.E.2d 798 (Ind. Ct. App. 2003).

VI. Entering Department of Child Services Records Into Evidence

DCS records are confidential. IC 31-33-18-1. Attorneys who subpoena DCS records for evidence in dissolution, paternity, or guardianship cases may receive a Motion to Quash by the DCS attorney in response. The motion may be filed due to confidentiality concerns because dissolution and guardianship cases are not confidential. IC 31-33-18-2(9) states that courts may have access to DCS records if the court finds that “access to the records may be necessary for determination of an issue before the court.” The statute goes on to state that access is limited to in camera inspection unless the court determines that public disclosure of the information contained in the records is necessary for the resolution of an issue then pending before the court.

If the court makes the necessary findings so that DCS records can be released, an evidentiary hurdle arises due to hearsay within DCS records. See D.W.S. v. L.D.S., 654 N.E. 2d 1170, 1173 (Ind. Ct. App. 1995). In this dissolution case, the records of Allen County Department of Public Welfare regarding physical abuse by the father were admitted into evidence over the alleged perpetrator father’s objection that the records did not fall under any business or official records exceptions to the hearsay rule. The father complained that the preparers of the Welfare Department reports had no first-hand knowledge of the alleged physical abuse and that the records were not properly authenticated under Ind. Evidence Rules 803(6) or 803(8). The Court reasoned that, because the report preparers did not observe the father hitting the child, the reports were based upon accounts of individuals who had no business duty to observe and report the facts of alleged abuse. If a report is properly attested to or authenticated, it is admissible in total as an exception to the hearsay rule if, and only if, the hearsay statements within the report are also admissible under an exception to the hearsay rule. Although the reports were properly authenticated, the mother did not establish that the preparers had first-hand knowledge of the reported incident of abuse nor did the mother offer any evidence to prove that any other exception to the hearsay rule applied to the statements recorded. Consequently the official record exception to the rule did not apply to the entire proffered report. The exception applied only to the extent that portions of the report indicated that an incident was reported and revealed the preparers’ direct observations of the child. Id. See

also Hinkle v. Garret -Keyser – Butler Sch. D., 567 N.E. 2d 1173, 1179 (Ind. Ct. App. 1991) (trial court erred when it determined the Welfare Department records were admissible as an exception to the hearsay rule; double hearsay is admissible only if an exception exists for each out-of-court declaration). In Page v. Greene County Dept. of Welfare, 564 N.E. 2d 956 (Ind. Ct. App. 1991), a contested involuntary termination of the parent-child relationship case, the Court found it was error to admit welfare reports (and testimony concerning the reports) containing children’s statements. The children did not testify at the termination hearing and the reports did not qualify under the business records exception because the caseworkers who prepared the reports did not have personal knowledge of the facts reported by the children. See also In Re Relationship of E.T. 808 N.E. 2d 639 (Ind. 2004) for an excellent discussion of the qualification of child service provider agency records as business records.

Clearly, attorneys should not rely on the DCS report as the only source of evidence to prove child abuse or neglect in a dissolution, paternity, or guardianship case, because the report will frequently contain inadmissible hearsay. The report can be a source of witnesses whom the attorney could call to testify.

VII. How DCS Involvement Can Benefit Your Client’s Case

DCS involvement can benefit your client’s case by: (1) providing an independent investigation of your client’s abuse or neglect reports; (2) possibly funding needed services through a CHINS proceeding; (3) protecting your client’s child through DCS actions, such as an informal adjustment or a CHINS proceeding. Placement of your client’s child with the non-custodial parent or appropriate and willing relatives may be a result of the CHINS proceeding.

DCS cannot prove your client’s dissolution, paternity or guardianship case because: (1) DCS assessments are usually limited to specific reported allegations; (2) DCS may determine that an assessment of an abuse or neglect report should not be conducted because the report does not meet the criteria for an assessment to be conducted; (3) DCS does not use the dissolution, paternity, or guardianship best interests or modification standards in its assessments; (4) hearsay restrictions may preclude the introduction of DCS

records into evidence in your case; (5) the DCS 311 assessment report is not a custody evaluation or a best interests determination. Although the DCS assessment will not prove why custody or parenting time orders should be entered in your dissolution or paternity case or why a guardian should be appointed, the assessment may provide helpful evidence which you can use in presenting your case. Your knowledge of how DCS functions and the implications of a DCS assessment can benefit the outcome of your client's case.