

# Children's Law Center of Indiana



## Adoption

2/24/11

In **In Re Adoption of M.B.**, 944 N.E.2d 73 (Ind. Ct. App. 2011), the Court affirmed the trial court's order denying and dismissing Stepfather's petition to adopt the child. The child was born to eighteen-year-old Mother on April 22, 2007. Father was present at the birth and executed a paternity affidavit on the day after the child's birth. Mother and Father were engaged at the time of the child's birth. After the child's birth, Mother and the child resided with Mother's parents. Father did not contribute to the cost of Mother's pregnancy or the child's birth. Mother's and Father's engagement ended approximately two months after the child was born. Mother returned to her waitress job after six weeks of maternity leave. Mother worked the morning shift and Father worked the evening shift as a cook at the same restaurant. To avoid the cost of daycare, Mother left the child with Father at his apartment while Mother was working. Father does not have a driver's license nor does he have a high school education. In August or September 2007, Mother unilaterally decided to take the child to daycare instead of leaving her with Father. Following the change in childcare arrangement, Mother allowed Father to see the child one day per week and Father had the child for one overnight visitation, at Christmas in 2008. Mother married Stepfather in August 2008.

Father has been employed intermittently since the child's birth as a cook, subcontractor, and self-employed construction worker in 2007 and 2008. Father's employment as a cook at the restaurant where Mother was working was terminated in October 2007. Father received unemployment benefits for three or four months. Father also left two subsequent jobs at restaurants due to the limited hours and low wage. Father asked Mother in 2008 for the child's Social Security number so that he could arrange to pay child support, but Mother refused Father's offer. Father exercised parenting time one work day per week, missing a few visitations, until July 2, 2009. On that date, Mother and Father argued about the time Father was supposed to return the child to Mother. After that argument, Mother refused Father's requests to see the child.

On September 2, 2009, Father filed a petition to establish paternity. On October 15, 2009, Stepfather filed his petition to adopt the child and motion to proceed with the adoption without Father's consent pursuant to IC 31-19-9-8. IC 31-19-9-8(2)(B) provides that consent to adoption is not required from the 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 or judicial decree. The trial court held hearings on Stepfather's petition for adoption on May 18 and July

1, 2010. On July 6, 2010, the court entered an order denying and dismissing Stepfather's petition. The order included the following: (1) the evidence is that Father provided no financial support; (2) Father did provide substantial parenting time that avoided the need for daycare during much of the first five months of the child's life; (3) Mother told Father that they didn't need his support money; (4) there has never been a Court order for support in place; (5) during much of the time Father was either out of work or working for minimum or low wage; (6) Father was regularly exercising parenting time at his request for over two years and three months from [the child's] birth to two months prior to his filing a paternity action; (7) Father's financial ability to provide support was not evident; (8) under these circumstances the Court finds that Stepfather has not met his burden of proving by clear, cogent and indubitable evidence that he may proceed with the adoption without Father's consent. Stepfather appealed the trial court's order denying and dismissing his petition to adopt the child.

**The Court stated that the burden of proof for an adoption without consent, under any of the subsections in IC 31-19-9-8, is the clear and convincing standard.** *Id.* at 77. Father claimed that Stepfather had the burden to prove the elements of IC 31-19-9-8(a)(2) by clear, cogent, and indubitable evidence. The Court observed that in *M.A.S. v. Murray*, 815 N.E.2d 216, 220 (Ind. Ct. App. 2004), another panel of the Court of Appeals opined that the burden of proof for an adoption without consent is the clear and convincing standard. *M.B.* at 77. The Court agreed with the *M.A.S.* opinion on the burden of proof for an adoption without consent. *M.B.* at 77.

**The Court found that Stepfather has not shown that Father failed to provide support within the year that preceded the filing of the adoption petition; therefore, Stepfather has not met his burden of showing that Father's consent is not required.** *Id.* at 78. Stepfather construed the trial court's finding that there was no support order to mean that Father did not have a duty to provide child support. The Court disagreed with Stepfather's construction of the trial court's findings and quoted *Boone v. Boone*, 924 N.E.2d 649, 652 (Ind. Ct. App. 2010), which states, "it is well-settled that parents have a common law duty to support their children." *M.B.* at 77. The Court said that the lack of a court order on support did not relieve Father of that obligation. *M.B.* at 77. The Court noted that the trial court considered that Father had lessened Mother's daycare costs by providing childcare one workday per week. *Id.* Citing *In Re N.W.*, 933 N.E.2d 909, 914 (Ind. Ct. App. 2010), the Court said that a parent's nonmonetary contribution to a child's care may be counted as support. *M.B.* at 77. The Court found that Stepfather has not shown the trial court erred in reaching the conclusion that Father's contribution in lessening daycare costs constituted support of the child. *Id.* The Court was also not persuaded by Stepfather's argument that the trial court should have considered the additional evidence that the nature of Father's employment was of his own choosing and that Father had testified that he was capable of providing support for the child. *Id.* at 78. The Court characterized Stepfather's argument as a mere request to reweigh the evidence, which the Court cannot do. *Id.* The Court concluded that Father provided support by providing childcare during his parenting time one workday per week and that Father cared for the child through July 2, 2009, which was within one year preceding the filing of the Petition for Adoption. *Id.*