

CHAPTER 8

DISPOSITIONAL AND PARENT ORDERS

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CHAPTER 8

DISPOSITIONAL AND PARENT ORDERS

I. PREDISPOSITIONAL REPORTS AND CASE PLANS

A. Mandatory and Discretionary Reports

IC 31-34-18-1 states that the court "shall" order the caseworker or probation officer to prepare a predispositional report after the court has entered a finding that a child is a CHINS. Under IC 31-34-10-9 (a) the court may proceed directly from a CHINS admission to a dispositional hearing if this is agreed to by all the parties. However, it can be argued that the court should proceed directly to the dispositional hearing only if the office of family and children has prepared a predispositional report and provided copies to the parties.

The following persons may also prepare predispositional reports: the child; the child's parents, guardian, or custodian; and the child's guardian ad litem or court appointed special advocate (CASA). IC 31-34-18-1(b).

B. Content of Office of Family and Children Predispositional Report

1. Guidelines for Preparing Predispositional Report

IC 31-34-18-4 provides that in preparing the predispositional report, the office of family and children shall consider the safety and best interest of the child and the community, and when consistent therewith, recommend care, treatment and rehabilitation that: (1) is in the least restrictive setting and closest to the parents' home; (2) least interferes with family autonomy and least disrupts family life; (3) least restrains the freedom of the child and family; (4) provides a reasonable opportunity for parent participation.

2. Needs and Recommendations for the Child

IC 31-34-18-1 provides that the predispositional report must contain a statement of the needs of the child, and recommendations for the child's care, treatment, rehabilitation or placement.

3. Out-of-Home Placement: Relatives and LCC Committees

If the caseworker believes that an out-of-home placement would be appropriate for the child, the caseworker "shall consider" whether the child should be placed with the child's suitable and willing blood or adoptive relative caretaker, including a grandparent, an aunt, an uncle, or an adult sibling, before considering other out-of-home placements. IC 31-34-18-2. This consideration should be reflected in the predispositional report. See this Chapter below Roman Numeral V. at C. for further discussion about relative placements.

If the caseworker is recommending shelter care placement for a child or foster care placement outside of the child's county of residence, the caseworker should consider whether it is necessary and appropriate to convene the local coordinating committee (LCC). See this Chapter below Roman Numeral V. at E. 1. for discussion on purpose and role of LCC in reviewing restrictive placements for children.

4. Parental Participation

IC 31-34-18-2(a) provides that the person preparing the predispositional report "shall consider" the necessity, nature and extent of the participation by a parent, guardian or custodian in a program of care, treatment or rehabilitation of the child. See this Chapter below at VIII. for full discussion of parental participation orders.

5. Parental Financial Responsibility

IC 31-34-18-3 provides that the caseworker "shall" prepare a financial report on the parent or the estate of the child to assist the juvenile court in determining the financial responsibility for services

provided for the child or the child's care giver. See this Chapter below at IX. for full discussion of financial responsibility.

6. Mental Health Examination of Child or Parents

Under IC 31-34-18-5(1) and IC 31-32-12-1(3), the court can order an examination of the child to assist the office of family and children in making recommendations regarding the needs of the child. Under IC 31-34-18-5(2) the court can "make provision" for an examination of the child's parent, guardian, or custodian "if the person gives consent;" however, in practice it does not appear that juvenile judges require or obtain parental consent prior to issuing evaluation orders. See Chapter 7 at II. E. for motions for examination of child or parents.

7. Conference with Experts

IC 31-34-18-1.1 through 1.3 provide that the person preparing the predispositional report has the discretion, or may be directed by the court, to confer with child experts about a disposition for the child, and to facilitate conferences with representatives from school, probation, office of family and children, and mental health and disability services providers. These conferences may be referred to as "case conferences" in some counties, and can be very beneficial. The experts consulted can help the report writer consider resources and programs that are appropriate for the child, and recommend needed care, treatment and placement for the child.

8. Mandatory Statement of Dispositional Options Considered

IC 31-34-18-6.1 directs the caseworker to include a description of all dispositional options considered in preparing the predispositional report and an evaluation of each option. This statute also requires that if the caseworker has consulted any experts pursuant to IC 31-34-18-1.1 through 1.3, the report should include the name, occupation, position and any relationship to the child of each person consulted.

C. Report May Contain Hearsay

The predispositional report may contain hearsay, if it is of probative value. IC 31-34-19-2(a). Arguably, this hearsay exception includes written reports from experts, and other necessary records regarding the child, that are attached to the predispositional report.

D. Distribution and Access to Predispositional Report

IC 31-34-18-6 provides that the "predispositional report shall be made available within a reasonable time before the dispositional hearing," and the court "shall provide" copies to the parties. Presumably this language means that the report prepared by the office of family and children, as well as any reports prepared by other parties, shall be filed with the court and served on the parties. Despite the language in the statute that the court "shall provide" copies of the report to the parties, it is the practice in many counties for the parties to serve copies of their reports upon the other parties.

IC 31-34-18-6 provides that if the juvenile court determines "on the record" that the predispositional report contains information that should not be released to the child or the child's parents, the court "shall" provide a copy of the report to parents' counsel and the child's guardian ad litem or court appointed special advocate (CASA), and "may" provide a factual summary of the report to the child and parents. If portions of the predispositional report are based on significant confidential drug, medical, or mental health records, or such confidential records are attached to the predispositional report, the preparer of the report should consider whether IC 31-34-18-6 or another mechanism should be utilized to avoid distribution of that confidential information directly to the parties.

E. Presence of Person Who Prepares Predispositional Report at Dispositional Hearing

IC 31-34-19-1.1 provides that the person who prepared the predispositional report "must be present, if possible" at the dispositional hearing. This appears to be contradictory language (must be/if possible), but the probable legislative intent was to have the caseworker who prepared the report available for cross-examination at the dispositional hearing.

F. Case Plan

The dispositional statutes do not require the filing of the case plan prepared by the office of family and children at the dispositional hearing. However, the case plan is frequently prepared prior to the dispositional hearing and is sometimes used as the predispositional report or as a supplement to the report.

1. Case Plan Requirements, Time Line, and Updates

In accordance with federal law, a case plan shall be prepared for each child who is under the supervision of the office of family and children as a result of an out-of-home placement or a dispositional hearing. IC 31-34-15-1. The case plan shall be completed not later than sixty days after the child's first placement outside of the home, or the date of the dispositional decree, whichever occurs first. IC 31-34-15-2.

The Indiana statutes on case plans make no reference to modification of case plans or regular distribution to parents of updated case plans. However, in A.P. v. PCOFC, 734 N.E. 2d 1107, 1113 (Ind. Ct. App. 2000), petition for transfer pending, the Court noted that it is reasonable to assume that subsequently altered and modified case plans will be provided to parents as the CHINS case proceeds. See this Chapter below Roman Numeral I. at F. 3. for full discussion of the case plan issue in the A.P. case. Policy should be developed and followed for revising case plans based on changed circumstances, negotiating revisions with parents, and modifying case plans to reflect additions or changes in court orders. Documentation should be maintained reflecting conferences with parents to negotiate and review modifications of case plans.

2. Content of the Case Plan

A case plan is a description and discussion of the child's placement needs, the efforts of the county department to provide family services, and the permanent placement plan for the child. IC 31-34-15-4 states that the case plan must include:

- (1) A permanent plan for the child and an estimated date for achieving the goal of the plan.
- (2) The appropriate placement for the child based on the child's special needs and best interests.
- (3) The least restrictive family-like setting that is close to the home of the child's parent, custodian, or guardian, if out-of-home placement is recommended. If an out-of-home placement is appropriate, the county department shall consider whether a child in need of services should be placed with the child's suitable and willing blood or adoptive relative caretaker, including a grandparent, an aunt, an uncle, or an adult sibling, before considering other out-of-home placements for the child.
- (4) Family services recommended for the child, parent, guardian, or custodian.
- (5) Efforts already made to provide family services to the child, parent, guardian, or custodian.
- (6) Efforts that will be made to provide family services that are ordered by the court.

3. Involvement and Rights of Parents in Case Plan

The office of family and children is to "negotiate" with the child's parent, guardian, or custodian in preparing the case plan. IC 31-34-15-2. A copy of the completed case plan shall be sent to the child's parent, guardian, or custodian within ten days of its completion. IC 31-34-15-3.

In A.P. v. PCOFC, 734 N.E. 2d 1107 (Ind. Ct. App. 2000), petition for transfer pending, the parents raised the failure of the office of family and children to provide them with case plans during the CHINS case as one of their grounds for reversing the termination judgment. The Court noted that Indiana law required the office of family and children to "negotiate" a case plan with the parents and to send a copy of the case plan to the parents within ten days after its completion. Id. at 1113. Although the Court acknowledged that Indiana law does not discuss modifications to case plans, it indicated that it is only reasonable to assume that subsequently altered and modified case plans should be provided to the parents. Id. In examining the actions of the office of family and children as reflected in the record before the Court, the Court questioned whether the office of family and children had "negotiated" the case plans with the parents, because the section of the case plan designated for parental signature was left blank on all the case plans. Id. In footnote 5 the Court noted the difficulty of negotiating with parents who are incarcerated, but implied that negotiation with the non-incarcerated parent might suffice. Id. Regardless of the negotiation issue, the Court stated that the failure of the office of family and children to provide copies of the case plans to the parents could have "substantially increased the risk of error with respect to the termination of parental rights" in that the parents were "deprived of some degree of notice as to what conduct on their part could lead to the termination of those rights." Id. at 1114. Although the Court noted that the original dispositional orders and subsequent review orders "may have provided some written notice" of required parental conduct, it was necessary for the parents to receive copies of the case plans because they may contain requirements not stated in the court orders. Id. The Court concluded that it was error to fail to provide copies of the case plan to the parents, and reversed the termination judgment on its

determination that this error, combined with other procedural errors in the case, denied the parents due process of law. Id. at 1119.

In Ferbert v. Marion County OFC, N.E. 2d (Ind. Ct. App. 2001), the parents alleged that failure of the office of family and children to provide them with a case plan delineating a permanent plan for their children and an estimated date for achieving the plan was a procedural irregularity of the CHINS proceeding, nullifying the CHINS determination, and thereby rendering the subsequent termination void. The Court of Appeals rejected the argument and affirmed the judgment terminating the parent-child relationship. Relying extensively on the A.P. case, the Court noted that the law requires a case plan for each child in need of services who is under the supervision of the county office of family and children, and the Court agreed that it would be “incongruous to hold that a county, with the assistance of a juvenile court, may commence CHINS proceedings for a child and remove a child from his or her home, yet disregard various portions of the CHINS and termination statutes on several occasions and still terminate parental rights.” However, in the instant case, unlike the A.P. case, (1) no case plan was included in the record on appeal to enable the Court to determine if there was a difference in what was required of the family by the case plan as opposed to the court orders, (2) the court record was replete with evidence that the parents were provided with notice of what conduct could lead to termination of their parental rights, and (3) the case reflected only an “allegation of one procedural error” involving the case plan, and not the multiple procedural irregularities in the CHINS and termination proceedings that occurred in A.P. Further, the Court noted that under the reasoning of A.P. any one of the procedural irregularities identified in that case, standing alone, would not have been sufficient to deny the parents due process of law, and it was not the Court’s intention to add “an element of providing a case plan to those that an agency must prove by clear and convincing evidence” in order to terminate parental rights.

4. Role of Foster Parents in Case Plan

IC 31-34-15-5 states that each foster parent “shall” cooperate in the development of the case plan for the child, and the office of family and children “shall” discuss with at least one foster parent of a child the foster parent’s role regarding the following: rehabilitation of the child and the child’s parents, guardians, and custodians; visitation arrangements; and services required to meet the special needs of the child. The foster parent does not have authority to appear or participate in the dispositional hearing unless the foster parent has intervened as a party, or has been invited to attend the hearing by the court or is called to testify by a party. See Chapter 2 Roman Numeral I. at H. on rights of foster parents generally.

5. Federal Law

IC 31-34-15-1 provides that the case plan shall be prepared “in accordance with federal law.” The relevant federal law appears at 42 U.S.C. 675(1)(A) through (E) and states that the case plan is a written document which includes at least the following:

(A) A description of the type of home or institution in which a child is to be placed, including a discussion of the safety and appropriateness of the placement and how the agency which is responsible for the child plans to carry out the voluntary placement agreement entered into or judicial determination made with respect to the child in accordance with section 472(a)(1).

(B) A plan for assuring that the child receives safe and proper care and that services are provided to the parents, child, and foster parents in order to improve the conditions in the parents’ home, facilitate return of the child to his own safe home or the permanent placement of the child, and address the needs of the child while in foster care, including a discussion of the appropriateness of the services that have been provided to the child under the plan.

(C) To the extent available and accessible, the health and education records of the child, including--

- (i) the names and addresses of the child’s health and educational providers;
- (ii) the child’s grade level performance;
- (iii) the child’s school record;
- (iv) assurances that the child’s placement in foster care takes into account proximity to the school in which the child is enrolled at the time of placement;
- (v) a record of the child’s immunizations;
- (vi) the child’s known medical problems;
- (vii) the child’s medications; and
- (viii) any other relevant health and education information concerning the child determined to be appropriate by the State agency.

- (D) Where appropriate, for a child age sixteen or over, a written description of the programs and services which will help such child prepare for the transition from foster care to independent living.
- (E) In the case of a child with respect to whom the permanency plan is adoption or placement in another permanent home, documentation of the steps the agency is taking to find an adoptive family or other permanent living arrangement for the child, to place the child with an adoptive family, a fit and willing relative, a legal guardian, or in another planned permanent living arrangement, and to finalize the adoption or legal guardianship. At a minimum such documentation shall include child specific recruitment efforts such as the use of State, regional, and national adoption exchanges including electronic exchange systems.

Federal regulation 45 C.F.R. 1356.21(g)(4) and (5) provides that the case plan shall include “a description of the services offered and provided to prevent removal of the child from the home and to reunify the family” and document “the steps to finalize a placement when the case plan goal is or becomes adoption or placement in another permanent home.”

II. DISPOSITIONAL HEARING

A. Hearing Required

The juvenile court “shall” hold a dispositional hearing. IC 31-34-19-1. The hearing may be held immediately after an admission of CHINS if the parties consent as stated in IC 31-34-10-9(a) through (c), or it may be scheduled for a later date. When the case is resolved by a factfinding hearing and a judgment of CHINS is entered, the court shall set a date for the dispositional hearing. IC 31-34-11-2.

B. Time Limitations

There is no statutory time limitation on the dispositional hearing. It should be noted that delaying the dispositional hearing, and consequential dispositional order, may affect the timing of a future involuntary termination of parental rights petition. Unless the court has ruled that reasonable efforts toward reunification are not required under IC 31-34-21-5.6, the termination statute at IC 31-35-2-4(b)(2)(A)(i) requires that the child has been removed from the parent for at least six months from the date of the dispositional decree as a prerequisite to the filing of an involuntary termination petition. This time requirement has been strictly enforced. See Platz v. Elkhart County Dept. of Welfare, 631 N.E. 2d 16 (Ind. Ct. App. 1994).

C. Rights of the Child and the Parent, Guardian, or Custodian

The child and the child's parent, guardian or custodian are entitled to be present at the dispositional hearing. However, the child may be excluded by the court for good cause shown upon the record. IC 31-32-6-8.

The court may appoint counsel for the child. IC 31-32-4-2(b). The court may appoint a guardian ad litem or court appointed special advocate (CASA) to represent the child at any time in the CHINS proceeding. IC 31-32-3-1. The child has the right to subpoena evidence and witnesses, cross-examine witnesses, and present evidence, unless the child is excluded from the proceeding. IC 31-32-2-1. See Chapter 2 at II. on procedural rights of children.

The juvenile court has the discretion to appoint counsel for the parent in any proceeding. IC 31-32-4-3. However, failure to appoint may be an abuse of discretion if the parent is mentally impaired or there are other exceptional circumstances. If the parent requests counsel and proves indigency, the court is required by IC 34-10-1-2 to appoint counsel. See E.P. v. Marion Cty. Office of Fam. & Child., 653 N.E. 2d 1026 (Ind. Ct. App. 1995); Holmes v. Jones, 719 N.E. 2d 843 (Ind. Ct. App. 1999). The parent, guardian or custodian has the right to subpoena evidence and witnesses, cross examine witnesses, and present evidence at the dispositional hearing. IC 31-32-2-3. See Chapter 2 at IV. on procedural rights of parents, including appointment of counsel.

D. Required Advisements to Parties

The child and the child's parent, guardian, or custodian shall be advised at the dispositional hearing of the modification procedures. IC 31-34-19-9. This alerts them to the court's ongoing jurisdiction and responsibility to modify court orders necessary to the care of the child, reunification of the parent-child relationship, and to otherwise obtain permanency for the child.

In the termination case, Matter of Y.D.R., 567 N.E. 2d 872, 875 (Ind. Ct. App. 1991), the mother argued that she was prejudiced by the juvenile court's failure to advise her at the dispositional hearing of the procedures for modification of a dispositional decree. The Court noted in footnote 1 that the dispositional statute, IC 31-6-4-15.3 (recodified in pertinent part at IC 31-34-19-9), does provide that the child and parents shall be advised of the modification procedures; however, the Court ruled that the mother failed to show she was prejudiced by the court's omission. Failure to advise of modification procedures at the dispositional hearing was also an issue in Matter of C.B., 616 N.E. 2d 763 (Ind. Ct. App. 1993). In that case the Court ruled that the Marion County Superior Court, Juvenile Division, did have jurisdiction over a CHINS placed in Tennessee with her uncle as against the Tennessee Court that refused to return the child to Indiana. However, the Marion County CHINS court record did not reflect that the child's uncle had been given notice of the modification procedures or given specific notice of the post-dispositional hearings in which the Juvenile Division deemed it necessary to return the child to the state of Indiana. Id. at 769. The Court ruled that the court's order to modify the dispositional decree by returning the child to Indiana without notice was invalid. Id. at 770.

It is also important to note that the advisements required at the initial hearing greatly impact on the dispositional stage of the CHINS case. At the initial hearing the child (if at an age of understanding) and the child's parent, guardian, or custodian shall be advised of the dispositional alternatives available to the court. IC 31-34-10-4. The parents, guardian, or custodian shall be advised that the court can order them to participate in the care, treatment, and rehabilitation of the child, and to be financially responsible for services provided to the child, parent, or guardian. IC 31-34-10-5(1) and (2). The parent or guardian shall also be advised of the right to controvert any allegations made at the child's dispositional or other hearing concerning his participation, or his financial responsibility for any services that would be provided. IC 31-34-10-5(3). It is encouraged that the court advise the child's parents, guardian, or custodian of these rights at the dispositional hearing, particularly if they were not so advised at the initial hearing.

E. Admission of Predispositional Reports

Predispositional reports should be offered into evidence at the dispositional hearing. IC 31-34-19-2. Filing the report with the court in advance of the hearing may not place the report into evidence.

F. Hearsay

In Matter of L.J.M., 473 N.E. 2d 637 (Ind. Ct. App. 1985), a delinquency modification case, the Court held that the child's residential caseworker could testify regarding hearsay statements contained in the progress report. The Court noted that the dispositional statute, IC 31-6-4-15.3(b), (recodified at IC 31-34-19-2(a)) and the review statute, IC 31-6-4-19(f) (recodified at IC 31-34-22-3(a)), both provided for the admissibility of "any" report that contained evidence of probative value, even if that evidence would otherwise be excluded. The language of L.J.M. goes beyond hearsay in reports to generally approve of the admission of hearsay in post-adjudication hearings:

Excluding hearsay evidence in disposition hearings would in many cases disserve the child by excluding relevant information that might support a less restrictive disposition.

Id. at 642, 643.

G. Standard of Proof

The standard of proof for the dispositional hearing is the preponderance of the evidence. IC 31-34-12-3.

H. Dispositional Guidelines, Policy, and Requirements

The dispositional guidelines at IC 31-34-19-6 state:

If consistent with the safety of the community and the best interest of the child, the juvenile court shall enter a dispositional decree that:

(1) is:

(A) in the least restrictive (most family like) and most appropriate setting available;

(B) close to the parents' home, consistent with the best interest and special needs of the child;

(2) least interferes with family autonomy;

(3) is least disruptive of family life;

(4) imposes the least restraint on the freedom of the child and the child's parent guardian, or

custodian; and

(5) provides a reasonable opportunity for participation by the child's parent, guardian, or custodian.

Although the guidelines contain a mix of the interests of the child and the parents, case law indicates that the "best interests" of the child is a substantial consideration in resolving issues at the dispositional stage of a CHINS case. See In Re C.W., 723 N.E. 2d 956, 962 (Ind. Ct. App. 2000) (Court affirmed dispositional order on its finding that placement with the foster parents, rather than grandparents, was in best interest of the child). In the CHINS case of Matter of Joseph, 416 N.E. 2d 857 (Ind. Ct. App. 1981), the Court of Appeals affirmed the juvenile court ruling that visitation with the father was not in the best interests of the child. The Court stated:

In short, the decisions of this state reveal the "best interests" standard has not been employed to make vague moral judgments about alternative lifestyles and parental fitness. Instead, the process of effecting that which is "in the best interests of the child" has in fact been an effort by our courts to preserve, and in some instances create, an environment conducive to the mental and physical development of the child - an environment which, to the extent possible, meets the "need of every child for unbroken continuity of affectionate and stimulating relationships with an adult." As such, the "best interests" test without question forwards a compelling state interest which justifies the resultant interference with the rights of the biological parents.

Id. at 861. (footnote omitted).

The purpose and policy statute of the juvenile code, IC 31-10-2-1, also provide significant guidance in determining dispositional issues. It states, in pertinent part, that it is the policy of this state to "(2) recognize the responsibility of the state to enhance the viability of family and children in our society; ... (4) strengthen family life by assisting parents to fulfill their parental obligations; ... (6) remove children from families only when it is in the child's best interest or in the best interest of public safety; ... (12) provide a continuum of services developed in cooperative effort by local governments and the state."

IC 31-34-19-7 contains the dispositional requirement that when out-of-home placement is recommended, the court "shall" consider whether the child should be placed with the child's suitable and willing blood or adoptive relative caretaker, including a grandparent, an aunt, an uncle, or an adult sibling, before considering other out-of-home placements.

I. Issues Before the Court

The issues before the court at the dispositional hearing are contained within a variety of statutes, as follows:

1. Needs and Dispositional Alternatives for Child

The court shall consider the alternatives for the care, treatment, rehabilitation, or placement of the child at the dispositional hearing. IC 31-34-19-1(1). This issue includes the determination of which supervision, outpatient treatment, placement, wardship, emancipation, and family services options within the dispositional alternatives statute, IC 31-34-20-1, are appropriate for the child.

2. Parental Participation

The court shall consider the necessity, nature, and extent of participation by a parent, guardian, or custodian in the child's program of care, treatment, or rehabilitation. IC 31-34-19-1(2). Parental participation may be initiated through the filing of a parental participation petition as outlined in IC 31-34-16. See this Chapter below at VIII. for discussion on parental participation.

3. Financial Responsibility

The court shall consider the financial responsibility of the parent or the guardian of the child's estate for services provided to the child, parent, or guardian. IC 31-34-19-1(3), IC 31-40-1-3. If the child is removed from the home and placed with a relative, foster parent, or in a residential placement, the court shall order existing child support obligations assigned to the office of family and children, or otherwise determine a child support order consistent with the child support guidelines. IC 31-40-1-5(b) and (c). See this Chapter below at IX. for discussion on financial responsibility.

4. Reasonable Efforts Requirement: Efforts of Office of Family and Children

IC 31-34-19-10(3) and (4) require a finding from the dispositional hearing whether the office of family

and children has exerted reasonable efforts toward preservation or reunification of the family, in accordance with federal law. This finding could be satisfied by the court adopting and incorporating by reference a statement of services offered and provided to the family made in the case plan or predispositional report filed with the court. See Chapter 4 beginning at VI. for discussion on reasonable efforts requirements.

5. Visitation

The dispositional statutes do not mention visitation as an issue for the dispositional hearing, but visitation is essential to the juvenile code policy of preserving and reunifying families, and the review hearing statute, IC 31-34-21-5(b)(5) and (13), provides that the parent's visitation, and opportunity to visit, is an important consideration at the review hearing. Therefore, visitation should be addressed and clarified during the dispositional hearing. It may be desirable that conditions, times, and places for visitation be clarified by the office of family and children, with reasonable procedures for modifying the visitation schedule as needed by the parents, office of family and children, or foster parents. See this Chapter below at VI. for further discussion on visitation issues.

J. Judicial Findings and Legal Settlement for School Attendance

IC 31-34-19-10 states that the juvenile court shall accompany its dispositional decree with written findings and conclusions. The statute lists five areas that must be addressed in the findings and conclusions:

- (1) The needs of the child for care, treatment, or rehabilitation.
- (2) The need for participation by the parent, guardian, or custodian in the plan of care for the child.
- (3) Efforts made, if the child is a child in need of services, to:
 - (A) prevent the child's removal from; or
 - (B) to reunite the child with;the child's parent, guardian, or custodian in accordance with federal law.
- (4) Family services that were offered and provided to:
 - (A) a child in need of services; or
 - (B) the child's parent, guardian, or custodian;in accordance with federal law.
- (5) The court's reasons for the disposition.

In A.P. v. PCOFC, 734 N.E. 2d 1106, 1114 n. 7, 1115 (Ind. Ct. App. 2000), petition for transfer pending, the Court ruled that the court's failure to issue findings in the dispositional order was a significant procedural irregularity. The Court noted that the juvenile code requires that written findings and conclusions and reasons for the disposition accompany the dispositional decree. The Court clarified that this requirement was even more critical when the dispositional order involves a change in the child's placement. Id. at 1115-1116.

The juvenile court is required under IC 31-34-20-5(b)(1) to include findings of fact regarding the child's "legal settlement" in its dispositional order, or other decree making or changing the child's placement. A student's "legal settlement" in a school corporation, as defined by IC 20-8.1-1-7.1, means that the school corporation has the responsibility to: (1) permit the student to attend the corporation's local public schools without the payment of tuition or (2) pay the transfer tuition for the student. The "legal settlement" findings shall be made whenever the court places the child or reviews a placement in a foster home or a state licensed private or public health facility. If the court has not previously made findings of fact regarding "legal settlement," it shall make the finding when the child's placement is reviewed. IC 20-8.1-6.1-5.5(b) requires the office of family and children to notify the school corporation where the child has legal settlement and the school corporation where the child is placed no later than ten days after the county places the child or changes placement. If the county office does not make the placement, the court or other placing agency shall notify the school corporation.

K. Scheduling Review Hearings and Progress Reports

The case review process is outlined in IC 31-34-21 and IC 31-34-22 and discussed at length in Chapter 9 Roman Numeral I. The case of each child under office of family and children supervision must be reviewed at least once every six months from the date the child was removed from the home, or the date of the dispositional order, whichever occurs first. To insure compliance with the six month time requirement, the court may set a date for the review hearing at the close of the dispositional hearing. This procedure will also insure notice to the parties of the hearing date, although IC 31-34-21-4 requires the office of family and

children to send a separate written notice ten days before the review hearing to the parents, foster parents, all other parties, and other persons specified at IC 31-34-21-4(a)(1) through (5).

III. OVERVIEW OF DISPOSITIONAL ALTERNATIVES

A. Statutory Listing of Dispositional Options

IC 31-34-20-1 states the dispositional alternatives available in CHINS cases. The court may order one or more of the following:

- (1) Order supervision of the child by the probation department or the county office of family and children.
- (2) Order the child to receive outpatient treatment:
 - (A) at a social service agency, or a psychological, a psychiatric, a medical, or an educational facility; or
 - (B) from an individual practitioner.
- (3) Remove the child from the child's home and place the child in another home or shelter care facility. Placement under this subdivision includes authorization to control and discipline the child.
- (4) Award wardship to a person or shelter care facility. Wardship under this subdivision does not include the right to consent to the child's adoption.
- (5) Partially or completely emancipate the child under section 6 of this chapter.
- (6) Order:
 - (A) the child; or
 - (B) the child's parent, guardian, or custodian;to receive family services.
- (7) Order a person who is a party to refrain from direct or indirect contact with the child.

The court also has the authority to issue orders for parental participation (see this Chapter below at VIII.), financial responsibility (see this Chapter below at IX.), and protective orders (see this Chapter below at VII.) as a part of the dispositional decree. The court may also detail the conditions of visitation.

B. Limits on Dispositional Orders

Although Matter of Garrett, 631 N.E. 2d 11, 12 (Ind. Ct. App. 1994), is a delinquency case, the statement in the opinion that "juvenile courts are bound to choose among dispositional alternatives set out in the code," would seemingly also apply to CHINS cases. In Garrett, the Court ruled that the dispositional statute did not authorize the juvenile court to award wardship of a delinquent to the Department of Mental Health. Id.

IV. WARDSHIP, SUPERVISION, OUTPATIENT TREATMENT, FAMILY SERVICES, AND EMANCIPATION

A. Wardship

Under IC 31-34-20-1(4) the court may grant wardship of the child to any person or shelter care facility. The term wardship is not defined in the juvenile code. The most common use of the term is the authority and responsibility over a child granted by the court to the office of family and children. In the past it was not uncommon for the child to be considered a ward of the court, but this is not current practice. Given the breadth of IC 31-34-20-1(4) the court can award wardship to someone other than the office of family and children, including another parent, relative, agency or shelter care placement.

Some analogize the term "wardship" to a "guardianship," however, this notion was challenged in Matter of S.T., 621 N.E. 2d 371 (Ind. Ct. App. 1993). In S.T., the grandmother filed suit against the department of welfare for breach of fiduciary duty in failing to collect support on behalf of the minor children in its wardship. The statement of facts shows that in the late 1970s the juvenile court adjudicated the children CHINS, made them wards of the welfare department, placed them with grandmother, and ordered the parents to pay support (which the parents did not pay). Id. at 372. Eventually the welfare department closed its file on the case. Id. The Court of Appeals ruled that the welfare department did not owe a fiduciary duty to the children as its guardian, because the court order making the children wards did not make the welfare department the children's guardian. The Court clarified that a wardship is not a guardianship when it stated:

Thus, where the relationship between the court and the child is considered to be continuing in nature, as is the case in CHINS proceedings, the child is considered a ward of the court. Further, the court may make a child a ward of the court without itself becoming the child's guardian.

Likewise, making children "wards of the welfare department" indicates that the Department's relationship with the children is one which is continuing in nature. It does not, as Turner [grandmother] argues, mean that the Department has been appointed guardian of the children. We therefore reject Turner's argument that the Department had a fiduciary duty to the children as their guardian.

Id. at 375.

1. Limits on Court's Authority to Create Wardships

Case law reflects limitations on the court's ability to create wardships for delinquent children, although there is no case law on this point for CHINS cases. In the delinquency case of Matter of Garrett, 631 N.E. 2d 11 (Ind. Ct. App. 1994), the Court of Appeals reversed the juvenile court's award of wardship of a delinquent to the Department of Mental Health (DMH), for placement of the child in appropriate care facility and for payment of the placement. The Court stated that the "exclusive means for court-ordered wardship" is set forth in the dispositional statute and the dispositional statute does not authorize DMH wardship. Id. at 12. See also Office of Family & Children v. Odisho, 656 N.E. 2d 536 (Ind. Ct. App. 1995) (juvenile court lacked authority to make delinquent child a ward of the office of family and children).

2. Limits on Wardship

The person awarded wardship may not consent to the child's adoption. IC 31-34-20-1(4). The agency or individual awarded wardship may seek court direction regarding the rights and responsibilities of the wardship.

3. Medical Care for Ward

It may be the practice of the office of family and children to consent to normal medical care for the child under the authority of the wardship, but there is no specific statutory support for this position. The office of family and children can obtain an order from the juvenile court for medical treatment or diagnosis of an adjudicated CHINS under IC 31-32-12.

Arguably, the office of family and children can authorize medical treatment for a CHINS under its own grant of authority in the Health Care Consent Law. IC 16-36-1-5(b) of the Health Care Consent law provides that a "judicially appointed guardian of the person" or a person appointed as the child's health care representative can consent for the child's care. If there is no guardian or health care representative appointed for the child, the child's parent or an individual in loco parentis can consent to the child's care. The office of family and children may qualify as a "judicially appointed guardian of the person" for its wards, but see Matter of S.T., 621 N.E. 2d 371, 375 (Ind. Ct. App. 1993) (welfare wardship is not a guardianship), or as an individual in loco parentis.

IC 12-17-11-2 requires the Division of Family and Children to establish a program that will allow "foster parents to authorize routine and emergency medical care to a foster child." IC 12-17-9 through IC 12-17-11 place responsibilities on the office of family and children with regard to the child's medical care and records, including the Medical Passport Program. IC 12-13-8-2 requires each county to establish a "medical assistance to wards fund" that is funded through a tax levy on property and various other taxes.

B. Supervision

IC 31-34-20-1(1) provides that the juvenile court may order supervision of the child by the office of family and children or the probation department. The juvenile code does not define supervision. In the context of CHINS, supervision is perceived as monitoring the care and treatment of the child and family by the office of family and children. A supervision order can be issued whether the child is in his own home or is placed elsewhere.

Supervision may involve the following: visits to see the child; interviews with foster parents or other adults who regularly interact with the child; visits to the home of the child's parent, guardian or custodian; observation of parent-child interaction; school checks regarding the educational and social development of the child; and interviews with service providers to be sure that court ordered treatment services are being

utilized. In addition to direct welfare supervision, regular home checks by a public health nurse may be appropriate when the child has special medical needs or the parent has extremely limited parenting skills with regard to an infant's daily feeding, hygiene, and medical care. Caseworkers from the office of family and children may provide these supervisory services directly, or the office of family and children may contract with an independent agency to provide some aspects of the supervision.

C. Outpatient Treatment for Child

IC 31-34-20-1(2) authorizes the court to order outpatient treatment for the child "at a social service agency, or a psychological, a psychiatric, a medical, or an educational facility; or from an individual practitioner." This subdivision only authorizes outpatient services. Inpatient treatment may be obtainable in a shelter care placement under IC 31-34-20-1(3) or a mental health placement under IC 31-34-19-3 or IC 31-34-19-5.

The court may be limited in its ability to order non-parties to provide services for the child. Obviously, there must be coordination and cooperation between the court and the service providers. For example, case law indicates the struggle of the court to avoid school expulsion of CHINS. See Chapter 3 at II. H. 5. regarding school expulsions.

D. Family Services

IC 31-34-20-1(6) authorizes the court to "[o]rder the child or his parent, guardian or custodian to receive family services." The dispositional order can specify family services that the parent, guardian, or custodian must use or it may broadly require the provision and utilization of treatment and rehabilitation family services as recommended by the office of family and children, mental health, or other service providers. A broad and open-ended order has the advantage of flexibility, but it requires prompt and clear communication between the case manager and the parent regarding what services the parent must utilize, how often, and the expected standard of performance.

Family services is broadly defined at IC 31-9-2-45 as services to:

- (1) prevent a child from being removed from a parent, guardian, or custodian;
- (2) reunite the child with a parent, guardian, or custodian; or
- (3) implement a permanent plan of adoption, guardianship, or emancipation of a child.

For discussion of family services in the context of parent orders and reunification services, see this Chapter below at VIII. on parental participation and Chapter 4 on reasonable efforts beginning at VI.

E. Emancipation

IC 31-34-20-1(5) provides that the court can partially or completely emancipate a child in need of services as a dispositional alternative. Under IC 31-34-20-6(a) court may issue an emancipation order if it finds that the child:

- (1) wishes to be free from parental control and protection and no longer needs that control and protection;
- (2) has sufficient money for the child's own support;
- (3) understands the consequences of being free from parental control and protection; and
- (4) has an acceptable plan for independent living.

The emancipation may be partial or complete, and the court shall specify what rights and responsibilities of the parent have been suspended, and what specific rights or authority are granted to the child. IC 31-34-20-6 (b). An emancipated child is still subject to the compulsory education law and the jurisdiction of the juvenile court. IC 31-34-20-6(c). The juvenile court does not have statutory authority to emancipate a child without a CHINS or delinquency adjudication. The request for emancipation can be raised at the dispositional hearing or any subsequent review or modification hearing.

V. PLACEMENT OPTIONS

A. Statutory Authority and Placement Considerations

IC 31-34-20-1(3) authorizes the court to "[r]emove the child from the child's home and place the child in

another home or shelter care facility. Placement under this subdivision includes authorization to control and discipline the child.” The purpose and policy statute endorses removal of the child from the home “only when it is in the child’s best interest.” IC 31-10-2-1(6). Placement outside of the home should be in the least restrictive placement possible, close to the parents’ home and in the most family-like setting consistent with the needs of the child. See IC 31-34-19-6(1), (3); IC 31-34-15-4 (3); 42 U.S.C. 675(5)(A). Given the broad language of IC 31-34-20-1(3) the court could place the child with a noncustodial parent, relative, family friend, church member, foster parent or other person that the court finds appropriate and consistent with the best interests of the child and the permanency plan for the child. It also includes the option of placing a child in a shelter care facility.

B. Placing Child with Noncustodial Parent

The juvenile court has the authority to supersede the custody ruling of the divorce court and place a child in need of services with the noncustodial parent. See IC 31-30-1-1(2) (exclusive jurisdiction of juvenile court over child in need of services of divorced parents); P.B. v. T.D., 504 N.E. 2d 1042 (Ind. Ct. App. 1987), modified on reh’g on other grounds 507 N.E. 2d 992 (Ind. Ct. App. 1987) (exclusive jurisdiction of the juvenile court to determine custody of child in need of services). The court’s authority to change custody of the child from one parent to another is also reflected in the permanency option stated at IC 31-34-21-7.5(1) (A), which provides that the juvenile court can place the child with the child’s noncustodial parent.

In 1999, IC 31-30-1-12 was passed to avoid conflicting divorce and CHINS custody orders. This statute grants the divorce court that issued the original custody ruling concurrent jurisdiction to hear a petition to modify custody of a child who is the subject of a CHINS case. However, the divorce custody ruling will only take effect if it is approved by the juvenile court or when the juvenile court closes its jurisdiction over the CHINS case. IC 31-30-1-13 contains a similar provision for avoiding conflicting custody orders in CHINS and paternity cases. Pursuant to these jurisdiction statutes, a parent or the office of family and children can seek a custody order that is consistent with the CHINS order while the CHINS case is still open. This will insure that the parent approved for custody in the juvenile proceeding will not lose custody due to a contrary divorce or paternity custody ruling when the CHINS case is closed. See Chapter 3 at II. E. for further discussion on CHINS and divorce conflict and overlap.

C. Relative Placement (Kinship Placement)

IC 31-34-19-7 requires the judge to “consider” placing a child with a relative when an out-of-home placement will be ordered by the court. This statute lists the categories of relatives as including grandparents, aunts, uncles, and adult siblings. Relatives may be eligible for welfare financial benefits, including Temporary Aid to Needy Families (TANF), medical care for the child, and a foster care per diem while caring for the child. Foster care payments may be conditioned upon compliance with necessary licensing procedures and requirements. See also Chapter 9 at IV. E., F., and G. for discussion of permanent placement of the child with relatives through custodianship, guardianship or adoption.

A few cases have addressed relative or “kinship” placement issues in CHINS cases. In In Re C.W., 723 N.E. 2d 956 (Ind. Ct. App. 2000), the grandparents of the CHINS filed a Petition for Kinship Placement at the dispositional hearing asking that the child be placed with them. The office of family and children and court appointed special advocate (CASA) filed predispositional reports recommending against placement with the grandparents. The CASA report indicated the grandparents’ lack of motivation and patience needed for proper care of the child, their habit of smoking cigarettes, and the possibility of their previous knowledge of mother’s abuse of the child but failure to take action to protect the child. Id. at 962. The trial court denied the grandparent placement on the grounds that the placement was not in the best interests of the child. Id. The child suffered from bronchitis and the grandparents had not completely eradicated the cigarette smoke residue from their home and vehicle. The grandparents’ second Petition for Kinship Placement was denied on the basis that the child had been adopted by the foster parents in the meantime, and therefore the grandparents no longer had standing to seek placement. The Court of Appeals affirmed the trial court on both petitions.

In E.R. v. Office of Family & Children, 729 N.E. 2d 1052 (Ind. Ct. App. 2000), the Court ruled that the juvenile court did not err in failing to place the Hispanic children with relatives in Mexico. The juvenile court did consider and make efforts with regard to relative placement, but the parents and the Mexican Consulate did not provide the court with the information upon which it could base a decision as to the feasibility of placing the children with the paternal grandparents. Id. at 1061. The parents invited any error in the juvenile

court's inability to assess a basis for placing the children in Mexico by failing to provide the necessary information about the relatives. An error invited by the complaining party is not a reversible error. Id

D. Foster Care

IC 31-9-2-47 states that a "foster parent" is "an individual who provides care and supervision to a child in: (1) a foster home (as defined in IC 12-7-2-90); or (2) a home approved as a foster home under IC 12-17.4." Foster homes are licensed by the Division of Family and Children. The local office of family and children recruits, trains, and pays a per diem to foster parents in reimbursement for the child's care. The office of family and children is responsible to supervise foster care placements and to provide for the expenses of the children. See Chapter 2 Roman Numeral I. at H. for further discussion on rights and responsibilities of foster parents..

1. Therapeutic Foster Care

Indiana law provides for "therapeutic" foster care, IC 12-17.4-4-1.5, and special needs foster homes, IC 12-17.4-4-1.7, for children who have more intense and specialized needs. The law requires specialized foster parents to have additional and ongoing training, and limits the number of foster children in the household.

2. Foster Care Appropriate to Child's Cultural Needs

In E.R. v. Office of Family and Children, 729 N.E. 2d. 1052 (Ind. Ct. App. 2000), the parents claimed it was error not to place their Hispanic children with relatives or Spanish speaking foster parents. Id. at 1059. On appeal, the Court agreed that "every effort should be made to design a system that is sensitive to non-English speaking culturally diverse" people, but the Court did not find that only Hispanic foster parents can provide "culturally appropriate" care for Hispanic children and the Court noted that the office of family and children had made efforts to provide Hispanic counselors for the children. Id. at 1061. The Court did not find error in the placement.

3. Foster Parent Review Board

IC 31-34-21-9(a) authorizes the juvenile court judge to assign cases to a foster care review board. The board is established by the court to review foster care placements and the board may be provided with confidential reports at the discretion of the judge. IC 31-33-18-2(12). The board is to file a report, including findings and recommendations regarding each foster placement it reviews. IC 31-34-21-9(b).

E. Shelter Care Placements

A shelter care facility is defined at IC 31-9-2-117 as a place of residence that:

- (1) is licensed under the laws of any state; and
- (2) is not locked to prevent a child's departure unless the administrator determines that locking is necessary to protect the child's health.

A youth shelter, group home, county home, or other residential facility or institution may qualify as a shelter care facility. The facility may be public or private. The definition does not preclude residential hospital programs, although the juvenile court does not have the authority to commit a child to a state mental health facility. See this Chapter below at X. for discussion on mental health placements.

IC 31-34-20-1 does not authorize secure placement of a CHINS as a dispositional alternative and IC 31-34-6-1(1) precludes detention of a CHINS in a secure facility. Under the detention statute, IC 31-34-6-1(2), a CHINS cannot be placed in a shelter care facility that houses persons charged with, imprisoned for, or incarcerated for crimes. This does not prevent commingling of CHINS and delinquents, since a delinquent act does not constitute a crime. See IC 31-32-2-4.

Shelter care facilities vary extensively in the following: number of residents; average length of stay; educational and treatment programs; admission criteria (age; mental capacity; suicide, delinquency, and other behavioral problems); admission procedure; involvement with child's parents, guardians or custodians; follow-up programs; and cost.

1. Review of Out-of-Home Placements: Local Coordinating Committee (LCC)

In 1988 legislation was passed requiring each county to create a local coordinating committee (LCC) to

review “restrictive placements” of children. Subsequent case law upheld the constitutionality of the LCC and mandated an LCC review prior to a restrictive placement. See Matter of Tina T., 579 N.E. 2d 48 (Ind. 1991) (constitutionality of local coordinating committee legislation upheld); Matter of Garrett, 631 N.E. 2d 11, 13 (Ind. Ct. App. 1994) (delinquent cannot be placed in restrictive facility without review by LCC). In 1995, the LCC legislation was significantly amended to make use of LCC’s discretionary in many situations. As amended, IC 31-38-2-2 provides that an agency recommending a placement outside of the child’s home that qualifies as a restrictive placement “may” convene a meeting of the LCC to review the proposed placement. However, if the referring agency is a court, the county office of family and children “shall” convene the meeting.

Although LCC review may be discretionary in many CHINS placements, it may be common practice in some counties and practitioners should have a basic understanding of the law. An LCC is established in each county. IC 31-38-1-1. The purpose of the LCC is to obtain input and recommendations regarding a potential “restrictive placement” for a CHINS. IC 31-38-2-7 and 8. “Restrictive placements” do not include relative placements, or foster care placement in the county of the child’s residence. IC 31-9-2-113. Also, the following placements are exempt from the LCC provisions: placement of a child in an inpatient psychiatric facility not to exceed thirty days; emergency placement of a child in a shelter care facility not to exceed sixty days; and hospitalization of a child for purposes other than psychiatric care. IC 31-38-2-9. The persons who serve on the LCC will vary in each case. The LCC is composed of the director of the office of family and children, the director of the community mental health center, and the superintendent of the school where the child resides, or their designees. IC 31-38-1-2. Each LCC will also include the following nonvoting members: the child’s parent or guardian; the child’s guardian ad litem or court appointed special advocate (CASA); and other agency representatives requested by the chairman. IC 31-38-1-2. The agency who makes the referral to the LCC will serve as the chairman of that LCC. IC 31-38-2-3. If an LCC is convened, the committee shall review the proposed restrictive placement and submit recommendations prior to the placement. IC 31-38-2-7. The office of family and children has specific administrative responsibilities with regard to the LCC, and making recommendations to the general assembly regarding the need for and availability of services to children. IC 31-38-2-10.

2. Shelter Care Placement in County of Child’s Residence

IC 31-34-6-3 prohibits a court from placing a child in a shelter care facility outside of the child’s county of residence, unless a comparable facility with adequate services is either unavailable or nonexistent in the child’s county of residence.

3. Judicial Center Maintains List of Placement Options

IC 33-13-14-6 requires the Indiana Judicial Center to maintain a roster of in-state facilities that have expertise in child services in a residential setting. The phone number for the Judicial Center is 317-232-1313.

4. Selection and Availability of Shelter Care Placements

Y.A. by Fleener v. Bayh, 657 N.E. 2d 410 (Ind. Ct. App. 1995), was a class action suit brought against state officials by seriously emotionally disturbed youths under the age of eighteen who alleged the state violated the Indiana constitution and their due process rights by failing to provide specialized mental health residential placements. The Court rejected the claim. The Court found that a child in custody of state officials has the constitutional right to be free from abuse or neglect, but this did not include the right to be free from some form of undifferentiated harm separate and apart from physical abuse or neglect. Id. at 419. The Court found no constitutional right to a specific residential placement.

In J.W. v. Hendricks County Office, 697 N.E. 2d 480, 483-484 (Ind. Ct. App. 1998), the parents appealed a reimbursement order on the grounds that the juvenile court did not place the child in a facility that would be covered by their insurance. The opinion noted that the juvenile court “is the final arbiter of the appropriate treatment for a child adjudicated CHINS.” Id. at 484. The evidence showed that the case manager was aware of the parents’ insurance, but the child’s behavior necessitated a more restrictive environment than had been provided before. The Court found that the parents failed to show that the court’s order for placement and reimbursement of expenses was contrary to law. Id.

5. Role of Persons Who Receive Placement of Child

IC 31-34-19-8 requires that the court send a copy of the predispositional report to any person receiving

placement or wardship of the child. The code does not further address the role of the person receiving placement of the child. It is recommended that shelter care facilities be given advance notice of review hearings, submit progress reports to the court, participate in case conferences regarding the child and family, and appear at review hearings.

VI. VISITATION

The juvenile code does not set standards or requirements for parent-child visitation. However, it does require the court under IC 31-34-21-5 to consider at each review hearing “(5) the extent to which the parent, guardian, or custodian has visited the child, including the reasons for infrequent visitation” and “(13) the extent to which the child’s parent, guardian, or custodian has participated or been given the opportunity to participate in ... visitation.” Various other provisions of the juvenile court indirectly promote parent-child visitation. Arguably, parent-child visitation is essential to the reunification effort required by IC 31-34-21-5.5(b)(2), and the dispositional guidelines at IC 31-34-19-6 emphasize orders that are least restrictive and least disruptive to family life.

A. Standard for Determining Visitation and Applicability of Parenting Time Guidelines

In the absence of clear standards on visitation, some would say that the amount and type of visitation between the child and parent is dependent upon the “best interest” of the child. See In Re J.J., 711 N.E. 2d 872, 875 (Ind. Ct. App. 1999) (dispositional guidelines clarify that orders and visitation considerations should be based on best interests of child); Matter of A.C.B., 598 N.E. 2d 570 (Ind. Ct. App. 1992) (visitation with incarcerated father denied because not in child’s best interests); Matter of Joseph, 416 N.E. 2d 857 (Ind. Ct. App. 1981) (visitation between abused child and father properly denied on grounds it was not in best interests of child). Others would argue that the goal of reunification of child and parent must be reflected in any visitation decision, and therefore parent visitation should only be denied or restricted if there is proof that the visitation would endanger the child’s physical health or significantly impair the child’s emotional development as set out in the divorce visitation law at IC 31-17-4-1.

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

B. Visitation Rights Protected

In the adoption case of Matter of Adoption of Topel, 571 N.E. 2d 1295 (Ind. Ct. App. 1991), the Court of Appeals relied on the case of Stewart v. Stewart, 521 N.E. 2d 956, 960 (Ind. Ct. App. 1988), in stating that “the right of a parent to visit his child is a ‘sacred and precious privilege.’” Topel at 1299. Federal law, 42 U.S.C. 675(5)(C) requires procedural protections regarding visitation. It states that “procedural safeguards shall also be applied with respect to ... any determination affecting visitation privileges of parents.” Id.

C. CHINS and Termination Cases Addressing Visitation Issues

Cases are cited below for various visitation issues arising in CHINS and Termination cases. For additional cases see this Chapter above at VI. A. on the standard for determining visitation, and Chapter 11 Roman Numeral IX. at H. on the effect of CHINS visitation orders in termination cases.

1. Visitation Conditioned on Evaluation and Visitation Suspended

In In Re J.J., 711 N.E. 2d 872 (Ind. Ct. App. 1999), father appealed the termination of parental rights judgment on the grounds that the juvenile court’s order that the father could not visit the child until he completed a psychiatric evaluation was in violation of the dispositional guidelines favoring visitation. The Court rejected father’s position, noting that the dispositional guideline statute “clarifies that the court should fashion a judgment that is first and foremost in the child’s best interest.” Id. at 875. The trial

court's ruling requiring father to complete the psychological evaluation was the least restrictive option to ensure the safety of the child that was still consistent with the best interests of the child. *Id.* In the termination case of *In Re L.S.*, 717 N.E. 2d 204 (Ind. Ct. App. 2000), the facts show that parental visitation with the children was suspended during the CHINS case due to severe parental conflict during visitations and father's refusal to comply with court imposed dressing limitations during visitations. In *Adams v. Office of Fam. & Children*, 659 N.E. 2d 202 (Ind. Ct. App. 1995), mother's visitation with the children was suspended during the CHINS proceeding because of her attempt to persuade the oldest daughter to retract the sexual abuse allegations.

2. Visitation with Incarcerated Parent

In appealing the judgment terminating his parental rights, the incarcerated father argued in *Matter of A.C.B.*, 598 N.E. 2d 570 (Ind. Ct. App. 1992), that he had been denied visitation with his child because he was a "non-adjudicated father". *Id.* at 572. The Court of Appeals noted that failure to establish paternity was a factor in the visitation decision, but clarified that it was not the sole factor and that visitation with the incarcerated father was denied because it was not in the child's best interests. With regard to the effect of incarceration on visitation the Court stated that the father's:

...inability to bond and visit with A.B. [child] is due more to his own actions, which resulted in his incarceration, than with his failure to establish legal paternity. Individuals who pursue criminal activity run the risk of being denied the opportunity to develop positive and meaningful relationships with their children.

Id. at 572.

In *A.P. v. PCOFC*, 734 N.E. 2d 1107 (Ind. Ct. App. 2000), petition for transfer pending, the Court ruled that the juvenile court erred in failing to issue findings and reasons supporting its order that an incarcerated father could have no contact with the child. Although the case hinges on compliance with the protective order statute, it suggests the need for judicial findings when parental visitation is denied. See this Chapter below at VII. E. for discussion in *A.P.* case on effect of no contact between child and incarcerated father.

3. Visitation with Foster Parents

In *Worrell v. Elkhart Cty. Office of Family*, 704 N.E. 2d 1027 (Ind. 1998), the Court ruled that foster parents do not have standing to request visitation with children who previously lived with them as foster children. The case does not foreclose, however, that the Court could order such visitation if it was determined to be in the best interests of the children.

4. Divorce Visitation Order not Binding on CHINS Court

In *Hallberg v. Hendricks Cty. Office*, 662 N.E. 2d 639 (Ind. Ct. App. 1996), the Court rejected the father's argument that the divorce visitation order issued in Allen County was binding on the CHINS proceeding in another county. The juvenile court has exclusive jurisdiction in CHINS proceedings, and the contrary divorce visitation order is not binding in the CHINS case. *Id.* at 644.

D. Grandparent Visitation

No case law has dealt with the application of the grandparent visitation statutes, IC 31-17-5-1 et. seq., to CHINS proceedings. These statutes provide that grandparents can petition for visitation with their grandchildren in three situations: the grandchild's parent is deceased; the grandchild's parents are divorced; or the grandchild was born out of wedlock. A parent of a putative father may not seek visitation rights with the grandparent until paternity is established. Grandparent visitation rights survive adoption by stepparents and by specified relatives. See *In Re Groleau*, 585 N.E. 2d 726 (Ind. Ct. App. 1992). Counsel should be aware of outstanding grandparent visitation orders regarding a child who is the subject of a CHINS case and either: (1) facilitate compliance with the grandparent visitation orders or (2) seek a juvenile court ruling that grandparent visitation is not in the best interest of the child and/or that grandparent visitation orders are preempted by juvenile court jurisdiction and/or that the grandparent visitation statute does not apply to CHINS cases.

The following case law on the grandparent visitation statute does not arise in the context of a CHINS case, but may be instructive. The right of grandparents to visit with their grandchildren is strictly controlled by statute. See *Cantu v. Cantu*, 562 N.E. 2d 768 (Ind. Ct. App. 1990) (grandparent may seek visitation only as

enumerated by the grandparent visitation statute). If grandparents fit within the statutory mandates, visitation can be granted if the court finds it is in the best interests of the child. See Swartz v. Swartz, 720 N.E. 2d 1219 (Ind. Ct. App. 1999) (court erred in granting excessive visitation to grandparents); Kennedy v. Kennedy, 688 N.E. 2d 1264 (Ind. Ct. App. 1997) (Court affirmed denial of grandmother's petition to visit with grandchild; trial court can look at discord between parent and grandparent in determining whether visitation in face of family discord is in child's best interest); In Re Walker, 665 N.E. 2d 586 (Ind. 1996) (denial of grandparent visitation affirmed on sufficient evidence that grandparents didn't have meaningful contact or relationship with child, mother wouldn't support or encourage relationship with grandparents, and visits would allow contact with father whose parental rights had been terminated); Daugherty v. Ritter, 646 N.E. 2d 66 (Ind. Ct. App. 1995), adopted and incorporated at 652 N.E. 2d 502 (Ind. 1995) (court can consider issues of conflict between parent and grandparent in denying grandparent visitation). The constitutionality of the grandparent visitation statute has been upheld under Indiana law. See Sights v. Barker, 684 N.E. 2d 224 (Ind. Ct. App. 1997). The U.S. Supreme Court recently ruled in Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054 (2000), that the grandparent visitation statute of the State of Washington violated the fundamental right of the custodial parent because it was overly broad in allowing any person to seek visitation with a child under any circumstances. The Indiana visitation statute does not seem vulnerable to the same over breadth challenge, since the Indiana statute limits the categories of persons that can seek visitation and the case law considers the totality of the family circumstances in determining the best interests of the child.

E. Visitation Issues Raised in other Family Law Cases

Visitation issues frequently arise in divorce, paternity, and guardianship cases. The applicability of this case law to CHINS cases will vary, on a case-by-case basis.

1. Visitation with Non-Parent

Visitation has been awarded to stepparents who can show that they had a custodial or parental relationship with the child, and that visitation would be in the best interests of the child. Standing to seek visitation has not been extended to other relatives or non-parents. See Worrell v. Elkhart Cty. Office of Family and Children, 704 N.E. 2d 1027, 1029 (Ind. 1998). See also Chapter 2 Roman Numeral I. at G. 3. and 4. for additional case law on this topic.

2. Visitation Not Tied to Child Support: Visitation a Right Not a Duty

In the divorce contempt case of Farmer v. Farmer, 735 N.E. 2d 285 (Ind. Ct. App. 2000), the trial court erred in ruling that father's suspended jail time due to contempt for failure to pay child support could be revoked on the basis of his failure to visit the child. The Court clarified that payment of child support is not tied to the right to visit the child, and failure to pay child support is not grounds for terminating visitation. Id. at 288. Further, the Court noted that there is no duty requiring a parent to visit or maintain a relationship with a child, and a parent should not be forced to visit his child under threat of imprisonment. Id. at 289, 290. See also Rendon v. Rendon, 692 N.E. 2d 889 (Ind. Ct. App. 1998) (child support and visitation are separate issues and obligations).

3. Violating Visitation Order Due to Child's Desires or Endangerment

In Williamson v. Creamer, 722 N.E. 2d 863 (Ind. Ct. App. 2000), the Court ruled that if a parent is concerned for the safety of the child during visitation, the appropriate remedy is to seek a modification of the visitation order. The parent can be held in contempt for violating a visitation order even when motivated by protection of the child. In Piercey v. Piercey, 727 N.E. 2d 26 (Ind. Ct. App. 2000), the Court reiterated that it is not legitimate to terminate visitation without court approval, but if a parent's violation of a court order was not willful due to children's express fears of father, the parent may avoid a contempt judgment. See also this Chapter below at XI. for further discussion on contempt.

4. AIDS, Disabilities, Incarceration, Homosexuality

AIDS can have an effect on visitation. In Stewart v. Stewart, 521 N.E. 2d 956 (Ind. Ct. App. 1988), the Court reversed the trial court's ruling denying visitation for a divorced AIDS infected father, and directed the trial court to fashion a visitation order that did not preclude visitation solely on the basis of AIDS. In Clark v. Madden, 725 N.E. 2d 100 (Ind. Ct. App. 2000), the Court ruled it was error to require that a blind father had to be accompanied by another adult when the child was in his custody. In Pence v. Pence, 667 N.E. 2d 798 (Ind. Ct. App. 1996), the Court ruled that an incarcerated parent had a right to a hearing regarding whether he could have visitation with the child throughout the period of the incarceration. A parent's homosexuality may or may not be relevant to determining the best interests of

a child in a visitation dispute. See Marlow v. Marlow, 702 N.E. 2d 733 (Ind. Ct. App. 1998) (a parent's homosexuality could be relevant to the best interest of the children in restricting visitation); Pryor v. Pryor, 714 N.E. 2d 743 (Ind. Ct. App. 1999) (without evidence that mother's behavior had adverse effect on child, court erred in ruling mother unfit to have custody based on homosexuality); Teegarden v. Teegarden, 642 N.E. 2d 1007 (Ind. Ct. App. 1994) (court lacked authority to restrict mother's homosexual behavior as a condition of having custody); D.H. v. J.H., 418 N.E. 2d 286 (Ind. Ct. App. 1981) (homosexuality standing alone without evidence of adverse effect on child doesn't render homosexual parent unfit to have custody as matter of law).

VII. DISPOSITIONAL PROTECTIVE ORDERS

The juvenile code contains many provisions for protecting children from contact with specified persons. Under IC 31-32-13-1, a motion can be made to "control the conduct of any person in relation to the child." The broad authority of IC 31-32-13-1 applies to parties as well as non-parties, and it appears to be applicable to all stages of a CHINS case.

Other protective order statutes apply specifically to the post-judgment or dispositional stage of the CHINS case. There appear to be two different means to obtain a dispositional order to restrain persons from contact with a child, and these different means contain different procedures and requirements: (1) IC 31-34-20-1(7) authorizes the court to "[o]rder a person who is a party to refrain from direct or indirect contact with the child" as part of the dispositional order; (2) IC 31-34-17-1 through 5 contain more detailed procedures for obtaining a protective order against a party or non-party once there has been a CHINS adjudication. It is interesting to note that in the termination case of A.P. v. PCOFC, 734 N.E. 2d 1107, 1116 (Ind. Ct. App. 2000), petition for transfer pending, the Court noted that IC 31-34-17-2 through 4 sets the requirements for the issuance of protective orders in a CHINS proceeding, without mention of the court's authority to issue restraining orders under IC 31-34-20-1(7). This may suggest that following the detailed procedures of IC 31-34-17-1 through 5 is the better practice.

A. Emergency Protective Orders

IC 31-32-13-7 through 8 contain procedures for issuance of an emergency protective order without a hearing or notice to the parties or other persons whose conduct is to be affected. Nothing limits the emergency procedures to a particular stage of the CHINS proceeding, so arguably they are applicable at the dispositional and review stages. See Chapter 5 at VII. F. for discussion of emergency protective orders.

B. Protective Order Against Party as Dispositional Option Under IC 31-34-20-1(7)

IC 31-34-20-1(7) provides that the court can order a person who is party to refrain from direct or indirect contact with the child as a dispositional order. If the court issues this order without compliance with the protective order provisions of IC 31-34-17, the court should include reasons for the protective order in the written findings and conclusions required by IC 31-34-19-10 for the dispositional hearing.

When the judge issues a protective order under IC 31-34-20-1(7), IC 31-34-20-2 requires that the person who petitioned for the protective order shall file a confidential form with the clerk as prescribed by the division of state court administration. IC 31-34-20-2(1) and IC 31-34-20-4(b) require the clerk and law enforcement to comply with IC 5-2-9 in distributing, maintaining, and modifying protective orders, and provide that protective orders can be removed from the protective order depository after the later of one of these occurs: a lapse of one year after the decree is entered, or the date specified in the decree.

C. Protective Order Against Parties and Non-Parties Under IC 31-34-17

IC 31-34-17 authorizes issuance of no contact protective orders against parties and non-parties. The following procedures are required.

1. Petition

IC 31-34-17-2 requires that the petition must be verified. IC 31-34-17-3 provides that a petition seeking to refrain a person from contact with a child must be entitled "In the Matter of a Protective Order for _____". and it must allege the following:

- (1) That the respondent is likely to have direct or indirect contact with the child in the absence of an order under this chapter.

- (2) That the child has been adjudicated a child in need of services.
- (3) That the best interests of the child will be served if the person refrains from direct or indirect contact with the child.

2. Standing

IC 31-34-17-1 provides that the following persons may sign and file a petition to require a person to refrain from direct or indirect contact with the child: prosecuting attorney; attorney for the office of family and children; caseworker; probation officer; department of correction; guardian ad litem; or court appointed special advocate (CASA).

3. Notice, Hearing, Standard of Proof, and Findings

IC 31-34-17-4 does not make any provision for notice, but provides that a hearing “may” be held on the petition concurrently with a dispositional hearing or a hearing to modify a dispositional decree. The discretionary language should be interpreted to give the court authority to address the issues at one of those hearings, not the discretion to avoid a hearing. To insure due process, notice and an opportunity to be heard should be provided to parties and non-parties whose behavior will be regulated by the requested protective order. IC 31-34-17-4(b) sets no standard of proof for the grant of a protective order, but states that the court shall grant the petition for a protective order if it finds that the allegations required by statute are true.

4. Filing, Distributing, Modifying, and Terminating Protective Orders

IC 31-34-17-5 provides that the clerk shall comply with the provisions of IC 5-2-9 if the court issues a protective order. IC 5-2-9 provides for distribution, maintenance, modification, and termination of protective orders by the clerk and law enforcement.

D. Violations of Protective Orders

The juvenile court and the parties may utilize contempt to deal with violations of protective orders. See this Chapter below at XI. for discussion on contempt. Also, IC 35-46-1-15.1(a)(4) and (9) provide that a person who knowingly or intentionally violates a dispositional protective order issued in a CHINS proceeding commits Invasion of Privacy.

E. Case Law on Protective Orders

In A.P. v. PCOFC, 734 N.E. 2d 1107, 1116 (Ind. Ct. App. 2000), petition for transfer pending, the Court reversed the termination judgment due to a combination of procedural errors, including the following three concerns with the order issued in the CHINS case barring the incarcerated father’s contact with the child: (1) no verified petition for the issuance of a protective order; (2) no statement of need or request for a no contact order in the reports filed with the court by the office of family and children or the court appointed special advocate; and (3) no written findings by the court that contact with the father would pose a threat to the child or that a protective order was in the best interest of the child. The Court indicated that these procedures were required by IC 31-34-17-2 and 3 for issuance of a protective order. The Court questioned whether contact with an incarcerated father would be harmful to the child, and noted the effect of the no contact order on the child’s relationship to his father. Id. The Court stated:

During the time the [protective] orders were in effect, Elvis [father] was incarcerated and thus could not have posed a physical threat to A.P. [child], and we can find no indication in the record that Elvis was verbally threatening A.P. from prison. There may have been other reasons for issuing the orders but the trial court has not provided us with a finding on the record that supports those orders. While we cannot speculate whether Elvis would have maintained contact with A.P. from prison but for the no- contact orders, they effectively precluded that opportunity altogether and thus could have contributed to A.P.’s estrangement from Elvis.

Id. at 1116-1117.

See also Ferbert v. Marion County OFC, N.E. 2d (Ind. Ct. App. 2001) (mother’s violation of court order that children were to have no contact with her husband supported the termination judgment).

Case law from other types of family law cases may be instructive on behaviors that may warrant a protective order. In Tillman v. Snow, 571 N.E. 2d 578 (Ind. Ct. App. 1991), the Court affirmed a protective order against the biological father whose parental rights had been terminated. The father’s manner of requesting

visitation with his now adopted daughter was abusive within the meaning of the protective order statute IC 34-4-5.1-1, and the trial court did not abuse its discretion in issuing a permanent protective order against the biological father. In Guerin v. Schaefer, 727 N.E. 2d 1119 (Ind. Ct. App. 2000), the Court affirmed a protective order against a babysitter who allowed the child to stay with her against the father's wishes and did not notify the father that the child was staying with her. In the paternity custody modification case of Sills v. Irelan, 663 N.E. 2d 1210 (Ind. Ct. App. 1996), the court allowed the mother to retain custody despite the father's petition for modification. However, custody was conditioned upon the mother having no contact with her boyfriend who was currently under criminal investigation for severely injuring the child. The mother appealed the no contact order, claiming it violated her freedom of association protected by the First Amendment. The Court stated that the freedom of association is not absolute, and must yield to the sufficiently important governmental interests of restricting custody orders as necessary to the protection of children. Compelling evidence was presented that the mother's association with her boyfriend presented a clear and present danger to the child's well-being and the Court determined that the mother's freedom of association with her boyfriend must yield to the child's best interest. The Court ruled it was not an abuse of discretion for the trial court to prohibit the mother from having contact with her boyfriend as a condition of continued custody of the child. Id. at 1215.

VIII. PARENTAL PARTICIPATION

The juvenile code places strong emphasis on enabling the parents, guardian, or custodian to change their abusive or neglectful behavior so that the family unit can be restored. The juvenile code states that it is the policy of the juvenile code "to strengthen family life by assisting parents to fulfill their parental obligations." IC 31-10-2-1(4). The dispositional guidelines require the court to provide a reasonable opportunity for parental participation in the care, treatment, and rehabilitation of the child. IC 31-34-19-6. The dispositional hearing statute requires the court to consider the necessity, nature, and extent of parental participation. IC 31-34-19-1(2). The reasonable efforts statute requires that the office of family and children "shall make reasonable efforts to preserve and reunify families," unless there has been a determination that reasonable efforts toward reunification are not required. IC 31-34-21-5.5(b); IC 31-34-21-5.6(b); IC 31-34-21-5.8.

A. Jurisdiction

IC 31-30-1-1(5) states that the juvenile court has exclusive jurisdiction in "[p]roceedings governing the participation of a parent, guardian, or custodian in a program of care, treatment or rehabilitation for a child under IC 31-34-16 or IC 31-34-15." Some have interpreted this provision to mean that the court can issue orders to parents only through a parental participation petition under IC 31-34-16, while others argue that the juvenile court has the authority to issue orders under the dispositional statute, IC 31-34-20-1(6) (judicial authority to order parent to receive family services) without a separate parental participation petition.

In Mikel v. Elkhart County DPW, 622 N.E. 2d 225 (Ind. Ct. App. 1993), the juvenile court adjudicated the children in need of services and ordered the father to pay support, participate in psychological testing, and finish parenting classes. Id. at 227. The court found the father in contempt for failure to obey the orders and sentenced him to jail for 180 days, or alternatively to serve the sentence in a mental health facility. Id. The Court of Appeals reversed because the state had not complied with the parental participation petition statute, IC 31-34-16. The Court ruled that IC 31-6-4-17 (recodified at IC 31-34-16) is jurisdictional, and compliance with that statute "is the only means a court may mandate parental involvement subject to contempt of court." Id. at 228. The Court also stated:

We conclude that the language of IC 31-6-4-17 [recodified at IC 31-34-16] mandates certain procedures be followed before the juvenile court can affirmatively order the participation of a parent in a dispositional decree. Prior to that time the juvenile court does not have jurisdictional authority over a parent and may not order parental action, as occurred in this case. We do not believe that the juvenile code grants jurisdiction over parents so that they may be found in contempt of court, simply by the filing of a CHINS petition, or by a court's finding that children are CHINS.

Id. at 229 (footnote omitted).

B. Standing to File Petition

The prosecutor, counsel for the office of family and children, probation officer, caseworker, department of

correction, and the child's guardian ad litem or court appointed special advocate have standing to file a parental participation petition. IC 31-34-16-1.

C. Parental Participation Petition

The petition shall be verified. IC 31-34-16-2. The petition shall be captioned and contain the allegations set out in IC 31-34-16-3, as follows:

A petition seeking participation of a parent, guardian, or custodian must be entitled "In the Matter of the Participation of ____, the Parent, Guardian, or Custodian of ____". The petition must allege the following:

- (1) That the respondent is the child's parent, guardian, or custodian.
- (2) That the child has been adjudicated a child in need of services.
- (3) That the parent, guardian, or custodian should:
 - (A) obtain assistance in fulfilling obligations as a parent, guardian, or custodian;
 - (B) provide specified care, treatment, or supervision for the child;
 - (C) work with a person providing care, treatment, or rehabilitation for the child; or
 - (D) refrain from direct or indirect contact with the child.

IC 31-34-16 does not clarify if the petitioner must particularize the services, or other participation sought in the parental participation petition. It is preferable that the petition state exactly what participation is sought, any relevant standards or quality of participation, and the reasons for the participation.

D. When to File Petition

Since IC 31-34-16-3(2) requires the petitioner to allege in the parental participation petition that the child has been adjudicated a CHINS, it appears that the petition should not be filed until there is an admission of CHINS or a judgment of CHINS in the factfinding hearing. However, it is the practice in some counties to file the petition at an earlier time. IC 31-34-16-4(a) does not set a time requirement for filing the petition, but suggests that the petition may be filed in advance of the dispositional hearing and anytime thereafter.

E. Notice

The juvenile code does not specifically provide for service of the parental participation petition upon the parent, guardian or custodian, but that is the best practice to insure due process of law.

When a parental participation petition is not used, it is still necessary for the party seeking parental participation to give advance notice of the requested participation so that the parent, guardian, or custodian can be adequately prepared to "controvert any allegations made at the child's dispositional or other hearing concerning his participation" as is the parent's right under IC 31-34-10-5(3)(A) and IC 31-32-2-3(2). Notice of requested participation orders can also be given through the predispositional report which must be made available to the parent in advance of the dispositional hearing under IC 31-34-18-6(a).

F. Hearing, Standard of Proof, Hearsay, Advisement of Consequences

IC 31-34-16-4 provides that the "court may hold a hearing on a [participation] petition concurrently with a dispositional hearing or with a hearing to modify a dispositional decree." The hearing is necessary to allow the parent, guardian, or custodian to cross-examine witnesses, subpoena witnesses and tangible evidence, and present evidence regarding parental participation as is guaranteed under the rights statute, IC 31-32-2-3. The right of the parent, guardian, or custodian to controvert allegations regarding participation stated in IC 31-34-10-5 also supports the right to a hearing on participation.

IC 31-34-16-4(c) provides that if the court finds that the allegations in the parental participation petition are true, the court shall enter a decree. Subsection (b) provides that the court shall advise the parent that failure to participate as required by a participation order can lead to the termination of the parent-child relationship.

Neither the juvenile code nor case law directly addresses the admissibility of hearsay in the participation hearing. Arguably, probative hearsay is admissible in all post-adjudication hearings. See Matter of L.J.M., 473 N.E. 2d 637 (Ind. Ct. App. 1985) (delinquency modification case). Also, hearsay relevant to participation may be contained within the predispositional report, if probative. IC 31-34-19-2(a). The counter argument to admission of hearsay is the right of the parent, guardian, or custodian to cross-examine witnesses in participation proceedings. IC 31-32-2-3(b). The admission of hearsay limits the right of cross-

examination.

G. Scope of Parental Participation Orders

The scope of parental participation orders is set out at IC 31-34-16-3, see this Chapter above at VIII. C., and also listed with some minor variance at IC 31-34-20-3 as follows:

If the juvenile court determines that a parent, guardian, or custodian should participate in a program of care, treatment, or rehabilitation for the child, the court may order the parent, guardian, or custodian to do the following:

- (1) Obtain assistance in fulfilling the obligations as a parent, guardian, or custodian.
- (2) Provide specified care, treatment, or supervision for the child.
- (3) Work with a person providing care, treatment, or rehabilitation for the child.
- (4) Participate in a program operated by or through the department of corrections.

Also, IC 31-34-20-1(6) provides that the court can order the parent, guardian, or custodian to receive family services. Family services are defined at IC 31-9-2-45 as services to:

- (1) prevent a child from being removed from a parent, guardian, or custodian;
- (2) reunite the child with a parent, guardian, or custodian;

Arguably, the scope of parental participation may be limited by IC 31-34-19-6 which requires that the dispositional decree should provide the least interference and disruption in family life and the least restraint on family and individual freedoms that is consistent with the safety of the community and the welfare of the child.

1. Possible Participation Orders

In addition to the traditional participation orders for counseling, parenting programs, child care, visitation, and cooperation with the office of family and children and other service providers, the broad language of IC 31-34-16-3 and IC 31-34-20-3 would support parental participation orders to obtain (or seek) employment, housing, mental health and addiction treatment, and welfare income supplements (such as TANF, SSI) as could be considered necessary to fulfill the parental obligation. The statute would authorize orders specifying the manner in which the child is to be supervised and possibly setting housing and cleanliness standards, if neglect was an issue. The participation order may contain boiler plate language that parents must keep the court, office of family and children and service providers informed of current addresses and phone numbers, and maintain regular contact with the office of family and children.

The juvenile code does not give the juvenile court specific authority to order a parent to participate in an examination or treatment without the parent's consent. See IC 31-34-18-5(2) (court can authorize examination of parent if parent consents); IC 31-34-16-3(3)(A) (court can order parent to "obtain assistance in fulfilling obligations as a parent"). Numerous termination of parental rights opinions reflect that juvenile courts do regularly order parents to participate in testing, counseling, and other forms of out-patient treatment for mental, emotional, drug, and alcohol problems.

2. Case Law

In Re Wardship of M.H., 490 N.E. 2d 1119 (Ind. Ct. App. 1985), a termination of parental rights case, outlines several parental participation plans in the statement of facts. The participation plans were not the subject of appeal, however, they provide some insight into the potential scope of participation orders. In M.H. the parents entered into a "Parent Participation Plan" at the dispositional hearing. The plan required the mother to do the following: provide sanitary and healthy living conditions, proper feeding, clothing, and medical care for the children; accept homemaker services; and cooperate with the welfare caseworker. Id. at 1120,1121. Subsequent participation plans required the mother to protect and supervise the children, avoid leaving the children unattended, complete parenting classes, obtain a psychological evaluation and follow counseling recommendations, dress the children properly, maintain visitation, maintain a specific schedule for housekeeping and laundry, receive services on budgeting money, develop sleep schedules, and prepare nutritional meals and give daily baths. Id.

In Wardship of J.C. v. Allen Cty. Office, 646 N.E. 2d 693 (Ind. Ct. App. 1995), the Court of Appeals ruled that the office of family and children is not required to file a parental participation plan in the

CHINS case as a precondition to seeking termination of parental rights. The Court noted that the “participation plan serves as a useful tool in assisting parents in meeting their obligations” and in clarifying the rehabilitation services to be provided by the welfare department, but termination of parental rights can occur without a participation plan if the necessary elements of the termination statute are met. *Id.* at 695.

H. Office of Family and Children Obligation to Assist in Parent Rehabilitation

The juvenile code obligates the county and the office of family and children to assist in parental participation and rehabilitation. The county shall pay for services ordered for the child, parent, guardian, or custodian. IC 31-40-1-2. The office of family and children is required at dispositional and review hearings to recount to the court the reunion and rehabilitation services that have been provided to the family. IC 31-34-19-10(4)(B); IC 31-34-21-5(a)(2) and (b)(3),(14). The local child protection service shall coordinate, provide or arrange for, and monitor family services for the child, parent, guardian, or custodian. IC 31-33-12-3. Services to be provided by, or through, the office of family and children could include intensive caseworker programs, homemaker services, parenting programs, counseling, financial management, and perhaps most important, transportation to facilitate parental utilization of services. See also Chapter 4 at VIII. on what constitutes reasonable efforts to preserve and reunify families.

IX. FINANCIAL RESPONSIBILITY FOR SERVICES, PLACEMENT, AND CHILD SUPPORT

A. Responsibility of County

IC 31-40-1-2 states:

- (a) The county shall pay from the county family and children’s fund the cost of:
 - (1) any services ordered by the juvenile court for any child or the child’s parent, guardian, or custodian, other than secure detention; and
 - (2) returning a child under IC 31-37-23 [interstate placement].
- (b) The county fiscal body shall provide sufficient money to meet the court’s requirements.

Under this statute the local office of family and children is responsible for the cost of services ordered by the court, and county government is responsible to provide needed funds to the office of family and children. IC 31-40-1-1 clarifies that the county’s financial obligation includes costs resulting from institutional placement of a child.

1. Financial Responsibility for GAL Fees

In In Re J.C., 735 N.E. 2d 848 (Ind. Ct. App. 2000), the court appointed a local attorney to serve as guardian ad litem to investigate and make recommendation regarding parental visitation with the two-year-old CHINS. The guardian ad litem submitted a request for payment to the office of family and children, and the office filed a motion with the court to limit its financial liability to the guardian ad litem. The court ordered the office of family and children to pay the fees of the guardian ad litem. The Court of Appeals affirmed on the grounds that the guardian ad litem provided a service to the child, and IC 31-40-1-2 provides that the county family and children’s fund is responsible for the cost of services ordered for the child. The Court found that the office of family and children waived the argument that guardian ad litem fees are to be paid by the guardian ad litem fund authorized by IC 33-2.1-7-3.1 because it did not raise the argument with the trial court. *Id.* at 850 n. 1. Further, the Court found there was no conflict of interest in the office of family and children paying the costs of another party (the guardian ad litem), since payment was being ordered by the trial court. *Id.*

2. County Responsibility Ends When Reason for CHINS Ends

In Lake County FCS v. Charlton, 631 N.E. 2d 526 (Ind. Ct. App. 1994), the Court of Appeals reversed the juvenile court's refusal to close the wardship of a CHINS at a status (review) hearing. The Court ruled that the office of family and children was not responsible to reimburse the parents for expenses incurred after the status hearing, since the evidence presented at the status hearing showed that the parents were now financially able to meet the child's needs and therefore the child no longer met the legal definition of CHINS.

3. OFC Responsibility for Costs of Mental Health Services

In Matter of Garrett, 631 N.E. 2d 11 (Ind. Ct. App. 1994), the Court of Appeals ruled that in delinquency

cases, the Department of Mental Health [now titled the Division of Mental Health] "is not the responsible party for mental health costs of juveniles." *Id.* at 13. Referring to IC 31-6-4-18(a) and (b) (recodified at IC 31-40-1-1), the Court noted that the cost of services, including mental health services, is to be paid by the county, or the child's parents if such payment would not cause an unreasonable hardship. IC 31-40-1-1 applies to both delinquency and CHINS cases. See also this Chapter below at X. for further discussion on mental health placements.

B. Responsibility of Court and Office of Family and Children to Obtain Parental Reimbursement and Child Support

The juvenile code obligates the office of family and children to submit information regarding the parent's financial situation to the court for the dispositional hearing. IC 31-34-18-3. The court is obligated to raise the issue of child support once the child has been removed from the home. IC 31-40-1-5(b) and (c). Further, the court "shall" address reimbursement for services ordered for the child, parent or custodian, beginning with the detention hearing. IC 31-40-1-3(c). The juvenile code does not specifically require the office of family and children to seek reimbursement or child support orders, so arguably the juvenile judge is obligated to raise these financial issues on the judge's own motion; however, the better practice is for the office of family and children to file a motion seeking reimbursement or child support.

C. Responsibility of Parent or Guardian for Child Support

IC 31-40-1-5 specifically obligates the court to facilitate child support orders for children removed from their homes. IC 31-40-1-5 appears to be a "stand alone" statute, containing procedures and standards for obtaining child support orders; not dependent upon the requirement and exceptions for reimbursement orders under IC 31-40-1-3. In fact, IC 31-40-1-5(g) states clearly that the court is authorized to issue orders for parents to reimburse the county for services provided to the child in compliance with the procedures of IC 31-40-1-3, "in addition" to the child support orders under IC 31-40-1-5. IC 31-40-1-5 generally appears to place significant responsibility on the court to initiate procedures to obtain child support orders for children placed outside of the home; however, IC 31-40-1-5(e) indicates that the Title IV-D Agency shall "establish," modify or enforce support orders assigned or entered by a court.

1. Child Support Requirements and Exceptions

IC 31-40-1-5(a) indicates that the child support provisions apply whenever a court issues an order removing the child from the home of the child's parent or guardian, and placing the child into a child caring institution, foster care home, or the home of a relative. The juvenile court's responsibilities with regard to child support vary depending upon whether there is an existing child support order or not.

a. Requirements if Already Existing Child Support Order

IC 31-40-1-5(b) provides that if there is an existing child support order for a child, the court shall order that the support payments be assigned to the office of family and children for the duration of the child's placement outside of the home. The juvenile court shall give notice of the assignment of support and of its assumption of jurisdiction to the court that previously had jurisdiction to modify or enforce the child support order. The statute does not address the fact that usually only one parent will be obligated to pay support under a divorce or paternity child support order, and therefore does not seem to require the court to order the previous custodial parent to pay child support while the child is out of the home. However, the provision of the statute that deals with determining child support when there has been no prior order, IC 31-40-1-5(c)(2), indicates that the court should order "each" of the child's parents or the guardians of the child's estate to pay support.

b. Requirements if No Existing Child Support Order and Support Order Exceptions

If an existing support order is not in effect, IC 31-40-1-5(c) provides that the court shall include in its order for removal of the child or for out-of-home placement of the child, an assignment of any right to child support or payment of medical costs to the county office of family and children. The court shall order "each" of the child's parents or the guardian of the child's estate to pay child support based on the child support guidelines, unless one of the following exceptions applies: (1) the court finds that an order based on the child support guidelines would be "unjust or inappropriate considering the best interests of the child and other necessary obligations of the child's family," or (2) the office of family and children is not making any payments whatsoever for the support or care of the child. Note that this standard for avoiding a child support order in compliance with the child

support guidelines is different from the standard for excepting parents from the responsibility for reimbursing the state for services provided during the CHINS proceeding under IC 31-40-1-3.

The juvenile code does not obligate the parents to file a child support work sheet until the dispositional stage under IC 31-40-1-3(b)(c); however, IC 31-40-1-5(c) clearly indicates that the court is to act on support issues when the child is removed from the home. If child support is going to be ordered earlier than the dispositional stage of the CHINS proceeding, the parents clearly need advisement of their financial obligation to support the child, and a hearing to determine their financial ability and responsibility to pay child support, and to determine whether they should be excepted from the child support guidelines.

2. Child Support Payments Made to Clerk and Distribution of Payments

IC 31-40-1-5(d) provides that the child support payments shall be made to the clerk of the circuit court. IC 31-40-1-5(e) provides that the Title IV-D Child Support Enforcement Agency shall enforce child support orders.

D. Responsibility of Parent or Guardian to Reimburse County for Expenditures

1. Standards and Conditions for Ordering Reimbursement

IC 31-40-1-3(a) provides that the parent of an “adjudicated” CHINS (or guardian of the child’s estate) is financially responsible for any services ordered by the court. IC 31-40-1-3(c) provides that the juvenile court “shall” order the child’s parents or guardian of the child’s estate to reimburse the county for the costs of services provided to the child or the parent or guardian unless an exception applies. IC 31-40-1-3(c) also provides that the Court “shall” make a reimbursement determination at a detention hearing, dispositional hearing or any other hearing to consider modification of a dispositional decree.

Reimbursement orders made prior to the dispositional stage may be of questionable validity since IC 31-40-1-3(a) states that the reimbursement mandate applies to the parent or guardian of an “adjudicated” child, and case law indicates that an adjudication of CHINS is a precondition to parent financial responsibility. See Mafnas v. Owen County Office of Family, 699 N.E. 2d 1210 (Ind. Ct. App. 1998) (court could not order reimbursement for residential care because child was not adjudicated CHINS prior to his eighteenth birthday); Woolf v. State, 545 N.E. 2d 590 (Ind. Ct. App. 1989) (court couldn’t order parents to reimburse for attorney services ordered by the court since child was never adjudicated delinquent).

IC 31-40-1-4 provides that the parent or guardian of the child’s estate shall reimburse the county for costs involved in returning the child to Indiana under the Interstate Compact Act on Juveniles under IC 31-37-23, in compliance with the procedures set out in IC 31-40-1-3, regardless whether the child is adjudicated a CHINS. See Matter of C.B., 616 N.E. 2d 763 (Ind. Ct. App. 1993) (proper procedures in returning child to state of Indiana under Interstate Compact)

2. Exceptions for Financial Reimbursement

IC 31-40-1-3(c) provides that the court “shall” order reimbursement, “unless the court finds that the parent or guardian is unable to pay or that justice would not be served by ordering payment from the parent or guardian.”

3. Information Provided to Court for Reimbursement Decision

IC 31-34-18-3 requires the caseworker to prepare a financial report on the parent, or the estate of the child, for the dispositional hearing. The purpose of the report is to assist the juvenile court in determining the person’s financial responsibility for services provided for the child or the person. IC 31-40-1-3(b) requires the parent of a CHINS or a delinquent to “furnish the court with an accurately completed and current child support obligation worksheet on the same form that is prescribed by the Indiana Supreme Court for child support orders.” See Dye v. Young, 655 N.E. 2d 549, 550, 551 (Ind. Ct. App. 1995) (in paternity child support case the trial court did not err in entering a child support order even though father did not submit required support worksheet).

4. Jurisdiction, Notice and Reimbursement Hearing

Satisfying the statutory requirements for subject matter jurisdiction in the CHINS case and obtaining

personal jurisdiction over the parents or the guardian through appropriate notice, are prerequisites to an order for financial responsibility. In the case of In Re Heaton, 503 N.E. 2d 410 (Ind. Ct. App. 1986), the juvenile court adjudicated a child to be in need of services without the filing of a CHINS petition and without notice to the parents. The juvenile court subsequently ordered the parents to reimburse the county for the cost of the child's care in a residential facility. On appeal, the Court of Appeals ruled that the juvenile court lacked subject matter jurisdiction in the absence of the CHINS petition, and therefore, its order for payment was void and could be attacked at any time. In Mafnas v. Own County Office of Family, 699 N.E. 2d 1210 (Ind. Ct. App. 1998), the Court ruled that the juvenile court lacked jurisdiction to order the parents to reimburse for the financial costs of a child who was not adjudicated CHINS prior to his eighteenth birthday.

Determining financial responsibility requires a hearing. See IC 31-40-1-3 (financial responsibility shall be determined at detention, dispositional or modification hearing); IC 31-32-2-3(3) and IC 31-34-10-5(3) (B) (right of parent, guardian, or custodian to controvert allegations regarding financial responsibility); L.J.F. v. Lake County Dept. of Pub. Welfare, 484 N.E. 2d 40, 41 (Ind. Ct. App. 1985) (reimbursement hearing required to determine parent's financial responsibility for child's residential costs).

Case law has not dealt with hearsay in the context of the reimbursement hearing. The financial report required by IC 31-34-18-3 may qualify as a predispositional report, and IC 31-34-19-2(a) provides that "any predispositional report may be admitted into evidence to the extent that it contains evidence of probative value even if it would otherwise be excluded." Therefore the financial report can contain probative hearsay. The delinquency case of Matter of L.J.M., 473 N.E. 2d 637, 643 (Ind. Ct. App. 1985), indicates that hearsay is generally admissible in post-adjudication proceedings. The parents' statements about their income can also be considered statements by a party-opponent, which arguably are not hearsay pursuant to Ind. Evidence Rule 801(d)(2).

E. Current Issues in Reimbursement and Child Support

The case law is in conflict on whether the court is obligated to hear evidence on the parent's ability to make financial reimbursement before it can hold the parent responsible, or whether the parent is obligated to raise the parent's inability to pay as an affirmative defense to avoid financial responsibility. Also, because the reimbursement statute, IC 31-40-1-3, and the child support statute, IC 31-40-1-5, appear to create separable and independent financial obligations, the courts should clarify whether payment is being ordered as weekly child support that will end when the child is returned home, or as full or partial reimbursement toward the child's expenses, including significant placement costs. If an order is labeled as child support or as reimbursement may affect whether the obligation is dischargeable in bankruptcy, but still there is a need to give the parents clear direction as to the purpose, and the ongoing or definitive nature of orders for monthly payments regarding children in placement.

1. Judicial Obligation to Consider Parent's Ability to Reimburse

In the delinquency case of Matter of C.K., 695 N.E. 2d 601 (Ind. Ct. App. 1998), the juvenile court ordered the father to pay \$100 per week as reimbursement for the child's placement costs, based upon the child support guidelines. Subsequently, the office of family and children petitioned for reimbursement for the full cost of the child's care, \$59,116. The juvenile court granted the petition and ordered the father to pay the requested amount, less the weekly support he had already paid. The father appealed. The Court of Appeals ruled that the court can enter judgment against the parent for the full amount of the placement costs beyond the weekly support amount ordered, but the court's earlier determination of the weekly support was "inadequate to constitute consideration of Father's ability to pay the entire reimbursement amount when reduced to judgment." Id. at 605. The case was reversed and remanded to the juvenile court to consider (1) the father's ability to pay the entire reimbursement sought, and (2) whether justice would be served by ordering reimbursement of the full amount.

In Carnahan v. State, 558 N.E. 2d 845 (Ind. Ct. App. 1990), the juvenile court ordered the parents of a delinquent child to reimburse the Indiana Department of Corrections for the cost of the child's incarceration at the Indiana Boys School. On appeal, the Court noted that parental reimbursement must be ordered in compliance with statutory procedures, and it is not available as a matter of common law. Reviewing the record of the case, the Court reversed the reimbursement order on the following grounds: (1) no evidence that the child had been adjudicated delinquent; (2) no evidence to support a finding that the parents were financially able to reimburse the expenses related to the child's incarceration; and (3) no

evidence that the parents had received notice of the reimbursement proceeding, which is fundamental to due process. Id. 847, 848.

In the case of L.J.F. v. Lake County Dept. of Public Welfare, 484 N.E. 2d 40 (Ind. Ct. App. 1985), the Court of Appeals indicated that the trial court must determine the appropriateness of financial responsibility, rather than merely order it. The following quote shows the Court's dissatisfaction with the procedure utilized by the juvenile court, although the Court does not specify the error.

Instead the hearing of November 21st commenced with the referee advising L.J.F.'s father that he was responsible for repaying the entire cost of placing L.J.F. at Excelsior. The father indicated that at that time he could afford to pay \$100 per month for L.J.F.'s care but he did not know how long that would continue. No evidence was presented as to the family's other assets or needs. Incredibly, when the father indicated he felt he could not afford the entire expense and asked the referee how he could secure financial aid in caring for L.J.F., the referee responded, "Oh, I haven't the faintest idea, sir." (footnote omitted). The procedures employed at the reimbursement hearing were clearly contrary to law.

Id. at 41.

In the case of In Re Estate of Keeler, 476 N.E. 2d 917 (Ind. Ct. App. 1985), the Court of Appeals ruled that the welfare department could seek reimbursement from the child's trust fund for expenditures made for the child while she was a ward of the welfare department. The Court stated that even if the welfare department had failed to comply with the financial responsibility procedure and standards of IC 31-6-4-18 (recodified at IC 31-40-1) the circuit court still had the authority under the guardianship statutes and common law to hold the estate liable for the child's care and support.

2. Burden on Parent to Prove Reimbursement Exception

In J.W. v. Hendricks County Office, 697 N.E. 2d 480 (Ind. Ct. App. 1998), the parents of an adjudicated CHINS complied with the court's order to file a financial declaration, open a child support account with the county clerk, and provide insurance information to the office of family and children. The court placed the child in a residential facility and ordered the parents to pay weekly support of \$41.00, retroactive to the date the child was removed from the home. Subsequently, the office of family and children petitioned for reimbursement of the unpaid placement costs of \$39,655.72. The evidence at the reimbursement hearing showed that the parents had a gross weekly income total of \$447.14 and an annual net income of \$20,800.00 and the parents testified that they would suffer financial hardship if required to fully reimburse the office of family and children. The juvenile court ruled that the parents did not carry the burden of showing they were unable to pay or justice would not be served by ordering payment, and ordered the parents to reimburse the state for the full costs of the institutional placement. The Court of Appeals ruled that the parents must plead the exception to mandatory reimbursement (i.e. inability to pay or justice would not be served by reimbursement) as an affirmative defense under Ind. Trial Rule 8(c), and carry the burden on the defense by a preponderance of the evidence. The Court of Appeals affirmed the trial court's ruling that the parents did not carry their burden, and the trial court's judgment for full payment of the costs was not contrary to law. However, the Court noted the contrary case law that public policy requires that the juvenile court consider the statutory factors for avoiding reimbursement, regardless of evidence presented by the parents, as set out in Matter of C.K., 695 N.E. 2d 601 (Ind. Ct. App. 1998). Id. at 482 n. 4.

3. Order Must Clarify Whether Parent is Responsible for Child Support Payment or Full Or Partial Costs of Residential Placement

In Washburn v. Office of Family & Children, 726 N.E. 2d 361 (Ind. Ct. App. 2000), the office of family and children sought reimbursement for the residential costs of a delinquent child from the parents in an amount consistent with the child support guidelines. The parents were ordered to pay \$40 per week. At subsequent hearings evidence was presented that the total costs of residential care exceeded \$90,000, and the court ordered the parents to pay \$500 per month. The office of family and children subsequently filed a Motion for Proceedings Supplemental, which the court granted and issued garnishment orders against the parents. On appeal, the Court clarified that proceedings supplemental under Ind. Trial Rule 69 are dependent upon a valid and enforceable judgment under Ind. Trial Rule 58. The Court found that the trial court's ruling was unclear as to whether it had issued a final judgment for full or partial reimbursement of the child's residential costs. The Court reversed and remanded for further proceedings to determine the

amount, if any, owed by the parents to the office of family and children in compliance with the reimbursement statutes and the Indiana Child Support Guidelines. The opinion notes, at footnote 3, that the Child Support Guidelines contemplate that child support will end when a child is emancipated or attains the age of 21, but reimbursement orders under IC 31-40 are not limited to weekly support only during the child's minority or the child's placement. The Court also noted that the right to reimbursement is not unlimited, and the court must consider the parent's ability to pay and whether justice would be served "by an order in excess of that which a parent would have paid under child support orders during the child's minority." *Id.* at 364.

4. Effect of SS, SSI, Annuity or Other Payments on Reimbursement or Child Support

In the CHINS case of *In Re R.C.*, 713 N.E. 2d 285 (Ind. Ct. App. 1999), the mother assigned her child support from the father to the office of family and children while the child was in residential care. At a reimbursement hearing the court ordered father to pay one half of the costs of the child's residential care, which included credit for the child support payment, and the court determined that father was able to pay \$40 per week toward the reimbursement owed. On appeal father alleged that income from annuities paid as part of a settlement of medical malpractice for injuries he incurred should not have been considered in determining his ability to reimburse the office of family and children. The Court of Appeals affirmed the trial court order, finding that it was not improper to include the annuities income. The evidence showed that the father was working part-time and not medically prevented from working additional hours, father's wife was employed and they paid \$575 in monthly rent, and father had spent \$90,000 on himself and his daughter from the proceeds of a medical malpractice award. In *Ritter v. Bartholomew County DPW*, 564 N.E. 2d 329 (Ind. Ct. App. 1990), the juvenile court ordered the father of the CHINS to pay support to the welfare department for the care of his delinquent child. The father failed to pay support and the juvenile court found him in contempt. On appeal, the father argued that he was unable to pay support because the social security benefits he received for his son could not be used for that purpose. The Court affirmed the contempt finding and ruled that the social security benefits paid to the father on behalf of the child were a proper subject of a support order. Note, however two more recent child custody cases in which the Court ruled that disability benefits should not be considered in holding a parent in contempt for failure to pay child support. In *Cox v. Cox*, 654 N.E. 2d 275 (Ind. Ct. App. 1994), the noncustodial father was disabled and received Supplemental Security Income (SSI). The trial court ordered him to pay child support based on potential income as if he were employed forty hours per week at minimum wage. The court subsequently found the father in contempt for failure to pay, and ordered him to serve a thirty day jail sentence unless he paid the child support as ordered. On appeal, the Court held that an SSI recipient as a matter of law lacks the money or means to satisfy his child support obligation. *Id.* at 277. In order to obtain SSI the father had proven that he was unable to do any substantial gainful activity by reason of a medically determinable physical or mental impairment. *Id.* The Court reversed the trial court's decision, stating that it was clearly erroneous or contrary to law because it effectively constituted an impermissible collateral attack upon the determination of father's entitlement to SSI benefits. See also *Esteb v. Enright by State*, 563 N.E. 2d 139 (Ind. Ct. App. 1990) (father's SSI shouldn't be considered income for purposes of determining contempt for failing to pay child support).

5. Support Can Accrue While Parent Incarcerated

In *Davis v. Vance*, 574 N.E. 2d 330 (Ind. Ct. App. 1991), a Title IV-D support case, the trial court refused to abate a father's child support obligation during his incarceration. The Court of Appeals affirmed, but clarified that allowing support to accrue is distinct from the issue of inability to pay that arises in a contempt proceeding. See also *Holsapple v. Herron*, 634 N.E. 2d 140 (Ind. Ct. App. 1995) (abatement of child support not warranted when failure to pay is result of criminal act).

F. Enforcement of Reimbursement and Child Support Orders

IC 31-40-1-6 provides that the State Division of Family and Children "may" contract with the prosecuting attorney, an attorney for the office of family and children who is not an employee of the office, or another licensed attorney, for enforcement and collection of reimbursement orders. IC 31-40-1-5(e) requires that the Title IV-D Agency shall "establish" and enforce child support orders.

In *Matter of S.T.*, 621 N.E. 2d 371 (Ind. Ct. App. 1993), a case that predates the statutory provision for determination, enforcement and collection of child support in IC 31-40-1-5, the grandmother sued the welfare department for failure to collect support from the parents. The support had been ordered by the juvenile court

when it adjudicated the children CHINS, awarded wardship to the welfare department, and placed the children with the grandmother. The Court found that there was nothing in the juvenile code which placed an affirmative duty on the welfare department to enforce the support order. The Court ruled that the department did not breach a fiduciary duty owed by a guardian in failing to collect the support, since a wardship is not tantamount to a guardianship.

G. Continuing Jurisdiction to Enforce Reimbursement Orders

The continuing jurisdiction statute, IC 31-30-2-1(c) provides that the juvenile court retains jurisdiction over the parent or guardian of a child's estate until the parent or the estate has satisfied any financial obligation ordered under IC 31-40 to reimburse the county for services provided to the child or for child support.

H. Contempt

A parent or guardian may be held in contempt of court for failure to comply with financial responsibility orders, and the juvenile court may enter judgment for the amount due. IC 31-40-4-1. See this Chapter below at XI. for full discussion on contempt.

In Mafnas v. Owen County Office of Family, 699 N.E. 2d 1210 (Ind. Ct. App. 1998), the office of family and children filed a petition for reimbursement of the cost of services provided for the children, including the costs related to the eldest child. The court issued a judgment against the parents for \$24,518.33, and ordered the parents to pay \$25 per month toward the judgment. On a motion for rule to show cause for failure to make the monthly payments, the court found the parents in contempt of court and ordered them to serve a thirty day jail sentence. On appeal, the Court of Appeals ruled that the trial court lacked jurisdiction over the eldest child because he was not adjudicated a CHINS prior to his eighteenth birthday, even though the CHINS petition had been filed prior to his eighteenth birthday. Id. at 1213. The Court determined that the statutory authority for reimbursement for county expenditures applies only to a child who is adjudicated a CHINS, and therefore the trial court was without authority to order reimbursement for the care of the eldest child. However, the Court ruled that the trial court had authority to hold the parents in contempt regarding their failure to reimburse the county for money expended for the other three children who had been adjudicated CHINS prior to their eighteenth birthdays. Despite the general rule that money judgments are not enforceable by contempt, the Court determined that the costs in this case were in the nature of child support and therefore payment can be enforced by contempt. The Court quoted Pettit v. Pettit, 626 N.E. 2d 444, 447 (Ind. 1993), that "contempt is always available to assist in the enforcement of child support, at least in respect of unemancipated children, including orders to pay accrued arrearage and money judgments against delinquent parents for past due amounts." Mafnas at 1213. Further, the Court ruled that the proscription against incarceration for debt in the Indiana Constitution does not prevent the use of contempt and incarceration to enforce child support obligations. Id. at 1214.

In Richardson v. Lake Cty. Dept. of Pub. Welfare, 439 N.E. 2d 722 (Ind. Ct. App. 1982), the Court of Appeals acknowledged that the contempt power could be used to enforce a court order for the support of a child adjudicated dependent and neglected. However, the Court ruled that a support order for reimbursement to the welfare department is not enforceable by contempt once the child is emancipated, reaches her majority, or is deceased. The available remedy in those situations is execution or attachment.

In Ritter v. Bartholomew County DPW, 564 N.E. 2d 329 (Ind. Ct. App. 1990), the Court of Appeals affirmed the juvenile court's ruling that the father of a delinquent was in contempt of court for failing to pay child support as required in the delinquency dispositional order. The Court held that Social Security disability benefits paid to the father on behalf of the child could be used to satisfy the support order. In Allee v. State, 462 N.E. 2d 1074 (Ind. Ct. App. 1984), the court held a putative father in contempt for failure to pay blood test costs.

X. **MENTAL HEALTH COMMITMENT AND VOLUNTARY PLACEMENT**

A. Options for Treating Mentally Ill Children

The juvenile dispositional statutes authorize outpatient services for children with mental health problems. IC 31-34-20-1(2)(A) and (B). For a child with greater mental health needs, the court can place the child into a shelter care placement with specialized mental health programming under the authority of the dispositional statute, IC 31-34-20-1(3), or alternatively the court can authorize a voluntary placement of a child into a

mental health facility or facilitate a civil mental health commitment proceeding in the juvenile court or the probate court.

B. Voluntary Mental Health Placement

A voluntary mental health placement is obtained by an application to a state mental health facility, and the consequent determination by the superintendent or a physician that the child is "mentally ill or has symptoms of mental illness" and is appropriate for placement. IC 12-26-3-1. The parent or legal guardian of a child under the age of eighteen may apply for the voluntary mental health placement. IC 12-26-3-2. No hearing is required. See Parham v. J.R. 442 U.S. 584, 99 S. Ct. 2493 (1973).

IC 31-34-19-5 is reasonably interpreted to require court authorization as a prerequisite to a voluntary mental health placement for a CHINS. When a voluntary mental health placement is made for a CHINS, the court cannot release the county office of family and children from its obligation to the child until a parent, guardian, or other responsible person approved by the court assumes the obligation. IC 31-34-19-5.

C. Mental Health Commitment

A temporary civil commitment may be appropriate when a child is mentally ill and is either gravely disabled or dangerous to himself or others. IC 12-26-6-1. Mental illness is defined as a psychiatric disorder which substantially disturbs a person's thinking, feeling, or behavior and impairs the person's ability to function, including (but not limited to) the conditions of mental retardation, alcoholism, and addiction to narcotics or dangerous drugs. IC 12-7-2-130. There are four different types of detention under the commitment law: immediate police detention, IC 12-26-4; emergency detention for seventy-two hours, IC 12-26-5; temporary commitment (for less than ninety days), IC 12-26-6; and regular commitment (for a person who is suffering from a chronic mental illness which is reasonably expected to require custody, care, or treatment for a period in excess of ninety days), IC 12-26-7. A temporary commitment proceeding can be initiated by a petition filed by any person over the age of eighteen, with an attached written statement from a physician indicating the need for the commitment.

If the juvenile court determines that a mental health commitment is indicated, the court can either refer the matter to probate court for the commitment, or it can initiate its own commitment proceeding. IC 31-34-19-3; IC 31-30-1-5. However, the juvenile court only has the statutory authority to place a committed child into a "child caring institution" and cannot place the child into a community or state facility under the direction of the Division of Mental Health (DMH). If the juvenile judge believes that a DMH facility is more appropriate for the child, then the judge shall transfer the commitment proceeding to the probate court. IC 12-26-1-4(b); IC 31-34-19-3(1).

D. Outpatient Mental Health Commitment

IC 12-26-14-1 and IC 12-26-14-2 provide that if a mental health commitment hearing has been appropriately conducted, the court can order an outpatient commitment if the court finds, among other things, that (1) the individual is likely to benefit from outpatient therapy designed to decrease the individual's dangerousness or disability and (2) the outpatient program representative testifies that the program can accept the individual immediately. An outpatient commitment is often appropriate for an individual who can function safely in society on a strictly enforced medication regimen.

J.M.F. v. State, 721 N.E. 2d 267 (Ind. Ct. App. 1999), involved a minor who was placed in a residential facility by the juvenile court following a delinquency charge that he had molested his younger sister. Subsequently, the deputy prosecutor filed a petition for the involuntary civil commitment of the minor, and the minor was committed to an outpatient treatment program. The Court of Appeals reversed the commitment on the grounds that the trial court could not commit the child to an outpatient program without the recommendation of the child's examining physician, and without testimony that the child would be guaranteed immediate placement into the outpatient program.

E. Responsibilities of GAL/CASA and Office of Family and Children in Commitments

IC 12-26-8-1(a) requires the juvenile court to appoint a guardian ad litem or court appointed special advocate (CASA) for the child before it commences any commitment proceedings. IC 12-26-8-1(e) provides that an "advocate shall represent and protect the best interests of the child." IC 12-26-2-7 provides that the guardian ad litem/CASA is immune from civil liability if the advocate performs his/her duties in good faith, except for gross misconduct.

IC 12-26-8-6 grants the guardian ad litem/CASA access to all reports relevant to the child. IC 12-26-8-4 requires the guardian ad litem/CASA to visit the facility where the child is committed and evaluate the child's placement within thirty days after commitment, sixty days after commitment, and six months after commitment. IC 12-26-8-5 requires the guardian ad litem/CASA to submit a report of each review of the child's commitment to the juvenile court, the superintendent of the facility where the child is committed, the office of family and children, and each party to the commitment proceeding.

F. Responsibility of Office of Family and Children in Mental Health Placements

IC 31-34-19-4 provides that when a commitment proceeding involving a CHINS is pending in either the probate court or juvenile court, the juvenile court shall discharge the child or continue the court's CHINS proceedings under the juvenile law. However, if the child is under the custody or supervision of a county office of family and children, the juvenile court may not release the county office from the obligations of the county office to the child pending the outcome of the commitment proceeding. Under IC 12-26-8-9, the office of family and children shall report to the court on the progress in implementing a commitment at least every six months, and the office shall continue to perform the six month CHINS reviews required by the review hearing statute. IC 31-34-19-5 provides that when a voluntary mental health placement is made, the court cannot release the county office of family and children "from the obligation of the county office to the child until a parent, guardian, or other responsible person, approved by the court, assumes those obligations." IC 31-34-19-5. IC 31-40-1-2 provides that the county shall pay from the county family and children's funds the cost of any services ordered by the juvenile court for a child; however IC 12-24-13-6 provides that the office of family and children is responsible for the cost of treatment or maintenance of a child placed in a state institution only if the cost is reimbursable under the state Medicaid program.

In In Re E.I., 653 N.E. 2d 503 (Ind. Ct. App. 1995), the Court of Appeals reversed the juvenile court's joinder of the Department of Education (DOE), the Indiana Department of Mental Health (IDMH), and the Indiana Family and Social Services Administration (FSSA) as necessary parties in the CHINS proceeding involving a thirteen-year-old autistic and developmentally delayed child in need of an appropriate mental health placement. The Court ruled that the local office of family and children was responsible for the needs and placements of the child. Further the Court ruled that the trial court lacked authority to order those agencies to share in the costs of the child's residential placement, as the local office of family and children, rather than those designated state agencies, was responsible for those costs.

G. Responsibility of Division of Mental Health and State of Indiana for Mentally Ill Children

Y.A. by Fleener v. Bayh, 657 N.E. 2d 410 (Ind. Ct. App. 1995), was a class action suit brought against state officials by seriously emotionally disturbed youths under the age of eighteen alleging the need for residential placement. The plaintiffs sought mandatory injunctive relief and a court order declaring a duty on the state to provide safe, appropriate, and therapeutic placements. The plaintiffs argued that: (1) the Indiana Constitution, Article 9 section 1, and Indiana statutes imposed an affirmative obligation upon the state to develop and provide residential services for emotionally disturbed children, and (2) the state violated plaintiffs' due process rights by not safeguarding them from harm or providing them with minimally adequate treatment. The Court of Appeals affirmed the trial court's grant of summary judgment in favor of the state officials and rejected the plaintiffs' claimed right to placements. The Court reviewed IC 12-21-1-1 through 3 and IC 12-8-8-1 through 8 and concluded that "the legislature did not intend to provide the comprehensive residential services demanded by the plaintiffs." Id. at 416. The Court opined that "the statutes describing services to be provided by the Division of Mental Health reflect a conscious effort to limit services to those available under existing appropriations." Id. The Court reasoned, "we are not at liberty to fashion a degree of care for a particular segment of the class, nor are we enabled to direct the General Assembly to raise funds adequate for the executive to care for all members of the class in an unlimited fashion." Id. at 417-418. In ruling on the plaintiffs' due process claim, the Court found that a child in the custody of state officials has the constitutional right to be free from physical abuse or neglect, but did not extend this right to be free from some form of undifferentiated harm separate and apart from physical abuse or neglect. Id. at 419. The Court found no constitutional right to specific residential placement.

For additional case and statutory law on the responsibility of the Division of Mental Health see the following: Matter of Garrett, 631 N.E. 2d 11, 13 (Ind. Ct. App. 1994) (Department of Mental Health not responsible for mental health costs of juveniles); In Re Commitment of T.J., 614 N.E. 2d 559 (Ind. Ct. App. 1993) (probate court orders to the Department of Mental Health regarding placement of a mentally ill child were voidable for failure to join the Department as a party to the involuntary commitment, but a mandate procedure is

appropriate to compel the Department of Mental Health to perform a duty prescribed by law); In Re Commitment of A.N.B., 614 N.E. 2d 563, 567 (Ind. Ct. App. 1993) (probate court can use mandate procedure to force Department of Mental Health to make arrangements for child's admission to appropriate state facility, but Department of Mental Health not generally responsible for costs of child's commitment or placement as that financial obligation falls upon child's parents or other "responsible parties").

XI. CONTEMPT

A. Juvenile Court Authority in Contempt

IC 31-32-14-1 provides that the juvenile court may punish a person for contempt of court under IC 34-47.

B. Criminal Contempt

Criminal contempt can be either direct or indirect and may be punishable by fine or imprisonment. B.L. v. State, 688 N.E. 2d 1311, 1313 n. 2 (Ind. Ct. App. 1997). In Matter of Lemond, 413 N.E. 2d 228 (Ind. 1980), the Indiana Supreme Court held the juvenile court judge and an attorney and his client in indirect criminal contempt for circumventing its ruling under the Uniform Child Custody Jurisdiction Act through a "sham" CHINS proceeding. In that case the court defined indirect criminal contempt as follows:

A criminal contempt can be any act which manifests a disrespect for and defiance of a court. The willful and intentional disobedience of the orders of these courts can constitute indirect criminal contempt. In Re Perrello, (1973) 260 Ind. 26, 291 N.E. 2d 698. See Denny v. State, (1932) 203 Ind. 682, 182 N.E. 313. Lemond, 413 N.E. 2d at 231.

C. Direct Contempt

Direct contempt occurs when a person displays disruptive or unlawful behavior or creates a disturbance in the court. IC 34-47-2-1. The disturbance can be caused by talking, moving about, or by signs or gestures. IC 34-47-2-1(b)(2). Direct contempt can also occur when a witness refuses to testify, IC 34-47-2-2; however, failure of a properly subpoenaed witness to appear may be dealt with summarily by issuance of an attachment order rather than through a contempt proceeding, IC 34-47-1-1(c). An attorney can be held in direct contempt of court for failure to appear for a hearing. See In Re Nasser, 664 N.E. 2d 93 (Ind. 1994) (Courts have inherent power to punish summarily acts of direct contempt without formal charges or evidentiary hearing). See also Williams v. State, 690 N.E. 2d 315, 317 (Ind. Ct. App. 1997); IC 34-47-2-4.

D. Indirect Civil Contempt

Indirect civil contempt is not directed at a wrong against the court, but is an action to force compliance with a court order for the benefit of the party harmed by noncompliance. See Duemling v. Fort Wayne Community Concerts, Inc., 243 Ind. 521, 188 N.E. 2d 274, 276 (Ind. 1963); Moore v. Ferguson, 680 N.E. 2d 862, 865 (Ind. Ct. App. 1997). IC 31-34-3-1 provides that a person commits indirect contempt by "willful disobedience of any process, or any order lawfully issued." Indirect contempt can also occur as follows: interference with execution of process or an order, IC 34-47-3-2; influencing testimony, IC 34-47-3-3; or making a false or inaccurate report of a case, IC 34-47-3-4.

1. Initiating an Indirect Contempt Proceeding: Rule to Show Cause and Contempt Citation

Case law has long been the reference in Indiana for contempt procedures. An action for civil contempt is initiated by filing a petition that states the court order and the alleged violation of the order. Hays v. Hays, 216 Ind. 62, 66, 22 N.E. 2d 971, 972 (1939). The petition "must be sworn to by the complainant on his personal knowledge or supported by the affidavit of some one who has personal knowledge of the facts set out in the pleading." Denny v. State, 203 Ind. 682, 182 N.E. 313, 321 (1932). The petition is filed in the underlying case out of which it arose. Duemling v. Fort Wayne Community Concerts, Inc. 243 Ind. 521, 188 N.E. 2d 274, 277 (1963).

Despite this well established body of case law on contempt, it is significant to note that IC 34-47-1-1 provides that the statutory procedures set out in IC 34-47-2 and 3 shall apply to all proceedings for contempt in all courts of record in Indiana. IC 34-47-3-5 provides that a person charged with indirect contempt is entitled to be served a "rule of the court" against which the contempt was alleged to have been committed. The rule to show cause must set forth the facts constituting the alleged contempt with

specificity and reasonable certainty, and specify a time and place for the alleged contemnor to show cause why he should not be held in contempt. IC 34-47-3-5(d) provides that the rule to show cause must be supported by an information and fully verified by the oath or affirmation of some officer of the court or other responsible person. See Crowley v. Crowley, 708 N.E. 2d 42, 53 n. 8 (Ind. Ct. App. 1999) (procedural requirements of IC 34-47-3-5 are binding in contempt actions, but failure to issue rule to show cause upon contemnor prior to contempt citation did not violate contemnor's rights in this particular case). IC 34-47-4-1 provides that the court may order a citation issued to the sheriff for service upon the person alleged to be guilty of contempt, directing the person to appear before the court at the time fixed in the citation, and to show cause why the person should not be punished for contempt of court. The citation shall be served by the sheriff in the same manner as summons is served in a civil proceeding, and return should be made to the court issuing the citation.

In the divorce contempt case of Zillmer v. Lakins, 544 N.E. 2d 550 (Ind. App. 1989), the Court of Appeals dealt with the problem of giving notice of contempt proceedings to persons who do not keep the court, their counsel, and other parties advised of their whereabouts. In Zillmer the father attempted to serve the out-of-state mother with a Rule to Show Cause for her failure to comply with visitation orders, but service could not be obtained because the mother had changed addresses without notifying the court, her counsel, or the father. The Court ruled that a party is obliged to know and keep advised about the activities of an on-going lawsuit, and the party cannot frustrate enforcement of the court's orders by failing to advise the other parties or the court about address changes. The contempt ruling against the mother was upheld despite failure to give her actual notice of the contempt proceedings. Id. at 552.

2. Right to Counsel

In the case of In Re Marriage of Stariha, 509 N.E. 2d 1117, 1122 (Ind. Ct. App. 1987), the Court ruled that an indigent charged with contempt of court for failure to pay child support had a right to court appointed counsel and to be informed of that right before the contempt hearing.

3. Required Elements and Burden of Proof

In the URESA child support case of Esteb v. Enright by State, 563 N.E. 2d 139, 141 (Ind. Ct. App. 1990), the Court reiterated case law limitations on indirect civil contempt: (1) the parent cannot be held in contempt if he does not have money to pay the support and is unable to secure it and (2) the parent who is the subject of the contempt order has the burden of proving that the failure to comply was not willful or was otherwise excused. See also Hays v. Hays, 216 Ind. 62, 22 N.E. 2d 971 (1939) (burden on the contemnor to show inability to comply with order); Williamson v. Creamer, 722 N.E. 2d 863 (Ind. Ct. App. 2000) (mother had burden of showing refusal to allow visitation was not willful). In Crowl v. Berryhill, 678 N.E. 2d 828, 830 (Ind. Ct. App. 1997), the Court stated that evidence that a party is aware of a court order and willfully disobeys the order is sufficient to support a finding of contempt, and even an erroneous order must still be obeyed until modified by court order or reversed on appeal. The court shall give the contemnor an opportunity to purge himself of the contempt. See Moore v. Ferguson, 680 N.E. 2d 862, 866 (Ind. Ct. App. 1997) (the only limit on a sentence for indirect civil contempt is that court must give contemnor opportunity to purge himself from contempt); Pitts v. Johnson Cty. Dept. of Public Welfare, 491 N.E. 2d 1013, 1016 (Ind. Ct. App. 1986) (court erred in not permitting mother to conform to court's original order requiring her to release confidential mental health records).

4. Remedies

Punishment is not the objective of civil contempt. Civil contempt remedies may be used to coerce compliance with the court order or to compensate the injured party for violations of the court order. See Crowl v. Berryhill, 678 N.E. 2d 828, 832 (Ind. Ct. App. 1997) (trial court's order to mother to pay grandparent's attorney fees was proper remedy to compensate grandparents for expenses incurred due to mother's contempt in violating court ordered grandparent visitation); Clark v. Atkins, 489 N.E. 2d 90, 98 (Ind. Ct. App. 1986) (mother ordered to pay father's travel expenses that were the result of mother's non-compliance with visitation order).

Incarceration can be used to coerce compliance with a court order as a remedy in indirect civil contempt. See Duemling v. Fort Wayne Community Concerts, Inc., 243 Ind. 521, 188 N.E. 2d 274 (1963) (court issued jail commitment, but suspended commitment upon contemnor's compliance with restraining order); Allee v. State, 462 N.E. 2d 1074 (Ind. Ct. App. 1984) (incarceration to coerce payment of court ordered blood test cost not a violation of constitutional prohibition of imprisonment for debt). If the court

uses incarceration to coerce a contemnor to do an affirmative act, the court must provide that the incarceration will end as soon as the contemnor complies; the contemnor must have the "key of his prison in his own pocket." Moore v. Ferguson, 680 N.E. 2d 862, 865 (Ind. Ct. App. 1997). See also Williamson v. Creamer, 722 N.E. 2d 863 (Ind. Ct. App. 2000) (mother ordered incarcerated for thirty-two days for violating visitation order); Ritter v. Bartholomew County DPW, 564 N.E. 2d 329, 330 (Ind. Ct. App. 1990) (father sentenced to fifteen days in jail with opportunity to purge himself of contempt by paying the arrearage, the attorney fees, and a bond fee).

E. Possible Contempt Actions Against Parents

1. Failure to Comply with Child Support or Reimbursement Orders

See this Chapter above at IX. H. for contempt cases for failure to comply with reimbursement orders.

2. Failure to Comply with Parental Participation Order or Other CHINS Orders

Although not an issue on appeal, the Court noted in the statement of facts in S.M. v. Elkhart Cty. Off. of Fam. & Child., 706 N.E. 2d 596 (Ind. Ct. App. 1999), that the mother was incarcerated twice for contempt of court for violating orders to participate in alcohol treatment. In Mikel v. Elkhart County DPW, 622 N.E. 2d 225 (Ind. Ct. App. 1993), the juvenile court adjudicated the children in need of services and ordered the father to pay support, participate in psychological testing, and finish parenting classes. The court found the father in contempt for failure to obey the orders and sentenced him to jail for 180 days, or alternatively to serve the sentence in a mental health facility. The Court of Appeals reversed the contempt judgment because the state had not complied with the parental participation petition statute. The Court ruled that the parental participation petition is jurisdictional, and compliance with that statute "is the only means a court may mandate parental involvement subject to contempt of court." Id. at 228.

3. Failure to Produce Child

In the case of Baltimore City Dept. of S.S. v. Bouknight, 493 U.S. 549, 110 S. Ct. 900 (1990), the U.S. Supreme Court upheld a juvenile court's order of civil contempt for failure of a mother to produce her child as earlier ordered by the juvenile court. The Supreme Court ruled that the mother's Fifth Amendment privilege against self-incrimination could not be invoked to avoid her compliance with the state's non-criminal regulatory scheme for the protection of children.

The facts of Bouknight show that the Baltimore City Department of Social Services (Department) obtained an adjudication in the juvenile court that infant Maurice Bouknight (child) was a "child in need of assistance" due to his mother's abuse. The juvenile court ordered the child to continue in the mother's custody upon the mother's agreement to the conditions of a court-approved protective supervision order. When the mother violated the conditions of the order by refusing to reveal the location of the child to the Department of Social Services, the Department petitioned the court to remove the child from the mother. At the hearing on the removal request, the court ordered the removal of the child from the mother, issued an order to show cause why the mother should not be held in civil contempt for failure to produce the child, and issued a bench warrant for the mother's appearance. After several hearings, the juvenile court found the mother in civil contempt for failure to produce the child as ordered and directed that the mother be imprisoned until she purged herself of the contempt by producing the child or by telling the court.

4. Failure to Allow Visitation or to Visit

In custody cases a parent may face contempt proceedings for denying visitation in violation of a court order, even if the parent believes the child is at risk during visitation or the child does not want to visit. The available remedy for the parent is to obtain a modification or suspension of the visitation order, not to unilaterally stop visitation. See Williamson v. Creamer, 722 N.E. 2d 863 (Ind. Ct. App. 2000) (mother held in contempt for stopping visitation despite her allegations child was physically and sexually abused during visitation by paternal stepgrandfather); Crowl v. Berryhill, 678 N.E. 2d 828 (Ind. Ct. App. 1997) (mother held in contempt for violating court order for child to visit grandparents); Hartzell v. Norman T.L., 629 N.E. 2d 1292 (Ind. Ct. App. 1994) (Court affirmed contempt ruling against mother for violation of visitation order, despite mother's allegations that child didn't want to visit father and mother's concern that father had molested child); but see Piercey v. Piercey, 727 N.E. 2d 26 (Ind. Ct. App. 2000) (no error

in court not finding mother in contempt for violating visitation order, because mother's violation of order not willful given her concern for safety of children).

In the divorce visitation case of Farmer v. Farmer, 735 N.E. 2d 285 (Ind. Ct. App. 2000), the Court found that the trial court erred in ruling that father's suspended jail time on contempt for failure to pay child support could be revoked on the basis of the father's failure to pay attorney fees or visit the child. On the issue of child visitation, the Court said that there is no duty requiring a parent to visit or maintain a relationship with the child and a parent should not be forced to visit his child under threat of imprisonment. Id. at 289-290. Arguably, this ruling would not apply to CHINS cases, in which parent visitation may be critical to the reunification efforts and civil contempt for failure to visit would be an appropriate remedy in light of the reunification goal.

5. Failure to Comply with Court Restrictions on Visitation or Custody

In Bechtel v. Bechtel, 536 N.E. 2d 1053 (Ind. Ct. App. 1989), the wife alleged error in the trial court's ruling that she was in contempt of court for violating the divorce order by allowing an unrelated male in her home, and in sentencing her to the Elkhart County Security Center as a sanction for the contempt. The Court of Appeals rejected the case on jurisdictional grounds for failure to perfect the interlocutory appeal, but expressed an opinion on the sanction argument. Without clarifying the distinction between civil and criminal sanctions, the Court stated that "it is within the inherent power of the trial court to fashion an appropriate punishment for the disobedience of the court's order." Id. at 1056.

6. Failure to Appear for Hearing

In Williams v. State Ex Rel. Harris, 690 N.E. 2d 315 (Ind. Ct. App. 1997), the Court ruled that the father could be held in indirect civil contempt, but not direct contempt, for failure to appear at a child support review hearing.

F. Contempt by a Child In Need of Services or Delinquent Status Offender

The case law generally holds that the court cannot incarcerate a CHINS or delinquent status offender for willful violations of court orders. In L.J.F v. Lake County Dept. of Pub. Welfare, 484 N.E. 2d 40 (Ind. Ct. App. 1985), the Court stated in footnote 1 that it was error to hold a child in need of services in contempt for running away from a court ordered placement. The footnote ruling is followed by a citation to W.M. v. State, 437 N.E. 2d 1028 (Ind. Ct. App. 1982). W.M. dealt with a child charged with criminal contempt for running away from a court ordered placement while a delinquency runaway charge was pending. The Court stated in W.M. that the juvenile contempt statute was intended to allow juvenile courts a means of keeping order in the court room and of obtaining jurisdiction over adults in some circumstances, but was not intended to allow incarceration of children for their noncriminal behaviors. But see T.T. v. State, 439 N.E. 2d 655, 659 (Ind. Ct. App. 1982) (criminal contempt not offense for purpose of establishing juvenile delinquency, but juvenile court "faced with a juvenile who willfully disobeys a lawful court order" may utilize contempt power if necessary procedures are followed). In the more recent case of B.L. v. State, 688 N.E. 2d 1311 (Ind. Ct. App. 1997), the Court ruled that the inherent contempt power of the juvenile court could not be used to incarcerate a status delinquent who repeatedly violated the court's order to attend school, as the legislature has enacted separate statutes and procedures for the limited secure detention of repeat truants and runaways.

XII. EXPUNGEMENT

A. Petition for Expungement

IC 31-39-8-1 through 6 provide for the expungement by the court of court, law enforcement, and service provider records related to juvenile court proceedings. In Dubois County Office of Family and Children v Adams, 671 N.E. 2d 202, 203 (Ind. Ct. App. 1996), the Court clarified that the statutory expungement procedures are only applicable to the records regarding cases that are before the juvenile court.

IC 31-39-8-2 provides that "any person" may petition the court at any time to remove from the files of the court, law enforcement, or service providers the records pertaining to "the person's" involvement in juvenile court proceedings. The expungement statutes do not specifically require a written expungement petition, although that would be the preferred practice.

The petition should set out facts on each of the criteria stated in IC 31-39-8-3(1) through (9). The petition should list the name and address of each law enforcement unit (city, county, state, or university) and each service provider that may have maintained a record on the child or family.

B. Factors and Standards for Granting Expungement

IC 31-39-8-3 sets out the factors the court is to consider in reviewing a petition to expunge, including the following: the best interests of child; age of child during child's contact with the system; nature of allegations regarding child; whether there was an informal adjustment or adjudication; disposition of the case; manner in which person participated in court ordered or supervised services; time during which person has been without contact with the system; whether person acquired criminal records; and person's current status.

The juvenile code contains additional consideration for the expungement of child abuse or neglect information held by the court. IC 31-39-8-4 states:

- (a) Child abuse or neglect information may be expunged under this chapter if the probative value of the information is so doubtful as to outweigh the information's validity.
- (b) Child abuse or neglect information shall be expunged if the information is determined to be unsubstantiated after:
 - (1) an investigation of a report of a child who may be a victim of child abuse or neglect by the child protection service; or
 - (2) a court proceeding.

In Dubois County Office of Family and Children v. Adams, 671 N.E. 2d 202 (Ind. Ct. App. 1996), a licensed foster parent (Adams) was accused of molesting two children for whom his wife was babysitting. The Dubois County Office of Family and Children (DCOFC) and the Jasper City Policy Department investigated and substantiated the allegations, but no criminal charges were filed against Adams. When the licensing foster care agency was notified of the substantiated allegations, the agency removed a foster child who was a ward of the Jasper County Office of Family and Children from the Adams home and ceased future foster care placements in the home. Adams filed a petition requesting that the Dubois County Juvenile Court order the DCOFC and other agencies to expunge records relating to the alleged sexual molestation. The DCOFC filed a motion to dismiss. The motion was denied and DCOFC filed an interlocutory appeal. The Court of Appeals ruled in DCOFC's favor that the Dubois Juvenile Court lacked subject matter jurisdiction to order the expungement of DCOFC records. IC 31-6-8-2 (recodified at IC 31-39-8-2) authorizes the juvenile court only to order the expungement of records relating to proceedings before that court. Neither the alleged molested children nor the former foster child were involved in juvenile proceedings in the Dubois Juvenile Court.

C. Procedure if Expungement Order Issued

IC 31-39-8-5 provides that if the court grants an expungement petition, the court shall order each law enforcement agency and service provider to send the records to the court. IC 31-39-8-6 provides that these records, together with the court's records, may be destroyed or given to the person to whom the records pertain.

D. Administrative Procedure to Obtain Expungement of Office of Family and Children Records

Independent of the provisions in IC 31-39-8, an individual can seek expungement of specific records held by the office of family and children. See Dubois County Office of Family and Children v. Adams, 671 N.E. 2d 202, 203 n. 3 (Ind. Ct. App. 1996) (availability of administrative procedures to expunge office of family and children records). IC 31-33-17-8 provides that the office of family and children shall give notice to the parent, guardian, or custodian of a child that a substantiated report of abuse or neglect has been entered. The notice shall be made within thirty days of the substantiation. Notice shall also be given to the alleged perpetrator, with an advisement that the perpetrator has thirty days to request a hearing to contest the classification of the report and to seek expungement of the report.

XIII. APPEAL

See also Appendix 4 entitled "Appeals from Involuntary Termination of Parent-Child Relationship: Some Basic

Issues.”

A. Authority to Appeal CHINS Judgment

IC 31-32-15-1 provides that “[a]ppeals may be taken as provided by law.” The parties to the CHINS case (listed at IC 31-34-9-7 as the child; the child’s parent, guardian or custodian; the office of family and children; the guardian ad litem or court appointed special advocate) have standing to file an appeal, and should be named as a party to any appeal filed.

B. Mootness

In the case of Roark v. Roark, 551 N.E. 2d 865 (Ind. Ct. App. 1990), the welfare department alleged that the father's appeal of the CHINS judgment was moot because the father had been reunited with the family and the judge had closed the case at the last review hearing. The Court rejected the welfare department's argument, and agreed with the father that "a CHINS finding presents collateral consequences serious enough to justify consideration of this appeal on its merits." Id. at 867. The Court noted that IC 31-6-8-1 (recodified at IC 31-39-2) allows the release of CHINS records for a variety of reasons, and that the release of such information could be harmful to the father in the future. Thus, despite the reunion of the family and closure of the juvenile case, the appeal was not moot because of the "potentially devastating consequences of a CHINS determination." Id. at 868. See also Mikel v. Elkhart County DPW, 622 N.E. 2d 225, 227 (Ind. Ct. App. 1993) (CHINS contempt ruling not moot even though father had served contempt sentence); Matter of Jordan, 616 N.E. 2d 388, 391 (Ind. Ct. App. 1993) (appeal not moot because CHINS detention case fell within public interest exception and issue likely to recur).

C. Policy for Expedited Appeals of Cases Involving Children

In Matter of J.L.V., Jr., 667 N.E. 2d 186, 191 (Ind. Ct. App. 1996), Judge Robertson of the Court of Appeals dissented to the majority’s dismissal of an appeal of the factfinding judgment filed prior to the dispositional hearing as premature. Judge Robertson noted that all appeals involving the care of children shall be given expedited consideration. This policy was announced by Chief Justice Randall T. Shepard in the January 17, 1996 State of the Judiciary Address to the Indiana General Assembly, and is also stated in footnote 1 of the grandparent visitation case, In Re Walker, 665 N.E. 2d 586, 587 (Ind. 1996).

D. Final Appealable Judgements and Interlocutory Appeals

The dispositional order is the final appealable judgment. See Matter of J.L.V., Jr., 667 N.E. 2d 186, 189 (Ind. Ct. App. 1996) (entry of dispositional order following dispositional hearing constitutes final appealable judgment, and appeals sought prior to issuance of dispositional order are interlocutory in nature and must accord with procedures required for certification of interlocutory appeal under Ind. Appellate Rule 4(B)); T.Y.T. v. Allen County Div. of Family, 714 N.E. 2d 752, 756 n 3 (Ind. Ct. App. 1999) (Court acknowledged that dispositional order rather than factfinding judgment is final appealable order, but since dispositional hearing was conducted eight days after factfinding hearing Court properly proceeded to hear appeal on merits). However, in Hallberg v. Hendricks Cty. Office, 662 N.E. 2d 639 (Ind. Ct. App. 1996), the Court rejected the argument of the office of family and children that the appeal was premature because the court had not conducted a dispositional hearing. The Court noted that the trial court had entered judgment of CHINS following a factfinding hearing, and the court had determined that the children should remain in the custody of their mother and receive services recommended by the office of family and children. Id. at 643. The Court stated:

Thus, although the trial court did not hold a separate dispositional hearing, we believe that the trial court’s order finally determined the rights of the parties. Accordingly, a final and appealable judgment exists and we will address the merits of Glenn’s [father’s] appeal.

Id. at 643.

Appeals may be taken from interlocutory orders prior to final judgment in compliance with Ind. Appellate Rule 4(B)(6). The case law is not clear whether a placement ruling subsequent to a dispositional hearing is a final appealable order, or subject to an interlocutory appeal. In E.R. v. Office of Family & Children, 729 N.E. 2d 1052 (Ind. Ct. App. 2000), the Court certified for interlocutory appeal the court’s post-dispositional order, which provided in part for the continued foster care placement of four of the children and ordered foster care placement for a fifth child. In determining that the interlocutory appeal was appropriate, the Court stated:

The placement decisions are subject to change while the CHINS proceedings are pending, and do not

finally determine placement of the children. The requirement that the juvenile court must hold a formal hearing for each periodic review, however, results in a formal determination regarding placement. Because Lopez and Rivera [parents] timely filed their praecipe after the May 3, 1999 placement decision as to J.O.R. [child] and the periodic review of the other children's placement, we find that the placement decisions are reviewable in this interlocutory appeal.

Id. at 1060.

Although the termination case of Smith v. Div. of Family and Children Serv., 729 N.E. 2d 1049 (Ind. Ct. App. 2000), did not deal with an appeal of a placement order, the Court's treatment of the placement order indicates that it was a final judgment, at least for purposes of subsequent termination proceedings. In that case the Court ruled that the post-dispositional removal of the children from the parent constituted a modification of the original dispositional order and served as a dispositional decree from which the six month time requirement for termination of parental rights could be calculated. Id. at 1052.

E. Standard of Appellate Review

In reviewing the sufficiency of the evidence the appellate court will not reweigh the evidence or judge the credibility of witnesses. In Re C.W., 723 N.E. 2d 956, 960 (Ind. Ct. App. 2000); Alexander v. La Porte Co. Welfare Dept., 465 N.E. 2d 223 (Ind. Ct. App. 1984). The ruling of the trial court will not be set aside unless it is clearly erroneous. In Re Wardship of B.C., 441 N.E. 2d 208 (Ind. 1982). The appellate court will consider the evidence most favorable to the judgment. J.K.C v. Fountain County Dept. of Pub. Wel., 470 N.E. 2d 88 (Ind. Ct. App. 1984).

In the CHINS case of Hallberg v. Hendricks Cty. Office, 662 N.E. 2d 639 (Ind. Ct. App. 1996), the Court reiterated the standard of appeal when the court issues specific findings of facts:

When reviewing a trial court's findings of fact and conclusions of law, we engage in a two-tier standard of review. We must first determine whether the evidence supports the findings and second, whether the findings support the judgment. The judgment will be reversed only if it is clearly erroneous, and the judgment is clearly erroneous only when it is unsupported by the findings of fact and conclusions of law entered on those findings. [citations omitted]

Id. at 643.

F. Waiver of Appealable Issues

Issues may be waived by failure to file a timely appeal. In E.R. v. Office of Family & Children, 729 N.E. 2d 1052 (Ind. Ct. App. 2000), the Court ruled that the parents waived appeal of the judgment of CHINS on the four older children by failing to file the appeal in a timely manner following the CHINS judgment.

A party may waive an error if the Court determines that the party invited the error by its own action or inaction. In A.D. v. Clark, 737 N.E. 2d 1214 (Ind. Ct. App. 2000), the Court ruled that the guardian ad litem waived the statutory requirement that the termination trial commence ninety days after the filing of the termination petition, by failure to object to continuances of the hearing. Thus, the Court determined that any error in failing to schedule the hearing within the ninety days, and the trial court's subsequent stay of the termination case until the adoption case involving the same child was completed, was invited by the guardian ad litem and thereby waived. Id. at 1216, 1217. The Court stated that "A party may not take advantage of an error which he commits, invites, or which is the natural consequence of his own neglect or misconduct." Id. at 1217. In E.R. v. Office of Family & Children, 729 N.E. 2d 1052 (Ind. Ct. App. 2000), the Court ruled that any error in the trial court's failure to place Hispanic children with relatives in Mexico was invited, and thus waived, by the failure of the parents and the Mexican Consulate to provide adequate information about the Mexican relatives.

There is conflicting case law on whether issues from the CHINS case can be raised in the appeal of the termination case, or whether those issues are waived by failure to timely raise them in the CHINS case. On appeal of the termination judgment in Smith v. Marion County DPW, 635 N.E. 2d 1144 (Ind. Ct. App. 1994), the Court ruled that the mother waived her right to appeal the issue of court appointed counsel in the underlying CHINS proceeding by her failure to do one or more of the following: file an appeal after issuance of the CHINS dispositional decree; file a motion to set aside the CHINS judgment; or raise the CHINS counsel issue at the termination of parental rights trial. The issue was waived by raising it for the first time in the appeal of the termination judgment. Id. at 1148. However, in other termination cases procedural issues

from the CHINS case were raised on appeal under a theory of fundamental error and denial of due process. In A.P. v. PCOFC, 734 N.E. 2d 1107 (Ind. Ct. App. 2000), petition for transfer pending, the Court reversed the termination judgment due to multiple procedural errors, with the bulk of those errors occurring in the underlying CHINS case in which there had been no appeal. The Court noted that the CHINS and termination statutes are “interlocking” and not independent of one another, and stated:

Thus, procedural irregularities in a CHINS proceeding may be of such import that they deprive a parent of procedural due process with respect to the termination of her parental rights. It would be incongruous to hold that a county, with the assistance of a juvenile court, may commence CHINS proceedings for a child and removal a child from his or her home, yet disregard various portions of the CHINS and termination statutes on several occasions and still terminate parental rights following the passage of time after a CHINS dispositional decree and a child’s removal from home.

Id. at 1112-1113.

In the A.P. case the following issues were neither raised on appeal in the CHINS case nor directly raised by the parties on appeal in the termination case: (1) the CHINS petition was unsigned and unverified; (2) no issuance of an original or modified dispositional decree containing the requisite findings on the removal of the children from the home; (3) no holding of a permanency hearing to examine whether the parent’s procedural rights were being safeguarded; (4) no compliance with the protective order statute by failing to list findings supporting the no contact order against the father; (5) failure to provide transportation of incarcerated father to review hearings and hearings on no contact orders. See also Matter of R.R., 587 N.E. 2d 1341 (Ind. Ct. App. 1992) (Court granted mother’s motions for relief from judgments to reverse both termination and underlying CHINS judgments based, in part, on procedural errors that had not been timely appealed in the CHINS case); this Chapter above Roman Numeral I. at F. 3. for discussion of Ferbert v. Marion County OFC, N.E. 2d (Ind. Ct. App. 2001) (Court considered whether potential error in case plan in CHINS proceeding denied parents due process of law in subsequent termination proceeding).

XIV. MOTION FOR RELIEF FROM JUDGMENT

In Matter of R.R., 587 N.E. 2d 1341 (Ind. Ct. App. 1992), the Court ruled that the mother's motions for relief from the CHINS and termination judgments should be granted. The Court noted that Ind. Trial Rule 60(B) is addressed to the equitable discretion of the trial court. Id. at 1342-1343. The motion may not deal with the substantive legal merits of the judgment, but is limited to the "procedural, equitable grounds justifying relief from the finality of the judgment." Id. A trial court ruling on a motion for relief from judgment is reviewed on appeal under the abuse of discretion standard. The grounds for the motion for relief from judgment in the CHINS case in R.R. were (1) failure to appoint a guardian ad litem or representative for the child; (2) failure to follow statutory procedures; and (3) failure to appoint counsel for mother. Id. at 1345.

XV. MODIFICATION OF DISPOSITIONAL DECREE

A. Overview

Modification refers to the process of changing the court’s dispositional orders for the child and family. IC 31-34-19-9 requires that the court advise the child and the child’s parent, guardian, or custodian at the dispositional hearing of the modification statutes. The modification statutes provide that the parties may seek, or the court may order, modifications at any dispositional hearing. Often modifications are requested and ordered at review hearings.

B. Jurisdiction

IC 31-34-23-1 provides that a dispositional decree may be modified as long as the court retains jurisdiction. IC 31-30-2-1 provides that the juvenile court retains jurisdiction over the child and the parent, guardian, or custodian until the child attains the age of twenty-one unless the parties are discharged by the court at an earlier time.

C. Standing to Seek Modification

IC 31-34-23-1 provides that the court can modify the dispositional decree on its own motion or upon the motion of any of the following: the child; the child’s parent, guardian, custodian or guardian ad litem; the

probation officer; the caseworker; the prosecuting attorney; the attorney for the office of family and children; or any person providing services to the child or to the child's parent, guardian or custodian under a decree of the court. The statute does not specifically authorize the court appointed special advocate (CASA) to file a motion for modification. The CASA may fit into the category of "any person providing services to the child" under a court decree, as stated above.

D. Types of Modifications

IC 31-34-23-3 specifically provides for two types of modifications: (1) emergency change in the child's residence and (2) any other modification of the dispositional decree. The statute seems clear that emergency changes in placement must comply with the modification procedures, but beyond that, the language is incredibly broad. The question is raised as to whether a party must make a modification motion for every addition or change to the court orders affecting the child or the child's parent, guardian, or custodian, or whether these changes can occur naturally within the context of regularly scheduled hearings. Arguably, it is the better practice to incorporate the necessary modification process into status, review, and permanency hearings. This may be done as simply as requesting modifications in progress or review reports and making oral requests for modification in the hearing which can be ruled on during the hearing. However, recommended modifications of a more substantial nature requested outside the context of an upcoming review hearing, may necessitate a written petition, notice, and separate hearing. See this Chapter below Roman Numeral XV. at G. for procedures and hearings on modifications.

E. Adding New Allegations to CHINS Case Through the Modification Process

The modification process can be used to add a new allegation of child abuse or neglect to the existing CHINS case. For example, a child may have been adjudicated CHINS due to parental neglect, but it is subsequently alleged that the child is being sexually molested by the mother. The molestation allegation can be alleged in a modification petition, rather than filing a new CHINS petition. There may be consequences for failing to bring "later discovered" allegations formally before the court in this manner, i.e.: (1) the parent does not have a fair opportunity to refute the allegations; (2) the parent does not receive the services necessary to resolve the newly identified parenting problem and (3) arguably the office of family and children cannot use unproven allegations as grounds for contesting discharge of the child from wardship or in seeking termination of the parent-child relationship. Also, the modification process can keep the court record current on the services offered to the family and further efforts needed to obtain parent-child reunion.

In the termination case of Matter of D.T., 547 N.E. 2d 278 (Ind. Ct. App. 1989), the CHINS petition and adjudication regarding the mother's four children dealt with sexual abuse and neglect of the children, but only one child was initially removed from the home. At the six month review hearing, the office of family and children obtained a modification to remove the three remaining children from the home due to the mother's psychological problems that prevented the mother from fulfilling her parental obligations. In its order following the hearing, the court approved the review, modified the dispositional order, and incorporated the case plan in its order. Id. at 284. The case plan provided for the mother to cooperate with the office of family and children and to utilize counseling, home-based services, and homemaker services. A termination petition was filed and granted after a hearing. The mother claimed on appeal that she did not have notice of all the conditions she needed to remedy, including her low income and inadequate housing. The Court rejected the mother's argument. It ruled that the dispositional modification order gave the mother adequate notice of the conditions she had to remedy to obtain reunion with her children and to avoid the termination of her parental rights. The Court stated:

We conclude, based upon our review of the original CHINS adjudication and dispositions, that Lola [mother] had adequate notice that the reason for the court's adjudication was her inability to care for and provide for her children, including but not limited to her lack of income and ability to provide shelter. If her situation did not improve, she faced the possibility that her parental rights would be terminated. While it is true that J.B.'s [child's] removal from the home was initially the result of sexual abuse, it became obvious that independent of, and perhaps because of the sexual abuse, Lola was unable to provide her four children with the care and necessities they needed. It is not necessary that new CHINS proceedings be initiated once new grounds for intervention by the DPW are discovered.

Id. at 284 (citations omitted).

The Court of Appeals indicated that new CHINS proceedings need not be initiated each time an additional reason for intervention is discovered in the termination cases of Matter of Y.D.R. 567 N.E. 2d 872, 876 (Ind.

Ct. App. 1991), and Matter of C.D., 614 N.E. 2d 591, 593 (Ind. Ct. App. 1993).

F. Modification Guidelines and Standard

The modification statutes at IC 31-34-23 do not provide criteria or guidelines for determining when modification is appropriate. Reasonably, the dispositional guidelines stated at IC 31-34-19-6 are applicable to modification of a dispositional order. See this Chapter above at II. H. for list of dispositional guidelines. This position is supported by the delinquency case of Matter of L.J.M., 473 N.E. 2d 636, 641 (Ind. Ct. App. 1985), in which the Court ruled that the juvenile court's modification order changing the child's placement from a residential facility to the Indiana Boys School was an abuse of discretion because it was not consistent with the dispositional guidelines. Further, if the court is making a placement of the child outside of the home, pursuant to IC 31-34-19-7 the court should consider placement with a suitable relative.

G. Procedure for Modification

1. Modification Motion

IC 31-34-23-1 provides that the person seeking to modify the dispositional decree shall make a motion for modification. The statute does not prescribe a format for the pleading. It is recommended that the pleading state the modification sought and the facts supporting the modification. Specificity in pleading and an attached affidavit with relevant facts are recommended to enable the court to grant the modification without a hearing when appropriate.

When evidence at the review hearing indicates the need for modification, the parties, or the court of its own motion, can orally request the modification. IC 31-34-23-1. The opposing parties may object to proceeding on the motion in the immediate hearing due to lack of advance notice and lack of modification report. See IC 31-34-23-3(b) (notice of modification petition required); IC 31-34-21-3(c) and IC 31-34-23-4 (office of family and children required to prepare report when modification recommended).

2. Notice

IC 31-34-19-9 requires the court to give oral notification to the child and the child's parent, guardian or custodian at the dispositional hearing of the modification statutes and procedures. IC 31-34-23-3 requires the court to give notice of all requested modifications "to those persons affected." The quoted language is vague. It is recommended that notice be given to all parties and involved persons.

IC 31-34-23-3 provides that the court can issue an order without a hearing on a request for an emergency change of the child's residence. It appears that notice of the emergency request is not required, since the next section of the statute provides that notice shall be given following the emergency order and a hearing shall be set if requested.

In Matter of C.B., 616 N.E. 2d 763 (Ind. Ct. App. 1993), the Court of Appeals reversed a juvenile court order to modify the dispositional order by returning a CHINS to Indiana from Tennessee. The juvenile court had placed the CHINS in Tennessee with her uncle under the Interstate Compact on the Interstate Placement of Children. Although the Court ruled that the Indiana juvenile court did have jurisdiction under the Interstate Compact to obtain the return of the child, the court's orders for return of the child and payment of expenses were invalid because the court had not given notice to the child's uncle (custodian/guardian) in Tennessee regarding the modification. The C.B. opinion notes that the court has the authority to modify the disposition, but notice must be given. Id. at 769. In Matter of L.J.M., 473 N.E. 2d 637, 640 (Ind. Ct. App. 1985), a delinquency case, the Court of Appeals stated that "the modification statute (including the requirement of notice) must be strictly followed." In that case the Court found error in failure to give notice of the modification prior to the removal of the delinquent from the court ordered residential facility and placement into the county jail. See also S.L.B. v. State, 434 N.E. 2d 155 (Ind. Ct. App. 1982) (failure to give child written notice of possible revocation of suspended Girls School Commitment at modification hearing not reversible error in delinquency case because child sufficiently apprised of proposed modification in advance of hearing).

3. Modification Report

Several different statutes refer to the preparation of a written modification report. IC 31-34-21-1 provides that the court can order a progress report at any time after the original dispositional decree, and shall proceed under the modification statutes at IC 31-34-23 if modification is recommended. IC 31-34-

22-1(c) states that before a periodic review hearing or permanency hearing:

(c) If modification of the dispositional decree is recommended, the probation department or the county office of family and children shall prepare a modification report containing the information required by IC 31-34-18 [predispositional report] and request a formal court hearing.

IC 31-34-23-4 states that:

If a hearing is required, IC 31-34-18 [predispositional report] governs the preparation and use of a modification report. The report shall be prepared if the state or any person other than the child or the child's parent, guardian, guardian ad litem, or custodian is requesting the modification.

Although IC 31-34-23-4 could be interpreted to mean that reports are necessary only when a hearing is required, the better practice and an equally compelling interpretation of the statutes taken together, is for the office of family and children to prepare a modification report whenever the office of family and children seeks modification.

IC 31-34-23-4 provides that the modification report shall be prepared based on the predispositional report statutes set out at IC 31-34-18 which require consideration of: (1) the needs of the child; (2) the need and extent of parental participation; (3) financial responsibility; and (4) the dispositional guidelines. IC 31-34-18-5 provides that the court can order an examination of the child, and also order an examination of the child's parent, guardian or custodian if that person consents. Pursuant to IC 31-34-18-6 the report should be made available to the child and parties within a reasonable time before the hearing, unless it is determined on the record that the report should not be provided to the child or the child's parent, guardian or custodian.

Reasonably, a progress or status review report can be subtitled a modification report to avoid the need to create multiple reports, when possible.

4. When is a Modification Hearing Required?

IC 31-34-23-3(a) requires that a hearing be held after the court has granted an emergency change in the child's residence, if the parties request a hearing. It is recommended that changes in the placement of a child who has been adjudicated a CHINS, whether of an emergency nature or not, should involve notice and an opportunity for a hearing. This may be a separate hearing or incorporated into an already scheduled review or status hearing. Federal law at 42 U.S.C. 675(5) (C) provides that "procedural safeguards shall also be applied with respect to parental rights pertaining to the removal of the child from the home of his parents, [and] to change in the child's placement." Although the modification statutes were not referenced in Smith v. Div. of Family & Children Serv., 729 N.E. 2d 1049, 1051 (Ind. Ct. App. 2000), the Court of Appeals reprinted the juvenile court's findings and orders advising the mother of the children's change of placement (removal from her home), and providing her a period of time in which to request a hearing. It is also recommended that when a change of placement involves the removal of the child from the parent's home, the court should enter findings supporting the need for the removal of the child from the home as a modification, or comply with the custody and detention procedures at IC 31-34-2 through 6. See this Chapter below Roman Numeral XV. at G. 6. for discussion on the need for findings when the court modifies the child's placement.

Aside from changes in the child's placement, the modification statute, IC 31-34-23-3(b), provides that the court shall give notice of any requested modification and "may" hold a hearing. The discretionary language can be interpreted to mean that a hearing is not required, but the court has the discretion to set a hearing or one may be set if requested by the parties. Arguably a hearing is required if the modification is directed at parental participation or financial responsibility. The initial hearing statute, IC 31-34-10-5 (3), requires the court to notify the parent, guardian or custodian of the right to controvert any allegations concerning parental participation and financial responsibility during the CHINS proceeding. Also, IC 31-32-2-3 provides that the parent, guardian, or custodian has the right to subpoena witnesses and tangible evidence, cross-examine witnesses, and present evidence in any proceeding to determine parental participation or financial participation. These procedural rights are tantamount to the right to a hearing, unless the parents have otherwise agreed to the requested modification in parental participation or financial responsibility and the agreement is submitted to the court.

5. Hearsay in Modification Hearing

In the delinquency case, Matter of L.J.M., 473 N.E. 2d 637 (Ind. Ct. App. 1985), the Court held that hearsay was admissible in a modification hearing. The Court stated:

Although the hearsay rule applies in a hearing to determine a child delinquent, it is not applicable to a modification proceeding. Hearsay is prohibited in a delinquency hearing because the court is deciding the guilt or innocence of the child... Once a finding of guilt or innocence is made, however, the court must focus on the specific needs of the juvenile to determine the type of dispositional that would serve his best interests and that of the community. Excluding hearsay evidence in dispositional hearings would in many cases disserve the child by excluding relevant information that might support a less restrictive disposition. (citations omitted).

Id. at 642, 643.

The reasoning of L.J.M. on the admissibility of hearsay at the dispositional stage of a delinquency hearing, appears equally applicable to CHINS litigation. In a CHINS case hearsay is not admissible at the factfinding hearing, but more leniency should be allowed at the ongoing dispositional stage to assure that information necessary to the treatment of the child and participation of the parents is admitted into evidence.

6. Required Findings in Support of Modification

The modification statutes at IC 31-34-23 do not state that the court must include findings in orders for modification, but recent case law indicates that is the better practice, particularly if the modification involves a removal from the child's home. In A.P. v. PCOFC, 734 N.E. 2d 1107 (Ind. Ct. App. 2000), petition for transfer pending, the Court of Appeals found that the trial court committed a procedural error in failing to make written findings and conclusions when it "fundamentally" modified the dispositional decree by placing the children into foster care. The facts of that case show that the juvenile court entered an original dispositional decree in September retaining the children in the custody of their mother. The following February, the children were removed from the custody of the mother, and the record of the trial court stated only that the children had been placed in foster care. The Court of Appeals stated:

We believe that in order to give effect to the CHINS statutory scheme, written findings and conclusions on the record concerning the court's reasons for modifying a dispositional decree are required just as they are for an original decree, particularly where that modification results in an out-of-home placement of a child.

Id. at 1116.