

Children's Law Center of Indiana



Paternity

06/26/2009

In **In Re B.W.**, 908 N.E.2d 586 (Ind. 2009), the Court reversed and remanded the trial court's judgment granting the adoption of the child and terminating father's parental rights. In 2006 Father and Mother shared a brief relationship during which they conceived a child. After Mother expressed a desire to place the unborn child for adoption, Father registered with Indiana's Putative Father Registry. At some point during the pregnancy, Mother contacted an adoption agency which found a couple interested in adopting the child. Mother executed pre- and post-birth forms giving consent for the adoptive parents to have temporary custody of the child, pending the outcome of the adoption proceedings. In late September 2006, the adoptive parents filed an adoption petition in Bartholomew County Superior Court, alleging, among other things, that Father was the biological father and was currently incarcerated in the county jail. When two days later the child was born, the Superior Court granted the adoptive parents temporary custody, and the child has since remained in their custody. On October 2, 2006, while incarcerated, Father received notice of the pending adoption, which notice complied with the dictates in IC 31-19-4-5, describing the form the notice to a named father must take. This notice informed Father that, if he sought to contest the adoption, he should file either a motion to contest the adoption in the Superior Court or a paternity action. On October 19, using a pre-printed one-page form and having filled in its blanks, Father filed a pro se paternity action in Bartholomew County Circuit Court, in which he sought to be adjudged the child's father and to "be required to fulfill the obligations of a father." The local rules permitted adoption petitions to be filed in any court, but required that all paternity cases "shall be filed" in the Circuit Court. On October 31, Father, pro se, filed in the same paternity action a more expansive, individualized petition entitled, "Petition to Establish Paternity and contest Adoption of Unknown Minor Child," which specifically sought to "establish the paternity of the below minor child born out of wedlock," "contest any adoption or termination of the parent-child relationship of that same child," and "[s]et a Hearing Date to stop all adoption procedures of the unknown minor child." On November 6, the attorney for the adoptive parents and Mother, filed in the Circuit Court paternity action his appearance for the adoption agency and a motion that it be permitted to intervene, which motion was granted. In January 2007, an attorney appeared for Father in the Circuit Court. In March the attorney representing Mother and the adoption agency filed in the Circuit Court a motion to dismiss the paternity petition. The Circuit Court denied the motion and ordered Father to submit to DNA testing. The June 21, 2007, Circuit Court hearing on the DNA test results was attended by Father, pro se, and by Mother, in person and with her counsel. Father stated that his attorney had withdrawn "because he had a conflict with the Judge here or something." The child was made a party to the action and, on June 28, the Circuit Court entered a judgment finding that DNA testing resulted in a 99.99% probability of paternity and establishing paternity of the child in Father, adjudicating him to be the legal and biological father of the child, but without any reference to custody, parenting time, or support. On June 25, the adoptive parents moved for a

final hearing on their adoption petition in the Superior Court, and it was scheduled for and held August 23, 2007. Copies of the motion and the Order scheduling the date and time of the final hearing were not sent to Father, but only to Father's former attorney in the Circuit Court case. The adoptive parents and Mother were present at the hearing, but Father did not appear, either pro se or by counsel. No attorney had entered any appearance for Father in the Superior Court adoption proceedings until approximately one month after the final adoption decree. Following the hearing, the Superior Court entered an order finding that Father had failed to file in the Superior Court a timely motion to contest the adoption as required by IC 31-19-10-1(b) and, based solely on this ground, it found Father's consent therefore irrevocably implied under IC 31-19-9-12(1). The court also found adoption to be in the child's best interests, granted the adoption, and ordered that Father's parental rights be terminated. Father appealed the adoption judgment, asserting that the trial court erroneously determined his consent to have been irrevocably implied, and that the adoption was therefore improperly granted without his consent. The Court of Appeals affirmed the adoption decree, concluding that "[a]lthough [the father] filed his petition to establish paternity in the paternity court within the required thirty days following service, he did not file a motion to contest [the] adoption in the proper court." In Re Adoption of B.W., 889 N.E.2d 1236 (Ind. Ct. App. 2008), *trans. granted Oct. 15, 2008*

The Court held that under IC 31-19-9-12(1), to be deemed to have implied his irrevocable consent to an adoption, a putative father must have failed to file both a paternity action and a motion to contest the adoption. *Id.* at 594. The Court found that, here, inasmuch as Father undisputedly timely filed his paternity action which sufficed to preclude a finding of implied irrevocable consent to the adoption, it was unnecessary to decide whether his timely attempt to contest the adoption, filed in the Circuit Court rather than in the Superior Court where the adoption was pending, satisfied the adoption implied consent statute. Therefore, because the trial court's decree of adoption was predicated upon its erroneous determination that Father's consent to the adoption was irrevocably implied by law, the Court reversed the judgment and remanded the matter to the trial court for further proceedings not inconsistent with the Court's opinion. *Id.*

The Court noted that the adoption of a minor child generally requires, among other things, the written consent not only of the child's mother, but also the child's father if the child is born during their marriage or, if not, of the father of the child whose paternity has been established by law; however, the adoption consent of a putative father may be implied under circumstances specified by IC 31-19-9-12:

A putative father's consent to adoption is irrevocably implied without further court action if the putative father:

- 1) fails to file:
 - A) a motion to contest the adoption in accordance with IC 31-19-10; and
 - B) a paternity action under IC 31-14;
within thirty (30) days after service of notice under IC 31-19-4;
- 2) having filed a motion to contest the adoption in accordance with IC 31-19-10, fails to appear at the hearing set to contest the adoption;
- 3) having filed a paternity action under IC 31-14, fails to establish paternity in the action; or
- 4) is required to but fails to register with the putative father registry established by IC 31-19-5 within the period under IC 31-19-5-12.

The Court observed that (1) the notice of the pending adoption Father timely received October 2, 2006, substantially tracked the language for “Notice to Named Father” required by IC 31-19-4-5; (2) thus, the notice informed Father that his consent to adoption would be irrevocably implied if he failed to preserve his right to object to an adoption petition by *either* filing a motion to contest the adoption *or* filing a paternity action; (3) when Father received notice of the adoption proceedings, within the designated time limit, acting pro se, he attempted to do both, by commencing a paternity action, and filing to contest the adoption in the Circuit Court, rather than in the Superior Court where the adoption petition was pending; (4) IC 31-19-10-1(b) states, “A person contesting an adoption must file a motion to contest the adoption *with the court* not later than thirty (30) days after service of notice of the pending adoption;” (5) the adoptive parents contend that filing the adoption contest in the Circuit Court rather than the Superior Court nullified Father’s attempt to contest the adoption; (6) Father argues that the provision of IC 31-19-10-1(b) stating that the motion to contest the adoption is to be filed “with the court” did not restrict him to the Superior Court; (7) regardless of whether Father’s attempt to contest in the Circuit Court the adoption petition filed in the Superior Court was sufficient, the parties agree that Father did properly and timely commence a paternity action and thereafter obtained a judgment establishing his paternity of the child; and (8) both parties apparently read IC 31-19-9-12(1) to trigger a putative father’s implied consent if the putative father fails *either* to institute a paternity action or to file a motion to contest the adoption, effectively replacing the provision’s “and” with an “or.” *Id.* at 592-93 (emphases added by the Court).

Contrary to the parties’ apparent interpretation of IC 31-19-9-12(1), the Court held that the statute’s plain language

authorizes a court to determine irrevocable implied consent only when a putative father fails in *both* respects, i.e., only when, within thirty days after receiving notice of the adoption petition, the putative father fails *both* to file a motion to contest the adoption *and also* to file a paternity action. But if he does either within the thirty-day time period, this precludes a court from finding his implied irrevocable consent to the adoption under this section. In order to be deemed to have given irrevocably implied consent, the named father, in accordance with [IC] 31-19-9-12(1), must fail to file, not *either*, but *both* a paternity action and a motion to contest the adoption within thirty days after service of notice.

Id. at 592 (emphasis in original). The Court explained that (1) applying the plain language of IC 31-19-9-12(1) to require a putative father to fail in both respects is entirely consistent with the plain language of IC 31-19-4-5, which in addition to providing (through the statutorily mandated notice) a putative father’s initial exposure to his obligations under the adoption statutes, indicates that putative fathers have a choice about how to proceed, and, thus, it is unnecessary to impose a strained construction on either provision so as to read them in harmony with each other; (2) the adoption statute creates a statutory proceeding unknown at common law and, under well established principles, the statute must be construed in favor of the rights of biological parents; (3) this interpretation finds additional support inasmuch as the adoption statutes contemplate concurrent jurisdiction by paternity and adoption courts in that, where a putative father opts under IC 31-19-9-12(1) to file a paternity petition, the statute anticipates that an adoption petition is concurrently pending, and as provided in IC 31-19-2-14(a), in that circumstance, “the court in which the petition for adoption has been filed has exclusive jurisdiction of the child, and the paternity proceeding *must be consolidated* with the adoption proceeding;” and (4) this common-sense requirement for consolidation understands that such concurrent actions are best resolved in one forum – resolution of paternity is a generally necessary prerequisite to completion of

adoption proceedings since a legally proven biological father's consent to an adoption is required and, if the putative father fails to establish paternity in the action, his consent will be irrevocably implied without further court action in accordance with IC 31-19-9-12(3). *Id.* at 592-93 (citations omitted and emphasis added by the Court). The Court noted that, (1) here, Father timely sought to establish his paternity and asserted his parental rights in the court designated in the local court rules; (2) it is noteworthy that IC 31-35-1-4.5 provides that a putative father's consent to the *termination of the parent child relationship* is irrevocably implied only if the father fails to file a paternity action under IC 31-4 or in a court located in another state that is competent to obtain jurisdiction over the paternity action within thirty days after receiving notice, or having done so, fails to establish paternity in the paternity proceeding within a reasonable period; (3) IC 31-14-10-1 provides that "upon finding that a man is the child's biological father, *the court shall ... conduct a hearing to determine the issues of support, custody, and parenting time;*" (4) here, the Superior Court, despite having been informed that a paternity action had been timely filed in Circuit Court, and subsequently being advised that Father had successfully established his paternity, nevertheless granted the adoption and terminated Father's constitutionally protected parental rights without Father's consent; and (5) here, Father timely registered with the Putative Father Registry, filed a petition to establish paternity and contested the adoption in the Circuit Court, putting all parties on notice that he desired to play a role in his child's life and that he sought adjudication of his parental rights. The Court also observed that, here, whether Father's consent should be irrevocably implied due to his failure to appear at the hearing set to contest the adoption pursuant to IC 31 19 9 12(2), was not at issue because (1) no such hearing was ever scheduled; (2) at no time before the trial court or on appeal did the adoptive parents assert Father's failure to appear at such a hearing as grounds for finding his implied consent; (3) the trial court did not base its implied consent decision on Father's failure to appear either at such a hearing or at the final adoption hearing; (4) notice of the date of the final adoption hearing was sent not to Father, but only to his former attorney in the Circuit Court matter, which attorney had never entered an appearance in the Superior Court adoption proceedings; (5) if the facts had been otherwise, that is, where a putative father files the statutory motion to contest the adoption but then fails after receiving notice to appear at the hearing set to contest the adoption, then his consent to the adoption may be irrevocably implied pursuant to IC 31-19-9-12(2); and (6) the expeditious placement of eligible children in permanent adoptive homes should not be unnecessarily delayed or jeopardized. *Id.* at 593-94 (emphases added by the Court).

Boehm, J, concurred with separate opinion "to observe that these statutes, taken together, seem to provide multiple opportunities for confusion or even intentional obfuscation," and with the hope that "the General Assembly will consider requiring that a putative father wishing to contest an adoption or declare paternity must file in the court in which an adoption action is pending or otherwise assure consolidation of these two proceedings..." *Id.* at 594.

Shepard, C.J., dissented, stating among other things, that the majority's ruling may help "the occasional blunderer, like the inmate in this case," but will also provide a tool for obstructionists to use in preventing the expeditious placement of eligible children.