

# CHAPTER 12

## PATERNITY

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# CHAPTER 12

## PATERNITY

### I. OVERVIEW OF LEGAL PROCEEDINGS TO DETERMINE PATERNITY

When a child is born during the marriage of the mother and the mother's husband it is presumed that the child is the biological and legal child of the mother and the husband. See IC 31-14-7-1 (presumed fathers); IC 31-9-2-15 (definition of child born in wedlock). It is generally not necessary to obtain a legal determination of this presumed fatherhood unless paternity is challenged, or challengeable, in a legal proceeding. The mother and father share in the right to the custody and care of the child.

When a child is born outside of a marriage, or paternity (fatherhood) is otherwise disputed, a legal proceeding may be required to clarify the rights and obligations of the alleged father. Statutory law clarifies the methods of establishing paternity. Individuals can initiate paternity proceedings, but federal and Indiana child support enforcement legislation also provide that the state can initiate proceedings to establish paternity and child support for children born outside of marriage.

#### A. Methods of Establishing Paternity

IC 31-14-2-1 provides that a man's paternity may "only" be established by one of the following methods: (1) in a paternity action under IC 31-14 or (2) by executing a paternity affidavit. IC 16-37-2-2.1 states that the paternity affidavit establishes paternity and gives rise to parental rights and responsibilities, including the obligation of child support. However, some juvenile courts have not considered that the paternity affidavit suffices as establishment of paternity for purposes of CHINS cases. See this Chapter below at VI. for discussion on whether paternity affidavit establishes paternity, and the recommended practice of obtaining a juvenile court judgment of paternity.

Listing a father on the birth certificate of a child born out of wedlock does not establish paternity or entitle the man to visitation or custody rights. A listing with the putative father registry also does not establish paternity, but it allows a putative father to receive notice of an adoption petition.

#### B. Paternity Proceeding in Juvenile Court

A paternity petition can be filed in juvenile court pursuant to IC 31-14 when a party with standing alleges that a man is the biological father of a child. The term "alleged father" is defined for purposes of the juvenile court paternity law at IC 31-9-2-9 as being any man claiming to be or charged with being a child's biological father. The paternity proceeding results in a determination of whether the man is the legal father of the child, and establishes rights and responsibilities with regard to custody, visitation, and financial support of the child.

#### C. Paternity Issues in Divorce Custody Cases

Paternity can be litigated in the context of a dissolution proceeding if the husband or wife contends that a child was not born of the marriage. The divorce case of Russell v. Russell, 682 N.E. 2d 513 (Ind. 1997), indicates that a "child of the marriage" includes the biological and adopted children of both the husband and wife, but may not include children conceived by someone other than the husband before or during the marriage. The Russell case provides that the husband's paternity may in some circumstances be legally established or disestablished in the dissolution proceeding, although the child or an alleged father may be able to pursue the matter in a separate juvenile court paternity proceeding.

#### D. Paternity Issues in Adoption

Paternity may be an issue in adoption cases when a child is born out of wedlock, although the paternity of a child may not be legally determined in the context of the adoption proceeding. The issue in an adoption case is the right of the biological father to receive notice of the adoption proceeding and/or to block the adoption by refusing to consent. See this Chapter below at V. for discussion of paternity proceedings

involving a child who is also subject of an adoption petition and for information on putative father registry. See also Chapter 13 for more detailed information on adoption and putative father registry.

E. IV-D and the Child Support Bureau

Indiana established the Child Support Division (now titled the Child Support Bureau) within the Division of Family and Children as the agency to administer the provisions of Title IV-D of the federal Social Security Act at 42 U.S.C. 651 through 669. See IC 31-9-2-130. The responsibilities of the Bureau are set out at IC 12-17-2 et seq., and include (1) establishing paternity for children born out of wedlock, and establishing child support orders and health insurance coverage; (2) collecting child support payments; and (3) implementing income withholding orders. The Bureau generally contracts with the prosecutor of each county to provide these IV-D services. IC 12-17-2-18. The prosecutor provides parent locator services and the other identified services to individuals who receive public assistance at no charge. A slight fee may be charged to other persons. See Collier v. Collier, 702 N.E. 2d 351 (Ind. Ct. App. 1998) (discussion on child support enforcement and holding that the prosecutor may represent parents in child support modifications). The IV-D prosecutor does not provide legal assistance in custody and visitation issues.

## II. RIGHTS OF ALLEGED FATHERS IN CHINS AND TERMINATION CASES

A. Alleged Father Qualifies as "Parent"

The CHINS notice and definition statutes make no special provision for alleged fathers. However, the notice statute, IC 31-34-10-2, authorizes the court to summons the child's "parent" and "any other person necessary for the proceedings" to the CHINS initial hearing. The alleged father may fit into both of those categories. The definition section of the juvenile code at IC 31-9-2-88 defines "parent" as meaning a "biological or adoptive parent." Arguably, the alleged father qualifies as the biological parent even prior to a paternity adjudication.

B. CHINS and Termination Case Law

The Court of Appeals ruled in In Re A.B., 165 Ind. App. 365, 332 N.E. 2d 226 (1975), that if a putative father appears at a neglect proceeding he is entitled to be heard and cannot be excluded from the proceeding, even if he has not established his paternity. Relying on Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208 (1972), the Court noted that on due process and equal protection grounds:

...the fathers of illegitimate children who appear and contest dependency proceedings, such as the instant one, are entitled to a fitness determination upon the merits. Under the policy and provision of our act, and in view of that principle, we are forced to conclude that the trial court abused its discretion in wholly denying Brown [putative father] any opportunity to participate in the proceedings upon the facts presented.

A.B., 365 N.E. 2d at 228.

In Matter of Laney, 489 N.E. 2d 551 (Ind. Ct. App. 1986), the Court of Appeals ruled that if a putative father appears at the termination of parent-child relationship proceeding he has standing to participate in the proceeding and is entitled to court appointed counsel.

In the termination of parent-child relationship case, Matter of A.C.B., 598 N.E. 2d 570 (Ind. Ct. App. 1992), a putative father alleged that in the underlying CHINS case he did not receive the rights normally afforded to fathers whose paternities were legally established. The Court rejected this argument, finding that the father was notified of the CHINS proceeding, transported from the prison to the court for each hearing, given the opportunity to be heard and admit to the CHINS petition, and his request for court appointed counsel "was treated no differently than that of any other parent." Id. at 572. The Court also noted that the denial of father's visitation was not inappropriate, because visitation was not in the child's best interest.

The Court noted in Matter of K.H., 688 N.E. 2d 1303, 1305 (Ind. Ct. App. 1997), that paternity does not have to be legally established before terminating the parent-child relationship. This case indicates, but does not so state, that the alleged father has standing in the termination case even though he has not established his paternity. The number of termination cases dealing with the rights of alleged fathers in termination cases indicates that alleged fathers have parental rights and are entitled to notice and party status in the termination cases even if they have not established their paternity. See Matter of N.B., 731 N.E. 2d 492, 494 (Ind. Ct.

App. 2000) (father had not established paternity at the time of the termination petition); Young v. Elkhart County Office of Family and Children, 704 N.E. 2d 1065, 1067 (putative father challenged sufficiency of evidence in termination case); Matter of A.C.B., 598 N.E. 2d 570, 572 (Ind. Ct. App. 1992) (statutes governing termination of parental rights do not require an adjudication of paternity prior to termination).

C. Custody and Visitation Rights

IC 31-14-13-1 gives sole custody of a child born out of wedlock to the biological mother, absent a court order or statute which provides otherwise. However, the statute also provides that a court can give the alleged father or another person custody of the child in a CHINS, paternity, or guardianship proceeding, or other specific situations. Even if a paternity affidavit has been properly executed in favor of the father, IC 16-37-2-2.1 provides that "the child's mother has sole legal custody of the child unless another custody determination is made by a court in a proceeding under IC 31-14." No statute addresses the right of an alleged father to visit with the child. In In Re A.A.C., 682 N.E. 2d 541 (Ind. Ct. App. 1997), the Court of Appeals noted in the facts of the case that the trial court denied the putative father visitation with his child during the CHINS proceeding until he established paternity, but this issue was not disputed on appeal.

### III. INVOLVING ALLEGED FATHERS IN CHINS PROCEEDING

A. Best Practice to Give Notice to Alleged Fathers

It is recommended in both CHINS and termination proceedings that the office of family and children give notice to any man (or all men) whom the mother identifies as the father or who are otherwise alleged to be the father, regardless of whether the father has made any efforts to identify himself as the father or had any contact with the child. See this Chapter above at II.A. on rights of alleged fathers. This is the better practice even though some case law indicates that a man who takes no action toward declaring his paternity or makes no effort toward developing a relationship with the child is not entitled to notice of legal proceedings affecting his relationship with the child. See Lehr v. Robertson, 463 U.S. 248, 103 S. Ct. 2985 (1983); B.G. v. H.S., 509 N.E. 2d 214 (Ind. Ct. App. 1987); and M.R. by Ratliff v. Meltzer, 487 N.E. 2d 836 (Ind. Ct. App. 1986). The office of family and children should search its program and financial assistance records (Food Stamps, Medicaid, Temporary Assistance to Needy Families, etc.) to identify alleged fathers.

B. Benefits/Detriments of Establishing Paternity

Jurisdiction over the alleged father may be highly advantageous to the office of family and children and may be in the best interest of the child in a CHINS proceeding. Involving the father in the CHINS case and obtaining an independent judgment of paternity facilitates the following: court orders for participation of the alleged father in the care and treatment of the child and in the rehabilitation of the family, IC 31-34-20-3; and court orders to the father for the financial support of the child and the cost of services for the child and family, IC 31-40-1. Also, involving the alleged father in the CHINS proceeding may create additional placement options for the child, including relative placements with paternal relatives. Failure to identify and involve the alleged father in the CHINS proceeding and to offer him rehabilitation and reunification services may defeat future efforts to terminate the parent-child relationship so that the child can be made available for adoption.

For the alleged father who wants to be awarded custody in the CHINS proceeding, the benefits of establishing his paternity in a separate legal paternity proceeding are obvious. Once paternity is legally established, the father must be afforded party status in CHINS and termination proceedings, should be entitled to rehabilitation services and visitation, and may be considered for placement of the child. See Chapter 2 Roman Numeral I. at D. for additional discussion of rights of alleged fathers. In Matter of A.M., 596 N.E. 2d 236 (Ind. Ct. App. 1992), the Court ruled that the evidence was insufficient to terminate the parent-child relationship of the biological father who was not given custody of the child throughout the CHINS proceeding. The Court found that the father had established paternity after the CHINS adjudication and worked with the welfare department to obtain custody of the child. The Court noted that the reasons for removal of the child from the mother could not be assigned to a father who had not been allowed to exercise his parental rights as to the child. However, subsequent termination case law has indicated that the child's placement with the noncustodial parent during the CHINS proceeding is not required, if the office of family and children documents the reasons why the noncustodial parent is not fit for placement of the child. See In Re B.D.J., 728 N.E. 2d 195, 200-202 (Ind. Ct. App. 2000) (evidence in termination hearing was sufficient to show that children were not placed with adjudicated noncustodial father when removed from mother because

father was unable to provide for their needs, and evidence showed reasonable likelihood that this would not change).

From the perspective of the child, establishment of paternity may have positive and negative effects. Establishing paternity enables the child to receive financial support and inheritance from the father, and possibly a greater opportunity to develop a relationship with the father through custody or visitation. On the other hand, establishing the paternity of a dysfunctional or dangerous man may force the child into an undesirable relationship, and there may be other situations in which establishment of paternity is not in the best interest of the child. See In Re R.P.D. Ex Rel. Dick, 708 N.E. 2d 916 (Ind. Ct. App. 1999) (Court affirmed trial court ruling that establishment of paternity in biological father was not in best interest of six-year-old child). IC 31-34-15-6 provides that the office of family and children shall refer the case of a CHINS to the local prosecutor to initiate paternity proceedings, if the office of family and children knows the identity of the father and "reasonably believes that establishing the paternity of the child would be beneficial to the child." Under that statute the prosecutor is obligated to file the proceeding if the referral is made.

C. Amendment of CHINS Petition to Include Alleged or Adjudicated Father

Neither case nor statutory law are clear on how to incorporate into the CHINS proceedings an alleged father who was not identified at the time of the initial CHINS proceeding, but whose identity was learned later. It may be possible to amend the CHINS petition to name the father and conduct necessary admission or factfinding hearings to determine the grounds for which the child is not currently placed with the father, and to identify the conditions under which placement could occur. In the concurring opinion in the termination case of Matter of K.H., 688 N.E. 2d 1303 (Ind. Ct. App. 1997), Judge Sullivan raised a serious concern that the father was not a party to the CHINS proceeding and therefore had not admitted to the adverse conditions existing in the home when the children were removed.

In addition to including the alleged father in the CHINS petition and the CHINS judgment, dispositional or parental participation orders should be issued to identify the evaluations, treatment, or other conditions the alleged father must comply with to obtain visitation with or placement of the child.

D. Locating Alleged Fathers

The IV-D Child Support Bureau may be helpful in locating alleged fathers, and the prosecutor may initiate paternity proceedings regarding those fathers. See this Chapter above Roman Numeral I. E. on parent locator services and this Chapter below IV. D. on obligation of prosecutor to initiate paternity cases.

The office of family and children may attempt to search three distinct listings which pertain to alleged fathers at the time a termination petition is filed or an adoption may be arranged. However, it should be noted that the statutory language in the registries does not specifically provide for searches pursuant to termination of the parent-child relationship, but for adoption. Arguably it can be assumed that the office of family and children is pursuing the goal of adoption when it initiates the termination petition, and therefore should be given access to the registry information. The Putative Father Registry, codified at IC 31-19-5, allows any individual or agency arranging an adoption to request the State Department of Health to complete a search of the Registry at IC 31-19-5-15. Paternity judgments are also recorded with the State Department of Health and a search request may be made to the Department for a record of paternity judgments by an attorney or an agency that may arrange an adoption. IC 31-19-6-1. Finally, the State Department of Health and local health departments are to maintain information on paternity affidavits pursuant to IC 16-37-2-14, with the separate provision at IC 16-37-2-2(f) and (g) to provide this information upon request of individuals or agencies arranging an adoption. The local health department, pursuant to IC 16-37-2-2(d), also must inform the Title IV-D agency (the child support bureau) regarding each paternity affidavit executed, and the office of family and children should request information from the bureau as to paternity affidavits.

## IV. ESTABLISHING PATERNITY WITH A PATERNITY PROCEEDING

A. Jurisdiction and Venue

IC 31-30-1-1(3) provides that the juvenile court has "exclusive original jurisdiction" in "[p]roceedings concerning the paternity of a child under IC 31-14." IC 31-14-3-2 provides that venue lies in the county in which the child, the mother, or the alleged father resides.

If a parent or the child resides outside of Indiana, two significant federal laws, codified in Indiana law, may apply: Uniform Interstate Family Support Act (UIFSA) at IC 31-18, and the Uniform Child Custody Jurisdiction Law (UCCJL) at IC 31-17-3. IC 31-30-1-10 provides that the circuit court has concurrent original jurisdiction with the juvenile court for the purpose of establishing the paternity of a child in a proceeding under UIFSA to enforce a duty of support. See also Egan v. Bass, 644 N.E. 2d 1272 (Ind. Ct. App. 1994) (UIFSA cases, previously referred to as URESA, are instituted to establish paternity for purpose of support collection when alleged father lives in another state). In Matter of Paternity of J.N., 643 N.E. 2d 913 (Ind. Ct. App. 1994), Florida forwarded mother's petition to establish paternity to Indiana and Indiana had jurisdiction to hear the URESA action without Florida exerting long-arm jurisdiction. In K.T.H. v. M.K.B., 670 N.E. 2d 118 (Ind. Ct. App. 1996), the Court clarified that URESA actions are limited to the establishment and enforcement of support obligations and cannot involve matters of custody or visitation. See also State of Virginia Ex. Rel. Bateman v. Foley, 712 N.E. 2d 1094, 1097-1098 (URESAs petition should not concern issues of visitation).

In Matter of R.L.W., 643 N.E. 2d 367 (Ind. Ct. App. 1994), the Court ruled that the Indiana trial court had jurisdiction under the Indiana Uniform Child Custody Jurisdiction Law (UCCJL) to establish paternity on a petition filed by the alleged father, even though the mother and child had left the state shortly before the filing of the petition. The Court ruled that the putative father qualified as a "parent" for purposes of the UCCJL, based on the following evidence; he resided with the mother and child in Indiana shortly before the mother and child fled the state; he held the child out to be his own by filing the paternity action; and the child bore his full name.

B. Civil Trial Rules and Standard of Proof

Paternity actions and related custody and visitation determinations are civil in nature and the civil trial rules apply. IC 31-14-3-1. The standard of proof in paternity actions is preponderance of evidence. See Reynolds v. State, 115 Ind. 421, 17 N.E. 909 (1888); Humbert v. Smith, 655 N.E. 2d 602, 605 (Ind. Ct. App. 1995), summarily affirmed at 664 N.E. 2d 365 (Ind. 1996). See also IC 31-34-12-3 (the standard of proof on juvenile proceedings other than delinquency and termination is preponderance of evidence.)

C. Right to Jury Trial

Without fanfare, the statutory right to a jury trial at IC 31-14-8-3 (formerly IC 31-6-6.1-7(b)) was repealed in 1997. See also IC 31-32-6-7 (all matters in juvenile court shall be tried to the bench except criminal matters). There may be some argument that the right to a jury trial in paternity proceedings at common law survives repeal of the statute.

D. Standing and Legal Responsibility to File Paternity Proceeding

The mother, the child, and the alleged father have standing to file a paternity proceeding under IC 31-14-4-1. A prosecuting attorney is required to file a paternity action and represent the child upon the request of the child, mother, alleged father, Division of Family and Children, or county office of family and children under IC 31-14-4-2. IC 31-14-4-2(b) provides that the prosecutor "may" file a paternity action if the child is alleged or adjudicated to be a CHINS or is otherwise under the supervision of the Division or county office of family and children. However, IC 31-34-15-6(b) states that the prosecutor "shall" file a paternity petition on a CHINS in out-of-home placement upon referral from the Division or county office of family and children that (1) the child was born out of wedlock and the identify of the alleged father is known, and (2) the Division or county office of family and children believes that establishing paternity of the child "would be beneficial to the child." Under the later statute, the Division or county office of family and children shall sign the paternity petition as the child's next friend. The Division or county office of family and children may file a paternity action under IC 31-14-4-3 when there has been an assignment of support rights under Title IV-D.

E. Filing Paternity Proceeding on Child Conceived Outside of Mother's Marriage

In recent years Indiana case law has clarified the right to bring paternity actions regarding children who were born during the mother's marriage to her husband, but were conceived by another man. These cases significantly impact on CHINS litigation, because it is both necessary and helpful to establish the identity of the legal father of the CHINS for purposes of custody, visitation, and termination of parental rights. Immediately below is a discussion on juvenile court paternity actions filed while the mother is married to her husband (the child's presumed father), or after the dissolution of mother and presumed father's marriage. See also this Chapter below at VII. for discussion on paternity challenges within the dissolution proceeding, and when a dissolution paternity ruling may be a bar to future juvenile court paternity proceedings.

1. Paternity Proceeding to Establish Paternity of Child Born While Mother's Marriage Still Intact  
In K.S. v. R.S., 669 N.E. 2d 399 (Ind. 1996), the mother and her neighbor conceived a child during the mother's marriage to her husband. The child was born and the mother's marriage remained intact. The neighbor filed a paternity action in the court with juvenile jurisdiction. The court approved the agreed entry of the mother and the neighbor that the neighbor was the biological father and that the mother and neighbor should have joint custody. The mother subsequently filed a motion to set aside the entry under Ind. Trial Rule 60(B)(6). On transfer, the Indiana Supreme Court reasoned that a child born to a married woman, but fathered by a man other than her husband, is a "child born out of wedlock." The paternity statute, IC 31-6-6.1-2 (recodified at IC 31-14-4-1), specifically authorizes the biological father to establish paternity. "Nothing in the paternity act precludes a man otherwise authorized from filing a paternity action on the basis of the mother's marital status." Id. at 403. This position is also supported in Russell v. Russell, 682 N.E. 2d 513, 519 (Ind. 1997).

In C.J.C. v. C.B.J., 669 N.E. 2d 197 (Ind. Ct. App. 1996), a child was conceived outside of the mother's marriage. The mother remained married and her husband supported the child as his own even though he knew he was not the biological father. The mother filed a paternity action against the alleged father. The Court dismissed the action on the alleged father's motion, but appointed a guardian ad litem for the child to determine 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. An amended petition was filed by the guardian ad litem. Even though blood tests confirmed paternity in the alleged father, the trial court dismissed the paternity petition on the argument that public policy does not favor the maintenance of a paternity action against a third party when a child is born during a marriage and the family remains intact. The Court of Appeals reversed the dismissal and ruled that the child can maintain a paternity action against the alleged father. The paternity statute favors the public policy of establishing paternity of children born out of wedlock.

2. Initiating Paternity Proceeding During Mother's Divorce Proceeding or After Divorce Judgment  
In In Re S.R.I., 602 N.E. 2d 1014 (Ind. 1992), the Indiana Supreme Court ruled that the alleged father can bring a paternity action regarding a child that was born during mother's marriage to another man, even though the child had been ruled a "child of the marriage" in the dissolution of the mother and her husband's marriage. Neither the alleged father nor the child were parties to the dissolution case, and thus the dissolution ruling was not res judicata as to the alleged father's paternity proceeding.

In In Re the Paternity of J.W.L., 682 N.E. 2d 519 (Ind. 1997), the Indiana Supreme Court ruled that res judicata did not bar a paternity petition filed by the mother as next friend for the child against an alleged father, even though the mother had earlier claimed in a separate dissolution proceeding in Florida that the child was born of the marriage to her husband. The Court reasoned that the child was not a party to the dissolution proceeding and therefore was not bound by its ruling on paternity. However, the Court noted that when the issue of paternity is fully litigated in a dissolution proceeding and the ruling is based upon, and consistent with, blood or genetic testing, the paternity ruling will constitute a determination in all but the most extraordinary circumstances and will be binding as to the child.

In In Re R.P.D. Ex Rel. Dick, 708 N.E. 2d 916 (Ind. Ct. App. 1999), the mother initiated a paternity petition in the name of the six year old child and herself, as next friend, alleging that someone other than the mother's current husband was the father of the child. The paternity proceeding was consolidated with the pending divorce proceeding involving mother and her husband. The husband, alleged father, and guardian ad litem filed motions to dismiss the paternity proceeding. The court dismissed the paternity petition upon its finding that a petition brought by next friend required a determination that the petition was in the best interest of the child, and the court ruled after a contested hearing that the petition was not in the best interest of the child in this case. The Court of Appeals affirmed the dismissal of the paternity petition and the trial court's finding that the mother was prohibited from bringing a paternity petition on the child's behalf. Id. at 920.

#### F. Party Status

IC 31-14-5-6 provides that the mother, child, and each person alleged to be the father are necessary parties to the paternity action. IC 31-14-5-2 provides that a person less than eighteen years of age may file the paternity petition if competent except for age. A person who is incompetent may file a petition through the person's guardian, guardian ad litem, or next friend.

The case law is clear that a child is a necessary and indispensable party to a paternity proceeding and must clearly be designated as a party in the pleading to ensure that the paternity judgment is res judicata as to all interested parties. See Matter of Paternity of H.J.F., 634 N.E. 2d 551 (Ind. Ct. App. 1994); In Re Paternity of V.M.E., 668 N.E. 2d 715 (Ind. Ct. App. 1996); Marsh v. Paternity of Rodgers by Rodgers, 659 N.E. 2d 171 (Ind. Ct. App. 1995). However, case law has held that failure to name the child as a party does not void the judgment. In K.S. v. R.S., 669 N.E. 2d 399 (Ind. 1996), the Indiana Supreme Court ruled that failure to name the child as a party to the paternity action does not render the paternity judgment void, but merely voidable. Because a motion filed pursuant to Ind. Trial Rule 60(B)(6) applies only to judgments that are void, the trial court was correct in denying the T.R. 60(B)(6) motion to set aside a paternity judgment on the grounds of failure to join the child as a necessary party. Id. at 405. On rehearing, the Court of Appeals ruled in K.T.H. v. M.K.B., 670 N.E. 2d 118, 119 (Ind. Ct. App. 1996), that a judgment against the father on a Uniform Reciprocal Enforcement Support Act [URESA] paternity petition that did not name the child as a party, was voidable (rather than void per se), and the judgment was not res judicata as to the child. See also T.L.G. v. R.J., 683 N.E. 2d 633 (Ind. Ct. App. 1997) (failure to name the child as a party to paternity action renders paternity judgment voidable as to child, however, child ratified voidable judgment by accepting the agreement to settle the support dispute).

IC 31-14-21-8 provides that prospective adoptive parents in a pending adoption proceeding can intervene as a party in the paternity proceeding involving the same child. However, the rights of the interveners are specifically limited by statute.

G. Statute of Limitations

Pursuant to IC 31-14-5-3 the mother and alleged father may be barred from filing a paternity suit more than two years after the birth of the child, unless (1) the mother and father both waive the limitation, (2) the father or his representative provided support for the child, (3) the mother or the Division or office of family and children files a paternity petition after the father acknowledged his paternity in writing, (4) the father files a paternity petition after the mother has acknowledged in writing that he is the biological father, (5) the mother or father was incompetent when the child was born, or (6) the responding party could not be served with summons during the two year period.

IC 31-14-5-2 provides that the child or the child's guardian, guardian ad litem or next friend can bring a paternity suit until the child's twentieth birthday. If incompetent at age eighteen, the child can bring the suit within two years of obtaining competency.

IC 31-14-5-4 provides that the Division of Family and Children or county office of family and children can file a paternity action until the child's nineteenth birthday or the date of the child's graduation from high school (whichever occurs first), in cases in which public assistance has been furnished for the child and there is an assignment of support rights under Title IV-D.

A paternity action must be filed during the lifetime of the alleged father or within five months of his death. IC 31-14-5-5. See Haas v. Chater, 79 F. 3d 559 (7th Cir. 1996) (in action for social security benefits for child, Court ruled that statute requires that paternity be established within five months of the father's death).

In the paternity case of Drake v. McKinney, 717 N.E. 2d 1229 (Ind. Ct. App. 1999), the Court noted that the statute of limitations is not jurisdictional, but an affirmative defense that must be pled and proven. The party pleading that the suit is barred by the statute of limitation bears the burden of proving the suit was commenced beyond the statutory time limit. See also Matter of Paternity of P.L.M. by Mitchell, 661 N.E. 2d 898 (Ind. Ct. App. 1996).

1. Filing Suit as Next Friend

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 by the child's mother, as next friend, alleging that someone other than the mother's current husband was the father of the child. The alleged biological father, mother's husband, and the guardian ad litem filed motions to dismiss the paternity proceeding, and following an evidentiary hearing on whether establishment of paternity was in the best interest of the child, the court dismissed the paternity petition. The Court of Appeals affirmed upon its reasoning that a hearing was necessary to determine the best interest 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 interest, and the Court

found that the trial court's judgment that the proceeding was not in the child's best interest was not clearly erroneous. Id. at 919.

In Matter of Paternity of P.L.M. by Mitchell, 661 N.E. 2d 898 (Ind. Ct. App. 1996), the putative father initiated a paternity action as next friend of the child two years after the father's statute of limitations had run. The mother appealed the paternity judgment. The Court ruled that the father was a proper next friend through which the child could file her paternity petition, and the two year statute of limitations for fathers did not apply because the petition was brought by the child. There is no statutory or case law restriction on who may serve as the child's next friend.

In Clark v. Kenley, 646 N.E. 2d 76 (Ind. Ct. App. 1995), the Court of Appeals ruled that a prosecutor shall file a paternity action on behalf of a child when requested to do so by the putative father, even though the putative father's action to establish paternity is barred by the two year statute of limitations. The petition must be brought in the name of the child, by his next friend the prosecutor. The prosecutor represents the child on the petition, not the father.

In Matter of Paternity of J.J.H., 638 N.E. 2d 815 (Ind. Ct. App. 1994), the mother assigned the support rights for the fourteen year old child to the local welfare department as a precondition to receiving welfare benefits. Although the statute of limitations had tolled on the rights of the mother and the welfare department to file a paternity action, the Court determined that a paternity action could be filed in the child's name by the mother as next friend because the child had until her twentieth birthday to bring suit. However, because child support had been assigned to the welfare department, and the department's paternity action was barred by the statute of limitations, the trial court could not order the father to pay child support. The department cannot circumvent the statute of limitations by including within the child's timely action to establish paternity, "its own concealed untimely action for child support." Id. at 818.

2. Furnishing Child Support Tolls Statute of Limitations

In Matter of Paternity of S.B.A., 645 N.E. 2d 1103 (Ind. Ct. App. 1995), the Court ruled it was error to dismiss the putative father's paternity action on summary judgment, as barred by the two year statute of limitations. There was a question of fact as to whether the father voluntarily provided support for the child and thus fit within the statute of limitations exception in IC 31-6-6.1-6 (recodified at IC 31-14-5-3 (b)(2)). The Court quoted case law indicating that minimal payments or provision of small amounts of clothing or "stuff" for a child could be considered "support" for purposes of tolling the statute of limitations. Id. at 1105, 1106. See also Drake v. McKinney, 717 N.E. 2d 1229 (Ind. Ct. App. 1999) (material issue of fact as to whether someone acting on father's behalf provided support for child precluded summary judgment).

3. Acknowledgment of Paternity Tolls Statute of Limitations Unless Rescission

In In Re Paternity of K.H., 709 N.E. 2d 1033 (Ind. Ct. App. 1999), the Court ruled that the paternity petition filed by the alleged father under the statute of limitations exception for written acknowledgment of paternity by the mother was timely because the petition was filed within two years of the mother's death, even assuming the mother's death had the effect of rescinding her acknowledgment. In Drake v. McKinney, 717 N.E. 2d 1229 (Ind. Ct. App. 1999), the Court ruled that the stepfather's act of petitioning for adoption of the child two weeks after the alleged father filed a paternity proceeding, did not infer that the mother's earlier written acknowledgment in a paternity affidavit of alleged father's paternity had been rescinded.

H. Appointment of Counsel or Guardian Ad Litem/CASA for Child

The paternity article of family law, IC 31-14, makes no reference to the appointment of a guardian ad litem or court appointed special advocate (CASA) for a child, and does not provide for a custody or visitation investigation by a guardian ad litem or CASA. However, paternity actions are within juvenile court jurisdiction and IC 31-32-3-1 provides that the juvenile court may appoint a guardian ad litem or CASA for a child "at any time." Ind. Trial Rule 17(C) provides that when an infant or incompetent is joined as a party to an action and is not represented, or is not adequately represented, the court shall appoint a guardian ad litem for the child.

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.

When a paternity action is brought by the prosecutor at the request of the child, mother, or Division or county office of family and children, IC 31-14-4-2(a) provides that the prosecutor shall "represent the child in that action." With regard to appointment of counsel for a child in a paternity proceeding, IC 31-32-4-2(b) provides that the judge has the discretion to appoint counsel for a child in any juvenile proceeding.

I. Right to Counsel for Parents

Neither the juvenile code nor the paternity article in family law, IC 31-14, require the appointment of counsel for the parent in a paternity proceeding. A parent can request appointment of counsel as an indigent under IC 34-10-1-1. In a case where a parent is the recipient of public assistance and the state has an interest under Title IV-D, due process and fundamental fairness demands that counsel be appointed to represent an indigent respondent. Kennedy v. Wood, 439 N.E. 2d 1367 (Ind. Ct. App. 1982).

J. Paternity Petition and Service of Process

IC 31-14-5-1 provides that the paternity petition shall be verified and captioned "In the Matter of the Paternity of \_\_\_." See this Chapter above at IV. F. for effect of failure to name child as party in paternity petition.

IC 31-14-3-1 provides that service of process shall be made in compliance with the civil trial rules. Ind. Trial Rule 4.2(A) requires that service upon an infant (defined as a person under eighteen) must be made upon the infant's next friend, guardian ad litem, or custodial parent and upon the infant if he is at least fourteen years old.

Service of the original paternity action was defective in Gourley v. L.Y., 657 N.E. 2d 448 (Ind. Ct. App. 1995). In that case the alleged father was a minor, and the next friend was not served; however, the defect did not deprive the trial court of personal jurisdiction because the minor father actually received the summons and complaint and there was no evidence that he did not understand his obligation under the summons. The Court noted that "personal jurisdiction over a party will obtain by any method of service which comports with due process." Id. at 450.

In the paternity case of Matter of R.L.W., 643 N.E. 2d 367 (Ind. Ct. App. 1994), the Court ruled that service on the mother by publication was sufficient because the father attempted to effect personal service at mother's last known address, mother had actual notice of the proceedings, and the mother and her counsel deliberately concealed mother's whereabouts. The Court noted that the sufficiency of the notice varies with the circumstances and it is not always possible to give personal service. Although the mother had actual notice in this case, the Court noted that if the service is "reasonably calculated to inform," the fact that the party served lacks actual notice does not defeat jurisdiction. Id. at 369. Under Ind. Appellate Rule 15(G), the Court assessed one thousand dollars in damages against the mother for concealing her whereabouts and remanded the case to the trial court for collection of the assessment and for consideration of contempt proceedings for violation of the trial rule requirements regarding acceptance of notice. Ind. Trial Rule 4.16 (A) states that it "shall be the duty of every person being served under these rules to cooperate, accept service, comply with the provisions of these rules, and, when service is made upon him personally, acknowledge receipt of the papers in writing over his signature."

In Stidham v. Whelchel, 698 N.E. 2d 1152, 1156 (Ind. 1998), vacating the Court of Appeals opinion at 648 N.E. 2d 548 (Ind. Ct. App. 1997), the Supreme Court noted that a judgment is void when issued without

personal jurisdiction, and a judgment for support that is "void for lack of personal jurisdiction may be collaterally attacked at any time and the "reasonable time" limitation under rule 60(B)(6) means no time limit."

K. Stipulations and Joint Petitions for Paternity

Pursuant to IC 31-14-10-3, the court may make a judgment of paternity and issue orders of support and visitation without a court hearing, if the parents jointly file a verified written stipulation or file a joint petition that resolves the issues of custody, child support, and visitation.

L. Presumed Father.

IC 31-14-7-1 provides that a man is a "presumed father" under the following situations: (1) the man and the child's mother are or were married to each other and the child was born during the marriage or within 300 days of the termination of the marriage; (2) the man and the mother attempted to be married in compliance with the law, even though the marriage is void or voidable, and the child is born during the time period specified in section 1 above; (3) the man executed a paternity affidavit; or (4) a blood test indicates with at least ninety-nine percent probability that the man is the child's biological father.

Presumed paternity can be rebutted by direct, clear and convincing evidence. In Fowler v. Napier, 663 N.E. 2d 1197 (Ind. Ct. App. 1996), the mother and alleged father had unprotected sexual intercourse during the probable period of gestation and the mother had sex with no other person during that time. A child was born to the mother and she initiated a paternity action against the alleged father, which apparently was not pursued because of inconclusive blood test results. The mother married another man. Six years after the initial paternity proceeding, the mother and her husband signed a Board of Health affidavit stating that the husband was the child's father. Eight years later, the child (by her mother as next friend) initiated a paternity action against the alleged father. DNA blood testing revealed a 99.9% probability that the alleged father was the biological father, and a judgment of paternity was issued. The alleged father appealed. The judgment was affirmed, upon finding that the presumption of paternity had been rebutted by direct, clear and convincing evidence. In Minton v. Weaver, 697 N.E. 2d 1259 (Ind. Ct. App. 1998), the Court ruled that the presumption of paternity in the mother's husband was rebutted by evidence of genetic test results and unprotected sexual relations of mother only with alleged father during period of conception. The Court clarified that the presumption of paternity can be rebutted by types of evidence not specifically listed in the case of Murdock v. Murdock, 480 N.E. 2d 243 (Ind. Ct. App. 1985).

M. Rebuttable Presumption of Fatherhood

IC 31-14-7-2 provides that if there is no presumed father under IC 31-14-7-1, then there is a rebuttable presumption of paternity if the man, with the consent of the child's mother, (1) receives the child into his home and (2) openly holds the child out as the man's biological child. The statute clarifies that these circumstances do not establish paternity.

N. Blood or Genetic Tests to Determine Paternity

IC 31-14-6-1 provides that upon the motion of any party to a paternity proceeding, the court shall order all of the parties to undergo blood or genetic testing performed through a qualified expert. See J.W.L. by J.L.M. v. A.J.P., Jr., 693 N.E. 2d 959 (Ind. Ct. App. 1998) (court shall grant request for blood test on petition to establish paternity brought by the child and court lacks discretion to deny blood tests on "best interest" standard). Although the moving party generally pays the costs of the blood tests, in cases in which the paternity action is filed by the state, the state may be required to initially pay for the tests. See Kennedy v. Wood, 439 N.E. 2d 1367 (Ind. Ct. App. 1982); Murdock v. Murdock, 480 N.E. 2d 243 (Ind. Ct. App. 1985). The state may recoup the blood testing expenditures as costs under IC 31-14-6-4. In paternity and dissolution proceedings a parent may be barred from obtaining blood testing if the parent has pled or admitted to the paternity. See Rundel v. Shady, 492 N.E. 2d 694 (Ind. Ct. App. 1986); Vanderbilt v. Vanderbilt, 679 N.E. 2d 909 (Ind. Ct. App. 1997) (mother who had assured husband of his paternity despite blood tests taken shortly after child's birth which showed 98.6% probability that third party was child's biological father, was barred by latches in subsequent dissolution case from rebutting husband's presumed paternity and Court affirmed denial of mother's request for blood tests). In the unpublished opinion of In Re Paternity of D.L.T and M.L.T., 71AO3-9910-JV-397 (Ind. Ct. App. April 17, 2000), the Court reiterated the reasoning of Fairrow v. Fairrow, 559 N.E. 2d 597 (Ind. 1990) and Leiter v. Scott, 654 N.E. 2d 742 (Ind. 1995), in ruling that a man was not entitled to a court ordered blood or genetic testing on a motion to set aside a judgment of paternity.

1. Admissibility of Test Results

IC 31-14-6-2 provides that if a party fails to file a written objection to the admissibility of genetic test results at least thirty days before a "scheduled hearing at which the test results may be offered as evidence," the test results are admissible as evidence of paternity without foundation testimony or other proof regarding the accuracy of the test results. See Humbert v. Smith, 664 N.E. 2d 356, 357 (Ind. 1996) (Court held test admissibility statute in paternity not void because it conflicted with foundational requirements of Ind. Evidence Rule 803(6), but was exception to Evid. R. 803(6) and was "consistent with the special care Indiana's courts have taken toward the expeditious resolution of questions of paternity, custody, and support of children"); Clark v. Gossett, 656 N.E. 2d 550 (Ind. Ct. App. 1995). IC 31-14-6-3 provides that the results of "tests" and the findings of an expert are admissible in all paternity proceedings, unless the court excludes the results or findings for good cause. IC 31-14-6-5 provides that the chain of custody of blood or genetic specimens may be established through verified documentation of each change of custody if the documentation was made at or around the time of the change of custody, and the documentation was made in the course of a regularly conducted business activity and was made as a regular practice of a business activity. Case law holds that test results may be admissible under the business records exception to the hearsay rule. See Fowler v. Napier, 663 N.E. 2d 1197 (Ind. Ct. App. 1996); Baker v. Wagers, 472 N.E. 2d 218, 222 (Ind. Ct. App. 1984) (expert witness may state opinions based upon tests performed by technicians under his direction).

2. Effect of Test Results

IC 31-14-7-1(4) creates a presumption of paternity for a man who undergoes a blood test that indicates with at least a 99% probability that he is the child's biological father. IC 31-14-6-3 provides that the results of the blood or genetic tests and findings of the expert constitute "conclusive evidence if the results and finding exclude a party as the biological father."

O. Default Judgment

IC 31-14-8-2 provides that a juvenile court "shall" enter a default order in a paternity suit against an alleged father who fails to appear, upon a showing that the alleged father received notice of the hearing.

P. Child Support

IC 31-14-11-1.1 provides that in a paternity proceeding temporary child support "shall" be ordered if there is clear and convincing evidence that the man involved in the proceeding is the biological father. IC 31-14-10-1 provides that once paternity is established, the court "shall" conduct a hearing to determine support, unless the parties have filed a written stipulation or joint petition resolving that issue pursuant to IC 31-14-10-3.

Although IC 31-14-11-2 states the relevant factors in the determination of child support, case law and the commentary to Indiana Child Support Guideline 2 clarify that the Child Support Guidelines apply to paternity proceedings. See In Re Paternity of A.J.R., 702 N.E. 2d 355, 359 (Ind. Ct. App. 1998); Matter of Paternity of A.D.W., 693 N.E. 2d 576, 579 (Ind. Ct. App. 1998). IC 31-14-11-5 provides that the court "shall" order retroactive child support from the date of the filing of the petition, and "may" order support from the date of the child's birth. IC 31-14-11-3 provides that the support order may include provisions for the child's education, medical expenses, health insurance coverage, and IV-D fees. See A.J.R. at 361-363 (limitation on court orders for educational expenses). IC 31-14-17-1 requires the court to order the father to pay at least fifty percent of the reasonable and necessary expenses of the mother's pregnancy and childbirth. The court must issue findings if it orders payment in excess of fifty percent of the expenses. A.J.R. at 363.

IC 31-14-11-8 provides that a support order may be modified or revoked upon a showing of substantial change in circumstances that makes the current terms unreasonable, or that a person has been ordered to pay an amount of child support that differs by more than twenty percent from the Support Guidelines and the order was issued at least twelve months before the current petition.

Q. Costs and Fees

IC 31-14-18-1 provides that the court may tax as costs the reasonable expenses of medical tests. If the state or a political subdivision has paid the initial costs for blood testings, IC 31-14-6-4 provides that it may recover those costs from an individual found to be the biological father in the action, and the court shall determine the manner in which reimbursement is to be made. The Court may also assess the costs of witness and attorney fees under IC 31-14-18-2. See Matter of Paternity of A.J.R., 702 N.E. 2d 355, 364 (Ind. Ct. App. 1998) (given "closeness" of current income and respective earning abilities of mother and father, it was

abuse of discretion for court to order father to pay mother's attorney fees). Contempt proceedings may be used to enforce payment of costs. Allee v. State, 462 N.E. 2d 1074 (Ind. Ct. App. 1984).

R. Child Custody and Visitation

IC 31-14-10-1 requires the juvenile court to conduct a hearing on custody and visitation once paternity is established. The factors for determining the best interest of the child in the custody determination are stated at IC 31-14-13-2, and are identical to the factors for custody determinations in dissolution cases. In In Re Paternity of K.J.L., 725 N.E. 2d 155, 157 (Ind. Ct. App. 2000), the Court noted that dissolution custody cases may be "instructive and authoritative" in the paternity context. See also Sills v. Ireelan, 633 N.E. 2d 1210, 1214 (Ind. Ct. App. 1996) (paternity and dissolution child custody and visitation statutes are "in pari materia and are appropriately construed together").

There is no presumption favoring either parent in an original determination of custody. The judge may interview a child in chambers to ascertain the child's wishes under IC 31-14-13-3, and the court has the discretion to allow counsel to be present for the interview. The parent granted custody of the child has the right under IC 31-14-13-4 to determine the child's upbringing, which includes education, health care, and religious training, unless the court determines that the best interests of the child require a limitation on this authority. If both parents request, or the court determines that the child's physical health, well being, or emotional development would be endangered or significantly impaired without supervision of the child's custodial placement, the judge may order the probation department or the office of family and children or any licensed child placing agency to supervise the placement to ensure that the custodial or visitation terms of the decree are carried out. IC 31-14-13-5.

The paternity statutes do not provide for joint legal custody of the child, as is available in divorce custody proceedings at IC 31-17-2-13 through 15. However, some courts have created custody orders in paternity cases for joint decision making by both parents regarding the child's upbringing, education, health care and religious training as outlined in the definition of "joint legal custody" at IC 31-9-2-67.

1. Custody Reports by Probation Officer or Caseworker

IC 31-14-10-1 provides that the parties may request, or the court may order on its own motion, that a probation officer or caseworker prepare a report to assist the court in determining support, custody, and visitation issues. Under IC 31-14-10-2 the probation officer or caseworker can consult with any person who may have information about the child's custodial arrangements, obtain court approval for professional diagnosis and evaluation of the child, and consult with and obtain information (without consent of the child's parent or guardian) concerning the child from medical, psychiatric, psychological or other persons with knowledge of the child. There is no provision in the paternity law for admissibility of a written report into evidence; however, analogy may be made to the divorce custody law on this procedural issue. IC 31-17-2-12 in the divorce custody law allows the court to order a probation officer, caseworker, guardian ad litem/CASA, court social service agency, or a staff member of the juvenile court to conduct an investigation and file a written report with the parties and the court ten days before the hearing. Hearsay in the report may not be excluded if the requirements of IC 31-17-2-12 are satisfied.

2. De Facto Custodian

1999 amendments to the paternity custody law created a "de facto custodianship." A de facto custodian is defined at IC 31-9-2-35.5 as a person who has been the primary care giver 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 31-14-13-2 requires that the court "shall" consider evidence that a child has been cared for by a de facto custodian as a factor in the custody determination. IC 31-14-13-2.5 provides 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 statute further provides that the court shall award custody to the de facto custodian if, after considering the required factors listed in subsection (b), the court determines that such an award is in the best interest 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. See Chapter 9 IV. F. 2. for discussion of de facto custodian laws in Matter of Guardianship of L.L., N.E. 2d (Ind. Ct. App. 2001).

3. Issues of Domestic Violence

IC 31-14-13-2(7) provides that the court "shall" consider "[e]vidence of a pattern of domestic violence

by either parent” as a factor in the custody determination. IC 31-14-14-5 creates a rebuttable presumption for supervised visitation when the court finds that a noncustodial parent has been convicted of a domestic battery under IC 35-42-2-1.3 and the incident of domestic violence was witnessed or heard by the noncustodial parent’s child.

4. Visitation and the Parenting Time Guidelines

IC 31-14-14-1 provides that the noncustodial parent is entitled to reasonable visitation, unless the court finds at a hearing that visitation "might endanger the child's physical health and well-being, or significantly impair the child's emotional development." The court can order that visitation with the noncustodial parent be supervised.

The Indiana Parenting Time Guidelines were adopted by the Indiana Supreme Court and became effective March 31, 2001. The Scope of Application of the Guidelines states that the Guidelines are applicable to paternity cases. The Guidelines are presumptive, and deviations by the parties or court must be accompanied by written explanation.

5. Modification of Custody or Visitation

Under IC 31-14-13-6 the juvenile court may not modify a custody order unless it is in the best interests of the child and there is a substantial change in the factors that the court had to consider in making the initial custody determination. This is identical to the modification standard in dissolution proceedings. IC 31-14-13-9 provides that in a proceeding for custody modification, the court may not hear evidence on a matter occurring before the last custody proceeding unless the matter relates to a change in the factors relating to the best interest of the child.

The Court ruled in In Re Paternity of Winkler, 725 N.E. 2d 124 (Ind. Ct. App. 2000), that when a child had resided with her mother for more than ten years, a paternity petition for custody by the father would be treated as a petition for modification of custody rather than an original determination of custody. In In Re Paternity of K.J.L., 725 N.E. 2d 155 (Ind. Ct. App. 2000), the Court ruled that mother could rescind an oral custody modification agreement she and father made in the courtroom, because the judge had directed the parties to reduce the agreement to writing and present it to the court for approval, and the court had not yet received or approved the written agreement. The Court noted that custody determinations are based on the best interest of the child, and no agreement between parties that affects custody is automatically binding upon the court.

IC 31-14-14-2 provides that the court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child, and no showing of substantial change of circumstances or endangerment or impairment to the child is required. See Taylor v. Buehler, 694 N.E. 2d 1156 (Ind. Ct. App. 1998). This is a different standard from dissolution law. For further information regarding visitation modification, see Matter of Paternity of A.R.R., 634 N.E. 2d 786 (Ind. Ct. App. 1994).

S. Prior Paternity Adjudication May Bar Relitigation Under Theory of Res Judicata

In the paternity cases of J.D. v. E.W. by C.W., 610 N.E. 2d 289 (Ind. Ct. App. 1993), and T.R. v. A.W. by Pearson, 470 N.E. 2d 95 (Ind. Ct. App. 1984), the Court held that res judicata principles precluded a child’s paternity action against the alleged father subsequent to a paternity action brought by the mother in which a full trial occurred on the merits. In the J.D. case the Court of Appeals noted that the mother and alleged father were both represented by counsel, the court heard the testimony of the parties, other witnesses, and experts, and the arguments of counsel. Id. at 290. The Court reasoned in J.D. that the mother adequately represented the child’s interests in the first paternity action, thus the mother and child were in privity and the paternity judgment could not be relitigated by the child. J.D. and T.R. were cited with approval in the Indiana Supreme Court opinion of In Re Paternity of J.W.L., 682 N.E. 2d 519 (Ind. 1997). J.W.L. is distinguishable because it involved the effect of a paternity determination in an earlier dissolution proceeding in which the child was not a party, on a subsequent juvenile court paternity proceeding. In J.W.L. the Court ruled the child was not barred by an earlier dissolution ruling from initiating a juvenile court paternity proceeding. However, the Indiana Supreme Court articulated in J.W.L. and in Russell v. Russell, 682 N.E. 2d 513 (Ind. 1997), the broadly applicable theory that where appropriate procedures for making paternity determinations (whether in a dissolution or a paternity proceeding) are followed and a judgment is rendered under such

circumstances and based upon and consistent with the results of blood or genetic testing, such a determination will preclude subsequent relitigation by any person in all but the most extraordinary circumstances.

T. Motion to Set Aside Paternity Judgment

In Matter of Paternity of K.M., 651 N.E. 2d 271 (Ind. Ct. App. 1995), the parents had filed a joint voluntary petition to establish paternity and both a judgment of paternity and an order for support were issued. Fifteen years later when the child was diagnosed with a rare bone disease, the father had the child take a blood test to determine if the child was his heir for the purpose of preparing his will. The test showed that the adjudicated father was not the biological father, and he filed a motion for relief from judgment under Ind. Trial Rule 60 (B). The Court reversed the trial court's order which set aside the paternity judgment, because the blood test was conducted to determine biological fatherhood and therefore was not grounds for setting aside the paternity judgment under the narrow ruling of Fairrow v. Fairrow, 559 N.E. 2d 597 (Ind. 1990). In Fairrow the Supreme Court set aside a support judgment in a dissolution on medical proof of the husband's non-paternity, because the proof was obtained independent of court action for a purpose related to the child's sickle cell anemia, and not for the purpose of determining whether the husband was the biological father of the child. In K.M. the Court stated, "[w]e hold that one who comes into court to challenge an otherwise valid order establishing paternity, without medical proof inadvertently obtained through ordinary medical care, should be denied relief as outside the equitable discretion of the trial court." Id. at 276. In the unpublished opinion of In Re Paternity of D.L.T and M.L.T., 71AO3-9910-JV-397 (Ind. Ct. App. April 17, 2000), the Court reiterated the reasoning of Fairrow and Leiter v. Scott, 654 N.E. 2d 742 (Ind. 1995), in ruling that a man was not entitled to a court ordered blood test on a motion to set aside a judgment of paternity.

V. **PATERNITY PROCEEDING WHEN ADOPTION PETITION PENDING INVOLVING SAME CHILD**

A. Putative Father Registry

The term "putative father" is similar to "alleged father," but is primarily applicable to adoption proceedings. IC 31-9-2-100 defines a "putative father" as a male of any age who is alleged to be a child's father, but who has not established his paternity (by executing a paternity affidavit or a paternity proceeding) and who is not a presumed father due to his marriage or attempted marriage to the child's mother. A man who knows or believes that he has fathered a child should register with the putative father registry to ensure his notice of any adoption proceeding involving the child, and a man initiating a paternity proceeding has certain other obligations with regard to the putative father registry.

IC 31-14-20-1 provides that a man who is a party to a paternity proceeding shall register with the putative father registry. IC 31-14-20-2 provides that a man who fails to register with the putative father registry waives the right to notice of an adoption petition regarding the child, if the adoption petition is filed before paternity is established and the child's mother does not disclose the name or address of the father to the agency or attorney arranging the adoption. A putative father's consent to adoption is irrevocably implied under IC 31-19-9-12(4) if the father was required to register with the putative father registry because the mother did not disclose his name, and the registration was not made prior to the filing of the adoption petition or thirty days after the child's birth, whichever occurs later. See Chapter 13 at VI. for further discussion on putative father registry in the context of adoption.

B. Inability to Pursue Paternity Proceeding

IC 31-19-9-12 provides that a putative father's consent to adoption is irrevocably implied without further court action if the putative father fails to file within thirty days of notice of an adoption petition both a motion to contest the adoption and a paternity action under IC 31-14. IC 31-19-9-14 and IC 31-19-9-17 provide that a putative father whose consent to adoption is irrevocably implied because he either did not file a paternity action thirty days after notice of the adoption proceeding or failed to timely register with the putative father registry as required by law, is not entitled to establish paternity under IC 31-14.

In In Re Paternity of Baby Doe, 734 N.E. 2d 281 (Ind. Ct. App. 2000), mother gave pre-birth and post-birth consent to the private adoption of her child to the prospective adoptive parents (adoptive parents), and did not reveal the name of the putative father. The child was born on August 16, 1998, and the adoptive parents filed a petition for adoption on August 31, 1998, and on October 15, 1998 filed the Department of Health Putative Father Registry Affidavit that no putative father was registered with regard to the mother or child's name. On

February 17, 1999 the putative father filed a paternity petition. The adoptive parent intervened in the paternity action and filed a motion for summary judgment alleging that the putative father's consent to adoption was irrevocably implied by his failure to register timely with the putative father registry, and seeking to prohibit the alleged father from establishing his paternity. The summary judgment was granted dismissing the paternity petition, and affirmed on appeal. The Court ruled that because the mother did not disclose his name as the father, the putative father was required to register with the putative father registry within thirty days of the birth of the child or the filing of the adoption petition, whichever occurred later. According to statute, the father's consent to the child's adoption was irrevocably implied by his failure to timely register, and the father was not entitled to either challenge the validity of his implied consent or to establish his paternity.

C. Putative Father's Duty to Give Notice and Rights of Prospective Adoptive Parents

IC 31-14-21-1 through IC 31-14-21-5 provide that a putative father who receives notice of an adoption petition involving his child or is otherwise aware of the petition, shall give notice of the pending paternity involving the child to the attorney or agency that gave the putative father notice of the adoption or to the clerk of the court having jurisdiction over the adoption. If the father fails to give notice of the paternity action and paternity is established, the court shall set aside the judgment upon the motion of the prospective adoptive parents to intervene. IC 31-14-21-6; IC 31-14-21-7. Even if there is no failure of notice, the prospective adoptive parents shall be allowed to intervene in the paternity action under IC 31-14-21-8 for the limited purposes of: receiving notice of the paternity proceedings; attempting to ensure that paternity is not established unless the putative father is the biological father; and objecting to any error that occurs during the paternity proceeding.

D. Expedited Paternity Proceedings and Blood Tests

When the court "knows" that an adoption petition is pending for the child who is the subject of the paternity petition, IC 31-14-21-9 requires that the court conduct an initial hearing not more than thirty days after the filing of the paternity petition or the birth of the child, whichever occurs later. IC 31-14-21-9.1 requires that the court order blood or genetic testing at the initial hearing, and if the alleged father is unable to pay for the initial costs of the testing, the court shall order that the tests be paid for by the state department of health from the putative father registry fees. IC 31-14-21-9.2 requires that the court shall conduct a final hearing to determine paternity within ninety days of the initial hearing, and shall issue a ruling on paternity not more than fourteen days after the final hearing. See other provisions of IC 31-14-21.

## VI. ESTABLISHING PATERNITY WITH A PATERNITY AFFIDAVIT

Title 16 and Title 31 contain seemingly conflicting or inconsistent statements about the legal effect of a paternity affidavit. The straightforward language of some statutes indicates that the paternity affidavit does constitute the establishment of paternity, and some case law supports that position. IC 31-14-2-1 states that a man's paternity may be "established" by executing a paternity affidavit. IC 16-37-2-2.1(g) provides that an executed paternity affidavit "establishes paternity" and gives rise to parental rights and responsibilities, including the right to obtain a child support order against the identified father. Case law indicates that the paternity affidavit establishes paternity for purposes of requiring father's consent to the adoption unless the need for consent is vitiated by father's lack of contact or support of the child or other consent exceptions. See Matter of Adoption of M.A.S., 695 N.E. 2d 1037 (Ind. Ct. App. 1998) (adoption law requires the consent of a man who filed a paternity affidavit); Matter of Adoption of A.M.K., 698 N.E. 2d 845, 847 (Ind. Ct. App. 1998) (paternity affidavit signed shortly after the child's birth acknowledged the father's obligation to support the child, and consent to adoption was not required due to father's failure to support child). Also, in In Re Paternity of J.A.C., 734 N.E. 2d 1057, 1060-1061 (Ind. Ct. App. 2000) the concurring opinion noted that the father's act of executing a paternity affidavit under IC 16-37-2-2.1 established his paternity and it was unnecessary for the father to further prove his paternity to avoid a guardianship of the child initiated by the aunt.

However, some juvenile courts have not considered that the paternity affidavit suffices as establishment of paternity for purposes of CHINS and termination cases because of the following law that indicates that the affidavit can be rebutted, or otherwise set aside, in several different situations: IC 31-14-7-1(3) provides that the paternity affidavit creates a presumption of paternity, and does not state that it establishes paternity; IC 16-37-2-2.1(h) provides that an action to set aside the affidavit can be initiated up to sixty days from the execution of the affidavit, and subsection (k) of that same statute provides that the affidavit can be set aside upon a showing from a

blood or genetic test that sufficiently demonstrates that the person who executed the paternity affidavit is not the child's biological father; IC 31-14-11-1 provides that an order establishing paternity and support shall be issued at a child support hearing, if the man who executed the paternity affidavit fails to set forth evidence that rebuts his paternity.

Because some of the above statutes state that the affidavit "establishes" paternity, other statutes indicate the need for a hearing to obtain a judgment of paternity on a paternity affidavit, another statute considers that a man who executes an affidavit is a "presumed" father, and another statute allows for the rescission of the paternity affidavit for a variety of reasons, it may be the better practice to obtain a legal determination of paternity in a juvenile court paternity proceeding. Further, it is clear that a paternity proceeding under IC 31-14 must be initiated for the biological father to obtain a judgment of custody or visitation.

A. Requirement for Paternity Affidavit

A paternity affidavit is a document initiated by both the mother and the identified male attesting that the identified male is the biological father of the child. Although the paternity affidavit law initially provided that the affidavit must be completed within seventy-two hours of the child's birth, the law now provides that an affidavit can be executed any time before the child's emancipation. The requirements for the paternity affidavit established in IC 16-37-2-2.1 are:

- The affidavit must be executed on a form provided by the State Department of Health.
- The affidavit may be executed through a hospital or a local health department.
- If executed through a hospital, the affidavit must be completed not more than seventy-two hours after the child's birth and IC 16-37-2-2 requires that it be filed with the local health officer not more than five days after the birth.
- If executed through a local health department, the affidavit must be completed before the child has reached the age of emancipation.
- The affidavit is not valid if executed after the mother has executed a consent to adoption of the child and the adoption petition has been filed.
- The paternity affidavit must contain, or have attached to it, the following:
  - mother's sworn statement asserting that the identified male is the child's biological father.
  - a sworn statement from the identified male "attesting to a belief that he is the child's biological father."
  - written information furnished by the Division of Family and Children explaining the effect of a paternity affidavit and the availability of child support enforcement services.
  - the social security number of each parent.

B. Execution of Affidavit with Health Department

Pursuant to IC 16-37-2-2 and IC 16-37-2-2.1 a person in attendance at a live birth of a child born out of wedlock shall advise the mother and probable father about paternity affidavits and give them the opportunity to execute an affidavit. The person shall file the birth certificate and any executed paternity affidavit with the local health officer, otherwise the parents can make such filings. IC 16-37-2-2(d) provides that the local health department shall inform the Title IV-D (support) agency of each paternity affidavit it receives.

C. Obtaining Child Support with Affidavit

IC 31-14-11-1 provides that if the man who executed the paternity affidavit fails to present evidence rebutting his paternity at a support hearing, the court can issue an order establishing paternity and support, without further proceeding to establish paternity.

D. Setting Aside a Paternity Affidavit

IC 16-37-2-2.1(h) provides that the mother, father, child, prosecutor, or office of family and children may file an action to have the paternity affidavit set aside no more than sixty days after the execution of the affidavit. IC 16-37-2-2.1(k) provides that the court can set aside a paternity affidavit upon a showing from a blood or genetic test that sufficiently demonstrates that the person who executed the paternity affidavit is not the child's biological father.

E. Use of Paternity Affidavit by Biological Parents Who Marry After Birth of the Child

When the biological parents marry after the birth of the child, they may wish to execute a paternity affidavit to avoid any subsequent legal contest regarding the legal paternity of the child. IC 16-37-2-16 provides that if a man claiming to be the child's biological father marries the mother of a child born out of wedlock, the man and the mother may produce proof of the marriage and execute a paternity affidavit in accordance with IC 16-37-2-2.1. The local health officer receiving this documentation is then to "remove all evidence of the fact that the child was born out of wedlock from the child's record of birth," and forward the information to the State Department of Health for the same corrections to be made on the child's birth certificate. IC 16-37-2-16.

## VII. ESTABLISHING OR DISESTABLISHING PATERNITY IN DISSOLUTION PROCEEDINGS

Russell v. Russell, 682 N.E. 2d 513 (Ind. 1997), is the leading case on establishing and disestablishing paternity in dissolution proceedings. In Russell the mother alleged in her divorce that her husband was not the biological father of one of the children, and after a series of procedural maneuvers involving motions for DNA testing and agreed entries, the court granted the divorce and awarded custody of all the children to the husband. The mother appealed, and the Indiana Supreme Court granted transfer and vacated the opinion of the Court of Appeals. The Supreme Court determined that before a divorce court can make a custody judgment it must find that it has jurisdiction to make such a ruling by determining the child is a "child of the marriage." Id. at 515. The Court defined a "child of the marriage" as including the biological and adopted child of both parties, whether the child was born before or during the marriage, as long as both parties are the natural or adopted parents of the child. Id. at 517. The Court noted that the divorce court can accept the agreement of the divorcing husband and wife that the child is a "child of the marriage." Id. A divorce court ruling that the child is a "child of the marriage" is binding as to the husband and wife, but does not generally prevent the child or an alleged father from filing a separate paternity action. The Russell opinion also noted that when either parent disputes that a child is a "child of the marriage" that issue can be fully litigated in the divorce case, and the court can determine that the husband is not the biological father of the child. Id. at 518. The divorce court has the authority to follow appropriate procedures for making paternity determination including ordering blood or genetic tests. In those situations in which the paternity issue is vigorously litigated, the divorce ruling will generally constitute a binding judgment of paternity in all but the most extraordinary circumstances that will preclude the husband, wife, and also the child and putative father from challenging the judgment in a collateral juvenile court proceeding.

In In Re Paternity of J.W.L., 682 N.E. 2d 519 (Ind. 1997), the Supreme Court followed the Russell opinion in stating that a "full trial" in the dissolution case on the merits of the paternity issue will have a preclusive effect, but the dissolution decree alone (without full litigation of the paternity issue) is not res judicata on the issue of paternity as to a non-party to the marital dissolution proceeding. Id. at 520. In J.W.L. the Court ruled that the child was not barred under res judicata from filing a paternity action against her alleged father despite a ruling in a prior dissolution proceeding in Florida that the child was a child of the marriage of his mother and her husband. This is consistent with In Re S.R.I., 602 N.E. 2d 1014 (Ind. 1992). For other cases consistent with the Russell opinion see, Friar v. Taylor, 545 N.E. 2d 599 (Ind. Ct. App. 1989) (dissolution court lacked jurisdiction to determine custody of two children conceived and born during marriage, but whose biological father was not the husband); Cooper v. Cooper, 608 N.E. 2d 1386 (Ind. Ct. App. 1983) (dissolution court has authority to order blood testing to determine biological father).

A. Disestablishing Paternity in Dissolution Proceeding

In Cochran v. Cochran, 717 N.E. 2d 892 (Ind. Ct. App. 1999), the father initially listed two children of the marriage in his divorce petition, but later filed a petition to establish paternity requesting DNA testing. The testing determined that the older child was not the father's biological child, and therefore not a child of the marriage. The dissolution court correctly entered its Decree of Dissolution finding only one child to be a child of the marriage. Id. at 894. In responding to mother's allegation that the trial court granted father's request to "disestablish paternity" the Court stated:

Nonetheless, Alison [mother] asserts that the dissolution court created a fatherless child and “disenfranchised U.C. [child].” Yet, under Russell if the dissolution court did not determine if U.C. was a child of the marriage, it would lack the authority to enter support, custody, or visitation orders. Moreover, a child born to a married woman, who is fathered by a man other than her husband is deemed to be a “child born out of wedlock.” This longstanding common law rule combined with the fact that a child is presumed to be a child of the marriage unless rebutted, leads us to conclude that this is not a case where a man is seeking to disestablish his own paternity status. Such status never existed in the first place. (citations omitted)

Id. at 894.

In Russell v. Russell, 682 N.E. 2d 513, 518 (Ind. 1997), the Court noted that a husband and wife may attempt to stipulate or otherwise agree in the divorce court that the child is not a child of the marriage (an agreement of non-paternity), but it is within the discretion of the court to withhold approval of the agreement until paternity has been established in another man. The Court stated that in such situations it is not improper to file a paternity action in juvenile court collateral to the pending divorce. The Court noted case law from another jurisdiction that the theory of equitable estoppel may prevent a mother from denying the husband’s paternity where mother is not seeking to establish paternity in another man. Id. at 518, 519.

B. GAL Appointment Required When Presumed Father Challenged in Divorce Proceeding

In Pinter v. Pinter, 641 N.E. 2d 101 (Ind. Ct. App. 1994), the Court noted that the divorce court erred in failing to appoint a guardian ad litem for the child because an appointment is required when a party seeks to overcome the presumption that a child born in wedlock is legitimate.

C. Latches and Equitable Estoppel

In Vanderbilt v. Vanderbilt, 679 N.E. 2d 909 (Ind. Ct. App. 1997), the mother was barred by latches from rebutting the presumption that her husband was the father of her child in the pending dissolution proceeding, because the mother had assured her husband that he was the biological father of the child, contrary to blood test results, and the mother had not disputed the dismissal of an earlier paternity action filed by a third party. However, in In Re Paternity of J.W.L., 682 N.E. 2d 519 (Ind. 1997), the Court ruled that a child was not estopped from bringing a paternity action against an alleged father, because the child had not been a party to an earlier dissolution proceeding where the child had been found to be a child of the marriage between the mother and the mother's husband. Note the dicta in Russell v. Russell, 682 N.E. 2d 513, 518-519 (Ind. 1997), that equitable estoppel may prevent a mother from denying the husband’s paternity if the mother is not seeking to establish paternity in another man.

D. Awarding Custody and Visitation to Husband Who is Not Biological Father

In Friar v. Taylor, 545 N.E. 2d 599 (Ind. Ct. App. 1989), quoted with approval in Russell v. Russell, 682 N.E. 2d 513 (Ind. 1997), the Court of Appeals ruled that the dissolution court lacked jurisdiction to award the husband custody of the two children not born of the marriage. However, in In Re the Paternity of L.K.T., 665 N.E. 2d 910 (Ind. Ct. App. 1996), the Court of Appeals found that the husband who raised the child, but was not the biological father, could be given custody in the dissolution proceeding, because the husband had overcome the presumption favoring custody in the biological father based on the more flexible standard of Turpen v. Turpen, 537 N.E. 2d 537 (Ind. Ct. App. 1989). As to visitation, the Court ruled in Francis v. Francis, 654 N.E. 2d 4 (Ind. Ct. App. 1995), that the trial court could award visitation to the mother’s husband who had raised the children, but who was not the biological father. The Court stated that visitation can be awarded when a third party demonstrates the “existence of a custodial and parental relationship and that visitation would be in the children's best interest.” Id. at 7. The Court noted that protests by the custodial parent that third party visitation will be harmful to the family is not enough to deny visitation in all cases. The Court further found untenable the custodial mother's argument that she reduced the husband's visitation based on the advice of a therapist, stating “there is no-advice-of-therapist defense which excuses disobeying a court order.” Id.