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ADOPTION CASES

In **In Re Adoption of A.K.S.**, 713 N.E. 2d 896 (Ind. Ct. App. 1999), putative father moved to re-open judgment and set aside adoption by stepfather. Trial court denied the motion. The putative father appealed on two issues: 1) Whether the trial court erred by finding that he was not entitled to notice of the adoption due to his failure to register with the putative father registry prior to the adoption, and 2) Whether the trial court erred by finding that his consent to the adoption was not required. Court of Appeals affirmed the trial court's order granting adoption.

The facts show that child was born on January 31, 1992 to mother and putative father, who were not married. The following day the two executed a paternity affidavit in accordance with IC 31-6-6.1-9(b)(2). (IC 31-6-6.1-9 controlled the execution of paternity affidavits prior to IC 16-37-2-2.1, the current controlling statute.) Putative father maintained frequent contact with child through March 1994, living with mother and child part of the time. He paid the day care expenses for child for a four-month period in 1993. On April 12, 1997, mother married stepfather and on May 6, 1997, stepfather filed a petition to adopt child. Mother consented to this adoption. The adoption petition was granted on September 23, 1997. The putative father learned of the adoption on October 6, 1997. He registered with the Indiana State Department of Health on Indiana's putative father registry on December 10, 1997, and filed his Motion to Reopen Judgment and to Set Aside Decree of Adoption on March 23, 1998. A hearing was held on the Motion to Reopen Judgment on October 14, 1998, and the trial court issued findings of fact and conclusions of law on November 12, 1998, which denied putative father's motion.

Notice requirement; definition of putative father. The putative father contended that Indiana's requirement that a putative father be registered in the putative father registry before he is entitled to notice of adoption violated the due process and equal protection guarantees of the United States Constitution. The Court of Appeals did not address this issue; holding instead that the trial court erred by finding that putative father was not entitled to notice of the adoption due to his failure to register with Indiana's putative father's registry because he fell outside the definition of a "putative father". The Court cited IC 31-9-2-100(2)(B), defining "putative father" as "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 of the child by executing a paternity affidavit under IC 16-37-2-2.1 before the filing of an adoption petition." The Court reasoned that as the putative father had executed a paternity affidavit the day after child was born, he was thus not required to register with the putative father registry. *Id.* at 898. Therefore, the conclusion by the trial court that he was not entitled to notice of the adoption due to his failure to register was erroneous. *Id.*

Requirement of consent of putative father who signs affidavit. The putative father further contended that the trial court erred in finding that his consent to the adoption of child was not required. The Court affirmed the finding of the trial court, reasoning that although the putative father's consent would have been required by IC 31-19-9-1(a)(2)(B) alone, in that he had executed a paternity affidavit; another code provision applied, and as such, his consent was not required. IC 31-19-9-8(a)(2)(B) provides that consent to adoption is not required from a parent of a child in the custody of another person 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 of judicial decree. The Court cited Moody v. Moody, 565 N.E. 2d 388 (Ind. Ct. App. 1991), in stating that although the putative father and mother did not have a court order requiring payment of child support, fathers have a common law duty to support their children which exists apart from any court order or statute. A.K.S. at 899. The Court stated that the evidence presented at trial supported the finding by the trial court that the putative father knowingly failed to provide support for child for over one year when he was required to do so by law; thus, his consent to the adoption was not required under IC 31-19-9-8(a)(2)(B). *Id.*

In **In Re Visitation of A.R.**, 723 N.E. 2d 476 (Ind. Ct. App. 2000), birth mother, who had consented to adoption of child by stepmother, petitioned to establish visitation rights as a third party after she was denied visitation with the child. Trial court denied birth mother's petition and awarded attorney fees to stepmother. Court of Appeals affirmed in part and reversed in part, affirming the denial of the birth mother's visitation petition, but reversing on the issue of attorney fees and remanding to the trial court with instructions for the trial court to vacate its attorney fee award. The facts show that the parents were married in 1988, divorced in 1996, and had one child born in 1990. Upon divorce, birth mother was granted custody of child. However, in January of 1998, child went to live with father and stepmother. In April of 1998, the father was granted custody of child and in the same month, the stepmother filed a petition to adopt child, along with birth mother's consent to the adoption. The adoption petition was granted in June 1998. The birth mother visited with child at least once per month from April through December 1998. In January 1999, the father and stepmother began refusing to allow visitation with birth mother. In April 1999, birth mother filed a petition to establish visitation with child based on the argument that since her parental rights had been terminated at the time of adoption, she had standing to petition for visitation rights as a non-parent third-party. The father argued that IC 31-19-16-1 and IC 31-19-16-2 govern any grant of post-adoption visitation, and the birth mother had failed to comply with the procedural requirements found within those statutes.

IC 31-19-16-1 provides exclusive means for post-adoption visitation. The Court held that IC 31-19-16-2 does indeed provide the exclusive means for a birth parent to obtain post-adoption visitation privileges. IC 31-19-16-2 contains seven provisions that must be complied with before a court may enter a grant of post-adoption visitation rights. In the present case, there was no dispute that these provisions had not been met. The Court went on to note that although this statute does not state explicitly that the procedures contained within are exclusive, when viewed within the context of the entire adoption statute, it is clear that the legislature intended that IC 31-19-16-2 would provide the exclusive means by which a birth parent may acquire post-adoption visitations rights. The Court further held that "we do not believe a birth parent's failure to comply with IC 31-19-16-2, resulting in the forfeiture of his or her newly-created right to post-adoption contact, should subsequently act as a means for that birth parent, under the guise of a non-parent third party, to circumvent the statute's requirements." *Id.* at 479. The Court held as a matter of law that birth mother, having failed to comply with the procedure set forth in IC 31-19-16-2, could not remedy that failure by seeking visitation as a non-parent third party. *Id.*

Attorney fees: The birth mother contended that the trial court erred in awarding attorney fees. The Court, stating that the issue in this case was one of first impression, held that although the birth mother erred in questioning IC 31-19-16-2's exclusivity, her claim was not frivolous, unreasonable, or groundless, and thus the trial court erred in awarding attorney fees. *Id.* at 480.

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 adoptive parents in the putative father's paternity action. The birth mother gave both pre-birth and post-birth consent to adoption of her child by the adoptive parents. The birth mother averred that the identity of the putative father was unknown to her because she had engaged in sex with more than one male companion. The child was released directly from the hospital to the adoptive parents, who promptly petitioned for adoption. More than thirty days after the child's birth and the filing of the adoption petition, the Department of Health Putative Father Registry Affidavit verified that no putative father was registered to receive notice of an adoption of a child born to birth mother.

Six months after the child was placed with the adoptive parents and the petition for adoption had been filed, the putative father filed a petition to establish paternity and a putative father registry form. The adoptive parents, whose adoption petition was still pending, filed a motion to intervene in the paternity cause, which was granted. The adoptive parents also filed a summary judgment motion, alleging that the putative father's failure to register with the Putative Father Registry within the time period of thirty days after birth or after the adoption petition, (whichever occurs later) constituted the father's irrevocable consent to adoption. See IC 31-19-5-4; IC 31-14-20-2. The putative father filed no affidavits to contradict the adoptive parents' summary judgment motion and neither he nor his attorney appeared at the summary judgment hearing. The trial court granted the adoptive parents' motion for summary judgment. Two months later the putative father filed a motion for relief from judgment pursuant to Ind. Trial Rule 60(B). At the hearing on his motion, the putative father testified that he did not know the child's birth mother was pregnant or had given birth until six months after she had given birth, because the mother never told him of the pregnancy and he had seen the birth mother on only one occasion since they had ended their relationship. The putative father's motion to set aside the summary judgment was denied.

Putative father had no meritorious defense for failing to register timely and therefore was not entitled to establish paternity. The Court, citing Indiana's Putative Father Registry, IC 31-19-5-2, stated that the purpose of the registry was to provide notice to a putative father that a petition to adopt a child has been filed. The Court further noted that the statute provides that a putative father who fails to timely register has his consent to adoption irrevocably implied. IC 31-14-20-2. Furthermore, IC 31-19-9-13 states that a putative father whose consent to adoption is implied is not entitled to challenge the adoption. IC 31-19-9-14 states that the putative father whose consent to adoption is implied is not entitled to establish paternity. The Court opined that when a statute is clear and unambiguous on its face, the court need not and must not interpret the statute. Id. at 285. The statute will be given its plain and clear meaning. Id.

The Court discussed published case law in New York, Arkansas and South Dakota concerning similar situations and noted that the putative father in this case was "apparently not interested enough to even inquire about the possibility of a pregnancy". Id. at 287. The Court stated that to conclude the putative father acted promptly once he became aware of the child was to misconstrue the relevant timetable. Id. Promptness is measured in terms of the baby's life, not the father's awareness. Id. The Court concluded that the putative father had no meritorious defense and the trial court had not erred in denying his motion to set aside the summary judgment. The Court opined that early, permanent placement of children with adoptive families furthers the interest of both the child and the state. Id. The child should also not be made to suffer when a putative father makes no inquiry regarding the possibility of a pregnancy. Id.

In **Bell v. Matter of Adoption of A.R.H.**, 654 N. E. 2d 29 (Ind. Ct. App. 1995), the Court affirmed the trial court's denial of the birth mother's petition to withdraw her consent to adoption. The twenty three year old birth mother approached Coleman Adoption Agency (Agency) to inquire about placing her four oldest children for adoption due to her financial and emotional inability to care for them. The birth mother signed affidavits indicating that she understood the consent to adoption form and that her consent to the adoption was freely and voluntarily given. She appeared before the probate commissioner who followed his usual practice of explaining parental rights under IC 31-6-5-3 and asking the parent if she meant to consent to the adoption. The birth mother signed two consents to the adoption of each of the children in the presence of the commissioner and left the children at the Agency where they were placed for adoption. Seven months later the birth mother filed a petition to withdraw her consent to adoption. The petition was denied and the birth mother appealed.

Voluntariness of consent to adoption: parent's grief at time of consent and parent's incorrect belief about "grace period." The birth mother claimed her consent to adoption was not voluntary because of the following: (1) undue influence since she was grief-stricken and devastated by the death of her grandmother when she executed the consent to adoption and (2) her belief that there was a "two week grace period." The Court relied on case law that "emotions, tensions, and pressure are... insufficient to void a consent unless they rise to the level of overcoming one's volition." *Id.* at 32. There was no evidence that the birth mother's grief over her grandmother's death rose to the level of overcoming her volition. Additionally, the Court identified "three stages of the birth mother's voluntariness in consenting": The birth mother told the Agency personnel that she had been thinking of placing her children for adoption for the past year; the birth mother spent two to three hours with the prospective adoptive parents discussing her reasons for wanting to consent to adoption before she signed the adoption consents; and the birth mother left her children with the Agency after signing the adoption consents. *Id.* at 33. The Court also rejected the birth mother's "grace period" argument upon the following evidence: the Agency personnel told the birth mother that there was not a "period of time" in which the parent can change her mind once the consent is signed; the consent to adoption form stated that the birth mother waived any opportunity to file an objection by signing the consent; and the birth mother's parent affidavit indicated she understood she could not change her mind, cancel or revoke after signing the consent. Practitioners should note that portions of the adoption consent forms and affidavits are included in the opinion, and may provide guidance in adoption consent documentation.

Withdrawing consent not in best interest of children. The birth mother argued that withdrawal of her consent was in the best interests of the children. When a parent petitions to withdraw her consent to adoption, the parent has the burden of establishing that the parent is acting in the best interests of the child. The parent must "specify precisely why it would be in her children's best interests to permit her to withdraw her consents to adoption." *Id.* at 34. Witness testimony that the birth mother was a loving and good mother was not enough to meet her burden of proof and the birth mother did not present evidence that the adoptive parents were ill or unfit. The Court quoted language from **Matter of Adoption of Hewitt**, 396 N. E. 2d 938 (Ind. Ct. App. 1979), clarifying the diverse interests of the biological parents and the adoptive parents, and the best interests of the child.

The trial judge must recognize there are three parties whose interests and feelings are involved in the adoption process and all must be treated fairly. That judge must balance the interest of the natural parents and their sacred relationship to their child against the hope, expectation, reliances, and desires of the adoptive parents – all against the best interest of the children, which, after all, rules supreme. *Id.* at 942, 943.

In **In Re Adoption of Dzurovcak**, 600 N.E. 2d 143 (Ind. Ct. App. 1992), the Court affirmed the Newton Circuit Court's (adoption court's) dismissal of the adoption petition and reversed and remanded with instructions the adoption court's decision awarding temporary custody to the adjudicated father. In an earlier decision concerning the same child and parties, **Matter of Adoption of Baby Boy Dzurovcak**, 556 N.E. 2d 951 (Ind. Ct. App. 1990), the Court had determined that the putative father could not veto the child's adoption pursuant to IC 31-3-1-6(a)(2) (recodified at IC 31-19-9-1) because he had not established paternity in a proceeding other than the adoption petition. The order adjudicating the father's paternity was entered in Lake County Juvenile Court (paternity court) while the first appeal of the Newton Circuit Court's (adoption court's) denial of the adoption petition was pending. Because the father had established paternity, did not consent to adoption, and his consent to adoption could not be legally implied, the adoption court dismissed the adoption hearing. A custody hearing was scheduled, but the prospective adoptive parents were not included as parties and no formal evidence was presented. The adoption court determined that the paternity court had greater resources to effectuate a custody order. The adoption court entered an order of only temporary custody to the adjudicated father, ordered the Lake County Department of Public Welfare to supervise, and found that the paternity court should determine permanent custody.

When father did not consent to adoption, established paternity in juvenile court and his consent could not be statutorily implied, adoption court properly dismissed adoption petition. The Court was unpersuaded by the adoptive petitioners' argument that the father should have established paternity prior to the commencement of the adoption action and that the paternity order entered after the adoption proceeding commenced was of no effect. The Court held that the father's action to establish paternity, filed in Lake County Juvenile Court within days of the commencement of the adoption proceedings, was not barred by the jurisdiction invoked by Newton Circuit Court in the adoption proceeding. *Id.* at 146. The Court opined that the establishment of paternity in the juvenile court did not constitute a redetermination of paternity which would violate the proscription against the invocation of jurisdiction by more than one court.

Practitioners should note that this opinion was written prior to Indiana's enactment in 1994 of the Putative Father Registry law at IC 31-19-5-1 through IC 31-19-5-25.

Adoption court erred by invoking its custody jurisdiction on only a temporary basis, by failing to allow prospective adoptive parents to be parties to the custody proceeding, and by failing to hold an evidentiary hearing on the child's best interests. The Court quoted IC 31-3-1-8 (recodified at IC 31-19-11-5) which states that if an adoption petition is dismissed the court shall determine the person who shall have custody of the child. The Court further stated that, although the adoption and paternity statutes provide for two avenues of custody determinations in situations such as the one presented, it does not follow that both the paternity court and the adoption court may exercise jurisdiction over the custody matters at the same time. *Id.* at 147. The Court stated that it is well settled that two courts of concurrent jurisdiction cannot deal with the same subject matter at the same time. Once jurisdiction is vested by the filing of a complaint or equivalent pleading, jurisdiction over the parties and subject matter is retained to the exclusion of other courts of equal competence until the case is resolved. *Id.* The Court opined that, because the adoption court had 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.*

The Court further opined that the adoption court erred in failing to hold an evidentiary hearing on the best interests of the child in determining custody. *Id.* at 148. The Court said that the adoption court had "misguidedly found" that the prospective adoptive parents were not parties to the custody hearing, and stated that the prospective adoptive parents, who had actual physical custody of the child at the time of the hearing, were "properly parties" to the custody hearing. *Id.* The Court held that the courts of this state must conduct an evidentiary hearing considering the best interests of the child prior to making a custody determination even where the traditional factors of unfitness, acquiescence and relinquishment are inapplicable. *Id.*

In **In Re Adoption of E.B.**, 733 N.E. 2d 4 (Ind. Ct. App. 2000), the Court affirmed the probate court's denial of an adoption petition filed by foster parents while the CHINS proceeding was still pending. The child had been placed with the foster mother as a result of a CHINS petition filed by the O.F.C. in juvenile court. The O.F.C.'s case plan listed reunification with the birth father as the child's permanent plan. The father completed all of the plan's requirements. Eight months after the filing of the CHINS petition, the O.F.C. recommended reunification of the child with the birth father who lived in Georgia, but the interstate compact approval from Georgia was needed before reunification could occur. The foster mother and her new husband petitioned to adopt the child in St. Joseph Probate Court before the compact was approved and while the CHINS proceeding was still pending. The birth father moved to contest the adoption and the trial court denied the adoption.

Probate Court lacked jurisdiction over adoption petition when CHINS proceeding with a reunification plan was still pending. The Court cited **In Re C.S.**, 713 N.E. 2d 863 (Ind. Ct. App. 1999), in support of its opinion that because the CHINS action was pending in juvenile court when the foster parents filed their adoption petition in probate court, the probate court lacked jurisdiction to hear it. The probate court lacked jurisdiction because the commencement of a CHINS proceeding vests exclusive jurisdiction in the juvenile court, and no other Indiana court has jurisdiction to entertain any proceedings which conflict with that exclusive jurisdiction. **Id.** at 5. The Court distinguished the Indiana Supreme Court's decision on **In the Matter of the Adoption of T.B.**, 622 N.E. 2d 921 (Ind. 1993), for two reasons: the CHINS proceeding was directed at reunifying the birth father and daughter; the adoption proceeding involved a third party attempting to adopt a child whose father's parental rights had never been terminated. **Id.** at 6.

In **In Re Adoption of I.K.E.W.**, 724 N.E. 2d 245 (Ind. Ct. App. 2000), the child's maternal grandparents and foster parents both filed petitions for adoption within a week after the parents' rights were terminated. The foster parents' petition for adoption was granted. The grandparents appealed the denial of their motions to intervene in the foster parents' adoption proceeding and for relief from judgment. Both of these motions were filed after the foster parents' adoption petition was heard and granted. The Court of Appeals reversed the foster parents' adoption due to lack of notice to the grandparents and remanded the case.

The child had resided with the foster parents for over four years and the St. Joseph County Office of Family and Children consented to the foster parents' adoption. The O.F.C. filed an objection to the grandparents' adoption, stating that it had an alternative permanency plan. The grandparents received no notice of the foster parents' adoption petition, but after the foster parents' petition was scheduled for hearing, the grandparents filed a motion for consolidation of the two adoption causes. The grandparents' adoption petition was not scheduled for hearing, because, although their request for appointment of a special judge was granted, neither O.F.C. nor the County Clerk timely struck one of the two remaining judges. A special judge did not file his acceptance of appointment on the grandparents' adoption petition until after the trial court had granted the foster parents' adoption.

Non-custodial grandparents are not entitled to intervene in adoption proceedings; relatives have no preferential right to adopt. The Court noted as a threshold consideration that non-custodial grandparents are not entitled to intervene in adoption proceedings. *Id.* at 249. The Court characterized Indiana case law concerning grandparents' due process rights to their grandchildren by stating that a liberty interest exists only where the grandparent-grandchild relationship is essentially a custodial one. In footnote six the Court opined that it is well-settled that relatives have no preferential right to adopt in Indiana. *Id.* Further, any of the grandparents' derivative due process rights from the child's mother with respect to visitation, custody or adoption were effectively extinguished before the grandparents' petition for adoption was filed due to termination of the mother's parental rights. *Id.*

Trial court's failure to notify adoptive petitioner grandparents of hearing on foster parents' adoption petition was abuse of discretion. 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.*

Consolidation of competing adoption petition not required. The Court did not require that the trial court consolidate and hold a hearing on the two competing adoption petitions. The Court concluded that the trial court did not error by failing to consolidate the two 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 the Indiana Trial Rules and adoption statutes provide 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.*

In Irvin v. Hood, 712 N.E. 2d 1012 (Ind. Ct. App. 1999), the Court affirmed the trial court's order dispensing with the birth father's consent to the stepfather's adoption. The birth father was present at the child's birth and signed an affidavit acknowledging his paternity of the child at the hospital. The birth father and the child's mother ended their relationship when the child was one year old. When the child was three years old, the mother married, and the stepfather had contributed to the child's support. The paternal grandparents had grandparent visitation rights, and the child visited with the grandparents approximately 24 times during the two years prior to the filing of the adoption petition. The birth father saw the child only in conjunction with the paternal grandparents' visitation. The birth father provided no financial support of any kind for the child after the child's first birthday.

Trial court's finding that birth father failed to support child was sufficient to support determination that birth father's consent was not required. The Court found that, by the birth father's own admission, he failed to provide for or meaningfully contribute to the child's food, shelter, utilities, medical care or child care. In fact he had provided only six items of clothing and some food during the child's visits at the home of the paternal grandparents for a period of three years. The Court also found the following: the birth father's response to the mother's requests for support was that he had his own bills to pay; the father was employed at various jobs and was regularly employed earning \$320.00 per week for one year prior to the filing of the adoption petition; the father could afford to travel abroad for two months to play rugby; the father offered no legitimate reason why he was unable to provide even minimal support for the child. Id. at 1014.

Indiana law imposes upon a parent the duty to support his children. The Court further opined that the parental duty of support exists apart from any court order or statute. Id. The Court found that the father had signed a paternity affidavit acknowledging that he was the child's natural father and thus had the duty to support the child from the time of the child's birth. Id.

In **In Re Adoption of J.P.**, 713 N.E. 2d 873 (Ind. Ct. App. 1999), the Court affirmed the trial court's order which dispensed with the need for the birth mother's consent and granted the foster mother's petition for adoption. The child had initially been placed in the custody of the St. Joseph County Division of Family and Children at the age of eight months when the birth mother was arrested on a felony charge. Later, the birth mother received permission to take the child for a one week visit to Tennessee. The mother moved, began living with a violent boyfriend whom she later married, and did not return the child to St. Joseph County. The child was located as a result of an investigation of abuse allegations by the Madison County Tennessee Department of Children. She was returned to Indiana and placed with the foster mother who later petitioned to adopt her.

By the time of the adoption petition hearing, the putative father's parental rights had been terminated and St. Joseph County Division of Family and Children had consented to the foster mother's adoption. The trial court found that the evidence established the requirements to allow adoption without the birth mother's consent pursuant to IC 31-19-9-8.

Trial court did not error in determining that mother's consent to adoption was not needed. IC 31-19-9-8 provides that parental consent to adoption is not required if the child is in the custody of another person and if for a period of at least one year the parent fails without justifiable cause to communicate significantly when able to do so or knowingly fails to provide for the care and support of the child when able to do so as required by law or judicial decree. The Court noted that demonstrating either of the two statutory criteria is sufficient to establish that adoption without parental consent may move forward. Id. at 875.

The evidence indicated that, after the child was removed by the Tennessee Department of Children, the birth mother did not visit for four months. The birth mother continued to live in Tennessee but then commenced visits with the child one time per month for two to five hours. The mother drove approximately 600 miles from Tennessee to South Bend for the visits. The child's response to the visits was not particularly favorable as reported by the CASA and case manager. Fifteen months after she began visiting, the birth mother moved to South Bend and lived in a battered women's shelter due to abuse by the child's stepfather. The mother requested but was denied additional visitation due to the physical abuse of the child, her infrequent visits, the presence of the abusive stepfather at some of the visits, and the length of time between the child's removal and the mother's return to Indiana.

In affirming the trial court's order, the Court opined that the thrust of the statute is to foster and maintain communication between non-custodial parents and their children, not to provide a means for parents to maintain just enough contact to thwart potential adoptive parents' efforts to provide a settled environment to the child. Id. at 876. The Court found that the birth mother's short, not-quite-monthly visits with the child, that commenced four months after the child was returned to Indiana, did not establish significant communication. Id. The Court also opined that the eventual increase in the length of visits after the birth mother moved back to Indiana did not vitiate the lack of significant communication for the one year period commencing when the child was returned to Indiana from Tennessee. Quoting **In Re Adoption of Subzda**, 562 N.E. 2d 745, 750 (Ind. Ct. App. 1990), the Court found that, when gauging significant communication, the one year period need not immediately precede the filing of the adoption petition. Id.

In **Matter of Adoption of L.C.**, 650 N.E. 2d 726 (Ind. Ct. App. 1995), the Court affirmed the trial court's denial of the adoption petition. The adoptive parents had contacted the Worcester County Department of Social Services (WCDSS) to adopt three wards of the state of Maryland. Three siblings were placed in the adoptive parents' home in Indiana by WCDSS. The adoptive parents returned the two older siblings to the WCDSS because of behavioral problems, and later informed the WCDSS that they wanted to adopt the remaining child. The WCDSS identified potential problems with the adoption, and sent notice to the adoptive parents requiring evaluations as a precondition to the consent of the WCDSS. When the adoptive parents could not agree on the circumstances of the evaluations, the WCDSS obtained an order from the Maryland court to remove the child from their home. The following occurred: the adoptive parents filed a petition for adoption in the Probate Division of the Marion Superior Court (Probate Court); WCDSS filed a motion to contest the adoption; the Probate Court entered an order giving full faith and credit to the Maryland order for the removal of the child from the adoptive parents; and the Probate Court heard and dismissed the adoption petition on the grounds that the WCDSS did not consent to the adoption and was not unreasonably withholding the consent.

Time limitations and best interest in withholding consent to adoption. The adoptive parents made alternative arguments regarding WCDSS's refusal to consent to the adoption: (1) the WCDSS failed to timely respond in writing to the request for consent, and (2) WCDSS's consent to adoption was unreasonably withheld. *Id.* at 729. The existing law at the time of the trial, IC 31-3-1-6(a)(3) provided that consent to adoption was required from the agency or county department of public welfare having lawful custody of the child, but under subsection (i)(6) of that statute, consent was not required from a legal guardian or custodian who had not responded to a request for consent within sixty days, and whose refusal to consent was not in the best interest of the child. The Court ruled that the WCDSS satisfied the sixty day requirement (which was deleted in the 1995 legislation). As to the issue of whether the consent was unreasonably withheld, the adoptive petitioners had a heavy burden "in light of the implicit presumption in IC 31-3-1-6(i)(6) that the legal guardian is acting in the child's best interest." *Id.* at 730. The Court ruled that the burden was not met based on the following evidence regarding the adoptive parents: they were unable to deal with the behavioral problems of the older siblings and returned them to WCDSS on short notice; they ignored WCDSS's request to give the older siblings prescribed medications; they used questionable disciplinary techniques with the older siblings; they did not cooperate in arranging necessary evaluations; and they used publicity in their adoption effort which negatively affected all of the children. The WCDSS's refusal to consent to the adoption was not unreasonable. Practitioners should note that IC 31-19-9-8(a)(10) is the current statute which governs the withholding of consent by a guardian or custodian.

Failure to file welfare report. The adoptive parents argued that the failure to file the statutorily required welfare report was error. Case law provides that the welfare report may not be considered by the court when an adoption petition is contested; therefore, the Court opined that any error in failure to file the report was harmless. *Id.* at 731.

Motion to quash subpoena for child to testify. The adoptive parents claimed that the trial court erred in quashing their subpoena for the child to testify, as it denied them the right to examine the child under oath and present her wishes. Quashing a subpoena is "improper where a witness potentially possesses some relevant and admissible evidence to offer at trial." *Id.* at 732. The Court concluded that because all of WCDSS's reasons for withholding consent related to the adoptive parents' failure to cooperate with WCDSS and to adequately care for the two older siblings, the child's testimony as to her wish to be adopted would have been irrelevant to the issue of withholding consent. The trial court did not err in quashing the subpoena.

Appointment of Guardian ad Litem. The adoptive parents argued that the trial court erred in failing to appoint a guardian ad litem for the child for the adoption hearing. Ind. Trial Rule 17(C) and IC 29-3-2-3(a) provide that a trial judge must appoint a guardian ad litem if he believes the minor is not otherwise adequately represented. The Court ruled that failure to appoint a guardian ad litem in this case was not an abuse of discretion because the appointment would not have affected the issue of WCDSS's withholding of consent and there was no evidence that the WCDSS and the adoptive petitioners were acting adversely to the child's best interests. *Id.* at 732, 733. The trial court also noted testimony from the Maryland attorney appointed to represent the child and her siblings in the Maryland proceedings, that it was her role to represent the best interests of the child in any tribunal where the child's interest was at stake.

Qualification of expert witness and expert testimony based on hearsay. The adoptive parents alleged the trial court erred in qualifying three witnesses as experts because the witnesses had "no advanced degrees, no special professional recognitions, and no special accomplishments." *Id.* at 733. An expert may be qualified by practical experience as well as formal training. Advanced degrees, special recognitions and accomplishments are not necessary. The expert witnesses at issue were: Ann Turner (ten year licensed social worker, previously qualified as an expert in hundreds of Maryland cases, and personally involved in the instant case); Patricia Reidl (state certified social worker with masters degree and twenty-five years experience); and Franzella Starkey (court appointed attorney for child and siblings in Maryland proceedings since 1991, chief counsel at Legal Aid Bureau for ten years, and who had attended numerous child welfare training programs). The adoptive parents also argued that the opinions of some of the experts

were based on hearsay, since those experts did not have first hand knowledge of the adoptive home or the child's circumstances in the home. The Court rejected the argument since the adoptive parents did not identify specific hearsay testimony in the record and Ind. Evidence Rule 703 permits an expert to give an opinion based upon hearsay, provided the hearsay is of the type reasonably relied upon by experts in the field. Id.

Change of judge in adoption proceedings. The adoptive parents argued that the trial court erred in failing to grant their request for change of judge. They alleged that the judge was biased and prejudiced against them based on a series of adverse rulings and the absence of a "rational reason" for the judge's refusal to stay the Maryland court order for removal of the child from their home. The Court rejected the arguments. Rulings unfavorable to a party do not establish actual bias. A "movant for change of judge must affirmatively show actual personal bias; an allegation that no rational reason exists for a judge's ruling is not a demonstration of bias or prejudice." Id. at 734.

In **Newman v. Deiter**, 702 N.E. 2d 1093 (Ind. Ct. App. 1998), the Newmans, prospective adoptive parents, brought a civil suit against the Marion Superior Court, Probate Division, Judge Charles Deiter, the Marion County Sheriff, and Michael Bishop, attorney for Children's Bureau, a supervising adoption agency, in connection with an adoption which was denied. The trial court granted summary judgment in favor of the Marion County Sheriff and granted motions to dismiss the judge and adoption agency attorney. Three children had been placed with the Newmans by the Worcester County, Maryland, Department of Social Services. Two of the children were returned to Maryland by the Newmans, but the Newmans notified Worcester County that they wished to adopt the third child, and the Newman's petition to adopt the child was filed in Marion Superior Court, Probate Division. Worcester County contested the child's adoption by the Newmans. After a hearing, Judge Deiter issued an order requiring the Newmans to deliver the child to a local adoption agency on a certain date and time for the child to be returned to Maryland. The Newmans sought a stay of Judge Deiter's order in federal court, which the federal court denied. Judge Deiter ordered the Marion County Sheriff to remove the child from the Newman's care. Judge Deiter later agreed to stay his removal order and hold an emergency hearing in his office late at night. At the conclusion of the emergency hearing, Judge Deiter informed the Newmans that he was ordering the Sheriff to the Newman's home to remove the child, and Judge Deiter required the Newmans to remain in his office, guarded by two Sheriff deputies, until the removal was accomplished. The Judge made this order because Mrs. Newman appeared visibly agitated and emotionally unstable and her statements led the Judge to believe that she would attempt to prevent the child's removal, creating an emotionally upsetting scene at the Newman home. The child was removed by the Sheriff, after which the Newmans were allowed to leave the Judge's office. The Judge later denied the Newman's petition to adopt after a hearing. The denial was affirmed and reported at **In the Matter of the Adoption of L.C.**, 650 N.E. 2d 726 (Ind. Ct. App. 1995), reh'g. denied, trans. denied, cert. denied at 517 U.S. 1136, 116 S. Ct. 1423, 134 L. Ed. 2d 547.

Trial court correctly determined that Judge Deiter was entitled to absolute judicial immunity. The Court opined that it is well-settled that judges are entitled to absolute judicial immunity from suits for money damages for all actions taken in the judge's judicial capacity, unless those actions are taken in the complete absence of any jurisdiction. *Id.* at 1097. A judge will not be deprived of immunity because the action he took was in error, or in excess of his authority. *Id.* at 1098. The Court found that the emergency best interests hearing was held for the Newman's benefit, the Judge had jurisdiction over adoption matters, and the Judge, by detaining the Newmans, was acting in a matter that was within at least the outer bounds of his jurisdiction. *Id.* The Court was unpersuaded by the Newman's numerous arguments and found that absolute judicial immunity applied. *Id.*

Absolute judicial immunity properly extended to Sheriff for acts done in furtherance of Judge's orders. The Court opined that summary judgment in favor of the Sheriff was appropriate, even construing all genuine issues of material fact in a light most favorable to the Newmans. The evidence disclosed that the Sheriff was acting in furtherance of Judge Deiter's order to temporarily detain the Newmans while the removal order was executed. The Court noted that Indiana case law provides that absolute judicial immunity extends to persons performing tasks so integral or intertwined with the judicial process that these persons are considered an arm of the judicial officer who is immune. *Id.* at 1100. The Court opined that the absolute judicial immunity afforded Judge Deiter properly extended to the Sheriff for those acts in furtherance of the judge's orders. *Id.*

Attorney for supervising adoption agency had no attorney-client relationship with prospective adoptive family. The Court found no cogent arguments by the Newmans to support their many allegations against Michael Bishop, the attorney for Children's Bureau, which was supervising the Worcester County adoptive placement of the child. Among the unsupported allegations were the following: breach of contract; breach of a fiduciary duty; interference with contractual rights; violation of privacy and defamation; civil conspiracy. The Court noted that there is no independent action for civil conspiracy. *Id.* at 1101. The Court found that no attorney-client relationship ever existed between the Newmans and Bishop; that the Newmans's relationship with Children's Bureau had deteriorated to the point that the relationship was adversarial; and the Newmans had retained their own counsel. The Court found that the only allegation regarding Bishop's conduct was that he opposed the Newman's attempt to obtain a stay of Judge Deiter's removal order, which was not sufficient to withstand a motion to dismiss. *Id.*

In **Rust v. Lawson**, 714 N.E. 2d 769 (Ind. Ct. App. 1999), the order granting the guardians' petition for adoption without the biological father's consent was affirmed. The child's married parents were both incarcerated at the time of the child's birth. The couple who accepted care of the child at the time of the child's birth were appointed the child's guardians with parental consent. Two and one half years later, the guardians petitioned to adopt the child. The mother consented to the adoption, but the father did not consent. The guardians alleged pursuant to IC 31-19-9-8 that the father had failed to communicate significantly with the child and had failed to provide for the child's care and support when he was able to do so as required by law or judicial decree.

Scope of appellate review and burden of proof. The Court noted that in reviewing a ruling on an adoption proceeding the ruling will not be disturbed unless the evidence leads to but one conclusion and the trial judge reached the opposite conclusion. *Id.* at 771. The Court also noted that clear, cogent, and indubitable evidence is needed to establish one of the criteria for dispensing with parental consent and that the adoptive petitioner bears the burden of proving the criteria. *Id.*

Evidence in support of failure to communicate significantly with child. The Court noted that the communication with the child must be significant, and must be more than a "token effort". *Id.* at 772. The Court also noted that Indiana case law provides that the efforts of custodians to hamper or thwart communication between parent and child are relevant in determining ability to communicate, as are the birth parent's financial and physical means to accomplish communication obligations. *Id.*

The Court cited the following evidence in support of the trial court's finding regarding the father's lack of communication with the child: there was no contact between August, 1995 and July, 1996; the father never gave the child birthday or Christmas cards or presents; the father visited very briefly at the guardian's home on four occasions in 1996 but had no substantial contact with the child; the father failed to visit or even request to see the child from October, 1995 until July, 1997, a period of approximately twenty-two months. The Court found it "hard to believe" that the father was incapable of communicating even once with the child for twenty-two months. *Id.* at 773. The Court found the father's arguments that his efforts to visit his child were frustrated due to lack of funds and/or lack of counsel were unpersuasive. The father had at least three attorneys, assistance from Howard County Legal Aid Association, employment at a construction job, and monthly disability payments during the period of failure to communicate.

No conflict of interest by guardian's attorney. The father argued that he was denied due process of law because his former counsel on a criminal matter prepared and submitted proposed findings of fact on behalf of the guardians in the adoption proceeding. The father alleged that his former attorney had violated Rule 1.9 of the Rules of Professional Conduct. The attorney had represented the father in a criminal case involving charges of aggravated battery, conspiracy to commit murder, and conspiracy to commit criminal confinement. The father was acquitted on all charges and the attorney had not represented the father on any other matters. The Court found that the attorney's present representation of preparing findings of fact and conclusions of law on behalf of the guardians in the adoption proceeding was not the same or substantially related to the attorney's former representation of the father in a criminal matter. The Court found no conflict of interest. *Id.* at 774.

In **Matter of Adoption of T. B.**, 622 N.E. 2d 921 (Ind. 1993), the Supreme Court vacated the Court of Appeals opinion at 608 N.E. 2d 1006 which had reversed the probate court's decision to revoke an adoption upon the petition of the adoptive mother. The Court of Appeals had based their decision on lack of subject matter jurisdiction in the probate court because a CHINS proceeding had commenced in the juvenile court. The Supreme Court further reversed the probate court's revocation of adoption and remanded for judgment against the adoptive mother's petition for revocation.

The child had formerly been a ward of Lake County Family and Children Services due to neglect by her birth mother. The birth mother's parental rights were terminated and the adoptive mother's petition for adoption was granted by the probate court. After the adoption, the child had behavior and substance abuse problems and became violent toward her adoptive mother. The child was subsequently psychiatrically hospitalized, where she told staff that she had been sexually abused while in the custody of her birth mother. Almost five years after the adoption, the child was found to be a Child in Need of Services for the second time and was placed in a residential treatment center.

The adoptive mother filed a petition to revoke her adoption in the probate court which had granted the adoption, alleging that FCS had made a material misrepresentation when it failed to disclose that the child had been sexually abused prior to the adoption and that revocation of the adoption was in the child's best interests. FCS moved to dismiss the revocation petition, asserting lack of jurisdiction in the probate court due to the second CHINS adjudication in juvenile court. The probate court determined that it was the proper forum to hear the revocation petition. After a hearing, the probate court found that through proper investigation FCS should have learned of the sexual abuse prior to the adoption and that it was in the child's best interests to terminate the parent-child relationship, and granted the revocation petition.

Court with probate jurisdiction may adjudicate an adoption matter simultaneously with juvenile court's adjudication of a CHINS proceedings. The adoptive mother argued that the probate court had authority to hear adoption matters and that juvenile court did not have exclusive original jurisdiction over adoption matters. The FCS conceded that the juvenile court did not have authority to revoke an adoption, but argued that the petition to revoke adoption must be stayed pending the outcome of the CHINS proceeding or that the merits of the request for revocation could be addressed through a termination petition in conjunction with the CHINS proceeding. The Court cited IC 31-3-1-1(a) (recodified at IC 31-19-2-2) which states that a resident of Indiana who seeks to adopt a child may file a petition for adoption with the clerk of the court having probate jurisdiction. The Court stated that as a result of this statute a court with probate jurisdiction has the power to enter an order granting adoption, which is similar to other judgments. *Id.* at 923. Consequently, the probate court retained power over its earlier decree of adoption. *Id.* The Court stated that an action for adoption and a CHINS proceeding are separate actions involving different rights. *Id.* at 924. The Court went on to state that the legislature established the jurisdiction of juvenile and probate courts. The power to adjudicate either matter does not divest the other court of its respective jurisdiction. *Id.* Consequently, a court with probate jurisdiction may adjudicate an adoption matter simultaneously with the juvenile court's adjudication of a CHINS proceeding. *Id.*

Evidence on adoption revocation petition did not support finding that FCS committed fraud. In its discussion of revocation the Court opined that public policy disfavors revocation of adoption because adoption is intended to bring parent and child together in a permanent relationship, bring stability for the child's life, and to allow the law of interstate succession to apply with certainty. *Id.* The Court also recognized that an order of adoption is a judgment and may be set aside pursuant to Ind. Trial Rule 60(B). *Id.* The Court found that, although the adoptive mother alleged fraud by FCS for failure to inform her of the child's sexual abuse, the record did not support a finding of fraud by FCS. *Id.* at 925. The Court noted that in order to set aside the order of adoption based on fraud, there must be a material misrepresentation of past or existing fact made with knowledge or reckless disregard for the falsity of the statement, and the misrepresentation must be relied upon to the detriment of the relying party. *Id.* In its review of the evidence, the Court found that the child had never admitted sexual abuse until after the adoption, that the precise nature of the sexual abuse was unknown, that the child had been removed from her birth mother due to neglect, and that the child's birth mother had denied allegations of sexual abuse. The Court opined that the record might support a finding that FCS had acted negligently in failing to discover sexual abuse, but that the record did not support a finding that FCS had committed fraud; therefore, the attempt to set aside the adoption based on fraud must fail. *Id.*

Adoptive mother was not the proper party to bring a termination of the parent-child relationship action based on child's best interests. The Court opined that the adoptive mother was not the proper party pursuant to IC 31-6-5-2 or IC 31-6-5-4 (recodified at IC 31-35-1-4 or IC 31-35-2-4) to bring an action to terminate the parent-child relationship. *Id.* The merits of this action were therefore not properly before the probate court, but the merits could be properly adjudicated at some future date if a termination action were brought by a proper party. *Id.*

In **Matter of Adoption of T.R.M.**, 525 N.E. 2d 298 (Ind. 1988), the Supreme Court vacated the Court of Appeals decision at 489 N.E. 2d 156 and affirmed the trial court's order granting the adoption of the child by a non-Indian Porter County couple despite the Indian birth mother's objection and the Oglala Sioux Tribal Court's objection. The birth mother and her Indian husband had become friends with the adoptive parents prior to the child's birth, when the adoptive parents went to the reservation to visit a mission sponsored by their church organization. The birth mother and her husband divorced, and the child was born in Hot Springs, South Dakota, where the birth mother and her other children were living in a motel. The birth mother telephoned the adoptive parents twice before the child's birth and requested that they adopt her unborn child, to which the adoptive parents agreed. Five days after the child's birth, the birth mother telephoned the adoptive parents and requested that they come to get the child. The adoptive mother traveled to South Dakota to pick up the child; the birth mother's former husband was present and did not object. The birth mother signed the consent to adoption form and the adoptive mother returned to Porter County, Indiana with the child. The birth mother placed two telephone calls and sent two letters to the adoptive parents within two weeks after the child's placement in Indiana. There was no further contact from the birth mother until ten months later, when both she and the Tribe filed habeas corpus petitions in Porter County. The Porter Circuit Court dismissed the Tribe's petition which claimed jurisdiction due to the Tribe's failure to appear and present evidence, denied the birth mother's habeas corpus petition, and granted temporary custody of the child to the adoptive parents. The adoptive parents then petitioned for adoption, the Tribe asserted jurisdiction by a wardship order from the Indian tribal court, and the Porter Circuit Court heard evidence concerning the jurisdictional issues and the adoption proceeding and granted the adoption. The child had ultimately reached the age of seven years at the time of the Indiana Supreme Court opinion.

Indian Child Welfare Act could not be applied because the purpose and intent of Congress could not be achieved thereby. The Court noted that, while the child's biological ancestry was Indian, the child had spent her entire seven years of life with her non-Indian adoptive parents in a non-Indian culture. The purpose of the federal 1978 Indian Child Welfare Act, 25 U.S.C.A. section 1901 et. seq. is to promote the best interests of Indian children through promoting the stability and security of Indian tribes and families by the establishment of minimum federal standards for the removal of Indian children from their families. *Id.* at 303. The Court opined that, while the purpose of the ICWA is to protect Indian children from improper removal from their existing Indian family units, such purpose cannot be achieved from the unique facts of this case due to the child's abandonment to the adoptive mother "essentially at the earliest moment after childbirth". *Id.* The Court stated that it could not discern how the subsequent adoption proceeding constituted a "break-up of the Indian family." *Id.*

State court can find good cause under ICWA to deny tribal jurisdiction when Indian child is not residing on reservation. The Court noted the trial court's findings that the birth mother had lived off the reservation for two years, had no intention of returning to the reservation in the foreseeable future, and that the adoption consent she had signed acknowledged that she was not residing on the reservation. The Court found that ICWA gives Indian tribal courts exclusive jurisdiction if the child resides or is domiciled within the reservation or when there is a tribal court wardship of the child, but section 1911(b) allows the state court to find good cause to deny tribal jurisdiction when the child is not domiciled or residing within the reservation. *Id.* at 305. ICWA also does not require the state court to give "absolute deference" to a tribal court order regardless of the circumstances. *Id.* at 306. The Court found that the tribal court lacked jurisdiction to issue its wardship order over a year after the child's birth when the child was not domiciled on the reservation. *Id.* at 307. The Court also found that the Tribe had waived its claim to exclusive jurisdiction through failure to assert jurisdiction during the habeas corpus proceeding, and the tribal court was bound by the adverse adjudication of its habeas corpus petition. *Id.* at 306, 307.

Trial court's findings that Indian birth mother had abandoned the child and that adoption was in the child's best interests were not an abuse of discretion. The Court found that the following evidence supported the judgment of adoption: birth mother had a long history of drug, alcohol abuse, and incarceration; birth mother had been twice divorced from the same man due to his alcohol abuse and physical abuse of her and planned to remarry him; birth mother was fully aware of the non-Indian culture consequences of adoption and had voluntarily relinquished her rights; testimony by a psychologist and caseworker from the county child protection service indicated that custody of the child by the mother would likely result in serious physical and emotional harm to the child. *Id.* at 308.

Adoptive parents did not improperly remove child to Indiana nor did they improperly retain custody of the child. The Court was unpersuaded by the birth mother's argument that the adoptive parents had violated ICWA by improperly removing the child or improperly retaining custody of the child. The Court opined that when the adoptive mother returned to Indiana with the child, she had the birth mother's consent and the birth mother had abandoned care, custody and control to the adoptive parents. *Id.* at 309. In addition the birth mother purported to revoke her consent, but, other than filing a habeas corpus petition, had not asserted any legal rights to the child or attempted to secure the child's return. *Id.*

Tribal court's divorce decree did not provide basis for continuing jurisdiction over the child. The birth mother and Tribe asserted lack of subject matter jurisdiction in the state court due to the tribal court's continuing jurisdiction in the divorce between the birth mother and her husband. The Court found this argument to be without merit, citing

the following: the child was born seven months after the tribal divorce; there had never been a finding that the husband was the child's birth father; the mother had denied her husband's paternity of the child; the usual tribal procedures for post decree modification concerning that child had not been followed. Id.

Trial court did not abuse its discretion in rehabilitation findings. The Court was unpersuaded by the birth mother's argument that section 1912(d) of ICWA required proof of remedial and rehabilitative efforts to prevent the breakup of an Indian family by the party seeking to terminate parental rights and that such proof had not been met. The Court found that the following facts supported the trial court's finding that efforts to rehabilitate the birth mother had been unsuccessful: the birth mother was considering an abortion to aid in reconciliation with her husband because he was not the child's biological father; the birth mother did not want her unborn child to grow up like one of her other four children who had a different father; the obstetrical nurse whom the birth mother had approached had suggested adoption as an alternative to abortion. Id. The Court opined that the actions of the adoptive parents to adopt the child could thus be seen as an active effort to reunite a pre-existing Indian family of the birth mother, her former husband, and their three children, thus fulfilling the spirit and requirements of section 1912 of ICWA. Id. at 310.

Trial court had sufficient evidence to support its finding of birth mother's drug and alcohol problems and unsuccessful rehabilitation efforts. The Court found that the following evidence supported the trial court's finding: the mother had a history of drug and alcohol abuse; the mother admitted being a teenage alcoholic and abusing acid and marijuana; the mother had voluntarily admitted herself into a drug and alcohol rehabilitation program prior to the child's birth; the mother had become drunk on at least one occasion after the habeas corpus hearing. Id.

Evidence, including testimony of three "qualified expert witnesses" as required by ICWA supported beyond a reasonable doubt that returning the child to the birth mother would cause serious emotional harm to the child. ICWA requires proof beyond a reasonable doubt in adoption determinations, as well as testimony of "qualified expert witnesses". Although "qualified expert witness" is not specifically defined in ICWA, legislature history reveals that it is "meant to apply to expertise beyond the normal social worker qualifications." Id. at 311. The Court found that a clinical and experimental psychologist, a Juvenile Judge of the Rosebud Sioux Tribe, and a social worker with graduate work hours in the fields of psychology, sociology and special education with four and one-half years' experience as a child protective service worker, met the Bureau of Indian Affairs guidelines for "qualified expert witnesses." Id. at 311. The three qualified expert witnesses testified that the birth mother's past behavior would likely continue, that her child-rearing abilities would be affected, and would likely result in serious emotional or physical harm to the child. Id. at 310, 311. The Court opined that the trial court's finding of serious emotional harm to the child if placed with the birth mother was supported beyond a reasonable doubt by the above evidence. Id. at 310.

Trial court did not error in granting adoption by non-Indian couple. Section 1915 of ICWA requires the judge to give preference of adoptive placement, absent good cause to the contrary, to members of the child's extended family, other members of the tribe, or other Indian families. The Court reviewed the birth mother's argument for preference for an Indian adoptive family on an abuse of discretion standard. Id. at 311. The Court noted that the record was silent as to any custodian other than the birth mother who met the criteria of section 1915. The Court found no abuse of discretion in the trial court's best interests of the child determination based on bonding between the child and the adoptive parents and on the serious emotional harm that would likely result if the child were returned to the birth mother. Id. The Court held that, because the evidence clearly demonstrated good cause to the contrary, adoptive placement preferences, including established tribal preferences, were not binding under the facts of this case. Id. at 313.

Trial court did not error in failing to dismiss adoption petition due to lack of notice and service upon birth mother's former husband as alleged father of the child. The trial court had appointed counsel for the birth mother's former husband when the husband so requested. Court appointed counsel subsequently withdrew at the adoption hearing due to lack of communication from the former husband. The Court opined that it was clear that the former husband had actual notice of the proceedings. Id. at 314. The Court noted that the former husband was not a party to the appeal, that the trial court correctly determined that paternity had not been established, and that there was insufficient evidence of the claim that the former husband was the child's birth father. The Court declined to find error. Id. The Court found that the birth mother's evidence that her former husband was the child's father which included a rebuttable presumption of legitimacy under South Dakota and tribal law, the former husband's affidavit filed with the tribal court over two years after the child's birth, and two letters sent to the court, raised a presumption, but the presumption had been rebutted by strong evidence. Id.