

Adoption

New Statutes and Amendments 2003 (SEA 517)

1. Petition for custody of child pending adoption. A new statute, IC 31-19-2-13, provides that the adoption petitioners may file an ex parte petition for temporary custody of the child at the time they file the adoption petition, or anytime thereafter. The custody petition must be verified, and signed by each petitioner for the adoption. The court can grant the custody petition if it finds the petition for adoption is in proper form and the temporary custody is in the best interest of the child, presumably without a court hearing. The temporary custodians become financially responsible for the child.

A word of caution is noted regarding all ex parte proceedings. See *In re Anonymous*, 729 N.E.2d 566 (Ind. 2000).

2. Consolidation of paternity and adoption cases in adoption court. A new statute, IC 31-19-2-14, provides that if an adoption petition and a paternity petition are both pending regarding the same child the cases must be consolidated and the court with the adoption petition has exclusive jurisdiction over both cases. The new statute also provides that if the adoption petition is dismissed the adoption court shall determine who has custody of the child and may either retain jurisdiction of the paternity case to complete the case or return the paternity case to the court in which it was originally filed.

Reading IC 31-19-2-14 in conjunction with the pre-existing IC 31-14-21-9, it would appear that when the cases are consolidated, the adoption court must comply with the statutory requirement at IC 31-14-21-9 to expedite the paternity case by conducting the initial hearing in the paternity court within 30 days of the birth of the child or the filing of the paternity petition (whichever occurs later), unless this has already been done before the paternity case is consolidated with the adoption proceeding.

3. New chapter clarifying when notice of an adoption proceeding is required and the correct notice form, and when notice is not required. IC 31-19-2.5 is a new chapter that addresses what persons are entitled to notice of the adoption proceeding (and in what form) because their consent to the adoption is required, and what situations do not require notice.

a. Persons to who notice must be given, when petition alleges their consent is not required. IC 31-19-2.5-2(b) provides that notice of the adoption proceeding must be sent to a putative father or parent if the petition alleges that the person's consent is not required under one of the following subcategories of IC 31-19-9-8:

- (a)(1) (child abandoned)
- (a)(2) (failure to support or have significant communication with the child)
- (a)(4)(B) (child conceived as a result of biological father's act of child molestation, but conviction not required)

- (a)(4)©) (child conceived as a result of biological father’s act of sexual misconduct with a minor, but conviction not required)
- (a)(9) (parent declared incompetent or mentally defective)
- (a)(11) (parent proven to be unfit and adoption in best interests of child)

IC 31-19-2.5-2(b) states that it is applicable to both putative fathers and parents who fit into those particular categories. It also provides that notice to persons who fit within those categories must be given pursuant to the new notice form in IC 31-19-4.5. Further, IC 31-19-2.5-2(a) provides that putative fathers are generally given notice pursuant to the notice form in the putative father chapter, IC 31-19-4, “except” as provided in subsection (b). Reading these subsections together it would appear that putative fathers who fit within the categories listed in IC 31-19-2.5-2(b) are given the new notice form at IC 31-19-4.5.

The new chapter (IC 31-19-4.5) entitled “Other Persons Entitled to Notice of Adoption” does not appear to be limited only to “other persons” but also includes notice to putative fathers who fit into specified categories. However, the language of IC 31-19-4.5-1 is confusing in that it says the chapter shall not be construed to affect notice to be provided to putative fathers under IC 31-19-4, but that it shall apply to putative fathers alleged to have abandoned, or failed to support or communicate with the child. IC 31-19-4.5-2 lists the same categories of persons included at IC 31-19-2.5-2(b) who are entitled to notice, and IC 31-19-4.5-3 states that those persons in section 2 shall receive notice pursuant to the form stated in IC 31-19-4.5-3.

Reading IC 31-19-2.5 together with IC 31-19-4.5 it appears that putative fathers should be given the notice required under chapter 31-19-4, and also the notice provided at IC 31-19-4.5 if they fit into specified categories for which the court can determine their consent is not required (i.e. abandonment, or failure to support or communicate). But it is important to consider that this may be very confusing to the recipient. The notice forms at IC 31-19-4-4 and IC 31-19-4.5-3 vary in that IC 31-19-4-4 applies only to putative fathers and directs the putative father to file a notice to contest the adoption or a paternity proceeding within the next 30 days, and IC 31-19-9-12 indicates that failure to do either of these acts will result in the putative father’s consent being irrevocably implied. The notice at IC 31-19-4.5-3, on the other hand, is not limited to putative fathers, must list the grounds for which the persons’ consent is not required, and only requires the persons receiving notice to file a motion to contest the adoption in 30 days and does not mention filing a paternity petition.

One final concern regarding dual notices for putative fathers. Note that IC 31-19-4 provides only for publication notice on out of state fathers; whereas IC 31-19-4.5-2 allows for notice by publication and this seemingly applies to both putative fathers and others who fall within the categories of IC 31-19-4.5.

b. Persons to whom notice must be given, when person’s consent is required. IC 31-19-2.5-3(1) states that the persons listed in IC 31-19-9-1 must be given notice because their consent is required. The form of notice is provided under IC 31-19-4.5, except for notice to some putative fathers that are covered by other more specific statutes. (See section 6 of these materials below regarding IC 31-19-4.5 form notice). The persons listed in IC 31-19-9-1 include:

Each living parent of child born in wedlock

Mother of child born out of wedlock and father whose paternity has been established by a separate paternity proceeding or paternity affidavit, unless father's consent was implied

Each person, agency, or county office of family and children having lawful custody of child

Court having jurisdiction of custody of child if legal guardian or custodian of child is not empowered to consent to adoption.

Child if more than 14 years of age.

Spouse of child if child is married

Parent or guardian of parent who is less than 18 years of age, if court determines that consent of parent's parent or guardian is in the best interest of the child to be adopted

Note, if a person fits within one of the above categories, but also fits within the categories listed at IC 31-19-2.5-4 for which no notice is required, then no notice of the adoption proceeding is required.

c. Putative father entitled to notice under IC 31-19-4, unless special circumstances apply. IC 31-19-2.5-3(2) and IC 31-19-2.5-2(a), read together, provide that if a putative father is entitled to notice under IC 31-19-4 then that chapter (IC 31-19-4) shall control the form of notice, except for putative fathers whose consent is allegedly not required under IC 31-19-2.5-2(b) (discussed above in subsection "a" of this section of the materials), and for putative fathers who are not entitled to notice under IC 31-19-2.5-4 because their consent is irrevocably implied (discussed below in subsection "e" of this section of the materials).

d. Notice required to OFC or child placing agency when parent-child relationship terminated under juvenile law. IC 31-19-2.5-3(b) provides that when the parent-child relationship is terminated under the juvenile code statutes at IC 31-35, notice of the adoption proceeding must be given to the licensed child placing agency or the county office of family and children that is the "ward" of the child. This is probably a technical error in wording because it is the child, not the agency that is generally considered the "ward".

IC 31-19-2.5-2 (a) indicates that notice to these persons shall be given using the form provided at IC 31-19-4.5. See also pre-existing statute IC 31-19-9-8(10) (consent may not be required of legal guardian or lawful custodian of person to be adopted who has failed to consent to the adoption for reasons found by the court not to be in the best interests of the child); notice at IC 31-19-4.5 shall be used for this category of persons according to new statutes IC 31-19-4.5-1 through 3.

e. Persons to whom notice does not have to be given, when petition alleges their consent

is not required or their consent was filed with the adoption petition. IC 31-19-2.5-4(1) provides that a person whose consent to adoption was filed with the adoption petition does not have to be given notice of the adoption proceeding. IC 31-19-2.5-4(2) provides that putative fathers and others do not have to be given notice of the adoption proceeding when allegations are made in the adoption petitions that their consent is not required for any of the following reasons:

IC 31-19-9-8(a)(4)(A) (biological father of child conceived out of wedlock by biological father's rape for which biological father was convicted).

IC 31-19-9-8(a)(4)(D) (biological father of child conceived out of wedlock by biological father's incest-no conviction required).

IC 31-19-9-8(a)(5) (putative father who did not file paternity action within 30 days of actual pre-birth notification under IC 31-19-3 (notice that child may be placed for adoption after birth), whether the child was born before or after expiration of 30 days. It also applies to putative father who timely filed the paternity petition after actual pre-birth notification, but failed to establish paternity).

IC 31-19-9-8(a)(6) (biological father who established his paternity by court paternity proceeding or paternity affidavit after the adoption petition was filed, but did not timely comply with putative father registry when he was required to because mother did not disclose his name or address).

IC 31-19-9-8(a) (7) (parent who relinquished parental right to consent to adoption as provided by IC 31-19-9-9 et seq.).

IC 31-19-9-8(a)(8) (parent whose parent-child relationship was terminated voluntarily or involuntarily under the juvenile code termination statutes at IC 31-35).

IC 31-19-9-12 (putative father who:

Failed to file a motion to contest the adoption and a petition to establish paternity within 30 days after notice of the adoption proceeding;

Failed to appear for the hearing on the motion to contest the adoption proceeding;

Filed a paternity petition but failed to establish paternity; or

Failed to register with the Putative Father Registry within the time limits, when required to do so)

IC 31-19-9-15 (same as IC 31-19-9-8(a)(5) above)

Note that new section IC 31-19-10-1 provides that only persons entitled to notice of an adoption proceeding can file a motion to contest, and therefore those persons listed immediately above

cannot file a motion to contest the adoption.

Note also that the new statute (IC 31-19-2.5-4) providing that notice of the adoption petition does not have to be given to persons who fall into certain categories, raises some questions. Although IC 31-19-2.5-4 is a new statute in 2003, it was based on repealed statute IC 31-19-4-11, with some differences and additions in the categories of persons affected. The addition that is troublesome is IC 31-19-9-12 (listed at IC 31-19-2.5-4(2) (G)) which provides that a putative father's consent to adoption is irrevocably implied if he doesn't file a motion to contest the adoption and a paternity action "within thirty days after service of notice under IC 31-19-4." Obviously, this category of putative fathers must be given notice of the adoption proceeding (in order to start the thirty day time limit), contrary to the alleged purpose of IC 31-19-2.5-4 to clarify which putative fathers or others are not entitled to notice.

It is also important to note the repeal of IC 31-19-4-10 in 2003 with regard to persons entitled to notice of the adoption proceeding. This statute previously provided:

"The court shall give notice of hearing and the opportunity to file objection to parents, putative fathers, other necessary parties, and interested parties that the court in the court's discretion directs."

IC 31-19-4-10 was the basis on which an adoption was reversed due to failure of the court to give grandparent adoption petitioners notice of the foster parents' separate adoption petition. This case and footnotes in similar cases, indicated the duty of the court to notify certain persons closely involved with the child or whom had filed a competing adoption petition, even though those persons were not actually parties to the immediate adoption proceeding. See *In re Adoption of I.K.E.W.*, 724 N.E.2d 245 (Ind.Ct.App.2000); *In re C.W.*, 723 N.E.2d 956, fn 6 (Ind.Ct.App.2000).

4. Amendment to post-birth "form" notices to putative fathers stating that form does not set forth all rights or obligations. The post-birth "form" notices to be sent to a putative father concerning the adoption proceeding were amended to advise the putative father that the "form" does not exhaustively set forth the putative father's legal obligations under the Indiana adoption statutes and a person being served with this notice should consult the Indiana adoption statutes. See the amendments to IC 31-19-4-4 and IC 31-19-4-5 (applicable only to out-of-state putative fathers) for the exact language in each statute.

Practitioners are cautioned that, the post-birth notice form at IC 31-19-4-4 advises putative fathers that they may file a paternity petition or notice to contest adoption in 30 days; however, IC 31-19-9-12 provides that the putative father's consent to adoption is irrevocably implied if he does not file a paternity petition and notice to consent to adoption in 30 days. This requires some legislative attention.

5. Waiver of notice bars future challenge to adoption. IC 31-9-4-8 provides that a person may waive the right to notice of an adoption proceeding before or after the birth of a child. An amendment was added to this statute to provide that the waiver of notice must be in writing, the

signature must be made in the presence of a notary public, and the notice must acknowledge that the waiver is irrevocable. The amendment also provides that a person who waives notice may not subsequently challenge or contest an adoption.

Since IC 31-9-4-8 and the 2003 amendments to that statute appear in the chapter generally directed to putative fathers, IC 31-4-4, that waiver provision could seemingly be limited to putative fathers; however, it should be noted that IC 31-4 is titled Notice of Adoption after Birth of Child and previously included statutes dealing with notice to persons other than putative fathers. See IC 31-19-4-10 through 13, repealed 2003. Regardless of the potential limitations of IC 31-9-4-8, practitioners should note that the new statute IC 31-19-4.5-4 creates a new provision for waiver of the right to consent that is seemingly applicable to all persons required to receive the form notice created in new chapter IC 31-19-4.5. See sections 3 and 6 of these materials for persons who will receive notice pursuant to IC 31-19-4.5.

6. Form for notice of adoption proceeding to specified persons whose consent to adoption is not required, and giving person 30 days to file motion to contest adoption once notice is given. IC 31-19-4.5-1 through 5 establish procedures and a “form” for notice that is to be issued to a legal parent, putative father, or certain other persons when the adoption petition alleges that the consent of this person is not required because of the existence of one or more of the following specified situations listed in IC 31-19-9-8:

- (a)(1) (child abandoned)
- (a)(2) (failure to support or have signification communication with the child)
- (a)(4)(B) (child born as result of biological father’s act of child molestation, but conviction not required)
- (a)(4)(C) (child born as result of biological father’s act of sexual misconduct, but conviction not required)
- (a)(9) (parent judicially declared incompetent or mentally defective)
- (a)(10) (legal guardian or lawful custodian of child found by court to not be acting in best interest of child in withholding consent)
- (a)(11) (parent proven to be unfit and adoption in best interest of child)

The person shall be given notice of the adoption proceeding in accordance with Indiana Trial Rule 4.1 if the person’s name and address are known, or in accordance with T.R. 4.13 if the name or address of the person is unknown. The notice form is stated at IC 31-19-4.5-3. The notice form requires a brief description of the reason/s why consent to the adoption is not required. This description must include enough information to put a reasonable person on notice, but does not require an exhaustive description of why the person’s consent is not required. The form notice further advises the person that if he does not file a motion to contest the adoption within 30 days after service of the notice, the person’s consent to adoption will be irrevocably implied and he cannot contest the adoption or the validity of the person’s implied consent. Any of these persons may sign a waiver of notice of the adoption proceeding. See section 5 of these materials. The notice also provides that this form does not exhaustively set forth a person’s legal obligations and the person being served with notice should consult the Indiana adoption statutes. IC 31-19-4.5-1 through 5.

Note that these laws do not apply to those persons falling into “no consent required” categories for which no notice of the adoption proceeding must be given under IC 31-19-2.5-4 (and discussed above in section 3(e) of these materials).

IC 31-19-9-18 is a new statute providing that the consent to adoption is irrevocably implied for a person who received the form notice under IC 31-19-4.5 of an adoption proceeding if the person failed to file a motion to contest the adoption in 30 days or failed to appear and prosecute the motion to contest without unreasonable delay. If the motion to contest is not filed in 30 days or the motion is not prosecuted without unreasonable delay, the court shall dismiss the motion to contest the adoption with prejudice and the consent will be irrevocably implied. In a related new section, IC 31-19-9-19 provides that a person whose consent to adoption is irrevocably implied due to the person’s failure to file the motion to contest or to prosecute the contest under IC 31-19-9-18, “may not contest the adoption or the validity of the person’s implied consent to the adoption.”

7. New “unfit” parent category for which consent to adoption is not required. IC 31-19-9-8(11) was added to provide that consent to adoption is not required from a parent if:

- (A) a petitioner for adoption proves by clear and convincing evidence that the parent is unfit to be a parent: and
- (B) the best interests of the child sought to be adopted would be served if the court dispensed with the parent’s consent.

Also note new section IC 31-19-10-1.4. This statute provides that if the consent issue involves allegations that consent is not required because the parent is “unfit”, the court shall consider all relevant evidence, but may not base its determination solely on a finding that the petitioner would be a better parent for the child or a parent has a biological link to the child sought to be adopted. Further, note the burden of proof for this category as discussed below in section 9 of these materials.

8. Specific conditions under which putative father may be allowed to file paternity case even though he failed to comply with pre-birth notice requirements. The Fitz opinion (778 N.E.2d 432 (Ind.Ct.App.2002) interpreted IC 31-19-9-17 to allow a putative father to establish his paternity when an adoption “fell through”, even though the father had not originally complied with the 30 day paternity filing requirement of the pre-birth notification statutes. Also, the Fitz opinion found that a second adoption petitioner could not be substituted for the first adoption petitioner who had sent the pre-birth notification to the putative father but decided not to go forward with the adoption. The Fitz case did not mention the existing statutory requirement in IC 31-19-9-17(b) that the putative father must file an affidavit prepared by the attorney or licensed child placing agency which served the pre-birth notification that neither a petition for adoption nor a placement of the child is pending. In response to Fitz,

IC 31-19-9-17 provides that a putative father may establish his paternity even if he failed to comply with the requirements of the pre-birth notification statutes, in the limited situation in

which there is no adoption petition pending or anticipated regarding the child. The statute sets specific requirements for showing that no adoption petition is pending or anticipated. The following language was added to IC 31-19-9-17 in 2003.

(b)...The requirements of this subsection are jurisdictional and must be strictly adhered to by the putative father and the court.

©) An individual who is otherwise barred from establishing paternity under this article may establish paternity in relation to a child if an adoption for the child is not pending or contemplated. A petition for adoption that is not filed or a petition for adoption that is dismissed is not a basis for enabling an individual to establish paternity under this section unless the requirements of subsection (b) are satisfied.

The new language attempts to clarify that a putative father who failed to comply with the requirements of the pre-birth notification cannot seek to establish his paternity unless the affidavit and other requirements of IC 31-19-9-17(b) are followed exactly, and the failure of anticipated adoption petitioners to file an adoption petition or dismissal of an adoption petition is not enough to allow the putative father to file the paternity action.

Two appellate opinions arising out of the same adoption case dealt with the right of a putative father to establish his paternity of a child even though the father failed to comply with the pre-birth notice requirement. In In Re Adoption of Infant Female Fitz, 778 N.E.2d 432 (Ind.Ct.Appels 2002) it was undisputed that the putative father did not file a paternity action within 30 days of receiving the pre-birth notification. However, the Court of Appeals remanded the putative father's motion to set aside the adoption judgment to the trial court. The Court of Appeals charged the trial court to determine if the parties perpetrated a fraud on the court in substituting a second set of adoptive petitioners for the original adoptive petitioners who had decided not to pursue the adoption. The trial court's denial of the putative father's motion on remand was affirmed on appeal, with the Court of Appeals stating in In Re Adoption of Fitz, 805 N.E.2d 1270 (Ind.Ct.App. 2004) that substitution of adoptive petitioners was not relevant to the issue of the putative father's compliance with the 30 day requirement, and there was no evidence that any fraud was perpetrated on the court with regard to this narrow matter.

9. Burden of proof on consent issue. IC 31-19-10-1.2 is a new section that sets out who has the burden of proof when the adoption petition alleges that the consent of a parent, putative father, or guardian is not needed for the adoption.

Parent or guardian carries the burden. Persons properly filing a motion to contest an adoption under the following categories carry the burden of proof that their consent is required in the following situations:

IC 31-19-9-8(a)(4)(B) (Child molestation)

IC 31-19-9-8(a)(4)©) (Sexual misconduct with a minor)

IC 31-19-9-8(a)(10) (guardian or custodian has the burden of proving that withholding consent to adoption is in best interest of child)

The statute also provides that if the consent issue involves child molestation or sexual misconduct with a minor, the absence of a criminal prosecution and conviction is insufficient to satisfy the burden of proof.

Adoption petitioner carries the burden of proof. If the motion to contest an adoption is properly filed, the adoptive petitioner bears the burden of proof that consent is not required in the following situations:

IC 31-19-9-8(a)(1) (abandonment)

IC 31-19-9-8(a)(2) (failure to support or failure to have significant communication)

IC 31-19-9-8(a)(9) (parent judicially declared incompetent or mentally defective)

IC 31-19-9-8(a)(11) (parent unfit)

IC 31-19-9-9 (parent convicted and incarcerated for specific crimes at time of adoption petition in which child's other parent is victim and dispensing with parental consent in child's best interests)

IC 31-19-9-10 (parent convicted and incarcerated at time of adoption petition for specific crimes against adoptive child, or the adoptive child's sibling, step-sibling, half-sibling and dispensing with parental consent in child's best interests)

Note, that the final two categories (IC 31-19-9-9 and 10) are not included under new chapters IC 31-19-2.5 or IC 31-19-4.5 with regard to the type of form notice that should be sent to those persons. This may require legislative attention.

10. Withdrawal of Consent to Adoption

Section (a) of IC 31-19-10-3 was reworded to provide that a consent to adoption may be withdrawn not later than thirty days after the consent is signed if the court finds (after a hearing) that the person seeking the withdrawal is acting in the best interest of the child and the court orders the withdrawal.

Section (b) was added to the statute to create specific limitations on withdrawing consent. It provides that consent to adoption may not be withdrawn after any of the following, whichever occurs first:

30 days after the consent is signed; or

The person who signs the consent appears in the court where the adoption has been or will be filed; or

An out-of-state parent who signed the consent appears in court and the out-of-state parent acknowledges that the consenting person understood the consequences of the consent, freely and voluntarily signed the consent, and believes the adoption is in the best interest of the child.

11. Orders protecting the anonymity of the adoption petitioner

Amendments to IC 31-19-10-7 provide that a court may issue an order protecting the anonymity of an adoption petitioner. The court may order an attorney who represents a party contesting an adoption or seeking to withdraw an adoption consent, not to disclose information that identifies or may tend to identify a petitioner for adoption.

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