

ready to proceed, and vice versa. The preferred reading of IC 31-34-10-9(c) is to require the consent of all the persons stated therein.

2. Judgment and Dispositional Hearing if Admission

Once an admission is made, IC 31-34-10-8 provides that the court shall enter judgment that the child is in need of services and schedule a dispositional hearing. The court should specify the CHINS category upon which judgment is entered. This assists the office of family and children and the child's parent, guardian, or custodian in determining the need for, and extent of, rehabilitation services.

IC 31-34-10-9(a) and (c) provide that if the respondent admits the CHINS petition the court can proceed immediately to a dispositional hearing upon the consent of specified persons. See this Chapter immediately above at M. 1. for persons who may consent to proceed directly to the dispositional hearing. The parties may not want to proceed immediately to a disposition hearing if a predispositional report has not been approved and considered by all the parties. IC 31-34-18-1 through IC 31-34-18-3 require that the office of family and children prepare a predispositional reports that contains recommendations for (1) the care, treatment, rehabilitation, and placement of the child; (2) parental participation; and (3) financial responsibility. See Chapter 8 Roman Numeral I. for discussion on predispositional reports.

II. GUARDIAN AD LITEM AND COURT APPOINTED SPECIAL ADVOCATE

The juvenile code provides that a guardian ad litem or a court appointed special advocate (CASA) may represent the best interest of a child in a CHINS proceeding. The code makes few distinctions between the roles and responsibilities of these two child advocates. The term "guardian ad litem/CASA" is used throughout this Chapter when the rights, roles, and responsibilities of the guardian ad litem and CASA are the same.

A. Appointment of Guardian Ad Litem/CASA

The juvenile code provides in IC 31-34-10-3 that the court shall consider the need for appointing a guardian ad litem/CASA for the child at the initial hearing. The court is mandated to appoint in some situations, but always has the discretion to appoint at any time in any juvenile proceeding. See IC 31-34-10-3(2); IC 31-32-3-1. See also this Chapter above, Roman Number I. at G. for discussion on when the appointment of a guardian ad litem/CASA is mandated. Trial courts also have discretion to appoint a guardian ad litem/CASA for children in other types of legal cases. See this Chapter below at III. for discussion of appointment of guardian ad litem/CASA in termination, paternity, divorce custody, guardianship, and adoption.

B. Statutory Definition of Guardian Ad Litem and CASA

IC 31-9-2-28 states:

"Court appointed special advocate," for purposes of IC 31-15-6 [divorce], IC 31-17-6 [custody and visitation], IC 31-19-16 [post-adoption visitation], IC 31-19-16.5 [post-adoption sibling contact], and the juvenile law, means a community volunteer who:

- (1) has completed a training program approved by the court;
- (2) has been appointed by a court to represent and protect the best interests of a child; and
- (3) may research, examine, advocate, facilitate, and monitor a child's situation.

IC 31-9-2-50 states:

"Guardian ad litem," for purposes of IC 31-15-6 [divorce], IC 31-16-3 [repealed], IC 31-19-16 [post-adoption visitation], IC 31-19-16.5 [post-adoption sibling contact], and the juvenile law, means an attorney, a volunteer, or an employee of a county program designated under IC 33-2.1-7-3.1 who is appointed by a court to:

- (1) represent and protect the best interests of a child; and
- (2) provide the child with services requested by the court, including:
 - (A) researching;
 - (B) examining;
 - (C) advocating;
 - (D) facilitating; and
 - (E) monitoring;

the child's situation.

A guardian ad litem who is not an attorney must complete the same court approved training program that is required for a court appointed special advocate under section 28 [IC 31-9-2-28 definition of CASA] of this Chapter.

Neither the guardian ad litem nor CASA definition includes non-attorney professionals who may be appointed as a guardian ad litem for payment, such as a trained social worker, counselor, or psychologist. These persons may not be serving as a volunteer, lawyer or as an employee of a local guardian ad litem or CASA program, and do not seem to fit in either definition. Since the professional is not an attorney, it would appear the community training is required. The court would also need to determine if the particular ethics of the profession, or applicable rules of privilege or confidentiality for the profession are in conflict with the guardian ad litem/CASA role.

C. Distinguishing Guardian Ad Litem and CASA

By statute there are only minor differences between the definition of guardian ad litem and CASA. Neither a guardian ad litem nor CASA is required by statute to be an attorney. However, in practice in Indiana, it is common that the court appoints an attorney to serve as a guardian ad litem.

The technical distinctions between the statutory definitions of guardian ad litem and CASA are as follows:

- TRAINING. A CASA is required to complete a training program. A guardian ad litem who is an attorney is not required to complete a training program, but a non-attorney guardian ad litem is so required.
- VOLUNTEER OR EMPLOYMENT STATUS. A CASA is defined as a "community volunteer," however a guardian ad litem is defined as an "attorney, volunteer, or employee of a county program." This may indicate that attorneys and employee guardians ad litem may receive remuneration for their services, whereas CASAs may not. A CASA volunteer could receive reimbursement for expenses such as mileage, long distance telephone calls and copying costs.
- PROVIDING SERVICES TO THE CHILD. The guardian ad litem definition states that the guardian ad litem is appointed to "provide the child with services requested by the court." This language does not appear in the CASA definition. However, in In Re J.C., 735 N.E. 2d 848 (Ind. Ct. App. 2000), the Court indicated that the "services" language referred to the same list of services (researching, examining, advocating, facilitating and monitoring) included in both the CASA and guardian ad litem statutory definition. The Court stated that the "purpose of appointing a GAL is to represent and protect the best interests of the child and to provide the child with services requested by the court such as researching, examining, advocating, facilitating, and monitoring the child's situation." Id. at 849.

D. Role of the Guardian Ad Litem/CASA

The guardian ad litem/CASA is appointed by the juvenile court to represent and protect the best interests of a child. IC 31-32-3-6. The guardian ad litem/CASA serves as an "officer of the court." IC 31-32-3-7. The definition statutes clarify that the roles and rights of the guardian ad litem/CASA include researching, examining, advocating, facilitating, and monitoring the child's situation. See IC 31-9-2-50 (definition of guardian ad litem); IC 31-9-2-28 (definition of CASA).

In Kern v. Wolf, 622 N.E. 2d 201 (Ind. Ct. App. 1993), the Court of Appeals affirmed the termination of parental rights judgment against the mother's claim that the CASA's zealous representation of the child was improper. The mother objected that the CASA "vigorously pursued the termination action" and "obtained depositions, summoned and examined witnesses and generally exercised a dominant role in the termination proceedings, with the DPW exercising a subordinate role." Id. at 204. Rejecting the mother's claim the Court of Appeals stated:

Pursuant to I.C. 31-6-1-12 [recodified at IC 31-9-2-28] a CASA is empowered to "represent and protect the best interests of a child and to provide that child with services requested by the court." According to The American Heritage Dictionary (Second Edition), "represent" means, inter alia, as "to keep from harm, attack or injury: to guard." Ascribing to these terms their plain and ordinary meaning, we conclude

that the CASA acted within statutory parameters when she took measures to pursue the termination of mother's parental rights.

Id. at 204.

E. Special Considerations When Guardian Ad Litem or CASA is Attorney

The difficulty of an attorney serving as a guardian ad litem or CASA for a child is the possible conflict between the attorney's professional and ethical responsibilities in an "attorney-client relationship" as opposed to the "best interests" representation provided as a guardian ad litem or CASA. In an attorney-client relationship an attorney is obligated (1) to ascertain and forward the "stated desires" of the client; (2) to keep the client informed and facilitate "client-directed" litigation, and (3) to maintain the client's confidences. Ind. Professional Conduct Rules 1.2, 1.4, and 1.6. The "best interests" representation provided by a guardian ad litem or CASA, on the other hand, considers the stated desires of the child dependent upon the developmental age and needs of the child, and the advocate makes an independent determination of the best interests of the child. Also, in representing the "best interests" of a child a guardian ad litem or CASA may choose to shield the child from the controversy and involvement in the litigation that could prove traumatic or harmful to the child. Finally, "best interests" representation may require sharing the confidences of the child for the purpose of protection of the child or furthering the best interests of the child.

The Court of Appeals acknowledged the dilemma when an attorney serves as guardian ad litem in the divorce custody case of Deasy-Leas v. Leas, 693 N.E. 2d 90 (Ind. Ct. App. 1998), in which the father's counsel subpoenaed the file of the attorney guardian ad litem. The opinion states:

Complicating matters further and even more challenging in terms of discerning the guardian's role and what types of information should remain confidential, is the situation when the guardian ad litem is an attorney. The attorney-client privilege is a cornerstone to legal representation. To say that an attorney acting as a guardian completely loses the shroud of confidentiality calls into question the efficacy of appointing guardians ad litem instead of attorneys to represent children.

We are faced with such a situation in the present instance. Guardian McKim is an attorney. Here, the parties requesting the information attack the guardian for acting more as an attorney than as the guardian for the best interests of the children. While admittedly the line is blurred when a guardian is also an attorney, the general duties are similar. Each is sworn to represent the best interests of the client or the charge. It is also noteworthy, that Guardian McKim's request for appointment of an attorney to represent the guardian was denied, leaving her no choice to proceed in both her capacity as guardian and her capacity as an attorney.

Id. at 98.

The Comment to Ind. Professional Conduct Rule 1.14, Client Under a Disability, (West Group Publication 2000) indicates that there are situations in which an attorney may not act in the traditional "attorney-client" role, but the Comment does not directly address the issue of an attorney serving as a guardian ad litem or court appointed special advocate. The Comment states that "maintaining the ordinary client-lawyer relationship may not be possible in all respects" when the lawyer represents a client who is under a disability due to minority or for other reasons. The Comment recognizes that a person under a disability, though legally incompetent for some purposes, may still be able to provide input and "understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being." The Comment further states:

The fact that the client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. If the person has no guardian or legal representative, the lawyer often must act as de facto guardian. Even if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

It may be helpful for the court to clarify whether the attorney is appointed as an attorney, a guardian ad litem, or both for the child. IC 31-32-3-3 provides that the attorney representing the child may be appointed as the child's guardian ad litem or court appointed special advocate.

F. State and Local Guardian Ad Litem and CASA Programming

1. Historical Perspective

The Child Abuse Prevention and Treatment Act of 1974 at 42 U.S.C. 5101, made federal grant money available to states that provided specific child abuse prevention and treatment programs. One of the programs was mandatory appointment of guardians ad litem. Although Indiana has never fully implemented the mandate for appointment in all CHINS cases, the state has made significant strides in this representation. The recodification of Indiana's juvenile code in 1979 required the judge to "consider" appointment of a guardian ad litem in every CHINS case, but did not mandate appointment. In 1980, the Indiana Law and Child Protection Project (predecessor to Indiana Advocates for Children-now Kids' Voice) developed pilot volunteer programs in Indiana which were variously referred to as guardian ad litem programs or court appointed special advocate (CASA) programs based on the growing national CASA movement. In 1989, the Indiana legislature created state matching funds for county guardian ad litem and CASA programs and created a state office of Guardian ad Litem/CASA.

2. State Office of Guardian Ad Litem/CASA and State Funding

IC 33-2.1-7-3.1 provides that the state office of GAL/CASA is administered by the Division of State Court Administration. The state office may provide training services and communication services for local officials and county GAL/CASA programs. The state office is assisted and guided by its advisory commission, which includes representative program directors and judges appointed to serve by the Indiana Supreme Court.

IC 33-2.1-7-3.1 authorizes the Division of State Court Administration to distribute matching funds, as appropriated by the general assembly, to counties administering guardian ad litem and CASA programs for children who are the victims of child abuse or neglect. The formula for the distribution of matching funds is codified at IC 33-2.1-7-3.2 and provides that distribution is based on the number of CHINS cases in a county as determined by the Division of Family and Children. Small counties that would have received less than \$2,000 under the formula are granted \$2,000. IC 33-2.1-7-3.1(c) provides that matching funds which are not distributed each year by July 1, do not revert to the general fund, but are available to be redistributed to county GAL/CASA programs.

3. County Guardian Ad Litem/CASA Programs

Most of the county programs utilize volunteers to represent children, but some programs utilize trained professionals or a combination of volunteer and professional services. The programs utilizing volunteers recruit the volunteers and provide training in the legal, social science, and developmental aspects of child abuse and neglect. After appointment to a particular case, the volunteer receives ongoing supervision from the program. Some programs utilize attorneys to assist in legal issues and/or to represent the CASA in court cases. The guardian ad litem/CASA has broad powers as a party to subpoena witnesses and records, to file motions, and take action necessary to represent the best interest of the child. Therefore non-lawyer guardians ad litem, CASAs, and program personnel should be cautioned to avoid the unauthorized practice of law and to obtain legal counsel for their representation as needed.

G. Party Status for Guardian Ad Litem/ CASA and Rights as a Party

IC 31-34-9-7 provides that guardians ad litem and CASAs are parties to CHINS proceedings. As a party to the CHINS proceeding under IC 31-34-9-7, the guardian ad litem and CASA are entitled to notice of all proceedings and to all the protections and privileges accorded to parties under the civil trial rules. This includes the following rights: file pleadings, motions, and appeals; subpoena documents and use other methods of discovery; and testify in court as well as call and examine witnesses and admit documents into evidence.

H. Court's Discretion to Appoint Counsel for Guardian Ad Litem/CASA

IC 31-32-3-4 provides that the guardian ad litem or CASA may be represented by counsel, and IC 31-32-3-5 provides that the court "may" appoint counsel for the guardian ad litem or CASA if "necessary to protect the child's interests."

I. Standing to Initiate Case and File Motions and Reports

The guardian ad litem/CASA does not have standing to initiate a CHINS petition, but can file a petition for the involuntary termination of the parent-child relationship under IC 31-35-2-4 and IC 31-35-3-4. The

guardian ad litem has a broad range of authority in the CHINS case as indicated in subsections 1 through 4 immediately below.

1. Protective Orders

Pursuant to IC 31-32-13-1 the guardian ad litem or any person providing services to the child or parent (which would reasonably include a CASA) may seek a protective order at any time during the CHINS process for the following purposes: to control the conduct of any person in relation to the child; to provide a child with an examination or treatment; or prevent a child from leaving the court's jurisdiction on an emergency or non-emergency basis. Under IC 31-34-17-1(6) the guardian ad litem/CASA has standing to request an order to restrain any person from direct or indirect contact with the child after the child has been adjudicated a CHINS.

2. Parental Participation

IC 31-34-16-1 through IC 31-34-16-3 provide that the guardian ad litem/CASA may file a verified parental participation petition to require the child's parent, guardian or custodian to do any of the following: obtain assistance in fulfilling their obligations for the child; provide specified care, treatment or supervision for the child; or work with any persons providing care, treatment, or rehabilitation for the child.

3. Modification Petition

IC 31-34-23-1 provides that the child, the child's guardian ad litem, and anyone providing services to the child or family have standing to petition the court to modify any dispositional order. Although the statute does not specifically authorize the CASA to file a petition for modification, arguably the CASA may file a petition in his/her representative capacity for the child, or as a service provider for the child.

4. Predispositional, Review and Permanency Reports

IC 31-34-18-1(b) provides that the guardian ad litem/CASA can file a predispositional report. The statute does not set a time requirement on the filing of the report, unlike the dissolution statute, IC 31-17-2-12 (b), which requires that a guardian ad litem/CASA report be filed ten days in advance of the custody hearing. See *Keen v. Keen*, 629 N.E. 2d 938 (Ind. Ct. App. 1994) (error for court in divorce proceeding to consider guardian ad litem report which was not timely served on the parties). Although the ten day time requirement of the dissolution statutes may be excessive for CHINS proceedings, it is recommended that the guardian ad litem/CASA report be served on the parties and the Court three to five days before the hearing.

IC 31-34-22-1 requires that the office of family and children or probation shall prepare a progress report before CHINS review hearings, but makes no mention of alternative reports. However, the broad language of IC 31-34-22-3 that "any report" may be admitted if it contains evidence of probative value, suggests that reports prepared by the guardian ad litem/CASA should be admissible for the six month periodic review hearing and the twelve month permanency hearing.

J. Access to Reports, Records, and Photographs

1. Predispositional and Review Reports

IC 31-34-18-6 provides that the predispositional report prepared by the office of family and children "shall be made available within a reasonable time before the dispositional hearing" to the guardian ad litem or CASA. The language of the statute does not indicate whether the report will be provided by the court or the office of family and children, but it is generally considered the responsibility of the office of family and children to provide necessary copies of the report. IC 31-34-22-2(a)(b) and (d) provide that any report prepared by the state for review of a dispositional decree, the periodic review hearing or the permanency hearing shall be made available to the guardian ad litem/CASA "within a reasonable time after the report's presentation to the court or before the court hearing."

2. Juvenile Court Records, Including Confidential Records Filed with the Court

The guardian ad litem/CASA has access to juvenile court records under the general provision of IC 31-39-2-3 which provides access to the court records to all parties to the CHINS case without a court order. IC 31-33-15-2 further provides that the guardian ad litem and CASA shall be given access under IC 31-39 to A(1) all reports relevant to the case; and (2) any reports of examinations of the child's parents or

other persons responsible for the child's welfare." The statute gives access to a broad range of confidential reports or documents pursuant to IC 31-39, which means it is limited to the records covered by IC 31-39 which includes juvenile court and law enforcement records. Therefore, IC 31-33-15-2 gives access to reports and documentation filed with the court and law enforcement, but may not authorize access to any documents not filed with the court regarding the child or the child's parent, guardian, or custodian.

3. Law Enforcement Records

The guardian ad litem and CASA have access to law enforcement records through the general provision of IC 31-39-4-4, granting access to relevant law enforcement records to any party to a juvenile court proceeding and the party's attorney. Further, IC 31-33-15-2 gives the guardian ad litem and CASA access to law enforcement records under IC 31-39 containing reports relevant to the case, and any reports or examination of the child's parent or other persons responsible for the child's welfare.

4. Records of the Office of Family and Children

IC 31-33-18-2(7) provides that the "reports and other material" of the office of family and children "shall be made available" to the guardian ad litem/CASA. IC 31-33-18-1 lists the breadth of available documents as being: "Any other information obtained, reports written, or photographs taken concerning the reports in the possession of: (A) the division of family and children; (B) the county office of family and children; or (C) the local child protection service."

IC 31-33-17-6(5) provides that any person who is allowed access to the records of the State Division of Family and Children and the county offices of family and children under IC 31-33-18 is likewise given access to the Indiana child abuse registry. Since CASAs and guardians ad litem have access to the records of the Division of Family and Children and the county offices of family and children under IC 31-33-18-2(7) they also have access to child abuse registry information upon request. See Chapter 4 at Roman Numeral V. on Indiana child abuse registry.

5. Photographs, X-Rays, and Medical Reports

IC 31-33-10-1 requires that health care providers, hospitals, and other medical institutions shall take photographs of areas of trauma on the child who is the subject of a report of abuse, and if medically indicated, complete radiological or other medical examinations of the child. IC 31-33-2-5 provides that these photographs, x-rays, and/or medical examinations shall be made available to the guardian ad litem/CASA for use in any judicial proceeding relating to a report of child abuse or neglect.

6. Mental Health Records of Child and Parents

Pursuant to IC 31-33-15-2 the guardian ad litem/CASA has access to "all reports relevant to the case" and any "reports of examinations of the child's parents or other persons responsible for the child's welfare" which are included in the court and law enforcement records under IC 31-39. This may include the mental health and other examination and treatment records of the parent or child that are filed with the court.

IC 16-39-2-9 provides that a "court appointed representative" can exercise the child's right to release the child's mental health records on behalf of the child. IC 16-39-4-2(5) specifically states that a "guardian ad litem" or "court appointed special advocate" involved in the planning, provision, and monitoring of mental health services for the child can make a written request for mental health records; however, this statute additionally requires that the child's treating physician must give a written consent for the release of the records.

Obtaining the mental health records of the child's parent, guardian, or custodian may be difficult if the parent, guardian, or custodian does not consent to the release of the records, or the records are not otherwise included in the court's file and available through IC 31-33-15-2. IC 16-39-2-8 provides that a court may order the release of the patient's mental health record without the patient's consent upon a showing of good cause in a juvenile proceeding under IC 31-30 through IC 31-40, following a hearing held under the Indiana Rules of Trial Procedure. This statute does not limit who can request mental health records, so it is reasonable to assume that the guardian ad litem/CASA has standing to file a request and to litigate the request at the required hearing. See Chapter 7 at II. D. 4. on obtaining access to mental health records.

Some judges may issue very broad access orders for the guardian ad litem/CASA in the order appointing the guardian as litem/CASA.

K. Confidentiality of Guardian Ad Litem/CASA Records

There is no case or statutory law on the confidentiality of the of the guardian ad litem records in a CHINS case. In the divorce custody case of Deasy-Leas v. Leas, 693 N.E. 2d 90 (Ind. Ct. App. 1998), the parties filed notice of discovery requesting production of the guardian ad litem's file. The guardian ad litem filed motions to quash the discovery and requested protective orders pursuant to Ind.Trial Rules 26(C) and 45(B). Id. at 92. The trial court denied the motion to quash upon its findings that (1) the guardian ad litem was appointed to represent the best interests of the child, not the child himself; (2) the law did not impose an attorney-client privilege upon the guardian ad litem-child relationship, and (3) the law does not impose any confidentiality or privilege upon the guardian ad litem-child relationship. Id. at 92. On appeal, the Court determined that Indiana has not enacted a statutory privilege for communications between the guardian ad litem and the child, and no privilege exists absent a statute. Id. at 94. However, the Court examined a broad range of juvenile and domestic relations custody statutes relating to confidentiality and determined that the "legislative scheme, while not specifically offering a guardian ad litem privilege, contains the general confidentiality provisions" and these provisions "cast a shadow on the legislature's willingness to give parties carte blanche access to communications and investigations lest they prey upon familial difficulties at the children's expense." Id. at 98. Further, the Court found that the guardian ad litem has by statute access to a great deal of confidential records and information. The parties can examine and cross-examine the guardian ad litem with regard to those records and the parties can discover those records independent of the guardian ad litem file, but "the appointment of a guardian ad litem should not be a discovery tool" for the parties. Based upon the general legislative scheme to provide some measure of confidentiality in guardian ad litem representation, and the intention to avoid the use of the guardian ad litem as a discovery tool for the parties, the Court determined that a trial court may, "when requested by a party acting with the mission to guard the children's best interest," issue protective orders under T.R. 26(C) to protect certain documents and communications in the guardian ad litem file from discovery. Id. at 99.

T.R. 26(C) provides that "Upon motion by any party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the county where the deposition is being taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense..." The protective order can completely deny the discovery request, or limit the scope, conditions, and redisclosure of the discovery.

L. Guardian Ad Litem/CASA Testimony and Hearsay

When testifying in the CHINS factfinding hearing, the guardian ad litem/CASA may be prohibited from repeating verbatim statements the child has made to the guardian ad litem/CASA or to other persons, unless the statements fall into a hearsay exception. See Roark v. Roark, 551 N.E. 2d 865, 869 (Ind. Ct. App. 1990) (hearsay generally not admissible at factfinding hearing and court erred in admitting out-of-court statements of children solely on opinion of guardian ad litem that testifying would be too traumatic for the children); Ind. Evidence Rule 802 (hearsay not admissible unless allowed by rules or law). See also Chapter 7 at VIII. and IX. for detailed discussion of hearsay, hearsay exceptions, and child hearsay exception. In the termination of parental rights case Matter of D.V.H., 604 N.E. 2d 634, 638-639 (Ind. Ct. App. 1992), the Court of Appeals rejected mother's argument that the testimony of the guardian ad litem on the child's desires was hearsay. The Court indicated that the guardian ad litem should "refrain from repeating verbatim statements" made by the child, but noted that the legislative creation of the guardian ad litem appointment "contemplates some summarization of the child's desires and state of mind." Id. at 639. With regard to detention, dispositional, and review hearings, as opposed to the factfinding and termination hearings, the guardian ad litem or CASA may use reliable hearsay in testifying.

M. Immunity from Liability

IC 31-32-3-10 provides that a guardian ad litem, CASA, employee of county guardian ad litem/CASA program, or volunteer for the county guardian ad litem/CASA program is immune from civil liability if he/she performs necessary duties in good faith and does not act with gross misconduct.

N. Guardian Ad Litem Costs and Fees

IC 31-33-15-3 states that "[a]ny costs related to the services of a guardian ad litem shall be paid according to

IC 31-40." IC 31-32-3-9 likewise provides that if any fees arise in connection with the guardian ad litem/ CASA "payment shall be made under IC 31-40." Under IC 31- 40-1-2(a) the county shall pay from the county family and children's fund the cost of any services ordered by the juvenile court for the child or the child's parent, guardian or custodian. IC 31-40-1-2(b) provides that the county fiscal body shall provide sufficient funds to meet the court's requirements. IC 31-40-1-3 provides that the parent or the guardian of the child's estate is financially responsible for any services ordered by the court, and the court shall order payment or reimbursement at a hearing, "unless the court finds that the parent or guardian is unable to pay or that justice would not be served by ordering payment from the parent or guardian."

Under the user fee provision of IC 31-40-3-1 the judge can order the parent or guardian to pay a guardian ad litem user fee not to exceed \$100 in cases in which a guardian ad litem or CASA is appointed. However, this provision is subject to IC 31-40-1-3 which provides that no payment shall be ordered if the parent or guardian is unable to pay or justice would not be served by ordering payment. It may be argued that the user fee provision of IC 31-40-3-1 was intended to limit the liability of the parent or the guardian of the child's estate to only the \$100 fee. There is a counter argument that the court's authority under IC 31-40-1-3 to order parental reimbursement is very broad and not limited to the \$100.00 user fee limit.

In In Re J.C., 735 N.E. 2d 848 (Ind. Ct. App. 2000), the trial court adjudicated the child a CHINS and appointed an individual to serve as guardian ad litem to determine visitation if any. The guardian ad litem submitted a bill to the local office of family and children for payment of services. The office filed a motion entitled "Amended Request for Order Terminating Liability for Guardian Ad Litem" to avoid payment of the guardian ad litem bill on two grounds: (1) the county fiscal body, not the office of family and children, was responsible for this expense, and (2) paying the bill would create a conflict of interest, since both the guardian ad litem and the office of family and children are parties to the CHINS proceeding. The trial court denied the motion and ordered the office of family and children to pay the guardian ad litem bill. On appeal, the Court noted that the office of family and children had the burden at trial and was appealing from a negative judgment. The Court affirmed the judgment of the trial court on the following sequential reasoning: IC 31-32-3-9 directs that payment of guardian ad litem fees shall be made under IC 31-40; IC 31-40-1-2 provides that payment of services shall be made from the county family and children's fund; the guardian ad litem investigation was a service to the child; and therefore there is a statutory basis for ordering the office of family and children to pay the guardian ad litem bill. The Court found that the office of family and children had waived any argument that, pursuant to IC 33-2.1-7-3.2, the county fiscal body and the Division of State Court Administration established a separate guardian ad litem fund to pay for guardian ad litem costs. The Court further found that it was not a conflict of interest for the office of family and children to pay the guardian ad litem fees, because the court ordered the payment of the fees and there was no hint of collusion between the office and the guardian ad litem. Id. at 850.

O. Discharge of Guardian Ad Litem/CASA

IC 31-32-3-8 provides that a "guardian ad litem or court appointed special advocate serves until the juvenile court enters an order for discharge under IC 31-34-21-11." IC 31-34-21-11 provides that when the juvenile court finds that the objectives of the dispositional decree have been met, the court shall discharge the child and the child's parent, guardian or custodian.

III. **GUARDIAN AD LITEM/CASA APPOINTMENT IN TERMINATION AND OTHER LEGAL PROCEEDINGS**

The appointment of a guardian ad litem or CASA has been statutorily provided for in many types of legal proceedings involving children. In the absence of specific statutory authority, appointment may still be required in any legal proceeding in which the court finds that "an infant or incompetent person is not represented, or is not adequately represented." Ind. Trial Rule 17(C). See also Matter of Paternity of H.J.F., 634 N.E. 2d 551, 553-555 (Ind. Ct. App. 1994).

A. Child Custody and Visitation Issues in Divorce Proceedings

The divorce court may appoint a guardian ad litem/CASA at any point in a divorce proceeding to represent and protect the best interests of the child. IC 31-17-6-1. In the divorce custody case of Schenk v. Schenk, 564 N.E. 2d 973 (Ind. Ct. App. 1991), the Court noted that the statute does not mandate appointment of guardians

ad litem in divorce cases, and the Court found that it was not an abuse of discretion to fail to appoint a guardian ad litem in that particular case. *Id.* at 979.

In divorce proceedings, the guardian ad litem/CASA "shall represent and protect the best interests of the child," and the guardian ad litem and CASA are considered "officers of the court for the purpose of representing the child's interests." IC 31-17-6-3; IC 31-17-6-4. The guardian ad litem/CASA may subpoena witnesses and present evidence regarding the supervision of the action or any investigation and report that the court requires of the guardian ad litem/CASA. IC 31-17-6-6. Although not addressed by statute, the Court noted in the divorce custody case of *Deasy-Leas v. Leas*, 693 N.E. 2d 90, 97 (Ind. Ct. App. 1998), that the guardian ad litem "is a party to the proceedings and is subject to examination and cross-examination." The guardian ad litem/CASA may be represented by counsel, or may request court appointment of counsel if necessary to protect the child's best interests. IC 31-17-6-5. *See also Deasy-Leas v. Leas*, 693 N.E. 2d 90 (Ind. Ct. App. 1998) (opinion mentioned trial court's denial of request of guardian ad litem for court appointed representation). The guardian ad litem/CASA may be appointed to investigate and report on the custodial arrangements for the child, and may submit a written report containing hearsay which may be received in evidence and may not be excluded on the grounds that the report is hearsay or otherwise incompetent, if all statutory requirements are satisfied. IC 31-17-2-12.

In *Danner v. Danner*, 573 N.E. 2d 934, 938 (Ind. Ct. App. 1991), the Court of Appeals ruled that the divorce court can assess a fee for guardian ad litem services against a parent. The court can award the guardian ad litem compensation for his services. *Id.* at 938. IC 31-17-6-9 allows the court to assess a user fee against either or both parents. The court may order that the fee may be paid to the clerk to be maintained as a guardian ad litem/CASA appointment fund, or to the county guardian ad litem/CASA program, or to the individual or attorney who provided the guardian ad litem service. A guardian ad litem/CASA may be ordered by the divorce court to exercise continuing supervision over a child and "to assure that the custodial or visitation terms of an order entered by the court" are followed. IC 31-17-6-7. The guardian ad litem/CASA serves until the court enters an order for removal. IC 31-17-16-3.

B. Guardianship Proceedings

If a minor is not represented, or adequately represented, by counsel in a guardianship proceeding, the probate court shall appoint a guardian ad litem for the child, unless the court determines that it is appropriate to waive the appointment. IC 29-3-2-3. Also, the probate court shall appoint a guardian ad litem or CASA when a petition is filed in probate court seeking guardianship for a child, alleging the following: the child's custodial parent has died and the noncustodial parent does not have the right to custody because that noncustodial parent had earlier been denied visitation (or given only supervised visitation) by the divorce court. IC 29-3-3-6. *See* Chapter 14 at IV. E. for further discussion of guardian ad litem in guardianship proceedings.

C. Delinquency

The delinquency initial hearing statutes at IC 31-37-12 do not mandate appointment of a guardian ad litem or CASA, nor require consideration of the appointment at the initial hearing. However, IC 31-32-3-1 provides that the juvenile court may appoint a guardian ad litem or a CASA at any time, and this statute has been interpreted to allow appointment in any juvenile proceeding, including a delinquency proceeding. *See also D.D.B. v. State*, 691 N.E. 2d 486, 487 (Ind. Ct. App. 1998) (guardian ad litem appointed for child in delinquency proceeding cannot waive child's right to testify unless guardian ad litem and child have meaningful consultation and child knowingly and voluntarily joins in the waiver). IC 31-37-10-7 does not include the guardian ad litem/CASA as a party in delinquency proceedings.

D. Paternity

The paternity article of family law, IC 31-14, makes no reference to the appointment of a guardian ad litem or CASA for a child, and does not provide for a custody or visitation investigation by a guardian ad litem or CASA. However, since paternity actions are within juvenile court jurisdiction, the juvenile court procedural law authorizes and controls the appointment of a guardian ad litem or CASA in paternity proceedings. IC 31-32-3-1 provides that the juvenile court may appoint a guardian ad litem or CASA for a child "at any time."

In *Matter of Paternity of H.J.F.*, 634 N.E. 2d 551 (Ind. Ct. App. 1994), the Court of Appeals opined that a guardian ad litem appointment is not warranted in all paternity cases, but a "guardian ad litem must be appointed to protect the child's interests in all cases where a party seeks to overcome the presumption that a child born in wedlock is legitimate." *Id.* at 555. In *In Re Paternity of V.M.E.*, 668 N.E. 2d 715 (Ind. Ct. App.

1996), the Court remanded the case and ordered the trial court to appoint a guardian ad litem to represent the children in the establishment of paternity. The Court stated that "in narrow circumstances, such as when the children are not adequately represented, an appointment is required." Id. at 717. The Court opined that the enmity between the parents with a real possibility of a custody award to the father made it unlikely that the children's rights would be adequately represented by the mother. In C.J.C. v. C.B.J., 669 N.E. 2d 197 (Ind. Ct. App. 1996), the trial court appointed a guardian ad litem upon its dismissal of the mother's petition to establish paternity, for the purpose of determining if it would be in the child's best interests to amend the petition and proceed with the paternity action in the child's own name.

In In Re R.P.D. ex rel. Dick, 708 N.E. 2d 916 (Ind. Ct. App. 1999), a paternity petition was brought in the name of the six-year-old child and the child's mother, as next friend, alleging that someone other than the mother's current husband was the father of the child. The husband, alleged father, and court-appointed guardian ad litem for the child filed motions to dismiss the paternity proceeding, and, following an evidentiary hearing on whether establishment of paternity was in the best interests of the child, the court dismissed the paternity petition. The Court of Appeals affirmed, reasoning that a hearing was necessary to determine the best interests of the child since the mother (as next friend) and the guardian ad litem disagreed as to whether the paternity proceeding was in the child's best interests. The Court found that the trial court's judgment that the paternity proceeding was not in the child's best interests was not clearly erroneous. Id. at 919.

E. Juvenile Mental Health Commitments

The juvenile court has concurrent jurisdiction over mental health commitments of persons under the age of eighteen. IC 31-30-1-5; IC 31-34-19-3. The juvenile court shall appoint a guardian ad litem or CASA for the child before it begins the commitment proceeding, and the guardian ad litem/CASA shall represent and protect the best interests of the child. IC 12-26-8-1. In addition to advocating for the child in the commitment hearing, the guardian ad litem/CASA is required to visit the facility and evaluate the services where the child is placed under the commitment thirty days, sixty days, and six months after the commitment. IC 12-26-8-4. The guardian ad litem/CASA shall have access to all reports relevant to the child. IC 12-26-8-6. The guardian ad litem/CASA shall submit a report regarding the thirty day, sixty day, and six month evaluations. IC 12-26-8-5. See Chapter 8 at X. for further discussion on juvenile mental health commitments.

F. Grandparent Visitation

Although the appointment of a guardian ad litem was not at issue in In Re Walker, 665 N.E. 2d 586 (Ind. 1996), it is noteworthy that the trial court appointed a guardian ad litem to represent the best interests of the child in a contested grandparent visitation case.

G. Termination of Parent-Child Relationship

The child's guardian ad litem/CASA in a CHINS petition has standing to file a petition for the involuntary termination of the parent-child relationship under IC 31-35-2-4(a)(3) and (4), and under IC 31-35-3-4 (petition for termination based on parent's conviction of specified offenses). In Kern v. Wolf, 622 N.E. 2d 201 (Ind. Ct. App. 1993), the mother argued on appeal that the termination statute was unconstitutional "because it permits the initiation of a petition for termination of parental rights by a community volunteer rather than a state actor," but the Court found that the mother waived the issue, noting that a "constitutional question will not be considered on appeal unless it was presented in the trial court." Id. at 203.

IC 31-35-2-4.5 mandates that the office of family and children, prosecutor, or guardian ad litem/CASA shall file a petition for the involuntary termination of the parent-child relationship when a child has been out of the home for fifteen of the last twenty-two months, or there has been a judicial ruling that reasonable efforts toward reunification are not required. When a guardian ad litem or CASA files a termination petition under IC 31-35-2-4.5(b) the office of family and children or the prosecutor are entitled to be joined as a party to the petition upon application to the court.

IC 31-35-2-7 requires the juvenile court to appoint a guardian ad litem or CASA on any petition for the involuntary termination of the parent-child relationship in which the parent objects to the termination. See Jolley v. Posey County DPW, 624 N.E. 2d 23 (Ind. Ct. App. 1993) (reversible error to fail to appoint guardian ad litem). In Matter of S.L., 599 N.E. 2d 227 (Ind. Ct. App. 1992), the Court noted that the children in a contested, involuntary termination of the parent-child relationship case have a "statutory right to have a guardian ad litem or special advocate represent their best interests." Id. at 229. Further the Court

clarified that failure to appoint a guardian ad litem was not harmless error, because the attorney for the welfare department represented the state, the attorney for the mother represented the mother's interests, and no one represented the child's interests as required by the appointment statute. Id. at 230. In footnote 3 the Court clarified that the interests of the welfare department (now the office of family and children) and the child "are not necessarily identical." Id. This is why the legislature enacted statutes which mandate or permit the court to appoint a representative for the children. Id.

IC 31-35-2-7 provides that the judge "may reappoint" the guardian ad litem or CASA that served the child in the underlying CHINS case to serve as the guardian ad litem or CASA in the termination proceeding. If a termination petition is granted and the matter is referred for adoption proceedings, IC 31-35-6-2 obligates the guardian ad litem/CASA serving the child to give information to the local office of family and children regarding the best interests of the child, and to report to the juvenile court and, if requested, to the probate court regarding the adoption plan and its appropriateness.

H. Adoption and Post-Adoption Visitation

It is recommended that the guardian ad litem or CASA who represents a CHINS in a termination of parental rights case continue her/his representation of the child into the adoption proceeding. See IC 31-32-3-8 (guardian ad litem/CASA serves until court enters order for discharge); IC 31-34-21-11 (discharge occurs when the objectives of the dispositional decree have been met). Once an adoption petition is filed on a CHINS, the guardian ad litem/CASA should seek clarification from the juvenile and probate courts regarding appointment. Guardian ad litem/CASA appointment is particularly important if the adoption is contested and/or if two different families seek to adopt the child. Guardians ad litem and CASAs may also be appointed in adoption cases that do not involve a CHINS, due to the adoption code's requirements of considering the child's best interests. See also IC 31-19-16-2 (referring to guardians ad litem and CASAs appointed in adoption proceedings under the authority of IC 31-32-3). See Chapter 13 at VIII. C. for further discussion of guardian ad litem in adoption.

A guardian ad litem/CASA can also be appointed to make recommendations for post-adoption visitation. One condition of the six conditions listed in IC 31-19-16-2 for granting post-adoption visitation, is the requirement that an appointed guardian ad litem or CASA recommend that the post-adoption visitation is appropriate.