



## **Adoption**

3/4/21

In **In re Adoption of W.K. IV and I.K.**, 163 N.E. 3d 370 (Ind. Ct. App. 2021), the Court held that the trial court erred in finding Father is unfit, and therefore, consent to Stepfather's adoption of the Children is required.

Mother and Father married in 2008 and had two children: one in 2008 and the other in 2010. They lived in various locations during their marriage, as both were active-duty military. Mother filed for divorce in 2013 and the divorce was finalized in 2014. Father settled in Texas while Mother settled in Indiana with the two children after meeting Stepfather. Father was awarded parenting time every summer and for school breaks as determined beginning in summer 2014. No child support was ordered as part of the divorce decree, but Father informally paid support until it was formally ordered in late 2016. Mother married Stepfather in 2016 and they had a child in February 2019. One month later, Mother died from cancer. Stepfather filed a petition to adopt the Children four days after Mother's passing. Stepfather alleged Father's consent to the adoption was not required under IC § 31-19-9-8. Stepfather was awarded temporary custody of the children through the end of the school year; then temporary custody would transfer to Father in Texas until further court order. The court later ordered Father to return the children to Indiana before the start of the new school year in August 2019, but Father failed to return the children. Father was arrested in September 2019 in Texas at which time Stepfather transported the children from Texas back to Indiana. In December 2019, the trial court held a hearing on the issue of whether Father's consent was required for Stepfather's adoption of the children. In July 2020 the trial court issued its final order finding: (1) Father failed without justifiable cause to communicate significantly with the children when able to do so beginning in 2013 for a period of not less than 12 months; (2) Father knowingly failed to provide for the care and support of the children when able to do so in 2013 and 2014; and (3) Father is unfit and it is in the best interest of the children that his consent be dispenses with. Father appealed the decision and the appellate court reversed.

**The trial court erred in finding that Father failed to communicate and failed to support the Children under IC § 31-19-9-8. Id. at 374-376.** Indiana Code section 31-19-9-8(a) provides consent is not required from: (2) A parent of a child in the custody of another person if for a period of at least one (1) year the parent: (A) fails without justifiable cause to communicate significantly with the child when able to do so; or (B) knowingly fails to provide for the care and support of the child when able to do so as required by law or judicial decree. Father argued that even assuming he failed to communicate significantly with the Children for at least one year beginning in 2013, he did eventually begin communicating significantly starting in the summer of 2014 when he was awarded parenting time every summer as part of the divorce decree. Id. at 374. Father also had the Children for several months after Mother's death. Id. The Court found "It would defy logic to allow Father's alleged one-year period of no communication in 2013 to overcome his more recent regular exercise of parenting time from 2014 to 2019. Id. Similarly, Father argued that even assuming he failed to provide support in 2013 and 2014 as alleged, he

supported the Children while they were with him during his summer parenting time. Id. at 375. Further, Father started informally paying child support in 2014 and was ordered to pay child support in late 2016. Id. The Court again found that it would defy logic to allow Father's alleged one-year period of not supporting the Children in 2013 and 2014 to overcome his more recent support from 2014 to 2019. Id.

**The trial court also erred in finding Father was unfit under IC § 31-19-9-8. Id.** Indiana Code section 31-19-9-8(a) provides consent is not required from: (1) 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. Father argued that the trial court's finding him unfit was largely based on his interference with custody charge, which were still pending at the time of the trial and were wrapped in the merits of the adoption case. Id. The Court reasoned that while keeping the children in Texas despite the court's order was a stupid thing for Father to do, under the circumstances it does not make him unfit. Id. Further, while the GAL had negative things to say about Father in her report; namely that Father drinks alcohol, shares cigarettes with friends in his garage, and uses corporal punishment, the GAL never relayed her concerns to the appropriate authorities either in Texas or Indiana. Id. The Court considered this lack of urgency to report such concerns "curious" given her claim she has "never been more concerned for any children" as she was for the Children in this case. Id. The Court reasoned that, instead, the record shows Father has been exercising parenting time with the children since 2014 and was awarded temporary custody after Mother's death. Id. at 375-376. While Father is not perfect, none of the concerns relayed by the GAL rise to the level of unfitness required to essentially terminate Father's parental rights. Id. at 376. Therefore, the Court reversed the trial court's determination that Father's consent is not required for Stepfather's adoption of the Children. Id.