



## **The Contested Adoption<sup>1</sup>**

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### **A. Right to Counsel for Parents**

#### **1. Court Advisement to Parents and Court Appointed Counsel**

The rights afforded to parents in involuntary termination of the parent-child relationship statutes (IC 31-32-2-5, IC 31-32-4-3, and IC 31-35-1-12) apply in adoption proceedings where the petitioners seek to adopt over the objections of one or both of the natural parents. In Re Adoption of Baby W., 796 N.E.2d 364, 375 (Ind. Ct. App. 2003). IC 31-32-2-5 states that a parent is entitled to representation by counsel in proceedings to terminate the parent-child relationship. IC 31-32-4-3(a) states that if: (1) a parent in proceedings to terminate the parent-child relationship does not have an attorney who may represent the parent without a conflict of interest; and (2) the parent has not lawfully waived the right to counsel under IC 31-32-5, the juvenile court shall appoint counsel for the parent at the initial hearing or at any earlier time. IC 31-35-1-12, the voluntary termination of parent-child relationship statute, includes in the required advisement to parents that "(7) the parents are entitled to representation by counsel, provided by the state if necessary, throughout any proceedings to terminate the parent-child relationship against the will of the parents". In Matter of Laney, 489 N.E.2d 551 (Ind. Ct. App. 1986), the Court opined that a putative father was entitled to court appointed counsel in proceedings by a private licensed child

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placing agency to terminate his rights. See also Petition of McClure, 549 N.E.2d 392 (Ind. Ct. App. 1990), in which the trial court's granting of stepfather's adoption was reversed because the incarcerated indigent father requested but was denied court appointed counsel.

The trial court has the duty to advise parents of their right to counsel in a contested adoption proceeding. In Taylor v. Scott, 570 N.E.2d 1333, 1335 (Ind. Ct. App. 1991), an adoption petition was filed by nonparent third parties who had been awarded custody of a child in a dissolution proceeding. The child's birth father was represented by three different attorneys, and fired his third attorney on the morning of the hearing. The trial court allowed birth father's third attorney to withdraw, and, without any judicial advisement to birth father about the right to counsel or the hazards of proceeding without counsel, the trial court proceeded with the hearing. The birth father did not request a continuance to obtain new counsel, but after the court had heard a substantial portion of the adoption petitioners' case, birth father requested a continuance to allow himself more time to organize his presentation of his case. The request for continuance was denied, the adoption petition was granted, and birth father appealed. The Court of Appeals reversed the trial court's granting of the adoption and held that birth father had three related statutory rights: (1) the right to be represented by counsel; (2) the right to have counsel provided if he could not afford private representation; and (3) the right to be informed of the two preceding rights, which the trial court had failed to do. The Court found that birth father had been deprived of an essential right and reversed and remanded for a new hearing at which he could be afforded the right to counsel. See In Re Adoption of G.W.B., 776 N.E.2d 952 (Ind. Ct. App. 2002), a case involving a stepfather's petition for adoption, in which the trial court refused to grant birth father's request for a continuance to have an attorney. The trial court said that birth father had a sufficient amount of time to hire an attorney in the two and a half months between his filing of his motion to contest the adoption and the hearing. The Court of Appeals reversed the trial court's granting of stepfather's petition for adoption, finding that: (1) the trial court did not advise birth father of his rights; (2) since there was only one hearing, there was no prior occasion upon which the trial court could have impressed upon birth father the serious consequences he faced if he represented himself; (3) consequently, birth father did not knowingly, intelligently, and voluntarily waive his right to counsel. Id. at 954. The Court remanded the case and instructed the trial court to vacate the hearing and all proceedings thereafter and conduct further proceedings consistent with the opinion.

Id. at 954-55. In In Re Adoption of Baby W., 796 N.E.2d 364 (Ind. Ct. App. 2003), the putative father appealed the dismissal of his objection to the adoption petition, arguing inter alia that he was denied due process because the adoptive parents' attorney never informed him of his right to counsel. The Court found putative father's argument without merit, noting that: (1) the letter sent to putative father by adoptive parents' attorney served as fair notice that the attorney represented interests contrary to interests of putative father; (2) it was the duty of the adoption court, not adoptive parents' attorney, to inform putative father of his right to counsel; (3) a review of the record revealed that the adoption court did not inform putative father of his right to be represented by counsel; (4) putative father was represented by the same counsel during the totality of the paternity and adoption proceedings, including the adoption appeal, so any error in the trial court's failure to inform putative father of his right to counsel was harmless. Id. at 375-76. The Court affirmed the adoption. But see In Re Adoption of J.D.C., 751 N.E.2d 747, 752 (Ind. Ct. App. 2001) (failure to appoint counsel for putative father who had failed to register in putative father registry was harmless because his consent was irrevocably implied and counsel would not have been of assistance).

The Taylor v. Scott opinion does not require that a parent be indigent for the court to appoint counsel for a parent who wishes to contest an adoption. Since the Taylor opinion and Petition of McClure, 549 N.E.2d 392 (Ind. Ct. App. 1990) applied the statutory right to counsel in termination cases to adoption cases, arguably a parent in a contested adoption who does not have counsel that can represent the parent without a conflict of interest has the right to court appointed counsel even if the parent is not indigent. But see Matter of Adoption of A.M.K., 698 N.E.2d 845, 848 (Ind. Ct. App. 1998), in which the Court affirmed the trial court's decision terminating father's representation by court appointed counsel and ordering father to reimburse the county for counsel's fees because father misrepresented his indigency status. Certainly appointment of counsel is always within the trial court's discretion and provides more legal security for the child by removing a reason for appeal which could result in a reversal of the child's adoption.

## 2. Joint Representation of Birth Parents

If the court appoints an attorney to represent both parents in a contested adoption, the appointed attorney must first determine whether both parents may be represented by the same attorney without a conflict of interest. Although this author is unaware of published adoption cases that discuss the issue of joint representation, the Indiana Supreme Court addressed the issue of joint representation in Baker v. County Office of Family & Children, 810 N.E.2d 1035 (Ind. 2004), an involuntary termination of parental rights case. In Baker, the parents, who were not married to each other, claimed that the trial court did not adequately inquire about their decision to go forward with representation by the same lawyer. The Court opined that the parents' joint representation did not result in a conflict of interest. Id. at 1042. The Court further said: (1) the parents preserved the same interests, namely maintaining parental rights over their child; (2) there was no solid evidence showing their interest were "adverse and hostile"; (3) the parents were not presenting evidence against one another; (4) neither parent stood to gain significantly by separate representation; (5) nothing suggested that representation by a single lawyer led to a fundamentally unfair hearing. Id.

## 3. Motion to Contest Adoption and Motion to Withdraw Consent

An attorney who is representing a birth parent who wishes to contest an adoption should file a motion to contest adoption with the court not later than thirty days after service of notice of the pending adoption, if the birth parent has not already done so. IC 31-19-10-1(b). IC 31-19-10-2 provides that a person seeking to withdraw consent to adoption under IC 31-19-10-3 or contesting an adoption must give notice of intent to withdraw consent to or contest the adoption to all parties to the adoption and a person whose consent to adoption is required by IC 31-19-9.

A consent to adoption may be withdrawn not later than thirty days after the consent is signed if: (1) the court finds, after notice and opportunity to be heard afforded to the adoption petitioner, that the person seeking to withdraw consent is acting in the best interest of the person sought to be adopted; and (2) the court orders the withdrawal of consent. IC 31-19-10-3(a). IC 31-19-10-1(c) requires a person seeking to withdraw the person's consent to an adoption to file a motion to

withdraw consent to adoption with the court not later than 30 days after service of notice of the pending adoption. IC 31-19-10-3(b)(1) provides that a consent to adoption may not be withdrawn after thirty days after the consent to adoption is signed. IC 31-19-10-3(b)(2) and (3) provide that a consent to adoption may not be withdrawn if the person who signs the consent appears, in person or by telephone or video conferencing, before a court in which the petition for adoption has been or will be filed or before a court of competent jurisdiction if the parent is outside Indiana, and acknowledges the following: (1) the person understood the consequences of the signing of the consent; (2) the person freely and voluntarily signed the consent; and (3) the person believes that adoption is in the best interests of the person to be adopted. IC 31-19-10-4 states that consent to adoption may be withdrawn only as provided in this chapter [IC 31-19-10] and may not be withdrawn after entry of the adoption decree.

#### 4. Case Law on Withdrawal of Consent

Indiana case law on withdrawal of adoption consent includes In Re Adoption of N.J.G., 891 N.E.2d 60 (Ind. Ct. 2008), in which the Court reversed and remanded for further proceedings the trial court's denial of birth mother's request to withdraw her adoption consent. The Court held that mother's pre-birth consent was void because it was executed pre-birth and did not meet statutory requirements that consent be executed in the presence of the court, a notary public, or an authorized agent of state or county department of family and children or licensed child placing agency. None of the documents in the record that were signed after the child's birth met the requirements for valid consents to adoption. In In Re Adoption of M.L.L., 810 N.E.2d 1088 (Ind. Ct. App. 2004) the Court affirmed the trial court's order granting the adoption despite the birth mother's signed revocation of her adoption consent. The adoption consent was executed in the presence of a notary public in Tennessee after birth mother, who had been arrested for drug possession, had later volunteered to act as a confidential informant for the sheriff in a controlled drug buy. The birth mother contacted a relative in Indiana and asked whether her cousin and his wife would be interested in adopting the child. The Indiana cousin and his wife drove to Tennessee to pick up the child. The birth mother helped her cousin and his wife pack the child's belongings and gave them the child's birth certificate and Social Security card. Birth mother's sole contention in disputing the voluntariness of her consent was that she would not have signed

the consent if the deputy sheriff had not threatened her with jail time and having her child taken from her. The Court was unpersuaded by this argument because: (1) the birth mother had first expressed her desire that her cousin take the child to live with him and his wife in Indiana before she was arrested or volunteered to work as a confidential informant; and (2) the Court could not say the only conclusion to be gleaned from the evidence was that the deputy sheriff's pressure on the mother to serve as a confidential informant overcame the mother's volition regarding adoption. The mother also contended that her consent was invalid because it did not comply with Tennessee law which requires that all surrenders of children must be made in chambers before a judge. The Court responded that the validity of the mother's consent was governed not by Tennessee law, but by Indiana law because the Indiana trial court had jurisdiction over the adoption. Indiana law, IC 31-19-9-2, allows consent to adoption to be executed in the presence of the court or a notary public. Because the mother executed her consent before a notary public, her consent was valid.

See also Bell v. Adoption of A.R.H., 654 N.E.2d 29 (Ind. Ct. App. 1995), in which the Court affirmed the trial court's denial of the birth mother's petition to withdraw her consent to adoption, finding no evidence that birth mother's consent was involuntary because birth mother's grief over her grandmother's death did not rise to the level of overcoming her volition. Birth mother's claim that she believed she had a two week grace period to change her mind after signing the consents was unsupported by written documents she had signed. Birth mother also failed to prove that withdrawal of her consent was in the children's best interests. Other cases on withdrawal of consent include Matter of Adoption of Johnson, 612 N.E.2d 569 (Ind. Ct. App. 1993) (Court affirmed order allowing birth mother to withdraw consent because adoptive parents had been diagnosed with AIDS and birth mother feared the adoptive parents' deaths would leave child without parents); Matter of Adoption of H.M.G., 606 N.E.2d 874 (Ind. Ct. App. 1993) (Court found that sixteen-year-old birth mother's consent given twenty-seven days prior to child's birth was not void but voidable; voidable pre-birth consent could be ratified by post-birth act which sufficiently manifests a present intention to give the child up for adoption; case remanded for full evidentiary hearing on question of post-birth ratification); Matter of Adoption of Hewitt, 396 N.E.2d 938 (Ind. Ct. App. 1979) (the fact that eighteen-year-old mother's consent had been given in hospital two days after child's birth was insufficient to void her consent; emotions, tensions and

pressure are insufficient to void consent unless a parent can show they rose to the level of overcoming parent's volition).

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

## **B. Consolidation of Adoption and Paternity Cases**

IC 31-19-2-14(a) states that if a petition for adoption and a petition to establish paternity are pending at the same time for a child sought to be adopted, the court in which the petition for adoption has been filed has exclusive jurisdiction over the child, and the paternity proceeding must be consolidated with the adoption proceeding. The attorney who represents a party in the paternity proceeding could file the motion to consolidate. The judge with jurisdiction over the paternity case can order transfer of the paternity case to the adoption court. IC 31-14-21-13 states that, upon notice that a court in which an adoption is pending has assumed jurisdiction of a paternity action under IC 31-19-2-14, the court in which the paternity action was pending shall stay all proceedings in the paternity action until further order from the court in which the adoption is pending. After the consolidation required by IC 31-19-2-14(a), the adoption court will then have jurisdiction over both the adoption and paternity cases.

If paternity has not yet been established, IC 31-14-21-3 through -5 impose legal requirements of notifying others on a putative father who files or is a party to a paternity proceeding if the putative

father is served with notice of an adoption or is “informed in any other manner” of a pending or potential adoption of child who is the subject of the paternity action. IC 31-14-21-3 requires the putative father to give notice of the paternity action to an attorney or agency that serves him with notice of an adoption. IC 31-14-21-4 states that a putative father who has not been served with notice of a paternity action but knows that an adoption has been filed and the court in which the adoption is pending shall serve the clerk of the court having jurisdiction over the adoption with notice of the paternity action. IC 31-14-21-5 states that the notice must include the name of the court, the cause number, and the date of filing of the paternity action.

IC 31-14-21-6 through 8 provide for the prospective adoptive parents’ right to intervene in the paternity proceeding. These intervention rights would apply in paternity cases either before or after the paternity case is consolidated with the adoption case. IC 31-14-21-6 states that if the putative father fails to provide notice under IC 31-14-21-3 or IC 31-14-21-4 and the prospective adoptive parents file a motion to intervene in the paternity action, the court shall allow the prospective adoptive parents to intervene in the paternity action under Ind. Trial Rule 24. IC 31-14-21-7 states that, if the court has already established the paternity of a father who failed to provide the required notice, and the prospective adoptive parents file a motion to intervene, the court shall set aside the paternity determination and allow the prospective adoptive parents to intervene. IC 31-14-21-8 states that the prospective adoptive parents may intervene solely for the purposes of: (1) receiving notice of the paternity proceedings; and (2) attempting to ensure that the putative father’s paternity is not established unless he is the child’s biological father. A prospective adoptive parent may object to any error that occurs during the paternity proceedings. IC 31-14-21-8(c).

If the court “knows of” a pending adoption of a child who is the subject of a paternity proceeding and the court in which the adoption is pending, IC 31-14-21-9, -9.1, and -9.2 establish time limits for the court presiding over the paternity case. IC 31-14-21-9 requires the court to conduct an initial hearing not more than thirty days after: (1) the filing of the paternity petition; or (2) the birth of the child, whichever occurs later. IC 31-14-21-9.1(a) requires the court at the initial hearing to order all parties to the paternity action to undergo blood or genetic testing. IC 31-14-21-9.1(b) states that if the alleged father is unable to pay for the initial costs of the testing, the

court shall order that the tests be paid for by the state department of health from the putative father registry fees collected under IC 31-19-2-8(2). The state department of health may recover costs from the man found to be the child's biological father. IC 31-14-21-9.2 states that the court shall conduct a final hearing to determine paternity not more than ninety days after the initial hearing. The court shall issue its ruling in the paternity action not more than fourteen days after the final hearing.

### **C. Legal Grounds for Dispensing with Consent**

IC 31-19-9-1 provides that the following persons must consent to the child's adoption: (1) each living parent of the child born in wedlock; (2) the mother of a child born out of wedlock and the father whose paternity has been established by a court proceeding other than the adoption proceeding or by a paternity affidavit unless the putative father gives implied consent under IC 31-19-9-15; (3) each person, agency, or county office of family and children having lawful custody of the child whose adoption is being sought; (4) the court having jurisdiction of the custody of the child if the legal guardian or custodian is not empowered to consent to adoption; (5) the adoptive child who is more than fourteen years old; (6) the adoptive child's spouse. The consent of a father who has signed a paternity affidavit is required unless another provision allowing the court to dispense with his consent, such as abandonment or failure to pay child support, applies. See In Re Adoption of A.K.S., 713 N.E.2d 896, 898 (Ind. Ct. App. 1999) (paternity affiant father was entitled to notice of adoption). See also Matter of Adoption of M.A.S., 695 N.E.2d 1037, 1039 (Ind. Ct. App. 1998) (adoption reversed due to incorrect legal notice to incarcerated father who had signed a paternity affidavit and whose consent was required). In In Re Adoption of J.E.H., 859 N.E.2d 288 (Ind. Ct. App. 2006), the Court affirmed the trial court's denial of the stepmother's petition to adopt her two stepsons, ages fourteen and ten, because the fourteen-year-old stepson had not consented to the adoption as required by IC 31-19-9-1(a)(5), and because it was not in the best interests of the ten-year-old to have a different mother than his brother.

After hearing evidence, the adoption court may make a finding that a required consent may be dispensed with in situations listed at IC 31-19-9-8 through 10, IC 31-19-9-12, IC 31-19-9-15, and IC 31-19-5-18.

## 1. Standard and Burden of Proof

The standard of proof in contested adoptions is clear and convincing when the adoption petitioners are requesting that the court dispense with a needed consent. IC 31-19-10-0.5 provides that the party bearing the burden of proof in a proceeding to contest an adoption or withdraw consent to adoption must prove the party's case by clear and convincing evidence. In In Re Adoption of M.A.S., 815 N.E.2d 216, 220 (Ind. Ct. App. 2004), the Court looked to a statute on burden of proof in termination of the parent-child relationship (IC 31-37-14-2) and guardianship case law (In Re Guardianship of B.H., 770 N.E.2d 283, 287 (Ind. 2002)) in discussing the standard of proof in adoptions where the petitioner seeks to prove that the parent's consent to adoption is unnecessary. The Court also considered the 2003 legislative addition to IC 31-19-9-8(a) at (11)(A) which allows the court to dispense with the need for parental consent if an adoption petitioner proves by clear and convincing evidence that the parent is unfit and that adoption is in the child's best interests. The Court concluded that the stepfather, who had petitioned for adoption, met the requirement of proving by clear and convincing evidence that the father's consent was not required. The Court also quoted the following language from B.H. in applying the clear and convincing standard:

In reviewing a judgment requiring proof by clear and convincing evidence, an appellate court may not impose its own view as to whether the evidence is clear and convincing but must determine, by considering only the probative evidence and reasonable inferences supporting the judgment and without weighing evidence or assessing witness credibility, whether a reasonable trier of fact could conclude that the judgment was established by clear and convincing evidence.

In Re Guardianship of B.H. at 288.

IC 31-19-10-1.2 clarifies who has the burden of proving that the court should dispense with the need for a parent's consent to adoption. The adoption petitioner has the burden of proof in most situations under this statute. The burden depends on which statutory exception to the need for the consent is alleged in the adoption petition. If the parent properly files a motion to contest the

adoption, the adoption petitioner carries the burden of proof that parental consent is not required in the following situations: (1) IC 31-19-9-8(a)(1) (abandonment); (2) IC 31-19-9-8(a)(2) (knowing failure to support or failing without justifiable cause to communicate significantly with the child for at least one year); (3) IC 31-19-9-8(a)(9) (parent judicially declared incompetent or mentally defective); (4) IC 31-19-9-8(a)(11) (parent unfit and adoption would serve child's best interests); (5) IC 31-19-9-9 (parent convicted of and incarcerated at time of filing of adoption petition for murder, causing suicide or voluntary manslaughter, victim is the other parent, and dispensing with parental consent is in child's best interests); (6) IC 31-19-9-10 (parent convicted and incarcerated at time of filing of adoption petition for specific crimes against child, child's sibling, or step-sibling and dispensing with parental consent in child's best interests). If the biological father properly files a motion to contest the adoption, and the petition for adoption alleges that the biological father's consent is unnecessary under: (1) IC 31-19-9-8(a)(4)(B) (child born out of wedlock who was conceived as a result of child molesting); or (2) IC 31-19-9-8(a)(4)(C) (child born out of wedlock who was conceived as a result of sexual misconduct with a minor) the parent has the burden of proving that the child was not conceived under circumstances that would cause the parent's consent to be unnecessary under IC 31-19-9-8(a)(4). The absence of a criminal prosecution and conviction is insufficient to satisfy the biological father's burden of proof. IC 31-19-10-1.2(b). If a petition for adoption alleges that a legal guardian or lawful custodian's consent to adoption is unnecessary under IC 31-19-9-8(a)(10) (legal guardian or lawful custodian's failure to consent is not in child's best interests), the legal guardian or lawful custodian has the burden of proving that withholding consent to adoption is in the child's best interests. IC 31-19-10-1.2(d).

It is crucial that a parent who files a motion to contest an adoption prosecute the motion timely. IC 31-19-10-1.2(g) states that if a court finds that the person who filed the motion to contest is failing to prosecute the motion "without undue delay," the court shall dismiss the motion to contest with prejudice, and the person's consent to the adoption shall be irrevocably implied.

IC 31-19-10-1.4 gives direction on the basis of the court's determination if the adoption petitioner is seeking to have the need for parental consent dispensed with because the parent is unfit and dispensing with parental consent is in the child's best interests (IC 31-19-9-8(a)(11)). IC 31-19-10-1.4 states that the court may not base its determination solely on a finding that a: (1) petitioner

for adoption would be a better parent for a child than the parent who moved to contest the adoption; or (2) parent has a biological link to a child sought to be adopted.

IC 31-19-10-5 states that the court shall set a hearing to contest the adoption whenever a motion to contest adoption is filed. IC 31-19-10-7(a) states that the court may send all notices of the filing of a motion to contest an adoption; conduct bifurcated hearings; and issue an order protecting the anonymity of a petitioner for adoption. IC 31-19-10-7(b) states that the order protecting anonymity may include an order directed to an attorney who represents a party contesting or seeking to withdraw consent to adoption. IC 31-19-10-6 provides that, after hearing evidence, the court shall: (1) dismiss the adoption petition if the court: (A) finds that the person who moved to contest the adoption has established that it is in the child's best interests that the motion to contest the adoption be granted; (B) finds that a required consent has not been obtained in writing or implied; or (C) permits a necessary consent to be withdrawn; or (2) deny the motion to contest the adoption. If the court dismisses the adoption, IC 31-19-11-15 states that the court shall determine the person who should have custody of the child. (See these materials at D. Custody Determination When Adoption Dismissed for further information.)

## 2. Abandonment

IC 31-19-9-8(a)(1) states that consent to adoption is not required from “[a] parent or parents if the child is adjudged to have been abandoned or deserted for at least six (6) months immediately preceding the date of the filing of the petition for adoption.” Note that the statute specifies the timing of the filing of the petition for adoption to plead abandonment as a reason for the court to dispense with the need for parental consent. Abandonment may be actual or constructive. For the court to determine abandonment, it is only necessary that the parent voluntarily fail to perform his required parental duties and obligations. Emmons v. Dinelli, 133 N.E.2d 56, 63 (Ind. 1956). Abandonment as used in the statute means any conduct by the parent which evinces an intent or settled purpose to forego all parental duties and to relinquish all parental claims to the child. In Re Adoption of Childers, 441 N.E.2d 976, 979 (Ind. Ct. App. 1982). IC 31-19-9-8(b) states that “[i]f a parent has made only token efforts to support or to communicate with the child, the court may declare the child abandoned by the parent.” In In Re Adoption of J.C., 919 N.E.2d 1230 (Ind. Ct.

App. 2010), the Court affirmed the trial court's conclusion that father's consent to adoption was not required as he had clearly abandoned the child within the requirements of IC 31-19-9-8(b). The Court noted: (1) prior to his incarceration, father's interaction with the child was limited, not taking advantage of the full visitation time that he was granted and stopping all visitation a full five months before his incarceration; (2) during his incarceration, father's efforts to communicate with the child were almost non-existent and failed to amount to a sincere attempt to stay involved in the child's life; (3) father failed to pay child support and was incarcerated for sixty days on two separate occasions for failure to pay child support.

### 3. Lack of Significant Contact

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

Indiana cases in which the Court of Appeals found that parental consent could be dispensed with due to failure to significantly communicate with the child include In Re Adoption of T.W., 859 N.E.2d 1215 (Ind. Ct. App. 2006) (father conceded that he had not attempted to personally communicate with children for three years by time of adoption trial; even though guardianship court had denied father in-jail visitation, guardianship court had not denied written or telephonic communication); In Re Adoption of C.E.N., 847 N.E.2d 267 (Ind. Ct. App. 2006) (Court affirmed trial court's decision that due to mother's sporadic, brief visits and lack of communication with the child for several years, mother's consent was not required); In Re Adoption of R.L.R., 784 N.E.2d 964 (Ind. Ct. App. 2003) (Court found birth mother's consent to adoption was not required and reversed trial court's denial of stepmother's adoption petition; child had no direct or indirect contact with birth mother for more than three years and child had established strong, healthy relationship with stepmother); Rust v. Lawson, 714 N.E.2d 769 (Ind. Ct. App. 1999) (father's

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

Cases in which the Court of Appeals opined that parental consent due to alleged failure to significantly communicate could not be dispensed with include: McElvain v. Hite, 800 N.E.2d 947, 949 (Ind. Ct. App. 2003) (Court reversed trial court's grant of stepfather's adoption petition; father had visited children without mother's knowledge while children were staying with a friend; father also had overnight visitation and visited one of the children at school after she had injured herself); In Re Adoption of Augustyniak, 505 N.E.2d 868 (Ind. Ct. App. 1987), reh'g granted at 508 N.E.2d 1307 (father lived in Florida and could not visit child regularly but sent child cards and gifts and offered to drive to Indiana for a visit which mother refused); Matter of Adoption of

Thomas, 431 N.E.2d 506 (Ind. Ct. App. 1982) (Louisiana divorce decree denied visitation to father, but he attempted communication; personal visits by paternal grandmother from Louisiana with children constituted indirect significant communication; father paid substantial child support without any legal compulsion to do so); Lewis v. Roberts, 495 N.E.2d 810 (Ind. Ct. App. 1986) (incarcerated adjudicated father's letters, gifts, visits and requests for visits displayed a continuing interest in his daughter).

#### 4. Failure to Support

IC 31-19-9-8(a)(2)(B) provides that the court may dispense with parental consent if the child is in the custody of another person and if, for a period of at least one year, the parent knowingly fails to provide for the care and support of the child when able to do so as required by law or judicial decree. In In Re Adoption of D.C., 928 N.E.2d 602 (Ind. Ct. App. 2010), the Court concluded that the adoptive petitioners established, by clear and convincing evidence, that the birth father failed to provide for the child's care and support when able to do so and his consent to adoption was not required. The following evidence supported the probate court's finding: (1) birth father was ordered to pay support in the amount of \$322.78 per month for the child; (2) from birth father's income of \$23,430, no more than \$500 had been paid on behalf of the child and his fifteen-year-old sister in the twelve months preceding the adoption petition; (3) with regard to checks that birth father sent to birth mother in 2004, \$70 was designated for the child's fifteen-year-old sister and \$150 was designated for clothes; (4) there was no showing that birth father made any single conforming child support payment for the child's benefit during the year preceding the filing of the adoption petition although a substantial child support arrearage had accrued. In In Re Adoption of B.R., 877 N.E.2d 217 (Ind. Ct. App. 2007), the Court reversed and remanded the trial court's denial of stepfather's petition to adopt the child. The birth father had never paid child support. The trial court erroneously found that birth father's consent was necessary because there was no court order or other requirement that birth father pay child support. The Court opined that birth father had the common law duty of a parent to support his child, and his failure to do so satisfied IC 31-19-9-8(a)(2)(B). In In Re Adoption of M.A.S., 815 N.E.2d 216 (Ind. Ct. App. 2004), the Court affirmed the trial court's order granting stepfather's adoption petition and finding that the birth father's consent was not needed because he had failed to support the child. The

Court noted that: (1) birth father failed to pay child support for two years during which time he was employed and also paid \$1000.00 for bail; (2) birth father had a duty to support the child which existed apart from any court order or statute; (3) the evidence implied that birth father was aware that the child support he was paying applied only to his two older children; and (4) birth father's occasional provision of groceries, diapers, formula, clothing, presents, and cash were gifts, not child support. In Matter of Adoption of A.M.K., 698 N.E.2d 845 (Ind. Ct. App. 1998), the Court of Appeals affirmed the trial court's order dispensing with parental consent of the birth father who had signed a paternity affidavit due to the birth father's failure to support the child. The Court noted that the paternity affidavit signed shortly after the child's birth acknowledged the father's obligation to support the child. Id. at 847. The following evidence supported the trial court's determination: (1) birth father withdrew from high school prior to the child's birth and did not work or offer financial support for the first year of the child's life; (2) birth father testified he paid a total of \$300.00 to \$400.00 in support which he paid to the paternal grandmother; (3) birth father was voluntarily unemployed; (4) birth father made no claim that he was unable to work or suffered an impairment which prevented him from working. The A.M.K. opinion is noteworthy because it indicates that birth father had a duty to pay child support based on his execution of the paternity affidavit. See also Irvin v. Hood, 712 N.E.2d 1012 (Ind. Ct. App. 1999), in which the Court of Appeals affirmed the trial court's order dispensing with the consent of birth father who signed a paternity affidavit but did not support the child financially for three years despite the father's earning regular income and being able to travel to Europe to play rugby. The Court opined that Indiana law imposes upon a parent a duty to support his children which exists apart from any court order or statute. Id. at 1014.

Other cases which affirmed the trial court's determination to dispense with parental consent due to knowing failure to support include: In Re Adoption of A.K.S., 713 N.E.2d 896 (Ind. Ct. App. 1999) (paternity affiant father was entitled to notice of adoption petition but his consent was dispensed with due to his failure to pay child support for three years; fathers have a common law duty to support their children); In Re Adoption of M.J.C., 590 N.E.2d 1095 (Ind. Ct. App. 1992) (paternity judgment ordered father to pay \$17.50 per week child support, but father paid nothing from 1982 through 1986, \$40.00 in 1987, and \$75 in 1990; father had income of \$9,500 in 1984 and approximately \$15,000 every year thereafter); and Matter of Adoption of Marcum, 436

N.E.2d 102 (Ind. Ct. App. 1982) (dissolution court ordered father to pay \$15.00 per week child support; father had employment as a coal miner averaging \$200.00 per week and later received unemployment benefits; father conceded he had made no support payments in the year preceding the filing of the adoption petition).

Cases in which the Court of Appeals affirmed trial court determinations that parental consent could not be dispensed with due to alleged failure to pay support include McElvain v. Hite, 800 N.E.2d 947 (Ind. Ct. App. 2003), in which the trial court's order granting stepfather's petition for adoption was reversed. Stepfather alleged that birth father's consent to the adoption was not needed due to birth father's failure to provide support to the children. In reversing, the Court noted the following evidence: (1) birth father failed to maintain his support obligations after losing his unemployment benefits; (2) after losing his benefits birth father was unable to pay support and had to move in with family members; (3) once birth father secured part-time employment, he had support payments withheld from his salary; and (4) the trial court had determined that birth father was not in contempt for failing to maintain child support when it determined his arrearage. See also In Re Adoption of Augustyniak, 505 N.E.2d 868 (Ind. Ct. App. 1987), reh'g granted at 508 N.E.2d 1307 and Graham v. Starr, 415 N.E.2d 772 (Ind. Ct. App. 1981). In Augustyniak, the trial court denied stepfather's petition to adopt the child and stepfather appealed. Stepfather argued, inter alia, that birth father's consent to adoption was not required because birth father had failed to make child support payments as required by the dissolution decree for a period of at least one year. The birth father failed to pay court ordered child support of \$20.00 per week despite an average income of \$9,000.00 per year, but the Court held that an inability to pay support cannot be shown by proof of income standing alone. The totality of circumstances, including whether income is steady or sporadic, and the parent's reasonable expenses must also be considered. "There may be a level of income so high that, standing alone, it would be sufficient to show the ability to make child support payments." Id. at 1308. In Graham, the trial court denied stepfather's petition for adoption, in which he alleged that birth father's consent was not needed due in part to failure to pay child support. The Court affirmed, finding that birth father's medical expenses for his wife and later surgery for himself which prevented him from working for eleven months, along with birth father's resumed payment of support when he returned to work were "mitigating circumstances" in that birth father was unable to provide

support. *Id.* at 774. See also Matter of Adoption of D.H. III., 439 N.E.2d 1376 (Ind. Ct. App. 1982) (birth father made only one \$20.00 child support payment in a twenty-two month period, but Court reversed trial court's adoption judgment because adoption petitioner did not prove that father was able to pay support and knowingly failed to do so.)

#### 5. Sexual Malfeasance by Putative Father

IC 31-19-9-8 states that the biological father's consent to adoption is not required for a child born out of wedlock who was conceived as a result of rape for which the father was convicted under IC 35-42-4-1, child molesting, sexual misconduct with a minor, or incest.

In In Re Adoption of J.D.B., 867 N.E.2d 252 (Ind. Ct. App. 2007), the Court held that the probate court's finding that birth father's consent to adoption was not required, was not contrary to law. The Court affirmed the trial court's judgment granting the foster parent's adoption. The foster parent had filed a petition for adoption alleging that birth father's consent was not required because the child was born out of wedlock and was conceived as a result of birth father's sexual misconduct with a minor. Citing IC 31-19-10-1.2 (b)(2) and IC 31-19-10-0.5, the Court noted that, contrary to birth father's contention, the burden of proof regarding whether the child was conceived as a result of sexual misconduct with a minor was birth father's burden rather than the adoptive parent's burden, and the absence of a criminal prosecution was insufficient to satisfy that burden of proof. The birth father also contended that he did not commit sexual misconduct with a minor because he did not knowingly or intentionally perform or submit to sexual intercourse with the 14-year old mother, because the mother had sexual intercourse with him while he was asleep. The mother's testimony at the consent hearing was consistent with the birth father's contention. The Court held that the fact that a twenty-nine-year old man and a fourteen-year-old girl had sexual intercourse and conceived a child solidly supports an inference that the man intended and/or knew that he was engaging in sexual intercourse. In Mullis v. Kinder, 568 N.E.2d 1087 (Ind. Ct. App. 1991), the twenty-one-year old father met the fifteen-year-old mother in Florida and had sexual intercourse which resulted in conception of a child whom the mother sought to place for adoption in Indiana. Father was not criminally convicted of child molesting and lacked notice of the potential legal implications regarding his consent to the adoption of a child conceived by

sexual intercourse with a fifteen-year-old. The Court of Appeals held that to establish by a preponderance of evidence that father committed child molesting, adoptive parents must show only father's and mother's respective ages and that father had sexual intercourse with mother. See also Pena v. Mattox, 84 F. 3d 894 (7<sup>th</sup> Cir. 1996) (Court opined that society rightly disapproved of the alleged father's act in impregnating a fifteen-year-old girl and the Constitution does not forbid states from penalizing father's illicit and harmful conduct by refusing to grant him parental rights to block the adoption).

#### 6. Parental Unfitness and Child's Best Interest

IC 31-19-9-8(a)(11) was added in 2003 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.

In In Re Adoption of H.N.P.G., 878 N.E.2d 900, 906-08 (Ind. Ct. App. 2008), the Court affirmed the trial court's denial of birth father's motion to contest the adoption of his daughter. The Court affirmed the trial court's order granting of the petition for adoption filed by the child's foster parents. The Court found the trial court's conclusion that birth father's consent to the adoption was not required was not clearly erroneous. Foster parents proved that birth father was unfit to be a parent and that the adoption was in the child's best interests. The Court quoted IC 31-19-9-8(a)(11) regarding when adoption consent is not required from a parent and referenced the trial court's finding that clear and convincing evidence of birth father's unfitness as a parent had been presented. The finding delineated as factors birth father's (1) poor work history; (2) expected difficulty finding employment as a convicted felon; (3) historical inability and difficulty staying off drugs even while incarcerated, and (4) lack of support he has provided to the child, not merely because of his incarceration. In arriving at its holding, the Court noted (1) due to his incarceration, birth father had never met or communicated with the child; (2) birth father's substantial history of

illegal drug use and his drug use since he was a juvenile; (3) birth father's current incarceration due to his convictions for dealing in methamphetamine and possession of precursors with intent to manufacture methamphetamine; (4) birth father's earliest possible release date was in 2010 and he might not be released until 2017, at which time the child will be about thirteen years old; (5) birth father did not challenge the trial court's finding that he has historically been unable to maintain employment, and will likely have a difficult time finding employment and supporting the child; (6) it is well-settled law that those who pursue criminal activity run the risk of being denied the opportunity to develop relationships with their children; (7) after birth father's release from prison, there is no guarantee he will be able to provide for the child or that he will ever obtain custody of her; (8) the child's needs are too important to force her to wait until a determination can be made that birth father will be able to be a fit parent to her; (9) birth father did not challenge the trial court's finding that foster parents' adoption was in the child's best interests; and (10) ample evidence supported the trial court's conclusion that the child's best interests were served by granting foster parents' adoption petition.

In In Re Adoption of T.W., 859 N.E.2d 1215, 1218-19 (Ind. Ct. App. 2006), the Court opined that the adoption petitioners, who were the children's great-uncle and great-aunt, had presented clear and convincing evidence to obviate the necessity of the birth father's consent to the adoption of his two children, ages five and eight. The adoption petitioners, who had been the children's legal guardians for three years at the time of the conclusion of the adoption hearing, alleged two legal reasons why the birth father's consent to adoption was not required: (1) birth father had failed without justifiable cause for at least one year to communicate significantly with the children who had been in the custody of another person (IC 31-19-9-8(a)(2)(B)); and (2) birth father was unfit to be a parent and the children's best interests would be served if the court dispensed with his consent. (IC 31-19-9-8(a)(11)).

The T.W. Court opined that the provisions of IC 31-19-9-8 are disjunctive; as such, either provides independent grounds for dispensing with parental consent. The Court noted the following evidence in support of the trial court's determination that birth father's consent could be dispensed with pursuant to IC 31-19-9-8(a)(11): (1) he was presently unable to care for the children and suggested the adoption petitioners retain custody until he was in a better financial condition; (2) he

had been unable to care for the children due to his drug use and criminal convictions for criminal recklessness and dealing methamphetamine for which he had received sentences totaling twenty-one and one-half years; (3) at the time of the adoption hearing, birth father was on house arrest; (4) birth father did not provide financial support for the children during their guardianship, and historically used his income to purchase methamphetamine; (5) although birth father was apparently free of methamphetamine, as reflected by mandatory drug screening, he had to pay probation fees and could barely take care of himself financially; (6) birth father opined that parental drug use did not harm children as long as drug use did not occur in the same location as the children; (7) there was ample evidence that the adoption petitioners had consistently provided for the children's needs, and the children had thrived in their care.

IC31-19-9-9 and 10 state that the court shall dispense with the consent of a convicted, incarcerated parent after notice and hearing if the parent is convicted of certain crimes against the child's other parent, the child or the child's sibling, and if dispensing with consent is in the child's best interests. The applicable crimes against the other parent for which the statute applies are: murder, causing suicide, voluntary manslaughter or an attempt to commit murder, causing suicide, or voluntary manslaughter. The criminal conviction may occur in Indiana or another state, if the crime is "substantially similar" to one of the listed crimes. The applicable crimes against the child, the child's sibling, half-sibling or stepsibling of the parent's current marriage are: murder, voluntary manslaughter, causing suicide, rape, criminal deviate conduct, child molesting as a Class A or B felony, incest as a Class B felony, neglect of a dependent as a Class B felony, battery as a Class A, B, or C felony, or attempt of any of the above crimes. For both statutes the parent whose consent is dispensed with must be incarcerated at the time of the filing of the adoption petition.

#### 7. Dispensing with Guardian's Consent

The court may order that the guardian's or custodian's consent to adoption is not required if the court finds that the reasons for withholding consent are not in the child's best interests. IC 31-19-9-8(a)(10). The guardian or custodian includes the Department of Child Services (DCS) which has wardship of the child due to a CHINS proceeding. In In Re Adoption of H.L.W., Jr., 931

N.E.2d 400 (Ind. Ct. App. 2010), the Court reversed the trial court's granting of an adoption petition filed by the child's foster parents. DCS wished to reunite the child with his birth father, who had established paternity and was substantially compliant with the services recommended by DCS, including unsupervised visitation with the child. The Court concluded that DCS met its burden of demonstrating by clear and convincing evidence that its withholding of consent was in the child's best interests. In In Re Adoption of S.A., 918 N.E.2d 736 (Ind. Ct. App. 2009), the Court affirmed the trial court's denial of the foster parents' petition to adopt their foster child. The Court affirmed the trial court's determination that adoption of the child by the adoptive petitioner, with whom the child's biological siblings lived, was in the child's best interest. The Department of Child Services (DCS) had wardship of the child pursuant to a CHINS proceeding. DCS had consented to the child's adoption by the foster parents, but had not consented to adoptive petitioner's adoption of the child. The Court was not persuaded by the foster parents' contention that the adoption decree must be set aside because DCS had not consented to the adoptive petitioner's adoption of the child. The Court stated that the trial court is solely responsible for making the determination of the child's best interest in an adoption, and DCS is not granted the unbridled discretion to refuse consent. The Court further noted: (1) DCS initially consented to adoptive petitioner's adoption, but later withdrew its consent and consented to foster parents' adoption; (2) the DCS case manager could not explain why DCS had withdrawn its consent to adoptive petitioner's adoption; (3) the DCS case manager could not identify any information that would warrant the DCS's determination that adoptive petitioner's home might have been inappropriate for the child.

In In Re Adoption of L.M.R., 884 N.E.2d 931 (Ind. Ct. App. 2008), the Court affirmed the trial court's order granting the adoption petition filed by the child's former foster mother, despite DCS's withholding of consent to her adoption of the child. The Court also affirmed the trial court's denial of the adoption petition filed by the child's paternal grandparents. DCS had removed the child from her foster mother, placed the child with her siblings at the paternal grandparents' home, and later consented to the paternal grandparents' adoption. The Court held that the trial court properly determined that DCS had failed to act in the child's best interest by refusing to consent to the former foster mother's adoption. The child had been born testing positive for drugs, exhibited withdrawal symptoms, and suffered from allergies, asthma, eye

infections, and Sensory Integration Disorder (SID). The Court observed that the former foster mother, who took custody of the child two days after birth, (1) studied information about caring for drug babies; (2) consulted medical experts to make the child's withdrawal as easy as possible; (3) took leave from her employment when the child exhibited withdrawal signs; (4) contacted First Steps for evaluation and advice when the child started hitting herself; (5) informed herself on the child's SID diagnosis; (6) remained by the child's bedside day and night when the child was hospitalized with Respiratory Syncytial Virus (RSV) and pneumonia; and (7) basically altered her life to focus on the child's care and needs. The Court contrasted the paternal grandparents' conduct including their (1) refusing to accept that the child had special needs; (2) being unaware of the child's SID diagnosis; (3) refusing to further involve First Steps in the child's development; and (4) limiting their contact with the child while she was in the hospital with RSV to one hour of paternal grandmother's time. In response to paternal grandparents' second argument, that their adoption of the child was the way to keep the three siblings together, the Court pointed to former foster mother's actions in the past, and assurances to keep the child in close contact in the future with her two brothers who were adopted by paternal grandparents. The Court also stated that it was not convinced as to paternal grandparents' third contention, that DCS's decision to withhold consent to the former foster mother's adoption request was based on the agency's knowledge and experience. The Court noted (1) for the first eighteen months of the child's life, DCS consistently recommended temporary placement of the child with former foster mother and made no recommendation regarding permanent placement; (2) then, without any change in circumstances of the child's care and without any advance notice to former foster mother, DCS changed its position and advocated for the removal of the child from her care and for permanent placement with paternal grandparents; and, (3) although the family case manager testified that he complied with DCS policy to review the child's medical records, he admitted he did not contact First Steps or discuss the child's SID diagnosis.

In In Re Adoption of Z.D., 878 N.E.2d 495, 498-99 (Ind. Ct. App. 2007), former paternal grandmother appealed Benton Circuit Court's dismissal of her adoption petition because adoption of the child by the foster parents had been finalized in Tippecanoe County. The Court noted, among other things, that (1) the Tippecanoe County Department of Family and Children (TCDFC) had refused to consent to grandmother's adoption of the child; (2) IC 31-19-9-1 required

TCDFC's written consent in that it had lawful custody of the child; (3) in accordance with IC 31-19-9-8(a)(10), TCDFC's refusal to consent required the trial court to determine whether TCDFC was acting in the best interests of the child in doing so; (4) from the record it appeared that TCDFC was acting in the child's best interests by refusing consent in that grandmother had indicated that she would allow contact between the child and the biological father, a child molester whose parental rights to the child had been terminated.

In In Re Infant Girl W., 845 N.E.2d 229, 244 (Ind. Ct. App. 2006), the Court considered whether Marion Probate Court properly granted the unmarried same sex couple's petition for adoption of their foster child despite Morgan County OFC's refusal to consent to the adoption. The Court noted that, because OFC was the child's guardian, its consent would normally have been required. Because the Probate Court concluded that the reasons for OFC's refusal to consent were not in the child's best interests, then OFC's consent was not necessary.

Attorneys who are representing clients who are petitioning to adopt adjudicated Children in Need of Services should be aware that the juvenile code and adoption case law differ on the preference for children to be placed with relatives. The juvenile code, IC 31-34-4-2(a), requires DCS to consider placement with a suitable and willing blood or adoptive relative, a de facto custodian, or stepparent before considering any other out-of-home placement. Adoption case law, on the other hand, does not give preferential treatment to blood relatives who seek to adopt a child. See In Re Adoption of B.C.S., 793 N.E.2d 1054 (Ind. Ct. App. 2003); In Re Adoption of I.K.E.W., 724 N.E.2d 245 (Ind. Ct. App. 2000); In Re Adoption of Childers, 441 N.E.2d 976 (Ind. Ct. App. 1982).

#### **D. Custody Determination When Adoption Dismissed**

IC 31-19-11-5 provides that if the court dismisses the petition for adoption, the court shall determine who should have custody of the child. The court is permitted by IC 31-19-11-5(b) to implement a gradual change of custody regardless of a person's immediate right to custody. The gradual change of custody to ease the child's transition may be ordered unless the gradual change would endanger the child's physical health or significantly impair the child's emotional

development. The court may do the following: (1) implement a change of custody by gradually increasing the child's visitation with each person who is entitled to custody; (2) order counseling for the child and persons involved in the custody change so that a plan for gradual change of custody may be implemented; (3) consult with the counselor to determine an order for the gradual change of custody that meets the child's best interests. IC 31-19-2-14(a) requires consolidation of the pending adoption and paternity court proceedings regarding the same child in the adoption court. IC 31-19-2-14(b) states that, if the adoption petition is dismissed, the court hearing the consolidated adoption and paternity proceeding shall determine who has custody of the child under IC 31-19-11-5. IC 31-19-2-14(c) states that, following a dismissal of the adoption petition under subsection (b), the court may: (1) retain jurisdiction over the paternity proceeding; or (2) return the paternity proceeding to the court in which it was originally filed. If the paternity proceeding is returned to the court in which it was originally filed, the court assumes jurisdiction over the child subject to any provisions of the consolidated court's order under IC 31-19-11-5.

For an example of how the adoption court determined custody when the adoption was dismissed, see Blasius v. Wilhoff, 863 N.E.2d 1223 (Ind. Ct. App. 2007), in which the father established paternity and the adoptive parents' petition to adopt the child was denied. The trial court awarded the adoptive parents custody of the child, age three, who had resided with the adoptive parents since birth. The Court affirmed the trial court's order giving custody to the adoptive parents, noting the trial court's findings that the father was an unfit parent due to his drug usage, criminal history, lack of positive support system and lack of financial stability and the significant emotional bond between the child and the adoptive parents. The Court concluded that the trial court's findings were not clearly erroneous and observed that the trial court applied the standard of review set out for third party custodianships set out in In Re Guardianship of B.H., 770 N.E.2d 283, 287 (Ind. 2000). The Court found that the trial court was clearly convinced that placement with the adoptive parents represented a substantial and significant advantage to the child. See also In Re Adoption of Dzurovcak, 600 N.E.2d 143 (Ind. Ct. App. 1992), where the Court clarified the adoption court's duty to determine custody if the adoption is dismissed. Despite the putative father's establishment of paternity in another court after the adoption petition was filed, the Court found that, since the adoption court assumed jurisdiction over the custody determination first, the adoption court could not hold its jurisdiction temporarily and then unilaterally offer permanent

jurisdiction to the paternity court. *Id.* at 147. The Court found that the adoption court further erred by not conducting a full evidentiary hearing on the child's best interests prior to making a custody determination and by not allowing the adoptive petitioners to be parties to the permanent custody hearing. *Id.* at 148.

#### **E. Time Period for Challenging Adoption Decree**

IC 31-19-14-1 states that an appeal of an adoption decree shall be decided on an expedited basis. IC 31-19-14-2 states that the time limits for a person whose parental rights are terminated by an adoption decree to challenge the decree are not more than the later of: (1) six months after the entry of an adoption decree; or (2) one year after the adoptive parents obtain custody of the child. IC 31-19-14-2 provides that the court shall sustain the adoption decree unless the person challenging the decree establishes, by clear and convincing evidence, that modifying or setting aside the adoption decree is in the child's best interests. Some persons may not challenge an adoption decree. These include the following: (1) a person who has consented to an adoption may not withdraw consent after the entry of the decree (IC 31-19-14-3(a)); (2) a person who is served with notice of an adoption may not contest the adoption or establish paternity more than thirty days after the date of service of notice of the adoption (IC 31-19-14-3(b)); (3) a person who receives actual [pre-birth] notice of an adoption under IC 31-19-3 may not contest the adoption or establish paternity more than thirty days after the date of receiving actual notice of the adoption (IC 31-19-14-3(c)). IC 31-19-14-3(d) states that a person who is prohibited from taking action under IC 31-19-14-3(a), (b), or (c) may not challenge an adoption decree. IC 31-19-4-4 states that after the expiration of the time period described in IC 31-19-14-2 [six months after entry of decree or one year after adoptive parents obtain custody of child], a person whose parental rights are terminated by the entry of an adoption decree may not challenge the adoption decree even if (1) notice was not given to the putative father; or (2) the adoption proceedings were in any other manner defective.

In In Re Adoption of D.C., 887 N.E.2d 950 (Ind. Ct. App. 2008), the Court reversed and remanded the trial court's denial of the birth mother's motion to set aside the decree granting stepmother's adoption. The trial court had denied birth mother's motion after determining that the adoption

proceedings had been defective for lack of personal notice but that, pursuant to the terms of IC 31-19-14-4, the time period to challenge the adoption due to any such defect had expired. The facts of the case indicate that notice of the adoption petition was sent to birth mother's former address in Louisville but delivery of this notice was unsuccessful. Stepmother's attorney published a three-week notice in the Louisville Voice-Tribune Newspaper. After the adoption petition was filed, the child's father and stepmother continued to receive support payments for the child from the birth mother via the Hopkinsville Friend of the Court, including payment made three days before the final adoption hearing. Father and stepmother made no attempt to locate birth mother's current address through the Friend of the Court. Father also knew that birth mother's grandmother lived in El Paso, Texas. The child was adopted by stepmother on July 5, 2005. Birth mother continued to make child support payments through 2007. Birth mother discovered that the child had been adopted by stepmother in January of 2007 and filed her motion for relief from judgment on March 13, 2007.

The Court concluded that IC 31-19-14-4, which specifies the permissible time period for challenging adoption decrees, created an unconstitutional due process violation when it was applied to bar birth mother's challenge to the adoption proceedings in this case. The Court quoted IC 31-19-14-2, which specifies the permissible time period for challenging an adoption decree, and IC 31-19-14-4, which provides that after the expiration of the time set forth in section 2, "a person whose parental rights are terminated by the entry of an adoption decree may not challenge the adoption decree even if: (1) notice of the adoption was not given to the child's putative father; or (2) the adoption proceedings were in any other manner defective;" and noted that, here, the parties agreed that birth mother's challenge to the adoption decree did not fall within the time specified in IC 31-19-14-4. The Court opined that (1) birth mother had the fundamental right to make decisions regarding the care, custody, and control of the child, and this right fell within the protections of the Due Process Clause of the Fourteenth Amendment; and (2) parental rights are sufficiently vital that, under the appropriate circumstances, they merit constitutional protection that will supersede state law.

In Mathews v. Hansen, 797 N.E.2d 1168 (Ind. Ct. App. 2003), a stepparent adoption, putative father did not register with the putative father registry and did not receive notice of the adoption

proceeding. The putative father had not seen, supported, or communicated with the five-year-old child for over one year. The trial court granted the adoption and putative father filed a motion to vacate the adoption eighteen months after the adoption decree had been entered. The Court concluded that the trial court properly granted stepfather's motion to dismiss putative father's challenge to the adoption. The Court discussed IC 31-19-4-2 and IC 31-19-14-4. The Court opined that, inasmuch as the statutes operate as statutes of limitation, such statutes are favored because they provide security against stale claims and promote the welfare and peace of society. The Court held that because putative father failed to register in a timely fashion, he could not now challenge the adoption decree. The Court noted that putative father had failed to file his motion to vacate the adoption within six months after the adoption decree had been entered or one year after the adoptive parents obtained custody of the child. The Court also held that IC 31-19-14-4 operated to preclude putative father's argument because his motion to vacate the adoption was filed over eighteen months after the entry of the adoption decree and beyond the one year requirement of stepfather's custody of the child. The Court noted that IC 31-19-14-4 specifically precluded putative father from contesting the adoption decree, even if notice had not been given to him. The Court stated that to permit putative father to vacate the adoption decree in these circumstances would contravene the intended purpose and specific language of the applicable statute of limitations.