

**CHAPTER 14**  
**GUARDIANSHIP**

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# CHAPTER 14

## GUARDIANSHIP

### I. DEFINITIONS

#### A. Statutory Definitions

##### 1. Guardian

The Juvenile Code defines guardian as "a person appointed by a court to have the care and custody of a child or the child's estate or both." IC 31-9-2-49. Guardianship proceedings are governed by Title 29 of the Indiana Code. IC 29-3-1-6 defines guardian as a person who is a fiduciary and is appointed by a court to be a guardian or conservator responsible as the court may direct for the person or the property of an incapacitated person or a minor. The term includes a temporary guardian, a limited guardian, and a successor guardian but excludes one who is only a guardian ad litem. The terms guardian and conservator are interchangeable.

##### 2. Guardianship

Guardianship is not formally legally defined by the Probate or Juvenile Code. Indiana's Adoption and Safe Families Act, enacted effective July 1, 1997, provides description of legal guardianship as a permanency plan at IC 31-34-21-7.5(E):

The legal guardian appointed under this section is a caretaker in a judicially created relationship between the child and caretaker that is intended to be permanent and self-sustaining as evidenced by the transfer to the caretaker of the following parental rights with respect to the child:

- (i) Care, custody, and control of the child.
- (ii) Decision making concerning the child's upbringing.

The portion of this definition which describes guardianship as intended to be permanent differs from Indiana case law and statutes which provide that a petition to terminate a guardianship can be brought if the guardianship is no longer necessary. IC 29-3-12-1(c). See Matter of Guardianship of R.B., 619 N.E. 2d 952 (Ind. Ct. App. 1993), and this Chapter at IX. for detailed discussion of termination of guardianship.

##### 3. Minor

A guardian may be appointed for an incapacitated person or a minor. IC 29-3-1-10 defines "minor" as an individual who is less than eighteen years of age and who is not emancipated. Guardianship terminates by operation of law according to IC 29-3-12-1 when the minor reaches the age of eighteen years. Before the court appoints a guardian, the court must adjudicate either minority or incapacity as provided by IC 29-3-5-2. Because guardianship law refers to a person under the age of eighteen as a minor rather than a child, the term minor, rather than child, will be used throughout this chapter to more accurately reflect Title 29 statutes and case law. In discussing statutes throughout this chapter, the term "minor" instead of the broader term "incapacitated person", which is frequently used in the guardianship statutes, will be employed.

#### B. Case Law

Indiana case law has reinforced the principle that guardianship is a judicially created means of providing care for a child. In Matter of Guardianship of Thompson, 514 N.E. 2d 618, 621 (Ind. 1987), the Indiana Supreme Court opined that it was necessary to have someone in legal control of the child's custody to be responsible for providing her day to day care. The Court stated that this was the purpose of the guardianship procedures in our law. The Court further noted that a final determination of the child's fate was yet to be made. In Goltry v. Goltry, 140 Ind. App. 76, 222 N.E. 2d 407 (1966), the Court of Appeals stated that a guardianship is for the protection and benefit of its ward, not its guardian. In E.N. Ex. Rel. Nesbitt v. Rising Sun-Ohio, 720 N.E. 2d 447, 451 (Ind. Ct. App. 1999), the Court concluded that the best interest of the child or incapacitated person is implicit in the guardianship statute.

## II. SCOPE AND PURPOSE OF CHAPTER

The purpose of this Chapter is to provide basic information concerning children's guardianship law, including statutes and case law governing appointment, removal, and termination of guardianship. CHINS practitioners should have an understanding of guardianship law for two reasons. The first reason is that some children for whom CHINS petitions have been filed have judicially appointed guardians who are parties to the CHINS proceeding. See IC 31-34-9-7. In these situations, the guardian as well as the parents may need services so that all possible options for the child's safety and permanency can be fully explored. Counsel should determine whether any limitations have been placed on the guardian's authority by the appointing court. The second reason why knowledge of guardianship law is essential for CHINS practitioners is that appointment of a guardian is a permanency option delineated at IC 31-24-21-7.5(1)(E). Counsel for the county office of family and children may be requested to facilitate the appointment of a guardian. See 470 I.A.C. 3-10.5-4 and of this Chapter at X. for further discussion of assisted guardianship. Defense counsel may decide to propose guardianship appointment as an alternative to a CHINS adjudication or a termination of the parent-child relationship proceedings. Because very few CHINS have financial resources, this Chapter does not provide information concerning guardian's accounting duties or responsibility for children's property.

## III. JURISDICTION AND VENUE

### A. Statutes Concerning Jurisdiction

The court which has probate jurisdiction in the county has exclusive original jurisdiction over all matters concerning guardians. IC 29-3-1-3, IC 29-3-2-1(b). This exclusive original jurisdiction does not apply to the following situations: juvenile court jurisdiction over children in CHINS, interstate compact on juveniles, delinquency and other proceedings included in IC 31-30-1-1; child custody jurisdiction pursuant to paternity proceedings (IC 31-14-10); dissolution court jurisdiction over actions for child custody and modification of child custody orders (IC 31-17-2-1), and jurisdiction over children whose situations are covered by the Uniform Child Custody Jurisdiction Law, IC 31-17-3-3. See Chapter 3 II. H. 6. for discussion of Uniform Child Custody Jurisdiction Law.

### B. Case Law Concerning Jurisdiction

In Comm. Hosp. of Ind. v. Estate of North, 661 N.E. 2d 1235, 1239 (Ind. Ct. App. 1996), the Court defined jurisdiction over the subject matter as the power to hear and determine cases of the general class to which the proceedings then before the court belong. The Court further stated that if a tribunal possesses the power to determine cases of the general class to which the particular case belongs, then it possesses subject matter jurisdiction to consider the particular case, absent specific and timely objections to the jurisdiction over the particular case. The Court opined that "when the legislature has intended a particular court to have exclusive jurisdiction, it has said so." Id.

#### 1. Dissolution/Paternity Custody Conflict with Guardianship Jurisdiction

The jurisdictional exceptions in statutes and case law are significant in considering the appointment of a guardian for a CHINS as a permanency plan because if paternity has been established judicially or if the marriage of the child's parents has been dissolved, statutes and case law indicate that probate court will not have jurisdiction to appoint a guardian. A guardianship so established could be voidable. Establishing a third party custodianship in the dissolution or paternity court which has ongoing jurisdiction over the child will be needed instead of guardianship. One exception to this rule is when the parents' marriage has been dissolved and one parent subsequently dies. The dissolution court does not retain jurisdiction over the child after a parent's death, see Atteberry v. Atteberry, 597 N.E. 2d 355 (Ind. Ct. App. 1992), so the probate court would have jurisdiction to appoint a guardian if one of the child's parents is dead. Unlike dissolution proceedings, paternity actions and paternity jurisdiction survive the death of a parent. IC 31-14-5-5; IC 31-14-5-8. Practitioners should note that some members of the legal community do not believe that IC 29-3-2-1 is a bar to obtaining guardianship in cases when the child is the subject of a paternity or dissolution custody order, but there is no pending litigation in those proceedings.

A conflicting jurisdiction issue between a paternity proceeding and a guardianship proceeding which

concerned the same child but were filed in two different Indiana counties was resolved in Matter of Paternity of Fox, 514 N.E. 2d 638 (Ind. Ct. App. 1987). In Fox the Court opined that, because the paternity petition had been filed ten days before the guardianship petition, the juvenile court properly exercised its exclusive jurisdiction over the child under the paternity cause. The Court cited State Ex Rel. American Fletcher National Bank and Trust Co. v. Daugherty, 263 Ind. 632, 283 N.E. 2d 526 (1972) for the principle that once jurisdiction over the parties and the subject matter has been secured, it is retained to the exclusion of other courts of equal competence until the case is resolved, and the rule applies where the subject matter before the two courts is the same, but the actions are in different forms. In Fox, the Court opined that the separate proceedings (paternity and guardianship) were in different forms, but as the father's paternity was not contested, the crux of both actions necessarily involved the same persons and issues, namely, who was to be awarded custody of the child. Fox at 641. See also dicta from concurring opinion in In Re Paternity of J.C., 734 N.E. 2d 1057, 1061 (Ind. Ct. App. 2000) (because paternity affidavit had been executed, paternity was established, and the child should have been immediately turned over to paternity affiant father upon the mother's death; therefore, previous decision of the probate court to appoint maternal aunt as guardian was in error). Practitioners should note the guardianship appointment was not the subject of the appeal in J.C.

2. Uniform Child Custody Jurisdiction Law Conflict with Guardianship Jurisdiction

In Matter of Guardianship of Mayes, 523 N.E. 2d 249 (Ind. Ct. App. 1988), the Howard Circuit Court appointed Indiana relatives as guardians of three children whose parents lived in Illinois. The guardianship appointment was vacated by the Court of Appeals due to the Uniform Child Custody Jurisdiction Law, which is another statutory exception to guardianship jurisdiction. In Mayes the Court found that Illinois satisfied the home state test and significant connection test of the U.C.C.J.L. because the children had all been born in Illinois, had resided in Illinois until six weeks prior to the guardianship proceedings, and the natural parents still lived in Illinois. Id. at 251.

3. CHINS Conflict with Guardianship Jurisdiction

a. Statutory Obligation to Refer to Juvenile Court

The probate court has jurisdiction over guardianships when parental abandonment or unfitness is alleged unless the court becomes aware through pleadings or evidence presented at the guardianship proceeding that the child "meets the definition of a child in need of services." IC 31-30-1-6. In that event, the probate court on its own motion or at the request of a party shall send the guardianship petition or record of guardianship proceedings or both to the prosecuting attorney or the county office of family and children attorney and direct that attorney to initiate an investigation and proceedings in the juvenile court to determine whether the child for whom the guardianship is requested is a CHINS. The probate court retains jurisdiction over the matter until the juvenile court authorizes the filing of a CHINS petition. The Indiana Supreme Court has opined that a child is not necessarily a CHINS "every time a custodial problem involving a child arises or by circumstances a child is not with its natural parents or legal guardians." Matter of Guardianship of Thompson, 514 N.E. 2d 618, 620 (Ind. 1987).

b. Concurrent Jurisdiction

The problem of concurrent juvenile court jurisdiction over a CHINS and probate court jurisdiction over a guardianship of the same child has also been addressed by the Indiana Appellate courts. In Matter of Guardianship of Bramblett, 495 N.E. 2d 798 (Ind. Ct. App. 1986), relatives filed a guardianship petition after their niece was adjudicated a CHINS and made a ward of the county welfare department. The guardianship petition was dismissed on the motion of the department and the dismissal was affirmed on appeal. The Court opined that no other Indiana court had jurisdiction to entertain any proceeding which in any way conflicted with the exclusive jurisdiction vested in the juvenile court by the commencement of a CHINS proceeding. Id. at 799. This issue was addressed again in a 1999 decision, In Re C.S., 713 N.E. 2d 863 (Ind. Ct. App. 1999), where Putnam Circuit Court held concurrent hearings on both the CHINS placement review and the paternal grandmother's guardianship petition and subsequently closed the CHINS case and then appointed the grandmother as the child's guardian. In the C.S. decision, the Court opined that due to the open CHINS case the trial court could not properly accept the guardianship petition and the evidence yielded by the two hearings could not provide a basis for the granting of the guardianship petition. The Court also held that the Putnam Circuit Court had improperly relinquished its CHINS jurisdiction over the child to

the extent that action was premised on the grant of the guardianship order. Id. at 865. The Court reversed the guardianship order and the order terminating the CHINS case, stating that the guardianship proceeding which took place while the child was the subject of a CHINS proceeding was conducted in the absence of subject matter jurisdiction. Id. at 864.

c. Practical Considerations to Resolve CHINS and Guardianship Jurisdiction

After the Bramblett decision, 495 N.E. 2d 798, the solution used by some practitioners in an effort to obtain relative guardianship of adjudicated CHINS so the CHINS proceeding could be terminated was to secure the juvenile court's approval of the guardianship proceeding and a written waiver of jurisdiction by the juvenile court to the probate court so the probate court could appoint a guardian. This procedure was believed to be acceptable in light of Bramblett because the probate court's jurisdiction over the guardianship was not conflicting with juvenile jurisdiction. The C.S. decision, if strictly followed, makes it more difficult to secure relative guardianships for adjudicated CHINS. One way for practitioners to obtain the appointment of a relative guardian is to prepare the guardianship petition, secure consents and waivers of notice from all persons who are willing to sign consents and waivers and then file the guardianship petition the same day the CHINS case is closed. The guardianship petition should request temporary guardianship for the relative and include the emergency elements delineated at IC 29-3-3-4. The court with probate jurisdiction can appoint the relative as temporary guardian pending a hearing if a hearing is necessary due to lack of parental consent. This procedure requires excellent timing and may incur some risk to the child which should be balanced against the risk of a voidable guardianship. See this Chapter at III. D. 1. below for a discussion of transfer of jurisdiction pursuant to IC 29-3-2-2(d). See this Chapter at Roman Numeral V. for further discussion of temporary guardianship.

C. Continuing Jurisdiction Over Guardian and Guardian's Attorney

The court retains control over a guardian after appointment. When a guardian is appointed, both the guardian and the guardian's attorney submit personally to the jurisdiction of the court in any proceeding relating to the guardianship. IC 29-3-7-4. The attorney for the guardian continues on the case until the attorney withdraws with the Court's approval or the guardianship is terminated. IC 29-3-9-10. Because of these statutes, attorneys for the county office of family and children who file guardianship petitions under the assisted guardianship program should make sure all pleadings clearly reflect that the attorney does not represent the guardian. See this Chapter at X. C. for further discussion of county office of family and children responsibilities and duties in assisted guardianship. Guardians appointed in other states submit personally to the jurisdiction of Indiana courts by filing a copy of the guardian's appointment and bond pursuant to IC 29-3-13-2 or receiving money or property belonging to the minor in Indiana. IC 29-3-13-3.

D. Venue

1. Statutes

IC 29-3-2-2(a)(1) provides that a petition for appointment of a guardian of an Indiana resident should be filed in the county where the minor resides. A temporary guardianship petition for a minor in need of medical care may be filed in the county where the medical facility that is providing or attempting to provide care is located. IC 29-3-2-2(a)(2) provides that a petition for appointment of a guardian of a non-Indiana resident may be filed in any county where the minor's property is located.

If proceedings are commenced in more than one county, they shall be stayed except in the county where first commenced until the court in the county where proceedings were first commenced determines proper venue. IC 29-3-2-2(c) allows the court to transfer the guardianship proceeding to another court in Indiana if any one of the following exists: (1) the proceeding was commenced in the wrong county; (2) the minor's residence has changed to another county; (3) proper venue under the Indiana Rules of Trial Procedure has been determined to be in another county; (4) transfer is in the best interests of the minor and the minor's property. A hearing pursuant to notice shall be held prior to transferring the case. The new county court shall complete all the guardianship proceedings as if the proceeding had originally commenced in that court. A guardianship proceeding may also be transferred to another state if the court outside Indiana assumes jurisdiction. IC 29-3-2-2(d) provides that where a guardian has been appointed by a court that does not have probate jurisdiction, the case shall be transferred to the court with proper jurisdiction and venue for qualification of the guardian and further guardianship proceedings. The above statute may be useful in CHINS guardianship situations discussed in this Chapter at III. 3.

2. Case Law

In MacLeod v. Guardianship of Hunter, 671 N.E. 2d 177 (Ind. Ct. App. 1996), the Court found that IC 29-3-2-2 provided an adequate and complete mode of determining the proper county of venue in two guardianship petitions filed in two different Indiana counties; therefore, Indiana Trial Rule 75 did not apply. See also Matter of Lawrance, 579 N.E. 2d 32 (Ind. 1991), where the Indiana Supreme Court held that because a proceeding had already begun in Hamilton County, any Marion County proceedings should have been stayed until the Hamilton County judge determined whether transfer of the case was proper.

#### IV. INITIATING A GUARDIANSHIP PROCEEDING

A. Petition

A guardianship proceeding is initiated by the filing of a signed and verified petition for appointment of guardian as provided by IC 29-3-5-1 and IC 29-1-1-9. A separate petition need not be filed for minor siblings who are children of a common parent. IC 29-3-5-6.

1. Who May File Petition

IC 29-3-5-1(a) allows "any person" to file a petition for appointment of guardian. IC 29-3-1-12 defines "person" as follows: an individual, an organization, an association, a nonprofit or for profit corporation, a limited liability company, a partnership, a financial institution, a trust, the division of family and children or other governmental entity, or other legal entity. The county office of family and children's attorney may file a guardianship petition to appoint a relative guardian for a CHINS. (See this Chapter at X. C. for further discussion) The county office of family and children attorney should be certain that both the petition and the attorney's appearance form accurately reflect that the attorney is not the attorney for the guardian. Failure to do so could result in ongoing probate jurisdiction over the attorney as attorney for the guardian.

2. Contents of Petition

IC 29-3-5-1(a) provides that the following information must be stated in the petition for appointment of guardian:

- (1) The name, age, residence, and post office address of the alleged incapacitated person or minor for whom the guardian is sought to be appointed.
- (2) The nature of the incapacity.
- (3) The approximate value and description of the property of the incapacitated person or minor, including any compensation, pension, insurance, or allowance to which the incapacitated person or minor may be entitled.
- (4) If a limited guardianship is sought, the particular limitations requested.
- (5) Whether a guardian has been appointed or is acting for the incapacitated person or minor in any state.
- (6) The residence and post office address of the proposed guardian and the proposed guardian's relationship to the alleged incapacitated person.
- (7) The names and addresses, as far as known or as can reasonably be ascertained, of the persons most closely related by blood or marriage to the person for whom the guardian is sought to be appointed.
- (8) The name and address of the person or institution having the care and custody of the person for whom the guardian is sought to be appointed.
- (9) The names and addresses of any other incapacitated persons or minors for whom the proposed guardian is acting if the proposed guardian is an individual.
- (10) The reasons the appointment of a guardian is sought and the interest of the petitioner in the appointment.
- (11) The name and business address of the attorney who is to represent the guardian.

B. Notice

After the petition is filed, the court shall schedule a hearing pursuant to IC 29-3-5-1(c). The petitioner has the duty to provide notice to the persons who are required to receive notice by the statutorily required methods of

notice.

1. Who Must Be Notified

IC 29-3-6-1 provides that notice of the petition for guardian of a minor and notice of hearing on the petition shall be given to the following persons whose whereabouts can be determined upon reasonable inquiry: (1) the minor who is at least fourteen years old unless the minor has signed the petition; (2) any living parent of the minor unless parental rights have been terminated (note that IC 29-3-1-11 defines parent as a biological or adoptive parent); (3) any person who has had principal care and custody of the minor during the 60 days preceding the filing of the petition; (4) any other person whom the court directs. A copy of the guardianship petition shall be attached to the notice. The form for the notice is delineated at IC 29-3-6-2. A temporary guardian may be appointed without notice in certain emergency situations pursuant to IC 29-3-3-4(a). See this Chapter at Roman Numeral V. for discussion of temporary guardianship.

2. Notifying Putative Fathers

Indiana law is unclear as to whether putative fathers should be given notice of a petition for appointment of guardian of a minor. Guardianship proceedings differ from adoption proceedings which sever all parental rights and responsibilities, so it is not necessary to notify putative fathers in the manner as required by adoption law. Recent Indiana law has made it easier to establish paternity, regardless of the child's age, so a putative father may easily and quickly become a legal father. See Chapter 12 at IV. and VI. concerning establishing paternity. Practitioners should consider notifying any putative father who fits into the following categories:

- A putative father for any minor under the age of two years.
- A putative father who is listed on the child's birth certificate.
- A putative father who has signed a paternity affidavit pursuant to IC 16-37-2-2.1 which legally establishes paternity.
- A putative father who has visited or supported the child financially.
- A putative father whose petition to establish paternity is pending.
- A putative father with whom the child has resided during the 60 days immediately preceding the filing of the petition.

Counsel should consult with the local court which has jurisdiction over guardianships regarding the existence of any local rule or policy regarding notification of putative fathers. See also In re Paternity of J.C., 734 N.E. 2d 1057, 1061 (Ind. Ct. App. 2000), where dicta in a concurring opinion stated that a guardian should not have been appointed on the death of the child's mother when paternity affidavit had been executed.

3. Methods of Notification

IC 29-3-6-1(c) provides that all notices of a petition for appointment of guardian shall be given in the manner prescribed by IC 29-1-1-12 through IC 29-1-1-14. IC 29-1-1-12 states:

Unless waived and except as otherwise provided by law, all notices required by this article to be served upon any person shall be served as the court shall direct by rule or in a particular case, either:

(a) by delivering a copy of the same to such person or by leaving a copy of the same at his last and usual place of residence, at least ten (10) days before the hearing, if he is a resident of the state of Indiana;

(b) by publication, if the person is a nonresident of the state of Indiana or if his residence is unknown, once each week for three (3) weeks consecutively in some newspaper printed and circulating in the county where said court is held, the first day of publication to be at least (30) days prior to the date set for hearing; or in case there be no newspaper printed in said county, then in some newspaper circulating in the county where the proceeding is pending, and designated by the judge or clerk;

(c) by registered or certified mail, requesting a return receipt, addressed to such person located in the United States, at his address stated in the petition for the hearing, to be posted by depositing in any United States post office in this state at least fourteen (14) days prior to the date set for hearing in such notice; or

- (d) by personal service on nonresidents to be served by any officer authorized to serve process in the county of the nonresident, which notice shall be served at least fourteen (14) days prior to the date set for hearing in such notice; or
- (e) by any combination of two (2) or more of the above.

In all cases where service by publication is ordered but personal service or service by registered mail is not ordered, all persons directed by the provisions of this article, or by order of the court, to be notified, whose names and addresses are known or can by reasonable diligence be ascertained by the party charged with the duty of giving such notice, shall in addition to such published notice be served by a written notice by United States mail, at least fourteen (14) days prior to the date set for hearing in said notice.

The personal representative or party charged with the duty of giving said notice shall furnish the clerk with sufficient copies of said notice, prepared for mailing, and the clerk shall mail the same.

IC 29-1-1-13 requires that the clerk shall make service by publication or mail at the instance of the party who requires service to be made. Personal service may be made by any competent person. IC 29-1-1-14 allows service to be made on the person's attorney if a written appearance has been entered in the pending guardianship proceeding.

C. Case Law on Effect of Lack of Notice

In Wells v. Guardianship of Wells, 731 N.E. 2d 1047 (Ind. Ct. App. 2000), the Court affirmed the appointment of an elderly, incapacitated woman's eldest daughter as permanent guardian despite the argument concerning lack of notice made by the woman's son. The Court noted that the son had refused to provide his address to the eldest daughter, that the eldest daughter had left telephone answering machine message at the son's business, and that the son had not been prejudiced by lack of formal notice because the son had appeared at two hearings and was represented by counsel at the hearings. Id. at 1050. The Court opined that it found no authority for the son's proposition that failure to comply with the notice requirements of IC 29-3-6-1 invalidated the guardianship. Id. In Bristow v. Konopka, 166 Ind. App. 357, 336 N.E. 2d 397 (1975), relatives who were directly caring for the child after the adoptive mother's death moved to set aside the birth mother's guardianship appointment. The trial court denied the relatives' request. The Court of Appeals, noting that in such matters the courts are more inclined to look at the material welfare of the child than to the rights of the natural parents, reversed and remanded with instructions to dissolve the birth mother's guardianship and conduct a guardianship hearing after due notice to the relatives. In Trook v. Lafayette Bank and Trust Co., 581 N.E. 2d 941 (Ind. Ct. App. 1991), the Court opined that lack of notice in a guardianship proceeding is a waivable defect which renders the proceeding voidable but not void ab initio.

D. Consents and Waiver of Notice

The parent or custodian may consent to the appointment of a guardian of the minor. The consent should be notarized and should include the guardian's full name. If the minor was born out of wedlock, the mother's consent should include the name of the man whom she believes is the putative father. The consent should also include a written waiver of notice of hearing permitted by IC 29-1-1-19 if the consenting person is willing to waive notice.

E. Guardian Ad Litem Appointment

1. Statutes

IC 29-3-2-3(a) requires the court to appoint a guardian ad litem to represent the minor, unless the court makes the written findings outlined at IC 29-3-2-3(b) which waive guardian ad litem appointment. The reasons for waiver of guardian ad litem appointment by the court are as follows: the proposed guardian is capable of representing and managing the minor's property; no other petition for the appointment of a guardian has been filed; and the petition for appointment of the guardian is uncontested. The court shall appoint a guardian ad litem if the minor is not represented or is not adequately represented by counsel. The court shall include its reasons for appointing a guardian ad litem as part of the record of the proceeding. A guardian ad litem may be appointed to represent several persons or interests unless precluded by a conflict of interest. Practitioners should be alert to conflicts of interest in guardian ad litem appointments. The guardian ad litem may need to file a motion with the court requesting to be relieved from a multiple appointment if a conflict of interest arises.

IC 29-3-3-6(c) provides for the required appointment of guardian ad litem or court appointed special advocate, who shall serve until removed by the court, when a guardianship petition is filed by a temporary custodian appointed pursuant to the dissolution statute, IC 31-17-2-11 (or IC 31-1-11.5-27 before its repeal). The guardian ad litem or court appointed special advocate shall serve until removed by the court.

2. Guardian Ad Litem Duties and Report

No guardianship statute delineates the guardian ad litem's duties in a guardianship proceeding.

Arguably, practitioners can look to the CHINS and dissolution statutes concerning guardians ad litem for guidance. See IC 31-9-2-50; IC 31-33-15-1 through 3; IC 31-17-6-1 through 9. In State Ex Rel. Keating v. Bingham, 233 Ind. 504, 121 N.E. 2d 727 (1954), the Indiana Supreme Court distinguished a guardian ad litem from the attorney for the guardian, stating that a guardian ad litem is appointed to represent the ward in some particular litigation and further that the guardian ad litem is not a party to the main action but is an officer of the court brought into the case by the appointment and order of the court to render services pursuant to the duty imposed on him by the court. Id. at 729, 730. See also Carr v. Carr, 685 N.E. 2d 92, 94-95 (Ind. Ct. App. 1997), in which the facts disclose that the guardian ad litem appointed for an incapacitated adult nursing home patient made observations and determinations. Practitioners are cautioned that, unlike CHINS or dissolution proceedings, no guardianship statute allows a guardian ad litem report which contains hearsay to be admitted into evidence over objection. Practitioners should ascertain the individual court's policy on this issue. Some courts allow the guardian ad litem's report in a guardianship case to come into evidence if the dissolution statutory requirements for guardian ad litem reports, outlined at IC 31-17-2-12(c), are met. These statutory provisions require the report to be filed with the court and sent to the parties at least ten days prior to the hearing and that the names and addresses of interviewees and underlying reports and data be made available to counsel upon request. If the appointing court has no policy for the introduction of guardian ad litem reports, the guardian ad litem should seek a stipulation from counsel for the parties regarding the admissibility of the report. If no stipulation can be negotiated, it may be necessary for the guardian ad litem or one of the parties to present witnesses at trial who have personal knowledge of the information in the guardian ad litem's report.

3. Guardian Ad Litem Fees

Indiana case law supports a court order for a guardian ad litem fee in a guardianship proceeding. In Whinery v. Hammond Trust and Savings Bank, 80 Ind. App. 282, 140 N.E. 451 (1923), the Court opined that an officer of the court, selected by the court to protect the interests of minors, should not be expected to perform his duties without compensation, and that it is incidental to the court's appointment power to allow the guardian ad litem suitable compensation to be paid as the equity of the case shall require. In State Ex Rel. Keating v. Bingham, 233 Ind. 504, 121 N.E. 2d 727 (1954), the Court opined that the compensation of a guardian ad litem for services rendered may be allowed as an expense of administration or out of the ward's interest in the proceedings in an amount determined by the court in its discretion. Id. at 730. The Bingham decision further provided that the court may hear evidence to assist in determining the amount of compensation to be paid or the court may summarily fix the amount of compensation upon the knowledge of the judge as to the work done by the guardian ad litem. Id. In United Farm Bureau Family Life Ins. v. Fultz, 176 Ind. App. 217, 375 N.E. 2d 601 (1978) the Court stated that the probate laws empower the trial court to compensate a guardian ad litem for his services either from the ward's interest in the estate, or from the body of the estate. The Court stated that the policy reason behind such is to insure that an officer of the court, who has been appointed by the court, will not have to render services without compensation. Id. at 613. Where the ward recovers nothing, the guardian ad litem fee shall be taken from the core of the litigation, such as the insurance policy proceeds. Id.

## V. TEMPORARY GUARDIANSHIP

A. Statutory Requirements for Appointment

Two Indiana statutes provide for the appointment of a temporary guardian for a specified time period of up to sixty days, pursuant to the petition of any person or on the court's own motion.

1. General Statute and Case Law Regarding Temporary Guardianship

The more general statute, IC 29-3-3-4, requires that all of the following be alleged and proven to secure the appointment of a temporary guardian: (1) a guardian has not been appointed for the minor; (2) an emergency exists; (3) the welfare of the minor requires immediate action; (4) no other person appears to have the authority to act. The parents and persons who have had principal care and custody of the minor for the immediately preceding sixty days may consent to the temporary guardianship and waive notice of the hearing, in which case no formal court hearing may be required. See IV. D. of this Chapter concerning consents and waivers of notice. If consents and waivers of notice cannot be secured, notice should be given to the persons listed at IC 29-3-6-1 and a hearing should be held on the temporary guardianship petition. See IV. B. of this Chapter concerning notice requirements. It is recommended that the temporary guardianship hearing be conducted on the record for the parties' and court's future reference. A temporary guardian may be appointed without notice and hearing if the petition alleges and the court finds that immediate and irreparable injury to the minor's person or injury, loss or damage to the minor's property may result before a hearing can be held. If the minor petitions to modify or terminate a temporary guardianship which was granted without notice, the court shall hold a hearing at the earliest possible time. Courts frequently schedule a parents' request to terminate or modify a temporary guardianship which was awarded without notice at the earliest possible time, although this is not specifically required by IC 29-3-3-4.

Practitioners should note that the Indiana Supreme Court found the appointment of a temporary guardian under IC 29-3-3-4 was invalid because an incapacitated adult's parents had legal authority to make medical decisions for her under the Health Care Consent Law codified at IC 16-8-12-1 et. seq. See Matter of Lawrance, 579 N.E. 2d 32 (Ind. Ct. App. 1991). IC 29-3-3-4(b) allows the court to suspend the authority of a previously appointed guardian and to appoint a temporary guardian for any period fixed by the court if the previously appointed guardian is not effectively performing his fiduciary duties and the welfare of the minor requires immediate action. See IX. of this Chapter for additional information on removal of guardian and appointment of successor guardian.

2. Temporary Guardianship Statute in Restricted Visitation Cases

The second temporary guardianship statute, IC 29-3-3-6, is effective when the custodial parent in a dissolution proceeding dies and the surviving parent's visitation had been suspended or restricted to supervised visitation under the dissolution decree. The surviving parent in the above circumstance does not have the right to custody of the minor without a proceeding authorized by law. IC 29-3-3-6(a). At the time the dissolution court enters its order restricting visitation, the court shall appoint a temporary custodian pursuant to IC 31-17-2-11 who receives custody of the child upon the custodial parent's death and who may petition the court with probate jurisdiction for an order of temporary guardianship. IC 29-3-3-6(b). Upon the petition of any person, including the dissolution court's appointed temporary custodian or on the court's own motion, a temporary guardian may be appointed for the minor for a specified period up to sixty days. The standard for the appointment of a temporary guardian pursuant to IC 29-3-3-6(g) is that a guardian shall be appointed if the court finds that the surviving parent is not entitled to the right of custody of the minor. In situations where IC 29-3-3-6 applies, a guardian ad litem or court appointed special advocate shall be appointed for the child pursuant to IC 29-3-3-6(c). See IV. E. of this Chapter for a detailed discussion of the guardian ad litem's role, powers and fees in guardianship proceedings.

B. Joinder with Other Proceedings

Both IC 29-3-3-4 and IC 29-3-3-6 allow for temporary guardianship proceedings to be joined with proceedings for appointment of a guardian pursuant to IC 29-3-5-1 et. seq. See this Chapter at IV. concerning initiating a guardianship proceeding. The guardianship petition filed under IC 29-3-5-1 may include a request for appointment of a temporary guardian and the required statutory criteria for appointment of a temporary guardian. A proposed order appointing a temporary guardian pending hearing may also be submitted to the Court. This procedure should be used to protect the minor when CHINS jurisdiction has been terminated with relative guardianship as the goal which In Re C.S., 713 N.E. 2d 863 (Ind. Ct. App. 1999) arguably requires. See this Chapter at III. C. 3. b. and c. for a more detailed discussion of the jurisdictional issues discussed in C.S.

C. Powers and Duties of Temporary Guardian

Because of the emergency nature of a temporary guardian's appointment, a temporary guardian's role may be

limited. Both IC 29-3-3-4(c) and IC 29-3-3-6(e) state that “a temporary guardian has only the responsibilities and powers that are ordered by the court.” Practitioners who submit proposed temporary guardianship orders are advised to delineate specific duties for the temporary guardian in the order. Examples include the authority to seek medical, dental, and mental health care; the authority to consent to surgery; the authority to enroll the minor in school or a day care center; the authority to discipline the minor; the authority to select a babysitter; the authority to apply for health insurance and any county, state, or federal government benefits on the minor’s behalf; the authority to provide safe and reasonable visitation to the minor’s parents.

D. Case Law

In Wells v. Guardianship of Wells, 731 N.E. 2d 1047 (Ind. Ct. App. 2000), the Court of Appeals affirmed temporary and permanent guardianship appointment orders for an elderly incapacitated woman. One of the woman’s sons appealed the trial court’s order appointing the eldest daughter as guardian. The son raised, inter alia, the issue of whether the court erred in the temporary guardian appointment because the guardianship petitioner had not complied with the notice provisions of IC 29-3-6-1. Noting that the appointment of a temporary guardian is governed by IC 29-3-3-4, the Court opined that the temporary guardianship statute requires notice but does not specify what form the notice must take or to whom it must be given. Id. at 1050. The Court inferred that notice must be given to the person who is the subject of the guardianship. Id. The Court agreed with the guardianship petitioner that the legislature intended to grant trial courts wide discretion to allow them to deal effectively with diverse and exigent circumstances. The Court commented that it is not surprising that notice requirements are relaxed in view of the circumstances under which a temporary or emergency guardianship is sought. The Court opined that temporary guardianships are sought when time is of the essence and immediate action is required. Id.

## VI. APPOINTMENT OF GUARDIAN

A. Legal Requirements

1. Statutes

IC 29-3-5-3(a) requires the court to appoint a guardian for a minor after a hearing if the court finds that the appointment of a guardian is necessary as a means of providing care and supervision of the physical person or property of the minor. If the court finds that it is not in the best interests of the minor to appoint a guardian, the court may do one of the following: (1) treat the petition as a petition for protective order pursuant to IC 29-3-4-1 and proceed accordingly (for minors, protective proceedings usually concern property interests delineated at IC 29-3-4-1(e), IC 29-3-4-2, and IC 29-3-4-3); (2) dismiss the guardianship petition; (3) enter any other appropriate order.

2. Case Law

In E.N. Ex. Rel. Nesbitt v. Rising Sun-Ohio, 720 N.E. 2d 447 (Ind. Ct. App. 1999), the Court of Appeals stated that because the term “necessary” is not defined by the guardianship statute, courts are bound to apply its common and everyday meaning. The Court looked to The American Heritage College Dictionary which defines “necessary” as “absolutely essential” and “needed to achieve a certain result or effect.” Id. at 452. The Court further concluded that the best interest of the child is implicit in the guardianship statute and that the trial court had properly included the best interest standard in determining whether to appoint a guardian. Id. at 451.

3. Considerations for Selection of Guardian

IC 29-3-5-4 states that the court shall appoint as guardian a qualified person or persons most suitable and willing to serve. In making its selection, the court shall have due regard for the following: (1) designations in a durable power of attorney; (2) request made in a will or other written instrument; (3) request by a minor who is at least fourteen years of age; (4) relationship of proposed guardian to the minor; (5) the best interest of the minor’s person and property. IC 29-3-5-5 prioritizes persons who shall be considered as prospective guardians, but the court, acting in the minor’s best interest, has the authority to select the best qualified guardian, regardless of priority. See IC 29-3-5-5(b). The following statutory priority for consideration is most relevant to the selection of a minor’s guardian: a person named by the will or attested writing of the minor’s parent; a relative with whom the minor has resided for more than six months before the filing of the petition; a person who is caring for or paying for the minor’s care. In In Re Guardianship of Stackhouse, 538 N.E. 2d 990 (Ind. Ct. App. 1989), the Court opined that case law

does not actually create a presumption in favor of the blood relationship in child custody matters apart from the presumption favoring a natural parent. The Court further stated that once the search for a custodian extends beyond the child's natural parents a host of other factors, including the personal attributes of the proposed guardian, become relevant in determining the person most suitable. *Id.* at 992.

4. Office of Family and Children Investigation

IC 29-3-9-11 provides that the court may order the division of family and children or county office of family and children to investigate the fitness and conduct of the guardian or proposed guardian and the conditions and circumstances of the minor. The division or county shall investigate and report to the court.

B. Limited Guardianship

1. Statutes

IC 29-3-5-3(b) allows the court to limit the scope of the guardianship if it is alleged and the court finds that the welfare of the minor would be best served by limiting the guardianship. The court shall make the appointive or other orders to encourage the minor's self-improvement, self-reliance, and independence and contribute to the minor's living as normal a life as possible without physical or psychological harm. If the court limits the guardianship, the guardianship letters must so state. IC 29-3-7-3. If a limitation is removed or modified, the appropriate revised letters shall be issued. IC 29-3-8-8(b). The court may create a limited guardianship at the time of the appointment or later on petition of anyone of the following: the minor's own petition; the petition of any other person approved by the court; the court's own motion. IC 29-3-8-8(a).

2. Case Law

In *E.N. Ex Rel. Nesbitt v. Rising Sun-Ohio*, 720 N.E. 2d 447 (Ind. Ct. App. 2000), the school system sought the appointment of a limited educational guardian for a sixteen-year-old special education student for the purposes of making educational decisions on the minor student's behalf. The Court, in reversing the trial court's appointment of a limited guardian, opined that the best interest of the minor is implicit in the guardianship appointment statute, IC 29-3-5-3, whether the guardianship is custodial or non-custodial. *Id.* at 451.

C. Guardianship Proceedings with Parental Consent and Waiver

A guardian may be appointed with the written consents and waivers of notice signed by the minor's parents. If there are no contested issues, the courts in some counties may not require a formal guardianship hearing on the record. The prospective guardians and their counsel may be permitted to appear before the judge informally with all of the required legal documents discussed at IV. A. and B. of this Chapter, including the proposed appointment order for the judge's signature and letters of guardianship for the probate clerk. The judge will wish to be certain that the prospective guardians understand their duties and obligations and the court's ongoing jurisdiction over the guardians. The guardians may be required to file a bond to protect the minor's property unless the court finds that a bond is unnecessary and enters an order to that effect. *See* IC 29-3-7-1, which provides the formula for the amount of the bond and the court's other directives to the guardian concerning financial matters. If the judge signs the proposed order appointing the guardian, practitioners should assist the newly appointed guardian in securing letters of guardianship subscribed before the clerk of the court or other officer authorized to take acknowledgments as required by IC 29-3-7-3. Practitioners should familiarize themselves with the local jurisdiction's probate rules.

D. Guardianship Proceedings Without Parental Consent and Waiver

The court with proper probate jurisdiction has the authority to appoint a guardian for a minor without the parents' or most recent custodians' consent if the court finds, pursuant to IC 29-3-5-3(a) that the appointment of a guardian is necessary as a means of providing care and supervision of the minor. *See* IV. this Chapter at IV. A. 2. for a definition of the term "necessary" in *E.N. Ex. Rel. Nesbitt v. Rising Sun-Ohio*, 720 N.E. 2d 447 (Ind. Ct. App. 1997). Case law, rather than statutes, forms the basis for standard of proof and burden of proof in non-consensual minor's guardianships.

1. Appointment of Counsel for Non-Consenting Parents

No guardianship statute requires appointment of counsel for parents who object to the appointment of a guardian for their child. Arguably, an indigent parent can request court appointed counsel pursuant to

IC 34-10-1-1. The Courts have required appointment of counsel for indigents in a variety of civil legal actions. See Sholes v. Sholes, 732 N.E. 2d 1252, 1253 (Ind. Ct. App. 2000) (denial of incarcerated husband's request for pauper counsel resulted in reversal of dissolution decree; indigent husband was statutorily entitled to appointment of counsel); Holmes v. Jones, 719 N.E. 2d 843 (Ind. Ct. App. 1999) (court's decision to deny appointment of pauper counsel in protective order case was reversed and remanded with instructions to appoint counsel or conduct an indigency hearing); Campbell v. Criterion Group, 605 N.E. 2d 150, 159 (Ind. 1992) (indigency determinations present a subject for the sound discretion of the trial court and a very clear case of abuse must be shown before this discretionary power can be interfered with); Elliott v. Elliott, 634 N.E. 2d 1345, 1350 (Ind. Ct. App. 1994) (indigency does not mean the person is totally without means; a person is indigent if he legitimately lacks financial resources without imposing a hardship on himself or his family). Since guardianship is not permanent and does not have the effect of an adoption, parents' rights to counsel in adoptions as described in Taylor v. Scott, 523 N.E. 2d 452 (Ind. Ct. App. 1988), do not apply to guardianships.

2. Case Law on Standard of Proof and Burden of Proof

If the parent contests the appointment of a guardian, Indiana law states that the person who seeks the appointment of a guardian must overcome the presumption that it is in the child's best interest to reside in the custody of a parent. The standard of proof required is clear and cogent evidence. See Matter of Guardianship of Riley, 597 N.E. 2d 995, 997 (Ind. Ct. App. 1992). In a dispute between the appointed guardian and the parent requesting a termination of the guardianship, the guardian has the burden of proof. See Matter of Guardianship of R.B., 619 N.E. 2d 952, 954 (Ind. Ct. App. 1993).

3. Statute and Case Law Regarding Rebuttable Presumption for Parental Custody

IC 29-3-3-3 states that except as otherwise determined in a dissolution of marriage proceeding, custody proceeding, guardianship proceeding, or other proceeding authorized by law, the parents of a minor have the right to custody of the minor's person. The parents also have the statutory right to execute legal documents concerning the minor and to consent to medical care or other professional care, treatment or advice for the minor's health and welfare. The presumption in favor of parental custody is rebuttable. Indiana case law states that to overcome the rebuttable presumption, it must be shown that the parent is unfit or has acquiesced in or voluntarily relinquished custody to the third party for such a long period of time that the affections of the child and the third party have become so interwoven that to sever them would seriously mar and endanger the future happiness of the child. See Hendrickson v. Binkley, 161 Ind. App. 388, 316 N.E. 2d 376 (1974). The Hendrickson standard has been cited in several guardianship cases. See also Matter of Guardianship of Riley, 597 N.E. 2d 995 (Ind. Ct. App. 1992) (Maternal grandmother's guardianship petition denied due to lack of evidence that divorced, non-custodial father was an unfit parent or had abandoned the children.); Styck v. Karnes, 462 N.E. 2d 1327 (Ind. Ct. App. 1984) (mother's request to terminate guardianship denied due to her failure to support or communicate with the child and psychological harm to child if bond between him and paternal grandparent guardian were severed); In Re Guardianship of Phillips, 178 Ind. App. 220, 383 N.E. 2d 1056 (1978) (joint petition for guardianship filed by maternal grandmother and uncle denied because there was no evidence that the father was unfit).

The Hendrickson standard has been modified and expanded into an additional preeminent best interests standard in more recent case law. See the following third party custody dissolution cases: Turpen v. Turpen, 537 N.E. 2d 537 (Ind. Ct. App. 1989); In Re Paternity of L.K.T., 665 N.E. 2d 910 (Ind. Ct. App. 1996). But see In Re Guardianship of B.H., 730 N.E. 2d 743 (Ind. Ct. App. 2000) (father's spousal and alcohol abuse ten years prior to stepfather's guardianship proceeding and children's desire to remain with stepfather were insufficient evidence to overcome father's presumptively superior right to custody of children); Marriage of Huber, 723 N.E. 2d 973 (Ind. Ct. App. 2000) (court's generalized finding that custody by grandparents was in children's best interest due to mother's evening work hours and disruption to children from leaving grandparents' home was inadequate to rebut the presumption of parental custody). Practitioners should be aware that Appellate decisions on guardianship without parental consent frequently quote third party custody cases. Indiana case law concerning children being awarded to the custody of third party non-parents has been applied by our Appellate Courts to both guardianship and third party custody proceedings.

4. Visitation for Parents in Guardianship Cases

No guardianship statutes govern the type or amount of parental visitation which the guardian must

provide. IC 29-3-8-1(a) grants a guardian “all of the responsibilities and authority of a parent”. Guardians of minors are often vested with a great deal of discretion in determining parental visitation. The Court which appoints the guardian may order specific visitation to be provided to the parents by the guardian. Indiana case law has characterized visitation as a “sacred, precious privilege”. See Matter of Adoption of Topel, 571 N.E. 2d 1295, 1299 (Ind. Ct. App. 1991) and Stewart v. Stewart, 521 N.E. 2d 956, 960 (Ind. Ct. App. 1988). Because of the reasons for the necessity of the guardianship, the court will need to balance the parents’ right to visitation against the minor’s right to safety and stability. Dissolution visitation guidelines including the Indiana Supreme Court Parenting Time Guidelines may be totally inappropriate in a guardianship proceeding because such extensive visitation could place the minor at great risk. In fact, the Indiana Parenting Time Guidelines Scope of Application states that the Guidelines are applicable to “child custody situations” including paternity. Guardianships are not listed as being within the Scope of the Parenting Time Guidelines; however, it is not clear whether guardianship proceedings qualify as “child custody” proceedings. If guardianship proceedings qualify as “child custody proceedings,” the Scope of the Indiana Parenting Time Guidelines states that the Guidelines may not be applicable “to situations involving family violence, substance abuse, risk of flight with a child, or any other circumstances the court reasonably believes endanger the child’s physical health or safety, or significantly impairs the child’s emotional development.” The type and amount of visitation which the proposed guardian should provide when guardianship is the designated CHINS permanency plan should be carefully considered by the office of family and children and fully discussed with the guardian. Optimally, the guardianship appointment order should include specific guidelines for parental visitation which are tailored to the child’s need for protection and the parents’ situation.

E. Appellate Review Standard

IC 29-1-1-22 states that any person considering himself aggrieved by any decision of a court having probate jurisdiction may prosecute an appeal to the court having jurisdiction of such appeal. Such appeal shall be taken as appeals are taken in civil cases. In E.N. Ex. Rel. Nesbitt v. Rising Sun-Ohio, 720 N.E. 2d 447, 450 (Ind. Ct. App. 1999), the Court stated that all findings and orders of the trial court in guardianship proceedings are within the trial court’s discretion and will be reviewed by the Appellate Court under an abuse of discretion standard. See also IC 29-3-2-4. In In Re Guardianship of V.S.D., 660 N.E. 2d 1064, 1066 (Ind. Ct. App. 1996), the Court opined that an abuse of discretion will be found only when the decision of the trial court is clearly against the logic and effect of the facts and circumstances before the court or the court has misinterpreted the law. In Carr v. Carr, 685 N.E. 2d 92 (Ind. Ct. App. 1997), a co-guardian argued that the clear and convincing evidentiary standard should have been used by the court in making its decision to change the nursing home placement for an incapacitated adult. The Court opined that the standard of appellate review for sufficiency of the evidence with respect to a judgment requiring proof by clear and convincing evidence imposes neither greater nor lesser judicial scrutiny than other sufficiency questions. Such judgments will be affirmed if, considering only the probative evidence and the reasonable inferences supporting it and without reweighing evidence or assessing witness credibility, a reasonable trier of fact could find the matter proven by clear and convincing evidence. Id. at 96.

## VII. RESPONSIBILITIES AND DUTIES OF MINOR’S GUARDIAN

A. Statutes

1. Required Powers and Duties

With the exception of a temporary guardian and unless otherwise ordered by the court, the appointed guardian of a minor has all of the responsibilities and authority of a parent and is responsible for the preservation of the minor’s property. IC 29-3-8-1. If the minor has no living parent or if the parents are incapacitated, the guardian may exercise the powers of the parent described at IC 29-3-3-3(1) through (8) by executing the following documents on the minor’s behalf: (1) specific Internal Revenue Code documents; (2) waiver of notice, consent and power of attorney under any statute, including Indiana tax documents; (3) consent to unsupervised estate administration; (4) Federal and state income tax returns; (5) consent to medical care or other professional care, treatment or advice for the minor’s health and welfare. The guardian must become sufficiently acquainted with the minor to know the minor’s capabilities, disabilities, needs, opportunities and physical and mental health. IC 29-3-8-1(a)(1). The guardian may apply any guardianship income and, if necessary, the principle, to the minor’s needs for support and shall report the physical and mental condition of the minor to the court. IC 29-3-8-1(a)(3),

(4). The guardian shall comply with applicable statutes at IC 29-3-12-1 through 5 when the guardianship is terminated. IC 29-3-8-1(a)(2). IC 29-3-8-3 mandates that a guardian "observe the standards of care and conduct applicable to trustees" with respect to the guardianship property. The guardian must also do the following: protect, preserve and conserve any guardianship property; encourage the minor's self-reliability and independence; consider recommendations for support, care, education and training made by the minor's parent. IC 29-3-8-3.

2. Permissive Powers and Duties

The guardian may also, inter alia, receive the minor's property; take custody of the minor and establish the minor's home, institute proceedings to obtain support for the minor; consent to medical or other professional care for the minor; consent to the minor's marriage or adoption. IC 29-3-8-2. The guardian may change the minor's residence with court approval after notice and hearing. IC 29-3-9-2.

3. Delegation of Powers and Duties

A guardian who is not a temporary guardian may delegate his powers regarding support, custody or property of a minor to another person by properly executed power of attorney. IC 29-3-9-1. The guardian's powers may be delegated for any period during which the custody of the minor is entrusted to an institution furnishing care, custody, education and training. If the minor is not entrusted to an institution, the delegation period must not exceed sixty days during which the guardian is incapacitated or absent from home. The power to consent to marriage or adoption may not be delegated. A guardian may not abandon the minor, but must formally resign his guardianship with the court. IC 29-3-12-4 authorizes the court to accept a guardian's resignation and appoint a successor guardian. Practitioners should note that the court with probate jurisdiction may appoint the county office of family and children as successor guardian of the minor if no other suitable person requests to be appointed successor guardian.

4. Compensation

IC 29-3-9-3 states that a guardian is "entitled to reasonable compensation for services as guardian and to reimbursement for reasonable expenditures made in good faith on behalf" of the minor.

B. Case Law

1. Generally

A guardian must act with fidelity and be able to carry out his duties efficiently. Matter of Guardianship of Brown, 436 N.E. 2d 877 (Ind. Ct. App. 1982). The court must permit representation of a ward by the ward's guardian in a civil lawsuit pursuant to Ind. Trial Rule 17C. See Richardson v. Brown, 173 Ind. App. 50, 362 N.E. 2d 197 (1977).

2. Sterilization

The Court of Appeals addressed sterilization of adult female wards in two cases, Lulos v. State, 548 N.E. 2d 173 (Ind. Ct. App. 1990) and In Re Guardianship of V.S.D., 660 N.E. 2d 1064 (Ind. Ct. App. 1996). In these cases the Court opined that a guardian who seeks a court order for tubal ligation on an incapacitated woman must file a petition for sterilization in good faith and present clear and convincing evidence that the procedure is in the best interests of the ward's health and welfare. In V.S.D. the Court of Appeals found that the trial court's order authorizing the guardian to consent to tubal ligation was supported by the following clear and convincing evidence: the ward had a lengthy history of mental illness that severely impaired her judgment concerning sexual behavior and use of contraception; both of the ward's parents thought tubal ligation was in the ward's best interests; pregnancy precluded the ward's ability to take medication for her mental illness; the ward's mental illness worsened without medication; when properly medicated, the ward did not desire to become pregnant; the ward had been detained on an emergency basis five times within the most recent fifteen months.

C. Local Rules and Practices Concerning Minor's Property

Practitioners should consult the local probate rules or court officials to determine whether the guardian will be required to file an inventory of minor's property, keep a separate guardianship bank account for the minor's Social Security, child support or assisted guardianship payments, or file an accounting of the minor's property and expenditures every two years.

## VIII. RESIGNATION, REMOVAL AND APPOINTMENT OF SUCCESSOR GUARDIAN

### A. Resignation

A guardian may resign the guardianship appointment and the court may accept the resignation. IC 29-3-12-4(a). Resignation of the guardian does not terminate the appointment of the guardian until the resignation and a final account have been approved by the court. IC 29-3-12-5. The resignation of a guardian after letters of guardianship have been duly issued does not by itself invalidate the guardian's acts or omissions prior to removal. IC 29-3-12-4 (c). After accepting the guardian's resignation, the court may appoint a successor guardian to succeed to the title, powers and duties of the former guardian if a successor guardian is required. IC 29-3-12-4(b). See this Chapter at IX. C. for further discussion of successor guardians.

### B. Removal of Guardian

Removal of a guardian deals with the fitness of the guardian. It differs from termination of a guardianship, which deals with the necessity for continuing the guardianship. See Matter of Guardianship of R.B., 619 N.E. 2d 952 (Ind. Ct. App. 1993). IC 29-3-6-3 states that at any time after the appointment of a guardian, any person may serve upon the guardian's attorney and file with the clerk of the court where the guardianship proceedings are pending, a written request for notice of all hearings and copies of all proceedings in connection with the removal, suspension, or discharge of the guardian or termination of the guardianship. Unless the court directs otherwise, the guardian or guardian's attorney shall comply with the request. Practitioners may use this statute to keep informed of the guardianship status of a CHINS whose permanency plan of guardianship has been secured.

#### 1. Statutory Reasons for Removal

IC 29-3-12-4 provides that a guardian may be removed, after notice and hearing, on the same grounds and in the same manner as provided for removal of a personal representative under IC 29-1-10-6. IC 29-1-10-6 lists the following reasons for removal: (1) the guardian's incapacity (except for physical illness, infirmity or impairment); (2) the guardian is disqualified, unsuitable or incapable of discharging duties; (3) the guardian's mismanagement of estate; (4) the guardian's failure to perform any duty imposed by law or lawful court order; (5) the guardian has ceased to be domiciled in Indiana.

#### 2. Initiating a Removal Proceeding

The following may initiate removal of a minor's guardian: the minor; any person interested in the guardianship (which arguably would include the minor's parents and relatives); the court on its own motion. IC 29-3-12-4(a). A verified petition for removal should be filed with the court where the guardian was appointed. A copy of the removal petition and notice of the hearing date should be served on the guardian and any other person whom the court directs in the same manner in which notices of a guardianship petition should be served. See IC 29-1-1-12 through IC 29-1-1-14; IC 29-3-6-1(b) and this Chapter at IV. B. concerning the manner of notice for removal proceedings.

#### 3. Emergency Suspension

IC 29-3-3-4(b) provides that if the court finds that a previously appointed guardian is not effectively performing fiduciary duties and the welfare of the minor requires immediate action, the court may suspend the authority of the previously appointed guardian. The court may appoint a temporary guardian for any period fixed by the court. The temporary guardian has only the powers ordered by the court. The court shall order only those powers that are necessary to prevent immediate and substantial injury or loss to the minor's person or property. IC 29-3-3-4(c). A guardian who is removed shall give a final accounting to the court.

#### 4. Case Law Concerning Removal of Guardian

The following cases concern the removal of a guardian for an incapacitated adult, but may be useful on a motion for removal of a minor's guardian. In Carr v. Carr, 685 N.E. 2d 92 (Ind. Ct. App. 1997), an incapacitated nursing home patient's uncle petitioned to remove the patient's adult daughter as guardian of the patient's \$2,500,000.00 estate. The daughter and uncle were co-guardians of the patient's person. The uncle desired to move the patient from an Indianapolis nursing home to a nursing home in Lafayette, so the uncle and the patient's girlfriend, who resided in Lafayette, could visit the patient more easily and because the Indianapolis nursing home was unsatisfactory in cleanliness and care. The daughter opposed

the nursing home move because the Lafayette nursing home required a downgrade in the patient's code status regarding aggressive life-saving measures from "A" to "C". The court ordered the removal of the daughter as guardian of the estate and the daughter appealed, arguing abuse of discretion. The Court of Appeals affirmed the daughter's removal. The Court found that the daughter had failed to file an accounting within the statutorily prescribed time. The Court also stated that the trial court could have concluded that the daughter's request to be compensated at the rate of \$80.00 per hour for the ministerial services she had provided to the estate was unreasonable and detrimental to the estate. The Court opined that the statute governing proceedings for removal of a guardian vests broad discretion in the trial court and the Appellate Court will not interfere unless an abuse of discretion clearly appears. Id at 97.

In Matter of Guardianship of Brown, 436 N.E. 2d 877 (Ind. Ct. App. 1982), two brothers appealed their removal as co-guardians of the persons and estates of their incapacitated parents. The Court affirmed their removal as guardians, finding that the following evidence supported removal: one guardian commingled guardianship funds with personal funds of the guardian, which made accounting difficult and constituted a breach of trust; one guardian isolated and sequestered the parents from their social contact with friends and family members to a degree tantamount to imprisonment; the other guardian had failed to attend to the prescribed diets and medical attention needed by the incapacitated parent. The Court concluded that the trial court had acted within its discretion. Id. at 890. The Court also noted that there was no evidence of conversion of guardianship funds by the co-guardians who were removed.

### C. Appointment of Successor Guardian

#### 1. Statutory Authority

The court may appoint a qualified successor guardian upon the resignation, removal or death of a previously appointed guardian. IC 29-3-12-4. The successor guardian should sign an oath or provide a bond as directed by the court. New letters of guardianship should be issued to the successor guardian, with any limitations of powers noted on the letters. See IC 29-3-7-1, IC 29-3-7-3.

#### 2. Case Law

In Carr v. Carr, 685 N.E. 2d 92 (Ind. Ct. App. 1997), the daughter of an incapacitated adult nursing home patient was removed as guardian of her father's estate, and Lafayette Bank and Trust was appointed successor guardian. The daughter argued on appeal that the appointment of Lafayette Bank as successor guardian was an abuse of discretion due to the following: Key Bank in Indianapolis had been providing services to the estate and was willing to serve as guardian; there was no evidence regarding Lafayette Bank's relationship to the father; there was no evidence that the appointment of Lafayette Bank was in the father's best interests. The Court was unpersuaded by the daughter's arguments, stating that the trial court was required by IC 29-3-12-4 to appoint a successor guardian. Id at 97. The Court could not conclude that the appointment of a professional fiduciary in the city where the father would be residing was an abuse of discretion; therefore, no error was found. Id.

In Matter of Guardianship of Brown, 436 N.E. 2d 877 (Ind. Ct. App. 1987), the court removed two brothers as co-guardians of the person of their elderly, ill parents despite the parents' request that one of the brothers, a physician, be appointed sole guardian. The court appointed a local attorney as successor guardian of the person of the elderly couple. The Court affirmed the trial court's successor guardian of the person appointment, stating that the appointment of a guardian is within the discretion of the trial court, which must have the ultimate regard for the ward's best interests. Id at 890. The Court found that the trial court could have reasonably concluded that the best interests of the elderly couple would be served by appointing an impartial individual who was not caught up in the family altercations as guardian of the person. The Court found no abuse of discretion given the rivalry and animosity among the couple's children as shown in the record. Id.

## IX. **TERMINATION OF GUARDIANSHIP**

### A. Statutory Provisions

IC 29-3-12-1 requires the court to terminate the guardianship on the minor's eighteenth birthday or in the event of the minor's death. The court may terminate the minor's guardianship if the guardianship property does not exceed \$3,500.00; the minor's residence has been changed to another state and a guardian has been

appointed in the new state; the minor marries or is adopted; or the guardianship is no longer necessary for any reason. The powers of the guardian cease upon termination of the guardianship except for payment of claims and expenses approved by the court and the exercise of other fiduciary powers, such as delivery of the minor's property to the person having custody of the minor or as the court directs. IC 29-3-12-5 provides that termination for any reason of the authority and responsibility of the guardian does not affect the liability of the guardian for prior acts or the obligation of the guardian to account for the guardian's conduct of his trust.

**B. Initiating a Petition for Termination of Guardianship**

The person, frequently the parent or another relative of the child, who desires to terminate the guardianship should file a verified petition with the court. The guardian and other persons whom the court directs should receive a copy of the petition and the order setting the petition for hearing pursuant to IC 29-1-1-12 through IC 29-1-1-14. See this Chapter at IV. B. regarding notice procedures.

**C. Burden of Proof**

The guardian has the burden of proof on a parent's petition to terminate guardianship. The guardian must prove that the continuation of the guardianship is necessary. See Matter of Guardianship of R.B., 619 N.E. 2d 952, 954 (Ind. Ct. App. 1993).

**D. Case Law**

Our Appellate Courts have held that the presumption in favor of parental custody stated in Hendrickson v. Binkley, 161 Ind. App. 388, 316 N.E. 2d 376, (1974) along with its exceptions applies to petitions by parents to terminate guardianship of their children. See this Chapter at VI. D. for a further discussion of the Hendrickson standard.

In Styck v. Karnes, 462 N.E. 2d 1327 (Ind. Ct. App. 1984), the Court affirmed the denial of the mother's petition to terminate the paternal grandfather's guardianship. The mother had killed the child's father at the time the guardian was appointed. The mother had completed her probation and counseling when she sought to terminate the guardianship. There was no evidence that the mother was currently unfit, but the Court found that the following evidence supported continuation of the guardianship: the mother had not pursued her termination petition for two and one-half years after filing it; the mother had failed to communicate with the child for over three years; there was a strong bond between the child and his grandfather as seen by a psychiatric social worker. The Court noted that the best interests of the child are always a factor for the court to consider. Id. at 1230. The Court opined that the Hendrickson presumption in favor of the mother's custody may have been overcome because the evidence permitted a reasonable inference of voluntary relinquishment by the mother such that the child's affections had become inextricably interwoven with the paternal grandfather's affections.

In Matter of Guardianship of R.B., 619 N.E. 2d 952 (Ind. Ct. App. 1993), the court granted the mother's petition to terminate the maternal grandmother's guardianship and the grandmother appealed. The Court affirmed the guardianship termination, finding that sufficient evidence, including the testimony of two psychologists, had been presented by the mother to rebut all of the factors enunciated in Hendrickson v. Binkley, 161 Ind. App. 388, 316 N.E. 2d 376 (1974). Among the court's findings were the following: the mother's frequent visits with the child; the mother's stable employment and housing situation; the stepfather's good relationship with the child; the psychologists' opinions that the best interests of the child would be served by reunification with the mother; one psychologist's finding that the mother was well adjusted mentally and emotionally. See also Matter of Guardianship of L.L., N.E. 2d (Ind. Ct. App. 2001), in which the trial court's denial of the mother's petition to terminate the paternal grandmother's guardianship was reversed and remanded. The Court noted the following evidence in support of the mother's petition to terminate guardianship: mother was not currently unfit; mother had been sober for six years; mother and her new husband were good parents according to four witnesses; mother had been successful in raising another child for six years.

**X. ASSISTED GUARDIANSHIP FOR CHINS**

The Family and Social Services Administration has developed an assisted guardianship program so that eligible adjudicated CHINS can have the permanency plan of relative guardianship with ongoing financial support from the county office of family and children after the CHINS case is closed. The Indiana assisted guardianship

program is codified at 470 I.A.C. 3-10.5-1 through 13 and went into effect on July 1, 2000. Funds for this program come from the TANF block grant, 42 U.S.C. 601(a)(1).

A. Child Eligibility

470 I.A.C. 3-10.5-2 requires that, to be eligible for the assisted guardianship program, the child must meet all of the following criteria:

- Have been adjudicated a CHINS by an Indiana juvenile court and been removed from home and placed in another home or shelter care facility under the supervision of the county office of family and children pursuant to a dispositional decree entered under IC 31-34-20-1.
- Have resided with the eligible guardian, an adult relative caretaker, in the guardian's home for a continuous period of not less than six months.
- Have had a court determination approving legal guardianship as the child's permanency plan pursuant to IC 31-34-21-7.
- Have an income level of less than 250% of the federal poverty level. This income is the child's income only. The income of the adult relative caretaker and the caretaker's family is not considered. The current income level for child eligibility is \$1740.00 per month.

In addition, the child must meet one of the following criteria:

- Be at least thirteen years of age;
- Be a member of a sibling group at least one of whom is thirteen years of age;
- Be seriously disabled as determined by S.S.I. standards;
- Be approved for legal guardianship as a permanency plan by an order entered by a juvenile court with jurisdiction over the child, if the order finds and states compelling reasons for selecting guardianship as the preferred permanency choice.

B. Guardian's Eligibility

470 I.A.C. 3-10.5-3 provides the following eligibility requirements for the guardian:

- Be a non-parent relative of the child as defined by IC 12-7-2-162.5, which lists the following relationships to an individual under age eighteen by blood, marriage, or adoption: grandparent, brother, sister, stepparent, step-grandparent, stepbrother, stepsister, first cousin, uncle, and aunt. The program also includes a great grandparent as an eligible relative. See 470 I.A.C. 3-10.5-1(j).
- Reside in a home that meets all requirements for foster care licensure.
- Reside with the eligible child in the home for a continuous period of not less than six months.
- Be primarily responsible for providing appropriate care, support, maintenance, education, and welfare of the child.
- Meet each of the following, as shown by a home study and evaluation prepared or approved by the county office of family and children:

(A) Have the current and projected continuing ability to provide for the child's physical, mental, emotional, educational, and psychological needs, upon termination of supervision of the child by the division or county office, except for provision of assistance approved under this rule.

(B) Have the continuing ability, willingness, and motivation to access and obtain appropriate services outside the home that are necessary or appropriate for the health, education, development, and well-being of the child and that will assist the child in becoming a self-supporting adult to the maximum extent feasible.

(C) Have established a nurturing, stable relationship with the child in which the child indicates a desire to continue a family relationship and residence with the guardian in the guardian's household.

(D) Have demonstrated the ability to determine and regulate an appropriate level of relationship and ongoing contacts with any parent or other close relative of the child, consistent with the safety and best interests of the child, and in conformance with any plan of visitation ordered or approved by the court in the child in need of services proceeding.

C. County Office of Family and Children Responsibilities and Duties

The county office of family and children has the following duties and responsibilities in facilitating the appointment of the eligible guardian as provided by 470 I.A.C. 3-10.5-4:

- Referral to county office of family and children attorney to assist with the establishment of guardianship.
- With the county director's approval, the office of family and children may file the petition for appointment of guardian and pay all or any designated portion of the legal costs and other expenses of the guardianship proceeding, including the services of the attorney for the county office. Practitioners should be certain that all guardianship pleadings clearly reflect that counsel for the office of family and children is not the guardian's attorney. See this Chapter at II. C.
- Give notice of the guardianship as required by IC 29-3-6-1(3).
- Seek the parents' consent to guardianship if the parent is identified and can be contacted with reasonable efforts and provide a written report to the court in the guardianship proceeding of the efforts to solicit parental consent.
- The county office shall provide to the guardian at the time the guardianship assistance agreement is approved information concerning social service resources that may be available to the guardian or the child through the county office or other community agencies. 470 I.A.C. 3-10.5-8(a).
- The county office of family and children is not responsible for monitoring the guardian's care and supervision of the child or for providing additional services to the child after the guardianship is completed. 470 I.A.C. 3-10.5-8(b).

D. Monetary Payments to Guardians

The county office will determine the amount of monthly payments, which, pursuant to 470 I.A.C. 3-10.5-5(b) are not to exceed \$512.00 per child. Payments shall begin in the month after the closure of the juvenile court CHINS case or the guardianship appointment, whichever occurs later. But see In Re C.S., 713 N.E. 2d 863 (Ind. Ct. App. 1999), discussed in this Chapter at III. B., which states that the trial court lacked jurisdiction to appoint a guardian while the CHINS case was still open. The county office of family and children has no responsibility for accounting to the court or disposition of the monthly assistance payments made to the guardian. 470 I.A.C. 3-10.5-11. An annual review of the guardianship assistance shall be conducted by the county office of family and children and the assistance amount may be redetermined based on the review and TANF guidelines. 470 I.A.C. 10.5-5(e). 470 I.A.C. 3-10.5-12 provides that the guardian may appeal the denial, redetermination, or termination of assistance in accordance with 470 I.A.C. 1-4.

E. Guardian's Responsibilities and Duties

The Indiana Administrative Code provides that guardians who received assisted guardianship payments have the following duties, in addition to the duties imposed on guardians by statutes or by a court order specific to their appointment.

1. Cooperation with Office of Family and Children and Title IV-D Program

The guardian shall apply for assistance on the division of family and children's prescribed form and must sign the assistance agreement. I.A.C. 3-10.5-3(d). The guardian must provide to the county office of family and children any financial or other information requested for the annual review. 470 I.A.C. 3-10.5-3(e). The guardian shall assign any rights to receive child support payments from the parent to the Title IV-D Program. 470 I.A.C. 3-10.5-9(a). The guardian shall cooperate with the county office of family and children by supplying all information in the guardian's possession to facilitate the county office's obligation to provide TANF information to the division of family and children. 470 I.A.C. 10.5-3-10(b).

2. Health Insurance

The guardian shall apply for medical insurance for the child through the Indiana Medicaid Program, the Children's Health Insurance Program, or any other financial assistance program for medical expenses. 470 I.A.C. 3-10.5-7(a). If the child is not eligible for a program, the guardian must obtain and maintain private health insurance which provides benefits that are substantially equivalent to the state programs, and provide evidence of health insurance to the county office of family and children. 470 I.A.C. 3-10.5-7(b),(c),(d).

3. Notification of Additional Proceedings

The guardian shall give notice of all hearings in the guardianship proceeding during any time that the guardianship assistance agreement is in effect. 470 I.A.C. 3-10.5-11(b). This provision allows the county office of family and children to be informed if a parent seeks termination of the guardianship or visitation which could put the child at renewed risk.

F. Terminating Assisted Guardianship

The county office of family and children shall terminate the guardianship assistance agreement and monthly payments if any of the following occurs: (1) the child's death or adoption; (2) termination of the guardianship by the court; (3) entry of a court order awarding custody to another person; (4) the child's incarceration in an adult correctional facility; (5) the child's detention in a juvenile detention center for more than 180 days; (6) entry of a dispositional decree in a new CHINS proceeding based on events occurring while the child is residing with the guardian if the decree removes the child from the guardian's home. 470 I.A.C. 3-10.5-6.

The county office of family and children may terminate the guardianship assistance agreement and monthly payments if any of the following occurs: (1) the child is no longer living with the guardian; (2) a successor guardian has been appointed; (3) the guardian is not supporting the child adequately; (4) the guardian has not provided information requested for the annual review; (5) the guardian fails to provide medical insurance or meet eligibility criteria; (6) the child has been adjudicated a CHINS in a new proceeding; (7) appropriated funds are no longer available. 470 I.A.C 3-10.5-6(b). Assistance payments usually terminate when the child reaches the age of eighteen years, but may continue and may be made directly to the child until the child is nineteen years of age if the child is a full time high school, vocational school, or technical school student. 470 I.A.C. 3-10.5-6(c).

G. Local Subsidized Guardianship for CHINS

A county office of family and children may, with the approval of the juvenile court and the division, establish and operate a written plan for subsidized guardianships for children whose court approved permanency plan is guardianship. The subsidized guardianship payments must be financed through local county funds. Subsidized guardianship may be an option for foster parents or relatives, such as great-aunts or second cousins, who are not listed as eligible relatives under the assisted guardianship criteria. Practitioners are advised to review the local subsidized guardianship plan before completing the subsidized guardianship.