

Children's Law Center of Indiana



Adoption

6/10/13

In **In Re Adoption of J.T.A.**, 988 N.E.2d 1250 (Ind. Ct. App. 2013), the Court affirmed the trial court's denial of the petition of Father's Fiancée to adopt Father's child. The child was born in 2000 and initially lived with Mother and was also cared for by his maternal grandmother. Father was awarded custody of the child in 2004, and Mother was ordered to pay child support. It appears that the change in custody was precipitated by Mother's drug use. Fiancée and Father have been together for approximately ten years and have two children together, ages four and five years at the time of the hearing. Fiancée and Father were engaged to be married at the time of the adoption hearing. The record indicates that the child and his two half-siblings live together with Fiancée and Father as a family, that the child refers to Fiancée as "mom," and that Fiancée is the child's primary caregiver. All parties appear to agree that Fiancée and Father provide the child with a loving and appropriate home. Mother never paid any child support until the adoption petition was filed, and never affirmatively requested visitation with the child prior to the adoption petition. Father and Fiancée were aware that Mother would see the child when the child visited his maternal grandmother. In 2008 Mother was arrested on drug charges. She completed a rehabilitation program while on pre-trial release, and then spent seventeen months in prison. She was released to a group home just prior to the adoption hearing.

Fiancée petitioned to adopt the child with Father's signed consent in September 2010. Mother was served with the petition in September 2010, and her attorney entered an appearance in the case less than two weeks later. In December 2010, Mother filed a request for visitation, which the court granted in February 2011, prior to Mother's incarceration. The court also ordered that a home study be prepared. In December 2011, Fiancée petitioned the court for a hearing date on the adoption. The hearing was held in August 2012, and the court denied Fiancée's petition to adopt the child.

The Court opined that the trial court erred in concluding that Father's parental rights would have been terminated if Fiancée's adoption petition had been granted. *Id.* at 1254. The trial court determined that, because Father and Fiancée were not married at the time of the hearing, if the adoption petition were granted, then both Father's parental rights and Mother's parental rights would be severed. The Court observed that the trial court based this determination on a reading of IC 31-19-15-1 and -2. IC 31-19-5-1 provides, in relevant part:

- (a) Except as provided in section 2 of this chapter or IC 31-19-16, if the biological parents of an adopted person are alive, the biological parents are:

- (1) relieved of all legal duties and obligations to the adopted child; and
 - (2) divested of all rights with respect to the child;
- and the parent-child relationship is terminated after the adoption....

Id. at 1253. The Court also reviewed IC 31-19-15-2, which provides, in relevant part, an exception such that “(a) If parent of a child is married to a biological parent of the child, the parent-child relationship of the biological parent is not affected by the adoption.” Id. The Court said that, in determining that Father’s parental rights would be terminated under this statute because he and Fiancée were not married, the trial court overlooked relevant case law, namely In Re Adoption of K.S.P., 804 N.E.2d 1253 (Ind. Ct. App. 2004). J.T.A. at 1253. In K.S.P., the Court analyzed IC 31-19-15-1 and -2 and held that the birth mother’s two children could be adopted by her same-sex partner without divesting the birth mother of her parental rights. K.S.P. at 1260. J.T.A. at 1253. The Court in K.S.P. examined the policy behind the adoption statutes and determined that the overriding concern was the best interest of the child, and that for the divesting statute [IC 31-19-15-1] in particular, the purpose “is to shield the adoptive family from unnecessary instability and uncertainty arising from unwanted intrusions by the child’s biological family.” K.S.P. at 1257. J.T.A. at 1253. The Court quoted the K.S.P. opinion, which stated that, “[i]t is clear that the divesting statute, designed as a shield to protect new adoptive families, was never intended as a sword to prohibit otherwise beneficial intra-family adoptions by second parents.” K.S.P. at 1258. J.T.A. at 1253. The Court said it is clear in the instant case that both Father and Fiancée were acting as parents to the child, that this was in intra-family adoption, and that neither Fiancée nor Father wished to have Father’s parental rights terminated by the adoption. Id. The Court opined that “[i]t is clear from the policy underlying the divestiture statute, and the overarching concern for the best interest of the child, that it would be absurd and contrary to the intent of the legislature to divest Father of his parental rights where he would continue to live in a family unit with the [c]hild and parent the [c]hild.” Id. at 1254.

The Court found that Mother’s consent to the child’s adoption was necessary and could not be dispensed with based on Fiancée’s claim that Mother had abandoned the child. Id. at 1254-55. Fiancée argued, pursuant to IC 31-19-9-8(a)(1), that Mother’s consent to the child’s adoption was not needed because Mother had abandoned the child. The Court, quoting In Re Adoption of Childers, 441 N.E.2d 976 (Ind. Ct. App. 1982), said that abandonment is defined as “any conduct by a parent that evinces an intent or settled purpose to forgo all parental duties and to relinquish all parental claims to the child.” J.T.A. at 1254. The Court noted that the relevant time period is at least six months immediately preceding the date of the filing of the petition for adoption. Id. The Court found that the trial court’s conclusion that Mother had not abandoned the child was supported by the evidence, as the record indicated Mother had regular contact with the child in the six months prior to the filing of the adoption petition, during which Mother was living with the maternal grandmother and Mother saw the child when he visited his grandmother. Id. The Court said that the record did not indicate that Mother otherwise evinced an intent to relinquish all parental claims. Id.

The Court found that Fiancée failed to carry her burden of proof that Mother’s failure to support the child was a reason for the trial court to determine that Mother’s consent to the

child's adoption was not required. *Id.* at 1255. The Court noted that IC 31-19-9-8(a)(2) is an independent ground from abandonment for dispensing with a parent's consent to adoption. *Id.* at 1254. The Court quoted I C 31-19-9-8(a)(2), the failure to support statute, which states that consent is not required from a parent where the parent's child is "in the custody of another person if for a period of at least one (1) year the parent:...(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." *Id.* The Court stated that, while the abandonment ground requires that the abandonment have occurred in the time immediately preceding the filing of the petition for adoption, there is no such requirement for the failure to support ground. *Id.* at 1254-55. The Court clarified that the plain language of the statute indicates that the relevant time period is *any* one year period in which the parent was required to and able to support the child but failed to do so (emphasis in opinion). *Id.* at 1255. The Court noted that the trial court's findings of fact and conclusions of law indicate that the trial court mistakenly believed that the timeline relevant to a determination of a failure to support is the year preceding the filing of the petition for adoption. *Id.* at 1254. The Court said that Mother was ordered to pay support following the determination of custody, but failed to pay any support for six years until after the petition for adoption was filed. *Id.* at 1255. The Court found that the record is silent as to Mother's ability to provide support during those years. *Id.* The Court said that Fiancée needed to prove that Mother was required to support, able to support, and failed to support the child for any one year period. *Id.* The Court observed that the record does not indicate that Mother's ability to pay was ever investigated, much less determined. *Id.*

The Court found that because Mother did not receive proper or complete notice of Fiancée's petition for adoption, Mother's consent to the adoption was not implied by her failure to contest the adoption within thirty days after she was notified of the adoption. *Id.* at 1257. The Court observed that the statute on notice of an adoption seems to have been written under the assumption that a mother would be giving up her child for adoption and that the father would be given notice; thus, the statute is not gender-neutral and on its face does not apply to Mother. *Id.* at 1256. The Court did not believe that it could be intent of the legislature to have numerous and detailed requirements for notice to fathers and putative fathers but few or no notice requirements for mothers. *Id.* The Court opined that all of the forms of notice to fathers have several things in common, regardless of their intended audience. *Id.* The Court said that the notice to Mother should have included at least the following elements: (1) an adoption petition has been filed; (2) where it was filed or who filed it; (3) that the recipient has a right to contest the adoption within thirty days after service of the notice; and (4) that failure to so contest the adoption will result in the recipient's consent being irrevocably implied. *Id.* The Court noted that, while the record showed that Mother was served with notice that, and by whom, a petition for adoption had been filed, and may have also been informed that it was alleged that her consent was not required, there is no indication that Mother was ever notified that she needed to contest the adoption within thirty days of the notification or her consent would be implied. *Id.* at 1257.