

# Children's Law Center of Indiana



## Adoption

7/28/10

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 a petition to adopt the child which had been filed by the child's Foster Parents. The child was born on March 21, 2006, and tested positive for cocaine and benzodiazepines. Mother admitted to using crack cocaine during pregnancy and left the hospital without the child and against medical advice. Mother returned a few days later with Father and signed paperwork listing Father as the putative father. DCS detained the child from the hospital on March 24, 2006, and placed him in foster care. The Department of Child Services (DCS) filed a Child in Need of Services (CHINS) petition, and the trial court granted the petition. The trial court ordered that the child was a ward of DCS and was to remain in foster care. Mother was uncooperative with DCS, and her parental rights were terminated by the court in September 2006. Despite the termination of Mother's parental rights, the goal of the CHINS action was reunification with Father. The trial court filed a dispositional order that required Father to: (1) visit with the child; (2) submit to random drug screens; (3) complete a parenting assessment and a psychological evaluation and follow all recommendations; (4) maintain stable employment; (5) remain drug free; (6) maintain consistent contact with DCS; (7) establish paternity. Father established paternity and was ordered to pay \$41 per week child support in July 2006. The child support order was transferred to the CHINS case and ordered to be paid to DCS for the cost of placement. Father had a construction business, which failed in 2006. He also owned some rental properties, but those were foreclosed. Father tried to do handyman work, but he had little business in 2007. Father made no child support payments to DCS between November 17, 2006, and November 30, 2007. Father initially resisted complying with DCS requirements, and he had one positive and three negative but dilute drug screens. Father eventually began complying with DCS requirements and found appropriate housing, completed drug and alcohol treatment, participated in parenting education, complied with visitations, completed a psychological and parenting assessment, and maintained contact with his DCS family case manager. His visitations with the child increased from supervised to unsupervised and, by early 2009, Father had unsupervised visitation with the child each week from Saturday through Tuesday. DCS recommended reunification of the child with Father, and the trial court approved that plan in both March 2008 and March 2009. In April 2009, Foster Parents filed a petition in the same trial court to adopt the child. Father and DCS filed motions to contest the adoption. In August 2009, the trial court held hearings on the Foster Parents' petition to adopt. At the hearings, DCS noted that Father and the child are bonded and that DCS's plan was reunification of the child with Father. The DCS family case manager had no concerns for "the

child's safety and wellbeing" in Father's care. In November 2009, the trial court issued findings of fact and conclusions thereon, which, inter alia: (1) denied DCS's and Father's motions to contest the adoption; (2) found that Father's consent is not required because Father paid a total of \$150 in child support in 2007 and 2008 and did not pay any support between November 17, 2006, and November 30, 2007, despite employment as a contractor and owning rental properties; (3) found that DCS offered no evidence to show that Foster Parents were not fit; (4) found that the petition for adoption may be granted over the refusal of DCS to consent if it is shown that DCS is not acting in the child's best interest in withholding consent; (5) found that the only evidence presented by DCS was that Father had (reluctantly) complied with most of the CHINS dispositional decree and because the child would be with family; (6) found that mere biological relationship is not sufficient to support the burden of proof which DCS must meet; (7) found that DCS's consent to the adoption is not required; (8) granted Foster Parents' adoption. DCS filed a motion to stay the adoption proceedings pending appeal, and the trial court granted the motion. DCS and Father appealed, raising the following issues: (1) DCS argued that the trial court had no jurisdiction to grant the adoption petition after the trial court also approved a CHINS permanency plan for reunification of the child with Father; (2) DCS argued that the trial court erred when it found that DCS was not acting in the child's best interest when DCS withheld consent to Foster Parents' adoption; (3) DCS and Father argued that the trial court erred when it found that Father's consent to adoption was unnecessary because he failed to pay support for the child to DCS for one year.

**The Court held that the adoption consent statutes (IC 31-19-9) enabled the trial court to consider the adoption proceeding despite the pending CHINS action.** *Id.* at 407-08. The Court stated that DCS's jurisdiction arguments are more accurately described as a "legal error" rather than a jurisdictional error. *Id.* at 404. The Court cited K.S. v. State, 849 N.E.2d 538, 540 (Ind. 2006), in which the Indiana Supreme Court disapproved of the phrase "jurisdiction over a particular case," holding that the phrase confuses "actual jurisdiction with legal error." H.L.W., Jr. at 404. The Court said that IC 31-19-1-2 provides that probate courts have exclusive jurisdiction in all adoption cases. Consequently, the trial court here had subject matter jurisdiction over both the adoption and CHINS actions. *Id.* The Court then discussed five cases in which Indiana's higher courts have addressed the "jurisdiction" conflict between juvenile courts considering CHINS actions and probate courts considering adoption actions. In In Re T.B., 622 N.E.2d 921, 924 (Ind. 1993), the Court opined that a court with probate jurisdiction may adjudicate an adoption matter simultaneously with the juvenile court's adjudication of a CHINS proceeding. H.L.W., Jr. at 404. In In Re E.B., 733 N.E.2d 4, 5-6 (Ind. Ct. App. 2000), trans. denied, the Court found that probate court did not have jurisdiction to grant the foster parents' petition for adoption while the CHINS proceeding was directed at reunification and father's parental rights had not been terminated. H.L.W., Jr. at 405. In In Re Infant Girl W., 845 N.E.2d 229, 240 (Ind. Ct. App. 2006), trans. denied, the Court concluded that a simultaneous CHINS and/or TPR proceeding does not divest the probate court of its exclusive jurisdiction over adoption; the consent statute "disentangles this ostensible jurisdictional knot." H.L.W., Jr. at 405. In In Re J.D.B., 867 N.E.2d 252, 258 (Ind. Ct. App. 2007), trans. denied, the Court concluded that the probate court had jurisdiction to rule on the foster parent's adoption petition

to adopt an adjudicated CHINS who had been born out of wedlock and conceived as a result of sexual misconduct with a minor. H.L.W., Jr. at 406. In In Re H.N.P.G., 878 N.E.2d 900, 904-905 (Ind. Ct. App. 2008), trans. denied, cert. denied the Court concluded that where DCS does not pursue reunification, the holding in E.B. does not control, the goals of the CHINS and adoption proceedings were consistent, and probate court had jurisdiction to consider the adoption petition. H.L.W., Jr. at 407. The Court observed that, in the instant case, the goal of the CHINS action was reunification of the child with Father, while the goal of the adoption proceeding was adoption of the child by Foster Parents; thus the goals of the proceedings were not the same. Id. The Court concluded that the statutory analysis found in Infant Girl W. is more persuasive and compatible with the Indiana Supreme Court's opinion in T.B. H.L.W., Jr. at 407. The Court also concluded that the CHINS plan of reunification is relevant in determining whether DCS's refusal to consent to the adoption was reasonable. Id. at 408.

**The Court found the trial court erred when it determined that DCS's withholding of consent to Foster Parents' adoption was not in the child's best interest.** Id. at 410. DCS was the child's legal custodian, so its consent to the adoption was required by IC 31-19-9-1. Id. DCS had the burden of demonstrating by clear and convincing evidence that its withholding of consent was in the child's best interests. Id. at 408. The trial court found that DCS was not acting in the child's best interest by withholding consent because DCS had not proved that Foster Parents were not fit, and the only evidence presented by DCS was that Father had (reluctantly) complied [with] most of the requirements of the CHINS dispositional decree and the child would be with family. Id. The trial court had also found that "[M]ere biological relationship is not sufficient to support the burden of proof which the DCS must meet." Id. The Court agreed with DCS that the trial court had applied the wrong standard by requiring DCS to show that Foster Parents were "not fit." Id. at 408-09. The Court's review of the record revealed that DCS and Father presented significantly more evidence than just a biological relationship. Id. at 409. The Court noted the following evidence in support of its conclusion that DCS met its burden of demonstrating by clear and convincing evidence that its withholding of consent to the adoption was in the child's best interests: (1) Father found appropriate housing, completed drug and alcohol treatment, participated in parenting education, complied with visitations, completed a psychological and parenting assessment, and maintained contact with his DCS family case manager; (2) Father's visitations with the child increased from supervised to unsupervised and by early 2009, Father had unsupervised visitation with the child each week from Saturday through Thursday; (3) the trial court approved DCS's permanency plan of reunification in the CHINS case in both March 2008 and March 2009; (4) DCS noted that Father and the child are bonded and the child was often upset when he had to leave Father's residence; (5) the DCS family case manager testified that Father had a long history of supervised and unsupervised visitation leading up to the current overnight visitation, and the case manager had no concerns for "the child's safety and wellbeing" in Father's care. Id. at 410.

Because the Court reversed based upon DCS's lack of consent to the adoption, the Court did not need to determine whether the trial court erred when it found that Father's consent to the adoption was unnecessary. Id.