

# CHAPTER 13

## ADOPTION

### I. OVERVIEW

Adoption is the legal process whereby a new, permanent parent-child relationship is created. A decree of adoption severs forever every part of the biological parent-child relationship and "engrafts" the child onto a new family tree. Matter of Adoption of Thomas, 431 N.E. 2d 506, 512 (Ind. Ct. App. 1982). See In Re C.W., 723 N.E. 2d 956, 963 (Ind. Ct. App. 2000) (after child's adoption by foster parents, maternal grandparents no longer held status as child's grandparents); In Re Visitation of Menzie, 469 N.E. 2d 1224, 1227 (Ind. Ct. App. 1984) (adopted child becomes the legal child of the adoptive parent). Generally, the effect of the adoption decree is to relieve the biological parents of all legal duties and obligations to the adopted child and to divest the biological parents of all rights to the child. When an adoption is granted, the parent-child relationship is terminated by operation of law. IC 31-19-15-1. A new birth certificate may be established for the child as a result of the adoption. IC 31-19-13-1. An exception to this general rule is when the adoptive parent is married to a biological parent, in which case the parent-child relationship between that biological parent who is married to the adoptive parent and the child is not affected by the stepparent's adoption. IC 31-19-15-2. A second exception to this general rule involves adoption with agreed postadoption visitation or contact privileges, pursuant to IC 31-19-16-1. See XII of this Chapter regarding postadoption contact.

Indiana statutes apply equally to agency adoptions and private adoptions. Numerous statutory changes have occurred in adoption law since 1994; the most significant change being the putative father registry at IC 31-19-5-1 et. seq. Some earlier case law may be inapplicable to the current statutory scheme.

When the juvenile court approves a permanency plan for a CHINS which includes adoption, the county office of family and children shall make reasonable efforts to "complete whatever steps are necessary to finalize the permanent placement of the child in a timely manner." IC 31-34-21-5.8. Some children's factual situations may allow for the filing of an adoption petition which requests that the court dispense with the need for parental consent instead of filing a petition for the involuntary termination of the parent-child relationship in juvenile court. The grounds for dispensing with parental consent are discussed in this Chapter at V.

### II. JURISDICTION

#### A. Statutes

IC 31-19-1-2 provides that the probate court has exclusive jurisdiction over adoption matters in each Indiana county that has a separate probate court. IC 31-19-1-1 provides that the adoption of a child who is born in one state by a person in another state is subject to the Interstate Compact on the Placement of Children, codified at IC 12-17-8.

#### B. Case Law

Initiation of a CHINS proceeding, over which the juvenile court had exclusive jurisdiction, did not deprive the circuit court which had granted the adoption of the child of jurisdiction over a petition to revoke the adoption. Matter of Adoption of T.B., 622 N.E. 2d 921 (Ind. 1993). But see In Re Adoption of E.B., 723 N.E. 2d 4 (Ind. Ct. App. 2000) (because CHINS petition with reunification of child and father as the goal was pending, the probate court lacked jurisdiction to hear the foster parents' adoption petition; fact situation was outside the holding of T.B., 622 N.E. 2d 921). In Matter of Adoption of T.R.M., 525 N.E. 2d 298 (Ind. 1988), the Porter Circuit Court was found to have good cause for denying transfer of jurisdiction to the tribal court of an Indian child who had never lived on the reservation and had been voluntarily placed with a non-Indian adoptive family by her Indian birth mother. In Holderness v. Holderness, 471 N.E. 2d 1157 (Ind. Ct. App. 1984), the dissolution court's order approving the father's voluntary termination of parental rights was reversed due to a lack of jurisdiction. In Matter of Adoption of H.S., 483 N.E. 2d 777, 781 (Ind. Ct. App. 1985), the Court opined that subject matter jurisdiction over an adoption petition is not lost due to deficiencies in the petition.

### III. PETITIONING FOR ADOPTION

#### A. Who May Petition

##### 1. In General

IC 31-19-2-2 provides that both husband and wife must join in an adoption petition unless it is a stepparent adoption, in which case only the stepparent must petition. Indiana residents may petition to adopt any child, but non-Indiana residents may petition in Indiana to adopt only a "hard to place" child. Non-Indiana residents may petition to adopt an Indiana child who is not hard to place, but the adoption should be filed in the petitioner's home state and the Interstate Compact at IC 12-17-8 applies. A "hard to place" child is defined by IC 31-9-2-51 as a child who is "disadvantaged because of ethnic background, race, color, language, physical, mental or medical disability, age, or because the child is a member of a sibling group that should be placed in the same home."

##### 2. Foster Parent Petitioners

In In Re Adoption of J.P., 713 N.E. 2d 873 (Ind. Ct. App. 1999), a foster parent with the consent of the St. Joseph County Division of Family and Children successfully petitioned to adopt a child who was in the custody of St. Joseph County. The probate court dispensed with the birth mother's consent due to her failure to communicate significantly with the child. The Court of Appeals affirmed the adoption. But see In Re Adoption of E.B., 733 N.E. 2d 4 (Ind. Ct. App. 2000), in which the Court affirmed the probate court's denial of an adoption petition by foster parents of an adjudicated CHINS on jurisdictional grounds. See also A.D. v. Clark, 737 N.E. 2d 1214 (Ind. Ct. App. 2000), in which the Court affirmed the trial court's order granting a stay of the involuntary termination proceeding pending a hearing on the foster parent's petition for adoption.

##### 3. Relative Petitioners

Case law provides that relatives have no preferential legal right to adopt. See In Re Adoption of Childers, 441 N.E. 2d 976, 980 (Ind. Ct. App. 1982), in which the Court stated that blood relationship, while a material factor, is not controlling. The controlling factor is the best interests of the child. Id. at 980. In footnote 6 of In Re Adoption of I.K.E.W., 724 N.E. 2d 245, 249 (Ind. Ct. App. 2000), the Court cited Childers for the principle that it is well settled that relatives have no preferential legal right to adopt in Indiana. In I.K.E.W., the foster parents' adoption of an adjudicated CHINS was reversed because the trial court failed to notify the maternal grandparents, who had also petitioned for adoption, of the foster parents' adoption hearing.

#### B. Where to File a Petition

Indiana residents may file their petition for adoption in their county of residence, in the child's county of residence, or in the county where the agency which has custody of the child is located. IC 31-19-2-2(a). Non-residents may file their petition for adoption in the child's county of residence or in the county where the agency having custody of the child is located. IC 31-19-2-3(a).

#### C. Form and Contents of Petition

IC 31-19-2-6 provides that the verified petition for adoption shall include the name, age, place of residence, date and place of marriage of the adoptive petitioners. The child's name (if known), sex, race, age (if known), place of birth, proposed adoptive name, length of time (if any) which the child has resided with the petitioners, whether the child possesses real or personal property and the property's description and value must also be included in the petition. The petition must also state the name and address of the birth parents (if known), the name and address of the child's guardian or nearest kin if the child is an orphan, the name of the court or agency which has wardship of the child and the name of the agency sponsoring the adoption. Accompanying the petition or to be filed not later than sixty days after the petition, must be the child's medical report prepared on a form prescribed by the state registrar. IC 31-19-2-7. If an adoption subsidy is being requested pursuant to IC 31-19-26-1 through 6, this request must be included in the petition for adoption. The petition for adoption must be filed in triplicate unless a subsidy is requested, in which case the petition must be filed in quadruplicate. IC 31-19-2-5. The court clerk shall send a copy of the adoption petition to a licensed child placing agency for their report pursuant to IC 31-19-8-6 with preference given to the sponsoring agency and to the county office of family and children whenever a subsidy is requested.

IC 31-19-2-12. Agency placement of the child in the adoptive petitioners' home is not a prerequisite to the court's consideration of the adoption petition on its merits. See Stout v. Tippecanoe Cty. Dept. of Pub. Welfare, 395 N.E. 2d 444, 452 (Ind. Ct. App. 1979); IC 31-19-7-1.

D. Adoption Filing Fees

The statutory filing fee for adoptions is \$100.00. In addition to the filing fee, an adoption history fee of \$20.00 and a putative father registry fee of \$50.00 must be paid to the State Department of Health. The registry fee is used to administer the registry and pay for paternity or genetic testing in a paternity action in which an adoption is pending in accordance with IC 31-14-21-9.1. All fees should be paid at the time of the filing of the adoption petition. IC 31-19-2-8. Counsel for the adoptive petitioners should save copies of the fee receipts to present to the court at the final hearing. The court may order any or all of the above fees waived due to the low income of the adoptive petitioners. An affidavit regarding the adoptive petitioners' income and expenses should be attached to the motion for fee waiver, along with a proposed order for the judge's signature which directs the clerk to waive the fee.

E. Criminal History Check for Adoptive Petitioners

1. Statutory Requirements

IC 31-19-2-7.5 adds a new requirement that adoptive petitioners shall submit the necessary information, forms, or consents for a licensed child placing agency or the county office of children which supervises and prepares the agency report pursuant to IC 31-19-8-1 et. seq. to conduct a criminal history check of the petitioners. The agency's report must contain the criminal history check information and the information is required for the court to grant the adoption. See IC 31-19-8-6(c) and IC 31-19-11-1(a)(8). In addition, IC 31-19-2-7.6 mandates an adoption petitioner to notify the court in writing if the petitioner is charged with a felony or a misdemeanor relating to the health and safety of children while the adoption proceeding is pending.

2. Criminal Convictions Which Can Prevent Adoption

1999 legislation provides at IC 31-19-11-1(c) that a court may not grant an adoption if the petitioner has been convicted of any of the following felonies or a substantially equivalent felony in another state: murder; causing or assisting suicide; voluntary manslaughter; reckless homicide; battery as a felony; aggravated battery; kidnapping; criminal confinement; a felony sex offense such as rape, criminal deviate conduct or child molesting; car jacking; arson; incest; neglect of a dependent; child selling; a felony involving a weapon or relating to a controlled substance; an offense relating to material or a performance that is harmful to minors or obscene. The court is not prohibited from granting an adoption based on a felony conviction for battery, car jacking, arson, felonies involving a weapon or controlled substance or substantially equivalent out of state crimes if the offense was not committed within the immediately preceding five year period. IC 31-19-11-1(c) further provides that a conviction of an adoptive petitioner of a felony or misdemeanor related to the health and safety of a child is a permissible basis for the court to deny a petition for adoption.

F. Adoptive Petitioner's Input in Termination Proceedings

IC 31-35-2-6.5(d), effective July 1, 1998, grants some prospective adoptive parents named in a petition for adoption the opportunity to be heard and to make any recommendations to the court at involuntary termination proceedings under IC 31-35-2-4 and motions to dismiss involuntary termination proceedings under IC 31-35-2-4.5. Only those adoptive petitioners in one of the following situations shall receive notice: (1) each required consent to adoption has been executed and filed with the county office of family and children; (2) the adoption court has determined that consent from a parent, guardian, or custodian is not required; or (3) a petition to terminate the parent-child relationship has been filed and is pending. The person or entity who files the termination petition or the motion to dismiss the termination petition shall send notice to the adoptive petitioners at least ten days before a hearing on a termination petition or a motion to dismiss a termination petition. IC 31-35-2-6.5(e) states that the right to be heard includes the right to submit a written statement to the court that, if served upon all parties to the CHINS proceeding and the other persons who are required to receive notice under this statute, may be made a part of the court record. Adoptive petitioners do not become parties to the termination proceedings as a result of their right to notice and opportunity to be heard. IC 31-35-2-6.5(g).

#### IV. ADOPTION CONSENTS

##### A. In General

A consent to an adoption may be signed at any time after the child's birth in the presence of the court, a notary public, or an authorized agent of a licensed child placing agency or county office of family and children. IC 31-19-9-2. See Bell v. Adoption of A.R.H., 654 N.E. 2d 29, 31 (Ind. Ct. App. 1995), for a description of the process of accepting consents in the presence of a Probate Commissioner. See also Matter of Adoption of H.M.G., 606 N.E. 2d 874 (Ind. Ct. App. 1993) (Court of Appeals opined that there is no doubt the statute contemplates execution of the adoption consent after the child's birth; however, a pre-birth consent can be ratified by the biological mother's post-birth actions). If the birth parent has counsel, counsel should be notified by a family case manager or social worker before accepting the birth parent's consent to adoption. See In Re A.M.H., 732 N.E. 2d 1284 (Ind. Ct. App. 2000). A consent must be voluntary to be valid. See Matter of Adoption of Topel, 571 N.E. 2d 1295, 1298 (Ind. Ct. App. 1991), in which the Court said that a parent's consent to adoption is voluntary if it is an act of the parent's own volition, free from fraud, duress or other consent-vitiating factors, and if it is made with knowledge of the essential facts. Id. The names of the adoptive petitioners are not required to be listed on the consent; however, consent may be given only to specifically named persons. The consent need not identify the adoptive petitioners if the consent contains a statement that the consenting person voluntarily executed the consent without disclosure of the adoptive petitioner's name. IC 31-19-9-3. Copies of the signed consent shall be filed with the clerk of the court where the adoption petition is pending and with the investigating agency which is preparing the court adoption report. IC 31-19-9-5. The birth parent who consents to adoption must be provided with a copy of the state registrar's non-release form for adoption history and must receive an explanation of the availability of adoption history information under IC 31-19-17 through 25 and the birth parent's option to file a non-release form. IC 31-19-9-6.

##### B. Hearing on Consent

The person or agency who accepts the birth parent's consent may request a consent hearing be held before the court having jurisdiction over the adoption. This consent hearing may occur before the adoption petition is filed. The hearing may be conducted based on the written or oral motion of a county office of family and children, a licensed child placing agency, or an attorney arranging an adoption. A record may be made of the consent hearing. This practice is recommended if the birth parent is a minor or suffers from developmental disability, mental illness, or some other possible consent vitiating condition. The birth parent may be represented by counsel, and the person accepting the consent may request court appointed counsel or provide private, independent counsel for the birth parent. Expert evidence of the birth parent's physical or mental condition, including the parent's ability to comprehend the meaning of consenting to adoption could be offered to the court to forestall future issues.

##### C. Minor Parent's Consent

A parent under the age of eighteen years of age may consent to the adoption of her/his child. IC 31-19-9-1 (b). The parent or legal guardian of a minor birth parent need not concur in the minor's consent unless the court requires the concurrence due to the best interests of the child to be adopted. IC 31-19-9-1(b). Although her age was not an issue on appeal, the Court of Appeals held that a sixteen-year-old mother's pre-birth consent could be ratified by her post-birth actions in Matter of Adoption of H.M.G., 606 N.E. 2d 874 (Ind. Ct. App. 1993).

##### D. Required Consents

Unless another statutory provision applies, the following persons must consent to the child's adoption: (1) each living parent of the child born in wedlock; (2) the mother of a child born out of wedlock and the father whose paternity has been established by a court proceeding other than the adoption proceeding or by a paternity affidavit; (3) each person, agency, or county office of family and children having lawful custody of the child whose adoption is being sought; (4) the court having jurisdiction of the custody of the child if the legal guardian is not empowered to consent to adoption; (5) the adoptive child who is over fourteen-years-old; (6) the adoptive child's spouse. The consent of a father who has signed a paternity affidavit is required unless another provision allowing the court to dispense with his consent, such as abandonment or failure to pay child support applies. See In Re Adoption of A.K.S., 713 N.E. 2d 896, 898 (Ind. Ct. App. 1999) (paternity affiant father was entitled to notice of adoption). See also Matter of Adoption of M.A.S., 695 N.E. 2d 1037, 1039 (Ind. Ct. App. 1998) (adoption reversed due to incorrect legal notice to incarcerated father who had signed a paternity affidavit and whose consent was required).

As discussed in this Chapter at Roman Numeral V., the court may dispense with the consent requirement in certain factual situations if clear and convincing proof is offered. Putative fathers who are entitled to notice and who establish paternity in a timely manner may legally veto the adoption. See In Re M.B.H., 571 N.E. 2d 1283 (Ind. Ct. App. 1991). The putative father notice requirements are discussed in this Chapter at VII.

E. Guardian/Custodian's Ability to Withhold Consent

The court having jurisdiction over the adoption may order that the guardian or custodian's consent to adoption is not required if the court finds that the reasons for withholding consent are not in the child's best interests. IC 31-19-9-8(a)(10). The guardian or custodian could include the county office of family and children which has wardship of the child. See A.D. v. Clark, 737 N.E. 2d 1214, 1217 (Ind. Ct. App. 2000), in which the Court noted at footnote 4 that the adoption petition might be granted over the MCOFC's refusal to consent if it were shown that MCOFC was not acting in the child's best interest in withholding consent. Prior statutory language required the court to find that the guardian or custodian's consent was being "unreasonably withheld." See Matter of Adoption of L.C., 650 N.E. 2d 726 (Ind. Ct. App. 1995) (Court held that adoptive petitioners have a heavy burden in demonstrating unreasonable withholding of consent in light of the implicit statutory presumption that the legal guardian is acting in the child's best interests); In Re Adoption of M.J.C., 590 N.E. 2d 1095 (Ind. Ct. App. 1992) (adoption reversed and remanded for purpose of determining whether grandmother/legal guardian's consent was being unreasonably withheld). As with other guardianship or wardship situations, a ward of the county office of family and children may be adopted without the consent of the county office of family and children. See Stout v. Tippecanoe Cty. Dept. of Pub. Welfare, 395 N.E. 2d 444, 450 (Ind. Ct. App. 1979) (county department is not vested with the power of a natural parent to withhold consent to an adoption).

F. Withdrawal of Consent

1. Statutes

A person who seeks to withdraw a consent to adoption must file a motion to withdraw consent with the court and give notice to all parties and to all persons whose consent to adoption is required. IC 31-19-10-1(b); IC 31-19-10-2. This should be done as soon as possible or within thirty days after service of notice of the pending adoption. IC 31-19-10-1. The court may allow a person to withdraw consent if the court finds that the person seeking the withdrawal is acting in the best interests of the child to be adopted. IC 31-19-10-5. The court shall hold a hearing on the motion for withdrawal of consent. Id. The hearing may be bifurcated. IC 31-19-10-7. The person seeking to withdraw consent has the burden of going forward.

2. Case Law

In Bell v. Adoption of A.R.H., 654 N.E. 2d 29 (Ind. Ct. App. 1995), the Court affirmed the denial of the birth mother's petition to withdraw her consent to adoption, finding no evidence that her consent was involuntary because the birth mother's grief over her grandmother's death did not rise to the level of overcoming the mother's volition. The court identified three stages of the birth mother's voluntariness in consenting as follows: the birth mother told the adoption agency social worker that she had been thinking of placing her children for adoption for the past year because she was neither emotionally nor financially able to care for them; the birth mother spent time with the adoptive parents the day before she signed the consents; the birth mother left the children at the adoption agency after signing consents. Id. at 33. The Court also found that the birth mother's claim that she believed she had a grace period was unsupported by the written documents she had signed. Finally, the Court found that the birth mother failed to prove that withdrawal of her consent was in the children's best interests when the adoptive parents had a lengthy marriage, were self-employed, had fourteen children, provided recreational activities for the children, and birth mother's children had begun calling the adoptive parents "mom and dad" shortly after their arrival in the home. Id. at 35. See also Matter of Adoption of Johnson, 612 N.E. 2d 569 (Ind. Ct. App. 1993) (Court affirmed order allowing birth mother to withdraw consent because adoptive parents had been diagnosed with AIDS and birth mother feared the adoptive parents' deaths would leave child without parents); Matter of Adoption of H.M.G., 606 N.E. 2d 874 (Ind. Ct. App. 1993) (Court found that sixteen-year-old birth mother's consent given twenty-seven days prior to child's birth was not void but voidable; voidable pre-birth consent could be ratified by post-birth act which sufficiently manifests a present intention to give the child up for adoption); Matter of Adoption of Hewitt, 396 N.E. 2d 938 (Ind. Ct. App. 1979) (the fact that eighteen-year-old mother's consent had been given in hospital two days after

child's birth was insufficient to void consent; emotions, tensions and pressure are insufficient to void consent unless parent can show they rose to the level of overcoming her volition).

A birth parent may also allege that consent is invalid because it was obtained through fraud or duress or any other consent-vitiating factor. To be valid, a consent must be made with knowledge of the essential facts. See Hewitt, 396 N.E. 2d 938 (Ind. Ct. App. 1979); Matter of Adoption of Topel, 571 N.E. 2d 1295 (Ind. Ct. App. 1991) (father's consent was allowed to be withdrawn because he did not understand that consenting to child's adoption meant he would have no right to see the child again); Adoptive Parents of M.L.V. v. Wilkens, 598 N.E. 2d 1054 (Ind. 1992) (putative father whose consent to adoption was not necessary could not prevail on fraud allegation based on adoptive parents having permitted visitation between putative father and children); Matter of Snyder, 438 N.E. 2d 1171 (Ind. Ct. App. 1981) (mother did not meet burden of proof that her facially valid adoption consents had been procured by undue influence; essence of undue influence is destruction of one's free agency).

A consent to adoption may not be withdrawn after the entry of the adoption decree. IC 31-19-10-4; IC 31-19-14-3. But see Matter of Adoption of Topel, 571 N.E. 2d 1295 (Ind. Ct. App. 1991), discussed immediately above.

G. Criminal Statutes on Child Selling and Profiting from an Adoption

Adoption practitioners should familiarize themselves with the criminal statute, IC 35-46-1-9, profiting from an adoption, which provides:

- (a) Except as provided in subsection (b), a person who, with respect to an adoption, transfers or receives any property in connection with the waiver of parental rights, the termination of parental rights, the consent to adoption, or the petition for adoption commits profiting from an adoption a Class D felony.
- (b) This section does not apply to the transfer or receipt of:
  - (1) reasonable attorney's fees;
  - (2) hospital and medical expenses concerning childbirth and pregnancy incurred by the adopted person's birth mother;
  - (3) reasonable charges and fees levied by a child placing agency licensed under IC 12-17.4 or by a county office of family and children;
  - (4) reasonable expenses for psychological counseling relating to adoption incurred by the adopted person's birth parents;
  - (5) reasonable costs of housing, utilities, and phone service for the adopted person's birth mother during the second or third trimester of pregnancy and not more than six (6) weeks after the childbirth;;
  - (6) reasonable costs of maternity clothing for the adopted person's birth mother;
  - (7) reasonable travel expenses incurred by the adopted person's birth mother that relate to the pregnancy or adoption;
  - (8) any additional itemized necessary living expenses for the adopted person's birth mother during the second or third trimester of pregnancy and not more than six (6) weeks after childbirth, not listed in subdivisions (5) through (7) in an amount not to exceed one thousand dollars (\$1,000); or
  - (9) other charges and fees approved by the court supervising the adoption, including reimbursement of not more than actual wages lost as a result of the inability of the adopted person's birth mother to work at her regular, existing employment due to a medical condition, excluding a psychological condition, if:
    - (A) the attending physician of the adopted person's birth mother has ordered or recommended that the adopted person's birth mother discontinue her employment; and
    - (B) the medical condition and its direct relationship to the pregnancy of the adoption person's birth mother are documented by her attending physician.

In determining the amount of reimbursable lost wages, if any, that are reasonably payable to the adopted person's birth mother under subdivision (9), the court shall offset against the reimbursable lost wages any amounts paid to the adopted person's birth mother under subdivision (5) and (8) and any unemployment compensation received by or owed to the adopted person's birth mother.

- (c) Except as provided in this subsection, payments made under subsection (b)(5) through (b)(9) may not exceed three thousand dollars (\$3,000) and must be disclosed to the court supervising the

adoption. The amounts paid under subsection (b)(5) through (b)(9) may exceed three thousand dollars (\$3,000) to the extent that a court in Indiana with jurisdiction over the child who is the subject of the adoption approves the expenses after determining that:

- (1) the expenses are not being offered as an inducement to proceed with an adoption; and
  - (2) failure to make payments may seriously jeopardize the health of either the child or the mother of the child and the direct relationship is documented by the attending physician.
- (d) An attorney or licensed child placing agency shall inform a birth mother of the penalties for committing adoption deception under 9.5 of this chapter before the attorney or agency transfers a payment or adoption related expenses under subsection (b) in relation to the birth mother.
- (e) The limitations in this section apply regardless of the state or country in which the adoption is finalized.

Attorneys should also become informed regarding local court policies concerning expenses which adoptive parents may legitimately pay to birth parents.

Attorneys for adoption practitioners and licensed child placing agencies are required to inform birth mothers of the adoption deception criminal statute at IC 35-46-1-9.5 which states:

A person who is a birth mother, or a woman who holds herself out to be a birth mother, and who knowingly or intentionally benefits from adoption related expenses paid:

- (1) when the person knows or should have known that the person is not pregnant; or
- (2) by or on behalf of a prospective adoptive parent who is unaware that at the same time another prospective adoptive parent is also incurring adoption related expenses in an effort to adopt the same child;

commits adoption deception, a Class A misdemeanor. In addition to any other penalty imposed under this section, a court may order the person who commits adoption deception to make restitution to a prospective adoptive parent, attorney, or licensed child placing agency that incurs an expense as a result of the offense.

## V. LEGAL GROUNDS FOR DISPENSING WITH PARENTAL CONSENT

### A. In General

An adoption petition may be granted without parental consent in situations delineated at IC 31-19-9-8 through IC 31-19-9-17. If an adoption petition is filed the court may find, after notice, appointment of counsel for the parent and hearing that there is a statutory reason for dispensing with parental consent. The adoption may then be granted without a separate termination proceeding and order obtained under IC 31-35-2 or IC 31-35-3. The Court of Appeals affirmed the trial court's order which granted a foster parent's petition to adopt a CHINS by dispensing with parental consent due to the birth mother's significant failure to communicate with the child in In Re Adoption of J.P., 713 N.E. 2d 873 (Ind. Ct. App. 1999). But see In Re Adoption of E.B., 733 N.E. 2d 4 (Ind. Ct. App. 2000), where the foster parents' petition for adoption was denied on jurisdictional grounds. Indiana law provides for seven different situations in which a judicial determination to dispense with consent may be made: abandonment; lack of significant contact; knowing failure to support; sexual misconduct by putative father; declaration of incompetency; conviction of certain crimes against the adoptive child's other parent; and conviction of certain crimes against the adoptive child or the adoptive child's sibling. In addition to these factual situations, the court may find that a putative father's consent to adoption is implied by his conduct.

### B. Standard and Burden of Proof

For an adoption to take place without parental consent, the statutory exceptions which provide for dispensing with consent must be shown by clear, cogent, and indubitable evidence. See In Re Adoption of Subzda, 562 N.E. 2d 745, 748 (Ind. Ct. App. 1990). Only one of the statutory exceptions must be shown to obviate the need for parental consent. See In Re Adoption of M.J.C., 590 N.E. 2d 1095, 1101 (Ind. Ct. App. 1992). The adoptive petitioner has the burden of proving why the court should dispense with parental consent. See Matter of Adoption of Thomas, 431 N.E. 2d 506, 513 (Ind. Ct. App. 1982). But see Emmons v. Dinelli, 235 Ind. 249, 133 N.E. 2d 56, 63 (1956) (adoption law should receive a liberal construction so that unfortunate children who have been bereft of a home and parental care may be afforded the benefits of an adoptive home).

C. Abandonment

IC 31-19-9-8(a)(1) states that parental consent to adoption is not required if the child is adjudged to have been abandoned or deserted for at least six months immediately preceding the date of the filing of the petition for adoption. Abandonment may be actual or constructive. For the court to determine abandonment, it is only necessary that the parent voluntarily fail to perform his required parental duties and obligations. Emmons v. Dinelli, 235 Ind. 249, 133 N.E. 2d 56, 63 (1956). Abandonment as used in the statute means any conduct by the parent which evinces an intent or settled purpose to forego all parental duties and to relinquish all parental claims to the child. In Re Adoption of Childers, 441 N.E. 2d 976, 979 (Ind. Ct. App. 1982).

D. Lack of Significant Contact

IC 31-19-9-8(a)(2) provides that consent to adoption is not required of a parent of a child in the custody of another person if for a period of at least one year the parent fails, without justifiable cause, to communicate significantly with the child when able to do so. IC 31-19-9-8(b) provides that if a parent has made only token efforts to support or communicate with the child, the court may declare the child abandoned by the parent. Case law provides that efforts of a noncustodial parent to hamper or thwart communication between parent and child are relevant in determining the ability to communicate; see In Re Adoption of Augustyniak, 505 N.E. 2d 868, 871 (Ind. Ct. App. 1987); Lewis v. Roberts, 495 N.E. 2d 810, 812-813 (Ind. Ct. App. 1986).

Indiana cases in which the Court of Appeals found that parental consent could be dispensed with due to failure to significantly communicate with the child include: Rust v. Lawson, 714 N.E. 2d 769 (Ind. Ct. App. 1999) (father's failure to communicate with child for a twenty-two month period warranted trial court's granting of guardian's adoption petition); In Re Adoption of J.P., 713 N.E. 2d 873 (Ind. Ct. App. 1999) (mother's brief monthly visits to adjudicated CHINS were not significant communications; foster parent's petition for adoption was granted); Adoption of T.H. v. Perry, 677 N.E. 2d 605 (Ind. Ct. App. 1997) (father filed but later dismissed paternity action and did not visit child for a period of more than two years); Williams v. Townsend, 629 N.E. 2d 252 (Ind. Ct. App. 1994) (father who was serving fifty year prison sentence for murdering his child's mother had abandoned child by sending only occasional letters and cards by child's paternal aunt and failing to take legal action to enable visitation or communication); In Re Adoption of Subzda, 562 N.E. 2d 745 (Ind. Ct. App. 1990) (father did not call, visit, or correspond with the child for a period of two years despite knowledge of child's address and access to transportation); Matter of Adoption of Herman, 406 N.E. 2d 277 (Ind. Ct. App. 1980) (incarcerated father had the means of regular communication available to him through letters and telephone calls, was not prevented from communicating with the child by the natural mother, took no measure to enforce his visitation rights through the courts, and could have enlisted the help of the child's paternal grandparents who lived in the same town as the child); Rosell v. Dausman, 373 N.E. 2d 186 (Ind. Ct. App. 1978) (mother had trouble picking up the children for visitation but was not prevented from making telephone calls or corresponding; nevertheless she exhibited only complete silence toward the children); In Re Adoption of Thornton, 358 N.E. 2d 157 (Ind. Ct. App. 1976) (while mother may not have known where child was, nothing indicated that she had inquired about the child; statute contemplates communication with the child itself and not merely involvement in litigation relating to the child's custody).

Cases in which the Court of Appeals opined that parental consent due to alleged failure to significantly communicate could not be dispensed with include: In re Adoption of Augustyniak, 505 N.E. 2d 868 (Ind. Ct. App. 1987), reh'g granted at 508 N.E. 2d 1307 (father lived in Florida and could not visit child regularly but sent child cards and gifts and offered to drive to Indiana for a visit which mother refused); Matter of Adoption of Thomas, 431 N.E. 2d 506 (Ind. Ct. App. 1982) (Louisiana divorce decree denied visitation to father, but he attempted communication; personal visits by paternal grandmother from Louisiana with children constituted indirect significant communication; father paid substantial child support without any legal compulsion to do so); Lewis v. Roberts, 495 N.E. 2d 810 (Ind. Ct. App. 1986) (incarcerated adjudicated father's letters, gifts, visits and requests for visits displayed a continuing interest in his daughter).

E. Knowing Failure to Support When Able

IC 31-19-9-8(a)(2)(B) provides that the court may dispense with parental consent if the child is in the custody of another person and if, for a period of at least one year, the parent knowingly fails to provide for the care and support of the child when able to do so as required by law or judicial decree. In Matter of Adoption of A.M.K., 698 N.E. 2d 845 (Ind. Ct. App. 1998), the Court of Appeals affirmed the trial court's order dispensing with parental consent of a father who had signed a paternity affidavit due to the father's failure to

support the child. The Court noted that the paternity affidavit signed shortly after the child's birth acknowledged the father's obligation to support the child. *Id.* at 847. The following evidence supported the trial court's determination: father withdrew from high school prior to the child's birth and did not work or offer financial support for the first year of the child's life; father testified he paid a total of \$300.00 to \$400.00 in support which he paid to the paternal grandmother; father was voluntarily unemployed; father made no claim that he was unable to work or suffered an impairment which prevented him from working. The A.M.K. opinion is noteworthy because it construes the signing of a paternity affidavit alone, as a requirement by law to support a child. The facts of A.M.K. do not indicate that there was a judicial support order entered with regard to father's obligation. See also Irvin v. Hood, 712 N. E. 2d 1012 (Ind. Ct. App. 1999), in which the Court of Appeals affirmed the trial court's order dispensing with the consent of a birth father who signed a paternity affidavit but did not support the child financially for three years despite the father's earning regular income and being able to travel to Europe to play rugby. The Court opined that Indiana law imposes upon a parent a duty to support his children which exists apart from any court order or statute. *Id.* at 1014.

Other cases which affirmed the trial court's determination to dispense with parental consent due to knowing failure to support include: In Re Adoption of A.K.S., 713 N.E. 2d 896 (Ind. Ct. App. 1999) (paternity affiant father was entitled to notice of adoption petition but his consent was dispensed with due to his failure to pay child support for three years; fathers have a common law duty to support their children); In Re Adoption of M.J.C., 590 N.E. 2d 1095 (Ind. Ct. App. 1992) (paternity judgment ordered father to pay \$17.50 per week child support, but father paid nothing from 1982 through 1986, \$40.00 in 1987, and \$75.00 in 1990; father had income of \$9500 in 1984 and approximately \$15,000 every year thereafter); and Matter of Adoption of Marcum, 436 N.E. 2d 102 (Ind. Ct. App. 1982) (dissolution court ordered father to pay \$15.00 per week child support; father had employment as a coal miner averaging \$200.00 per week and later received unemployment benefits; father conceded he had made no support payments in the year preceding the filing of the adoption petition).

Cases in which the Court of Appeals affirmed determinations that parental consent could not be dispensed with due to alleged failure to pay support include In Re Adoption of Augustyniak, 505 N.E. 2d 868 (Ind. Ct. App. 1987), reh'g granted at 508 N.E. 2d 1307 and Graham v. Starr, 415 N.E. 2d 772 (Ind. Ct. App. 1981). In Augustyniak, the father failed to pay court ordered child support of \$20.00 per week despite an average income of \$9000.00 per year, but the Court held that an inability to pay support cannot be shown by proof of income standing alone. The totality of circumstances, including whether income is steady or sporadic, and the parent's reasonable expenses must also be considered. "There may be a level of income so high that, standing alone, it would be sufficient to show the ability to make child support payments." *Id.* at 1308. In Graham, the Court found that father's medical expenses for his wife and later surgery for himself which prevented him from working for eleven months, along with father's resumed payment of support when he returned to work were "mitigating circumstances" in that the father was unable to provide support. *Id.* at 774. See also Matter of Adoption of D.H. III., 439 N.E. 2d 1376 (Ind. Ct. App. 1982) (father made only one \$20.00 child support payment in twenty-two month period, but Court reversed adoption because petitioner did not prove that father was able to pay support and knowingly failed to do so).

F. Sexual Malfesance by Putative Father

IC 31-19-9-8 states that the consent to adoption is not required by a biological father of a child born out of wedlock who was conceived as a result of rape for which the father was convicted under IC 35-42-4-1, child molesting, sexual misconduct with a minor, or incest. In Mullis v. Kinder, 568 N.E. 2d 1087 (Ind. Ct. App. 1991), the twenty-one year old father met fifteen-year-old mother in Florida and had sexual intercourse which resulted in conception of a child whom the mother sought to place for adoption in Indiana. Although the father was not criminally convicted of child molesting and lacked notice of potential implications of sexual intercourse with a fifteen-year-old, the Court of Appeals held that to establish by a preponderance of evidence that the father committed child molesting, adoptive parents must show only father's and mother's respective ages and that father had sexual intercourse with mother. See also Pena v. Mattox, 84 F. 3d 894 (7th Cir. 1996) (Court opined that society rightly disapproved of the alleged father's act in impregnating a fifteen-year-old girl and the Constitution does not forbid states from penalizing father's illicit and harmful conduct by refusing to grant him parental rights to block the adoption).

G. Judicial Declaration of Incompetency

IC 31-19-9-8(a)(9) provides that the court may dispense with consent from a parent who is judicially declared incompetent or mentally defective. The terms "incompetent" and "mentally defective" are undefined in Title

31. A separate guardianship incompetency adjudication could be used to meet the statutory standard. Expert psychological or psychiatric evidence may be required to prove the parent is incompetent or mentally defective.

#### H. Parental Conviction and Incarceration

IC 31-19-9-9 and 10 state that the court shall dispense with the consent of a convicted, incarcerated parent after notice and hearing if the parent is convicted of certain crimes against the child's other parent, the child or the child's sibling, and if dispensing with consent is in the child's best interests. The crimes against the other parent for which the statute applies are: murder, causing suicide, voluntary manslaughter or an attempt to commit murder, causing suicide, or voluntary manslaughter. The criminal conviction may occur in Indiana or another state, if the crime is "substantially similar" to one of the listed crimes. The applicable crimes against the child, the child's sibling, half-sibling or stepsibling of the parent's current marriage are: murder, voluntary manslaughter, causing suicide, rape, criminal deviate conduct, child molesting as a Class A or B felony, incest as a Class B felony, neglect of a dependent as a Class B felony, battery as a Class C felony, or attempt of any of the above crimes. For both statutes the parent whose consent is dispensed with must be incarcerated at the time of the filing of the adoption petition. Proof of conviction and incarceration can be offered by certified copy of criminal conviction, (Ind. Evidence Rule 803(22)) and Department of Correction records (Ind. Evidence Rule 803(8)). See also Payne v. State, 658 N.E. 2d 635 (Ind. Ct. App. 1995).

Except for the situations outlined immediately above, parental imprisonment, standing alone, does not establish abandonment so as to allow adoption without parental consent. Murphy v. Vanderver, 349 N.E. 2d 202 (Ind. Ct. App. 1976). An incarcerated parent may fail to communicate significantly with his child, thus establishing legal cause for dispensing with his consent. Williams v. Townsend, 629 N.E. 2d 252 (Ind. Ct. App. 1994). Imprisonment alone should not be deemed a justifiable reason for failing to maintain significant contact with one's child. Matter of Adoption of Herman, 406 N.E. 2d 277 (Ind. Ct. App. 1980).

#### I. Irrevocably Implied Consent

IC 31-19-9-12 through 17 establish irrevocably implied consent to adoption by operation of law for a putative father who fails to take certain legal actions at certain times. IC 31-19-9-13 provides that a putative father whose consent to adoption is implied is not entitled to challenge the adoption or the validity of his implied consent. IC 31-19-9-14 and IC 31-19-9-17(a) provide that a putative father whose consent to adoption is irrevocably implied is not entitled to establish paternity of the child by a court proceeding or by executing a paternity affidavit. One exception to this rule is provided by IC 31-19-9-17(b) discussed in this section at 2.

##### 1. Irrevocably Implied Consent When Actual Pre-Birth Notice Received

IC 31-19-9-15 provides that if a putative father receives actual pre-birth notice pursuant to IC 31-19-3 of the mother's intention to place the child for adoption, the putative father's consent is irrevocably implied unless he files a paternity action in Indiana or in another state that is competent to obtain jurisdiction over the paternity action within thirty days of receiving the notice. The paternity action must be filed regardless of whether the child is born before or after the thirty day period. IC 31-19-9-15(a)(1). The putative father's consent is also irrevocably implied if he fails to establish paternity in the paternity proceeding under IC 31-14 after filing the action. IC 31-19-9-15(a)(2). Arguably, this requires the putative father to comply with the notice and time deadlines of IC 31-14-21 for paternity actions filed when an adoption is pending. See In Re Adoption of A.N.S., 741 N.E. 2d 780 (Ind. Ct. App. 2001) (although not addressed on appeal, adoption court concluded that irrevocably implied consent was inequitable when putative father filed paternity action thirty-eight days after receipt of pre-birth notice).

##### 2. Establishment of Paternity When Adoption Does Not Take Place After Actual Pre-Birth Notice

If neither a petition for adoption nor placement of the child in a proposed adoptive home is pending, IC 31-19-9-7(b) allows the putative father who received actual pre-birth notice to establish paternity. To do so, the putative father must submit an affidavit prepared by the licensed child placing agency or attorney that served him with the pre-birth notice. The affidavit must state that neither a petition for adoption nor placement of the child in an adoptive home is pending. The affidavit must be submitted with the putative father's paternity petition. Paternity may then be established if the court finds on the record that neither a petition for adoption nor a prospective adoptive placement is pending. IC 31-19-9-17(b).

3. Irrevocably Implied Consent When Pre-Birth Notice Has Not Been Served  
IC 31-19-9-12 states that consent to adoption is irrevocably implied for a putative father in any one of the following situations:
  - The putative father fails to timely register with the Putative Father Registry when required to do so; or
  - The putative father fails to file a motion to contest adoption in accordance with IC 31-19-10 and a paternity action under IC 31-14 within thirty days after service of notice of the petition for adoption under IC 31-19-4; or
  - The putative father, having filed a motion to contest adoption, fails to appear at the hearing set to contest the adoption; or
  - The putative father, having filed a paternity action under IC 31-14, fails to establish paternity.
4. Time Limitations for Establishing Paternity in Adoption Situations  
In 1999 the Indiana legislature enacted specific time limits for establishing paternity when the court “knows of” a pending adoption of a child who is the subject of a paternity action and the court in which the adoption is pending. IC 31-14-21-9 provides that in the above situations the court shall conduct an initial hearing within thirty days of the filing of the paternity petition or the child’s birth, whichever occurs later. IC 31-14-21-9.1(a) requires the court to order all parties to undergo blood or genetic testing. IC 31-14-21-9.1(b) requires the court to order the state department of health to pay for the initial costs of testing from the putative father registry fees collected in adoption cases if the father is unable to pay for the initial costs of testing. A final hearing to determine paternity shall be conducted within ninety days after the initial hearing and the court shall issue its ruling on the paternity action fourteen days after the final hearing. IC 31-14-21-9.2.

## VI. PUTATIVE FATHER REGISTRY

### A. Purpose

The purpose of the putative father registry is to determine the name and address of a putative father not identified by the mother at the time she signs an adoption consent who may have conceived a child for whom an adoption petition has been or may be filed. IC 31-19-5-3. The registry allows a putative father to receive adoption notice through records of his name and address maintained by the state department of health. IC 31-19-5-2; IC 31-19-5-4; IC 31-19-5-5. The use of the registry allows the putative father to take action on his own to receive notice of a pending adoption, instead of relying on the biological mother to provide his name and address on or before the date she consents to adoption to the adoption agency or attorney who arranges the adoption. IC 31-19-5-5. Registration is a necessary prerequisite to entitle the putative father to notice of an adoption petition unless the mother provides his name or address by the date she consents. The putative father who fails to timely register waives notice of adoption and his consent to his child’s adoption is irrevocably implied by operation of law. IC 31-19-5-18.

The registry also allows an attorney or licensed child placing agency that represents prospective adoptive parents to learn the identity and address of a putative father so that his consent to adoption may be requested or notice can be sent to him. IC 31-19-5-21. The attorney or agency could contact the registered father prior to the filing of the adoption petition to ascertain whether he objects to the adoption. If he objects, the mother or adoptive petitioners may decide not to proceed with the adoption.

### B. Who Must Register

A putative father is a male of any age who is alleged to be or claims that he may be a child’s father but who has not established paternity and who is not a presumed father under IC 31-14-7-1(1) or IC 31-14-7-1(2) due to his marriage or attempted marriage to the child’s mother. IC 31-9-2-100. A presumed father defined by IC 31-14-7-2 who receives the child into his home with the mother’s consent and openly holds the child out as his biological child must register to be entitled to adoption notice. IC 31-19-5-6. In In Re Adoption of A.K.S., 713 N.E. 2d 896, 898 (Ind. Ct. App. 1999), the Court of Appeals opined that a father who had executed a paternity affidavit was not required to register with the putative father registry.

### C. Form of Registration

A putative father registry form is available through the state department of health, each clerk of a circuit

court, and each local health department. IC 31-19-5-13. The form is provided by the state department of health, and must include the father's name, address for legal notice, Social Security number, and date of birth and must be signed by the putative father and notarized. IC 31-19-5-10; IC 31-19-5-7(a)(1). The following information must be included if known: mother's name including aliases, mother's address, Social Security number and birth date; and child's name and birth date. IC 31-19-5-7(a)(2) and (3). An amended registration form shall be submitted by the putative father each time the information he must supply changes. IC 31-19-5-11. The putative father may revoke his registration at any time by submitting a signed notarized statement. IC 31-19-5-19. He may register in person, by mail, by facsimile, or by private courier. IC 31-19-5-20. The putative father may designate an agent for service of notice if he does not have an address where he may receive notice. Service on the agent under Ind. Trial Rule 4.1 constitutes service of notice on the putative father. IC 31-19-5-7(b). If the agent cannot be served according to T.R. 4.1 further notice to the agent or putative father is not necessary.

D. Time for Registration

The putative father may register before the child's birth. IC 31-19-5-12(b). To be entitled to notice of an adoption the putative father must register no later than thirty days after the child's birth or the date of the filing of the adoption petition, whichever occurs later. IC 31-19-5-12(a).

E. Request for Putative Father Registry Search

An attorney or agency that arranges or may arrange an adoption may make a verified written request for a putative father or paternity determination registry search from the state department of health at any time. IC 31-19-5-15; IC 31-19-6-1. The state department of health shall respond by affidavit within ten days verifying whether a putative father has timely registered or whether a paternity determination has been made. IC 31-19-5-21; IC 31-19-6-2. A copy of the registration form or paternity determination with the department's affidavit of search shall be supplied to the requesting attorney or agency. IC 31-19-5-16(b)(1); IC 31-19-5-21(a). The county office of family and children may request a putative father or paternity determination search request when adoption becomes the plan for the child. Note, however, that the putative father may still make a timely registration until the date the adoption petition is filed. IC 31-19-5-12.

F. Case Law on Putative Father Registry

In *In Re Paternity of Baby Doe*, 734 N.E. 2d 281 (Ind. Ct. App. 2000), the Court affirmed the trial court's denial of a putative father's motion to set aside the summary judgment granted in favor of the adoption petitioners in the putative father's paternity action. The putative father's failure to register timely (within thirty days of the child's birth or thirty days of the filing of the petition for adoption, whichever occurs later) precluded him from establishing paternity, challenging his irrevocably implied consent to adoption or contesting the adoption. *Id.* at 287.

Practitioners should note that the Court of Appeals opinion concerning the due process issues raised by Indiana's putative father registry in *Walker v. Campbell*, 711 N.E. 2d 42 (Ind. Ct. App. 1999), was vacated and held for naught by the Indiana Supreme Court at 719 N.E. 2d 1248 (Ind. 1999).

## VII. NOTICE

A. Implied Consent and Pre-Birth Notice Requirements

IC 31-19-3-1 allows for a pregnant woman to serve the putative father of her unborn child with actual notice that she is considering adoptive placement for the child. Actual notice of the potential adoption may be served on the putative father by a licensed child placing agency, an attorney representing prospective adoptive parents of the child or an attorney for the mother. Providing notice to the putative father does not obligate the mother to proceed with adoptive placement. IC 31-19-3-2. The form of the actual notice, prescribed at IC 31-19-3-4, states that the putative father must file a paternity action to establish his paternity of the unborn child within thirty days of receipt of the notice. This time period may expire before the child's birth. See IC 31-14-4-1(2)(B) which allows an expectant father of an unborn child to file a paternity action. The form also states that if the putative father fails to file a paternity action timely or is unable to establish paternity, the putative father's consent to adoption or the voluntary termination of the putative father's parent-child relationship under IC 31-35-1 or both shall be irrevocably implied. The notice also states that, if the putative father fails to file the paternity action timely or fails to establish paternity, the putative father loses the right to contest the adoption, the validity of his implied consent to adoption, the termination of the parent-

child relationship or the validity of his implied consent to termination of the parent-child relationship. See this Chapter Roman Numeral V. at I. 1. for further discussion of implied consent after service of pre-birth notice. The person who provides actual notice to the putative father shall submit an affidavit to the court having jurisdiction over the adoption petition detailing the circumstances surrounding the service of actual notice including the time, if known, date, and manner in which actual notice was provided. IC 31-19-3-3. The Indiana Rules of Trial Procedure do not apply to the giving of pre-birth notice. IC 31-19-3-8.

To use this statute effectively, it is very important that the correct pre-birth statutory notice be served on the putative father. See Matter of Paternity of Baby Girl, Born 6/7/94, 661N.E. 2d 873 (Ind. Ct. App. 1996) (judgment of adoption, denial of putative father's motion to contest adoption, and dismissal of paternity petition were all reversed because the putative father had not received the statutorily required pre-birth notice form and had been affirmatively misled by the post-birth notice form which he received). County office of family and children attorneys could use this statute to provide for adoptions for mothers who seek or are already receiving agency services, including pregnant wards who desire to place their unborn children for adoption.

IC 31-19-3-5 requires the putative father who receives actual notice under the pre-birth notice statute to notify the agency or attorney arranging the adoption if the putative father files a paternity action. The notice must include the name of the court in which the paternity action has been filed, the cause number and date when the action was filed. If the putative father fails to provide the required notice concerning his paternity action, IC 31-19-3-6 requires the court with jurisdiction over the paternity action to allow the prospective adoptive parents to intervene in the paternity action on the adoptive parents' motion pursuant to Ind. Trial Rule 24. If paternity has already been established and the putative father has failed to provide the required notice under IC 31-19-3-5, the court is required by IC 31-19-3-7 to set aside the paternity determination and to allow the prospective adoptive parents to intervene on their motion pursuant to Ind. Trial Rule 24. See also IC 31-14-21.

B. After Birth Notice Requirements and Exemption from Notice

If a parent has not consented to adoption or had parental rights voluntarily or involuntarily terminated under IC 31-35, the parent may need to receive notice of the adoption petition. IC 31-19-4-1.

IC 31-19-4-11 exempts the following persons from being given notice: biological fathers of children conceived as a result of sexual wrongdoing (discussed in this Chapter Roman Numeral V. at F.); putative fathers whose consents to adoption are irrevocably implied under the pre-birth actual notice statute; putative fathers who are required to but do not timely register with the putative father registry; putative fathers whose paternity is established after the filing of a petition for adoption; parents who have relinquished the right to consent; and parents whose parental rights have been terminated. See Matter of Adoption of D.V.H., 604 N.E. 2d 634 (Ind. Ct. App. 1992), (adoption decree entered thirteen days after involuntary termination judgment was not invalidated due to lack of notice to birth mother); and Adoptive Parents of M.L.V. v. Wilkens, 598 N.E. 2d 1054 (Ind. 1992) (putative father had never established paternity in a separate court proceeding; therefore his consent to adoption was not needed and his allegations of misrepresentation in obtaining his consent were irrelevant). IC 31-19-4-1 and IC 31-19-4-2 require notice to putative fathers whose name and address is provided by the birth mother on or before the date she consents to adoption and to putative fathers who have timely registered with the putative father registry within thirty days after the child's birth or on the date of the filing of the adoption petition, whichever occurs later. Also, when the child is conceived outside the state of Indiana by a putative father whom the mother does not name, IC 31-19-4-3 requires publication notice to be given pursuant to Ind. Trial Rule 4.13.

C. Notice to Putative Fathers

IC 31-19-4-4 prescribes the form of the publication notice which must be given to unnamed, out of state fathers. IC 31-19-4-5 prescribes the form of notice to be given to named fathers. Both notices advise the putative father that he must do the following or his consent to adoption will be irrevocably implied: file a motion to contest adoption or file a paternity action within thirty days after service of the notice and, after filing the paternity action, establish paternity.

Practitioners should note that the instructions given to the putative father in the notice statutes, IC 31-19-4-4 and IC 31-19-4-5, differ from what Indiana law requires of putative fathers as set out in IC 31-19-9-12. IC 31-19-9-12 states that the putative father's consent is irrevocably implied if he fails to file a motion to

contest and a paternity action within thirty days of service of notice. The putative father is also required to do the following according to IC 31-19-9-12; (1) appear at the contested adoption hearing; (2) establish paternity; (3) register with the putative father registry. Because IC 31-19-4-4 and IC 31-19-4-5 provide that notice shall be given in “substantially the following form” and the exact wording of IC 31-19-4-4 and IC 31-19-4-5 is not legally required, practitioners should consider drafting their own notice, which more correctly states the law as delineated by IC 31-19-9-12. Practitioners should note the Court’s ruling in Matter of Paternity of Baby Girl, Born 6/7/94, 661 N.E. 2d 873 (Ind. Ct. App. 1996), where the Court found that the putative father had been affirmatively misled by the post birth notice form he received, when a pre-birth notice was required. See this Chapter at VIII. F. for further discussion on how putative fathers may prevent adoption.

The putative father may waive his right to notice in writing either before or after the birth of the child. IC 31-19-4-8. If actual notice has been given pursuant to the pre-birth notice statute, no additional notice is necessary. IC 31-19-4-9. A putative father who has not registered with the putative father registry in a timely manner and whose name or address are not disclosed by the mother on or before the date she signs an adoption consent is not entitled to notice unless the child was conceived outside the state. IC 31-19-4-6.

#### D. Service of Notice

IC 31-19-4-7 states that putative fathers need not actually receive the notice of adoption proceedings so long as service is provided in compliance with Ind. Trial Rule 4.1 or Rule 4.13 (when applicable). Practitioners should note that this statute applies only to putative fathers, not to other persons who must receive notice.

See Matter of Adoption of M.A.S., 695 N.E. 2d 1037 (Ind. Ct. App. 1998) (registry indicated a paternity affidavit had been signed by both parents and was on file with the state health department; adoption was reversed because institutionalized putative father did not receive correct legal notice pursuant to Ind. Trial Rule 4.3); and In Re Adoption of A.K.S., 713 N.E. 2d 896 (Ind. Ct. App. 1999) (paternity affiant father was entitled to notice).

#### E. Notice to Persons Other Than Putative Father

##### 1. Statutes

Parents, including mothers, legal fathers, and adjudicated fathers who have not consented to adoption and whose parental rights have not been terminated and legal guardians must receive notice of an adoption petition and the opportunity to file an objection. IC 31-19-4-10. The county office of family and children or licensed child placing agency which has wardship of the child must also be given notice of the pendency of adoption proceedings. IC 31-19-4-12.

##### 2. Case Law

In Matter of C.W., 723 N.E. 2d 956 (Ind. Ct. App. 2000), an appeal by maternal grandparents of the denial of two kinship placement petitions in a CHINS case, the Court affirmed the denial of the first petition based on the evidence and affirmed the denial of the second petition due to lack of standing because the child had been adopted by foster parents. Although the issue of notice to the grandparents of the foster parents’ petition for adoption was not before the Court, in footnote 6, the Court opined,

...we can envision a situation where competing Petitions for Adoption are filed in different counties, or as in the present case, a Petition for Adoption has been filed while a CHINS proceeding has been initiated on a child’s behalf in a different court. Thus, we believe that in order for an adoption court to fulfill its duty to notify appropriate parties, it has an affirmative duty to conduct an initial inquiry to determine whether or not all of the “interested parties” have been given notice of the Petition for Adoption, and if there are any competing actions pending in other courts.

Id. at 960.

In footnote 7, the Court also criticized the DFC stating that they acted “inappropriately” when they did not inform the grandparents of the petition for adoption filed by the foster parents. The Court noted that the grandparents had attempted to maintain close ties with the child and had taken measures to increase the likelihood that the child would be placed with them. The Court opined that DFC’s failure to inform

the grandparents of the foster parents' adoption petition foreclosed any chance the grandparents may have had to contest the adoption and gain custody. Id.

In In Re Adoption of I.K.E.W., 724 N.E. 2d 245 (Ind. Ct. App. 2000), a case in which grandparents were not given notice of the foster parents' adoption petition, the foster parents' adoption was reversed by the Court of Appeals. The Court concluded that IC 31-19-4-10 required the trial court to give notice and the opportunity to file objection to interested parties. The Court found that the grandparents, having filed a competing petition for adoption, were "unquestionably" interested parties. Id. at 250. The Court found that the trial court's failure to notify the grandparents of the foster parents' adoption hearing deprived the grandparents of their opportunity to contest the petition and was an abuse of discretion. Id. The Court held that the requirement for notice by the court necessarily imposed upon trial courts an affirmative duty to inquire as to who may be an interested party entitled to notice under the statute. Id. at 251. The Court found that the duty to inquire about interested parties was not limited to a query of the petitioner. The Court also opined that, given that more than one judge may have jurisdiction in adoption cases and that competing petitions to adopt the same child may be filed in different counties, the necessity of imposing an affirmative duty to inquire became even more apparent. Id.

### VIII. CONTESTING AN ADOPTION

#### A. Motion Required

A person contesting an adoption, including a putative father, must file a motion to contest adoption not later than thirty days after service of notice of the pending adoption. IC 31-19-10-1(a). An adoption agency or county office of family and children should file a motion to contest an adoption petition when agency consent to the adoption will not be given. An agency which has custody or wardship of the prospective adoptive child and is contesting the adoption should formally intervene in the adoption by motion pursuant to Ind. Trial Rule 24. A person who moves to contest an adoption shall give notice of the intention to contest the adoption to all parties to the adoption and to all persons whose consent is required. IC 31-19-10-2.

#### B. Counsel for Parents in Contested Adoptions

If unrepresented parents, including putative fathers, wish to withdraw consent or contest allegations by adoptive petitioners that the parent's consent is implied or should be dispensed with, case law mandates court appointed counsel if requested. See Taylor v. Scott, 590 N.E. 2d 1333 (Ind. Ct. App. 1991) (adoption reversed and remanded for new hearing at which the father could be afforded right to counsel; Court of Appeals opined that the father had three related statutory rights: the right to be represented by counsel, the right to have counsel provided if he could not afford private representation, and the right to be informed by the trial court of the two preceding rights). See also Petition of McClure, 549 N.E. 2d 392 (Ind. Ct. App. 1990) (adoption reversed because incarcerated indigent father requested but was denied court appointed counsel in stepparent adoption); Matter of Laney, 489 N.E. 2d 551 (Ind. Ct. App. 1986) (putative father entitled to court appointed counsel in adoption proceeding which may result in termination of his parental rights). But see Foster v. Adoption of Federspiel, 560 N.E. 2d 691 (Ind. Ct. App. 1990) (incarcerated indigent putative father filed pro se motions, indicated his full intention to represent himself, and did not request court appointed counsel; therefore, contested adoption judgment without counsel for putative father was affirmed).

In Matter of Adoption of A.M.K., 698 N.E. 2d 845 (Ind. Ct. App. 1998), the Court departed from the above case law and held that in contested adoption proceedings only non-consenting indigent parents have a right to counsel. In A.M.K. the trial court found that the father had misrepresented his indigency status in an affidavit he had submitted to the court and terminated the father's representation by court appointed counsel pursuant to IC 34-10-2-2 because he was guilty of improper conduct. The trial court also ordered the father to reimburse the county for his court appointed attorney fees. Both of the trial court's orders with regard to counsel were affirmed. Practitioners should be cautious in relying on A.M.K. since the source of the court appointed counsel right from termination law at IC 31-32-4-3 does not include indigency as a requirement for court appointed counsel.

### C. Guardian Ad Litem or Court Appointed Special Advocate in Contested Adoptions

#### 1. Statutes

Courts frequently appoint a guardian ad litem or court appointed special advocate for a child in a contested adoption. No statute or case law requires the appointment of a guardian ad litem or court appointed special advocate for a child in a contested adoption. A guardian ad litem or court appointed special advocate may be appointed in postadoption visitation proceedings when a motion to modify or void an agreement is at issue. See IC 31-19-16-6 and this Chapter at XII. A. for a further discussion of guardian ad litem and court appointed special advocate in postadoption visitation situations.

#### 2. Case Law

In Matter of Adoption of L.C., 650 N.E. 2d 726 (Ind. Ct. App. 1995), the Court looked to guardianship law at IC 29-3-2-3 and Ind. Trial Rule 17(c) to ascertain whether the trial court had erred in failing to appoint a guardian ad litem for a child in a contested adoption proceeding. The Court opined that under these rules, a trial judge need appoint a guardian ad litem only if the judge believes the minor is not otherwise adequately represented. Id. at 732. The Court found no apparent necessity for such an appointment and held that the trial court had not abused its discretion by not appointing a guardian ad litem for the child.

#### 3. Practical Considerations for Guardians ad Litem and Court Appointed Special Advocates

As in guardianship and grandparent's visitation cases, there is no statutory provision for guardian ad litem or court appointed special advocate appointment, reports, or fees in adoptions. The GAL attorney should argue by analogy that a fee is appropriate because of similar provisions in dissolution and guardianship case law. The Court may or may not desire a report depending on whether the adoption is contested. Case law provides that the child-placing agency report may not be considered by the Court in contested adoptions. See Matter of Adoption of T.R.M., 525 N.E. 2d 298 (Ind. Ct. App. 1988); Matter of Adoption of L.C., 650 N.E. 2d 726 (Ind. Ct. App. 1995); Matter of Adoption of Thomas, 431 N.E. 2d 506 (Ind. Ct. App. 1982). Reasoning by analogy, the Court may not wish to have a formal written report filed by the guardian ad litem or court appointed special advocate. The guardian ad litem or court appointed special advocate should ask the Court whether a report should be filed. To preserve confidentiality, two different reports may need to be filed so that names and identifying information will not be exchanged. Even if the Court does not desire a report to be filed, an informal report should be prepared and shared with counsel for the guardian ad litem or court appointed special advocate to help the guardian ad litem or court appointed special advocate prepare for his oral testimony in Court.

### D. Hearing on Contested Adoption

The court shall set a hearing on the motion to contest the adoption. IC 31-19-10-5. The hearing may be bifurcated and the court may send out all notices to preserve confidentiality. IC 31-19-10-7. At the hearing on the motion to contest the adoption, the court, after hearing evidence, may deny the motion to contest. If the court finds that a required consent has not been obtained or implied and cannot be dispensed with, or permits a necessary consent to be withdrawn, or finds that it is in the best interests of the child to grant the motion to contest adoption, the court shall dismiss the petition for adoption. IC 31-19-1-6. In In Re Adoption of I.K.E.W., 724 N.E. 2d 245 (Ind. Ct. App. 2000), the Court held that the trial court did not error by failing to consolidate two adoption causes due to lack of jurisdiction over the grandparents' adoption petition by virtue of the pending change of judge. The Court opined that conscientious and diligent following of Indiana Trial Rules and adoption statutes provides ample procedural guidance for competing adoption petitions to be decided justly and expeditiously at the discretion of the trial court and in the best interests of the child. Id. at 251.

### E. Dismissal of Petition and Custody Determination

If the court dismisses the petition for adoption the court shall determine the person who should have custody of the child. IC 31-19-11-5(a). If the child is a ward of a guardian or an office of family and children, the court shall provide for the custody of the child in an adoption decree. IC 31-19-11-2. If the court determines that it is necessary to change the child's custody, regardless of a person's right to immediate custody, the court may order a plan for a gradual change of custody to ease the child's transition. IC 31-19-11-5. The court may order counseling and consult with counselors to develop and implement a plan for a gradual custody change. See In Re Adoption of Dzurovcak, 600 N.E. 2d 143 (Ind. Ct. App. 1992) (adoption court erred in failing to conduct an evidentiary hearing considering the best interests of the child in making a custody determination;

prospective adoptive parents, who had actual physical custody of the child, were proper parties to the custody proceeding).

F. How Putative Fathers May Prevent Adoption

1. Statutory Compliance

If a putative father is entitled to notice of adoption under Indiana Law (through registry or mother's identification) and the facts do not support a determination that his consent is not required or may be judicially dispensed with, he can successfully prevent his child's adoption. The putative father must do the following to prevent adoption after service of notice of the adoption petition: (1) file a motion to contest adoption within thirty days; (2) file a paternity proceeding in the appropriate Indiana juvenile court or in a court in another state that is competent to obtain jurisdiction; (3) appear at the scheduled hearing on the motion to contest adoption; and (4) establish paternity. See IC 31-19-9-12. If a putative father receives actual pre-birth notice, he must within thirty days after the receipt of notice, regardless of whether the child has been born yet, do the following: (1) file a paternity action in the appropriate Indiana juvenile court or in a court in another state that is competent to obtain jurisdiction over the paternity action; and (2) establish paternity. IC 31-19-9-15.

Putative fathers who fail to act as described above will have their consents to adoption irrevocably implied as a matter of law. IC 31-19-9-13; IC 31-19-9-16. They will not be entitled to contest the adoption, to contest the validity of their implied consent, or to establish their paternity of the child. See IC 31-19-9-13; IC 31-19-9-14; IC 31-19-9-16; and IC 31-19-9-17.

2. Case Law

Several Indiana decisions support putative fathers who took the necessary actions as described above. See In Re Adoption of A.N.S., 741 N.E. 2d 780 (Ind. Ct. App. 2001) (adoptive petitioner was bound by putative father's paternity adjudication resulting from paternity petition filed thirty-eight days after receipt of pre-birth notice); In Re Adoption of Infant M.D., 612 N.E. 2d 1068 (Ind. Ct. App. 1993) (trial court erred by not dismissing petition for adoption because father had established paternity in a proceeding other than the adoption proceeding and father had not consented to adoption); In Re M.B.H., 571 N.E. 2d 1283 (Ind. Ct. App. 1991) (putative father could "veto" the adoption by clearly establishing paternity in a separate legal proceeding before intervening in the adoption proceeding); Matter of Adoption of Baby Boy Dzuravcak, 556 N.E. 2d 951 (Ind. Ct. App. 1990) (if putative father can demonstrate that he established paternity in a proceeding other than the adoption proceeding prior to the granting of the adoption petition, he will have the power to veto the adoption).

**IX. LEGAL ROLE OF ADOPTION AGENCY**

A. Prior Written Approval of Placement

A child may not be placed in a proposed adoptive home without the prior written approval of a licensed child placing agency or county office of family and children. IC 31-19-7-1. The written approval for placement shall be filed with the adoption petition. IC 31-19-7-3. Indiana law provides for the following exceptions to the prior approval statute: a child sought to be adopted by a stepparent or blood relative; a child placed from an agency outside Indiana with the written consent of the Division of Family and Children; or if the court, after a hearing, waives the prior written approval requirement. The better practice for an attorney who represents prospective adoptive parents is to encourage the adoptive parents to have a home study or "family preparation" completed before petitioning for adoption so the emergency waiver hearing will not be needed when a child becomes available for placement. Note also that the prior approval of the prospective adoptive home is legally different from the adoption agency's consent to the adoption of a specific child by the family. The consent of the Office of Family and Children is needed only for its wards. IC 31-19-7-2. Even this consent may be dispensed with by the court. See this Chapter at IV. E. for further discussion.

B. Preparation of Adoption History

A person, a licensed child placing agency, or county office of family and children placing a child for adoption shall provide to the adoptive parents a report summarizing non-identifying, available medical, psychological, and educational records of the person or agency concerning the birth parents. This report shall be given to the adoptive parents not later than the date of the child's adoptive placement or within thirty days after the child's

placement if the adoptive parents consent to the delay. IC 31-19-17-2. All available non-identifying social, medical, psychological, and educational records of the adoptive child shall be provided to the adoptive parents. IC 31-19-17-3. A summary of the known existing records which are not in the possession of the placement agency or person shall also be given to the adoptive parents. An attempt to secure copies of the additional records for the adoptive parents shall be made by the placement agency or person upon the adoptive parents' request. Identifying information shall be redacted. IC 31-19-17-4.

C. Supervision Period

A period of supervision of the child's placement in the adoptive home by a licensed child placing agency or county office of family and children is required before an adoption may be finalized. IC 31-19-8-1. The length of the period of supervision is within the sole discretion of the court and may take place either before or after the filing of the adoption petition. IC 31-19-8-2.

D. Agency Report for Finalization of Adoption

Within sixty days of the date of reference of the adoption petition to the agency, a written agency report concerning recommendations for the adoption shall be filed with the court. IC 31-19-8-5. IC 31-19-8-6 provides that the report shall include the following information: former environment and antecedents of the child; fitness of the child for adoption; whether the child is classified as "hard-to-place;" the suitability of the proposed adoptive home for the child; the criminal history information regarding the adoptive petitioners required by IC 31-19-2-7.5. See III. E. of this Chapter regarding the criminal history requirement. Information about the adoptive parents' financial condition may not be included. IC 31-19-8-6. The court may order further investigation or supervision before hearing the petition for adoption. IC 31-19-8-7. The agency report is not binding on the court, but is advisory only. IC 31-19-8-8. See Matter of Adoption of L.C., 650 N.E. 2d 726, 731 (Ind. Ct. App. 1995) (trial court could not have considered welfare report in making its determination on adoption petition because adoption was contested; therefore, any error in failure to file welfare report was harmless); Matter of Adoption of Thomas, 431 N.E. 2d 506, 510 (Ind. 1982) ( where proceedings are contested, the welfare report may not be considered by the court).

Any original notarized consent forms signed by birth parents or court orders terminating the parent-child relationship which are in the agency's possession should be attached to the report if these documents have not previously been provided to counsel for the adoptive petitioners. The agency's consent to the adoption of the children by the adoptive petitioners (if the agency is consenting to the adoption) should also be supplied with the report if it has not already been provided. A completed copy of the child's adoption medical history form required by IC 31-19-2-7 should be attached to the agency report. An original signed postadoption contact agreement should also be submitted to the court if this agreement has been made.

E. Case Law on Liability Issues

In Newman v. Deiter, 702 N.E. 2d 1093 (Ind. Ct. App. 1998), the Court affirmed the granting of the motion to dismiss a lawsuit brought by prospective adoptive parents against the attorney for the supervising adoption agency. The Court found that no attorney client relationship (with its resultant fiduciary duty) had ever existed between the adoptive parents and the agency attorney. The Court noted that by the time the contested adoption proceedings had begun and an order seeking removal of the child was sought, the relationship between the prospective adoptive parents and the adoption agency had become adversarial and the adoptive parents had retained their own counsel. The Court also found that none of the adoptive family's allegations concerning the attorney's conduct supported their claims of interfering with contractual rights, violation of privacy or defamation and that Indiana law does not provide for an independent cause of civil conspiracy, which was alleged against the agency attorney. Id. at 1101. The same suit against the probate judge and county sheriff was dismissed due to judicial immunity. In Keep v. Noble Cty. Dept. of Public Welfare, 696 N.E. 2d 422 (Ind. Ct. App. 1998), the Court of Appeals affirmed the summary judgment granted in favor of the Department because the adoptive mother's complaint for negligence and deceitful withholding of information regarding a child placed with her for adoption in 1958 was time barred. The adoptive mother did not file her complaint within two years of learning that her handicapped adopted child was the product of an incestuous relationship and that the birth mother had contracted German measles during pregnancy. The Court noted that the two year statute of limitations and 180 day tort claim notice requirement began to run when the adoptive mother knew she had been injured and had a cause of action for alleged misrepresentation regarding the child's adoption. Id. at 425. In T.S.B. by Dant v. Clinard, 553 N.E. 2d 1253 (Ind. Ct. App. 1990), the Court affirmed the summary judgment granted in favor of a private adoption agency and its director because the private agency did not obtain custody of the child or place her in the home where the

child allegedly suffered physical and emotional abuse. The adoption agency had merely given the name of a couple who was interested in adoption to the child's guardian who placed the child in the custody of the couple without the involvement of the welfare department or an adoption agency. The Court opined that, in determining whether a legal duty arises, consideration must be given to the nature of the relationship between the parties and whether the party being charged with negligence had knowledge of the situation or circumstances surrounding that relationship. *Id.* at 1256. The Court applied these principles and found there was no duty on the part of an adoption agency to a child when the agency was not engaged in placing the child for adoption. *Id.* The opinion did not attempt to answer the question of the duty of an adoption agency toward a child when the agency is engaged in the child's adoptive placement.

## **X. ADOPTION HEARING**

### **A. Required Documents**

To complete the adoption, the attorney for the adoptive petitioners must be sure that the following documents have been completed and filed with the court:

- The agency report for finalization of adoption. IC 31-19-8-5.
- All necessary consents, including the agency consent if it is an agency adoption.
- The affidavit prepared by the state department of health indicating the search of the putative father registry and paternity determination registry. IC 31-19-5-16; IC 31-19-5-17.
- Copies of all correctly and timely served notices of adoption to parents, including notices served to any fathers disclosed by the state department of health searches.
- Copies of any applicable orders granting termination of the parent-child relationship.
- The child's completed and signed adoption medical history form. IC 31-19-2-7.

The attorney should also bring the following documents to the adoption hearing:

- A copy of the fee receipt to show that all necessary fees were paid to the county clerk and state department of health, unless the court previously ordered the fees to be waived.
- The typed state department of health form which is needed to locate the child's birth certificate and establish a new birth certificate. IC 31-19-12-1.
- The original and four copies of the proposed decree of adoption containing the new name which the child shall be given. IC 31-19-11-4; IC 31-19-12-2. If a request for subsidy has been made pursuant to IC 31-19-26-1 through 6, the decree must include the nature, conditions, and length of time during which the subsidy shall be paid. IC 31-19-11-3.
- Originals of any post-adoption visitation privileges agreements or post-adoption sibling contact agreements signed by all necessary parties.

Although the Adoption Assistance agreement is not presented to the court which hears the adoption, counsel for the adoptive parents should be certain that the child's eligibility has been determined before the adoption hearing. If the child is eligible for Adoption Assistance, the agreement must be negotiated and signed by both adoptive parents and the director of the county office of family and children before the adoption petition is granted. Failure to complete the above necessary procedures will usually result in denial of Adoption Assistance and necessitate an administrative appeal by the adoptive petitioners to secure post-adoption financial assistance and Medicaid for the child. See this Chapter at XIII. C. for further discussion of Federal Adoption Assistance.

### **B. Legal Requirements for Granting Adoptions**

To complete the adoption the court must hear evidence from each of the petitioners and make the following findings: (1) adoption is in the child's best interests; (2) the petitioner(s) are of sufficient ability to rear the child and furnish suitable support and education; (3) the agency investigation report pursuant to IC 31-19-8-5 has been filed; (4) the state department putative father registry affidavit has been filed; (5) proper notice of the adoption has been given; (6) the paternity determination affidavit by the state department of health has been filed; (7) all necessary consents have been given. Legislation effective July 1, 1999 added the requirement that the court find that the adoptive petitioner is not prohibited from adopting the child as the result of an inappropriate criminal history. See this Chapter at III. E. for a complete discussion of the

criminal history statute.

The court shall provide for custody of the child in the adoption decree if the child is a ward of a guardian, an agency, or a county office of family and children. IC 31-19-11-2. An adoption petition may, in the court's discretion, be heard and granted even if an appeal of a termination decision is pending. IC 31-19-11-6.

C. Effect of Adoption Decree

1. New Birth Certificate

When an adoption petition is granted, the adoptive petitioners become the legal parents of the child. The State Department of Health shall establish a new birth certificate for the Indiana-born child unless the court, the adoptive parents, or the adoptive child request that a new birth certificate not be established. IC 31-19-13-1. The new birth certificate must show the child's actual place and date of birth. The new birth certificate replaces the child's original birth certificate. IC 31-19-13-2. The child's original birth certificate shall be sealed from inspection or surrendered to the State Department of Health by the local health department. IC 31-19-13-4. If a child is born outside Indiana, the State Department of Health shall forward the information for a new birth certificate to the appropriate out of state registration authority. IC 31-19-12-4(a). If the out of state authority fails to supply an adoptive birth certificate after ninety days, the Indiana State Department of Health shall create a delayed registration of birth upon request. IC 31-19-12-4(b).

2. Effect on Birth Parent-Child Relationship

Except for stepparent adoptions and postadoption privileges situations pursuant to IC 31-19-16-1, the effect of the child's adoption is to relieve the birth parents of all legal duties, obligations and rights to the child. IC 31-19-12-4(b).

D. Dismissal of Petition

1. Statute

IC 31-19-11-5 provides that if the court dismisses the petition for adoption, the court shall determine who should have custody of the child. The court is permitted by IC 31-19-11-5(b) to implement a gradual change of custody regardless of a person's immediate right to custody. The gradual change of custody to ease the child's transition may be ordered unless the gradual change would endanger the child's physical health or significantly impair the child's emotional development. The court may do the following: (1) implement a change of custody by gradually increasing the child's visitation with each person who is entitled to custody; (2) order counseling for the child and persons involved in the custody change so that a plan for gradual change of custody may be implemented; (3) consult with the counselor to determine an order for the gradual change of custody that meets the child's best interests.

2. Case Law

In In Re Adoption of Dzurovcak, 600 N.E. 2d 143 (Ind. Ct. App. 1992), the Court clarified the adoption court's duty to determine custody if the adoption is dismissed. Despite the putative father's establishment of paternity in another court after the adoption petition was filed, the Court found that, since the adoption court assumed jurisdiction over the custody determination first, the adoption court could not hold its jurisdiction temporarily and then unilaterally offer permanent jurisdiction to the paternity court. Id. at 147. The Court found that the adoption court further erred by not conducting a full evidentiary hearing on the child's best interests prior to making a custody determination and by not allowing the adoptive petitioners to be parties to the permanent custody hearing. Id. at 148.

## XI. ADOPTION APPEALS

All adoption appeals shall be decided on an expedited basis. IC 31-19-14-1. The following persons are excluded from challenging an adoption decree: (1) a person who has not contested the adoption nor established paternity more than thirty days after service of notice; (2) a person who receives actual pre-birth notice who does not contest the adoption nor establish paternity within thirty days after the date of receiving actual notice; (3) a person who has consented to adoption and whose consent has not been withdrawn prior to the entry of the adoption decree. IC 31-19-14-3. If a person does not fall into one of the categories listed at IC 31-19-14-3, the person

whose parental rights are terminated by the entry of the adoption decree must challenge the decree either within six months after the entry of the decree or within one year after the adoptive parents obtain custody of the child, whichever is later. IC 31-19-14-2. The person challenging the decree must establish, by clear and convincing evidence, that modifying or setting aside the decree is in the child's best interests. IC 31-19-4-4 provides that no challenges to the decree are permitted after the time period outlined at IC 31-19-14-2. Although a parent, including a putative father, has the right to counsel in a contested adoption at the trial level, Indiana case law is silent as to whether there is a right to appellate counsel. Arguably, IC 34-10-2-1 for indigent parents could apply to appellate counsel as well. An indigent parent who seeks a free transcript and record of proceedings for an adoption appeal will probably succeed in this request due to the United States Supreme Court decision M.L.B. v. M.L.J., 519 U.S. 102, 117 S. Ct. 555 (1996). In this contested stepparent adoption case, the Supreme Court held that the State of Mississippi may not withhold from the mother a "record of sufficient completeness to permit proper appellate consideration of her claims." Id. at 117 S. Ct. 570.

## **XII. POSTADOPTION CONTACT**

In Matter of Parent-Child Rel. of Ellis, 681 N.E. 2d 1145, 1149 (Ind. Ct. App. 1997), dissent to denial of transfer at 658 N.E. 2d 476 (Ind. 1997), the Court of Appeals stated that Indiana does not provide for "open" adoptions; however, two different forms of postadoption contact for birth parents with their adopted children are provided by Indiana statute. See IC 31-19-16-1 through 8 and IC 31-16-19-9. Enforceable postadoption contact for birth siblings is governed by IC 31-19-16.5-1 through 7.

### **A. Statutes**

#### **1. Postadoption Contact with Birth Parents**

If a child is under two years of age at the time of adoption, IC 31-19-16-9 allows the birth parent and adoptive parent, without court approval, to agree to postadoption contact privileges that may not include visitation. Such agreements are not enforceable and do not affect the finality of the adoption.

If a child is at least two years old at the time of the adoption and the court finds that there is a significant emotional attachment to the birth parent, the birth parent and adoptive parent may submit a postadoption contact agreement for the court's approval at the time of the adoption. IC 31-19-16-1 and 2. The agreement must contain the two provisions outlined at IC 31-19-16-3: (1) the birth parent acknowledges that the adoption is irrevocable even if the adoptive parents do not abide by the agreement; (2) the adoptive parents acknowledge that the birth parents have the right to seek to enforce the agreed postadoption privileges. In addition, the following provisions at IC 31-19-16-2 must be met for the court to grant postadoption privileges and approve the postadoption contact agreement: (1) the agreement must serve the child's best interests; (2) each adoptive parent consents to the postadoption contact privileges; (3) the adoptive and birth parents execute a postadoption contact agreement and file it with the court; (4) the licensed child placing agency sponsoring the adoption and the child's guardian ad litem or court appointed special advocate recommends the agreement; (5) if there is no licensed child placing agency the agency preparing the adoption report required by IC 31-19-8-5 is informed of the agreement and comments on the agreement in its report to the court; (6) the child consents to the agreement if the child is at least twelve years old.

After the court approves the agreement, IC 31-19-16-4 allows for enforcement or modification of the agreement. Either a birth parent or an adoptive parent may petition the court which granted the adoption to modify or compel compliance with the agreement. IC 31-19-16-6 states that the court may modify or void the agreement at any time before or after the adoption if the court determines, after a hearing, that the best interests of the child require that the agreement be modified or voided. The court may appoint a guardian ad litem or court appointed special advocate to represent the child in proceedings concerning postadoption contact modification or a request that the agreement be voided. IC 31-19-16-7. Monetary damages may not be awarded by the court as a result of a petition to void or modify the agreement. IC 31-19-16-5. The court may not revoke the adoption due to failure of a birth parent or adoptive parent to comply with a postadoption contact agreement. IC 31-19-16-8.

#### **2. Postadoption Birth Sibling Contact**

IC 31-19-16.5-1 provides that the court entering an adoption decree may order the adoptive parents to

provide specified postadoption contact for their adoptive child who is at least two years of age with a preadoptive sibling if each adoptive parent consents to the contact and the contact would serve the best interests of the adopted child. The adoption may not be revoked nor may money damages be awarded if the postadoption contact order is violated. IC 31-19-16.5-3; IC 31-19-16.5-7. The court shall consider any relevant evidence in making its determination to order postadoption sibling contact, including the following: recommendation of the licensed child placing agency; recommendation by the adopted child's guardian ad litem or court appointed special advocate; recommendation made by the agency which prepared the statutorily required adoption report; wish expressed by the adopted child or adoptive parents. IC 31-19-16.5-2.

The postadoption sibling contact order may be vacated or modified or adoptive parents' compliance may be compelled on petition to the court. IC 31-19-16.5-4. The persons who may file such a petition include: an adoptive parent; a preadoptive sibling by next friend, guardian ad litem or court appointed special advocate; the adopted child by next friend or guardian ad litem or court appointed special advocate. IC 31-19-16.5-5 allows the court to vacate or modify the postadoption sibling contact order after the adoption if, after a hearing, the court determines that this action is in the best interests of the adopted child. A guardian ad litem or court appointed special advocate may be appointed prior to the hearing to represent and protect the best interests of the adopted child. The guardian ad litem or court appointed special advocate may be appointed only if the interests of the adoptive parent and the child differ to the extent that the court determines that the appointment is necessary to protect the child's best interests. IC 31-19-16.5-5.

B. Case Law

In In Re Visitation of A.R., 723 N.E. 2d 476, 479 (Ind. Ct. App. 2000), the Court held that IC 31-19-16-2 provides "the exclusive means" for a birth parent to acquire postadoption visitation rights. The Court relied on legislative history in making this decision. The Court noted that the "general rule of total divestiture" of all birth parent rights with respect to an adoptee was altered by the 1994 enactment of the postadoption contact law. The Court opined that the legislature did not intend that a birth parent's failure to comply with the statute should subsequently act as a means for the birth parent, under the guise of a non-parent third party, to circumvent the statute's requirements. Id. at 479.

### **XIII. POSTADOPTION FINANCIAL ASSISTANCE FOR ADOPTIVE FAMILIES**

A. State and Federal Overlap

Indiana state law provides for post-adoption financial assistance for hard-to place children via adoption subsidies. (IC 13-19-26-1 through 6). Adoption subsidy must be ordered through the court. The federal government provides adoption assistance for eligible children through the Adoption Assistance Program, 42 U.S.C. 673. Adoptive families may receive both forms of financial assistance in some situations. The adoptive child must be eligible to receive assistance, and petitioners must request the assistance. Not all children who are wards of the county office of family and children are eligible for post-adoption financial assistance. Some children who are not wards of the county office of family and children will be eligible for post-adoption financial assistance, if the correct procedures are instituted.

B. Indiana Adoption Subsidy

A request for adoption subsidy must be included in the petition for adoption. IC 31-19-2-6. To be eligible for subsidy, the child must be a "hard-to-place" child, defined in IC 31-9-2-51 as a child who is disadvantaged because of ethnic background, race, color, language, physical, mental, or medical disability, age, or because the child is a member of a sibling group which should be placed in the same adoptive home. Subsidies may be ordered for the child's financial support and for health care expenses. IC 31-19-26-2 and IC 31-19-26-3. Court ordered subsidies do not affect the legal status of the child nor the legal rights and responsibilities of the adoptive parents. IC 31-19-26-6.

1. Financial Support Subsidy

The court which enters the adoption decree may order the county office of family and children responsible for foster care of the adopted child to pay a financial subsidy to the adoptive parents to the extent that money is available. IC 31-19-26-1(b). The financial subsidy shall not exceed the monthly cost of care of the child in a foster family home, if federal payments for adoption assistance are not equal

to the total monthly cost of care of the child in a foster home. IC 31-19-26-2. Note that this statute makes no reference to subsidies for adoptive parents who are not receiving federal adoption subsidy because their adoptive child is not eligible for federal adoption assistance. A reasonable statutory interpretation is that the county office may be ordered to pay a financial subsidy not exceeding the cost of foster home care when the adoptive family is not receiving federal Adoption Assistance.

2. Statutes Concerning Health Care Subsidy

The court which orders the health care subsidy to be paid as part of the child's adoption decree should specify in its order the physical, mental, emotional or medical condition which existed before the petition for adoption was filed. IC 31-19-26-3(1). The attorney for the adoptive petitioners should include this specific information in the adoption petition and the proposed decree. Medical subsidies may be ordered only if payments from insurance or public money to treat the condition are not available to the adoptive parents. IC 31-19-26-3.

3. Medicaid Coverage for Children who are Awarded Indiana Subsidy Only

Effective July 1, 1999 the State of Indiana initiated Indiana Adoption Subsidy Program Medicaid (IASP Medicaid) for the eligible county subsidy only child who is not eligible for Medicaid under the federal Adoption Assistance Program.

a. In General

The DFC manual revised October, 2000 states at section 820 that the adoptive child who meets the following requirements qualifies for Medicaid: the child receives a court ordered subsidy that is in effect on or after July 1, 1999; the child is not entitled to Adoption Assistance; the child has a documented qualifying medical, physical, mental or emotional condition or cause of condition that existed at the time of the adoption. Medicaid begins on the date the child is eligible for subsidy or on July 1, 1999, whichever is later. Prior to July 1, 1999 the individual county was responsible for funding the health care subsidy using solely county funds, and the subsidy was limited only to the medical, surgical, hospital and related expenses due to the condition or cause of the condition that existed at the time of the adoption petition. Section 820 of the DFC Manual states that the child who qualifies for Medicaid under the subsidy only program is entitled to the full range of Medicaid services.

b. County OFC Responsibilities in Determining Eligibility

Section 820.2 of the DFC Manual provides that, upon notification that the health care subsidy has been ordered and the adoption finalized, the county OFC must determine the child's eligibility for Medicaid and contact the adoptive parents to complete a subsidy Medicaid agreement. If the court orders a county subsidy that includes a medical subsidy for the health care costs of the child and the order specifies the child's medical, physical, mental, or emotional special need, and that the condition or cause of the condition existed prior to the filing of the adoption petition, then the child is entitled to Medicaid with no further review. If the court orders a county subsidy that includes a medical subsidy for the health care costs of the child but the order does not specify the qualifying medical, physical, mental, or emotional condition and that the condition or the cause of the condition existed prior to the filing of the adoption petition, then the OFC must determine if the child qualifies for Medicaid. If the court has not made this determination of the child's special need, then the OFC must do so and must document the child's need in the case record in order to qualify the child for the Medicaid entitlement. If no such medical condition or physical, mental, or emotional handicap can be documented by the OFC, then the child will not be eligible for Medicaid; county funds must be used for the child's medical expenses, as ordered by the court. If the court should order a support subsidy for a child, but fail to order a medical subsidy for the health care costs of the child, then the OFC must review the child's case. If review reveals that the child does have a medical, physical, mental, or emotional condition or cause of condition that existed at the time of the adoption and that medical assistance is needed, then the child is also entitled to Medicaid. For the subsidy-only child, statements from licensed psychologists, social workers, or counselors, as well as statements from licensed physicians may be used to document the child's condition. Section 820.3 of the DFC Manual states that an agreement between the OFC and the adoptive parent(s) is required for the adoptive child who qualifies for IASP Medicaid. The OFC shall initiate contact with the adoptive parent(s) to complete the agreement once it has determined a child qualifies for Medicaid benefits. The OFC shall contact the adoptive family when a revised agreement is necessary.

4. Subsidy Duration and Required Period of Reporting

Adoption subsidy, once ordered, continues under the trial court's discretion. Based on information filed by the adoptive parents in their sworn annual report regarding the location of the adoptive parents and child and the child's condition or other information received by the court indicating changed conditions, the court may continue, increase, reduce, or discontinue the subsidy. IC 31-19-25-5. Usually the subsidy continues until the adopted child dies, becomes emancipated, reaches the age of eighteen, or the adoption is terminated, whichever occurs first. Subsidy may continue even though the adoptive parents leave the jurisdiction. Subsidy may continue until the child reaches the age of twenty-one if the child petitions to continue the subsidy and is enrolled in high school, college, or a vocational training program. IC 31-19-26-4(b).

C. Federal Adoption Assistance for Adoptive Families

The Title IV-E Adoption Assistance Program provides monthly payments to adoptive parents and Medicaid for the benefit of eligible special needs children. Adoption Assistance is an entitlement program for eligible children. Adoption Assistance became available in Indiana for children adopted on or after October 1, 1982.

1. Sources of Information Concerning Adoption Assistance

Adoption assistance is not codified in Indiana statutes. Federal law and federal regulations at 42 U.S.C. 673 and 42 C.F.R. 435.145, 42 C.F.R. 4353.227, 42 C.F.R. 435.403, 42 C.F.R. 435.604 and 45 C.F.R. 1355, 1356 and 1357 are sources of law concerning Adoption Assistance. Another excellent source of detailed information concerning Adoption Assistance is Section 8 of the Indiana Child Welfare Manual revised in October, 2000. Attorneys who practice in this area are urged to obtain a copy of this section of the manual from their local county office of family and children.

2. Eligibility

a. Child's Special Needs Eligibility

All three of the following conditions must be met for the child to meet the special needs eligibility requirements for Adoption Assistance: (1) there must be a court order that it is not in the child's best interest to be returned to the parents or that a return is contrary to the child's welfare; (2) reasonable efforts to place the child for adoption without Adoption Assistance must be made or may be waived if such efforts conflict with the child's best interests; (3) the child must have a specific factor or condition which makes it reasonable to conclude that the child cannot be placed adoptively without Adoption Assistance. A child who is voluntarily placed for adoption by the parents may meet the first requirement if a best interest determination is made by a court within six months of placement. An exception to the second requirement of making reasonable efforts to place the child without Adoption Assistance can be made if significant emotional ties exist between the child and the prospective adoptive parents. The child must have at least one of the following conditions at the time of adoptive placement to meet the third requirement:

- The child must be at least two years of age and be a member of a commonly recognized minority group; or
- If under age two, the child must be a member of a commonly recognized minority group and also be a member of a sibling group of at least two children, one of whom is at least two years of age, who must be placed together for adoption in the same home; or
- The child must be at least six years of age if the child is not a member of a minority group; or
- If under age six, the non-minority child must be a member of a sibling group of at least two children, one of whom is at least six years of age, who must be placed together for adoption in the same home; or
- The child must have a medical condition or a physical, mental, or emotional handicap or a recognized high risk of such condition or handicap specifically documented by a physician.

b. Child's Categorical Eligibility

In addition to meeting the special needs criteria, the child must meet one of the following criteria:

- The child must qualify for Supplemental Security Income or meet Supplemental Security

Income eligibility requirements prior to adoption finalization; or

- The child must have been eligible for Assistance to Families with Dependent Children based on the program guidelines in effect on July 26, 1996. This includes a child who is receiving Title IV-E Foster Care at the time the adoption petition is filed and the child was eligible for AFDC while living with the parent at the time of the child's removal.

c. Adoption Assistance for Non-Wards

Even if they have not been found to be CHINS and are not wards of the county welfare department, special needs children who are being placed for adoption either independently or by a private licensed child-placing agency may receive Federal Adoption Assistance Payments (AAP) and Medicaid if they meet the eligibility requirements. It is crucial that the application be made by the adoptive parents, processed by the county welfare department in which the adoptive parents reside, and that the written adoption assistance agreement be completed before the child's adoption is finalized. Counsel for the adoptive parents or the licensed child placing agency must request a hearing to obtain a court determination stating that the child cannot or should not be returned to his birth parents. In non-CHINS cases the juvenile court will not have jurisdiction, so the hearing should be held in the court with jurisdiction over the adoption. The hearing could be requested at the time the adoption petition is filed. Notice of the hearing should be given to the office of family and children in the county of residence of the adopting parents. The county office may appear by counsel and/or caseworker to cross-examine witnesses and present evidence on the issue of whether the child cannot be returned to the home of the birth parents. Remember that the court does not determine or order the child's AAP eligibility because AAP is a federal entitlement program. The court makes a determination only as to the "return to birth parent" eligibility requirement. A caveat to adoptive parents for non-wards is that in addition to the court determination regarding return to birth parents mentioned above, the county welfare department must make its determination that the child cannot be placed adoptively without AAP benefits because of a specific factor or condition and that a reasonable effort has been made to place the child for adoption without using AAP and Medicaid benefits. Fortunately, the AAP guidelines state that if seeking an alternate adoptive home is not in the child's best interests, this requirement may be waived by the county welfare department in determining eligibility. See this Chapter above at XIII. C. 2. a. One of the factors that supports waiver is the child's emotional bond to the adoptive family. The adoptive parents may wish to obtain and submit to the county department, a psychological evaluation of the bonding between the child and family.

d. Eligibility Requirements for Adoptive Parents

Federal regulations require that the adoptive parents pass a criminal background check in order to qualify for Adoption Assistance. Indiana law requires that a criminal history check be made of adoptive parents and excludes persons with specific criminal convictions from adopting children. See this Chapter above at III. E. Because federal policy interpretation states that the purpose of Adoption Assistance is to provide adoption incentives for families of any economic stratum, there is no financial criteria for prospective adoptive parents to adopt an eligible child. The circumstances of adoptive parents may be considered in the negotiation and re-negotiation of the Adoption Assistance Agreement. See this Chapter at XIII. C. 4. for discussion of the Adoption Assistance Agreement. Adoption Assistance payments may be made prior to the finalization of an adoption and in legal risk situations, i.e., when the child is not yet legally available for adoption.

3. Adoption Assistance Application

Adoptive parents are to be given information about the Adoption Assistance Program by the county office of family and children or the licensed child placing agency which is involved with the child. Information shall be given during the course of the family assessment and at the time the special needs child is being offered to the family for placement. The county office of family and children shall give the adoptive parents an application, state form 2973, to complete.

A separate application form for each child must be completed and signed by the adoptive parents and the director of the county office of family and children. Application for Adoption Assistance shall be made to the county office of family and children which has wardship of the child, or to the county of the adoptive parents' residence if the child is not a ward. When the application is submitted, the county

office of family and children shall determine the child's eligibility, notify the adoptive parents within forty-five days of the date of the application of the child's eligibility or ineligibility and provide information to the adoptive parents of their right to appeal the decision before a state hearing officer. Because of the amount of money involved adoptive parents should carefully consider an appeal if Adoption Assistance is denied. When the application is approved, the child will be certified eligible for Adoption Assistance. No recertification of initial eligibility is required for the child at the biennial renewal of the Adoption Agreement.

4. Adoption Assistance Agreement

45 C.F.R. 1356.41 requires that the Adoption Assistance agreement, state form 2974, be completed by the county office of family and children and signed by the adoptive parents and county director prior to or on the day of the adoption finalization. The agreement is to be the result of negotiation between the county office of family and children and may involve Medicaid, a monthly payment which may not be greater than 75% of the maximum per diem for which the child would qualify, or both. The signed agreement serves as written notice to the adoptive parents of the amount of adoption assistance to be paid, the child's Medicaid eligibility, or both. The Child Welfare Manual, Section 8, subsection 809 characterizes the agreement as a "legally binding contract between the COFC and the prospective adoptive parents... enforceable in a court of law." The signed agreement may become effective when the child is placed in the adoptive home or at the time of adoption finalization. The Adoption Assistance payment may be supplemented by a court ordered adoption subsidy so that the child receives 100% of the foster care per diem in post adoption assistance. See this Chapter at XIII. B. 1 for further discussion of financial support subsidy.

5. Adoption Assistance Continuation and Reapplication

Adoptive parents must participate in a biennial renewal of the Adoption Assistance agreement. The county office of family and children shall send notice to the adoptive parents sixty days prior to the renewal. New Adoption Assistance agreement forms shall also be sent to the adoptive parents, which must be completed and signed by the adoptive parents and returned by the adoptive parents for the signature of the county office of family and children director. The Adoption Assistance agreement will be terminated if the adoptive parents fail to submit their renewal request within five working days after the renewal date. Practitioners should inform adoptive parents of the need to cooperate with the biennial renewal process including the need to keep the county office informed of the adoptive parents' current address. The biennial renewal is also the time to renegotiate the agreement due to any changed circumstances of the adoptive parents. The State Division of Family and Children's Child Welfare Manual states some reasons why the Adoption Assistance amount may change: there is a change in the child's special needs; the child is placed temporarily in a residential facility for medical care, treatment or correction; the adoptive parents experience a significant loss of income; there is a change in the IV-E AAP rate or the availability of federal funding.

When the foster care per diem rate changes or is increased due to the child's age, the Adoption Assistance payment shall be changed accordingly.

6. Discontinuance of Adoption Assistance

Federal law and policy require the discontinuance of Adoption Assistance when one of the following occurs: (1) the child reaches eighteen years of age (or twenty-one years of age if the child's physical or emotional handicap requires a continuance of Assistance); (2) the adoptive parents are no longer legally liable for the child's support; (3) the child no longer receives financial support from the adoptive parents; (4) the adoption disrupts and the adoptive parents' parental rights are terminated; (5) the adoptive parents fail, after proper notice from the county office of family and children, to complete the required biennial renewal agreement; (6) the death of the child; (7) the death of the adoptive parents.

The Adoption Assistance agreement does not transfer payments to anyone else. There is no transfer of benefits to another family if the adoptive parents' parental rights are terminated or the adoptive parents die. The child still remains eligible for Adoption Assistance. A new adoptive family may receive Adoption Assistance if a new agreement is negotiated and signed by the new adoptive parents and the county office of family and children director.

7. Appeal of Discontinuance of Adoption Assistance  
470 I.A.C. 1-4 provides for appeals of discontinuance of Adoption Assistance at an administrative hearing. The adoptive parents or their counsel must appeal in writing within thirty days of the effective date of the office of family and children's notice of discontinuance of Adoption of Assistance. The adoptive parents may request assistance from the county office of family and children staff in drafting the adoptive parents' letter of appeal and request for the administrative hearing. The appeal and request for administrative hearing must be sent to Indiana Family and Social Services Administration, Division of Family and Children, Office of General Counsel, Hearings and Appeals, 402 West Washington Street, Room W392, MSO4, Indianapolis, IN, 46204-2773.

D. Nonrecurring Adoption Expense Program

1. Overview

Parents who adopt children with special needs may be eligible for state reimbursement or direct vendor payment of the adoptive parents' nonrecurring adoption expenses. Nonrecurring adoption expenses are defined as reasonable and necessary adoption fees, court costs, attorney fees, and other expenses, which are directly related to the legal adoption of a child with special needs. See 42 U.S.C. 673(a)(6)(A). Some examples of reasonable expenses, outlined in the state Division of Family and Children manual, revised in October, 2000, include the following: (1) reasonable and necessary fees for the adoptive home study, needed health and psychological examinations for the child, adoptive placement and supervision fees; (2) reasonable court costs, including statutory filing fees; (3) reasonable and necessary attorney fees; (4) transportation, lodging and food expenses for the adoptive child and parent incurred during travel for pre-placement visits and the placement. The total amount of nonrecurring adoption expenses reimbursed shall not exceed \$1,500.00 for each adopted child.

2. Child's Eligibility

The child for whom an Adoption Assistance agreement has been completed qualifies for nonrecurring adoption expenses. Other special needs children who are adopted may also qualify for nonrecurring adoption expenses, even if the children are not wards of the county office of family and children. Children who have been placed through a licensed child placing agency, or an independent, foreign or relative adoption may be eligible for the nonrecurring adoption expense program. The county office of family and children shall advise parents who are adopting a special needs child of the availability of nonrecurring adoption expenses. The adoptive parents must complete and sign an application, state form 46152, prior to finalizing the adoption. The application is also signed by the family case manager and the director of the county office of family and children and submitted, with a recommendation, to the Central Office of the State Division of Family and Children for review. If the application is approved, the adoptive parents and the county office of family and children enter into and sign the Nonrecurring Adoption Expenses agreement, state form 47702. The adoptive parents have the right to administratively appeal a denial of their application for nonrecurring adoption expenses.

The following criteria are used to determine the child's eligibility: (1) the child cannot or should not be returned to the parents as documented by court order, signed voluntary relinquishments or consents to adoption, involuntary termination or verification of the parents' death; (2) reasonable, but unsuccessful efforts have been made to place the child without adoption assistance unless to do so would be against the child's best interests; (3) the child must have a specific condition or there must be a specific factor which makes it reasonable to conclude that the child cannot be placed without providing adoption assistance or reimbursement of nonrecurring adoption expenses.

3. Claiming Procedures and Direct Vendor Payments to Attorneys

Claim forms shall be submitted for reimbursement of each nonrecurring adoption expense. Instructions for the claiming procedure are provided to adoptive parents when their Nonrecurring Adoption Expense application is approved and the agreement form is given to them. The adoptive parents may decide to have the state pay their adoption attorney directly. The adoption attorney must submit the necessary form, state form 11294, itemizing expenses related to the adoption. The adoptive parents must certify that the services have been completed and verify the amount of payment, using state form 47701. The State Manual provides that all claims must be received within two years of the date of the final decree for adoptions completed after June 14, 1989. The adoption need not be finalized prior to claiming reimbursement.

#### **XIV. REVOCATION OF ADOPTION**

Indiana statutes do not directly address the revocation of an adoption; however, IC 31-19-13-3 does provide that the original birth certificate shall be restored upon notice of annulment or revocation of an adoption. In Matter of Adoption of T.B., 622 N.E. 2d 921, 924 (Ind. 1993), the Indiana Supreme Court stated that public policy disfavors a revocation of an adoption, because an adoption is intended to bring a parent and child together in a permanent relationship, to bring stability to the child's life, and to allow laws of interstate succession to apply with certainty to adopted children. The Court went on to state that an order of adoption is a judgment and may be set aside pursuant to Ind. Trial Rule 60B. Id. at 924. In T.B., the adoptive mother sought to set aside her adoption based on dual theories of fraud by the Department and the best interests of the child. The Supreme Court reversed the trial court's revocation of adoption, stating that the record might support a finding that the Department was negligent in failing to discover that the child was a victim of sexual abuse, but fraud had not been proven. Id. at 925. The Court also held that the adoptive mother was not a proper party to bring an action to terminate the parent-child relationship on her best interest assertion; therefore, the trial court should enter judgment against the adoptive mother on her petition for revocation. In County Department of Pub. Welfare v. Morningstar, 128 Ind. App 688, 151 N.E. 2d 150 (1958), the Court of Appeals affirmed the trial court's finding that the Department had perpetrated a fraud on the adoptive parents by misrepresenting the child's background. Id. at 155. The adoption was set aside and the child was made a ward of the county welfare board, the legal predecessor to the county office of family and children.