

# Children's Law Center of Indiana



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

By Saundria Bordone, J.D.  
Derelle Watson-Duvall, J.D.  
Kids' Voice of Indiana  
The Derelle Watson-Duvall Children's  
Law Center of Indiana  
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Parties who seek guardianship or third party custodianship of a child are most often related to the child and are motivated by their concerns that the child has been abandoned, abused or neglected or is currently at risk. Sometimes the child has previously been adjudicated a Child in Need of Services and the permanency plan of guardianship or third party custody has been identified. See IC 31-34-21-7; IC 31-34-21-7.5(c)(1)(D); IC 31-34-21-7.7.

Title 29 specifically governs guardianships but not third party custody sought outside of probate court. This paper discusses: (1) whether third party custody or guardianship is needed; (2) generally, what statutes are relevant; (3) the provisions of Title 29 specifically regarding guardianship of a minor; (4) case law standards for determining whether a guardian/third party custodian should be appointed; (5) the information that should be included in a court order which appoints a guardian or third party custodian; (6) case law standards for determining whether to terminate guardianship or modify custody from the third party back to the parents; (7) parenting time standards in

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guardianships and third party custodianships; and (8) practice tips for success in obtaining guardianship or third party custody.

Guardianship and third party custody cases are emotionally difficult for all of the parties. Parties who are seeking guardianship or third party custody may be emotionally conflicted between wanting to help and protect the child and wanting to maintain a good relationship with the child's parents, who are usually close relatives. The parents may become angry and feel betrayed by the relatives who are seeking third party custody. The child may feel caught in the middle between loved persons who have become legal adversaries. The financial and emotional resources of the parties seeking guardianship or third party custody may have already been depleted by supporting and caring for the child.

It is important that everyone involved in a guardianship or third party custody proceeding understand that Indiana law presumes children should be in the custody of a parent and that rebutting that presumption will require those who are seeking guardianship or third party custody to present evidence which reflects negatively on the parents. Most people believe that custody determinations are always made in the child's best interests and will have difficulty understanding the rebuttable presumption concept. Hopefully the information in this paper will be helpful in explaining the applicable law. Statutory citations used in this paper are effective as of July 1, 2011, and case law information is effective as of volume 943 of the North Eastern Reporter.

### **I. Is third party custody or guardianship needed?**

Many people use the terms "third party custody" and "guardianship" interchangeably. It is important to determine which type of proceeding to file. The probate court has exclusive original jurisdiction over non-CHINS guardianships. See IC 29-3-1-3; IC 29-3-2-1 (b). The probate court, which awards guardianships, does not have jurisdiction over children who have had paternity adjudications (IC 31-14-10) or whose parents have filed a dissolution proceeding (IC 31-17-2-1). See IC 29-3-2-1 (d). Once jurisdiction has been asserted in a case by the paternity or dissolution court, that court retains original and continuing jurisdiction over custody matters relating to the minors in those cases with some possible exceptions. **Murdock v. Estate of Murdock,**

935 N.E.2d 270 (Ind. Ct. App. 2010) and **Atteberry v. Atteberry**, 597 N.E. 2d 355 (Ind. Ct. App. 1992) hold that the dissolution court loses jurisdiction after a parent's death. However, with no reference to Atteberry, the appeals court in **In Re Custody of G.J.**, 796 N.E.2d 756 (Ind. Ct. App. 2003), *trans. denied*, allowed the child's uncle to pursue custody in the dissolution court after the death of the father. Paternity court jurisdiction survives the death of a parent. See IC 31-14-5-5; IC 31-14-5-8. It should be noted that, without court involvement, the execution of a paternity affidavit pursuant to IC 16-37-2-2.1 establishes paternity and gives rise to parental rights and responsibilities which, effective July 1, 2006, explicitly include reasonable parenting time, unless another determination is made by the court with paternity jurisdiction. If a paternity affidavit is executed after July 1, 2010, IC 16-37-2-2.1(h)(2)(B) (effective July 1, 2010) clarifies that the paternity affiant father has parenting time with the child according to the Indiana Parenting Time Guidelines unless another determination is made by a court in a proceeding under IC 31-14-14. Inasmuch as establishing paternity with a paternity affidavit does not involve a court proceeding, if paternity was established by a paternity affidavit alone, a guardianship proceeding in probate court should be initiated in order for third parties to obtain custody of the child. It should also be noted that the mother has the sole legal custody of a child born out of wedlock in the absence of a contrary court order or statute. See IC 31-14-13-1.

In general, third parties who desire "custody" of a child should petition for guardianship and proceed under Title 29 of the Indiana Code in the following situations:

1. Both of the child's parents are deceased.
2. There was a dissolution of marriage, but one of the parents is now deceased.<sup>2</sup>
3. The child's parents have remained married to each other.
4. The child was born out of wedlock and paternity has not been established in court.

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

5. The child has not been adjudicated a Child in Need of Services or the juvenile court does not currently have jurisdiction over the child's custody.

If there is a paternity or dissolution proceeding, attorneys should petition for third party custody in the paternity or dissolution proceeding which has been previously filed rather than in the probate court. The court in which the paternity or dissolution proceeding has been filed has continuing jurisdiction over the child, so the probate court does not have jurisdiction to grant a guardianship. The paternity or dissolution court has jurisdiction to grant custody or to modify custody to a third party.

The judicial approach to dissolution court jurisdiction in third party custody cases appears to be evolving. The following cases are included as examples of this evolution:

In **In Re Guardianship of S.M.**, 918 N.E.2d 746 (Ind. Ct. App. 2009), the Court reversed and remanded the trial court's order appointing Aunt the permanent guardian of two children. The children's parents had divorced in Vermillion County, Illinois (Illinois court) in 2002. The Illinois court granted custody of the children to Father, but in 2007, the Illinois court modified custody to Mother, who lived in Indiana. The children spent much of their time with Aunt while Mother worked during the evenings. The children moved into Aunt's home when Mother became ill with cancer. Mother died on November 1, 2008, when the children were ages ten and eight. Two days after Mother's death, Aunt petitioned for and was granted emergency temporary guardianship of the children by Madison Superior Court (trial court). The trial court held an evidentiary hearing in January 2009. Father appeared at the January hearing and informed the trial court that the parents' divorce and all proceedings regarding the children had been handled in the Illinois court. The trial court appointed Aunt the children's permanent guardian and granted parenting time to the Father, who continued to reside in Illinois. The trial court also said that the Illinois court could determine jurisdiction, but the purpose of the January 2009 guardianship hearing was to determine the children's best interests until a jurisdiction determination was made.

The S.M. Court looked to the Uniform Child Custody Jurisdiction Law (UCCJL) codified at IC 31-21 and determined that the trial court lacked subject matter jurisdiction to issue a temporary emergency order; therefore, the temporary emergency order was

void ab initio. Id. at 750. IC 31-21-5-4 provides an Indiana trial court with temporary emergency jurisdiction if the children are present in Indiana and have been abandoned or if it is necessary to protect them because they are “subjected to or threatened with mistreatment or abuse.” Id. at 749. The Court noted there was no evidence that the children were abandoned or threatened with mistreatment. Id. at 750. The Court said that, to the contrary, a surviving parent has the right to custody of his or her children, unless otherwise determined in a dissolution decree or in another proceeding authorized by law. Id. The Court opined that, due to the UCCJL (IC 31-21-5-3), the trial court lacked subject matter jurisdiction to modify the Illinois court’s child custody order because Father resides in Illinois. Id. at 749. The order appointing Aunt as the children’s permanent guardian was void ab initio. Id. The Court remanded the case with instructions for the trial court to issue an order denying the petition for guardianship and directing that custody be with Father. Id. at 750.

**In Re Marriage of Huss**, 888 N.E.2d 1238 (Ind. 2008), touched on several jurisdiction-related issues in third party custody cases. Here, 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, Wife 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 granted the divorce and, among other things, awarded custody of all four children to Husband. Wife appealed.

The Huss Court held that the dissolution trial court did not err by failing to give effect to the intervening paternity judgment by the paternity court, where the subject matter of child custody of all four children, including the child who was the subject of the

paternity judgment, was before the dissolution court from the inception of the dissolution action which was pending prior to Wife's initiation of the paternity proceedings. *Id.* at 1241-42. 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. The Court cited and quoted IC 33-28-1-6 and *In Re Paternity of Fox*, 514 N.E.2d 638 (Ind. Ct. App. 1987), *trans. denied*, in support of this conclusion. The Court reviewed the procedural history here:

- (1) Husband's petition for dissolution of marriage, filed in the Adams Circuit Court on April 21, 2005, asserted that there were four unemancipated children born of the marriage, named each of them, and expressly requested that a provision be made with respect to the custody and support of these children;
- (2) Wife's counter-petition identified the same four children as "born to this marriage;"
- (3) each party moved for a provisional order requesting custody of the children;
- (4) following a contested hearing, the dissolution trial court awarded temporary custody of all four children to Husband;
- (5) Wife, as mother and next friend of the child, thereafter filed a separate paternity action in Wells Circuit Court as to the youngest of the four children;
- (6) Wife prosecuted the paternity action to its conclusion during pendency of the dissolution action and obtained a paternity judgment that another man was the child's biological father, limiting his visitation rights, and awarding her custody;
- (7) Wife notified the dissolution trial court of the paternity judgment and filed a motion to dismiss the subject child from the dissolution case, attaching a copy of the paternity judgment;
- and (8) the dissolution trial court took Wife's motion under advisement and proceeded to a contested final hearing, after which it denied Wife's motion and entered the final decree which, among other things, awarded custody of all four children to Husband. *Id.* at 1242. 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.

Despite Wife's contention to the contrary, the Huss Court also held that the dissolution trial court had jurisdiction over the child of whom Husband was not the biological father. The Court distinguished Russell v. Russell, 682 N.E.2d 513, 517 (Ind. 1997), which holds that a dissolution court does not have jurisdiction to enter a custody order regarding children born during a marriage but whose biological father was not the husband. The Court 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 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 commencement 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.

The Huss Court noted that, here, because Wife had not asserted any appellate claim that de facto custodian status was a necessary prerequisite to awarding third party custody of the youngest child to Husband, the correctness of the trial court's finding of de facto status was not a determinative issue. Id. at 1248. The Court did observe in a footnote, however, that there is an unresolved issue "regarding whether 'de facto custodian' status is a necessary prerequisite in a dissolution proceeding to a spouse receiving custody of a child for whom the spouse is not the biological parent." Id. at 1248 n.3. The Court (1) listed non-dissolution cases which have held that a party who is not a natural parent need not allege or claim status as a de facto custodian in order to pursue custody; (2) noted that dicta in Custody of G.J., 796 N.E.2d 756, 762, (Ind. Ct. App. 2003) suggested that, in a dissolution proceeding, the award of custody of a child to a non-biological parent may be restricted to a person who qualifies as a de facto

custodian; and (3) this conclusion is not expressly stated in the language of the de facto custody statutes. Huss at 1248 n.3.

In **In Re Custody of G.J.**, 796 N.E. 2d 756 (Ind. Ct. App. 2003), *trans. denied*, the Court held that, as a matter of apparent first impression: (1) the child's paternal uncle had standing to file a direct action pursuant to IC 31-17-2-3(2) for custody of the child; and (2) the child custody statute allows any person other than a parent to seek custody of the child by initiating an independent cause of action for custody that is not incidental to a marital dissolution, legal separation, or child support action. Thus, IC 31-17-2-3(2) provides third parties with the option to pursue custody of a child in a direct cause of action. In G.J. the parents filed for dissolution, but the father died before the dissolution was final. The mother remarried. The child's paternal uncle filed a petition for custody of the child, alleging that (1) the child's new stepfather was a convicted child molester who collected child pornography; (2) a court order in the dissolution proceeding between the parents had prohibited the mother from allowing contact between the child and stepfather; and (3) the mother had lost custody of other children to the Tippecanoe County Office of Family and Children. On the day that a hearing was scheduled, the mother moved to dismiss the paternal uncle's petition, arguing lack of standing. The trial court granted the motion, concluding that IC 31-17-2-3 related only to dissolution of marriage, and indicating its belief that the paternal uncle would properly file under the guardianship statute. The Court of Appeals reversed the trial court's dismissal of the paternal uncle's petition and concluded that the uncle had standing to file a direct action for custody of the child. Id. at 764. The Court opined that allowing a third party to seek custody of a child by filing a direct cause of action pursuant to child custody statutes is wholly consistent with Indiana public policy. Public policy has long recognized that if a parent is unfit or otherwise unable to care for a child, it may be in the child's best interests to be placed in the custody of a third party. Id. at 762, citing Gilchrist v. Gilchrist, 225 Ind. 367, 372, 75 N.E. 2d 417, 419 (1947).

See also **Christian v. Durm**, 866 N.E.2d 826 (Ind. Ct. App. 2007) (trial court did not err by proceeding with merits of third party custodian's claim despite dismissal of underlying dissolution petition), *trans. denied*; **Nunn v. Nunn**, 791 N.E. 2d 779, 785 (Ind. Ct. App. 2003) (Court remanded custody decision to trial court to determine

whether child's stepfather, who had been found not to be child's biological father as a result of DNA testing during dissolution/paternity proceeding, should be granted custody because he met definition of de facto custodian).

Where a child has been adjudicated a Child in Need of Services (CHINS) and remains under the jurisdiction of the juvenile court, the juvenile court has jurisdiction over a guardianship of the person of the child if the juvenile court has approved a permanency plan under IC 31-34-21-7 that provides for the appointment of a guardian of the person. See IC 31-30-1-1(10). IC 31-34-21-7.7, states that if juvenile court approves a permanency plan that provides for the appointment of a guardian for the child, juvenile court may appoint a guardian of the person and administer a guardianship under IC 29-3. *IC 31-34-21-7.7 was amended effective July 1, 2011, adding subsections (c), (d), and (e). IC 31-34-21-7.7(c) states that the juvenile court may include in an order creating a guardianship the requirements, terms, and conditions described in IC 29-3-8-9(a). IC 29-3-8-9, a new statute, added effective July 1, 2011, states, inter alia, that a probate or juvenile court may include in its order creating a guardianship: (1) a requirement that the minor must reside with the guardian until the guardianship is modified or terminated; and (2) any terms and conditions that a parent must meet in order to seek modification or termination of guardianship. IC 31-34-21-7.7(d) and (e) state that, if the juvenile court closes the CHINS case after creating a guardianship: (1) the guardianship survives the closure of the CHINS case; (2) the probate court may assume or reassume jurisdiction of the guardianship and take further action as necessary.*

If the child has been adjudicated a CHINS or a delinquent child, the dissolution or paternity court has only concurrent original jurisdiction with the juvenile court for the purposes of modifying custody. Any dissolution or paternity modification order entered by the dissolution or paternity court while the child is under the juvenile court's jurisdiction, is effective only when the juvenile court enters an order approving the custody modification or terminating the CHINS proceeding. See IC 31-30-1-12; IC 31-30-1-13. *IC 31-30-1-12(a) was amended effective July 1, 2011, to state that a court having jurisdiction under IC 31-17-2 of a child custody, parenting time, or child support 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 juvenile court*

*jurisdiction due to a CHINS or delinquency proceeding (new language underlined). Three new subsections, (c), (d), and (e), were added to IC 31-30-12 effective July 1, 2011. IC 31-30-1-12(c) states that, if the juvenile court modifies child custody, child support, or parenting time and terminates the CHINS or delinquency case, the [dissolution] court having concurrent original jurisdiction shall assume or reassume primary jurisdiction of the case to address all issues. IC 31-30-1-12(d) states that a court that assumes or reassumes jurisdiction under subsection (c) may modify custody, child support, or parenting time in accordance with applicable modification statutes. IC 31-30-1-12(e) provides that a [juvenile] court order modifying custody, child support or parenting time survives the termination of the CHINS or delinquency proceeding until the [dissolution] court having concurrent or original jurisdiction assumes primary jurisdiction and modifies the order. IC 31-30-1-13 was amended effective July 1, 2011, with the addition of two new subsections, (c) and (d). IC 31-30-1-13(c) states that if a juvenile court establishes or modifies paternity and terminates the child's CHINS or delinquency proceeding, the [paternity] court having concurrent original jurisdiction shall assume or reassume primary jurisdiction of the case to address all other issues. IC 31-30-1-13(d) states that an order establishing or modifying paternity of a child by a juvenile court survives the termination of the CHINS or delinquency proceeding.*

If the juvenile court has jurisdiction as described above, parties seeking guardianship or third party custody of the child should do so in the juvenile court proceeding. Those third parties' interests might best be advanced by contacting the child's Department of Child Services (DCS) case manager and the child's Court Appointed Special Advocate/Guardian ad Litem to express interest, and to request criminal history checks, a home study, and foster parent training for themselves. If the child is in the care of the third parties, they should receive notice of any periodic case review hearing or permanency in the CHINS proceeding and have an opportunity to be heard and to make recommendations to the court. IC 31-34-21-4. Foster parents and other temporary caretakers of CHINS must be given notice of detention, initial, dispositional, periodic case review, permanency, and termination of the parent-child relationship hearings and shall have an opportunity to be heard and to make recommendations to the court at those hearings. IC 31-34-5-1; IC 31-34-5-1.5; IC 31-34-

10-2(g); IC 31-34-19-1.3; IC 31-34-21-4; IC 31-35-2-6.5. The court shall also provide a foster parent or other temporary caretaker with notice of and the opportunity to be heard at the factfinding hearing. (IC 31-34-11-1(c)). Formal intervention in the CHINS proceeding may be pursued through a motion to intervene, pursuant to Ind. Trial Rule 24, but intervention may not be necessary if DCS favors placement with the third parties.

## **II. What statutes are relevant?**

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

Persons seeking third party custody in dissolution or paternity proceedings should petition for intervention to obtain party status pursuant to Ind. Trial Rule 24. See also **In Re Paternity of E.M.**, 654 N.E. 2d 890 (Ind. Ct. App. 1995) for a discussion of Indiana’s

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

three part test for intervention as a matter of right. The intervenor must demonstrate that he has an interest in the subject of the action, that disposition in the action may as a practical matter impede protection of that interest, and that representation of the interest by existing parties is inadequate. *Id.* at 892. Permissive intervention under T.R. 24B may be granted by the court when a statute confers a conditional right to intervene or when an applicant's claim or defense and the main action have a question of law or fact in common.

Both the dissolution and paternity custody statutes, IC 31-17-2-8 and IC 31-14-13-2, require the court to consider evidence that a child has been cared for by a de facto custodian as one of the custody determination factors. A de facto custodian is defined at IC 31-9-2-35.5 as a person who has been the primary caregiver and the financial support of a child for six months if the child is under three years of age, and for one year if the child is at least three years of age. IC 31-17-2-8.5 and IC 31-14-13-2.5 provide that if the court determines by clear and convincing evidence that the child has been cared for by a de facto custodian, the court shall make the de facto custodian a party to the proceeding. The statutes further provide that the court shall award custody to the de facto custodian if, after considering the required factors listed in subsection (b) of each statute, the court determines that such an award is in the best interests of the child. If the court awards custody to a de facto custodian, the de facto custodian is considered to have legal custody of the child under Indiana law. In **In Re Paternity of T.P.**, 920 N.E.2d 726 (Ind. Ct. App. 2010), *trans. denied*, the Court affirmed the trial court's conclusion that the intervenor Caretakers did not qualify as the child's de facto custodians. *Id.* at 731. Caretakers claimed that they had cared for the child for 244 days during the time period of May 2007 to September 2008, but the Court noted that this was not a majority, much less a significant majority, of the time. The Court observed that, while there was evidence that Caretakers provided basic needs and financial support for the child, Caretakers point to no evidence demonstrating that this constituted a majority of the child's total needs and support. *Id.* The Court also observed that, even if they qualified as de facto custodians, Caretakers were still required to overcome the natural parent presumption in order to gain custody of the child. *Id.*

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

In **A.J.L. v. D.A.L.**, 912 N.E.2d 866 (Ind. Ct. App. 2009), the Court affirmed the trial court's award of custody of the children, ages twelve, eleven, and seven, to Father's Aunt and Uncle, who had filed to intervene in the parents' dissolution case in May 2008 and requested custody. The children had lived with Aunt and Uncle fifty percent of the time from January 2006 through February 2007 and sixty to seventy percent of the time from February 2007 to February 2008. During those periods, Aunt and Uncle provided the children with food, clothes, and medical care and attended to their educational needs. Mother appealed the trial court's custody award to Aunt and Uncle. The Court opined that the trial court did not err when it concluded that Aunt and Uncle are the de facto custodians of the children. *Id.* at 871. The Court noted the extended times the children lived with Aunt and Uncle since January 2006, and that during those periods: (1) Aunt and Uncle provided for the children's food, and together with other family members, provided for the children's clothing and medical expenses; (2) Aunt and Uncle paid for babysitters they hired to watch the children when they were out; (3) Mother did not provide financial assistance; (4) when the children were with Mother, Aunt and Uncle occasionally provided food or other household items, paid one of Mother's utility bills and occasionally gave Mother "a dab of money;" (5) Aunt met with the oldest child's teacher twenty-five to thirty times from February 2008 to May 2008, to address that child's failing grades; and (6) Uncle regularly helped the oldest child with his math

homework. The Court found that the evidence was sufficient to show by clear and convincing evidence that the children resided with Aunt and Uncle a majority of the time for unspecified non-consecutive periods over the preceding two years and that Aunt and Uncle provided the basic necessities for the children during that period. *Id.* at 870.

But see the discussion in **In Re Guardianship of L.L.**, 745 N.E. 2d 222, 229-230 (Ind. Ct. App. 2001), *trans. denied*, on the de facto custodian laws. Although noting that the de facto custodian laws are not specifically applicable to guardianship cases, the Court explored the intent, meaning, and significance of the laws. The Court concluded that the laws are not intended “to displace the parental preference presumption” and they did not change the common law regarding custody disputes between natural parents and third parties. *Id.* at 230.

IC 29-3-3-3 states that, except as otherwise determined in a dissolution of marriage proceeding, guardianship proceeding, or other proceeding authorized by law, the parents have the right to custody of their child. The parents also have the statutory right to execute legal documents concerning the child and to consent to medical care, or other professional care, treatment or advice for the child’s health and welfare.

### **III. The Guardianship Statutes - Title 29**

Guardianships may be granted to protect minors or incapacitated adults. In guardianship law, children are referred to as “minors”. Under guardianship law, a minor is a person under eighteen years of age who is not emancipated. IC 29-3-1-10. A minor may be emancipated by marriage, military service, or a court order as a disposition of a CHINS or delinquency proceeding. The court is required to terminate the guardianship of a minor when the minor attains eighteen years of age, unless the minor has been adjudicated an adult incapacitated person as defined by IC 29-3-1-7.5. IC 29-3-12-1(a)(1). Any person may petition for the appointment of a guardian for a minor. IC 29-3-5-1(a). The person who petitions may be an individual, a government entity such as the Department of Child Services, or a corporation. IC 29-3-1-12. The person who files the petition need not be the person who is seeking to be appointed guardian. *Effective July 1, 2011, the petition for guardianship must include information on whether a Child in Need of Services (CHINS) petition or a program of informal adjustment has been filed*

regarding the minor. The petition must also include information on whether the CHINS or informal adjustment case is open at the time the guardianship petition is filed. IC 29-3-5-1(a)(12). The court shall notify DCS of a hearing regarding the guardianship of a minor if a CHINS petition has been filed regarding the minor or a program of informal adjustment is pending. IC 29-3-5-1(g). Any person may apply for permission to participate in the guardianship proceeding and the court may grant this request with or without a hearing if the participation will serve the minor's best interest. IC 29-3-5-1(f). *Effective July 1, 2011, DCS may participate in the guardianship hearing if a CHINS petition has been filed or a program of informal adjustment is pending. IC 29-3-5-1(g).* Legal notice of the guardianship petition must be served by the petitioner on any living parent of the minor (unless parental rights have been terminated), on any person who has had principal custody of the minor during the sixty days before a petition is filed, and on the minor who is fourteen years of age or older. IC 29-3-6-1(a)(3). The court may grant a temporary guardianship without notice for up to sixty days (*up to ninety days effective July 1, 2011*) if a minor has no guardian, an emergency exists, the welfare of the minor requires immediate action, and no one else appears to have the authority to act. IC 29-3-3-4(a).

*IC 31-30-1-6 directs the probate court's actions when allegations in a petition for guardianship or allegations produced at guardianship proceedings indicate that the child for whom the guardianship is requested meets the definition of a CHINS. IC 31-30-1-6(a) was amended effective July 1, 2011, to provide that the probate court on its own motion or on the request of a party shall: (1) send the petition for guardianship or the record of guardianship to DCS; and (2) direct DCS to initiate an assessment to determine whether the child is a CHINS. This statutory amendment changes prior law, which required the probate court to: (1) send the petition for guardianship or the record of guardianship proceedings, or both, to the prosecuting attorney or the attorney for the department of child services; and (2) direct the prosecuting attorney or the attorney for the department of child services to initiate an investigation and proceedings in the juvenile court to determine whether the child is a CHINS. IC 31-30-1-6(d) was added effective July 1, 2011, and provides that if a juvenile court: (1) issues an order establishing or modifying a guardianship of a minor; and (2) requests additional*

*proceedings regarding the guardianship of the minor; the probate court that retains jurisdiction over the case or another appropriate court shall conduct additional proceedings.*

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

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

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

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

If the parents are deceased or have consented to the guardianship, or the court has found that the case law standards for appointing a guardian without a parent’s consent have been met, the court must then determine who is most appropriate to be guardian. In deciding who shall be guardian, the court is required to appoint the most suitable and willing person to serve. IC 29-3-5-4. Consideration should be given to the blood relationship between the minor and the proposed guardian, but the court is not required to

prefer or appoint a blood relative. See **In re Guardianship of Stackhouse**, 538 N.E. 2d 990, 992 (Ind. Ct. App. 1989) (once the search for a custodian extends beyond child's natural parents, a host of other factors, including personal attributes of the proposed guardian, become relevant in determining the person most suitable to discharge obligations of that office). The court may consider the proposed guardian's relationship with the minor, and the minor's best interest. IC29-3-5-4. The court shall also consider any request made in a will and any request by a minor who is at least fourteen years of age. IC 29-3-5-4. IC 29-3-7-7, effective May 12, 2009, provides that a person may not be appointed, or serve as, a guardian if the person is a sexually violent predator as described in IC 35-38-1-7.5 or has been convicted of a specifically listed sex crime.<sup>4</sup>

In **In Re Guardianship of A.L.C.**, 902 N.E.2d 343 (Ind. Ct. App. 2009), the Court affirmed the trial court's award of guardianship of the child's person to Maternal Grandmother and Maternal Step-Grandfather and guardianship of the child's estate to Maternal Grandmother, Maternal Step-Grandfather and Maternal Grandfather. The Court held that Paternal Grandparents, who had intervened after the child's Maternal Grandparents were appointed temporary guardians of the child's person and estate, were bound by the temporary guardianship orders and could not challenge them on appeal because Paternal Grandparents did not have standing to challenge the temporary guardianship orders. *Id.* at 351. Despite having been served with the original Emergency Petition for Appointment of Temporary Guardians, Paternal Grandparents did not seek to intervene in the guardianship proceeding for over two months after the appointment of the temporary guardians. Paternal Grandparents were bound by the temporary guardianship orders because an intervenor is not permitted to relitigate matters already

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<sup>4</sup> IC 29-3-7-7, provides that a court may not appoint a person to serve as the guardian or permit a person to continue to serve as a guardian if the person: (1) is a sexually violent predator (as described in IC 35-38-1-7.5); (2) was at least eighteen (18) years of age at the time of the offense and was convicted of child molesting (IC 35-42-4-3) or sexual misconduct with a minor (IC 35-42-4-9) against a child less than sixteen (16) years of age: (A) by using or threatening the use of deadly force; (B) while armed with a deadly weapon; or (C) that resulted in serious bodily injury; or (3) was less than eighteen (18) years of age at the time of the offense and was convicted as an adult of: (A) an offense described in IC 35-42-4-1, IC 35-42-4-2, IC 35-42-4-3 as a Class A or Class B felony, IC 35-42-4-5(a)(1), IC 35-42-4-5(a)(2), IC 35-42-4-5(a)(3), IC 35-42-4-5(b)(1) as a Class A or Class B felony, IC 35-42-4-5(b)(2), or IC 35-42-4-5(b)(3) as a Class A or Class B felony; (B) an attempt or conspiracy to commit a crime listed in clause (A); or (C) a crime under the laws of another jurisdiction, including a military court, that is substantially equivalent to any of the offenses listed in clauses (A) and (B).

determined in the case. *Id.* With regard to the permanent guardianship, Paternal Grandparents were not “entitled” to be appointed co-guardians as a matter of law by virtue of Father’s Nomination requesting that they be appointed guardians of the child’s person and estate, because the best interest of the child is the overriding factor the trial court must consider when appointing a guardian. *Id.* at 353-355. Mother and Father had executed a paternity affidavit the day after the child was born out of wedlock on August 27, 2005. Prior to Mother’s death in a single-car accident on May 23, 2007: (1) Mother and Father had lived with the child in a house purchased by Paternal Grandparents; (2) Paternal Grandparents provided the couple with money; (3) Mother was addicted to alcohol; (4) Father had a criminal record and used illegal drugs; and (5) Paternal Grandparents, Maternal Grandmother, and Maternal Great Grandmother provided child care for the child. The trial court, among other things, granted temporary guardianship of the child and his estate to Maternal Grandfather and Step-Grandmother, granted permanent guardianship of the child’s person to Maternal Grandmother and Step-Grandfather, and ordered that they be joined by Maternal Grandfather as guardians of the child’s estate. Citing to IC 29-3-5-4(7) and IC 29-3-5-5(b), the Court found that, while Paternal Grandparents fell within one of the priority categories in IC 29-3-5-5(a) entitling them to priority *consideration* for appointment as the child’s guardian, that status did not entitle them to be appointed guardians, inasmuch as the best interest of the child is the overriding factor the trial court must consider when appointing a guardian (emphasis in opinion). *Id.* at 353-54. (IC 29-3-5-5(b) provides: “With respect to persons having equal priority, the court shall select the person it considers best qualified to serve as guardian. The court, acting in the best interest of the incapacitated person or minor, may pass over a person having priority and appoint a person having a lower priority or no priority under this section.” *Id.*

In appointing a guardian, the court may specify or limit the guardian’s powers. The guardian may be appointed to provide a home for the minor or to oversee and conserve the minor’s property, or both. *Effective July 1, 2011, a new statute, IC 29-3-8-9, provides that a probate or juvenile court may include in its order creating a guardianship the requirement that the minor must reside with the guardian until the guardianship is terminated. IC 29-3-8-9(a)(1). Effective July 1, 2011, the court may also include in its*

*order creating guardianship any terms and conditions that a parent must meet in order to seek modification or termination of the guardianship. IC 29-3-8-9(a)(2).* Separate individuals may be appointed to provide for the minor's physical needs (guardian of the person) and to manage the minor's income (guardian of the estate). The guardian may be required to report to the court regarding the minor's physical and mental condition. IC 29-3-8-1(a)(4). The guardian must file an inventory and an accounting regarding the minor's property with the court. IC 29-3-9-5; IC 29-3-9-6. The minor's property may be ordered to be placed in a restricted account, and the guardian may need to ask the court for permission to spend the minor's money for education, health care, or other special needs on an individual basis as each need arises. A guardian of a minor has all the responsibilities and authority of a parent and must become knowledgeable about the minor's capabilities, disabilities, needs, and physical and mental health. IC 29-3-8-1. Some health insurance plans require guardianship of the minor by the insured person in order to have the minor covered by the guardian's health insurance. Guardians are not required to use their own funds to care for the minor. Guardians may apply for Social Security or other benefits for the minor. Guardianship will not always make a guardian eligible for government financial assistance such as Temporary Assistance to Needy Families (TANF) benefits for the child. The guardian will also be required to be legally related to the child in the degree of relationship required by TANF rules.

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

*Effective July 1, 2011, IC 29-3-8-9 was added to the guardianship code. Among other provisions, it requires the court to notify DCS of the filing of a petition and any hearings related to a petition to modify, terminate, or remove a guardian when the minor was the subject of a CHINS proceeding or participating in an informal adjustment program. IC 29-3-8-9(d). The court must also notify DCS if the minor was the subject of*

*a CHINS petition or participating in an informal adjustment program and the guardian later dies or petitions to resign. IC 29-3-8-9(d).*

The Court may remove a guardian on its own motion or on the petition of the minor or any person interested in the guardianship (which includes the minor's parents and relatives), after notice and hearing. Also, the appointed guardian may resign. IC 29-3-12-4(a). Reasons for removing a guardian include incapacity or unsuitability of the guardian, failure to perform legal duties or not following court orders, or moving outside the state. IC 29-3-12-4(a); IC 29-1-10-6. See also **Schwartz v. Schwartz**, 773 N.E. 2d 348, 352 (Ind. Ct. App. 2002) (guardian of incapacitated adult's estate removed due to mismanagement of assets, failure to file quarterly accountings, and failure to follow court orders). A removal proceeding is initiated by the filing of a verified petition for removal with the court in which the guardian was appointed. A copy of the removal petition and notice of the hearing date should be served on the guardian and on any other person the court directs. See IC 29-1-1-12 through IC 29-1-1-14 and IC 29-3-6-1(b). A guardian who is removed shall give a final accounting to the court. IC 29-3-12-4(a). The court may appoint a successor guardian when the original guardian is removed. IC 29-3-12-4(b). IC 29-3-3-4(b) provides that, if the court finds that that a previously appointed guardian is not effectively performing fiduciary duties and the welfare of the minor requires immediate action, the court may suspend the authority of the previously appointed guardian. The court may appoint a temporary guardian for any period fixed by the court. The temporary guardian has only the powers ordered by the court. The court shall order only those powers that are necessary to prevent immediate and substantial injury or loss to the minor's person or property. IC 29-3-3-4(c).

The court may terminate the guardianship if it is no longer necessary, even if the guardian remains suitable. IC 29-3-12-1(c)(4). Termination of a guardianship is initiated by the filing of a verified petition for termination with the court. The guardian and other persons whom the court directs should receive a copy of the petition. See IC 29-1-1-12 through IC 29-1-1-14 and IC 29-3-6-1(b). *IC 29-3-8-9 was added to the guardianship code effective July 1, 2011. It states that a juvenile or probate court which creates a minor's guardianship may include in its order any terms and conditions that a parent must meet in order to seek modification or termination of the guardianship. IC 29-3-8-*

9(a)(2). *Except as provided by IC 29-3-12, the Court may modify or terminate the guardianship only if the parent complies with the terms and conditions and proves the parent's current fitness to assume all parental obligations by a preponderance of the evidence. IC 29-3-8-9(b).*

*The new statute also creates specific requirements for Department of Child Services (DCS) involvement in guardianship cases only when the minor was the subject of a CHINS case or is participating in a program of informal adjustment. IC 29-3-8-9(c) states that, if the petition for modification, resignation, or removal of the guardian or termination of the guardianship is filed before the parent complies with the court ordered terms and conditions described in IC 29-3-8-9(a)(2), the court shall refer the petition to DCS for DCS to determine the placement of the child in accordance with the best interests of the child. IC 29-3-8-9(e) states that the court shall do the following at a hearing on a petition for modification, resignation (including resignation due to the guardian's death), or removal of guardian or termination of guardianship: (1) consider the position of DCS; (2) if requested by DCS, allow DCS to present evidence on whether the guardianship should be modified or terminated; the parent's fitness to provide care and supervision of the minor at the time of the hearing; the appropriate care and placement of the child; and the child's best interests. The powers of the guardian cease upon termination of the guardianship except for payment of claims and expenses approved by the court and the exercise of other fiduciary powers, such as delivery of the minor's property to the person having custody of the minor or as the court directs. IC 29-3-12-1(d). See below at part VI for a discussion of Indiana case law regarding the legal standard for the termination of guardianships or other third party custody situations.*

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

There is no statutory provision for a GAL report in guardianship proceedings. The Court will probably request a report or the GAL may wish to file a report. The

report should be filed and distributed ten days in advance, following the procedure outlined for the dissolution reports at IC 31-17-2-12. There is no statutory provision that allows hearsay evidence to be considered by the Court if it is included in a GAL guardianship report. The Court may choose to apply the dissolution statute and allow the Guardian ad Litem guardianship report to be entered into evidence. (But see **In Re Guardianship of Hickman**, 805 N.E.2d 808 (Ind. Ct. App. 2004), *trans. denied*, for a general discussion of the admissibility of a GAL report in guardianship proceedings.) The GAL may include reliable hearsay in the guardianship report, and the source of the hearsay should be noted, such as “according to therapist Ms. Jones” or “according to teacher Mr. Smith.” The GAL guardianship report should include a recommendation as to whether the guardianship should be granted or denied, whether it should be temporary (for less than 60 days) or permanent, the type and amount of parenting time which should be ordered, and whether a review hearing should be set. The term “custody” is not usually used in guardianship proceedings.

#### **IV. What are the case law standards which the court must use in determining whether to appoint a third party custodian?**

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

First, it is presumed it will be in the best interests of the child to be placed in the custody of the natural parent. Secondly, to rebut this presumption it must be shown by the attacking party that there is, (a) unfitness, (b) long acquiescence, or (c) voluntary relinquishment such that the affections of the child and third party have become so interwoven that to sever them would seriously mar and endanger the future happiness of the child. The third step is that upon a showing of

one of these above three factors, then it will be in the best interests of the child to be placed with the third party.

Hendrickson at 380.

The Supreme Court held in B.H.:

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

B.H. at 287. Regarding the Hendrickson considerations, the Supreme Court stated: “In a proceeding to determine whether to place a child with a person other than the natural parent, evidence establishing the natural parent’s unfitness or acquiescence, or demonstrating that a strong emotional bond has formed between the child and the third person, would of course be important, but the trial court is not limited to these criteria.”

B.H. at 287. The Court reasoned, “The issue is not merely the ‘fault’ of the natural parent. Rather, it is whether the important and strong presumption that a child’s interests are best served by placement with the natural parent is clearly and convincingly overcome by evidence proving that the child’s best interests are substantially and significantly served by placement with another person.” Id. The Court also held that “this determination falls within the sound discretion of our trial courts, and their judgments must be afforded deferential review.” Id. But the Court noted that, “A generalized finding that a placement other than with the natural parent is in the child’s best interests, however, will not be adequate to support such determination, and detailed and specific findings are required.” Id.

B.H. involved Father’s appeal of the trial court’s appointment of the children’s Stepfather as the children’s guardian following the death of the children’s Mother. The Court of Appeals, in In Re Guardianship of B.H., 730 N.E.2d 743 (Ind. Ct. App. 2000), had reversed and remanded, holding that the trial court’s findings that Father was unfit, that he had abandoned his children, and that it was in the children's best interests to

remain in the custody of Stepfather were not supported by sufficient evidence to rebut the presumption of Father's right to custody. The Supreme Court, however, granted transfer, vacated 730 N.E.2d 743, and affirmed the trial court's guardianship appointment. The Supreme Court found the many factors given in the trial court's findings of fact and conclusions of law sufficient to grant Stepfather's guardianship petition. The listed factors were: (1) the estranged relationship between the children and Father and his lack of any significant interaction with them since his 1991 separation from Mother; (2) the failure of Father to stay current in paying his child support for the children; (3) instances of abuse before the separation and Father's violent confrontation with the children's maternal aunt after the separation; (4) Father's history of excessive drinking that resulted in an arrest for driving while intoxicated in 1998 and a citation for public intoxication after he moved to Houston, Texas in 1996; (5) Stepfather's role as the only psychological father the children had known since December 1991; (6) the children's connections with the community and the proximity of extended family provided by placement with Stepfather; (7) the teenaged children's strong desire to remain in Indiana with Stepfather; (8) the recommendations of the Court Appointed Special Advocate report and the children's psychotherapist that it was in the best interests of the children to remain in Indiana with Stepfather; and (9) Stepfather's role as the primary source of financial support for the children for the previous four years. B.H., 770 N.E.2d at 288.

Chief Justice Shepard concurred in the result of the B.H. opinion, but wrote a separate opinion in which Justice Sullivan concurred. The Chief Justice embraced the objective of "requiring a rather considerable showing" to overcome the parental presumption, but did not join the majority opinion because "I think what the Court ends up saying about the required showing actually weakens the parental presumption as it has usually been applied" over the last five generations. Id. at 289.

In In Re Marriage of Huss, 888 N.E.2d 1238 (Ind. 2008), the Indiana Supreme Court affirmed the trial court's dissolution and custody judgment granting custody of all four of Wife's children to Husband, including the youngest child who was not the

biological child of Husband.<sup>5</sup> 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 child's 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 granted the divorce and, among other things, awarded custody of all four children to Husband. Wife appealed.

The Huss Court found that the evidence was not insufficient to support the dissolution trial court's award of custody to Husband, a "non-parent third party," rather than to Wife as the child's biological mother. Id. at 1248. In making this determination, the Court noted the following facts: (1) during the marriage, Husband was at home evenings and spent time helping the children with their homework; (2) Husband prepared meals and shared doing the laundry and shopping with Wife; (3) during the almost one year period following the provisional order granting him custody, Husband was primary caretaker for all four children; (4) Husband fully accepted the subject child as his own, and treated all four children equally; (5) Husband regularly made several trips to school each day to facilitate the children's participation in extracurricular activities; (6) considerable testimony regarding the close relationship between the four children and both parties' extended families nearby; (7) Wife's mother's testimony that what the children needed was stability, and they were getting that from being with Husband; (8) witnesses' testimony about Wife's plans to move with the subject child to Louisiana, and how this would negatively impact the child's stability and family relationships; and (9) the dissolution trial court interviewed the children in chambers. Id. at 1247. The Court also observed that it could not reweigh the evidence as Wife urged. Id. at 1248.

**King v. S.B.**, 837 N.E.2d 965, 967 (Ind. 2005) (Dickson, J., dissenting) was an appeal

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<sup>5</sup> The Court summarily affirmed the remainder of the Court of Appeals determination at Huss v. Huss, 870 N.E.2d 588 (Ind. Ct. App. 2007) (unpublished and noncitable), *trans. granted* 878 N.E.2d 218 (Ind. 2007).

from a Trial Rule 12(B)(6) dismissal of a declaratory judgment request filed by Mother's former domestic partner. The declaratory judgment request sought a judicial declaration that the domestic partner was entitled to parenting time rights, child support obligations, and certain other parental rights and responsibilities with respect to Mother's child who Mother and the domestic partner jointly decided to bear and raise together, and who was conceived by artificial insemination using semen donated by the domestic partner's brother. The Court reversed and remanded, holding that at least some of the relief sought in the case fell within that which In Re Guardianship of B.H., 770 N.E.2d 283 (Ind. 2002) "grants persons other than natural parents to seek and Indiana trial courts, where appropriate, discretion to award".

In Parks v. Grube, 934 N.E.2d 111 (Ind. Ct. App. 2010), the Court found there was sufficient evidence to support the trial court's conclusion that Grandparents proved by clear and convincing evidence that the children's best interests were served by placement with Grandparents. The Court affirmed the trial court's order granting custody of three children to Grandparents after the custodial father's death. Mother argued on appeal that Grandparents failed to provide that she is unfit, that the trial court made erroneous findings on her alcohol use, and that the trial court relied solely on the wishes of the two older children. Citing In Re Guardianship of B.H., 770 N.E.2d 283, 288 (Ind. 2002), the Court opined that evidence of parental unfitness is important, but it is not the only criteria that a trial court may consider. Parks at 115. The Court said that, accordingly, Grandparents were not required to prove that Mother is unfit. Id. The Court noted the following evidence in support of the trial court's order: (1) Mother's two convictions for Operating a Vehicle While Intoxicated; (2) the children's testimony that Mother was intoxicated the day their father died; (3) one child's testimony about finding a beer can in Mother's purse and a bottle of vodka under Mother's trailer; (4) evidence from the children's journals that Mother yells at them, calls them names, and tells them she does not want to see them again when Mother is intoxicated; (5) testimony from Mother's boyfriend that Mother was usually intoxicated when she lived with him in 2007; (6) testimony from Mother's former friend and neighbor that the friend cared for the children when Mother would "come home drunk with a stranger" during Mother's parenting time with the children. Id. at 116.

In **In Re Paternity of L.J.S.**, 923 N.E.2d 458 (Ind. Ct. App. 2010), *trans. denied*, the Court reversed the trial court's order awarding custody of the three-year-old child to Grandparents. The Court opined that the trial court's findings did not clearly and convincingly overcome the important and strong constitutional presumption that the child should be placed in Father's custody. *Id.* at 465. The Court considered the trial court's findings, which included, inter alia: (1) Father was temporarily delinquent in child support; (2) the child has asthma and should not be exposed to tobacco smoke; (3) the child began living with Grandparents at birth and continues to reside with them; (4) the child has a special bond with Grandparents; (5) Mother's opinion that it would be in the child's best interests to live with Grandparents. The Court opined that these findings say nothing about Father's fitness as a parent nor do they suggest that Father abandoned the child, relinquished his rights, or otherwise abdicated his authority and were inadequate to clearly and convincingly overcome the important and strong presumption that the child's interests are best served by placement with Father. *Id.* at 464. The Court also commented on the following trial court findings which pertain more to Father: (1) although Father did not have much contact with the child for the first nine months, Father testified that he refrained from visiting because he did not know the child was his son; (2) Father's employment changes did not reflect on Father's unfitness or instability because the employment changes were conscious changes to increase his salary and to enable him to live closer to the child; (3) the facts that Father works in Kentucky but lives three hours away in Indiana and that the child's visitation with Father requires extensive driving show that Father wanted to see the child enough to travel great distances; (4) although Father smokes, he does not smoke in the house or car when the child is present and there is no finding or showing that Father's smoking has exposed the child to harm; (5) Father's failure to attend transparenting classes and to timely reimburse Mother for the child's birth do not, as the trial court concludes, establish Father's disregard for the child's welfare. *Id.* at 464-65. The Court said that, while it appears that Grandparents have provided a stable and good home for the child, that was not the issue to be determined by the trial court. *Id.* at 465. Rather, the issue was whether the important and strong presumption that the child's interests are best served by placement with Father

were clearly and convincingly overcome by evidence proving that the child's best interests are substantially and significantly served by placement with Grandparents. *Id.*

In **In Re Paternity of T.P.**, 920 N.E.2d 726 (Ind. Ct. App. 2010), *trans. denied*, the Court affirmed the trial court's denial of intervenor Caretakers' petition for custody of the child, holding that Caretakers did not present clear and convincing evidence to overcome the parental presumption. *Id.* at 732-34. The Court observed: (1) the trial court concluded Mother had permitted liberal visitation by Caretakers but had not acquiesced in their having custody of the child; and (2) the fact that the child and Caretakers have spent a great deal of time together and have a strong bond does not negate the finding that Mother and the child have similarly spent a great deal of time together and maintain a stronger bond. *Id.* at 732. The Court also found no clear error in the trial court's declining to use the factor of Mother's unfitness due to allegedly improper influences of drug use, sexual activity, and crime in Mother's neighborhood. *Id.* at 732-33. The Court noted the following evidence in support of the trial court's determination regarding these issues: (1) the child's difficulties in school were attributed to her possible learning disability and the late start to her school year rather than to alleged dangerous influences at her home; (2) there was no evidence that Mother's present behavior included ongoing drug use following Mother's summer of 2008 relapse; (3) sexual allegations were apparently deemed unsubstantiated by Child Protection Services; (4) medical evaluations did not raise concerns regarding Mother's care of the child; (5) Mother had taken steps to ensure the child's safety, including walking the child to and from school; (6) the child had adjusted to her community, and no community was immune from crime; (7) the child denied that Mother's drug use and sexual activity had occurred in front of said child. *Id.* The Court also found that Caretakers had not demonstrated clear error in the trial court's conclusion that Mother's housing was adequate and that Mother's frequent moves demonstrated her ability to address and resolve problems. *Id.* at 734. The Court noted the following evidence in support of the trial court's conclusion that Mother's history of unstable housing was largely justified and that her housing situation as of March 2009 was fully adequate: (1) Mother's testimony that all of her homes had heat, working appliances, and, with the exception of one month-long residence, running water, and that the child was never required to sleep on the floor; (2) by the time of the February 12,

2009, hearing, the Guardian ad Litem reported that Mother's housing conditions were adequate; (3) while the pipes in Mother's residence apparently later burst, Mother found new housing which was fully adequate. *Id.* at 733-34.

In **A.J.L. v. D.A.L.**, 912 N.E.2d 866 (Ind. Ct. App. 2009), the Court affirmed the trial court's dissolution order that awarded custody of Father's and Mother's three children to Aunt and Uncle. Mother contended the evidence was insufficient to support the custody order, arguing that Aunt and Uncle have not rebutted the presumption that favors awarding custody of children to the natural parent. The Court disagreed with Mother's argument, noting the following evidence: (1) Mother's voluntary relinquishment of the children to the care of the Aunt and Uncle for fifty percent of the time from January 2006 through February 2007, sixty to seventy percent of the time from February 2007 to February 2008, and full-time since February 2008; (2) Mother lacked a stable residence, had no valid driver's license, and was unable to provide adequate support or care for the children; (3) Aunt and Uncle provided for the care and needs of the children without financial contribution from Mother; (4) the children are bonded emotionally to Aunt and Uncle; (5) the oldest child was a lot happier and his behavior had improved "100 percent" since living with Aunt and Uncle. *Id.* at 872-874, n.5.

In **Christian v. Durm**, 866 N.E.2d 826 (Ind. Ct. App. 2007), *trans. denied*, the Court affirmed the trial court's award of custody of the child to the third party custodian (Custodian) rather than to Parents. Custodian petitioned to intervene in Parents' dissolution proceeding and sought custody of the child. Parents moved for dismissal of the dissolution petition and the dissolution petition was dismissed. Parents asserted that custody was not properly at issue because the dissolution petition had been dismissed. The trial court proceeded with the custody hearing; however, and denied Parents' motions for dismissal of the custody petition. On appeal, the Court observed that, as an intervenor, Custodian enjoyed equal standing with the original parties (Parents), and had a pending claim to pursue. In finding that there was clear and convincing evidence that the child's best interests were substantially served by placement with Custodian, the Court noted: (1) the conditions of Parents' home from which the child was removed were deplorable; (2) the child was underweight, smelled, and suffered from a bad diaper rash; (3) Parents did not have full-time employment; (4) Father's efforts to obtain employment

were hindered by the lack of a vehicle; (5) Parents had chronic problems paying their rent and, prior to the hearing, their landlord had given them notice to vacate their apartment; (6) Mother was taking court-ordered anger management classes, but failed to control her son's aggression against the child; and (7) in Custodian's home, the child thrived, gained weight and attained age-appropriate motor skills. *Id.* at 830. The Court also noted that the trial court was not required, as Father and Mother suggested, to make a specific finding of unfitness or abandonment. *Id.*

**Blasius v. Wilhoff**, 863 N.E.2d 1223 (Ind. Ct. App. 2007), *trans. denied*, originated with the filing of an adoption petition. Mother had voluntarily terminated her parental rights, but Father established paternity and contested the adoption petition. The trial court dismissed the adoption petition but, following a custody hearing, issued special findings of fact and conclusions of law granting custody of the child to Adoption Petitioners as third party custodians. The Court noted, *inter alia*, the following evidence which supported the trial court's order: (1) the child's physical development was good, her immunizations were current, and she was flourishing in Adoption Petitioners' care; (2) the four-year-old child had lived with Adoption Petitioners since birth and knows them as her primary parents; (3) Father's drug usage, his criminal history, his lack of financial stability, and his maintenance of a lifestyle that does not provide a healthy environment for a small female child; (4) Marijuana, cocaine, and stolen property were secreted at a residence owned and regularly visited by Father. *Id.* at 1226-27. On appeal, the Court held that inasmuch as (1) the evidence supported the trial court's findings, and the trial court's findings provided support for its judgment to grant custody of the child to Adoption Petitioners; (2) the trial court applied the standard of review set out in In Re Guardianship of B.H., 770 N.E.2d 283, 287 (Ind. 2002); and (3) the trial court was clearly convinced that placement with the third party custodians represented a substantial and significant advantage to the child, "according the trial court the appropriate deference, as we must, we cannot conclude its findings are clearly erroneous or that its judgment is against the logic and effect of the evidence." Blasius at 1231.

In **Truelove v. Truelove**, 855 N.E.2d 311 (Ind. Ct. App. 2006), the Court affirmed the dissolution trial court's award of third party custody of the two children of the marriage to Grandparents. Mother challenged the custody award on appeal, arguing

that the trial court was required to find that Grandparents were de facto custodians of the children, Mother was unfit, or Mother had long acquiesced to Grandparents' custody of the children, and the evidence did not support any of these particular findings. The Court noted that, although the trial court appropriately refrained from labeling Mother an "unfit" parent, there was clear and convincing evidence that the children's best interests were substantially served by placement with the paternal grandparents. *Id.* at 315. The Court cited to the criteria of In re Guardianship of B.H., 770 N.E.2d 283, 287 (Ind. 2002) and noted that the trial court's findings addressed (1) the children's long-term placement with Grandparents; (2) Parents' lack of financial resources and payment of child support; and (3) Mother's sporadic involvement in the children's day-to-day lives. The Court also discussed the evidence supporting these findings. *Id.* at 314-15.

The Court in Allen v. Proksch, 832 N.E.2d 1080, 1095-97, (Ind. Ct. App. 2005) affirmed the trial court's order granting custody of the child to Maternal Grandmother as third party custodian. It applied the holdings of In Re Guardianship of B.H., 770 N.E.2d 283 (Ind. 2002) and found that the trial court's findings provided ample support for its order in granting Grandmother custody of the child. In doing so, the Court cited the following trial court findings: (1) Father's "sporadic" contact with the child from the time of the marriage dissolution when the child was less than one year old until the time when the child was approximately five years old; (2) Father's act of telling Mother that the child should not stay with him during the summer of 2001; (3) Father's abandonment of any personal contact with the child in the summer of 2001 until 2003, when Mother petitioned the trial court to modify child support; (4) Father's minimal effort to contact Mother or the child; (5) allegations that Father had hit the child when the child had stayed with him prior to 2001; (6) the child's special behavioral and emotional needs and his need to be in a stable environment; (7) Grandmother's ability to provide the child with stability and her involvement with the child's mental health treatment and school activities; and (8) the child's attachment to Grandmother and his desire to remain with Grandmother. The Court also noted these facts: (1) the guardian ad litem recommended that, despite the presumption in favor of the natural parent, custody of the child should remain with Grandmother with a future goal of reunification with Father; (2) the child's therapist from Riley Hospital testified he had concerns about the child's mental health

declining if the child had an abrupt change in his living conditions and that it would be better to have the child ease into a relationship with Father; (3) the child's therapist also testified that it was important for the child to have a stable environment and that Grandmother had been a stable influence, but that Father did not have stability with the child; and (4) despite his recommendation that Father should have custody, the psychologist hired by Father testified that Grandmother had provided stability to the child, had "possibly even saved his life[,]" and that an abrupt change of custody of the child from Grandmother to Father would cause "more chaos" for the child and "would precipitate more damages."

In **Hinkley v. Chapman**, 817 N.E.2d 1288, 1293-94 (Ind. Ct. App. 2004), the Court (1) cited the standard in **In Re Guardianship of B.H.**, 770 N.E.2d 283 (Ind. 2002); (2) held that based upon the facts delineated by the trial court, the trial court had concluded that the parties seeking guardianship, Half-sister and her Husband, had met their burden; (3) determined that the trial court could have concluded that the judgment was established by clear and convincing evidence; and (4) therefore, held that the trial court did not abuse its discretion in appointing Half-sister and her Husband as the child's guardians. The Court noted that the trial court had found (1) that the child, although ten years old, was reading at a first grade level and performing mathematics at a third grade level; (2) citing the psychological evaluation, that the child's developmental lag was not the result of a learning disability, but of Mother's failure to educate him using age-appropriate materials; (3) that Mother's recent attempts to seek help for the child had been driven by Guardian's decision to intervene; (4) that Mother's intention to enroll the child in public school in the future was insincere; and (5) that Half-sister and her Husband had "legitimate concern for [the child]."

In **Nunn v. Nunn**, 791 N.E.2d 779 (Ind. Ct. App. 2003), the Court found that the trial court had jurisdiction to decide the custody dispute between Wife and Husband, who was not the child's father, and remanded it for resolution. It cited **In Re Guardianship of L.L.**, 745 N.E.2d 222, 230-31 (Ind. Ct. App. 2001), *trans. denied*, for the propositions that, in cases involving a custody dispute between a natural parent and a third party, there is a presumption that the natural parent should have custody of the child, and the third party bears the burden of overcoming this presumption by clear and cogent evidence.

The Court remanded this issue to the trial court for consideration under the framework announced in L.L. Evidence the Court found tending to rebut the parental presumption included: (1) Husband did not know the child was not his biological child until the dissolution proceeding; (2) Husband had been a father figure to the child her entire life; and (3) Husband and the child had developed a deep father-daughter bond. Id. at 784-85. The Court also noted Husband's testimony that he was instrumental in the child's daily care and financial support. Id. at 785.

Other third party custody cases are discussed below at part VI. regarding termination of guardianships and third party custodianships.

#### **V. What information should be included in the court order which appoints a guardian or third party custodian?**

When a guardianship or third party custodianship is being considered by the court, attorneys for the parties should submit case specific proposed orders with findings of fact and conclusions of law. *Effective July 1, 2011, the order creating the guardianship may include: (1) a requirement that the minor must reside with the guardian until the guardianship is terminated or modified and (2) any terms and conditions that a parent must meet in order to seek modification or termination of the guardianship. IC 29-3-8-9(a).* The proposed order should set forth and support the specific reasons indicating whether the parental presumption has been or has not been overcome. The order should also address in what ways the child's best interests are substantially and significantly served by placement with another person and how placement with the third party "represents a substantial and significant advantage to the child." **In Re Guardianship of B.H.**, 770 N.E.2d 283, 287 (Ind. 2002). A generalized finding that placement other than with the natural parent is in the child's best interests will not be adequate to support such determination, and detailed and specific findings will be required. Id. In **In Re Custody of J.V.**, 913 N.E.2d 207 (Ind. Ct. App. 2009), the Court remanded the case to the trial court to enter the required best interests findings to support its award of the child's custody to Grandmother. The Court observed that the evidence supported the trial court's determination that Grandmother is the child's "de facto custodian", but the trial court was also required to consider whether awarding

custody of the child to Grandmother was in the child's best interests. The Court opined that "[s]uch findings are particularly important in this case given the significant burden a third party must overcome to rebut the presumption that the natural parent should have custody of his or her child." *Id.* at 211. See also **Hinkley v. Chapman**, 817 N.E. 2d 1288, 1294 (Ind. Ct. App. 2004), in which the Court affirmed the trial court's order entering extensive findings in support of its conclusion that appointing guardians was in the child's best interest. Although the trial court did not make a specific finding that the guardianship appointment was "necessary as a means of providing care and supervision of the physical person or property of the ... minor," the Court held that such a finding was implicit in the trial court's extensive findings in support of its conclusion that the appointment of the guardians was in the child's best interest. Thus, the statutory requirement for such a finding of necessity was met. *Id.* at 1291.

There is also a need for detailed and specific findings by the trial court when it denies a petition to terminate guardianship. See **In Re Guardianship of A.R.S.**, 816 N.E. 2d 1160 (Ind. Ct. App. 2004) (discussed below at part VI.) in which the court's decision to deny a petition to terminate guardianship was reversed and remanded. The Court stated that special findings are especially important as a means of alerting parents of the reasons why their children are not being returned to their custody, thereby effectively putting parents on notice as to what steps they must take before their children will be returned to them. *Id.* at 1162.

## **VI. What are the case law standards the court must use in determining whether to terminate the guardianship or modify custody from the third party back to a parent?**<sup>6</sup>

Current case law holds that, in deciding whether to terminate a guardianship or modify a third party custodianship, the clear and convincing evidence standard must be used and detailed and specific findings, rather than a generalized finding, are required. The Supreme Court's opinion in **In Re Guardianship of B.H.**, 770 N.E.2d 283 (Ind. 2002), is very relevant to cases involving the termination of guardianships and third party

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<sup>6</sup> See above at part III., The Guardianship Statutes – Title 29, regarding the statutory provisions pertaining to removal of a guardian and termination of a guardianship.

custody, as well as to those involving their initial establishment. See the in-depth discussion of B.H. above at part IV. See also part III for information on IC 29-3-8-9, a new statute effective July 1, 2011, concerning termination of guardianship.

In its March 25, 2009 decision in K.I. ex rel. J.I. v. J.H., 903 N.E.2d 453 (Ind. 2009), the Supreme Court spoke directly to the standard to be applied in determining whether to modify custody from the guardian or third party custodian back to a parent. The K.I. Court held that, when ruling on a parent's petition to modify custody of a child who is already in the custody of a third party, (1) although in a very technical sense, a natural parent seeking to modify custody has the burden of establishing the statutory requirements for modification by showing modification is in the child's best interest, and that there has been a substantial change in one or more of the enumerated factors, as a practical matter, this burden is minimal; and (2) once this minimal burden is met, the third party must prove by clear and convincing evidence "that the child's best interests are substantially and significantly served by placement with another person." In Re Guardianship of B.H., 770 N.E.2d 283, 287 (Ind. 2002). If the third party carries this burden, then custody of the child remains in the third party; otherwise, custody must be modified in favor of the child's natural parent. K.I. at 460-61

In K.I., the child was born out of wedlock on November 28, 2001. At the time the parties' relationship ended, Father was unaware that Mother was pregnant. About six weeks after the child's birth, Mother left the child in the custody of maternal grandmother (Grandmother) who, with her husband, filed for guardianship of the child which was granted September 17, 2002. Sometime in September or October of 2002, during a chance encounter between Mother and Father, Mother showed Father a picture of the child and told Father he might be the child's biological father. On March 12, 2004, acting as next friend of the child, Grandmother filed a petition to establish paternity in Father and sought an order also awarding custody to Grandmother, and directing Father to pay child support and reimbursement of medical and hospital expenses. Following a September 13, 2004 hearing, based on genetic testing results, the trial court entered an order declaring Father to be the child's biological father and memorializing the parties' agreement on the other issues which included leaving the child in Grandmother's custody. Over the next eighteen months, Father spent a significant amount of time with

the child. On August 29, 2006, the State on behalf of the Grandmother filed a motion to modify child support. On September 25, 2006, Father filed a Petition for Change of Custody. After a hearing, on June 15, 2007, the trial court entered an order awarding custody of the child to Father, among other things. In her appeal of the custody order, Grandmother relied on In Re Paternity of Z.T.H., 839 N.E.2d 246 (Ind. Ct. App. 2005), which held that in addressing a parent's request to modify the long-term permanent custody of a third party, a burden shifting approach is the most appropriate way to protect parental rights and the best interests of the child. In Z.T.H. the Court said that: (1) first, the third party must rebut the parental presumption with clear and convincing evidence establishing the natural parent's unfitness or acquiescence, or demonstrating that a strong emotional bond has formed between the child and the third party; and (2) if the third party succeeds, then the third party is essentially in the same position as any custodial parent objecting to the modification of custody, and the parent seeking to modify custody must establish the statutory requirements for modification by showing that modification is in the child's best interests and that there has been a substantial change in one or more of the factors enumerated at IC 31-14-13-2 and, if applicable, IC 31-14-13-2.5). Z.T.H. at 252-53.

In K.I., the Supreme Court discussed In Re Paternity of Z.T.H., 839 N.E.2d 246 (Ind. Ct. App. 2005) and explicitly disapproved the Z.T.H. court's conclusion that, where a parent requests to modify a third party's custody, "a burden shifting approach is the most appropriate way to protect parental rights and the best interests of the child." K.I. at 459. In K.I., the Court saw the central issues as (1) what standard a trial court should apply when ruling on a parent's petition to modify custody of a child who is already in the custody of a third party, and (2) what role, if any, the presumption in favor of the natural parent plays in a modification proceeding. The Court explained that: (1) the distinctions between the statutory factors required to obtain initial custody and those required for a subsequent custody modification are not significant enough to justify substantially different approaches in resolving custody disputes; (2) both require consideration of certain relevant factors; (3) importantly, Indiana courts have long held that even when a parent initiates an action to reobtain custody of a child who has been in the custody of another, the burden of proof does not shift to the parent, rather the burden

of proof is always on the third party; (4) a burden shifting regime that places the third party and the parent on a level playing field, as does the one in Z.T.H., is inconsistent with this State's long standing precedent; and (5) here, even though Father never had custody in the first place, he is the child's natural parent and the underlying rationale is the same. K.I. at 460 (citations omitted). The Court further noted that, even though, in accordance with IC 31-14-13-6, a party seeking a change of custody must persuade the trial court that modification is in the best interests of the child and that there is a substantial change in one or more of the factors that the court may consider "under section 2 and, if applicable, section 2.5 of this chapter," (1) these are modest requirements where the party seeking to modify custody is the natural parent of a child who is in the custody of a third party; (2) inasmuch as, in accordance with B.H. at 287, the parent comes to the table with a "strong presumption that a child's interests are best served by placement with the natural parent" the first statutory requirement is met from the outset; and (3) because a substantial change in any one of the statutory factors will suffice, "the interaction and interrelationship of the child with ... the child's parents" – one of the grounds on which the trial court relied in this case – satisfies the second statutory requirement. K.I. at 460.

In In Re M.K., 867 N.E.2d 271 (Ind. Ct. App. 2007), the Court reversed and remanded the trial court's denial of Mother's petition to terminate the guardianship of her two children. Contrary to the trial court, on appeal the Court found that Guardians had not met their burden of rebutting the presumption in favor of Mother obtaining custody of her daughter: (1) there was absolutely no indication that, at the time of the hearing, Mother was an unfit parent; (2) Mother did not voluntarily abandon her daughters for any considerable length of time; and (3) there were no compelling, real, or permanent interests of the children that would be best served by their remaining in the custody of the Guardians. Id. at 275. In support of its finding, the Court noted the following facts: (1) Mother left the children with Guardians (maternal aunt and uncle) in 2002 because of her depression and substance abuse; (2) the aunt and uncle were appointed the children's Guardians in August 2002; (3) Mother has since completed two drug and alcohol recovery programs and has been sober since January 2003; (4) Mother attends four to seven AA or NA meetings per week, leads recovery groups, and sponsors other members;

(5) Mother continues to see a therapist regularly and takes medication for her depression; (6) Mother receives Social Security Disability benefits and will receive child support from the children's father; (7) Mother has been in a stable relationship for four years and lives in a house with room for the children; (8) Mother kept in regular contact with the children during the course of their guardianship; (9) Mother speaks to the children at least three times a week, and sometimes daily; and (10) the children have spent summers and holidays with Mother. Id.

The Court in **In Re Guardianship of J.K.**, 862 N.E.2d 686 (Ind. Ct. App. 2007) (Crone, J., dissenting) affirmed the termination of the guardianship of the child. The Court held that the trial court's termination of the guardianship was not clearly erroneous, where (1) the trial court concluded that the circumstances warranting the guardianship had changed and the guardianship should now be terminated; (2) the Court held it could not say that Guardians proved by clear and convincing evidence that the guardianship should continue; (3) the evidence of the current fitness of Parents was conflicting; and (4) the Court could not reweigh the evidence and judge the witnesses' credibility. Id. at 693. The Court noted that, here, even though Parents filed the petition to terminate the guardianship, Guardians had the burden of proving the requirements set forth by the Indiana Supreme Court in **In Re Guardianship of B.H.**, 770 N.E.2d 283 (Ind. 2002). **J.K.** at 692-93. The evidence produced at the hearing revealed some changes since the guardianship hearing: (1) Mother was now working and nearing the end of probation; (2) Father had qualified for some type of disability and was receiving disability payments; (3) Parents now had their own apartment; (4) Parents' divorce proceedings had been dismissed; (5) the criminal cases and protective order against Father were dismissed; and (6) there is no evidence that drug issues have still been a problem. Id. at 689-690. On the other hand: (1) Parents were behind in their rent payments; (2) they could not afford a telephone; (3) they had been threatened and Father had been assaulted by a person involved in his prior criminal cases; and (4) Mother had lied to the welfare department to improperly receive benefits, and it was unknown if criminal charges would be filed as a result. Id. at 693.

In **In Re Guardianship of A.R.S.**, 816 N.E.2d 1160 (Ind. Ct. App. 2004) (Crone, J., dissenting), the Court reversed and remanded the trial court's denial of

Mother's petition to terminate the guardianship of her two children by Maternal Grandfather and Step-grandmother. In so doing, the Court held that a generalized finding that a placement other than with the natural parent is in a child's best interests will not be adequate to support such determination, and detailed and specific findings are required. Id. at 1162. Further, the Court reversed because, absent any findings and in light of confusion at the trial regarding what standard of review to apply to the action, the Court could not be certain that the proper standard of review, the clear and convincing evidence standard, was employed. Id. at 1163.

The Court majority stated two purposes for special findings of fact: (1) to provide the parties and the reviewing court with the theory upon which the case was decided; and (2) as a means of alerting parents of the reasons why their children are not being returned to their custody, thereby effectively putting the parents on notice as to what steps they must take before their children will be returned to them. Id. at 1162. The Court acknowledged that the statute does not require specific factual findings, but relying on In Re Guardianship of B.H., 770 N.E.2d 283, 287 (Ind. 2002) noted "our supreme court has explicitly mandated trial courts to issue detailed and specific findings when a child is placed in the care and custody of a person other than a natural parent." The Court detailed two reasons to extend the detailed and specific findings requirement to petitions to terminate guardianship: (1) The issues are the same regardless of whether the placement is the initial placement or a question of whether the placement should be continued; and (2) the reason behind requiring detailed and specific findings applies in equal force to termination of guardianship petitions, i.e. notifying the parties and the reviewing court of the facts and theory upon which the decision is based. Id. at 1162-63.

In A.R.S. the Court of Appeals cited as appropriate to petitions to terminate guardianship, the standard in In Re Guardianship of B.H. at 287:

In a proceeding to determine whether to place a child with a person other than the natural parent, evidence establishing the natural parent's unfitness or acquiescence or demonstrating that a strong emotional bond has formed between the child and the third person is important, but the trial court is not limited to these criteria. The issue is not merely the "fault" of the natural parent. Rather it is whether the important and strong presumption that a child's interests are best served by placement with the natural parent is clearly and convincingly overcome by evidence proving that the child's

best interests are substantially and significantly served by placement with another person...A generalized finding that a placement other than with the natural parent is in a child's best interests, however, will not be adequate to support such determination, and detailed and specific findings are required.

The Court in **In Re Paternity of V.M.**, 790 N.E.2d 1005 (Ind. Ct. App. 2003) affirmed the trial court's denial of Father's petition to modify the permanent custody of his two children whom Father and Mother had previously voluntarily placed with Maternal Grandfather. The Court held that the record supported the conclusion that the presumption in favor of Father having custody of the children was rebutted by evidence of Father's past unfitness, voluntary abandonment of the children, long acquiescence in Grandfather's custody, and other factors that would rebut the strong presumption in favor of the Father; and that the best interests of the children were served by continued placement with maternal grandparents. *Id.* at 1008-09. The Court relied on the standard to be applied in custody disputes between a natural parent and a third party as articulated by the supreme court in **In Re Guardianship of B.H.**, 770 N.E.2d 283, 287 (Ind. 2002), which states in part: "The issue is not merely the 'fault' of the natural parent. Rather, it is whether the important and strong presumption that a child's interests are best served by placement with the natural parent is clearly and convincingly overcome by evidence proving that the child's best interests are substantially and significantly served by placement with another person. This determination falls within the sound discretion of our trial courts, and their judgments must be afforded deferential review." The Court noted that, here, the trial court concluded that staying with the maternal grandparents was in the children's best interests, and it articulated specific reasons for its conclusion. *Id.* at 1008.

The two children in **V.M.** were born out of wedlock. About seven years previously, Mother and Father had relinquished care and custody of them to Maternal Grandfather. At that time, Father lacked fitness and willingness to parent the children, due in large part to his past drinking problems and criminal behavior. Subsequently, Father married, had a family, quit drinking and using drugs, started attending church regularly, maintained consistent visitation with the children, and paid child support to the maternal grandfather. Father did not dispute the conversion of a temporary custody order

to a permanent one about a year before he filed his petition for custody of the children. Father filed his petition after Maternal Grandfather moved with the children away from the town where Father also resided.

In **Roydes v. Cappy**, 762 N.E.2d 1268 (Ind. Ct. App. 2002) (Riley, J., dissenting), the Court affirmed the trial court's denial of Parents' petition for termination of guardianship. The Court opined that, although the guardianship was originally granted to obtain health insurance for the child, the Court could look beyond the original grounds for granting the guardianship in making its decision to terminate the guardianship. The Court concluded that the trial court had not abused its discretion in denying Parents' petition to terminate, even though the trial court did not specifically find that Mother was unfit. Id. at 1275. The trial court had found the following: (1) Grandmother's concerns about Mother's inability to care for the child were justified; (2) Mother had a history of losing jobs and not paying bills; (3) Mother had been physically violent toward Grandmother; and (4) Mother had been physically violent towards Father in the child's presence. Id. The Court further opined that a parent's very recent history of financial irresponsibility and employment instability, especially if it is consistent with an established pattern of such behavior, could be considered in determining whether a parent is presently fit to regain custody of a child. Id. The Court noted that Mother had been unable to maintain her former residence and automobile even with the guardian's assistance, and that Mother's income was insufficient to meet the financial needs of herself and the child. Id. at 1276.

In **Harris v. Smith**, 752 N.E.2d 1283 (Ind. Ct. App. 2001), the Court affirmed the trial court's order modifying custody from Grandparents to Mother. On appeal Grandparents claimed that Mother's agreement to place the child in the custody of Grandparents was tantamount to an admission of unfitness. The Court disagreed with this argument, but acknowledged that the trial court was required to consider the stability of the child in making its decision. The Court also opined that there is a constitutionally based preference that a parent rather than a non-parent have custody when the parent has not been shown to be unfit. Id. at 1288-1289, citing Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); In Re Guardianship of L.L., 745 N.E.2d 222 (Ind. Ct. App. 2001), *trans. denied*. The Court also stated that a non-parent seeking

custody is required to prove the parent's unfitness at the present time, not at some time in the past. Harris at 1290. The Court opined that Grandparents had not successfully rebutted Mother's presumptively superior right to custody with a clear and persuasive showing that Mother was presently unfit. Id. The evidence supporting the trial court's decision included the following: (1) Mother's employment as assistant manager at a café where she could earn up to \$600.00 per week; (2) Mother's employer's testimony that Mother was a good employee; (3) Mother had a two bedroom trailer home with her boyfriend and her son; (4) the maternal grandmother was available to baby-sit with the child and to transport the mother to work because the mother's license was suspended; (5) Mother's testimony that she had stopped using drugs, but still drank beer; and (6) Mother's testimony that the child in this case had stated that she wanted to stay with her Mother and her brother. Id.

In **In Re Guardianship of L.L.**, 745 N.E.2d 222 (Ind. Ct. App. 2001), *trans. denied*, the Court reversed the trial court's denial of Mother's petition to terminate Paternal Grandmother's guardianship of the child. The Court considered the relevant case law, the "de facto custodian" statutory amendments, and constitutional concerns and set forth "the appropriate standard for courts to apply when considering a natural parent-third party child custody dispute." Id. at 230. That standard provides: (1) there is a presumption in all cases that the natural parent should have custody of the child; (2) the third party bears the burden of overcoming the parental presumption by clear and cogent evidence; (3) evidence to rebut the presumption may, but does not need to consist of the parent's present unfitness, or past abandonment of the child such that the affections of the child and third party have become so interwoven that to sever them would seriously mar and endanger the future happiness of the child; (4) a general finding that it would be in the child's best interest to be placed in the third party's custody is not sufficient; (5) if a decision to leave or place custody in the third party is to be based solely upon the child's "best interests," as opposed to a finding of parental unfitness, abandonment, or other wrongdoing, such interests should be specifically delineated, as well as be compelling and in the "real and permanent" interests of the child; (6) if the presumption is rebutted, then the trial court engages in a general "best interests" analysis; and (7) the trial court may, but is not required to be guided by the "best interests" factors listed in IC 31-14-

13-2, IC 31-14-13-2.5, IC 31-17-2-8, and IC 31-17-2-8.5, if the proceeding is not explicitly governed by them. Id. at 230-31.

The L.L. Court also provided other guidance regarding custody disputes involving a third party. Following a statutory interpretation analysis, the Court held that the intent of the “de facto custodian” 1999 amendments (IC 31-14-13-2.5 and IC 31-17-2-8.5) was not to displace the parental preference presumption, but was to clarify that a third party may have standing in certain custody proceedings, and that it may be in a child’s best interests to be placed in that party’s custody. Id. at 229-30. Further, the Court noted that, while custody evaluations may be a useful tool in resolving parent-third party child custody disputes, when the evaluation does not consider the parental presumption, its ultimate custody recommendation should be given less deference than it might be in a custody dispute between two natural parents. The Court instructed that, in such a case, the trial court should look beyond the recommendation to determine if the report contains “evidence of parental unfitness, abandonment, or other wrongdoing or of compelling, real, and permanent interests of the child that require his or her custody with a third party.” Id. at 232

### **VII. What parenting time standards apply in guardianship and third party custody cases?**

As a Guardian ad Litem you need to address in your investigation, report, and testimony what parenting time the parent(s) should be allowed if guardianship or third party custody is ordered by the court. Arguably the natural parents are entitled to parenting time in a non-parent custodianship. Paternity and dissolution law provide that the noncustodial parent is entitled to reasonable parenting time rights unless the court finds, after a hearing, that parenting time by the noncustodial parent might endanger the child’s physical health or significantly impair the child’s emotional development. See IC 31-14-14-1; IC 31-17-4-1. Effective July 1, 2009, IC 31-14-14-1, the paternity statute, was amended to add two rebuttable presumptions if the noncustodial parent has been convicted of child molesting (IC 35-42-4-3) or child exploitation (IC 35-42-4-4(b)): (1) IC 31-14-14-1(c) establishes a rebuttable presumption that the person might endanger the child’s physical health and well-being or significantly impair the child’s emotional

development; and (2) IC 31-14-14-1(d) establishes that, if the court grants parenting time to the person, there is a rebuttable presumption that it must be supervised.

The Indiana Supreme Court adopted the Indiana Parenting Time Guidelines with an effective date of March 31, 2001. The Scope of Application of the Guidelines states that the Guidelines are applicable to all custody situations, but they are “not applicable to situations involving family violence, substance abuse, risk of flight with a child, or any other circumstances the court reasonably believes endanger the child’s physical health or safety, or significantly impair the child’s emotional development.” The Scope section further states that there is a “presumption that the Indiana Parenting Time Guidelines are applicable in all cases covered by these guidelines” and “deviation from these guidelines by either the parties or the court must be accompanied by a written explanation indicating why the deviation is necessary or appropriate in the case.”

The court which appoints the guardian or third party custodian may order specific parenting time to be provided to the parents by the guardian or custodian. Because of the reasons for the necessity of the guardianship or third party custodianship, the court needs to balance the parents’ right to parenting time against the child’s right to safety and stability. The type and amount of parenting time which the proposed guardian or third party custodian should provide should be ordered by the court based on the circumstances of the particular case. A detailed plan for parenting time should be included in the court order which appoints a guardian or third party custodian. A parenting time order which considers the reason(s) why the guardianship or third party custodianship was needed would be in the best interest of the children.

See **Allen v. Proksch**, 832 N.E.2d 1080, 1095-97 (Ind. Ct. App. 2005) (trial court granted Father parenting time with child as provided in Indiana Parenting Time Guidelines for non-custodial parent where Grandmother was awarded custody of child as third-party custodian); **In Re Guardianship of A.R.S.**, 816 N.E.2d 1160, 1162-63 (Ind. Ct. App. 2004) (Crone, J., dissenting) (Mother abandoned earlier effort to terminate guardianship of her children after establishing a fixed visitation schedule); **Roydes v. Cappy**, 762 N.E.2d 1268, 1270 (Ind. Ct. App. 2002) (trial court entered an order requiring Mother and Guardian, who was maternal grandmother, to follow a visitation schedule); and **Harris v. Smith**, 752 N.E.2d 1283, 1288-90 (Ind. Ct. App. 2001) (order

granting Grandparents custody of child stated Mother and Father “shall be entitled to visit [the child] at all reasonable and proper times agreeable to [third-party custodians]”). But see **Duncan v. Duncan**, 843 N.E.2d 966 (Ind. Ct. App. 2006) (Court affirmed trial court’s denial of Father’s motion to establish parenting time with two sons, where Father had molested their older sister for ten years, threatened her with a gun, and pressured oldest son to discontinue therapy against his best interests), *trans. denied*; and **Appolon v. Faught**, 796 N.E. 2d 297, 300 (Ind. Ct. App. 2003) (Court opined that from the circumstances of domestic violence, threats to take children, and admitted child molestation, trial court was within its discretion to deny visitation altogether to Father). See also **In Re Guardianship of K.T.**, 743 N.E.2d 348 (Ind. Ct. App. 2001) in which the Court stated that the Grandparent Visitation Act was the exclusive vehicle through which the former guardians of the child, the maternal grandparents, should have been granted visitation with the child. Accord **In Re Guardianship of J.E.M.**, 870 N.E.2d 517 (Ind. Ct. App. 2007).

### **VIII. What are some practice tips for success in obtaining guardianship or third party custody?**

- Interview relatives who may have negative information and prepare affidavits for their signature.
- Obtain criminal histories, if any, on the parents, including certified copies of guilty pleas or guilty findings and sentencing orders.
- Consider the use of a professional psychologist evaluator to establish the above-described factors courts must rely on in deciding third party custody cases. The evaluation may win your case. But see **In Re Guardianship of L.L.**, 745 N.E. 2d 222, 232 (Ind. Ct. App. 2001), in which the Court opined that a custody evaluation performed in a third party situation without consideration of the presumption favoring the natural parent should be looked at differently, with less deference given to an ultimate custody recommendation than might be given in a custody dispute between two parents. It is important that the custody evaluator in a third party custody situation be given written guidance concerning the

presumption and that counsel for all parties be sent copies of the communication to the evaluator.

- Consider asking the Court to appoint a court appointed special advocate or guardian ad litem to represent the child's best interests. But see In Re Guardianship of Hickman, 805 N.E. 2d 808, 823-24 (Ind. Ct. App. 2004) in which the Court of Appeals discussed the admissibility of a guardian ad litem's opinion in an adult guardianship case.
- Obtain copies of any Department of Child Services assessment reports concerning the child. If your client has temporary custody or guardianship of the child, IC 31-33-18-2(8) authorizes parents, guardians, custodians or other persons responsible for the welfare of a child named in a report and an attorney of any of the above persons to obtain the Department of Child Services report. If your client does not have temporary custody or guardianship of the child, the court may conduct an in camera inspection of DCS records if the court determines that access to the records may be necessary for determination of an issue before the court. The court may order the records released if the court determines that public disclosure of the records is necessary for the resolution of an issue then pending before the court. IC 31-33-18-2(9).
- Obtain certified copies of CHINS adjudications and relevant orders if the child is or has been adjudicated a CHINS. Your client may be able to obtain these documents if your client has temporary custody or guardianship.
- Obtain child support payment records certified by the Clerk.
- Use discovery tools including motions for production of documents, interrogatories and requests for admissions.
- The parties seeking third party custody should prepare and maintain a history of contact with the parents and child.

- The parties seeking third party custody should obtain the child's medical records to show the care or lack of care by the parents and how the potential third party custodians have cared for the child.