Children's Law Center
of Indiana

Paternity[1]

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Paternity may be legally established through one of two methods: (1) execution of a paternity affidavit, or (2) filing in court to establish paternity. IC 31-14-2-1. Also, paternity is legally presumed in specific situations, but the presumption is subject to rebuttal. This paper discusses (1) the legal presumption of paternity; (2) the paternity affidavit; (3) court action to establish paternity; and (4) paternity in CHINS and termination of the parent-child relationship proceedings.

Many of the statutes regarding presuming and establishing paternity have evolved and are continuing to evolve. The evolutionary progress of some of the provisions is important inasmuch as "statutes are to be given prospective effect only, unless the legislature unequivocally and unambiguously intended retrospective effect as well." **State v. Pelley**, 828 N.E.2d 915, 919 (Ind. 2005) (declining to construe IC 25-23.6-6-1, which statutorily created the counselor/client privilege, as applying retroactively, and finding the date of the communication rather than the date of the disclosure request to be the operative date). See also **Walsman v. State**, 855 N.E.2d 645, 650 (Ind. Ct. App. 2006) and cases cited therein. Thus, some of the effects of these paternity statutes will likely vary depending on the statutory provisions in effect at the time of the execution of the paternity affidavit or other operative event. Therefore, this paper will address historical provisions of some of the paternity establishment and presumption statutes.

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I. The Legal Presumption of Paternity

Presumption of paternity is addressed by IC 31-14-7 (IC 31-6-6.1-9 prior to the 1997 recodification). IC 31-14-7-1 is entitled "Presumptions; child's biological father" and gives the separate circumstances under which "a man is presumed to be a child's biological father" as: (1) the child was born during a marriage between the man and the child's biological mother, or no later than three hundred (300) days after its termination by death, annulment, or dissolution; (2) the man and the child's biological mother attempted to marry each other by a marriage solemnized in apparent compliance with the law even though the marriage was statutorily void or voidable, and the child was born during the attempted marriage or no later than three hundred (300) days after its termination by death, annulment, or dissolution; and (3) the man undergoes a genetic test that indicates with at least a ninety-nine percent (99%) probability that the man is the child's biological father. The first two of these circumstances have been included in the applicable statute since at least 1993; it appears that the third circumstance was added in 1995. Other circumstances, not currently listed, have been listed at various times since 1993.

IC 31-14-7-2, which is entitled "Rebuttable presumption; child's biological father," provides at (a) that, if there is not a presumed biological father under section 1, there is a rebuttable presumption that a man is the child's biological father if, with the consent of the child's mother, the man receives the child into the man's home and openly holds the child out as the man's biological child. It also provides at subsection (b) that the circumstances under this section do not establish the man's paternity; and a man's paternity may only be established as described in IC 31-14-2-1. The provisions of IC 31-14-7-2 have been substantively the same since it was added in 1997; before that, however, at least since 1993, other circumstances were listed in the applicable statutory provision. Also, from at least 1993 to 1997, instead of the provision currently at IC 31-14-7-2(b), the applicable provision had a subsection which stated that the presumption which is currently stated in IC 31-14-7-2 (with its then various circumstances) was rebuttable and did not prevent the filing of an action to establish paternity.

Indiana case law indicates that the "fatherhood" presumed under IC 31-14-7-1 as well as IC 31-14-7-2 is rebuttable despite the difference in how the sections are entitled. The presumption imposed by the development of the Indiana common law prior to

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enactment of the statute was not changed or enlarged by the statute and remained rebuttable by direct, clear and convincing evidence. **Tarver v. Dix**, 421 N.E.2d 693, 696-97 (Ind. Ct. App. 1981), *trans. denied*. Some cases in which the presumption did not preclude litigation of the child's paternity include: **K.S. v. R.S.**, 669 N.E.2d 399, 401-02, 406 (Ind. 1996) (Supreme Court, reversing Court of Appeals, held that cause of action exists under IC 31-6-6.1-2 (now IC 31-14-4) when third party attempts to establish paternity of child born into marriage which remains intact; that child born to married woman, but fathered by man other than her husband, is child born out of wedlock for purposes of statute; and that man, otherwise authorized by paternity act to file paternity action, is not precluded from doing so because of mother's marital status); **In Re Paternity of S.R.I.**, 602 N.E.2d 1014 (Ind. 1992) (in paternity action filed by putative father, Supreme Court held that putative father may establish paternity without regard to mother's marital status if petition is timely, but question of whether cause of action like this one would be permitted if mother's marriage were still intact was not presented or decided here; while stability and finality are significant objectives to be served when deciding status of children of divorce, there is substantial public policy in correctly identifying parents and their offspring and such identification should prove to be in the best interests of child for medical or psychological reasons; and doctrine of *res judicata* cannot control where petitioner was not a party to dissolution action inasmuch as "dissolution findings are binding on the parties to the dissolution," which the child was not); **Fairrow v. Fairrow**, 559 N.E.2d 597 (Ind. 1990) (Supreme Court held that husband entitled to relief from 11-year-old child support order for child born during marriage, where gene testing evidence which became available independent of court action constituted direct, clear and convincing evidence that husband could not be child's father and gave rise to prima facie case for relief; that one who comes into court to challenge support order on basis of non-paternity without externally obtained clear medical proof should be rejected as outside equitable discretion of trial court; and that justice is a substantial public policy which disfavors support order against husband who is not child's father); **In Re Paternity of B.W.M. v. Bradley**, 826 N.E.2d 706 (Ind. Ct. App. 2005), *trans. denied*, (Court held child entitled to maintain paternity action against alleged father where child was born to Mother during marriage and birth record showed husband as father, but after dissolution of

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marriage, on husband's petition, and based on DNA testing, trial court found husband not to be child's biological father); **In Re Estate of Long**, 804 N.E.2d 1176 (Ind. Ct. App. 2004) (reversing and remanding trial court's order denying personal representative's petition to determine heirs and for DNA testing of decedent's presumptive child born to decedent's wife within 300 days of the decedent's death, where Court held that the personal representative had to be able to challenge the child's paternity in the presumptive father's stead in order for IC 29-1-6-6, the statute allowing a petition to determine heirship, to have any meaning in this circumstance); **Minton v. Weaver**, 697 N.E.2d 1259 (Ind. Ct. App. 1998), *trans. denied,* (in paternity action, contrary to jury verdict which Court found to be clearly erroneous and against the logic and effect of the facts, Court found that clear and convincing evidence rebutted presumption that mother's husband at time of child's birth was child's biological father, where child's mother and alleged father testified to having engaged in sexual intercourse during months in which child must have been conceived, child's mother and her husband testified to no sexual intercourse during the year in which the child must have been conceived, and alleged father DNA tested with a 99.97% probability of paternity); **C.J.C. v. C.B.J.**, 669 N.E.2d 197 (Ind. Ct. App. 1996), *trans. denied,* (child is allowed to maintain paternity action against alleged father despite child's birth during currently intact marriage of mother to another man); **Fowler v. Napier**, 663 N.E.2d 1197 (Ind. Ct. App. 1996) (in paternity action, Court held mother's testimony that she had sexual intercourse only with alleged father constituted the needed direct, clear and convincing evidence to rebut presumption of paternity in man who had acknowledged paternity of child in "Indiana State Board of Health affidavit" which at the time was circumstance listed in IC 31-6-6.1-9 and which would have fallen within ambit of section 1 of its successor statute IC 31-14-7 were the provision in existence at time IC 31-6-6.1-9 was repealed); **Cooper v. Cooper**, 608 N.E.2d 1386 (Ind. Ct. App. 1993) (in dissolution matter, trial court was required under paternity statute and T.R. 35(A), regarding court ordered mental or physical examinations, to order blood group testing requested by husband, where wife and husband had standing to litigate in their divorce proceeding paternity of child born during marriage because wife had standing to bring paternity action and husband, as person alleged to be father, was a necessary party to any paternity action); **G.A.H. v. L.A.H**, 437 N.E.2d 1016 (Ind. Ct. App. 1982) (Court held that an act of

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intercourse coupled with the probability of conception at that time is sufficient to rebut the presumption of legitimacy, citing Roe v. Doe, 289 N.E.2d 528 (Ind. Ct. App. 1972)).

Some cases involving the presumption of fatherhood in which litigation of paternity was found to be barred include: **Leiter v. Scott**, 654 N.E.2d 742 (Ind. 1995) (Supreme Court summarily affirmed opinion of Court of Appeals in 638 N.E.2d 1335 which affirmed trial court's dismissal of ex-husband's petition to modify several-year-old dissolution decree and order DNA tests because he had reason to believe he was not father of child identified as child of parties in decree; and noted that the opinion was consistent with Supreme Court's opinion in Fairrow v. Fairrow, 559 N.E.2d 597 (Ind. 1990) in which it had granted ex-husband relief from a support order based on evidence of non-paternity which was obtained independent of court action, but advised that "[o]ne who comes into court to challenge a support order on the basis of non-paternity without externally obtained clear medical proof should be rejected..."); **Paternity of H.J.B. Ex Rel. Sutton v. Boes**, 829 N.E.2d 157, 159-60 (Ind. Ct. App. 2005) (affirming trial court's dismissal of a petition to disestablish paternity and request for DNA testing which had been filed by child's maternal grandmother as his guardian and next-friend after death of mother and her husband where child had been born during marriage of mother to husband who, thus, was presumed to be father under IC 31-14-7-1(1)(B)); **Richard v. Richard**, 812 N.E.2d 222 (Ind. Ct. App. 2004) (evidence in the record did not constitute direct, clear and convincing proof necessary to overcome statutory presumption that presumed father was child's biological father, where presumed father was married to biological mother and child was born not later than three hundred days after dissolution and genetic testing indicated ninety-nine percent or greater probability that presumed father was child's biological father, thus meeting two of the IC 31-14-7-1 criteria, but presumed father's identical twin also tested at probability greater than ninety-nine percent and testified child was probably his and he was willing to pay child support); **Driskill v. Driskill**, 739 N.E.2d 161 (Ind. Ct. App. 2000), *trans. denied,* (affirmed trial court's finding that ex-wife was judicially estopped from attacking her ex-husband's status as father of child born while ex-husband and ex-wife were living together but before they married, where ex-husband was listed as father on child's birth certificate and child was acknowledged as "child of the marriage" in dissolution decree and in three subsequent agreed entries signed by ex-wife); **In Re R.P.D.**

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Ex Rel. Dick, 708 N.E.2d 916 (Ind. Ct. App. 1999), *trans. denied*, (Court held trial court did not err by dismissing mother's petition to establish paternity because it was untimely filed under IC 31-14-5-3(b); trial court did not err by concluding that mother may not deny presumption that husband is child's father; and, inasmuch as trial court's judgment that paternity petition was not in child's best interest was not clearly erroneous, mother, as child's next friend, was prohibited from bringing paternity petition on child's behalf, where issue of child's best interest was raised by contrary positions taken by GAL and mother); **Estate of Lamey v. Lamey**, 689 N.E.2d 1265, 1268-70 (Ind. Ct. App. 1997), *trans. denied,* (uncle not entitled to challenge child's paternity in heirship proceeding, where uncle had no standing under paternity statutes to try to establish or disestablish child's paternity; Indiana laws do not expressly authorize a third party who is not asserting paternity in child to petition court for mandatory determination of child's paternity, under guise of "heirship" challenge, when child born into intact marriage; and Court concluded that Supreme Court intended its holding in K.S. v. R.S., 669 N.E.2d 399 (Ind. 1996) to be narrowly construed to mean that only when a third party seeks to establish paternity over a child born into intact marriage may presumption as to father-husband's paternity be overcome); **Vanderbilt v. Vanderbilt**, 679 N.E.2d 909 (Ind. Ct. App. 1997), *trans. denied,* (doctrine of laches precluded wife's attempt to rebut husband's status as presumed father in dissolution proceeding by moving for blood group testing, where wife failed to properly establish child's paternity ten years earlier, assured husband of his paternity, and acquiesced in, and encouraged the strong father-daughter relationship between husband and child).

II. The Paternity Affidavit

Execution of a paternity affidavit is one of the only two methods to legally establish paternity. A properly executed paternity affidavit does not require court action to establish paternity. A paternity affidavit is executed by both the mother and the father. It can be executed at the hospital where the child is born within 72 hours of the birth or at the local health department in the jurisdiction where the child was born any time before "the child has reached the age of emancipation." IC 16-37-2-2.1(c). The addresses of the county health department offices are online at http://www.in.gov/isdh/23926.htm. IC 16-

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37-2-2.1(b) provides that, immediately before or after the birth of a child born out of wedlock, "a person who attends or plans to attend the birth, including personnel of all public or private birthing hospitals, shall" provide an opportunity for the child's mother and a man who reasonably appears to be the child's biological father to execute an affidavit acknowledging the paternity of the child. Including the father's name on the birth certificate of a child born out of wedlock does not legally establish paternity unless a paternity affidavit is filed also. See **Matter of J.N.H.**, 659 N.E.2d 644, 647 (Ind. Ct. App. 1995) (finding that man named as father on child's birth certificate was not the child's legal parent in the context of mother's petition to change child's name). The child born out of wedlock will be recorded in official birth records under the mother's name or as directed in a properly executed paternity affidavit. IC 16-37-2-13. If a paternity affidavit is later executed at the local health department office, the office will correct the local record of birth by adding the name of the father to the local birth record and will inform the state office. IC 16-37-2-14. "If the parents of a child born out of wedlock in Indiana later marry, the child shall legally take the last name of the father." IC 16-37-2-15. If the man claiming to be the child's biological father marries the mother of a child born out of wedlock, the man and the mother may produce proof of the marriage and execute a paternity affidavit. IC 16-37-2-16. If they do, the local health department shall then remove all evidence of the fact that the child was born out of wedlock from the child's birth record and forward the new information to the state department for correction of their records. Id.

A paternity affidavit is not valid if it is executed after the mother of the child has executed a consent to adoption of the child and a petition to adopt has been filed. IC 16-37-2-2.1(d). A paternity affidavit must be executed on a form provided by the state health department. IC 16-37-2-2.1(c). It must contain or have attached the following: (1) the mother's sworn statement asserting that the man who reasonably appears to be the child's biological father is the child's biological father; (2) a statement by the person identified by the mother to be the father in which he attests to a belief that he is the child's biological father; (3) written information furnished by the child support bureau of the department of child services (DCS) which explains the effect of an executed paternity affidavit and the availability of child support enforcement services; and (4) the social security number of

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each parent. IC 16-37-2-2.1(e). The statute also provides that it is a Class A misdemeanor for a woman to "knowingly or intentionally falsely [name] a man as the child's biological father under this section." IC 16-37-2-2.1(f).

Prior to 1995, the paternity statutes at IC 31-6-6.1-9 (repealed in 1997) explicitly stated that execution of a paternity affidavit did not prevent the filing of an action to establish paternity. The 1997 amendments added IC 31-14-2-1 which since then has provided that execution of a paternity affidavit is one of the only two methods of establishing paternity. However, until 2001, IC 31-14-7-1 listed execution of a paternity affidavit as one of the bases for presuming a man to be a child's biological father. Statutory amendments effective 2001 added IC 31-14-7-3 which states that a man is a child's legal father if the man properly executed a paternity affidavit which has not been rescinded or set aside under IC 16-37-2-2.1.

In 1995, IC 16-37-2-2.1 was added and since then has contained many of the evolving provisions pertaining to establishment of paternity by paternity affidavit. IC 16-37-2-2.1(m), which was added effective July 1, 2006, states that a properly executed paternity affidavit conclusively establishes the man as the legal father of a child without any further proceedings by a court, "except as provided in this section." IC 16-37-2-2.1(k) was amended in 2006 to provide, "The court may not set aside the paternity affidavit unless a genetic test ordered under subsection (h) or (i) excludes the person who executed the paternity affidavit as the child's biological father." Since 2001, IC 16-37-2-2.1(h) has provided that, within sixty (60) days of the affidavit's execution, the man who is a party to the affidavit may file an action in paternity court to request an order for a genetic test. IC 16-37-2-2.1(i), as amended effective July 1, 2006, provides that the only basis on which a paternity affidavit may be rescinded after sixty (60) days is if (1) a court determines that fraud, duress, or material mistake of fact existed in the execution of the affidavit and, (2) the court, at the request of the man who is a party to the affidavit, orders a genetic test, the results of which indicate that the man is excluded as the father of the child. IC 16-37-2-2.1(j) was added in 1997, and since then has provided that the court shall not suspend the legal responsibilities of a party to the executed paternity affidavit during a challenge to the affidavit.

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Since 1995, IC 16-37-2-2.1 has provided, first at subsection (e) but now at subsection (g), that a properly executed paternity affidavit establishes paternity and gives rise to parental rights and responsibilities of the man executing the affidavit, including the right of the child's mother or the Title IV-D agency to obtain a child support order against the person. Effective July 1, 2006, (1) that child support order may include an order requiring the provision of health insurance coverage; (2) the parental rights and responsibilities include "reasonable parenting time rights unless another determination is made by a court" with paternity jurisdiction; and (3) the paternity affidavit "may be filed with a court by the department of child services." Since 1997, this subsection of the statute has also provided that the child's mother has sole legal custody of the child unless another custody determination is made by a court. IC 16-37-2-2.1(g).

The provisions of IC 16-37-2-2.1 that pertain to setting aside the paternity affidavit have experienced substantial change since its addition in 1995. Initially, IC 16-37-2-2.1(f) contained those provisions and specified:

> Notwithstanding any other law, [any person statutorily entitled to file in court for the establishment of paternity] may file an action in a court with jurisdiction over paternity to have a paternity affidavit that is executed under this section set aside. The court shall set aside the paternity affidavit upon a showing from a blood or genetic test that sufficiently demonstrates that the person who executed the paternity affidavit is not the child's biological father.

In 1997, among other things, the numbering of this subsection was changed from (f) to (h) and its timeframe of coverage was changed by the addition of the language "within sixty (60) days of the date that a paternity affidavit is executed under this section." At the same time IC 16-37-2-2.1 subsections (i) and (k) were added to provide:

> (i) A paternity affidavit that is properly executed under this section may not be rescinded more than sixty (60) days after the paternity affidavit is executed except in case of fraud, duress, or material mistake of fact.
>
> (k) The court shall set aside the paternity affidavit upon a showing from a blood or genetic test that sufficiently demonstrates that the person who executed the paternity affidavit is not the child's biological father.

In 2001, IC 16-37-2-2.1(i) was amended to provide that a court must have determined that the fraud, duress, or material mistake of fact "existed in the execution of the paternity affidavit." At the same time IC 16-37-2-2.1(k) was amended to remove "blood or" and to

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change "is not the child's biological father" to "is excluded as the child's biological father." The next amendments to subsections (i) and (k) were effective July 1, 2006, and their substantial effects on the law are described in the above discussion of the current statutory provisions for establishment of paternity by paternity affidavit.

Indiana case law regarding setting aside paternity affidavits includes **In Re Paternity of N.R.R.L.**, 846 N.E.2d 1094 (Ind. Ct. App. 2006), *trans. denied*. In N.R.R.L., the Court affirmed the trial court's order denying a motion to dismiss the paternity petition and joining the adjudicated father as a party to the proceeding. The motion to dismiss had been filed by the mother and the adjudicated father. When the child was born, the mother and the adjudicated father executed a paternity affidavit which was subsequently filed, along with a petition for child support, in the Marshall Circuit Court (herein, the trial court). Two years later, in the Marshall Superior Court, the petitioner filed to establish his paternity of the child, naming the mother as the sole respondent. The mother and the petitioner stipulated to genetic testing which showed the petitioner to be the child's biological father. Subsequently, the Marshall Superior Court adjudged the petitioner to be the child's father, ordered that he was to have visitation, and ordered the parties to submit to a custody evaluation. Then, the case was transferred to the trial court. The mother filed a motion to dismiss the petitioner's paternity action, and the adjudicated father filed a motion to intervene. The adjudicated father, then, filed his Notice of Joinder in Motion to Dismiss, and the petitioner filed a motion to join adjudicated father. After a hearing, the trial court denied the motion to dismiss but granted petitioner's motion to join the adjudicated father as a party. The adjudicated father filed an appeal which asserted that the petition should have been dismissed because it did not name him as a necessary party to the action. On appeal, the Court distinguished In Re Paternity of K.L.O., 816 N.E.2d 906, 908-09 (Ind. Ct. App. 2004) (Court reversed and remanded on interlocutory appeal from trial court's denial of dismissal motion of alleged father whose DNA test revealed a probability of 99.99995% that he was biological father, where the dismissal motion was based on mother-petitioner's failure to join, as required by IC 31-14-5-6, another man who was still child's legal father because his previously executed paternity affidavit had not been rescinded or set aside when the results of genetic testing excluded him as child's father; and found that, as the child's legal father the adjudicated father was a necessary

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party to the petitioner's action, but the adjudicated father's "intervention remedied any error arising from the failure to name him as a party to the paternity action."). Id. at 1097.

What the N.R.R.L. Court said next is more important for our purposes here, however. It opined that the legislature has stated that it "favors a public policy of establishing paternity under [title 31, article 14] of a child born out of wedlock." IC 31-14-1-1. The Court noted that (1) although the adjudicated father's execution of the paternity affidavit had established him as the child's legal father, it did not preclude another man's attempting to establish paternity of the child; and (2) genetic testing established the petitioner's status as the biological father, thus raising the presumption under IC 31-14-7-1(3) that he is the child's biological father. In footnote 3 of its opinion, the Court stated:

> Under Indiana Code Section 16-37-2-2.1(k), "the court shall set aside the paternity affidavit upon a showing from a genetic test that sufficiently demonstrates that the person who executed the paternity affidavit is excluded as the child's biological father." We do not reach the issue of whether the genetic test establishing [the petitioner] to be the child's biological father necessarily excludes [the adjudicated father] as the child's biological father. Such a finding would be grounds for the trial court to set aside [the adjudicated father's] paternity affidavit. *See* Indiana Code Section 16-37-2-2.1.

Id. at 1097.

Subsequent to issuance of N.R.R.L., the Court in **Paternity of Davis v. Trensey**, 862 N.E.2d 308 (Ind. Ct. App. 2007), applied the statutes as amended in 2006 and affirmed the trial court which, among other things, had implicitly set aside the paternity affidavit of Mother's fiancé. While she was pregnant, Mother informed Father that he was probably the father of the child. Mother was engaged to another man, and, when the child was born on July 21, 2005, the Mother gave the child her fiancé's last name. She and her fiancé executed a paternity affidavit indicating that the fiancé was the child's father. On January 30, 2006, the County Prosecutor's Office filed a petition to establish paternity in Father. On April 19, 2006, the trial court ordered Mother, Father, and the child to submit to genetic testing. The results showed a 99.9943 percent chance that Father was the child's biological father. (The fiancé was also ordered to submit to a genetic test and, by it or some means not in the record, he was excluded as possibly being the child's biological father.) At the conclusion of a June 21, 2006 hearing, the trial court entered an order

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establishing paternity in Father, changing the child's last name, and directing Father to pay child support.

Pursuant to Father's appeal, the Davis Court found that methods of attacking the presumption of paternity created by a paternity affidavit are not limited to the procedure set out in IC 16-37-2-2.1., and that, by entering a finding of paternity in Father, the trial court implicitly negated the fiancé's paternity affidavit. Id. at 313, 314. The Court held that this paternity action was not governed by the paternity affidavit statute, IC 16-37-2-2.1, but instead by IC 31-14-4 et seq., pursuant to which the trial court correctly ordered Father's genetic test and entered a finding of paternity against Father based upon the results thereof. Id. at 312. The Court noted: (1) under IC 16-37-2-2.1(m), executing a paternity affidavit "conclusively establishes the man as the legal father of the child;" and (2) that presumption of paternity can be rebutted. According to the Court, the methods available to negate the paternity affidavit vary depending upon the identity of the party that wishes to rebut paternity. The Court agreed with Father that rebuttal under IC 16-37-2-2.1 was not properly accomplished, but reiterated that the rebuttal procedures under IC 16-37-2-2.1 are applicable for "a man who is a party to a paternity affidavit under" IC 16-37-2-2.1(h), and that man, the fiancé, had not initiated this paternity action. Therefore, according to the Court, IC 16-37-2-2.1 did not apply. The Court held that, inasmuch as the Prosecutor's Office filed this paternity action, the action was governed by IC 31-14-4-1 which authorized the Prosecutor's Office to file it, and by IC 31-14-6-1 which authorizes "any party" in such a paternity action to petition for genetic testing and compels trial courts to grant those motions. The Court noted that, in this case, the resulting tests eliminated the fiancé who executed the paternity affidavit as the father and established Father as the biological father. In support, the Court quoted IC 31-14-7-1(3) as stating "[a] man is presumed to be a child's biological father if … the man undergoes a genetic test that indicates with at least a ninety-nine percent (99%) probability that the man is the child's biological father." The Court stated that: (1) no language in IC 31-14-4 et seq. prevented the Prosecutor's Office from filing a paternity action in a case where a man filed a paternity affidavit more than sixty days before; (2) therefore, the instant paternity action was authorized under IC 31-14-4 et seq.; and (3) "this conclusion is consistent with the strong public policies in favor of identifying the correct biological father and allocating the

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child support obligation to that person as explained by our Supreme Court." Id. at 312-13. Further, the Court explicitly disagreed with the premise that IC 16-37-2-2.1 and IC 31-14-4 are in conflict. The Court noted that, (1) in 2006, the Indiana General Assembly amended both statutes and "it appears the General Assembly did not perceive a conflict between those two provisions;" and (2) "the language employed in the provisions does not evince any incompatibility." Id. at 313.

In **In Re Paternity of H.H.**, 879 N.E.2d 1175 (Ind. Ct. App. 2008), the Court reversed and remanded the trial court's order setting aside Father's paternity of H.H. When Mother discovered she was pregnant soon after Mother and Father started dating, they both knew Father was not the child's biological father but agreed that he would be the father. Father assisted in birthing classes and assisted during labor. H.H. was born April 6, 2004, and two days later Mother and Father signed and filed a paternity affidavit naming Father as H.H.'s father. They lived together until 2006 and after the separation, Father provided financial support for, and continued to visit H.H. In April 2007, Father petitioned to establish custody, support, and parenting time of H.H. Mother contested the petition on the ground that Father was not H.H.'s biological father. Father acknowledged he was not the biological father, but asserted that he had paternal rights pursuant to the paternity affidavit Mother and Father had signed. The trial court found that the paternity affidavit had been fraudulently executed and set it aside.

The H.H. Court held that, once a mother has signed a paternity affidavit, she may not use the paternity statutes to deprive the legal father of his rights even if he is not the biological father. Id. at 1178. The Court cited to IC 16-37-2-2.1(i) and opined that the legislature did not intend this statute to be used to set aside paternity affidavits executed by a man and a woman who both knew the man was not the biological father of the child, but instead intended it to protect a man who signed a paternity affidavit due to "fraud, duress, or material mistake of fact" --- a man who signed an affidavit without awareness of the questionable nature of his paternity. Id. at 1177-78. The Court observed that (1) if mothers could manipulate the paternity statutes as Mother has here, men would have no incentive to execute paternity affidavits, and thereby voluntarily accept the responsibility to provide for children financially and emotionally, without genetic evidence proving their paternity; (2) under the trial court's holding, a man could maintain his legal relationship

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with a child in such a situation only if he had genetic proof of his paternity; and (3) if a woman may "use" a man to support her and her children until she tires of him, and then "dispose" of him as both partner and father, an unwed father would have no guarantee his relationship with a child could be maintained without proof of a genetic relationship. Id. at 1178. The Court concluded that this could not be the intent of the legislature and it could not further the public policy of this State where "protecting the welfare of children … is of the utmost importance." Id. (citations omitted).

More recently, in **In re Paternity of M.M.**, 889 N.E.2d 846 (Ind. Ct. App. 2008), the Court reversed and remanded for court-ordered genetic testing the trial court's dismissal of Legal Father's motion for rescission of his paternity affidavit and paternity testing. The Court held that some extraordinary circumstances will permit a challenge to paternity despite the strong public policy in favor of the establishment of paternity; and, here, Legal Father was the victim of either Mother's intentional deception or misapprehension of the critical fact of paternity. Id. at 848-49. Legal Father had executed a paternity affidavit three days after the child's birth and subsequently was ordered to pay child support. About seven months later, following two genetic tests excluding him as the biological father, Legal Father filed a petition for modification of child support, and moved for rescission of the paternity affidavit and for DNA testing. The motion was denied by the trial court.

In support of its finding, the M.M. Court cited IC 16-37-2-2.1(i) as providing that when more that sixty days have passed since the execution of the paternity affidavit, the affidavit may be rescinded only when a court:

> (1) has determined that fraud, duress, or material mistake of fact existed in the execution of the paternity affidavit; and
>
> (2) at the request of a man described in subsection (h), [the man who executed the paternity affidavit,] has ordered a genetic test, and the test indicates that the man is excluded as the father of the child.

Id. at 848. According to the Court, citing In Re Paternity of H.H., 879 N.E.2d 1175, 1177 (Ind. Ct. App. 2008), this statute reflects the legislature's intent to provide assistance to a man who signed a paternity affidavit due to fraud, duress, or material mistake of fact. Id. at 847-48. The Court stated that, (1) although it agreed that the public policy in favor of

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establishing paternity of a child born out of wedlock is important and embodied in the paternity statutory scheme, there is a co-existing substantial public policy in correctly identifying parents and their off-spring; and (2) a legal father may challenge paternity only in extreme and rare instances and the challenge must be made by evidence that has become available independently of court action. M.M at 848 (citations omitted). The Court noted that, here, (1) Legal Father testified without contradiction that Mother had advised him he was the only potential father; (2) two genetic tests showed otherwise; and (3) thus, Legal Father provided unrefuted testimony of circumstances amounting to either fraud or a material mistake of fact. Id. The Court held that this satisfied the first prong of IC 16-37-2-2.1(i), but the affidavit could be rescinded only if the court-ordered genetic test requested by the Legal Father excludes the Legal Father as the child's biological father. Id.

See also **In Re Paternity of M.M.B.**, 877 N.E.2d 1239 (Ind. Ct. App. 2007) (trial court erred in vacating Father's paternity of children and accompanying support orders, where Father's request for relief under Trial Rule 60(B) was outside equitable discretion of trial court inasmuch as Father did not stumble upon genetic evidence of his non-paternity inadvertently, but rather he actively sought evidence to address his suspicions that he might not have been children's biological father); **In Re Paternity of E.M.L.G.**, 863 N.E.2d 867 (Ind. Ct. App. 2007) (Court held (1) inasmuch as four putative fathers at issue failed to have their paternity affidavits set aside within sixty-day time limit provided for in IC 16-37-2-2.1 (2001), under IC 31-14-7-3 (2001), each man was deemed the legal father and trial court erred as a matter of law in granting fathers' requests for genetic testing to disestablish paternity; (2) trial court set aside paternity affidavits based on statutorily invalid reason - men's allegations that they were not aware of legal ramifications of affidavits when they signed them; (3) Indiana Code has no provision for filing action to disestablish paternity, citing In Re Paternity of H.J.B., 829 N.E.2d 157, 159 (Ind. Ct. App. 2005), and trial court does not have authority to treat child support proceedings as proceedings to disestablish paternity).

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III. Court Action to Establish Paternity

A. Jurisdiction:

Although some Indiana case law, alluded to below, raises issues regarding the exclusivity, IC 31-30-1-1(3) provides that, with a few exceptions, the juvenile court has "exclusive original jurisdiction" in proceedings "concerning the paternity of a child under IC 31-14," which is entitled "Family Law: Establishment of Paternity." To avoid confusion, herein, the juvenile court with this jurisdiction will be referred to as the paternity court and the juvenile court with jurisdiction over proceedings involving a child in need of services (CHINS) will be referred to as the CHINS court. Once the paternity court asserts jurisdiction it has exclusive jurisdiction over all matters having to do with the paternity, custody, parenting time, or child support of the child involved except as provided in IC 31-30-1-13 and IC 31-30-1-10. The probate court has exclusive jurisdiction in all adoption matters in Indiana counties that have separate probate courts. IC 31-19-1-2

IC 31-30-1-13(a) provides that, subject to subsection (b), the juvenile court has concurrent original jurisdiction with another juvenile court for the purpose of modifying custody of a child who is under the jurisdiction of the juvenile court because the child is the subject of a CHINS proceeding or is the subject of a juvenile delinquency proceeding that does not involve an act described under IC 31-37-1-2 (an act that would be an offense if committed by an adult). IC 31-30-1-13(b) provides that any paternity court order modifying custody which is made while the child is under the CHINS jurisdiction described in (a), is effective only when the CHINS or delinquency court enters an order approving the custody modification or terminating the CHINS or delinquency proceeding.

IC 31-30-1-13 was added by amendment in 1999. **Reynolds v. Dewees**, 797 N.E.2d 798, 800-802 (Ind. Ct. App. 2003) is a case of first impression regarding its implementation. In this case, in June 1998, the county office of family and children filed a petition in juvenile court alleging the child to be CHINS. When the child was almost two years old, in September 1998, Father stipulated to paternity and the paternity court awarded custody to Mother pursuant to the parties' stipulation. About two years later, the CHINS court temporarily, and then permanently, placed the child with Father. About nine months later, while the CHINS case was still pending, Father filed a petition for change of custody in the paternity court which, after a trial, awarded Father permanent custody of the

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child. The Mother appealed, arguing that the paternity court's judgment was void in that it lacked jurisdiction to make a custody determination while the CHINS case was pending in another juvenile court. The Court found that the Mother's jurisdictional issue was a matter of law and, thus, the Court reviewed the issue de novo and acknowledged that Mother's position was "wholly accurate" prior to July 1, 1999, when IC 31-30-1-13 became effective. The Court found that IC 31-30-1-13 vested the paternity court with the requisite jurisdiction to enter the order modifying the child's custody and awarding it to Father, but, because of limitations placed on the paternity court by the statute and the limited information available to the Court, it could not determine whether or when that modification became effective.

The paternity court's "exclusive original jurisdiction" is also modified by IC 31-30-1-10 which provides that a circuit court has concurrent original jurisdiction with the paternity court, "including the probate court in St. Joseph County" to establish paternity of a child under the Uniform Interstate Family Support Act (UIFSA), IC 31-18. The UFISA along with IC 31-21 (formerly IC 31-17-3), the Uniform Child Custody Jurisdiction Law (UCCJL), are the codifications in Indiana law of two significant federal laws which apply when paternity matters, among others, have multi-state ramifications. This is not the forum for a discussion of this complicated aspect of the law. It is addressed in more detail, however, in Chapter 3, Jurisdiction, and Chapter 12, Paternity, of the CHINS Deskbook 2001 and the 2007 Supplement to the CHINS Deskbook 2001.

In **Russell v. Russell**, 682 N.E.2d 513, 518 (Ind. 1997), a dissolution of marriage case, the Indiana Supreme Court stated:

> In many cases, the parties to the dissolution will stipulate or otherwise explicitly or implicitly agree that the child is a child of the marriage. In such cases, although the dissolution court does not identify the child's biological father, the determination is the legal equivalent of a paternity determination in the sense that the parties to the dissolution - the divorcing husband and wife - will be precluded from later challenging that determination except in extraordinary circumstances. *See* Fairrow v. Fairrow, 559 N.E.2d 597, 600 (Ind. 1990) (husband entitled to relief from support judgment only in event that "the gene testing results which gave rise to the prima facie case for relief in this situation became available independently of court action."). However, a child or a putative father is not precluded by the dissolution court's finding from filing a separate action in juvenile court to establish paternity at a later time. *See* J.W.L. by J.L.M. v. A.J.P., 682 N.E.2d 519 (Ind. 1997) (child);

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K.S. v. R.S., 669 N.E.2d 399 (Ind. 1996) (putative father); In Re S.R.I., 602 N.E.2d 1014 (Ind. 1992) (putative father).

In other cases, the issue of whether a child is a child of the marriage may be vigorously contested. In such cases, the dissolution court has the authority to follow appropriate procedures for making paternity determinations. *See* Cooper v. Cooper, 608 N.E.2d 1386 (Ind. Ct. App. 1993) (dissolution court has authority to order blood testing during dissolution proceeding to determine biological father). When a dissolution court makes its determination as to whether the child is or is not a child of the marriage under such circumstances and based upon and consistent with the results of the blood or genetic testing, such a determination, (i) in addition to having the preclusive effect on the divorcing husband and wife described in the preceding paragraph, (ii) will constitute a determination in all but the most extraordinary circumstances that the divorcing husband is or is not the biological father of the child, precluding a child, putative father, or other person from challenging that determination in subsequent or collateral proceedings.

Marriage of Huss, 888 N.E.2d 1238 (Ind. 2008), however, presents an unusual situation which resulted in a decision well worth noting. The Huss Court held that the dissolution trial court did not err by failing to give effect to the intervening paternity judgment by a different 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. Id. at 1241-42. The Court affirmed the dissolution trial 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. During the first nine years of their marriage, Husband and Wife had three children. They then separated for eight months, but subsequently reconciled when Wife was four to five months pregnant with another man's child. When the fourth child was born, Wife listed Husband as the father on the birth certificate and gave the child Husband's last name. Four years later, Husband and Wife sought dissolution of their marriage in the Adams Circuit Court (hereinafter dissolution trial court). During pendency of the dissolution proceeding, Mother filed for, and received a judgment in Wells Circuit Court (hereinafter paternity court) establishing paternity of the fourth child in a man other than Husband and awarding her custody of the fourth child. The dissolution trial court subsequently granted the

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divorce and, among other things, awarded custody of all four children to Husband. Wife appealed.

Contrary to Wife's contention on appeal, the Court opined that 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." Id. at 1241. 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 trial court was entitled to complete its handling of the previously filed dissolution action, including its determination of custody of all four children. Id. at 1242.

Despite Wife's contention to the contrary, the Huss Court also held that the dissolution trial court had jurisdiction over the child of which 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 pointed out that Russell at 518 observed that in cases where the parties "stipulate or otherwise explicitly or implicitly agree that the child is a child of the marriage," and there is a determination that a child is a child of the marriage, the divorcing husband and wife "will be precluded from challenging that determination, except in extraordinary circumstances." 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

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interests…,” which determination was actually the ultimate basis for the dissolution trial court’s decision in this case to award Husband custody of the child he did not father. Huss at 1242-43.

Also contrary to Wife’s contentions, the Huss Court held that the dissolution trial 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. Wife contended that, where both a wife and husband know that a child being born to the wife is not the husband’s child, the child is deemed to be a child born out of wedlock, and that IC 31-14-13-1 requires that a biological mother is to have sole legal custody of a child born out of wedlock. The Court reviewed IC 31-14-13-1 noting that the provision relied on by Wife is subject to a number of exceptions, two of which apply to this dissolution case: “(3) IC 31-14 (custody of a child born outside of a marriage);” and “(8) an order by a court that has jurisdiction over the child.” Id. at 1243. The Court concluded that, here, this statutory presumption did not compel an award of custody to Wife inasmuch as “[e]ither the dissolution court is considering the award of custody of a child born outside the marriage, as under Russell, or, if not, then it was a court that had jurisdiction over the child.” Id. The Court noted: (1) in the dissolution proceeding Wife affirmatively applied to the dissolution trial court for temporary and permanent custody and child support as to all four children born during the parties’ marriage, and she did not raise any issue of paternity until one week before the scheduled final dissolution hearing; (2) the issue of child custody was clearly before the dissolution court before the start of the paternity action, and the dissolution court was entitled to complete its handling of the previously filed dissolution action, including the determination of custody of all four children; and (3) the dissolution trial court did not err in failing to give effect to the intervening paternity and custody judgment of the paternity court. Id. at 1243-44.

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B. The Process:

Venue lies in the county in which the child, the mother, or the alleged father resides. IC 31-14-3-2. A paternity action may be filed by:

- the mother or expectant mother, alone or jointly with the alleged father;
- a man alleging he is the biological father of a child or an unborn child, alone or jointly with the mother;
- a child;
- the department of child services (DCS) or county office of family and children (OFC) if the mother, the person with whom the child resides, or the director of the county office of family and children has executed an assignment of support rights under Title IV-D of the federal Social Security Act; or
- the prosecuting attorney,
  - who shall file and represent the child upon the request of the above named parties, or
  - who may file if the child is or is alleged to be a CHINS and is under the supervision of DCS or the county OFC as the result of a court ordered out-of-home placement.

IC 31-14-4. A person less than eighteen years of age may file a paternity petition if competent except for age; if incompetent, the person may file through the person's guardian, guardian ad litem, or next friend. IC 31-14-5-2. Additionally, IC 31-34-15-6 provides that, when a child born out of wedlock is, or is alleged to be, a CHINS, and is under the supervision of DCS or a county OFC as a result of a court ordered out-of home placement, DCS or the county OFC shall refer the child's case to the local prosecuting attorney's office for the mandatory filing of a paternity action if the identity of the alleged father is known and if DCS or the county OFC reasonably believes that establishing paternity would be beneficial to the child. The DCS or county OFC shall sign the paternity petition as the child's next friend.

IC 31-14-5-1 provides that the paternity petition shall be verified and captioned "In the Matter of the Paternity of ___." Service of process shall be made in compliance with the civil trial rules. IC 31-14-3-1. Ind. Trial Rule 4.2(A) requires that service upon a person under eighteen must be made upon the person's next friend, guardian ad litem, or custodial parent and upon the person if he is at least fourteen years old. The mother, child, and each person alleged to be the father are necessary parties to the paternity action.

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IC 31-14-5-6. See also **In Re Paternity of C.M.R.**, 871 N.E.2d 346, 350 (Ind. Ct. App. 2007) (Court held order for genetic testing was void due to failure to join necessary parties including estate of deceased alleged father). Case law makes clear that the child is a necessary party to a paternity proceeding and must be clearly designated as a party in the pleading to ensure that the paternity judgment is *res judicata* to all interested parties. Failure to name the child as a party to the action renders the judgment voidable, but not void. **K.S. v. R.S.**, 669 N.E.2d 399, 405-06 (Ind. 1996). IC 31-14-21-8 provides that prospective adoptive parents in a pending adoption proceeding can intervene as a party in the paternity proceeding involving the same child, but, as intervenors, their rights are severely limited by statute. An action not otherwise barred is not barred by the death or stillbirth of the child or the death of the mother. IC 31-14-5-8. IC 31-14-5-7 provides that a man who files or is a party to a paternity action "shall register with the putative father registry under IC 31-19-5."

Statutes of limitations apply to the filing of paternity actions. They are not jurisdictional, but an affirmative defense that must be pled and proven. The burden of proving that the suit was commenced beyond the statutory time limit, and, thus, the suit, is barred, falls to the party pleading it. See **In Re Paternity of B.N.C.**, 822 N.E.2d 616, 617 n. 5 (Ind. Ct. App. 2005); **Drake v. McKinney**, 717 N.E.2d 1229, 1231 (Ind. Ct. App. 1999). IC 31-14-5-5 requires that any paternity action be filed during the alleged father's lifetime or not later than five months after his death. Pursuant to IC 31-14-5-3(b), the mother, alleged father, and DCS or its agents, except as provided in subsection (a), may be barred from filing a paternity suit more than two years after the birth of the child, unless (1) the mother and alleged father both waive the limitation and file jointly, (2) the alleged father or his representative provided support for the child, (3) the mother, DCS, or the county OFC files a paternity petition after the alleged father acknowledged his paternity in writing, (4) the alleged father files a paternity petition after the mother has acknowledged in writing that he is the biological father, (5) the mother or alleged father was incompetent when the child was born, or (6) the responding party could not be served with summons during the two-year period. IC 31-14-5-3(c) provides that the paternity petition must be filed not later than two years after the condition described in subsection (b) ceases to exist. According to IC 31-14-5-3(a) and IC 31-14-5-4, DCS or the county OFC can file a

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paternity action until the child's nineteenth birthday or the date of the child's graduation from high school (whichever occurs first), where public assistance has been furnished for the child and there is an assignment of support rights under Title IV-D. The child or the child's guardian, guardian ad litem, or next friend can bring a paternity action until the child's twentieth birthday; and, if incompetent at age eighteen, the child can bring the action within two years of obtaining competency. IC 31-14-5-2. The DCS can be the child's next friend if there is a CHINS case. IC 31-34-15-6.

Regarding who could file a paternity petition as the child's next friend, there did not appear to be any statutory or case law restriction until the Court of Appeals issued its decision in **J.R.W. ex rel. Jemerson v. Watterson**, 877 N.E.2d 487, 491, 492 (Ind. Ct. App. 2007). In Jemerson, the 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 the duty of acting on behalf of the child, no proper basis existed upon which Maternal Aunt and Uncle (Petitioners) might assert standing as the child's next friends. Then, in **R.J.S. v. Stockton**, 886 N.E.2d 611 (Ind. Ct. App. 2008), in partial reliance on Jemerson, the Court affirmed the trial court's dismissal of the paternity petition filed as the child's next friends by the parents of the child's alleged father (Petitioners), where the alleged father had died prior to the child's birth. The R.J.S. Court found that the trial court's dismissal of the paternity petition was proper because Petitioners lacked standing to file such a petition. Id. at 616. The R.J.S. Court reviewed the provisions of IC 31-14-4-1 regarding who may file a paternity petition, and concluded that Petitioners did not have standing to file the petition as alleged grandparents. Id. at 614. The Court then considered the propriety of their filing as the child's next friends (as they had), and concluded that if Petitioners were proper next friends of the child, their petition would not have been time-barred. Id. at 614 n.2. The Court noted that (1) there is no statutory definition of "next friend;" (2) but this definition was recently addressed in Jemerson v. Watterson, 877 N.E.2d 487 (Ind. Ct. App. 2007) which stated that the cases supported the "contention that only parents, guardians, guardians ad litem, and prosecutors may bring paternity actions as next friends of children;" and (3) Petitioners took issue with the Jemerson decision, arguing, "correctly, that some of the cases cited by this court and the

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ex-husband said, 'There is no limitation provided in the statute as to who may act as the child's next friend.'" R.J.S. at 614-15. The Court rejected Petitioners' invitation "to rely on this language to suggest that there truly is no limit on who may file a paternity petition as a child's next friend," observing that the language must be read in context of the cases, and in those cases the "next friend" was a parent, guardian, or prosecutor. Id. at 615. The Court stated that 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. The Court also (1) recalled its reasoning in Jemerson at 492 to the effect that a next friend is required for a child only when there is no parent or general guardian to institute an action on the child's behalf; (2) observed that, unlike a guardian or guardian ad litem, a "next friend" generally is not court-appointed; and (3) cited a Nebraska case which held that, because the child was living with his mother, his natural guardian, there was no basis for a next friend to initiate a paternity action. R.J.S. at 615-16. The Court here concluded, that, (1) although it was conceivable 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 (2) Petitioners were not entitled to circumvent the authority of the child's natural and court-appointed guardians by filing a paternity action as his next friend. The Court also (1) observed that the legislature had allowed grandparents to seek visitation with their grandchildren, but had not seen fit to allow alleged grandparents to file paternity actions; and (2) opined that there might be potential constitutional implications in permitting grandparents to initiate a paternity proceeding over the objections of the natural mother. Id. at 616 & n.5.

Upon the finding of paternity, the court is to conduct a hearing to determine the issues of support, custody and parenting time, unless the parties have resolved these issues in a verified written stipulation or joint petition. IC 31-14-10-1, -3. If the mother and alleged father execute and file a verified written stipulation or filed a joint petition resolving the issues of custody, child support, and parenting time, the court may make findings and orders without holding a hearing and shall incorporate provisions of the written stipulation or joint petition into orders entered. IC 31-14-10-3. At the request of a

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party or on its own motion, the court may order a probation officer to prepare a report to assist the court in determining these matters. IC 31-14-10-1. IC 31-14 makes no reference to the appointment of a guardian ad litem (GAL) or court appointed special advocate (CASA) for the child, and does not provide for a custody or parenting time investigation by a GAL or CASA. Paternity actions are within juvenile court jurisdiction, however, and IC 31-32-3-1 provides that the juvenile court may appoint a GAL or CASA for a child "at any time." IC 31-14-8-2 provides that the court "shall" enter a default order in a paternity suit against an alleged father who fails to appear, upon a showing that the alleged father received notice of the hearing.

On the motion of a party to the proceeding, the court shall order all parties to undergo blood or genetic testing which shall be performed by a qualified expert approved by the court. IC 31-14-6-1. If a party fails to file a written objection to the admissibility of genetic test results at least thirty days before a "scheduled hearing at which the test results may be offered as evidence," the test results are admissible as evidence of paternity without foundation testimony or other proof regarding the accuracy of the test results. IC 31-14-6-2. Results of "tests" and findings of an expert are admissible in all paternity proceedings, unless the court excludes the results or findings for good cause and they constitute "conclusive evidence" if the results and finding exclude a party as the biological father of the child. IC 31-14-6-3. The chain of custody of blood or genetic specimens may be established through verified documentation of each change of custody if the documentation was made at or around the time of the change of custody; the documentation was made in the course of a regularly conducted business activity; and the documentation was made as a regular practice of a business activity. IC 31-14-6-5.

IC 31-14-13-1 provides: "A biological mother of a child born out of wedlock has sole legal custody of the child, <u>unless a statute or court order provides otherwise under the following</u>:...(3) IC 31-14 (custody of a child born outside of a marriage)." (emphasis added). Once the matter of custody is before the court, it is charged with determining custody "in accordance with the best interests of the child". IC 31-14-13-2. In this regard, the factors the court is to consider in making a custody determination in a paternity proceeding are set forth in IC 31-14-13-2, and 2.5. These factors are consistent with the custody determination factors set forth in IC 31-17-2-8 and 8.5. In 2009, IC 31-14-13-2.3

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was added, to become effective July 1, 2009. IC 31-14-13-2.3, which is very similar to the sections of IC 31-17-2 regarding joint legal custody, states:

> (a) In a proceeding to which this chapter applies, the court may award legal custody of a child jointly if the court finds that an award of joint legal custody would be in the best interest of the child.
>
> (b) An award of joint legal custody under this section does not require an equal division of physical custody of the child.
>
> (c) In determining whether an award of joint legal custody under this section would be in the best interest of the child, the court shall consider it a matter of primary, but not determinative, importance that the persons awarded joint legal custody have agreed to an award of joint legal custody. The court shall also consider:
>
> > (1) the fitness and suitability of each of the persons awarded joint legal custody;
> >
> > (2) whether the persons awarded joint legal custody are willing and able to communicate and cooperate in advancing the child's welfare;
> >
> > (3) the wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age;
> >
> > (4) whether the child has established a close and beneficial relationship with both of the persons awarded joint legal custody;
> >
> > (5) whether the persons awarded joint legal custody:
> >
> > > (A) live in close proximity to each other; and
> > >
> > > (B) plan to continue to do so;
> >
> > (6) the nature of the physical and emotional environment in the home of each of the persons awarded joint legal custody; and
> >
> > (7) whether there is a pattern of domestic or family violence.

IC 31-14-14 governs parenting time following a determination of paternity. A noncustodial parent is entitled to reasonable parenting time rights unless the court finds, after a hearing, that parenting time might endanger the child's physical health and well-being or significantly impair the child's emotional development. IC 31-14-14-1(a). Effective July 1, 2009, new provisions were added at IC 31-14-14-1(c) and (d). They state:

> (c) In a hearing under subsection (a), there is a rebuttable presumption that a person who has been convicted of:
>
> > (1) child molesting (IC 35-42-4-3); or
> >
> > (2) child exploitation (IC 35-42-4-4(b));

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might endanger the child's physical health and well-being or significantly impair the child's emotional development.

(d) If a court grants parenting time rights to a person who has been convicted of:

(1) child molesting (IC 35-42-4-3); or

(2) child exploitation (IC 35-42-4-4(b));

there is a rebuttable presumption that the parenting time with the child must be supervised.

If a paternity affidavit is properly executed, and the man who executed the affidavit fails to set forth evidence at a child support hearing that rebuts the man's paternity, an order establishing paternity and child support for the child may be obtained at the child support hearing without any further proceedings to establish the child's paternity. IC 31-14-11-1. (Regarding setting aside paternity affidavits in child support proceedings, see **In Re Paternity of E.M.L.G.**, 863 N.E.2d 867 (Ind. Ct. App. 2007) (Court held (1) inasmuch as four putative fathers at issue failed to have their paternity affidavits set aside within sixty-day time limit provided for in IC 16-37-2-2.1 (2001), under IC 31-14-7-3 (2001), each man was deemed the legal father and trial court erred as a matter of law in granting fathers' requests for genetic testing to disestablish paternity; (2) trial court set aside paternity affidavits based on statutorily invalid reason - men's allegations that they were not aware of legal ramifications of affidavits when they signed them; (3) Indiana Code has no provision for filing action to disestablish paternity, and trial court does not have authority to treat child support proceedings as proceedings to disestablish paternity); **Paternity of Davis v. Trensey**, 862 N.E.2d 308 (Ind. Ct. App. 2007) (Court applied statutes as amended in 2006, and upheld trial court's order implicitly setting aside paternity affidavit in child support action against man other than man who had executed paternity action, holding that (1) case filed by County Prosecutor's Office was governed by IC 31-14-4-1 rather than IC 16-37-2-2.1; (2) no language in IC 31-14-4 et seq. prevented the Prosecutor's Office from filing a paternity action in a case where a man filed a paternity affidavit more than sixty days before; (3) therefore, the instant paternity action was authorized under IC 31-14-4 et seq.; (4) "this conclusion is consistent with the strong public policies in favor of identifying the correct biological father and allocating the child

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support obligation to that person as explained by our Supreme Court;" and (5) IC 16-37-2-2.1 and IC 31-14-4 are not in conflict.))

In a paternity proceeding, temporary child support "shall" be ordered if there is clear and convincing evidence that the man involved in the proceeding is the biological father. IC 31-14-11-1.1. The court may order either or both parents to pay any reasonable amount for child support after considering all relevant factors including the financial resources of the custodial parent; the standard of living the child would have enjoyed had the parents been married and remained married to each other; the physical and mental condition of the child; the child's educational needs; and the financial resources and needs of the noncustodial parent. IC 31-14-11-2. See **In Re Paternity of N.C.**, 893 N.E.2d 759, 761 (Ind. Ct. App. 2008) (Court affirmed trial court's order requiring incarcerated Father to pay $6 per month child support, where, contrary to Father's contention, Court found support order to be consistent with Lambert v. Lambert, 861 N.E.2d 1176, 1177 (Ind. 2007), in which Supreme Court held that "in determining support orders, courts should not impute potential income to an imprisoned parent based on pre-incarceration wages or other employment related income, but should rather calculate support based on the actual income and assets available to the parent.") The support order may include provisions for the child's education, medical expenses, health insurance coverage and Title IV-D fees. IC 31-14-11-3. IC 31-14-11-5 provides that the court "shall" order retroactive child support from the date of the petition's filing, and "may" order support from the date of the child's birth. See **In Re Paternity of McGuire-Byers**, 892 N.E.2d 187, 192 (Ind. Ct. App. 2008) (Court found trial court did not abuse its discretion in ordering Father to make child support payments retroactive to child's birth, where paternity was established pursuant to petition filed by child when child was eighteen years old, and Father knowingly avoided his responsibility to support the child although he was aware he was child's father from time of child's birth.) IC 31-14-17-1 requires the court to order the father to pay at least fifty percent of the reasonable and necessary expenses of the mother's pregnancy and the childbirth. The court must issue findings if it orders payment in excess of fifty percent of the expenses. **In Re Paternity of A.J.R.**, 702 N.E.2d 355, 363 (Ind. Ct. App. 1998). See also **In Re Paternity of A.R.S.A.**, 876 N.E.2d 1161 (Ind. Ct. App. 2007) (upholding trial court order that Father reimburse Medicaid fifty percent of child's birthing expenses and

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finding that IC 31-14-17-1 does not violate either the Equal Protection Clause, or the Due Process Clause of the Fourteenth Amendment.) A support order may be modified or revoked upon a showing of substantial change in circumstances that makes the current terms unreasonable, or that a person has been ordered to pay an amount of child support that differs by more than twenty percent from the child support guidelines and the order was issued at least twelve months before the current petition. IC 31-14-11-8.

IV. Paternity in CHINS and TPR Proceedings

A putative father is statutorily defined as a male of any age who is alleged to be or claims that he may be a child's father but who has not established paternity of the child in a court proceeding or by paternity affidavit and is not presumed to be the child's father under IC 31-14-7-1(1) or (2) as discussed above at part I. A putative father does not have to establish paternity to have standing in a CHINS or termination of parent-child relationship (TPR) proceeding involving his child or children. See **In Re A.B.**, 332 N.E. 226 (Ind. Ct. App. 1975) (citing Stanley v. Illinois, 405 U.S.645 (1972), Court reversed trial court's judgment finding child to be dependent and neglected child, where putative father appeared at proceeding with counsel and indicated his desire to submit to jurisdiction of court and contest allegations of petition, but trial court denied him opportunity to participate in proceedings); **Matter of Laney**, 489 N.E 2d 551 (Ind. Ct. App. 1986) (if putative father appears at termination of parent-child relationship proceeding he has standing to participate in proceeding and is entitled to court-appointed counsel). Putative fathers have parental rights and are entitled to notice and party status in CHINS and TPR cases even if their paternity is not established. **In Re C.C.**, 788 N.E.2d 847, 851 (Ind. App. Ct.2003), *trans. denied*; **In Re D.Q.**, 745 N.E.2d 904, 911 (Ind. Ct. App. 2001); **Matter of A.C.B.**, 598 N.E.2d 570 (Ind. Ct. App. 1992). Paternity does not have to be established before the putative father's parent-child relationship with the child can to terminated. Id. Case law indicates that, as in the case of a legally established parent, "in order for an involuntary termination determination to be made, it is necessary that the statutory CHINS procedures have been properly followed." **Hite v. Vanderburgh Cty Office of Fam. and Child.**, 845 N.E.2d 175, 182 (Ind. Ct. App. 2006) (affirming termination of parental rights of putative father where record unclear on his paternity

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status; only evidence was his claim that he had established paternity, which county OFC disputed). See also IC 31-35-2-4(b)(2). A putative father has standing to appeal the involuntary termination of his parent-child relationship with the child notwithstanding his failure to establish paternity. **In Re Parent-Child Relationship of S.M.**, 840 N.E.2d 865 (Ind. Ct. App. 2006) (holding, contrary to argument of DCS on appeal, father had standing to challenge trial court's determination to terminate his parental rights regardless of whether he had taken steps to establish his paternity).

IC 31-34-15-6 provides that, when a child born out of wedlock is, or is alleged to be, a CHINS, and is under the supervision of DCS or a county OFC as a result of a court ordered out-of home placement, DCS or the county OFC shall refer the child's case to the local prosecuting attorney's office for the mandatory filing of a paternity action if the identity of the alleged father is known and if DCS or the county OFC reasonably believes that establishing paternity would be beneficial to the child. The DCS or county OFC shall sign the paternity petition as the child's next friend.

In a CHINS case, it is safest to try to assure that the apparent father, if there is one apparent, is the child's biological father. This is the case even if the child was born during the mother's marriage to the man who holds himself out to be the child's father. As discussed above in parts I and II, respectively, the legal presumption of paternity is rebuttable; and the man's name on the child's birth certificate does not establish, or even raise a legal presumption of his paternity. Thus, if some astute questioning of the mother and apparent father, as well as relatives, about the paternity of each child involved, is not done at the outset of the proceedings, the children's potential stability is left open to substantial setback with the surprise appearance of putative fathers or fathers with legally presumed or established paternity after the CHINS/TPR process has proceeded a long way down the road to hopefully stabilizing the children's lives.

It is also a wise course, early in the process, to attempt to find the putative father or fathers if there appears to be one or more who are not in the picture. The State has access to records that could assist in this effort. If found, he or they may not be at all interested in the children and may voluntarily, permanently remove themselves from the picture. If paternity has been legally established, that is one less thing to worry about. If the plan is reunification with the mother or some other permanency plan not involving termination of

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parental rights, the newly located father(s) are potential resources, even if unwilling ones, for economic support for the children, thus, offering the children the potential for more economically advantaged lives. Further, reunification plans can fall apart fairly easily when they involve a mother whose lifestyle is such that the children have been removed from her care even temporarily. Her landing in jail or being murdered could quickly require a back up plan.

Although it is not necessary to legally establish a putative father's paternity in order for him to be subject to CHINS and TPR proceedings and their effects, doing so has its advantages. As stated above, he would become a potential legally-obligated source of child support if his parental rights were not terminated. Establishing his paternity would also open up temporary or permanent placement alternatives for the children. He may desire to have custody of the children; and he may be determined to be the best placement for the children. Also, although there is no preference for the child's relatives among competing adoptive parents, IC 31-34-4-2 and IC 31-34-19-7 state a statutory relative preference for the child's relatives in temporary or other permanent placement alternatives. See **In Re Adoption of B.C.S.**, 793 N.E.2d 1054, 1062-63 (Ind. Ct. App. 2003); **In Re Adoption of Childers**, 441 N.E.2d 976, 980 (Ind. Ct. App. 1982). Unless the putative father's paternity is legally established, his relatives are not considered to be the child's relatives. Moreover, it appears that, once a parent's parental rights have been terminated, that parent's relatives are no longer considered the child's relatives. See **In Re Adoption of I.K.E.W.**, 724 N.E.2d 245, 249 n. 6 (Ind. Ct. App. 2000) (Court stated that because parental rights of child's mother were terminated before commencement of adoption proceedings, any of maternal grandparents' derivative due process rights with respect to visitation, custody, or adoption were effectively extinguished before they filed their petition); **In Re G.R.**, 863 N.E.2d 323 (Ind. Ct. App. 2007) (holding that moment Mother's rights were terminated, Maternal Grandmother no longer had standing to pursue visitation rights pursuant to IC 31-17-5-1).

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