

# Children's Law Center of Indiana



## Adoption

7/10/12

In ***In Re Adoption of N.W.R.***, 971 N.E.2d 110 (Ind. Ct. App. 2012), the Court reversed and remanded with instructions the trial court's order granting Foster Parents' adoption petition. The Court held that when, as here, the agency acting in loco parentis moves to withdraw consent before an adoption decree has been entered because it has failed in its statutory obligation to conduct a complete placement investigation, the presumption that its initial consent was proper is nullified. The Court held that on these facts, the trial court erred when it refused to grant DCS' motion to withdraw its consent to Foster Parents' adoption petition; consequently, the adoption decree was entered without the consent required by statute, and was thus invalid.

The child was born in November 2009. When he was seventeen days old, he was placed in foster care with Foster Parents, and a CHINS petition was filed. The child was adjudicated a CHINS in December 2009. The child's biological paternal aunt ("Aunt") learned that the child had been removed from his parents, and in December 2009, Aunt asked DCS to place the child with her in East Chicago. The child's three older siblings had already been placed with Aunt, and during the pendency of this case, Aunt adopted the three siblings. DCS did not place the child with Aunt, and informed Aunt that the child's permanency plan was reunification. Aunt persisted in contacting DCS, and DCS allowed Aunt and the child's siblings to visit the child starting in May 2010. The visitations increased to weekend visitations, and by the time of the hearing in December 2010, Aunt had visited with the child for at least 200 hours. The parents' parental rights were terminated by September 2010, and Foster Parents filed a petition to adopt the child. DCS executed a consent to the adoption by Foster Parents, but thirty days later, DCS filed a motion to intervene in the adoption proceedings and a motion to withdraw its consent. On December 6, 2010, the trial court allowed DCS' motion to intervene and held a hearing on DCS' motion to withdraw consent; on December 9, 2010, Aunt filed a petition to adopt the child. On December 9, 2010, the trial court consolidated the competing adoption petitions and heard additional evidence on DCS' motion to withdraw consent. On December 22, 2010, the court issued an order denying DCS' motion to withdraw consent. In July 2011, the trial court held a final hearing on the consolidated adoption petitions and issued an order in August 2011 granting Foster Parents' petition to adopt the child. Aunt appealed, arguing that the trial court abused its discretion when it denied DCS' motion to withdraw consent, and that the trial court abused its discretion when it granted Foster Parents' petition to adopt the child.

**The Court held that the trial court should have granted DCS' motion to withdraw its consent to Foster Parents' adoption petition because DCS failed to perform its statutory**

**duty to investigate placement alternatives, and thus, DCS had not given valid consent to Foster Parents' adoption petition.** *Id.* at 116. The child became a ward of DCS when the child was determined to be a CHINS. The child's status as a ward of DCS meant that DCS had a statutory duty to make recommendations to the trial court about what placement and services would be in the child's best interests. *Id.* at 113. A trial court deciding an adoption petition must find that "proper consent, if consent is necessary to the adoption has been given." *Id.*; see also IC 31-19-11-1(a)(7). The consent required is set out in relevant part at IC 31-19-9-1(a)(3): "...except as otherwise provided...a petition to adopt a child who is less than eighteen years of age may be granted only if written consent to adoption has been executed by...each person, agency, or county office of family and children having lawful custody of the child whose adoption is being sought." *Id.* at 113-14; see also IC 31-19-9-1(a)(3). In the instant case, DCS executed a written consent to the adoption by Foster Parents, but later filed a motion to intervene and withdraw its consent. *Id.* at 114. The county director of the DCS office testified in part that that DCS sought to withdraw its consent because DCS had received information that there may be the option of a relative who had the child's siblings who was more interested than the director had understood her to be when he signed the consent for Foster Parent's adoption, and that because of this misunderstanding, Aunt had not been fully investigated as a possible placement. *Id.* In noting this evidence, the Court reasoned that DCS did not merely change its mind, but rather, confessed that it had failed to do its statutory duty to investigate alternative placements, and in effect, repudiated its consent. *Id.* at 116. The Court opined that Aunt met her burden to show prima facie error on this issue. *Id.* The Court noted that the trial court's ruling against the DCS' motion was not harmless and substantially affected the rights of the parties; consequently, the trial court erred when, on these facts, the trial court refused to grant DCS' motion to withdraw its consent to Foster Parents' adoption petition. *Id.*

**The Court further concluded that DCS' lack of proper consent to Foster Parents' adoption petition satisfied the clear and convincing evidence test to show that the withdrawal of consent was in the child's best interests.** *Id.* at 117. Once consent is given, it can only be withdrawn by filing a motion in court. *Id.* at 114. The party seeking to withdraw consent must prove by clear and convincing evidence that withdrawal is in the best interests of the child. *Id.* The county director of the DCS office testified that: (1) DCS was seeking to withdraw its consent in order to fully explore the best interests of the child; (2) that DCS had no reason to think that adoption by Foster Parents was not in the child's best interests; and (3) and that DCS was not committing to the position that adoption by Aunt was in the best interests of the child. *Id.* The Court noted that a permanency plan is not fixed and unchangeable, as the legislature has provided the ability for these plans to be created and to be modified. *Id.* at 115. Indiana Code requires that a child's permanency plan be re-evaluated to see if it needs to be changed or modified (IC 31-34-21-7(a), (b)(6)). *Id.* The legislature also provided for withdrawal of consent to adoption if it is in the best interests of a child. *Id.*; see also IC 31-19-10-3. The most important interest in adoption cases is the best interests of the child; DCS here executed a consent without having fully investigated an adoptive placement who consistently expressed an interest in having the child placed with her, and who has adopted the child's siblings. *Id.* at 115. Because DCS did not perform its statutory duty with regards to the best interests of the child and could not give proper consent, the Court concluded that the clear and convincing evidence test with regards to withdrawal of consent being in the best interests of the child was satisfied. *Id.* at 116. "While [Aunt] only needed to show prima facie error in this case, the evidence from DCS

clearly and convincingly shows that the withdrawal of DCS' consent was in the best interests of the child in order to allow DCS to investigate [Aunt] as an adoptive placement and, thereby better inform the court in its determination of the best interests of the child." Id. at 117.

**The Court also held that the adoption decree was invalid, because it was issued without properly adhering to statute.** Id. at 117. The Court noted that since there was nothing in the record showing that consent of the legal custodian of the child, in this case, DCS, was not required, consent by the legal custodian was necessary. Id. Since the Court already held that DCS' consent was invalid, the adoption decree was entered in contravention to statute. Id. This rendered the adoption decree invalid. Id.

**The Court reversed and remanded the matter, with instructions for DCS to complete its investigation and for the trial court to reconsider the evidence.** Id. at 118. The Court issued detailed instructions on remand; these instructions were as follows: (1) DCS shall complete its investigation of Aunt as a potential adoptive placement; (2) DCS shall then file its report and recommendation regarding placement with Aunt; (3) DCS shall file its consent to adoption by either Aunt, Foster Parents, or both; (4) the trial court must reconsider evidence from the July 2011 hearing along with DCS' new report on Aunt and any newly executed consent(s); (5) the trial court shall review the evidence de novo to determine which adoptive placement is in the best interests of the child; (6) the trial court must give due consideration to the evidence showing that these siblings should be placed together; (7) the trial court is not permitted to consider the passage of time or maintenance of the status quo dispositive, as that would vitiate the appeal; and (8) the trial court must enter findings of fact to support its decision. Id.